TRADE-MARKS: MONOPOLY OR COMPETITION?

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THREE articles have appeared in the *Georgetown Law Journal* in which the thesis is asserted that trade-marks are monopolies in restraint of trade under the Anti-Trust Acts. Their publication seems to have been caused in part by the proposed revision of the United States Trade-Mark Statutes, which was started by a bill originally introduced into the House on January 19, 1938. The thesis of this present article is that a trade-mark in fact distinguishes one man's product from the products of his competitors, with the result that the consumer can make a choice among them.

The basis of Mr. Borchard's argument is that trade-marks have monopolistic features which have never been examined from the standpoint of the public interest. This basic question is "of great importance from the point of view of the public interest" but outside the "purpose of the present article." The development from this basis is that the various "legal privileges" appurtenant to trade-marks may provide

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2 This bill was H.R. 9041, 75th Cong. House hearings were held on March 15-18, 1938 by the Committee on Patents, Subcommittee on Trade-Marks. H.R. 4744 was introduced in the next Congress, and House hearings were held on March 28-30, 1939 by the same committee. After a revision, a new bill, H. R. 6618, 76th Cong., was introduced on June 1, 1939, with House hearings on June 22, 1939 by the Committee on Patents. This bill passed the House on July 17, 1939 and, with amendments, passed the Senate on June 22, 1940. Upon a motion in the Senate to reconsider, it was returned to the calendar and expired with the Congress. H.R. 102, H.R. 5416 and S. 895, 77th Cong., passed the Senate on September 17, 1941. House hearings were held November 4, 12-14, 1941 by the Committee on Patents, Subcommittee on Trade-Marks. This bill passed the House with amendments on September 24, 1942 and was returned to the Senate. Senate hearings were had on December 11, 1942 and the bill expired with the Congress. The present bill, H.R. 82, 78th Cong., was introduced on January 6, 1943, and House hearings were had on April 7-8, 1943 by the Committee on Patents. It passed the House on June 28, 1943 and was referred to the Senate; Senate hearings were had before a subcommittee of the Committee on Patents on November 15-16, 1944. The bill now pending is H. R. 1654, dated January 22, 1945.

8 Borchard, "Are Trade-Marks an Anti-Trust Problem?" 31 *GEORGETOWN L. J.* 245 at 246 (1943).
trade-mark owners desirous of violating the Anti-Trust Laws with a sure shield to defeat attacks by the Anti-Trust Division. Therefore, "no trade-mark legislation should be enacted unless first the impact of such legislation on the public interest is thoroughly explored in all of its aspects and some machinery is provided for the protection of that interest."  

Mr. Diggins' article (and Mr. Hall's note where it covers matters within the scope of this present article) is an attack on cartels. He assumes that a trade-mark gives a monopoly in a product. He states that a trade-mark exists only where it is used and two or more businesses may use the same trade-mark on the same product in different territories. As general statements, both assumptions set forth in this sentence are correct. Because of trade-mark "monopoly," it is assumed that a cartel is able through the use or abuse of trade-marks to divide the world among its members.

In exploring trade-marks and the machinery to protect their owners and the public, the writers of these articles fail to show what the "legal privileges flowing from the ownership of trade-marks" are or how trade-marks and their "legal privileges" affect the public. To remedy this omission, this present article will not take the cue of modesty from its predecessors, but will discuss, albeit briefly, the nature of trade-marks, their "monopolistic aspects," their "legal privileges," the interest of the public, and machinery for the protection of the public. From the very nature of a trade-mark and its protection, these aspects are so intertwined as to make separate discussions of them meaningless.

**The Function and Legal Privilege of a Trade-Mark**

One of the purposes of our legal system is to protect private property. The attack on trade-marks by calling them monopolies is an attack on property in general, because all property is essentially monopolistic. To call a thing a monopoly is merely to apply an ugly word to it. Property connotes exclusion. The owner of real estate has the right to keep everyone off it. The owner of personal property, whether tangible or intangible, may use it to the exclusion of all others. The effect of the law preserving and sustaining these exclusions gives the owner a monopoly in such "property." Legal protection extends to more personal monopolies. The peculiar and unique talents of a Caruso, an Alda, a Churchill, a Fred Allen, are the exclusive property of those persons to do with as they will.  

