An anniversary to mark: the who, what, when, and why of California's trademark registration law of 1863

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Abstract

In 1863, a one-term senator introduced a trademark bill to the California legislature that the *Daily Alta California* at first reported as of little more than parochial interest. In fact, when seen in local context, the bill might seem to have been aimed primarily at the senator's own business interests. Yet the ensuing law represents the first trademark registration law in the common law jurisdictions. As such, the law is particularly intriguing, because standard histories of law and business usually credit manufacturing interests and states for pioneering trademark law, and in 1863 California was hardly a classic manufacturing state. This essay thus attempts to explore the background of this law in order to answer the questions why California and why then?

An Anniversary to Mark:

M.S. Whiting and the Who, What, When, and Why of California's Trademark Registration Law of 1863

On January 12th 1863, Manasseh S. Whiting, a first-term legislator from San Francisco, introduced to the California Senate Bill 31, "An Act Concerning Trade Marks." The Senate referred the bill to the Committee of Commerce and Navigation, on which Whiting sat. Over the coming months it was amended, ordered, engrossed, read, and sent over to the Assembly. The work of the two houses was reconciled, and the resulting "Act Concerning Trade Marks and Trade Names" went to the governor, Leland Stanford, who signed it into law on April 3d.[1]

As such, the act appears little more than an unexceptional example of the passage of laws in early California. The year of its passage does suggest that in 2013 we might have acknowledged its 150th anniversary, but so we might for the bills on the fire

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1 *Journal of the California Senate. Fourteenth Session.* (Sacramento: State Printer, 1863), 88 and passim. *Statutes of California Passed at the Fourteenth Session of the Legislature* (Sacramento: State Printer, 1863) Cap. CXXIX. Some twenty years later, Stanford cultivated his own, extensive viticultural interest. See Vincent P. Carosso, *The California Wine Industry, 1830-1895: A Study of the Formative Years* (Berkeley, CA: University of California Press, 1976)

companies and macadamized roads of San Francisco or an amendment to the Corporations Act of 1850, all introduced by Whiting in 1863. Indeed, the *Daily Alta California* included Bill 31 with Whiting's others in the general category of legislation specifically relating to "local [i.e. San Francisco] affairs." In another article, however, the paper did sense that the trademark bill might appeal to more than parochial interest puffing it as "better than any trade mark law to be found in any State or country."[2] Of course, local papers tend to exaggerate the broader significance of homegrown products. Here, though, the *Alta* understates the case. The law was "better" if only because it was the first trademark registration act to pass among the several states of the union. Other states had trademark law, but none had comprehensive registration, a critical innovation that helped to distinguish modern trademark legislation from its heterogeneous predecessors.[3] Furthermore, as there was no such federal law until 1870, California in this

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2 "San Francisco Bills," *Daily Alta California* [hereafter, *Alta*], 1863, April 13, 1; "Trade Mark Bill," *Alta*, 1863, Feb. 2, 1.

3 For the importance of registration in distinguishing modern trademark law from its antecedents, see Lionel Bently, "The Making of Modern Trade Mark Law: The Construction of the Legal Concept of Trade Mark," pp.: 3-41 in Lionel Bently, Jennifer Davis, Jane Ginsburg ed., *Trade Marks and Brands: An Interdisciplinary Critique* (Cambridge: Cambridge University Press, 2008)

regard led the country as a whole. Yet the significance of the law reached well beyond both the several and the united states. The British parliament had attempted to pass trademark registration legislation in 1862, the year before the California act. But its early proponents had been forced to abandon a registration clause.[4] A compromised and inadequate "Merchandize Marks Act" took effect in January 1863 just as Whiting was introducing his bill, and Britain produced a registration law only in 1875.[5] Thus Whiting's legislation was the first trademark registration law in common law countries, giving the *Alta* better reason than it perhaps knew to puff the bill and giving us some reason to acknowledge the anniversary.

The achievement is singular not only for when it appeared, but also for where. Conventional accounts of trademarks hold that such laws were key instruments of modern industrialization and tend to assume that manufacturing states led the way.[6]

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4 Henry Trueman Wood, "The Registration of Trade Marks," *Journal of the Society of the Arts* 24(1875)(26 Nov): 17-31.

5 "Registration of Trade Marks," 38 & 39 Vict.

6 Alfred Chandler, for example, sees branded goods as important to his account of industrialization, but leaves his analysis of the food sector until after World War I and traces its innovative impetus to "high-speed canning." From this perspective, it is particularly hard to see why an agricultural state would take the lead in trademarking. Alfred D. Chandler,

Emerging as the "Second Industrial Revolution" was unleashed, but emerging in agricultural California, far from the acknowledge centers of that revolution, this law is thus perhaps as unexpected as it was unprecedented. Beyond celebrating California for being the place where such distinctive legislation arose, then, this essay also investigates why it emerged where it did. Towards this question of why, it first looks a little more at the question of who, suggesting that Whiting's role is revealing, as he was not only an instrumental member of the senate, but also a representative of an influential sector of the state's growing economy. The paper then turns to examine what emerged, bringing under this heading first an account of the legislation and its antecedents, then the process of registration that the law introduced, next some of the early litigation that ensued, and finally transformations that robust trademark law, perhaps unintentionally, underwrote.

Scale and Scope: The Dynamics of Industrial Capitalism (Cambridge, MA: Harvard University Press, 1990) 146 and 149. Similarly, Mira Wilkins Chandlerian analysis, though presented in a collection devoted to food and drink, draws attention to mass production capabilities of firms like Coca-Cola and Bayer in explaining the emergence of the modern brand, making it seem inherently unlikely that the original legislation would arise in an agricultural state. Mira Wilkins, "When and Why Brand Names in Food and Drink" pp.: 15-40 in Geoffrey Jones and Nicholas Morgan, eds., *Adding Value: Brands and Marketing in Food and Drink* (London: Routledge, 1994).

From who and what, the paper returns in conclusion to the overarching questions of why, trying to weave these threads of investigation into a coherent account of why California and why then.

Who

To understand the law in its historical context, it is helpful to know a little more both about the senator and about the sector that he represented.

The Senator

Whiting had come to California from Maine in 1849 and soon enmeshed himself in San Francisco politics and business.[7] He dabbled in both local and national politics before being elected state senator for the Fifth District of San Francisco on the "Union Party" ticket in 1862.[8] In this role, if we set the

7 *Wine Dealers' Gazette* [hereafter *WDG]* 1(1)(1871): 2.

