Pure Confusion: Should Pure Licensors Share the Products Liability of Manufacturers and Sellers of Dangerously Defective Products?

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PURE CONFUSION: SHOULD PURE LICENSORS SHARE THE PRODUCTS LIABILITY OF MANUFACTURERS AND SELLERS OF DANGEROUSLY DEFECTIVE PRODUCTS?

INTRODUCTION

Among the legal landscapes that have been subject to confusion in the last century, one of the murkiest is the overlap between the fields of trademark licensing and products liability. Trademarks were originally conceptualized as a means for consumers to identify the physical source of goods. This identification allowed consumers to rely on their prior experiences to form expectations of quality. As such, trademarks were not licensable because they would cease to identify the true source of goods. Over time, it became evident that consumers did not care about the actual source of goods, but merely the consistent quality of those goods. At the same time, the emergence of industrialization and independent manufacturers made clear that the ability to license trademarks would enable businesses to outsource production and retain an established customer base. These changes led to the legal acceptance of trademark licensing.

Before the emergence of products liability, injured consumers were forced to seek compensation under either breach of warranty or simple negligence. However, just as the industrialization of America rendered anachronistic the traditional view of trademarks as non licensable, so too did these causes of action prove to be insufficient to allow injured consumers a method of recovery. The inclusion of strict

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2. Id. § 3:2.
3. Id. § 18:39.
liability within products liability allowed consumers to recover against manufacturers with whom they were not in privity and against sellers of defective goods who were not involved in the manufacture of those goods.8

As the field of products liability has expanded to include more potential defendants and plaintiffs and the field of trademark licensing has grown into a huge industry,9 the two fields have inevitably overlapped. Unfortunately, a uniform approach to this overlap has never been established.10 Some courts hold that licensors must be substantially involved in the design, manufacture, or distribution of a defective product to be held liable as an apparent manufacturer.11 Others hold that the mere act of licensing a trademark is sufficient to warrant treatment of the licensor as an apparent manufacturer.12

The lack of a unified approach to the products liability of trademark licensors can be remedied by an analysis of the factual bases and policy underpinnings of these two seemingly disparate areas of law. Part II of this Comment examines the development of both trademark licensing and products liability.13 It then discusses the inevitable overlap of these two fields of law and describes different approaches taken by courts when applying products liability to trademark licensors.14 Next, Part III argues that a pure trademark licensor should be held strictly liable for defective products bearing its trademark, just as sellers and manufacturers are held liable.15 Finally, Part IV discusses the potential impacts of such an approach.16

II. Background

A. The Birth of Trademark Licensing

The propriety of trademark licensing has changed significantly over the last century because of the change in the perceived purposes of trademarks. Historically, the recognition of trademark rights has been justified as protecting both the consumer and the trademark owner.17

8. See id. at 301–03.
9. See id. at 302.
10. See Deschamp, supra note 5, at 250–51.
13. See infra notes 17–62 and accompanying text.
14. See infra notes 63–134 and accompanying text.
15. See infra notes 135–51 and accompanying text.
16. See infra notes 152–55 and accompanying text.
17. S. REP. NO. 100-515, at 4 (1988), reprinted in 1988 U.S.C.C.A.N. 5577, 5580 (“Trademark law protects the public by making consumers confident that they can identify brands they prefer and can purchase those brands without being confused or misled... When the owner of a
Due to the former justification, trademarks were not the transferrable, licensable property we know today. Courts maintained that when the public becomes familiar with a trademark and relies on its designation of quality, affixing that trademark to a different product "becomes a false and deceitful designation." Thus, trademarks could not be transferred without also transferring the trademark owner's entire manufacturing operation; to allow otherwise would subject the public to fraud and deception, which would be "totally inconsistent with the theory upon which the value of a trade-mark depends and its appropriation by an individual is permitted."  

With the onset of the industrial revolution and the subsequent mass production of goods, it became evident that the ability to license trademarks would be a boon to the manufacturing industries. Further, it became clear that the public was not concerned about the identity of the actual producer of a given good as long as the good was of an expected quality. Congress recognized as much by permitting the assignment of marks in the Lanham Act: "A registered mark or a mark for which an application to register has been filed shall be assignable with the good will of the business in which the mark is used . . . ."  

Today, trademarks no longer serve only the narrow function of identifying the physical source of products; they also serve "as indications of consistent and predictable quality assured through the trademark owner's control over the use of the designation." To ensure that the product is of a consistent and predictable quality, the Lanham Act permits a trademark owner to license its trademark to a licensee that is a related company. The Act defines a related company as "any person whose use of a mark is controlled by the owner of the mark with respect to the nature and quality of the goods or services on or in connection with which the mark is used." Should a licensor fail

18. See McCarthy, supra note 1, § 3:8.
20. Id.
21. Deschamp, supra note 5, at 250.
22. Restatement (Third) of Unfair Competition § 33 cmt. a (1995) ("The narrow conception of trademarks as indications of physical source was eventually replaced by a recognition that trademarks may signify other connections between goods bearing the mark and the trademark owner, including the trademark owner's approval or sponsorship of the goods.").
26. Id. § 1127.
to exercise the mandated control over the nature or quality of the goods, the licensor risks forfeiture—the loss of the legal right to exclusive use—of the trademark.\textsuperscript{27} However, because the Act fails to specify what constitutes the necessary amount of control, courts have addressed the issue based on the facts of each case.\textsuperscript{28} Generally, though, courts are disinclined to find that a licensor has failed to exercise the requisite control.\textsuperscript{29}

**B. The Evolution of Products Liability**

Just as the industrialization of America led to the recognition of trademarks as transferrable property, so too did it lead to the birth of strict products liability.\textsuperscript{30} Strict products liability has been justified on several grounds, most notably (1) its ability to spread the cost of injuries among those who reap the benefits and can more readily bear the cost\textsuperscript{31} and (2) its ability to encourage the production of goods with fewer defects.\textsuperscript{32} That there was a need to satisfy these two public policy needs is clear when considering the evolution of strict products liability from negligence.

To prevail under a theory of negligence, a plaintiff must show that he suffered an injury that was caused by the defendant’s breach of duty it owed to the plaintiff.\textsuperscript{33} In cases in which the plaintiff is injured by a defective product that he purchased from the defendant, a duty is imposed on the defendant seller through contract law; specifically, an implied warranty of merchantability.\textsuperscript{34} Under this warranty, the seller implicitly guarantees that the product is merchantable, or fit for its...


\textsuperscript{28} Generally, licensors have an affirmative duty to monitor the activities of their licensees with respect to their trademark. *Id.*

\textsuperscript{29} Restatement (Third) of Unfair Competition § 33 cmt. c (1995) (“As a general matter, courts are reluctant to interfere with the marketing arrangements adopted by trademark owners, and minimal control over the quality of a licensee’s goods or services is often sufficient to satisfy the requirement imposed under this Section.”).

\textsuperscript{30} See Buss, supra note 7, at 301.