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4 Id. at 261.  
associations of such laborers, have similar protections which are individually and collectively, monopolistic rights. Even the status of marriage is a monopoly which the law tries valiantly to protect, sometimes to the annoyance of the parties concerned.

These exclusionary, or monopolistic rights, which delimit and define what the "property" is are merely a function of their legal protection. As Mr. Justice Holmes said in *Dupont v. Masland*:

"The word property as applied to trade-marks and trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith."  

He further described it in *Beech-Nut Packing Company v. P. Lorillard Company*:

"...in a qualified sense the mark is property protected and alienable, although as with other property its outline is shown only by the law of torts, of which the right is a prophetic summary."  

To delineate what the word "property" means regarding trade-marks and to what exclusive or monopolistic rights it gives rise, it is necessary to examine why there are trade-marks. Manufacturers and traders use trade-marks because they want consumers to recognize and buy their products so that their businesses may be perpetuated. But why does the consuming public encourage and aid manufacturers and traders in obtaining this advantage? Because the members of the consuming public are assisted by trade-marks in buying products which they have found acceptable and in rejecting those found wanting. Judge Clifford many years ago recognized this fact, when he said:

"Equity gives relief in such a case, upon the ground that one man is not allowed to offer his goods for sale, representing them to be the manufacture of another trader in the same commodity. Suppose the latter has obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods or from the higher price the public are willing to give for the article, rather than for the goods of the other manufacturer, whose reputation is not so high as a manufacturer."

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6 244 U.S. 100 at 102, 37 S. Ct. 575 (1917).
7 273 U.S. 629 at 632, 47 S. Ct. 481 (1927).
8 McLean v. Fleming, 96 U.S. 245 at 251 (1878).
Judge Tuttle, in one of those utterances usually heard in chambers and too infrequently set forth in an opinion, gave a concrete illustration of both the consumer's and the manufacturer's interest in a trade-mark.\footnote{James Heddon's Sons v. Millsite Steel & Wire Works, (D.C. Mich. 1940) 35 F. Supp. 169 at 175, affirmed (C.C.A. 6th, 1942) 128 F. (2d) 6.}

"There are many big businesses that have grown up wherein they have taken one little thing, one slogan, one name, one designation, one design, and used it for years. For example, the rubber boot cases, in which the little round red spot on the rubber boot came to mean a particular maker—I remember my father telling me when a boy that the red spot meant that they were good boots, and that they were made by a good concern. That little round, red spot on a rubber boot, went on through the years, and, of course, it became of great value to the manufacturer, and any other manufacturer that would commence using it would steal some business."

This elementary analysis of the workings of one part of our distributing system is the underlying (though usually the unstated) premise of, and basis in every trade-mark decision. Mr. Justice Frankfurter articulates this premise in *Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co.*\footnote{316 U.S. 203, 62 S. Ct. 1022 (1942).} His distillate of the function of a trade-mark is already classic:

"The protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trade-mark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress."\footnote{Id. at 205.}

What does this commercial symbol, the trade-mark, mean to the public? One type of trade-mark may make a consumer think immediately of a particular business organization. The consumer can accept
or reject the product from his knowledge of the quality of that organization’s product. The name “General Electric” or “duPont” on a product gives that choice to a consumer.

The other extreme is whether the trade-mark connotes a product which the consumer has found desirable or undesirable, without the consumer thinking about the organization which produces it. It would be interesting to know how many inveterate cigarette smokers know who makes “Chesterfields,” “Luckies,” “Camels,” “Philip Morris,” “Pall Mall” or any of the other brands. Of course, consumers know some concerns make each of these brands, but what concern is not important to the average consumer. Rather, when a consumer sees one of those trade-marks on a product, he can “take it or leave it.” This is the underlying fact to which Mr. Justice Frankfurter referred when he said that to the consumer the trade-mark means “the desirability of the commodity on which it appears.”