8 Whiting was born in Union, Maine in 1824 and died in California in 1899. Archives of the Society of California Pioneers, vol 1. p. 289 and vol. 4, p. 289 (I am extremely grateful to Patricia Keats, the Society's librarian, for helping me with these records of Whiting; one record gives the year of Whiting's birth as 1824); *San Francisco Chronicle*, 1899, Aug 1, 10. In 1856, Whiting appeared on the "People's Ticket" as a (successful) candidate to be a justice of the peace. "People's Ticket," *Alta*, 1856, Nov. 3, 2. In 1859, he was elected delegate to the 1860 state convention of the

trademark law aside, he was not particularly active, working on the hometown legislation noted above and sitting on various committees. After his term as senator, he gradually moved away from politics and patronage and back to life as what San Francisco directories described variously as a "merchant" or "capitalist."[9] Indeed, Whiting's business probably explains his involvement in trademarks legislation as well as his politics. His legislative participation served his commercial interests quite as much as his San Francisco district.[10]

Republicans. "Republican Primary Election," *Alta*, 1859, July 17, 2. In 1861 he travelled to Washington in an (unsuccessful) attempt to be appointed postmaster of the San Francisco Post Office. "Office Seeking in Washington," *Alta*, 1861, Feb 27, 2.

9 In 1866, for example, he was a delegate to the Republican convention in Philadelphia as well as chairman of the "National Union State Central Committee." The committee published a pamphlet that sought to rally disaffected unionists to support President Andrew Johnson's tepid policies of reconstruction in the aftermath of the Civil War. See *Address of the National Union State Central Committee to the People of California* (San Francisco: Alta California, 1866).

10 Whiting was accused of neglecting the city's interest on certain votes and on one occasion the sergeant-at-arms had to separate Whiting from his accuser. "The Senatorial Caucus Concludes its Labors," *Alta*, 1863, February 10, 1. See also "Latest from Sacramento," *Alta*, 1863, April 9, 2.

The Sector

After the senate, Whiting went briefly into the oil business helped perhaps by political connections, but his principal career was as a wine merchant.[11] He claimed to have started in this in 1849, the year he arrived in the state, and thus to be "the oldest wine and liquor dealer in California."[12] He did business primarily under the designation "M.S. Whiting & Co," occasionally and briefly adding partners to the business.[13] With

11 See *Statutes of California Passed at the Sixteenth Session of the Legislature* (Sacramento: State Printer, 1866) Cap CXIX, 219: "It shall be lawful for M.S. Whiting and C.W. Kellogg ... to construct a wagon road ... Colusa ... terminating ... near the Antelope Valley Petroleum Company's works."

12 *WDG* 1(1)(1871) 2. An advertisement of 1858 claims that the firm was founded only in 1852. [Advertisement], *Alta*, 1858, October 6, 4; an advertisement of 1851 has "Whiting & Co" as "Auction and Commission Merchants, dealing in "dry goods, groceries goods and merchandise of every description ... provisions." [Advertisement], *Sacramento Transcript*, 1851, 28 May, 1. Carosso notes that Pierre Sansevain [sic] claimed that his uncle, Jean Louis Vignes, was the first California wine merchant. *California Wine Industry*, 37.

13 In 1858 Whiting formed the partnership Whiting, Goodman & Co. The firm dissolved later the same year. See "Announcement of Dissolution," *Alta*, 1858, Aug 12, 4. The partnership of Whiting & Berry formed in 1867 and dissolved at the end of 1868. [Untitled], *Daily Dramatic Chronicle*, 1867, September 28, 2; 1868, December 1, 4.

his second partner, Fulton G. Berry, Whiting produced a pamphlet about wine and the wine trade, which defends that trade against, on the one hand, accusations of fraud and falsification, and on the other, growing attacks from the temperance movement.[14] In 1871, though he continued his wine business, he committed himself further to this defense by launching the *Wine Dealers' Gazette*, the "acknowledged organ of the Wine and Liquor Trade," the first such publication in California.[15]

In these publications, Whiting helped promote California's wine trade, which grew to prominence in the period. Though alcohol and agriculture were pervasive in the country as a whole, wine was becoming a distinctive and distinctly productive part of the Californian alcohol and agriculture sectors. The state's

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14 M.S. Whiting & F.G. Berry, *A Treatise on Wines, Spirits, and Teas, with Correspondence and Certificates*. Fourth edn. revised and enlarged. (Whiting & Berry, San Francisco, 1868[?]). This edition claims that more than 30,000 copies had been distributed.

15 An advertisement in Rowell's *Directory* claims that the *Gazette's* "circulation is larger than that of any other paper of its class." More cautious, Thomas Pinney feels it "remarkable" that this was the only early periodical exclusively devoted to wine, while describing it as "unimportant." Geo. P. Rowell & Co, *American Newspaper Directory* (New York: Geo P. Rowell & Co, 1880), 1006; Thomas Pinney, *A History of Wine in America: From the Beginnings to Prohibition* (Berkeley: University of California Press, 2005), 369.

population increased a dramatic 47 percent across the 1860s. Its wine production increased 800 percent between 1860 and 1866 alone. This expansion reflected a growing awareness of and response to California particularly favorable conditions for viniculture. Though not entirely disinterested, the influential wine expert Agoston Haraszthy was voicing widely felt enthusiasm when he claimed in 1862 after a tour of European vineyards, "California is superior in all the conditions ... to the most favored wine producing regions of Europe."[16]

Such disproportionate growth in production compared to population might have created problems of overproduction, but as California was starting on this rapid period of expansion, potential rivals outside the state were stumbling. Eastern wine regions were sliding towards a civil war that caused major disruption while leaving California relatively untouched. And the arrival of the cross-country telegraph and growing confidence that a train would soon follow made ready access to those markets seem increasingly possible. In 1860, the *Alta* reflected growing sentiment when it wrote, "We believe ... that Californian wine will soon enter largely into our exportations,"

16 Thomas H. Pauly, "J. Ross Browne: Wine Lobbyist and Frontier Opportunist" *California History* 51(2)(1972): 99-116; Agoston Haraszthy, *Grape Culture: Wines, and Wine Making* (New York: Harper, 1862), xv.

noting that California production was capable of meeting "nearly the entire demand in the United States, for certain classes of wine." In 1863, the year of Whiting's bill, California exports to eastern states were more than double what they had been at the beginning of the decade.[17] "We do not see," the *Alta* had added, "why heavy grades of wine ... may not be sent to England."[18] The English market, traditionally supplied from Europe, might have seen in every sense a much more distant prospect had it not been that, while California production flourished, Europe was still suffering from the effects of oidium, a disease which had debilitated European vineyards in the 1850s.[19]

Against such potential and confidence, however, had to be set problems the sector faced. Temperance would become a particular thorn towards the end of the 1860s, as we shall see, but first the fledgling trade had to confront the perennial and endemic problems of what were variously called "fraud," "falsification," "adulteration," and "counterfeiting."[20] People

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17 Carosso, *California Wine Industry*, 34.

18 "Californian and Other Wines," *Alta*, 1860, September 5, 2.

19 French production is reported to have sunk from 39 million to 11 million hectoliters. Christy Campbell, *Phylloxera: How Wine Was Saved for the World* (London: Harper/Collins, 2004), 31.

