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Trade Marks

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Definition.

A trade mark has been judicially defined as follows: "A trade mark is a distinctive name, word, mark, emblem, design, symbol or device, used in lawful commerce to indicate or authenticate the source from which has come, or through which has passed, the chattel upon or which it is applied or affixed."

Origin.

The origin of trade marks is in the dim shadows of antiquity. Bricks and lead water pipes laid before the Christian era and exhumed in modern times illustrate the use of words or symbols for identifying the manufacturer, and tradition informs us that at the building of King Solomon's Temple, each craftsman was required to place his private mark on the stones that he hewed in the quarry. Trade marks were found on the charred loaves of bread that were excavated from the ruins of Pompeii.

However, many centuries elapsed before the subject of trade marks again demanded the notice of historians; the record of their use in modern times appears to begin with the guilds and skilled craftsmen of England and the adoption of the so-called hall-marks for designating articles produced in the fine arts. Later the hall-marks were the subject of statutory definition and protection in England. A hall-mark was not a trade mark in a technical sense because it indicated the quality of an article rather than the identity of the manufacturer, but the steps incident to the protection of hall-marks indicate the trend of thought toward the recognition of a private property right in the insignia used to designate goods of a certain origin.

Property Right in a Trade Mark.

The full recognition by the courts of an enforceable property right in private trade marks is comparatively recent. There are records of a few scattering cases in England in the 16th and 17th centuries where the chancellor recognized and enforced trade marks, but the action was based on unfair or fraudulent competition. It is only within the past hundred years that trade mark rights have been accorded their rightful place and have been fully protected by the courts.

There is a distinction between infringement of a trade mark or a trade name, and unfair competition, although usually there is unfair competition wherever there is such infringement. A trade name may consist merely in the name of the merchant or his predecessor and not constitute a technical trade mark. The trade name is, however, fully protected by the courts. For example: If one were to establish a store and call it Marshall Field & Co., the court would issue an injunction against the continued use of the trade name. This would not be a trade mark infringement.

What Constitutes a Technical Trade Mark.

A technical trade mark, as such, must possess certain characteristics:

(a) It must not be descriptive of the character or quality of the goods. If it were, it would limit others in the use of the language in describing their product.

(b) It must not be geographical. That is, it must not consist in the

name of a city, locality or country which others in the same locality would otherwise have an equal right to use. For example: A manufacturer of pencils could acquire no trade mark right by adopting the word "Chicago." This for the reason that other pencil manufacturers in Chicago would have an equal right to call their products "Chicago Pencils." There is an exception to this doctrine in cases such as that of the Elgin watch (179 U. S. 665), where the word Elgin acquired, through many years of exclusive use, a meaning quite apart from the location of the factory in the City of Elgin, Illinois.

(c) It must not consist merely in the name of an individual. For example: A man by the name of Smith would acquire no exclusive right to the use of the name as against others of the same name who might wish to engage in the same line of business. The exception to this is that through long usage a man's name may become associated in the minds of the public with a particular article and any subsequent manufacturer of the same product whose name is the same, must use great care in marketing his product under his own name in order to make it certain that the public is not deceived into buying his product in the belief that it is the product of the original manufacturer. In the case of the Remington Typewriter, the court enjoined a relative of the original Remington from putting out a typewriter under his own name.

(d) It must not consist of the flag or coat of arms of the United States or any of the states. The reason for this is obvious.

Aside from the restrictions mentioned, there is no limitation as to what may be adopted as a technical trade mark. It has been well said that a trade mark is a manufacturer's commercial signature. It is a guarantee to the purchasing public that the goods bearing that mark or signature will conform to the expected requirements as to quality and fitness for a desired purpose.

Trade Mark Right is Independent of Statute.

It must be borne in mind that a trade mark right is a part of the common law; it exists apart from any statutes on the subject. The government and the different states, with a few exceptions, have enacted laws providing for the registration and enforcement of trade marks, but these are merely collateral to the inherent rights of the user to the property in his mark. Registration in the United States Patent Office adds to the owner's common law rights only the right to sue for infringement in the Federal Courts, regardless of the citizenship of the parties or the amount in controversy. Incidentally it provides a convenient means of establishing a date of adoption and use. A prerequisite to Federal registration is interstate use.

Distinction Between Patent and Trade Mark.

A trade mark is quite different from a patent or a copyright, both of which are creatures of statute. A patent or copyright may be acquired and not used during the entire term of the grant without affecting in any way the monopoly. This is, however, not true of a trade mark. The monopoly in the use of a trade mark is dependent upon continuous use. Abandonment of the mark even for a short period will defeat the monopoly. In this connection, however, it would be well to note that abandonment is a question of intention, which must be proven.

A trade mark is also distinguished over a patent or copyright in that the

right acquired is perpetual so long as the use is continued. Registrations of trade marks are granted for a term of twenty years, but may be renewed as often as desired.

Cannot be Separated from the Good Will.

While a trade mark is a property right, the courts have repeatedly held that it cannot be separated from the business in which it is used. That is, it cannot be sold without at the same time selling the good will of the business. Neither can it be parcelled out or its use licensed to others. Inasmuch as it is supposed to represent goods of a certain manufacturer or dealer, it would constitute a fraud on the public to permit its use by another manufacturer who might see fit to include under the mark goods of inferior quality.

Importance of Trade Marks.

The casual observer appreciates but little the importance of trade marks in the commerce of the country. When he calls for a package of "Camel" cigarettes or a box of "Uneeda" biscuits he little realizes the tremendous value of those and similar trade marks. It is reliably stated that a trade mark for a tooth paste, originally sold in this country by German owners, was seized by the alien property custodian during the war and sold to the present distributors for a million dollars cash.

Trade Mark Infringement Inexcusable.

Infringement of trade marks is usually a matter of easy determination and the courts invariably favor the plaintiff. Inasmuch as trade marks are arbitrarily selected, a subsequent manufacturer has the entire language from which to select and it is inexcusable that he should select something that simulates as closely as possible the mark of a rival manufacturer. Obviously, there could be but one purpose in simulating the mark of another; that is to acquire business which he would otherwise not be entitled to.

Of course, the question of similarity is unimportant where the goods of the parties are not the same. For example, the trade mark "Gold Medal" for flour would not be infringed by one who used the trade mark Gold Medal on a typewriter. In that connection, the Patent Office has many knotty questions to decide in determining whether or not registrations should be granted for trade marks which have been previously registered for goods that are not of the same descriptive properties, but which may ultimately be put out by the original adopter. For example, a concern in New York adopted the word "Sheik" for face powder and subsequently another concern in Indianapolis adopted the same word for rouge. The New York manufacturer did not put out rouge and the Indianapolis manufacturer did not put out face powder, but it was held that the original adopter was entitled to extend his line of goods to include all the articles in the cosmetic line and therefore that the mark should not be registered to the subsequent user.

(Editor's Note: This is the second of a series of articles by Mr. Murray. Another article on "Copyrighting" is being prepared.)

WRITERS OF THE NIGHT.

[A column conducted by David and Jonathan.]

The Boy's Court.

The city hall—that strange rendezvous of city officials—where municipal court judges meet from day to day—holding court and meting out justice to