The rationale of this type of symbol is set forth in Manhattan Shirt Co. v. Sarnoff-Irving Hat Stores:

“... When the courts speak of the public’s identifying the source of origin, they do not mean thereby that the purchasing public can identify the maker by his specific name or the place of manufacture by precise location. What they mean by such expression is that the purchaser of goods bearing a given label believes that what he buys emanated from the source, whatever its name or place, from which goods bearing that label have always been derived.”

This symbol represents the manufacturer or trader to the consumer. As Judge Learned Hand described it in Yale Electric Corp. v. Robertson:

“... His mark is his authentic seal; by it he vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner’s reputation, whose quality no longer...


18 19 Del. Ch. 151 at 162, 164 A. 246 (1933), affirmed 20 Del. Ch. 455, 180 A. 928 (1934).

lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask.  

Judge Page phrased this differently in Northam Warren Corporation v. Universal Cosmetic Co.:

“... A trade-mark is but a species of advertising, its purpose being to fix the identity of the article and the name of the producer in the minds of the people who see the advertisement, so that they may afterwards use the knowledge themselves and carry it to others having like desires and needs for such article.”

Judge Leibell put it succinctly in Lazar v. Cecelia Co.:

“A trade-mark is merely a protection for good will...”

If there is no business or good-will, the trade-mark symbolizes nothing and there is no reason for its protection. An attempt to transfer a trade-mark without the business which it symbolizes is invalid.

When courts and lawyers refer to the protection of a trade-mark, they mean the protection of the business and the good will of which the trade-mark is the visible or audible representation. The accuracy of the euphemism is indicated by Mr. Justice Holmes’ statement in Prestonettes v. Coty:

“... A trade-mark only gives the right to prohibit the use of it so far as to protect the owner’s good will against the sales of another’s product as his.”

The business and good will which is given protection deals with certain products. Protection is limited to those products and “such other goods as might naturally be supposed to come from him.” Because of this limitation, the Supreme Court in American Steel Foundries v. Robertson, authorized the registration of “Simplex” as a trade-mark for various parts of brake mechanisms stating:

16 (C.C.A. 7th, 1927) 18 F. (2d) 774 at 774.
17 (D.C. N.Y. 1939) 30 F. Supp. 769 at 771.
20 264 U.S. 359 at 368, 44 S. Ct. 350 (1924).
"The mere fact that one person has adopted and used a trade-mark on his goods does not prevent the adoption and use of the same trade-mark by others on articles of a different description. There is no property in a trade-mark apart from the business or trade in connection with which it is employed." 22

Another limitation is that the symbol must distinguish its owner's goods from those of his competitors. If the symbol is merely the name or generic term for the product or a proper description of it, it does not identify any one person's brand. Failing to distinguish, it is not a trademark. Being a name or description, anyone has the right to use it honestly. The words "Shredded Wheat" are not a trade-mark for shredded wheat, 23 nor is "Linoleum" for that product, 24 nor "Cellophane" for that product, 25 nor "Raisin-Bran" for a cereal made of those products, 26 nor "Worcestershire Sauce" for that condiment, 27 nor "Lackawanna" 28 for coal from the Lackawanna district.