20 The fledgling character of the state, with limited governmental

put together dreadful concoctions of cheap wine, grain alcohol, and food coloring and called them "claret," "port," "sherry," or "madeira" depending on the price they sought. To establish a reliable and enduring trade, producers had to provide consumers with indications of authenticity. Individual traders worked to build reliable reputations. On their own, however, successful attempts at branding provided tempting targets for counterfeiters, who regularly put their concoctions in bottles marked with reputable names (those of the old champagne houses were particularly popular).

Indeed, a standard advertising trope made a virtue of such frauds by arguing that imitation was a vindication of quality. The much advertised Hostetter's bitters had on its label "the best evidence of the merit of an article is the disposition to produce counterfeit" before going on to claim that its own label

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supervision, enabled fraud more generally. Counterfeiting of coins, post office stamps, and particularly gold dust was widely reported. Nonetheless, these kinds of fraud were endemic to wine regions, all of which, to be successful, had to overcome them. For the challenge of fraud to the development of wine markets, see James Simpson, *Creating Wine: The Emergence of a World Industry* (Princeton: Princeton University Press, 2011); Alessandro Stanziani, "Information, Quality and Legal Rules: Wine Adulteration in Nineteenth Century France," *Business History* 51(2)(2009): 268-291.

had been much imitated. Similarly, advertisements for the firm of Freeman & Simpson argued that "[t]hese various attempts to counterfeit our Whiskies are perhaps the best tribute to the high reputation which they have achieved."[21] Such claims indicate the problem, but they were of course as easily made by the bootlegger as by the honest dealer.

The next step for someone trying to build a reputation was to go to court to prosecute those trying to appropriate one. In common law jurisdictions, however, barriers to and costs of successful prosecution of the various forms of fraud and "passing off" were high and the relief often minimal.[22] Consequently, as fraud grew, so did calls for statutory intervention and legislation to protect the sector. Five years before Whiting's bill, the *Alta* insisted that

> our Legislature should fix the stamp of criminality on all forgery of labels and trade marks, the adulteration of any article bearing a label or trade mark, and the sale from a labeled package of an article known to be spurious. A statute making such provisions would be of much value to protect the public and honest and enterprising tradesmen.[23]

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21 [Advertisement], *SDU*, 1860, November 21, 3.

22 In common law jurisdictions, the case of *Rodgers* vs. *Nowell* was often held up as a caution. The plaintiff spent more than £2,200 on the case and received only £2 compensation in return. Duncan Mackenzie Kerly, *The Law of Trade Marks and Trade Names* (London: Sweet & Maxwell, 1908).

23 "Native vs. Imported Wines," *Alta*, 1858, December 14, 1.

The following year, in a story about New Yorkers fabricating California wines and selling them at "low grog shops," the paper argued that the importance of the wine sector to the state elevated the concern from one for the wine interest alone to one for the state as a whole:

> The wine interest is becoming too important to the wealth of our State and the health of our people for us to allow those frauds to go unnoticed or unpunished. ... We know enough, however, about the evil to perceive that something may be done by statutes to forbid the adulteration of all wines made in this State, the counterfeiting of all labels and trade marks of California wine, and the filling of all labels, and barrels, kegs, bottles, etc., bearing a trade mark of one wine with any different liquor for the purposes of deception.[24]

Legislators responded. It took more than a single law, but over the next few years the legislature took up almost all the concerns in this passage. Whiting's bill thus represents a culmination, rather than a single intervention, the outcome of a determined progress that at times bent other legislation towards the wine trade's concerns, and at times, generalized the trade's own concerns to encourage the support of other alcohols and other sectors, in particular food and medicine. Indeed, as we shall see, once the law was past, other sectors took as much or more advantage of Whiting's law as the wine trade. For by the time the law was passed, wine trade interest in general and its representative Whiting had moved on to other concerns, in

24 "Frauds in Fabricating and Adulterating Wine," *Alta*, 1859, October 8, 2.

particular the rising threat from the temperance movement. Here critical weapons moved from trademarks *per se* to the skillful marketing involved in "rebranding" products. Whiting proved as adept at this as he had at legislating.

To understand these developments, it is useful to move from the matter of "who" to consider the related questions of "what" mentioned above: what exactly was the legislation, what part did registration play in it, what part litigation, and how did these support the transformation of wine sector interests and identity?

What

To understand what emerged in 1863 and what it led to, we need to look beyond the law itself to its antecedents. Then, with an outline of the development of the law established, we can turn to its consequences

Legislation

Early statutory history of marking begins in California, perhaps unsurprisingly, not with wine but with another part of the agricultural sector and the marks and brands of cattle. These were first addressed in an unexceptional law of 1850 that obliged owners of "horses, mules, cattle, sheep, goats or hogs" to establish a mark or brand "different from the marks and brands of his neighbor" and to register these with the county

recorder, who was in turn obliged to send copies to the recorders of neighboring counties, responding, no doubt, to the tendency of cattle to wander if given the chance as much as the tendency of neighbors to poach. The requirements for registration and for marks to be distinctive anticipated eventual trademark law, a connection made clear when California codified its law in 1872 and united agricultural marks and brands and trademarks in a single chapter.[25] From 1850 on, the state established various other systems of marking and registration for, among other things, flour, pork and beef, imported alcohol, medical mixtures, and, of course, gold. These were to be inspected, registered, and marked, stamped, or branded. All such requirements involved a type of what the French called "marques obligatoire"--marks that the law required certain people to put on their animals and goods, principally so that if something bad happened--if cattle trampled crops, if

25 "An Act Concerning Marks and Brands," *Statutes of California Passed at the First Session of the Legislature* (Sacramento: State Printer, 1850) Cap. LXXIX. The following year the state passed a related obligation for a distinctive counterbrand, whose role was to annul the ownership claim in the original brand. "Supplementary Act Concerning ... Marks and Brands," *Statutes of California Passed at the Second Session of the Legislature* (Sacramento: State Printer, 1851) Cap. CI; *California Political Code* (Sacramento: State Printer, 1872) Cap. VII.

food poisoned consumers--responsibility could be traced to the source. Yet some of these obligations also came with benefits. If someone stole your cattle, with a mark you could identify the cattle and perhaps the thief. Equally if the state marked your flour as "Superfine," you received a government-sanctioned endorsement of quality that might gain traction in the marketplace.