\textsuperscript{32} James A. Henderson, Jr. & Aaron D. Twerski, *Products Liability* 8 (3d ed. 1997). In addition to these justifications, there are other, less frequently noted justifications for products liability, such as “enterprise liability, . . . practicality, and implied representation.” See Gary Highland, *Sales of Defective Used Products: Should Strict Liability Apply?*, 52 S. CAL. L. REV. 805, 811 (1979).


\textsuperscript{34} See U.C.C. § 2-314 (2010).
purpose, by selling the product.\textsuperscript{35} Thus, if a consumer purchases a
good and it proves to be defective, the consumer has a tort remedy
under a breach of contract theory; however, until the middle of the
twentieth century, a plaintiff seeking such relief was required to show
the existence of privity of contract between the parties.\textsuperscript{36} The con-
straints of privity were finally eliminated in the landmark case
\textit{MacPherson v. Buick Motor Co.}\textsuperscript{37}

In \textit{MacPherson}, a motorist was injured when a wooden spoke in the
wheel of his Buick car shattered.\textsuperscript{38} The motorist brought a negligence
claim against Buick.\textsuperscript{39} Buick did not itself manufacture the wheels,
nor did it sell the vehicle directly to the motorist.\textsuperscript{40} Rather, Buick
purchased the wheels from a separate entity and sold the vehicle
through a dealer.\textsuperscript{41} Traditionally, the requirement of privity would
have left the motorist without a remedy as against Buick, but Judge
Cardozo eliminated the privity requirement, stating:

> If the nature of a thing is such that it is reasonably certain to place
> life and limb in peril when negligently made, it is then a thing of
danger. . . . [I]rrespective of contract, the manufacturer of this thing
> of danger is under a duty to make it carefully. . . . [W]here danger is
to be foreseen, a liability will follow.\textsuperscript{42}

Even without the strictures of privity, the requirement that a plain-
tiff prove the breach of a duty owed to it by the defendant often
barred injured consumers from recovering under a negligence theory.
In Justice Traynor's famous concurrence in \textit{Escola v. Coca Cola Bot-
tling Co.}, he argued that strict liability principles should govern manu-
facturer liability, not negligence principles.\textsuperscript{43}

In \textit{Escola}, a waitress was storing bottles of Coca Cola in a refrigera-
tor when one of the bottles exploded, causing serious injuries to her
hand.\textsuperscript{44} The waitress brought a negligence claim against the bottling

\begin{itemize}
\item \textsuperscript{35} \textit{Id.} The warranty exists only "if the seller is a merchant with respect to goods of that
kind." \textit{Id.}
\item \textsuperscript{36} \textit{Henderson & Twerski, supra} note 32, at 8 ("[A]nyone not in ‘privity of contract’ with
the supplier could not recover for the supplier’s negligence no matter how directly and
foreseeably his injuries were causally linked to that negligence.").
\item \textsuperscript{37} See \textit{MacPherson v. Buick Motor Co.}, 111 N.E. 1050, 1053 (N.Y. 1916).
\item \textsuperscript{38} \textit{Id.} at 1051.
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{41} \textit{Id.}
\item \textsuperscript{42} \textit{Id.} at 1053.
\item \textsuperscript{43} \textit{Escola v. Coca Cola Bottling Co. of Fresno}, 150 P.2d 436, 440–41 (Cal. 1944) (Traynor, J.,
concurring).
\item \textsuperscript{44} \textit{Id.} at 437–38 (majority opinion).
\end{itemize}
company, relying on the doctrine of res ipsa loquitur.\textsuperscript{45} The court held that the waitress had presented evidence sufficient for the jury to find that the bottling company was negligent.\textsuperscript{46}

Justice Traynor, concurring in the judgment, concluded that in cases such as this, strict liability should serve as the basis for liability, not negligence.\textsuperscript{47} Justice Traynor presented several public policy considerations that have since served as the basis for strict products liability. He argued that manufacturers are best able to inspect and prevent dangerous defects in their own products.\textsuperscript{48} He also maintained that with the benefits of mass production of goods comes the risk that some of those goods will be dangerously defective and that under just considerations of cost allocation, it would be unfair to expect individuals to bear the cost of those risks.\textsuperscript{49} Finally, Justice Traynor argued that administrative efficiency and simplification of the law demand that strict liability supplant the doctrine of res ipsa loquitur in products liability cases.\textsuperscript{50}

In \textit{Greenman v. Yuba Power Products, Inc.}, Justice Traynor got his wish. A consumer was injured when he was struck by a piece of wood that flew out of a lathe he had purchased from a retailer.\textsuperscript{51} In holding the manufacturer of the lathe liable for the consumer's injuries, Justice Traynor established the doctrine of strict products liability as a distinct remedy in tort, separate from breach of warranty or simple negli-

\textsuperscript{45} \textit{Id.} at 438. "The doctrine of res ipsa loquitur—literally, Latin for 'the thing speaks for itself'—has frequently been invoked when the plaintiff seeks to establish the defendant's negligence by circumstantial evidence." \textit{Epstein}, supra note 33, at 299.

\textsuperscript{46} \textit{Escola}, 150 P.2d at 440.

\textsuperscript{47} \textit{Id.} at 440 (Traynor, J., concurring) ("I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.").

\textsuperscript{48} \textit{Id.} at 440-41 ("[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot.").

\textsuperscript{49} \textit{Id.} at 441 ("The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.").

\textsuperscript{50} \textit{See id.}

In leaving it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability. It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence. If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly.

\textit{Id.}

\textsuperscript{51} \textit{Greenman v. Yuba Power Prods., Inc.}, 377 P.2d 897, 898 (Cal. 1962).
gence.\textsuperscript{52} After Greenman, the American Law Institute promulgated § 402A of the \textit{Restatement (Second) of Torts}, which makes sellers of defective products strictly liable as if they were manufacturers.\textsuperscript{53}

For the purposes of this Comment, it is also important to briefly discuss § 400 of the \textit{Restatement (Second)}, which sets forth the apparent manufacturer doctrine. Unlike § 402A, which established a regime of strict liability for sellers, § 400 and the rules that it incorporated by reference "establish[ed] a regime of fault-based manufacturers' liability."\textsuperscript{54}

Under the apparent manufacturer doctrine, a nonmanufacturing seller of a defective product is liable as a manufacturer.\textsuperscript{55} While this doctrine can be amply supported under theories of economic efficiency,\textsuperscript{56} some courts have justified it under a theory of estoppel by focusing on the seller's conduct in causing the public to believe that it was the manufacturer.\textsuperscript{57} However, resorting to this justification unnecessarily reifies the fault-based roots of the apparent manufacturer doctrine.\textsuperscript{58}

The apparent manufacturer doctrine has been rendered largely unnecessary with the inclusion of § 402A in the \textit{Restatement (Second)},

\textsuperscript{52} \textit{Id.} at 900-01.

A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. . . . Although . . . strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.

\textit{Id.} (citations omitted).

\textsuperscript{53} \textit{See Restatement (Second) of Torts} § 402A (1965); \textit{see also Buss, supra note 7, at 301-02.