A trade-mark owner is further limited to protection in the territory in which his product is known. Where two people have used the same trade-mark on similar goods in widely separated territories, and have honestly built up their separate businesses, each owns the mark in the territory he occupies. 29 Neither can stop the other in the other's territory, and either can stop an invasion of his territory by the other or by a third person. 30 In the Rectanus case, the prior user had sold a product with the trade-mark "Rex" in the New England states. The defendant, without knowledge of this use, had sold a similar product with the same trademark in Kentucky. The court held that, unlike a patent or a copy-

28 Delaware & Hudson Canal Co. v. Clark, 13 Wall. (80 U.S.) 311 (1871).
right "to either of which, in truth it has little or no analogy," the trade-mark right related only to the business in which it was employed. The business being in New England, plaintiff had no right in Kentucky, for "the mark means one thing in one market, an entirely different thing in another." •

The territorial limitation is not confined to states, or areas of this country, but the limitation may be between country and country. In Bourjois & Co. v. Katzel the French manufacturer of "Bourjois" (and other) face powders had a market in this country. It transferred its business, including its good-will and trade-marks, in this country to plaintiff, and plaintiff imported the powder from France, packaged it for the American trade, and was successful in developing the market in this country. Defendant bought the same powder in France, imported it in the French packages and sold it as "Bourjois." The court held that the French manufacturer was prevented, by its contract with the plaintiff, from using these trade-marks in the United States and defendant had no greater rights than her vendor. In addition, the fact was that in the United States, these trade-marks meant the plaintiff. Mr. Justice Holmes stated:

"It is said that the trade-mark here is that of the French house and truly indicates the origin of the goods. But that is not accurate. It is the trade-mark of the plaintiff only in the United States and indicates in law, and, it is found, by public understanding, that the goods come from the plaintiff although not made by it."

The legal redress available to a trade-mark owner is either damages in a law action or an injunction and profits in an equity suit, or both; more generally in these days, both forms of relief are granted in a modern civil action. He must plead and prove a good trade-mark, that the defendant has used it or one similar to it, and that he has been damaged by the defendant's conduct. He is subject to the above limitations and the usual legal and equitable defenses. The theory of the proceeding, whether under the common-law action for deceit or the equitable suit against fraud, is that the public has been or may be deceived or confused by defendant's actions to the plaintiff's detriment; that the infringer is taking away or may likely take away some of his

81 United Drug Co. v. Rectanus, 248 U.S. 90 at 97 (1918).
82 Id. at 100.
83 260 U.S. 689, 43 S. Ct. 244 (1923).
84 Id. at 692.
competitor's customers by misrepresentation. The test is whether some of the prospective purchasers are likely to be deceived or confused into buying defendant's product when they want plaintiff's product.\textsuperscript{85}

With this brief introduction to a very large body of law, we may examine the monopoly aspects of a trade-mark. A trade-mark symbolizes the good will of a business. Good will is protected by law and consequently is what we know as property, just as the factory, machinery, raw materials and finished goods are legally protected and therefore are property. Others than the owner are excluded from the use of real and personal property and in that sense, a "monopoly" exists. In fact, most rights which the law protects are in this sense monopolies.

To call these legally protected rights "monopolies" is to give an entirely new meaning to that term as it is used in our law. It characterizes a set of rights with a stigma objectionable since Jacobean times. Judge Frank seeks to avoid this emotionalism in his analysis of trade-marks in \textit{Eastern Wine Corp. v. Winslow-Warren, Ltd., Inc.}:

"There are some persons, infected with monopoly-phobia, who shudder in the presence of any monopoly."\textsuperscript{86}

In the sense, then, that any exclusive right is a "monopoly," a trade-mark is a monopoly. Judge Frank calls it a "monopoly in trade names" and "name-monopolies."\textsuperscript{87} Judge Frank's opinion in the \textit{Eastern Wine} case is an interesting examination of fundamentals from the viewpoint of judicial theory. His basic analysis should be thought over in examining the theory of trade-marks and their protection. He says:

"The protection of such monopolies in names seems, then, to rest on the social interest in protecting primarily, not the consumer, but the businessman who has gained a strategic advantage, through building up of good-will, against unfair practices by competitors who desire to poach on that good-will. The public interest, from that point of view, is primarily in the preservation of honesty and fair dealing in business and in procuring "the security of the fruits of individual enterprise.""\textsuperscript{88}

"To put the matter differently, there is a basic public policy, deep-rooted in our economy and respected by the courts, resting on the assumption that social welfare is best advanced by free compe-