Overtime, law shifted away from obligation to supporting the beneficial aspects of marking for the producer and preventing the appropriation of their marks by imitators--essential aspects of modern trademark law. As California law moved in this direction, two strategies developed, one focused on the product itself and another on the container or label that came with it. (For example, one anticipatory law of 1853 sought to criminalize the use of counterfeit labels, while another of 1855 sought to prevent the counterfeiting of gold dust itself.[26]) For trade in drinks, both strategies are evident. Between 1860 and 1863, five bills were put before the senate or assembly

[26] "An Act Supplementary to an Act Concerning Crimes and Punishments," *Statutes of California Passed at the Fourth Session of the Legislature* (Sacramento: State Printer, 1853) Cap. XIX; "An Act to Prevent the Counterfeiting of Gold Dust and Other Species of Gold," *Statutes of California Passed at the Sixth* Session *of the Legislature* (Sacramento: State Printer, 1855) Cap. CXLIII.

addressing marks or labels, on the one hand, and adulteration, on the other. Four were passed, but only with the last, Whiting's bill of 1863, did the wine interest seem content.

In the first, unsuccessful bill, the Senate in 1860 sought to make it an offense for anyone to take a marked soda water bottle and fill it with a substandard product--a common practice.[27] The author of the bill claimed that it reflected the wishes of constituents who had fallen prey to such deceit. Lacking any stronger support than this, the bill failed. Though, as we shall see, soda water bottlers were active with regard to their trademarks, there does not seem to have been a sufficient "soda water interest" to get such a bill passed without help. The same year, the Assembly, turning to content not form, was more successful in its "Act to Prohibit the Sale and Disposal of Adulterated Spirituous or Alcoholic Liquors, Wines, or Cider." No doubt the inclusion of alcohol helped draw support from the wine interest, yet the successful law was deemed little more useful than the failed bottle bill and both issues, of labels

[27] Though the practice was near universal, Carosso claims it was particularly significant in California as the state had no glass manufacturers until the founding of the Pacific Glass Works in 1862. Carosso, *California Wine Industry*, 35.

and of content, were quickly addressed again.[28]

The first was taken up by the Senate in 1861, in "An Act Concerning Certain Trade-Marks." Perhaps influenced by the success of the adulteration act, this went beyond the limited "soda water" mentioned in the earlier trademark bill to protect the containers of "wine, cider, porter, ale, beer, soda water, or mineral water." Unlike previous mark and brand laws, this law no longer imposed an obligation, but rather gave producers of these goods the right to "file his claim and description of the mark, with the County Clerk ... and a duplicate thereof with the Secretary of State." But it added an incentive for filing, making it a misdemeanor for anyone "to use, sell, or have in his or their possession, any bottle, a trade-mark for which has been acquired under the provisions of the act."[29] The trade in these specified drinks now precluded an ancillary trade in their empty containers.

The movement from cattle in 1850, through flour, and beef, to soda and on to drinks in general tracked the growing

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28 "California Legislature," *SDU*, 1860, February 25, 1; "An Act to prohibit the sale and disposal of Adulterated Spirituous or Alcoholic Liquors, Wines, or Cider," *Statutes of California Passed at the Eleventh Session of the Legislature* (Sacramento: State Printer, 1860) Cap. CCXXIII.

29 "An Act Concerning Certain Trade-Marks," *ibid.*, Cap. CCCLXXVIII.

commodification of agricultural products and their commercialization by producers, distributors, and retailers. While I have suggested it is unwise to credit canonical industrial manufacturing sectors with introducing trademark law, the commercialization and industrialization of the California agricultural sector clearly did contribute. It was not the cattle on the hoof so much as the food and drink in bottles and cans and over the counter that became the *locus classicus* of the "brand." And with food and drink to be sold over the counter, rather than with cattle wandering over fences, consumers and the extent to which they might be deceived became an ostensible focus of brand protection, as the constituency for the failed law of 1860 indicates. Though, as that failure also indicates, consumer interests were in practice less compelling than the producer's.[30]

If addressing the wine interest helped make the 1861 bill a success by modifying the earlier, failed attempt to include wine, a similar expansion of the law's appeal is evident in 1862 when another adulteration bill--"to Prohibit the Sale and Disposal of Adulterated Spirituous or Alcoholic Liquors, Wines, or Ciders"--was introduced, almost as if the earlier law of 1860 did not

[30] McKenna argues, with much justification, that the "conventional wisdom that trademark law sought to protect consumers" is as spurious as it is widespread. Mark P. McKenna, "The Normative Foundations of Trademark Law," *Notre Dame Law Review* 82(5)(2007): 1839-1916.

exist. Indeed, the *Alta* asserted that "[t]here is at present no law to prohibit the adulteration of food and drink, or, at least, no law that prevents it." It then reversed itself to concede:

> There is a statute to forbid the adulteration of liquors with any drug or poisonous substance; but the act is one that has not now, and never will have any force. There never has been a conviction or an indictment under it. But its main defect is, that it is not sufficiently comprehensive. Dr. Hill [the Assembly member who introduced the bill] has introduced a bill into the Senate, which is probably as good as any measure that can be devised.[31]

Comprehensiveness was achieved by the new bill, which, where the former bill had inveighed against adulterations that were harmful, now encompassed any kind of unacknowledged adulteration, whether harmful or wholesome. It also linked container and contained: to make any mixture without indicating that it was a mixture on the container was now against the law. In supporting its passage, the *Alta* argued, "[n]o industrial interest suffers so severely [from such unannounced mixtures] in California as the wine interest," which it later noted "is especially concerned in the passage of the bill." [32]

With content well protected, the bill also sought more precision with respect to labels and names, which proponents argued needed protection in their own right, and not merely as the adjunct of the "bottle or bottles," as the 1861 act held.

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[31] "The Adulteration of Article of Food and Drink," *Alta*, 1862, March 30, 2.

[32] *ibid.*

Section five of the 1862 adulteration act attempted to hone earlier trademark law, making it "forbidden ... to sell any article, to be used as food or drink by persons, under a false name, with intent to deceive the purchaser as to the real name of the article." This was not yet fully-fledged trademark law. Nonetheless, with this clause, the adulteration act took a significant step forward, positioning the mark not only in relation to the product, but also in relation to the producer. To deceive the public about either relation was now a crime.

As the bills of 1861 and 1862 were traveling the legislature, the press was closely following several notable cases of fraud that were traveling the courts. I will discuss litigation in the following subsection, but one case deserves mention here as again it helps point to interests and precedents bearing on the bill. In January, 1861, Charles Meinecke, the San Francisco agent of Veuve Clicquot accused a local importer, Bernard Hirsch, of selling German Hock as Clicquot Champagne. In France, the champagne sector had carefully cultivated its marks under state protection since the 1820s. Veuve Clicquot had first registered its mark in the Marne in 1825 and fought to protect it carefully ever since to such an extent that when the *Alta* lectured the California wine trade on the importance of cultivating reputation it pointed for a model to "[t]he brand of

'Veuve Clicquot' [which] is a guarantee of its quality."[33]

Evidence in the case against Hirsch's imitations outlined, among other things, the innovative ways in which Veuve Clicquot burned marks into the bottom of corks, which it then covered in stamped, gold-flaked sealing wax to prevent its bottles being deceptively reused. In looking after its brand, however, Veuve Clicquot had learned how to reach well beyond the material character of the package and the distinctive qualities of the content. For instance, to prevent her marks being imitated in Russia Madame Clicquot had engaged French diplomatic power in her defense.[34] So doing she had helped prompt the system of reciprocal treaties by which France agreed to recognize only those marks that came from countries where French marks were or would be recognized and protected. This law had a seminal influence on the internationalization of trademark registration law. The British legislation of 1862 and 1875, as well as the U.S. federal law of 1870 were all responses to such treaty

[33] "Répertoire de 1825 à 1858. Marques de Fabrique et de Commerce," Archives Départmentales de la Marne; "Californian and Other Wines," *Alta*, 1860, September 5, 2.