\textsuperscript{54} \textit{Restatement (Third) of Torts: Prods. Liab.} § 14 cmt. a (1997).

\textsuperscript{55} \textit{Restatement (Second) of Torts} § 400 (1965) ("One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer."); David J. Franklyn, \textit{The Apparent Manufacturer Doctrine, Trademark Licensees and the Third Restatement of Torts}, 49 CASE W. RES. L. REV. 671, 693 (1999).

\textsuperscript{56} \textit{See Escola v. Coca Cola Bottling Co. of Fresno}, 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring).

\textsuperscript{57} \textit{See Franklyn, supra note 55, at 693.

\textsuperscript{58} When liability turns on whether the defendant led the plaintiff to believe that the defendant was the manufacturer of the product, the issue is whether the defendant should be estopped from denying liability as a manufacturer because of its misleading representations. However, strict liability analysis does not make equitable assessments of a defendant's conduct, but rather asks only whether the plaintiff is a seller. When a court injects the equitable doctrine of estoppel into a strict liability analysis it brings into play the very issue of fault that strict liability eschews.
which has essentially subsumed § 400. Section 402A differs from the apparent manufacturer doctrine in that the former eschews any requirement that the seller hold itself out as the manufacturer and requires only that the seller has sold a "product in a defective condition unreasonably dangerous to the user or consumer." While § 400 finds a seller liable by treating him as a proxy for the manufacturer, § 402A avoids this fiction and makes a seller directly liable, regardless of appearances or consumer assumptions as to the source of the goods.

With the inclusion of § 402A, it has become questionable whether there is any life left in the apparent manufacturer doctrine. After all, if a seller is strictly liable for any defective products it sells, it is irrelevant whether the seller appeared to be the manufacturer. Whether § 400 serves any remaining purpose depends on its interpretation. As discussed below, courts have interpreted the provision loosely to apply the section to trademark licensors.

C. Overlap of Trademark Licensing and Products Liability

As products liability expanded the universe of both proper defendants and plaintiffs, the overlap between the areas of trademark licensing and products liability became inevitable. Products liability began by applying to manufacturer-sellers, but it expanded up the chain of commerce to manufacturer-nonsellers and then expanded sideways to include nonmanufacturer-sellers. Similarly, the broadening scope of

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59. See Restatement (Second) of Torts § 402A (1965).

60. Id. § 402A(1). Further, the rule of strict liability applies to a seller even if "(a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller." Id. § 402A(2).

61. See id. § 402A.


[T]he apparent-manufacturer doctrine was developed in the context of suits by consumers against sellers of dangerous chattels. . . . The aim of the doctrine clearly was to provide a remedy for consumers injured by unsafe products. Today, of course, this objective is achieved by the doctrine of strict products liability; all sellers of dangerously defective chattels are now strictly liable to injured purchasers—that is, they have the same liability as the manufacturer—without regard to whether or not they held themselves out to the public as the maker of the product.

Id.
proper plaintiffs brought within the ambit of the doctrine anyone who would foreseeably use a product.

It is now widely accepted that a seller responsible for introducing defective goods into the market and the manufacturer (the party best able to inspect the goods and prevent their entry into the market) should be held liable for injuries caused by the defects. But what of a trademark licensor that neither manufactures nor sells a defective product? Pure trademark licensors bear resemblance to manufacturers and sellers in that they participate in the stream of commerce to the extent that they reap a benefit from licensing their marks. Additionally, the quality-control requirements of the Lanham Act suggest not only that licensors are in a position to ensure that products bearing their marks are of a reliable quality, but also that they should be required to do so.

Whether these similarities are sufficient to bring pure licensors within the ambit of products liability is a question that courts have wrestled with for the last century. Some courts have held that the mere act of licensing a trademark brings a licensor within the ambit of products liability; however, the majority of courts have held that in order for products liability to attach to a licensor, the licensor must be substantially involved in the process that brings the product to market.

1. Pure Trademark Licensors Liable as Apparent Manufacturers

A minority of courts have held that a pure licensor, regardless of its participation in the design or manufacture of a defective product, is liable under the doctrine of strict products liability. These courts have expanded the apparent manufacturer doctrine by interpreting the scope of Restatement (Second) § 400 to include pure licensors—meaning that a pure licensor’s control over design, manufacture, or distribution is not a deciding factor in liability. Support for this interpretation can be found in comment d of that section:

The rule stated in this Section applies only where the actor puts out the chattel as his own product. The actor puts out a chattel as his own product... where the actor appears to be the manufac-

64. This Comment uses the term “pure trademark licensor” to refer to a trademark licensor that has licensed its trademark for consideration but is not substantially involved in the design, manufacture, or distribution of the product associated with that trademark.
65. See supra notes 25-27 and accompanying text.
turer of the chattel. . . . [T]he actor frequently causes the chattel to be used in reliance upon his care in making it . . . .67

Connelly v. Uniroyal, Inc. is an often-cited case for the proposition that pure licensors can be apparent manufacturers. There, the Supreme Court of Illinois expressly held that a pure licensor may be held liable regardless of its lack of involvement in the design, manufacture, or distribution of the product.68 In Connelly, a motorist was injured when a tire bearing Uniroyal’s trademark failed.69 The tire was manufactured in Belgium by Uniroyal’s wholly owned subsidiary.70 While the court noted Uniroyal’s substantial involvement in the production of the tires, this discussion was limited only to the theory of vicarious liability.71

To appreciate the strength of the Supreme Court of Illinois’s application of Restatement (Second) § 400 to trademark licensors, it is important to note that Uniroyal’s involvement would easily have been sufficient to qualify it as an apparent manufacturer under the majority view.72 In fact, the court noted that while Uniroyal’s participation was considerable, it was inapposite: “[W]e do not consider that such par-

67. Restatement (Second) of Torts § 400 cmt. d (1965).
68. See Connelly, 389 N.E.2d at 163.
69. Id. at 157.
70. Id. at 161.
71. Id. at 161–62.
72. The court provided a detailed list of Uniroyal’s involvement:
[A]t the time the tire in question was manufactured a wholly owned subsidiary of Uniroyal owned approximately 95% . . . of the outstanding shares of [the manufacturer]; . . . Uniroyal granted [the manufacturer] the nonexclusive license to use its registered trade name, “UNIROYAL”; . . . Uniroyal was to make available to [the manufacturer] detailed information as to the methods, processes and formulas used in the manufacture of tires and tubes and other products manufactured by Uniroyal. Also included was a provision whereby Uniroyal would supply technical services and instruction to [the manufacturer], including recommendations and assistance in purchasing equipment, processes to improve operations, supplying of specifications, including testing procedure, and information concerning the construction of the products covered by the agreement, including “patterns and prints where necessary to describe constructions.” [The manufacturer] was free to send representatives to visit Uniroyal’s plant and investigate manufacturing methods and processes and formulas used in those plants. The agreement also provided for quarterly payments to Uniroyal and that [the manufacturer] “in its advertising . . . may publicize . . . the facts that in its manufacturing practices it practices and employs the manufacturing and technical methods used in the United States by [Uniroyal] and that [the manufacturer] adopted these methods after investigation and study of manufacturing and technical methods followed by manufacturers in the most promising and progressive.” [The manufacturer] was required to permit Uniroyal’s representatives “to have knowledge at all times of the goods and manufacturing operations . . . associated with its business identified with the trademark and logo,” and under certain conditions preference was to be accorded Uniroyal in [the manufacturer’s] purchases of materials produced by Uniroyal.