\textsuperscript{85} Vulcan v. Myers, 139 N.Y. 364 at 367 (1893).
\textsuperscript{86} (C.C.A. 2d, 1943) 137 F. (2d) 955 at 958.
\textsuperscript{87} Id. at 959.
\textsuperscript{88} Id. at 958.
tition, with the consequence that competition affords a privilege to do acts, resulting in financial harm to another person, which would be actionable in the absence of that privileged kind of activity; this privilege, as Holmes said, 'rests on the economic postulate that free competition is worth more to society than it costs, and that on this ground the infliction of the damage is privileged.'" 39

Judge Frank's comments are one juridical synthesis of the basis of trade-mark protection. They are of necessity bottomed upon the unstated every day facts in our distributive system. The usual judicial approach to the protection of the public and of the trade-mark owner is more empiric. 40 Judge Anderson's opinion in General Baking Co. v. Gorman illustrates this view where he said:

"It should never be overlooked that trade-mark and unfair competition cases are affected with a public interest. A dealer's good will is protected, not merely for his profit, but in order that the purchasing public may not be enticed into buying A.'s product when it wants B.'s product. In meritorious cases of this kind, the plaintiff is acting, not only in his own interest, but in the public interest. The situation is radically different from that which arises in cases of alleged infringement of a copyright or a patent, under which the rights originate in a monopoly grant from the government. The existence and extent of such monopolies are therefore, except as they reward and thus promote ingenuity, adverse to the rights of the purchasing or using public. In one aspect, the alleged infringer of a copyright or of a patent is in a fight for the public interest—to make a free and open field. But unfair competition—of which trade-mark infringement is but a part (United Drug Co. v. Rectanus Co. 248 U.S. 90, 97, 39 S. Ct. 48, 63 L. Ed. 141)—is, broadly speaking, grounded on the right of both dealer and purchasing public to be protected from frauds of which both are victims. Dadirrian v. Yacubian, 98 F. 872, 876, 39 C.C.A. 321. In these cases, the infringer works a fraud upon dealer and customer alike; his palming off is piracy pure and simple." 40

Upon analysis of the facts underlying the use and protection of trade-marks, trade-marks are not monopolies in any objectionable sense nor are they restraints of competition. They are the essence of competition. Their purpose and effect is to distinguish competitive goods. If there is no competitive product, the basic need for a trade-mark dis-

39 Id. at 958.
40 (C.C.A. 1st, 1925) 3 F. (2d) 891 at 893.
appears, because there is no reason to distinguish one product from another. When only one product exists, there is no "customer," there is only a "consumer." The consumer takes it or does without. He has no choice.

**Anti-Trust Matters**

To support their contentions that trade-marks have monopolistic results, Messrs. Borchard, Diggins and Hall assume their conclusion by adopting the premise, erroneous both in fact and in law, that trade-marks are monopolies in the invidious, anti-trust sense. They claim that trade-marks cause, or are effective in, creating or maintaining restraints of competition through tying agreements, trade associations, patent monopolies and those various arrangements frequently called cartels.

Two decisions on *tying agreements* are referred to. In *United Shoe Machinery Corp. v. United States,*41 the Supreme Court held that the tying agreements violated the Anti-Trust Laws, but upheld an agreement requiring a lessee to obtain repair parts for delicate and complicated machines only from the lessor-manufacturer. No reference whatever was made to trade-marks.

In *Pick Mfg. Co. v. General Motors Corp.*42 the Court likewise upheld an agreement whereby defendant's dealers agreed to buy repair parts for General Motors' cars solely from that corporation. The only reference to trade-marks was to indicate the particular brand of automobile to which the agreement related.

No reference was made by the authors of the prior articles to the concurrent *Pick* case, under the same title.48 Pick had been placing General Motors' trade-marks upon Pick products and was of course enjoined.