[34] "Contrefaçons des Vins Français et des Marques de Fabriques," Archives Nationales de France f/12/2682.

obligations incurred with France or intermediaries.[35]

Well before the formal convention of 1869 with which the French government pushed the U.S. government towards reciprocal trademark recognition, and in part as a result of discussion around the Veuve Clicquot case, the need to respect marks such as Clicquot's in order to have California marks respected became increasingly clear within the state.[36] The *Alta* saw the law of 1863 as principally protecting foreign products from local misbehavior: "The object is to prevent imitation of certain foreign liquors, which are bottled abroad, and the bottles after having been emptied are bought up by counterfeiters, who fill them up with fraudulent mixture." Such protection, the paper argued, also served local interests as these practices "injur[ed] the business of the men engaged in importing the genuine article." In the context of the growing potential of California wine, the case also made clear the more general point that the state had to offer protection to imported marks, not only to protect its own importers, but also if it wanted to claim

35 Paul Duguid, "French Connections: The International Propagation of Trademarks in the Nineteenth Century," *Enterprise & Society* July (2009): 3-37.

36 The convention was signed on April 16, 1869. See Henry Blumenthal, *France and the United States; Their Diplomatic Relations, 1789-1914* (Chapel Hill, University of North Carolina Press, 1970).

protection for its own wines whether in European markets, New York grog shops, or even San Francisco bars. Whiting's bill, the *Alta* claimed, "was drawn up at the request of some importers of San Francisco," but serving their interests it also served wine and similar interest more generally.[37]

Thus, the bill Whiting introduced arrived trailing behind it his own and others' concerns with wine importing and retailing, a significant history of case law that reflected local and international concerns, and a sequence of related but unsatisfactory law.[38] Inevitably, such a bill attracted "lively interest." As questions were "raised before the Senate Committee on Commerce," to which the bill was referred, and after "[s]everal [other] bills ha[d] been submitted," the bill took

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[37] No doubt local and international interests combined for, as the French Consul reporting on the California wine sector in 1862 noted, "Un grand nombre de vignerons Français et Allemands sont employés." "Rapport Commercial pour 1861 [de] Consulat de France à San Francisco" Archives National de France, Fontes Commercial, California, f12/2593; "Californian and Other Wines," *Alta*, 1860, September 5, 2.

[38] With regard to the last, the *Alta* complained that the bill did not acknowledge its predecessors: "really it is a proposed amendment, with the alteration of very few words, to an act adopted in 1861." "Our Legislative Correspondence, *Alta*, 1863, January 18, 1.

significant strides beyond Whiting's initial proposal.[39] The new law explicitly repealed the Act of 1861 and in place of its sparse three sections provided a fulsome fifteen. Also, as the *Alta* noted, like the adulteration law before it, the act took commercial law significantly beyond common law precedent in this area. Whiting's act also broadened its appeal by going beyond named goods (e.g. the "wine, cider, porter, ale, beer, soda water, or mineral water" of 1861) to which the earlier bills had limited themselves to encompass anyone "us[ing] any peculiar name, letters, marks, device, figures, or other trade mark or name ... in any manner attached to or connected with, any article ... manufactured or sold by him." As such it was no longer an "Act Concerning Certain Trade-Marks," as the limited law of 1861 and even Whiting's initial bill had been, but instead an unqualified "Act Concerning Trade-Marks and Names." The law offered those who "shall file" with the secretary of state (a contentious wording, as we shall see) protection from anyone "using without [manufacturer's] consent ... for the purpose of representing any article to have been manufactured or sold by" by the person rightfully filing. In sum, while building on many laws that had come before it, the eventual act simultaneously created, for the common law jurisdictions at

[39] "Our Legislative Correspondence," *Alta*, 1863, January 27, 1.

least, unprecedented legislation, a critical feature of which was registration.

Registration

In establishing a trademark law, several states including New York, which had passed criminal law to punish fraudulent use of marks in 1845, preceded California. But the predecessor laws lacked registration. Not only do contemporary scholars see registration as critical to trademark law, but so did the pioneering French, who had allowed registration since 1803 and, as noted above, had set out to persuade its trading partners to establish registration systems of their own.[40] It was the absence of such a provision that prompted many inside and outside the British Isles to regard Britain's "Merchandize Marks" law of 1862 as inadequate and, almost as soon as it was passed, to clamor for revision.[41] In this regard, there was a curious *pas de deux*. The California law of 1861, unlike Britain's law of 1862, included registration, but Britain's law,

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[40] Lionel Bently, "From Communication to Thing: Historical Aspects of the Conceptualisation of Trade Marks as Property" pp.: 3-41 in Graeme B. Dinwoodie & Mark D. Janis ed., Trademark Law and Theory: A Handbook of Contemporary Research (Cheltenham, UK: Edward Elgar, 2008); Duguid, "French Connections."

[41] Wood, "The Registration of Trade Marks."

unlike California's, did not limit itself to marks on bottles or containers, but included all merchandize. The landmark California law of 1863, then, can be seen as embracing the strengths and overcoming the weaknesses of both these precedents.[42] Early trademark law can often seem more international than national, and California's law appears that way in the influences it responded to and the precedent it set.

California precedent was soon followed by Oregon, Nevada, Missouri, and Kansas, and eventually by the U.S. federal government and numerous other states and, eventually, the U.K. government.[43] Not only, of course, did other states follow. So too did registrations. A brief examination of California registrations from inception to the end of the century helps

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[42] The California code carried an explicit reference to that British law and its definition of what a mark was. *California Political Code* (1872) Cap. VII.