Id. at 161 (some alterations in original).
participation is an essential element in order that the doctrine of strict liability apply . . . . The fact that the defendant may not have been a link in the chain of distribution is wholly irrelevant. 73

The approach of the Connelly court has often been referred to as the "stream of commerce" approach. 74 This theory asserts that all entities that are part of the producing and marketing enterprise responsible for placing a defective good in the stream of commerce are strictly liable for injuries caused by that product. 75 The stream of commerce approach allocates the cost-risk of injuries to those who benefit from the sale of defective goods. 76

The apparently broad scope of the Connelly decision was limited by the Supreme Court of Illinois's later decision, Hebel v. Sherman Equipment. 77 In that case, an employee's foot became caught in the conveyor belt of an automatic car wash. 78 The car wash system—with the exception of the defective conveyor belt—was manufactured and assembled by Sherman Equipment, and the system as a whole bore Sherman's trademark. 79 The appellate court found that Sherman Equipment was an apparent manufacturer because a "reasonable person in [the employee's] position would view the entire assemblage at the . . . car wash as one 'system' and would infer that Sherman Equipment manufactured all of its 'component parts,' including the conveyor, and that this inference amounts to Sherman Equipment's holding itself out as the conveyor's manufacturer." 80

The Supreme Court of Illinois reversed the appellate court. 81 In doing so, it limited Connelly by requiring that there be some reliance on the part of the consumer and that the defendant meet a threshold level of participation in the stream of commerce. 82 The court reasoned that the apparent manufacturer doctrine requires actual reli-

73. Id. at 162-63.
76. See Schwartz, supra note 74, at 377-78.
78. Id. at 200.
79. Id. at 200-01.
80. Id. at 203.
81. Id. at 200.
82. Id. at 204-05.
ance on the part of the consumer and "that whether a holding out has occurred must be judged from the viewpoint of the purchasing public."\(^8\) The court admitted that a casual observer may believe the entire system to be manufactured by Sherman; however, it found that the employer actually purchasing the equipment was a sophisticated consumer and could not reasonably have relied on such an impression.\(^4\)

As for participation in the stream of commerce, the *Hebel* court distinguished *Connelly*:

> The basis for the imposition of strict liability in *Connelly* was the defendant's integral involvement in the overall producing and marketing enterprise that placed the dangerous product in the stream of commerce, and its participation in the profits from the distribution of the product.\(^5\)

Sherman Equipment did not share the same level of involvement or the same economic benefits as did Uniroyal in *Connelly*. Therefore, the court held that characterizing Sherman Equipment as an apparent manufacturer was without justification.\(^6\)

2. **Pure Trademark Licensors Not Liable as Apparent Manufacturers**

The majority of courts have required a certain amount of involvement by a trademark licensor in the design, production, or distribution of a defective product before attaching liability.\(^7\) These courts have frequently relied on either *Restatement (Second) of Torts* § 400 or *Restatement (Third) of Torts* § 14.

a. **The Pure Trademark Licensor Under *Restatement (Second) of Torts* § 400: The Apparent Manufacturer Doctrine**

In *Burkert v. Petrol Plus of Naugatuck, Inc.*, the Supreme Court of Connecticut relied on *Restatement (Second) of Torts* § 400 for the proposition that a trademark licensor cannot be liable as an apparent manufacturer without substantial participation in the manufacture,

\(^{83}\) *Hebel*, 442 N.E.2d at 203.

\(^{84}\) Id.

\(^{85}\) Id. at 204. The *Hebel* court's distinguishing of *Connelly* is dubious. As discussed above, the *Connelly* court expressly held that the level of Uniroyal's control was irrelevant to liability. The discussion regarding Uniroyal's involvement was limited only to the issue of agency. *See supra* notes 71–73 and accompanying text.

\(^{86}\) *Hebel*, 442 N.E.2d at 205.

\(^{87}\) *See*, e.g., *Yoder v. Honeywell Inc.*, 104 F.3d 1215 (10th Cir. 1997); *Torres v. Goodyear Tire & Rubber Co.*, 867 F.2d 1234 (9th Cir. 1988); *Nelson v. Int'l Paint Co.*, 734 F.2d 1084 (5th Cir. 1984); *Burkert v. Petrol Plus of Naugatuck, Inc.*, 579 A.2d 26 (Conn. 1990).
design, or distribution of the defective product.88 In Burkert, consumers sued a retailer of a transmission fluid that proved to be defective.89 The retailer brought an indemnification action against Atlantic Coast Oil and General Motors.90 The retailer had purchased the fluid from Atlantic Coast Oil, and the fluid bore the trademarks of both Atlantic Coast and General Motors.91 General Motors did not receive payment for the license of its trademark, did not control the fluid’s production, and did not inspect the fluid to ensure that it met General Motors’ specifications.92 The court held that because of General Motors’ limited involvement in the production, design, or distribution of the fluid, it could not reasonably be characterized as a seller and was therefore not an apparent manufacturer under Restatement (Second) of Torts § 400.93

b. The Pure Trademark Licensor Under Restatement (Third) of Torts: Products Liability § 14

The Restatement (Third) of Torts § 14, published in 1998, is derived directly from Restatement (Second) of Torts § 400.94 Besides largely reifying the rule set out in its predecessor, comment d to § 14 specifically addresses the issue of whether a pure licensor should be held liable as an apparent manufacturer:

The rule stated in this Section does not, by its terms, apply to the owner of a trademark who licenses a manufacturer to place the licensor’s trademark or logo on the manufacturer’s product and distribute it as though manufactured by the licensor. In such a case, even if purchasers of the product might assume that the trademark owner was the manufacturer, the licensor does not “sell or distribute as its own a product manufactured by another.” Thus, . . . the licensor, who does not sell or otherwise distribute products, is not liable under this Section of this Restatement.