Mr. Borchard refers to an instance of a *trade association* using a trade-mark as part of a scheme of creating a monopoly. The alleged misuse of the trade-mark was a minor incident in the whole matter. Of course, the improper use of a trade-mark is always subject to judicial scrutiny and correction, just as any other legally enforceable right, whether in land or tangible personal property. The fact that only one alleged misuse of a trade-mark by a trade association is cited indicates that this matter is not a problem.

Where there are *patent rights,* the exclusive right to make, use and

48 (C.C.A. 7th, 1935) 80 F. (2d) 638.
vend arises from the patent. The presence or absence of a trade-mark on the product does not change the exclusive right which the patent law gives. When a trade-mark is affixed to a patented product, the nature of the trade-mark does not change. The general rule applies that a word claimed to be a trade-mark but which is or becomes the generic name of the product is not a trade-mark and may not be protected. As a matter of fact, upon the expiration of a patent, all exclusive rights in the product cease, and what is claimed to be a trade-mark may have lost that character by becoming the descriptive name of the patented thing. On the other hand, if a word, on the termination of the patent exclusion means the producer, as distinguished from the product, it does not go into the public domain. What the term means is a question of fact. If it indicates origin it is a trade-mark and entitled to full protection.

The pending litigation concerning General Electric, and "Mazda" lamps, is cited to show how a trade-mark confers a monopoly of product. It proves just the opposite. Mr. Borchard points out the source of the "monopoly" where he says:

"... The domination of the industry by General Electric was first secured through the ownership of the 'Edison' patents, but has later been continued through a series of restrictive agreements based on certain other patents."

Undoubtedly, the trade-mark "Mazda" has assisted General Electric in selling its lamps. That is the purpose of a trade-mark. If competing manufacturers cannot win public acceptance for their products, they have not succeeded in presenting to the public a better lamp. To argue the contrary would imply that American consumers are fools.

Mr. Diggins argues that cancellation of all General Electric's patents on lamps would be ineffective to end General Electric's "monopoly" on lamps. He must therefore assume that General Elec-

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46 Borchard, "Are Trade-Marks an Anti-Trust Problem" 31 GEORGETOWN L. J. 245 at 253 (1943). An action is or was pending between the Government and General Electric. The writer is not familiar with it, so assumes as fact for the purposes of this article the statements made by Messrs. Borchard and Diggins in their articles. The same applies to the Merck matter referred to infra.
Mr. Diggi11s complains that various companies sell lamps in different countries of the world to the exclusion of one another, and blames this state of affairs on trade-marks. He asserts that trade-marks create and support a division of territories. On the contrary, it is the division of territories and the fact that laws do not operate outside the sovereignty making them which cause a division of trade-marks. We do not yet live in "One World."

The protection of a trade-mark depends upon the law of the state or nation where it exists. The judicial recognition of trade-marks is coterminous with the jurisdiction of the court, unless one jurisdiction by way of comity recognizes and protects rights in another jurisdiction. In the United States, a trade-mark is founded upon, recognized and protected by the law of the respective states. The same applies as between nations. A trade-mark confers no extra-territorial jurisdiction.

If a particular trade-mark exists in each nation of the world, the various separate trade-mark rights may be held in the following three ways:—they may be unified in one concern by outright ownership, stock control or contract; they may be separately held by different concerns in contractual relations with each other; or they may be held by antagonistic organizations with no relationship among them. Criticism is directed only to the second type. But it is inherent in the system of political and jurisdictional division of territories that different concerns hold rights in different territorial divisions. The presence or absence of contractual relations does not affect the existence of trade-mark rights. The criticism is directed to the sovereignty of nations, not to trade-marks.

Whether one organization or several separate concerns own the various trade-mark rights in different countries of the world is not the means of determining whether or not there is a monopoly of product within the Anti-Trust Laws. One concern doing business in every country in the world may have such a monopoly.