[43] For England, "Merchandize Marks Act," 25 & 26 Vict. Cap. 88; for Oregon, *The Organic and other General Laws of Oregon* (Salem, OR: Eugene Semple, 1874), Cap. 33; for Nevada, *Statutes of the State of Nevada Passed at the First Session of the Legislature 1864-5* (Carson City, NV: John Church, 1865), Cap 82; for Kansas, *The Laws of the State of Kansas Passed at the Sixth Session of the Legislature* (Lawrence, KA, Speer & Ross, 1866), Cap. 66; for Missouri, *Laws of the State of Missouri Passed at the Adjourned Session of the Twenty-Third General Assembly* (Jefferson City, MO: Emory S. Foster, 1866).

indicate some of the intended and unintended consequences of the law. And in passing it paints a revealing picture of commercial and commodifying California towards the end of the century.[44]

The Secretary of State's office had opened a register under the law of 1861 to record "container brands."[45] California

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[44] The following data are drawn from the trademark applications and trademark register in the California State Archives, Sacramento. I am grateful to the state archivists for help with this work. This less-than-rigorous survey runs from May 1861 to February 1901. The first seven marks are for "container brands" registered under the law of 1861. (In subsequent years "container brands" continue to be mixed in with other marks and names, though marked as "CB"—some 35 are included by 1901.) The eighth registration and hence the first trademark was recorded by B.J. Fish and Norman Coon (see below) on May 2, 1863, a month after the act was signed into law. In general, I refer to registrations rather than marks, as some firms include numerous marks in a single registration and the exact number is hard to parse. As registrants usually declared what category their goods belonged to, registrations have been coded according to the U.K. trademark classification in use after 1875. Registrations have been given only one classification although occasionally one registration lists products from different sectors. For these reasons, figures given are indicative but not definitive. In more rigorous jurisdictions, it can be important to distinguish applications from registrations. As in this period in California the distinction is rarely important, I have elided the two.

[45] Despite the size of the state, registration was centralized. By contrast,

businesses had responded in desultory fashion: seven bottled-water companies registered their marks between 1861 and 1863, while other eligible drinks remained aloof. Although the law of 1863 repealed its 1861 predecessor, the Secretary of State's office kept the same register and numbering system, shifting seamlessly from container brands to trademarks in general. Instead of drawings of bottles and facsimiles of labels, whole stamped flour sacks and similar items begin to unfold from the register.

Under the new law, interested parties submitted an affidavit describing the brand and providing a sample or facsimile. They also paid a fee of five dollars. If registration under the old law was unenthusiastic, under the new, the start was unpropitious. The first firm to register was R.F. Fish and Norman Coon, who registered Fish's "Infallible Hair Restorative" (mark #8) a day after the law took affect, only to have the same mark registered the following month by Charles Story (#12), who claimed the mark was rightly his. In between, Arms & Dallam registered three marks (#9-11) without indicating what they were for. (Arms & Dallam was a brush and broom

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when Missouri and Kansas passed their registration laws, they recorded registrations by county, a hangover, perhaps of prior cattle brand registrations on the assumption that branded goods would wander little further than branded cattle.

business.) Despite the earlier requirement for distinctiveness in cattle brands, it evidently took a little time for the Secretary of State to deal with contending claims to similar or identical marks and to make registrants specify the kind of goods at issue.

These registrations were followed a little later by one of the first still widely known names in the register, Henry Deringer, who registered his mark for guns (#20) in October 1863. In 1865, the jobbing firms of J.Y. Hallock and of Fuller & Heather, both importers and dealers in glass for construction, the later dealing in particular in imported French glass, registered their marks (#38 & 39) and a year later F.H. Rosenbaum, another glass importer, registered his (#58). Hanson & Co (#59) and Pacific Asphaltum (#62), lumber and paving companies respectively, followed. These firms merit mention primarily because they stand out as atypical of the registrations that follow from the law, and so help indicate what was typical. Indeed, of the almost 4,000 registrations in California by the end of the century, only about 140 come from more classically Chandlerian industrial manufacturing sectors.

By contrast, the dominant sectors, accounting for roughly 75% of registrations come from food and drink, tobacco, medicine, and cosmetics. The initial burst comes from medicines (an

increasingly complicated category, as we shall see), one third of all marks in the first decade, and about one sixth over the whole period. Its shrinking share does not represent a decline in medicine so much as a surge in food. This sector forms only 7 percent of marks in the 1860s, but 32 percent over the whole period. As these two swap positions, in between come tobacco, 13 percent initially and 11 percent overall, and alcohol, 15 percent initially and 10 percent overall. The shifts suggest that alcohol and medicine, where the importance of reliable marks had long been known, asserted themselves early. These, for example, are the source of the first long-distance marks in the register: Wolfe's schnapps from New York (#13), Hostetter's bitters from Philadelphia (#14), Cutter whisky from Louisville (#23), and Eugene Clicquot and Heidsieck champagne from France (#26 & 27).[46] All came from firms with well-established if ill-protected marks. By contrast, the early food marks were new, local, and relatively evanescent. Early marks in this category begin with Provist's vinegar (#18), Harbison's honey in its comb (#42), Holden's yeast powder (#93), and Chadbourne's Santa Clara crackers (#100), single marks that left little trace.[47] Unlike

[46] J.H. Cutter's registration was another that was quickly followed by a rival claim to the mark, made by William J. Cutter (#29 & 30).

[47] By the time Chadbourne completed the hundredth registration and fourth food mark, thirty-three registrations for medicines, fifteen for tobacco

alcohol, this sector's branding power developed *post hoc* under the protection of the law. The first significant California representative of the state's growing agricultural commodity sector is flour (#116 & 117), first registered in 1868, and the first long-distance food product is Lea & Perrins's Worcestershire sauce from England (#270). Despite these tentative beginnings, food producers from California came to dominate. Particularly noticeable is the sector's development of multiple trademarks. Of the 32 firms with more than 10 registrations, 17 come from the food sector, and of the 108 with more than 5, 52 come from the sector. By contrast, no medical business has 10, and only 5 have 5 or more. Food's nearest competitor in multiple registrations is tobacco, though it falls well behind. (Six firms have 10 or more registrations.) Moreover, tobacco tended to cycle through marks, treating them as ephemeral records of notable occasions--the name of a visiting actress or newsworthy general, dropped as the occasion recedes--whereas food sector marks seem generally intended to endure. And ultimately it is from this sector that some of the most enduring new marks come. Though Clicquot and Heidsieck, Cutter, and Lea & Perrin marks survive, they preceded the law. Enduring food and soft drink marks--Ghirardelli (#397), Del

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products, and thirteen for alcohol had been made.

Monte (#1194), Martinelli (#1226), Sperry (#2517), Folger (#3007) and the like--appear, in contrast, almost as products of the law and the climate it helped to create as of the firms that created them. Their main rival in fame and endurance from another sector is probably Levi Strauss (#1704), though in general clothing does not form a significant portion of the California marks.

A sign that it was in good part foreign wine producers that influenced the law comes from the difficulty of finding California wine names that have endured. In fact, despite the promise of the sector, its producers appropriated or approximated foreign designations (California champagne, port, sherry, and madeira and claret appear in different guises) rather than to developed their own. Overall, pure wine registered about the same number of marks as bottled water. One difficulty in making this claim, however, is that the border between wine (and alcohol more generally) and medicine was highly porous. Sainsevain, the name of one California's major wine companies of the 1850s, for instance, appears in the register in 1863, but only for a "wine bitters" and calling for the "attention of Druggists, Physicians and Chemists" (#16). Both Wolfe's schnapps and Hostetter's bitters are similarly registered and advertised as medicinal products, though as we shall see in discussing this matter further below, they were

highly alcoholic.