Trademark licensors are liable for harm caused by defective products distributed under the licensor’s trademark or logo when they participate substantially in the design, manufacture, or distribution of the licensee’s products. In these circumstances they are treated as sellers of the products bearing their trademarks.95

88. See Burkert, 579 A.2d at 33.
89. Id. at 28.
90. Id.
91. See id. at 29.
92. Id.
93. See id. at 33.
95. Id. § 14 cmt. a ("The rule stated in this Section derives from § 400 of the Restatement, Second, of Torts, promulgated in 1965.").
As is readily apparent, comment d was drafted to address the conflict between courts over the issue of whether a pure licensor should be considered an apparent manufacturer, a point noted by the Appeals Court of Massachusetts in its recent opinion, *Lou v. Otis Elevator Co.* 96

Prior to *Lou*, Massachusetts had long recognized the apparent manufacturer doctrine set forth in *Restatement (Second) § 400.* 97 In *Thornhill v. Carpenter-Morton Co.*, for example, a retailer purchased wood stain from the manufacturer and sold it to plaintiff. 98 The wood stain’s can bore a label representing that the retailer had manufactured it. 99 When the consumer used the stain on her kitchen floor, it ignited and severely burned her. 100 The Supreme Judicial Court of Massachusetts held that “[i]t is no justification that the [retailer] procured the stain instead of having it compounded on its own premises. . . . [A]nd its representations to the purchasing public or consumer without any notice of its dangerous character that it was the manufacturer must be taken as essentially true.” 101 Not only is *Thornhill* in line with *Restatement (Second) of Torts § 400*, but it actually serves as the basis of an illustration provided in that section. 102

However, in *Lou*, Massachusetts joined the ranks of the majority by limiting the application of the apparent manufacturer doctrine. In

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97. The Massachusetts legislature had codified products liability into its general laws:

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume or be affected by the goods.

99. Id.
100. Id.
101. Id.
102. See *Restatement (Second) of Torts* § 400 cmt. d, illus. 1 (1965).

A puts out under his own name a floor stain which is manufactured under a secret formula by B, to whom A entrusts the selection of the formula. The stain made under this formula is inflammable, as a competent maker of such articles would have known. Of this both A and B are ignorant, and neither the advertisements nor the directions contain any warning against using it near unguarded lights. C purchases from a retail dealer a supply of this stain and while D, C’s wife, is applying it to the floor of the kitchen, C strikes a match to light the gas. An explosion follows, causing harm to D and to E, a friend who is watching D stain the floor. A is subject to liability to D and E.
contrast to Connecticut’s adherence to the majority rule through reliance on Restatement (Second) of Torts § 400, the Lou court grounded its position by officially adopting Restatement (Third) of Torts § 14.103

In October 1998, four-year-old Lou traveled to the People’s Republic of China to visit his grandparents.104 While descending an escalator in a department store, Lou’s hand became caught between the skirt panel and step tread.105 He was dragged down the escalator, and his hand was almost completely severed at mid-palm, resulting in “permanent thirty-one percent whole-body impairment.”106

China Tianjin Otis Elevator Co., Ltd. (CTOEC) manufactured the escalator.107 The company was formed in 1984 as the result of a joint venture between Otis Elevator Co. and two Chinese corporations.108 CTOEC manufactured and sold escalators within China under a trademark license from Otis.109 In addition to the trademark license, CTOEC was permitted the use of “Otis’ Know–How” in the production of escalators,110 which included Otis’s manufacturing designs; methods for the production, installation, maintenance, and testing of the escalators; quality-control specifications; instructions on factory management; instructions on the renovation of CTOEC’s factories; and assignment of personnel responsible for the management of the factory.111 Several key components of the escalator were manufactured by Otis’s wholly owned subsidiary in Germany.112

The litigation was a long and drawn out affair. Lou brought suit against Otis in 1999, alleging both negligent design and strict liability.113 At the conclusion of the trial, the judge instructed the jury regarding Restatement (Third) of Torts § 14 comment d.114 The charge was put to the jury along with a verdict slip questioning the jury (1) whether “Otis was a manufacturer or apparent manufacturer of the escalator” and (2) whether the escalator was “unreasonably dangerous as a result of being defectively manufactured or defectively designed.”115 The jury answered both questions in the affirmative and

104. Id.
105. Id.
106. Id. at 142–43.
107. Id. at 143.
108. Id.
109. Lou, 933 N.E.2d at 143.
110. Id.
111. Id.
112. Id.
114. Id. at 2–3.
115. Id. at 3–4 (internal quotation marks omitted).
DEPAUL LAW REVIEW

returned a verdict for Lou of $3.35 million.116 Otis then appealed the decision of the trial court to the Appeals Court of Massachusetts.117

In September 2010, the Appeals Court of Massachusetts held that the apparent manufacturer doctrine, as set forth in § 14 of the Restatement (Third), reflected the law of Massachusetts.118 The court began by noting the split between jurisdictions when applying the apparent manufacturer doctrine under § 400 of the Restatement (Second).119 Then, taking into consideration the language of § 14 of the Restatement (Third), it decided that the later Restatement represented a limitation of the doctrine.120

The court acknowledged that § 400 and its accompanying comments could be read to apply the doctrine to either a broad or narrow category of licensors.121 It agreed with Otis that § 400, along with comment a, restricts the scope of liable entities to those who supply the product by sale, lease, gift, or loan.122 However, the court went on to explain that comment d of § 400 supported a broader application by including within the interpretation of “those who put out” licensors that appear to be the manufacturer as a result of a consumer’s reliance on the trademark.123

The court then discussed the different ways courts have applied the broad reading and the narrow reading of § 400.124 The court grouped these cases into three categories and posited that comment d of § 14 was intended to address the discrepancy between courts as to whether a licensor is liable when there is no substantial involvement.125 According to the Lou court, comment d was designed to preclude application of the doctrine where there is no substantial involvement, and as such, it represented a limitation of the doctrine, not an expansion.126

116. Id. at 4. An additional $3,295,327.46 of prejudgment interest was added, bringing the total verdict to $6,645,327.46. Brief of Appellant at 9, Lou, 933 N.E.2d 140 (No. 2009-P-0632), 2009 WL 1934573. The prejudgment interest was one of the issues on appeal, and the appellate court devoted a substantial portion of its opinion affirming the award. See Lou, 933 N.E.2d at 150–53.
117. Lou, 933 N.E.2d at 142.
118. Id. at 148.
119. Id. at 147.
120. Id. at 148.
121. Id.
122. Id. at 146–47.
123. Lou, 933 N.E.2d at 147.
124. Id.
125. Id. at 147–48.
126. Id. at 148.
While acknowledging the persuasiveness of the Restatements, the court declined to follow § 14 on that fact alone. Because Massachusetts had never applied the apparent manufacturer doctrine outside of the distribution chain, the court relied instead on extra-jurisdictional opinions, including the Supreme Court of Arizona’s decision in Torres v. Goodyear Tire & Rubber Co.\

In Torres, a motorist was injured when the tread of one his tires separated while he was driving. The tire was manufactured by a wholly owned subsidiary of Goodyear and bore Goodyear’s trademark. The Torres court found that Goodyear’s ability to control the manufacturer was “pervasive” and that it shared in the profits from sales of the tires. The court relied on these factors to characterize Goodyear as an apparent manufacturer and, in colorful language that the Lou court found particularly compelling, opined that “[c]ertainly the brain that so competently and thoroughly directs the entire enterprise must be liable for the acts of its appendages.” Finding Torres persuasive, the Lou court held that “the [trial] judge correctly instructed the jury on Massachusetts law in accordance with Restatement (Third) of Torts: Products Liability § 14 comment d.”