..exists, it would most likely stem from some patent rights. Separate concerns owning trade-mark rights to the same mark in various countries usually have competition. If they do not, it is likely because of patent rights, but not because of the trade-mark rights. In the "Mazda" illustration, different concerns own the trade-mark rights in India, China, and Japan. Mr. Diggins' claim merely is that this division gives to "each preferential position in his own markets." He points out that there is competition under other trade-marks by the concerns in these markets. An examination of this "preferential position" would undoubtedly indicate that purchasers in those countries prefer the product sold under the "Mazda" trade-mark to other competing lamps. The argument breaks down because it confuses the shadow with the substance,—it makes an unwarranted assumption in default of relying on the facts.

Another patent situation concerns Rohm & Haas, both American and German, and certain plastics sold under the designation "Plexiglas." The German company developed the particular plastics and the covering patents. When the patents were assigned to the American company, the "Plexiglas" trade-mark was also assigned. Here, again, the "monopoly" arose out of the patent rights, for anyone can manufacture and sell the product upon the termination of the patents. This litigation terminated in a consent decree. When the matter was later aired before a Senate committee, it was the patent and other non-trade-mark matters which were discussed. In the three hundred odd pages of the hearings, no mention was made of the trade-mark assignments.

The other examples where patents were involved break down into the same analysis; namely, whatever "monopoly" of product or restraint of trade occurred, or is alleged to have occurred, arose out of the patent rights or other matters not connected with trade-marks.

The restrictions placed on manufacture by patent rights is best illustrated where they were not a factor. In a so-called "cartel" situation, the matter of the American and German Merck companies, Mr. Diggins points out that many of the products made and sold by Merck were not covered by patents. The reasoning is that the "Merck" trade-mark gives a monopoly of product. Merck has many competitors in the manufacture and sale of chemicals and pharmaceuticals. It would be

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interesting to see, and hear, the reaction of the officers and salesmen of these competitors if they were told that they could not compete with Merck. Whatever the violations of whatever laws Merck is averred to have committed, the public is not prevented from getting chemical and pharmaceutical products from either Merck or its many competitors. The only true analogy is that Liggett & Myers is a monopoly because no one else sells "Chesterfield" cigarettes. It seems doubtful that the public or the makers of "Luckies," "Camels" or the other cigarettes think that Liggett & Myers has a cigarette monopoly.

The further Messrs. Borchard and Diggins go in trying to prove that trade-marks are restraints of trade and are used in violation of the Anti-Trust Laws, the clearer it appears that they can only prove the opposite. Mr. Borchard, with admirable candor, recognizes that trade-marks are not anti-trust problems, for he says:

"... To what extent trade-marks might be used in this connection remains to be seen." 52

The American business man is not lacking in ingenuity. There are a great many anti-trust decisions on the books, where intentionally or not, business men have engaged in practices which have run afoul of the law. The plethora of reported trade-mark and unfair competition cases testify to attempts to engage in unfair methods of doing business. The Federal Trade Commission is not unfamiliar with such attempts. After more than fifty years experience with the Anti-Trust Laws, if trade-marks were an anti-trust problem, there would likely be some evidence of it. The absence of such decisions is the strongest proof that trade-marks are properly well outside the ever-increasing jurisdiction of the Anti-Trust Division.

Conclusion

The courts, state and federal, instructed by the Bar, have to a very large extent created and developed the law of trade-marks. The nature of a trade-mark case virtually forces one side to present the position of the public. In many cases, both counsel perforce must point out the effect upon the public of either side's contention. No judge can properly decide a trade-mark case without weighing the public's interest. The public's immediate interest is summarized by Victor Herbert's tune

For I Want What I Want When I Want It, and the judge wants to know what is "in the customer's mind." 53

For well over a hundred years, American courts have been protecting the public in trade-mark cases. There are erroneous decisions in the reports, for neither Bench nor Bar is more than human. On the whole the public has been amply protected. If it had not been, there would have been some discernable public clamor. When the nature of trade-mark rights is comprehended, it is easy to understand why the public is satisfied with the protection afforded to it and to manufacturers and sellers by the courts and why the public has encouraged distribution of products by that convenient symbol of good will, the trade-mark.