While the names change, the type of goods registered in California are generally recognizable as the sort of goods registered across the years, across other states, and across the federal register, once that comes into action. Though it led the way, in this regard, it walked a common path. But the California register was distinctive in other ways. In particular, while conventional histories see trace the innovation of service, collective, and certification marks to the Lanham Act of 1945, portraying these kinds of mark as offspring of the modern economy, in fact California registered and sanctioned all these types almost from the inception of the register. Service marks included auction houses, dental offices, debt collectors, delivery services, insurance agencies, savings unions, and undertakers. Collective and certification marks began with the "union label," launched by tobacco workers to promote "white labor," an ugly outgrowth of Chinese exclusion sentiment. The "label" spread, however, to other causes, promoting eight-hour days and condemning child labor as well as touting union membership in general. These are later joined (in practice and in the register) by marks for the California "Pure Food Movement," which acted much like similar marks today. Other collectives and associations and different types of cooperatives, clubs and associations also registered their marks

successfully. Fledgling colleges and business schools entered the register early on as well.[48]

The distribution of the applicants provides another image of the state in the last third of the century. Only three percent of the registrants are women, mostly dealing in food, medicine, and cosmetics. Fewer than five percent come from out of state, and only 41 applications in all from overseas (France leads with 13, followed by England with 7, though if Scotland, Ireland, and Wales are added, Great Britain pips France with 14). Conversely, within the state, 63 percent come from San Francisco, which is very distantly followed by 9 percent from Sacramento, 4 percent from Los Angeles, 2 each percent from Oakland and Stockton, 1 percent from San José, while 140 of the 190 California locations submit only one registration.[49] The distribution had a long tail.

Litigation

The legislation and registration of trademarks was in part a

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[48] Duguid, "A Case of Prejudice?"

[49] There are no Los Angeles marks in the 1860s, but in the 1880s and 1890s the number doubles with each decade, reflecting primarily the growth of the citrus orchards. The potential number from this area was probably restricted, however, by the growth of cartels in the citrus-fruit sector over the same period.

response to earlier litigation, such as the Veuve Clicquot case. Throughout the common law jurisdictions, available law, primarily in equity courts, was judged to be too cumbersome for any but the most determined, like Clicquot. With a new law allowing plaintiffs to draw on the evidence of registration to support a suite and claim a misdemeanor under the statute, California led the way into a new era, one in which, many hoped, ease of litigation would deter infringers. A brief look at early cases shows that early registrants were quick to assert and defend their rights. The promptness of these actions suggests that some registrants took registration as a springboard to litigation that they had been eager but previously felt unable to pursue. Inevitably, courts also spent a good deal of time establishing the overall significance of the legislation and, in particular, of registration.

The early litigation does not, however, tell a story simply of the just prosecuting the unjust. The case of one of the earliest registrants under the "container brand" law of 1861, Casey & Kelley, shows the tendency of those with marks to overreach. The firm registered its mark (#3) in May and by July had three cases in Police Court with people arrested for having Casey & Kelley marked bottles in their possession. In two of the cases defendants were found guilty for being in possession of bottles, in the third the court felt it was unreasonable to

prosecute someone who had tried to sell empty bottles back to Casey & Kelly itself and let the defendant go.[50]

Inevitably, early litigation had to establish the extent and limits of the legislation, and in particular the significance of this new concept of registration, especially with regard to prior rights under common law. When the law was first proposed, the *Alta* denounced it for conferring rights on the first to register, arguing that "[t]he first man to file a claim of Heidsick [sic] Champagne would have the exclusive right to sell that wine in the State."[51] While this reading of the law was generally dismissed, some of the early registrations do look like attempts at appropriation. As noted above, the first registration under the law was made by Fish and Coon, claiming the rights to "Fish's Infallible Hair Restorative." The counterclaim by Charles Story, trying to register the same name, followed promptly. Story also filed an affidavit claiming to have bought the mark from a third party in 1861. B.F. Fish seems to have survived Story's quick response, and it took a California Supreme Court judgment on behalf of Redington & Co,

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[50] "City Intelligence," *SDU*, 1861, July 9, 3; July 19, 3; July 22, 3; July 28. The name Kelly (or Kelly) is spelled both ways within the initial application as well as in the newspaper accounts.

[51] "Trade Marks," *Alta*, 1863, January 24, 1.

subsequent owners of Story's business, to make it definitively clear that Fish's prior registration did not establish rights over a mark already in use.[52]

The *Alta* had also claimed that the law "permits the counterfeiting of all trade-marks not filed with the Secretary of State." Such a reading suggested that to fail to register was to surrender common-law rights. Despite the law's wording that "[a]ny person wishing to secure the exclusive use of any such trade mark or name *under the provisions of this Act*, shall file his claim to the same ... with the Secretary of State" [emphasis added], the California courts were called upon to clarify. This they did in the case of *Derringer* v. *Plate*, which came before the California courts in 1865.[53] Though Deringer had, as we have seen, filed a registration, part of the judgment turned not on whether he had registered, but on whether he had to, and the court decided that he did not: "the statute does not take away the remedy at common law; ... it is an affirmative statute, and ... action may be maintained both at common law and

[52] 31 Cal 185, 1866; see also *SDU*, 1867 January 2, 2.

[53] 29 Cal 292, 1865. As well as misspelling Deringer's name, the court also managed to misdate the law as April 3d, 1853. The case, contentiously, affirmed that trademarks were property. It was to avoid this affirmation that some English lawyers had resisted registration in 1862.

under the statute."[54] The judgment also usefully affirmed the rights of out of state businesses--Deringer came from Philadelphia--to protection under the state law.[55]

Others early to register were also early to court. In the case of Udolpho Wolfe, litigation preceded registration. In 1861, he had taken several people whom he claimed were forging his Schiedam Schnapps mark in California to court. Though he had not registered under the 1861 act, he was, as we have seen, one of the first out-of-town firms to register his mark following the 1863 law. Reversing this order of action, Hostetter & Smith registered its mark on August 6 and was in court by August 23 pursuing Domenico Ghirardelli and one of his employees for infringing on Hostetter's mark for its "Celebrated Stomach Bitters."[56] Mercado & Skully, registrants of

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[54] 29 Cal 292, quotation at 293.

[55] Inept rewriting of the law threw the question of its relation to common law into doubt in 1872 and again in 1911. Amendments had to be hurriedly passed in each case. See Paul Duguid, "California Marking & Collective Amnesia," *University of California Davis Law Review*, forthcoming (2013).