Over the last century, the conception of trademarks as property incapable of discrete alienation has relaxed to account for the changes in our increasingly industrial economy. Similarly, the doctrine of strict products liability developed to address the harms arising from our industrialization. As a matter of course, these two fields of developing law have inevitably overlapped with inconsistent results.

III. ANALYSIS

Generally, there are two approaches for applying products liability to a trademark licensor. The majority approach, adopted by the American Law Institute through its promulgation of Restatement

127. Id. (“[W]e have never taken the position that this court should abdicate to the views of the American Law Institute as set forth in its various Restatements.” (quoting Bongaards v. Millen, 793 N.E.2d 335, 348 (Mass. 2003)).

128. Id. (citing Torres v. Goodyear Tire & Rubber Co., 786 P.2d 939 (Ariz. 1990)). The U.S. Court of Appeals for the Ninth Circuit certified a question of law to the Supreme Court of Arizona, and the Supreme Court of Arizona reframed the question: “[I]s [a] trademark licensor strictly liable for personal injuries caused by a defective product put into the stream of commerce by the trademark licensee?” Torres, 786 P.2d at 941.

129. Torres, 786 P.2d at 941.
130. Id. at 941–42.
131. Id. at 942.
132. Id. at 945.
133. Id.; see also Lou, 933 N.E.2d at 148–49.
134. Lou, 933 N.E.2d at 153.
DEPAUL LAW REVIEW

(Third) of Torts § 14 comment d, is to trademark licensor liable when it “participate[s] substantially in the design, manufacture, or distribution of the licensee’s products.”\textsuperscript{135} The minority approach—the stream of commerce approach—holds that a trademark licensor not involved in either the chain of distribution or the manufacture of a defective product may still be held strictly liable for its licensees’ defective products.

One logical approach to take when analyzing the implications of an overlap between two seemingly discrete areas of law is to consider the public policy underpinnings of each field and then decide whether a particular approach to the overlap fulfills these objectives. Such an analysis of the overlap between products liability and trademark licensing shows that pure trademark licensors should be held to the same standards as sellers and manufacturers.

Two of the major policy concerns that support strict products liability are the appropriate allocation of the costs of injuries and the prevention of defective goods from entering the marketplace, both of which are well served by the stream of commerce approach. The primary function of a trademark, as recognized by modern law, is to serve as an indication of quality consistent with other goods bearing that same mark. That function would only be reinforced, and thus become more reliable, by applying the stream of commerce approach to pure trademark licensors.

A. The Public Policy Underpinnings of Products Liability Support the Application of Strict Products Liability to Pure Licensors

The appropriate allocation of cost is one of the most basic justifications behind strict products liability. The concept of placing the loss caused by defective products on those who reap the benefits from creating the products is easily applicable to a trademark licensor that receives valuable consideration in exchange for the use of its mark. Another common justification of strict products liability is that the risk of strict liability attaching to sellers will result in those sellers pressuring manufacturers to use the utmost caution in preventing defective goods from entering the marketplace. There is no reason to assume that a pure licensor is not able or willing to apply that same pressure.

\textsuperscript{135} RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 14 cmt. d (1998).
1. Costs Should Be Allocated to Pure Trademark Licensors

"The major purpose of strict liability is to place the loss caused by defective products on those who create the risk and reap the profit by placing a defective product in the stream of commerce, regardless of whether the defect resulted from the 'negligence' of the manufacturer." Putting aside those rare cases in which the trademark licensor has received no benefit from the licensing of its mark, when considering the allocation of the cost of injuries to a consumer among those entities that profit from the sale of the products, it is hard to argue that a trademark licensor should receive special treatment compared to the manufacturer or seller.

While it is true that the licensor is different from the manufacturer or seller insofar as it is not literally in the "chain" of manufacture and distribution, such a narrow construction of "stream of commerce" is unnecessary and seems to be a step backward in the evolution of strict products liability. Frequently, the entire enterprise that introduces a product, defective or not, into the stream of commerce is driven by the licensing of the licensor's trademark. Often, it is the value of the mark, which is a corollary of the esteem with which the public holds the mark, that spurs the sales of the product and makes the enterprise profitable—let alone economically feasible.

Further, even before states adopted Restatement (Second) of Torts § 402A, the traditional ideas of privity had been eliminated from this area of law. Given the dissolution of the privity requirement and the role of trademark licensing as a driving force behind the production of goods, it is almost anachronistic to require a trademark licensor to be an actual participant in the chain of commerce in order to allocate the costs of injury to the licensor. After all, "strict liability arises, not because of the [seller's] legal relationship with the manufacturer or with other entities in the manufacturing-marketing system, but because of its 'participatory connection, . . . with the enterprise that created consumer demand for and reliance upon the product.'"

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137. See, e.g., Hebel v. Sherman Equip., 442 N.E.2d 199, 205 (Ill. 1982).

138. See Note, Tort Liability of Trademark Licensors, 55 IOWA L. REV. 693, 695 (1970) ("The demand created for a product becomes associated with the mark which comes to represent a particular quality product. The consumer then relies on his past associations with a trademarked product in making his product selection.").

139. See id. at 695–96.

140. See supra notes 37–42 and accompanying text.

The licensor is undoubtedly part of that enterprise when a product is manufactured and sold bearing its trademark; the sales of the product are amplified by the existence of the mark, and the trademark licensor has received consideration for the use of its mark.

Finally, if the goal of strict products liability is to take the cost of injuries away from an injured consumer and spread that cost among those who have reaped the benefit and are likely better able to internalize that cost through pricing, it makes perfect sense to include the licensor in the equation. It is reasonable to assume that the more parties that bear the cost, the more efficiently that cost can be spread among themselves. For example, the members of the enterprise can contract for varying degrees of responsibility.

Strict liability is not attached to the manufacturer because it caused the defect, and a seller is strictly liable despite the fact that it could not have caused the defect; liability attaches to these entities due to the role they play in bringing the product to market. It would be entirely consistent with these considerations to hold a pure trademark licensor to that same standard of liability.

2. Pure Trademark Licensors Can Play a Valuable Role in Preventing Defective Goods from Entering the Marketplace

A second major justification for holding sellers of defective products strictly liable is their perceived ability to influence the conduct of the manufacturer. Justice Traynor first explained this justification in Vandermark v. Ford Motor Co.:

[The retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to safety. Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff.]

Trademark licensing has become an enormous industry.143 Manufacturers are able to produce products bearing a well-known mark with the knowledge that consumers, relying on that mark, will purchase that product. In this way, the manufacturer does not need to develop goodwill with the public and can instead license the goodwill of the licensor. In this sense, a licensee depends on the licensor as a crucial player in the enterprise. There is no reason to assume that a licensor is not as able or as willing as a seller “to exert pressure on the

manufacturer” to ensure that the product is safe. In fact, a licensor exposed to the possibility of strict liability would be more likely to exert pressure on its licensees to ensure safe design and manufacturing procedures.

B. The Primary Function of a Trademark as an Identification of Quality Supports the Stream of Commerce Approach

Trademarks, originally viewed only as signifiers of origin, became licensable only upon the reconstruction of trademarks as signifiers of consistent quality. Now trademarks are viewed as “guaranteeing that all products bearing the same mark share the same quality regardless of the manufacturer.” It is only with this conception that trademarks are licensable.

As mentioned earlier, the Lanham Act places an affirmative duty on trademark licensors to retain reasonable control of the licensee’s products. Whether the risk of forfeiture is effective depends on the trademark owner’s self-interest in its mark. However, this protection is only prospective as far as consumers are concerned: it aims to prevent future confusion or misplaced reliance on the trademark. If a licensor fails to control the quality of the products to which its trademark is attached, the resulting forfeiture will not compensate the injured consumer that purchased the product in reliance on the trademark’s ostensible guarantee of consistent quality. It seems unfair that a licensor can benefit economically by inducing consumers to rely on its trademark as a sign of quality, yet not be held accountable along with the manufacturer and seller when that reliance proves to be misplaced.

Further, the prospective penalty of forfeiture is not a great risk. Courts are disinclined to declare forfeiture absent extreme circum-

144. Vandermark, 391 P.2d at 171.
145. Calboli, supra note 143, at 344.
146. Id.
148. See Note, supra note 138, at 699 (“The present state of the law [as of 1970], in which a mark owner can step outside the scope of the products liability by entering a licensing agreement while continuing to reap financial benefit at the consumer’s expense, is indefensible in light of the important role that trademarks play in the economy.”); see also Deschamp, supra note 5, at 269 (“Presently, under the Lanham Trademark Act, licensors can license their trademarks to numerous manufacturers, thus generating a greater amount of profit than if they only manufactured products themselves. Licensors can also formulate their involvement with the product so that they retain rights to the mark but not enough to warrant the imposition of liability. In this situation, the system perpetuates a win-win situation for licensors who profit without potential liability while consumer interests are sacrificed.”).
stances. In fact, in recent years "courts [have] progressively relaxed the interpretation of the control that licensors must exercise over their licensees and [have] held that first 'adequate,' then 'sufficient,' and then 'minimal' control was sufficient to fulfill the statutory requirement." If the threat of forfeiture is not a true concern for a trademark licensor, there is no real impetus, except for a likely de minimis loss of goodwill, for it to influence the quality of the goods bearing its mark.

The law of trademarks, and the right of exclusive use of a trademark, is premised on the fact that consumers use those marks to assess the quality, and often the safety, of the products they purchase. It is a natural corollary that when a consumer purchases a product based on a trademark's implicit guarantee of quality and that product proves to be defective, thereby breaching that guarantee, the licensor who reaps an economic benefit from placing that "guarantee" on the product should be held accountable for that breach.

When the public policy justifications of products liability and trademark law are considered individually, it becomes clear that the stream of commerce approach to the strict products liability of trademark licensors is the appropriate approach. The cost-allocation and defect-prevention goals of product liability are best served by the stream of commerce approach. That theory also flows naturally from the foundation of trademark law: trademarks are indicators of quality upon which consumers rely.

IV. IMPACT

The stream of commerce approach is by no means a new theory. However, not only is it the minority approach, it is also in danger of finding itself without followers. For example, the Supreme Court of Illinois, having clearly adopted the stream of commerce approach in Connelly, seemed to distance itself from that approach in Hebel. It is

149. See Calboli, supra note 143, at 345–46.
150. Id. at 346.
151. As recognized by the Superior Court of Connecticut:
[T]here is no reason why the strict tort liability analysis could not be expanded to include the licensor of a trademark. As an important factor in supplying goods, the trademark owner is engaged in an activity in which experience dictates that some injuries can be anticipated. If he were himself producing the product, it is likely that the strict tort analysis would be applicable. It seems not to be in the public interest to allow one to escape this responsibility through the simple maneuver of entering a licensing agreement.

not readily apparent why the stream of commerce approach should find such disfavor. Several explanations seem likely: fear of excessive litigation; hesitancy to attach strict products liability to additional corporations; or reluctance to initiate a drastic change in the law. Whatever the reason may be, courts continue to analyze the application of products liability to trademark licensors under a negligence framework. Put another way, courts tend to look to the licensor’s involvement rather than analyzing the situation from the standpoint of the injured consumer. The problem with focusing on culpability rather than reliance is best illustrated with a simple hypothetical.

Charles, a law student, is a big fan of Swifty, an athletic apparel company. He has purchased Swifty brand shoes his entire life, and he has always been satisfied with their quality. He also likes to wear sweatshirts with Swifty’s logo, the “Swifty Splat,” across the front because he feels it gives him an athletic, sporty image. Swifty has spent decades developing its brand by consistently producing quality footwear and by spending billions of dollars on advertising. The Swifty Splat is now its most valuable asset, an asset that generates immense revenue not only by inducing customers to purchase Swifty products, but also through multiple licensing agreements with various manufacturers, including Brella’s, a small, family-owned umbrella manufacturer. Less than a century ago, Swifty would not have been able to license its mark to Brella’s; today, Swifty may generate revenue by licensing the Splat logo to Brella’s, and Brella’s can pay to use Swifty’s Splat, confident that the Splat will help generate sales and that consumers will be willing to pay even more for the umbrella merely because it bears the Splat.

One day, on his way to school, Charles gets stuck in a thunderstorm. He ducks into Stuff-N-Sundries, a family-owned convenience store, to wait out the rain. While inside Stuff-N-Sundries, Charles sees Brella’s umbrellas bearing the Swifty Splat. Excited about the find, Charles pays for the umbrella and leaves for school confident that he will remain dry. When Charles arrives at the school library, he tries for several minutes to close his new umbrella, but unfortunately it just will not close. He gives it one more strong pull, and one of the ribs snaps, rips through the fabric, and hits Amy, a fellow classmate, in the eye.

Less than one century ago, Amy, blind in one eye, would not have had a claim against Brella’s because she lacked the requisite privity. Fortunately for Amy, the law has evolved to take into account the realities of our society, and lack of privity is no longer a bar for her. Similarly, less than one century ago, Amy would not have had a claim against Stuff-N-Sundries not only because she lacked privity, but also
because Stuff-N-Sundries was not negligent in the manufacture or design of the umbrella. Today, however, Amy has a valid claim against Stuff-N-Sundries. Finally, less than one century ago, Amy would not have been able to bring suit against Swifty because it was not a manufacturer or seller, nor was it substantially involved in the design, manufacture, or distribution of the umbrella. Unfortunately for Amy, under the majority approach, she is still unable to bring suit against Swifty today. Swifty will not be held strictly liable.

A. **The Stream of Commerce Approach Better Protects Consumers**

This hypothetical illustrates the absurd result of the majority approach. Swifty is an enormous corporation with billions of dollars in revenue. A substantial portion of that revenue is generated through licensing deals just like the one in the hypothetical. Swifty’s ability to license its Splat mark is predicated on the assumption that Swifty will control the production of the umbrella, thereby ensuring that Charles’s legislatively presumed reliance on the Splat as a sign of quality is not misplaced. Moreover, if it turns out that Brella’s and Stuff-N-Sundries are judgment-proof, insolvent, outside of a state’s jurisdiction, or otherwise immune, Amy will be left without a remedy.

1. **The Stream of Commerce Approach Creates a Strong Incentive for Licensors to Ensure that Products Bearing Their Mark Are of High Quality**

The majority position creates a legal reality in which Swifty’s risk of liability is directly proportional to the amount of quality control it exerts over Brella’s. It bears repeating that this control is obligatory under the Lanham Act. By holding a licensor liable only when it is substantially involved in the design, manufacture, or distribution of a product, it necessarily follows that the more substantially Swifty is involved, the more likely it will be held liable for any defective umbrellas. As it stands under the majority approach, the only economic incentive for a licensor to insure that products bearing its marks are free of defects is the protection of its goodwill and public image.

Conversely, holding Swifty to the same standard of liability as Brella’s and Stuff-N-Sundries would create a strong incentive for Swifty to police the quality of the goods bearing the Splat mark. As opposed to the aforementioned incentive to maintain its goodwill, the

153. See Franklyn, supra note 55, at 710 (“[S]ubjecting licensors to potential liability under the apparent manufacturer doctrine would provide licensors with additional incentives to eliminate the unsafe character of their licensees’ goods.”).
specter of liability is a more readily quantifiable consideration that licensors will be unable to easily disregard. Moreover, under current law, licensors are already saddled with the obligation of policing the quality of goods bearing their marks. Attaching strict liability to Swifty when it shirks its legislatively imposed obligations cannot be said to be an unfair outcome.

The above discussion highlights the inherent conflict between the majority approach and trademark law. Trademark law requires a trademark licensor to control the manufacture of goods bearing its mark. The majority approach attaches strict products liability to that same licensor upon a showing of substantial control. Thus, a trademark licensor finds itself attempting to balance on a tightrope between trademark forfeiture and strict products liability. The stream of commerce approach would eliminate this precarious balancing act by holding the licensor liable regardless of control, while at the same time encouraging that licensor to make greater efforts in insuring that the manufacturer is not producing defective goods.

2. **The Stream of Commerce Approach Allows Injured Consumers a Remedy Where There May Otherwise Be No Relief**

It is quite likely that Amy will be unable to identify who sold the umbrella or, even more likely, who manufactured the umbrella. Without a defendant, Amy will be unable to bring a suit for damages. Having seen the Splat on the umbrella, if there is one thing Amy knows for certain, it is that Swifty played a role in the enterprise that brought the defective umbrella into the marketplace. The stream of commerce approach would allow Amy to bring suit directly against Swifty, thus giving her an easily identifiable path to compensation.

Suppose further that Brella's is a foreign corporation without sufficient contacts to bring it within the ambit of the forum state's jurisdiction and that Stuff-N-Sundries is insolvent or otherwise judgment-proof. The stream of commerce approach would allow Amy to bring suit directly against Swifty, thus ensuring that she has a defendant adequately situated to pay damages.

**B. The Stream of Commerce Approach Promotes Judicial Economy**

One of the main problems of the majority approach is that it utilizes the all-too-subjective "substantial" standard. While in some areas of the law, subjective standards may be inescapable or even prefera-
ble, it makes little sense to remain tied to such a standard in the present circumstance. Standards such as “substantial” or “reasonable” are typically questions of fact to be decided by a jury. The result is that issues that turn on such a finding of fact are irresolvable at the early stages of litigation.

Holding trademark licensors to the same liability as manufacturers and sellers injects a bright-line rule into products liability that will make cases justiciable as a matter of law. While it is true that there will usually be other questions of fact that must be found by a jury, avoiding a jury decision on the meaning of “substantial” in a particular fact pattern will lighten the burden on the jury and the judicial system as a whole. Further, parties will no longer be forced to spend the time and money investigating and researching the question of substantiality.

Finally, many products liability cases may turn on whether the defendant was sufficiently involved to be held liable under the majority approach. When the answer is unclear, parties are much more likely to proceed to trial, dragging on litigation, perhaps through the appellate courts. Under the stream of commerce approach, those cases would likely settle immediately. This would relieve a significant burden on the courts and litigants, and more importantly, allow injured consumers to find relief more quickly. A quicker resolution would mean lower costs for a plaintiff.

C. The Stream of Commerce Approach Allows for Self-Distribution of Liability

Any fear that the stream of commerce approach would result in Swifty being unwilling to license its mark, thereby stifling Brella’s ability to manufacture umbrellas and Stuff-N-Sundries ability to sell the umbrellas, is misplaced. Swifty, Stuff-N-Sundries, and Brella’s are fully capable of, and likely will have, allocated the costs among themselves through their various licensing and sales agreements. Perhaps the licensing agreement calls for Brella’s to indemnify Swifty for damages arising out of defective products manufactured by Brella’s that bear the Swifty Splat. In this sense, the result of the lawsuit would be the same if the jurisdiction subscribed to the majority approach.

154. See, e.g., Arroyo v. United States, 656 F.3d 663, 673–77 (7th Cir. 2011) (Posner, J., concurring) (discussing both the necessity and limitations of the “reasonable man” standard).

155. See Edmund M. Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 HARV. L. REV. 165, 186 (1929) (“The accepted theory of jury trial requires that there be submitted to the jury only matters in dispute as to which reasonable men could differ, and that in resolving the dispute the jury shall hear only legal evidence.”).
However, under the stream of commerce approach, Amy would have an easily identifiable defendant; moreover, Brella's would be on notice of its exposure to strict liability and would likely pay close attention to its design and manufacturing protocol in order to avoid defective goods from entering the marketplace.

V. Conclusion

The inevitable overlap of trademark licensing and products liability has left confusion in its wake. Unfortunately, the less preferable approach has taken the lead and appears to be gaining adherents, while the stream of commerce approach shows signs of falling by the wayside. Pure trademark licensors should be held to the same standard of products liability as sellers and manufacturers. The justifications of strict products liability apply just as readily to pure licensors as they do to sellers and manufacturers. Trademark law mandates that licensors exercise control over the products bearing their trademarks, and yet the penalties for failing to control such products do nothing to address any resulting injuries to consumers.

The courts have failed to find a unified theory of products liability as applied to trademark licensors. The Restatement (Second) of Torts § 400's apparent manufacturer doctrine is incapable of supporting strict products liability for pure trademark licensors. The Restatement (Third) of Torts § 14 expressly refuses to apply that liability. Despite these failings, an examination of the doctrinal roots of trademark licensing and products liability inevitably leads to the conclusion that trademark licensors should be held strictly liable for defective products bearing their trademarks. Perhaps the day will come when courts realize that there is no sound reason in either logic or public policy for treating licensors any differently than manufacturers or sellers of defective goods.

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