[56] "A Bitter Case," *Alta*, 1863, August 26, 1. Ghirardelli claimed that "there was not a trade mark as contemplated in the statute." His defense may reflect an earlier case in which the defendant had successfully claimed that "Chartres coffee" referred to a common preparation process and could not be protected as a mark. Though not involved in that case, Ghirardelli

"Sainsevain's Bitters" were a little slower. They registered the mark in August and were in court by October, while the first two foreign registrants, Charles Heidsieck and Eugene Clicquot were slower yet, ending up in court only in 1867--charging "six John Does" with "manufacturing their brands wholesale ... [and] ... doing a flourishing business, producing wines highly prized by connoisseurs." Meanwhile, in 1865, mark #30 lit a smoldering flame in California courts over rights to the Cutter mark that did not burn out until the 1870s.[57]

A sample of legislation drawn from the first 30 marks only is far from dispositive, but it does suggest that the legislation and registration together led quickly to litigation, which in turn set precedents for the laws and cases that followed across the country.

Transformation

Despite Heidsieck and Clicquot's presence in the list above, a look at the law's aftermath makes it hard to avoid the conclusion that the sector that was most active in the

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organized an advertising campaign "opposition to the monopoly of Chartres coffee." [Advertisement] *Alta*, 1863, June 11, 4.

[57] "By Telegraph to the Union," *SDU,* 1867, June 26, 3; "Court Proceedings," *Alta*, 1865, August 26, 1. Cutter cases went on well into the 1870s, closely followed by the *Wine Dealers' Gazette*.

legislation was comparatively much less active in registration and litigation. Whiting's role and the surrounding newspaper discussions of the law put the wine interest at the heart of the legislation. Yet once it was passed, wine merchants appear in the register no more frequently than bottled water merchants, even though as we saw, legislatively the "water interest" was ineffectual compared to the powerful wine interest. In the courts, too, alcohol was more likely to be represented by whisky firms like Cutter than wine firms. Even Whiting himself took direct advantage of his own law in only a limited fashion. In March of 1868, Whiting & Berry complained about imitations of their "century port," but in its defense, they used neither registration nor litigation. It was only in 1870 that Whiting registered a mark. That year he registered the image of a mortar and pestle for "Medical Whisky" and the phrase "Selected Cuvée" for "foreign and domestic wines" (#152 & #154), registrations that while little and late are interestingly indicative.

After his time in the senate and his flirtation with petroleum, Whiting had returned to the wine business. Furthermore, with the Whiting & Berry pamphlet and then the *Wine Dealers' Gazette*, he had added boosterism to his business. The *Gazette* made common cause with Whiting's earlier legislation: "The persistent course of this paper from its existence to the

present," it declared in 1873, "is in exposing and warring against the violation of trademarks" and "hold[ing] the fabricators ... up to deserved contempt" for their "bogus brands."[58] To this end, the *Gazette* regularly reported the major trademark cases of the day, in California and elsewhere, in detail. Nonetheless, the paper more generally indicates that Whiting's attention had shifted to an approach better described as "rebranding" rather than branding. In this, he illustrated how marks might be used in ways not quite anticipated by the law. Trademark theory can seem unaware or unwilling to acknowledge this alternative track. Canonical texts suggest that the mark allows the consumer to know that he or she is buying a product whose "attributes are the same as that of the brand" bought before.[59] What Whiting began to discover was how the same product could be subtly transformed so that the consumer might see in it quite different attributes.

Such a transformation in the sector became important in the period because, while the alcohol trade still struggled with bogus marks and concocted goods, in California of the 1870s it

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[58] *WDG* 3(2)(1873): 1.

[59] William M. Landes & Richard A. Posner, "Trademark Law: An Economic Perspective" *Journal of Law & Economics* 30(2)(1987): 265-309. See Duguid, "California Marking" for a history of such claims.

was facing a newly energized threat from the temperance movement, which, like the wine trade before it, had started to seek and to find help in legislation. Organized opposition to alcohol had spread from the east, where Maine passed a prohibition law in 1851, to the west. (As another transcontinental arrival from Maine, Whiting presumably knew what he faced.) Though never as strong in California as in eastern states, intermittently the movement managed to raise popular indignation and support. In the 1870s, organizations like the Independent Order of Good Templars, the Sons of Temperance, and the State Temperance Alliance began to use that support to put pressure on the legislature. Mass meetings were held across the state and legislators invited. Petitions were drawn up which were then sent to local representatives, who often in turn presented these petitions to the senate or assembly.[60] The movement took particular encouragement from a group of states--Illinois, Pennsylvania, Indiana, Maryland, and New Jersey--that with different degrees of success had produced "local option" laws in the early 1870s. These held that if a certain portion of the voters in any town or city (usually one-third) petitioned for it,

[60] For instance "Senate," *SDU*, 1874, January 26, 1 [petition from Grass Valley]; "Assembly," *SDU*, 1874, February 7, 1 [from San Joaquin]; "The Capital," *Alta*, 1874, February 7, 1 [from Siskiyou County]; "California Legislature," *SDU*, 1874, February 9, 1 [from Contra Costa County].

a local vote must be held to decide whether liquor licenses would be offered in the jurisdiction. Without such licenses, the New Jersey Supreme Court had ruled, the jurisdiction must remain dry.[61] Some laws also included "civil damages" provisions. These held, as the *Pacific Rural Press* reported, that "any person injured 'in person, property, or in means of support by any intoxicated person, or in consequence of intoxication, may recover damages therefor from the person, who, by selling or otherwise furnishing the liquor, caused the intoxication.'" The alcohol trade saw such damages as particularly damaging to its interests.[62]

To advance their case, the Good Templars of California relied on its publication, the *Weekly Rescue.* This was founded in 1864, but in 1870 as the movement advanced, the Templars expanded and revamped the paper. It was said to be the only temperance newspaper in the state, which made it a fitting

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[61] J.F. Dillon, *The Law of Municipal Corporations* 2d. ed. (New York: James Cockroft & Co, 1873); Robert C. Pitman, *Alcohol and the State* (New York, National Temperance Society, 1880). The thought that women, who tended to support temperance laws disproportionately, might support local ordinances, almost gave them limited access to the franchise in 1874. "Assembly," *SDU*, 1874, February 21, 1.

[62] "A Plea for 'The Civil Damages Act,'" *Pacific Rural Press*, 1873, August 2, 67.

opponent to Whiting's *Gazette*, the only paper devoted to wine in the state.[63] (Indeed, Whiting may perhaps have started his paper in 1871 as a response.) Exchanges could be quite personal. The *Rescue*, for example, portrayed Whiting as a fallen figure, "formerly a member of your Legislature," but now associating "with the whisky-makers and drunkard-makers [who] force you to swallow the filthy mixtures ... poison which they manufacture."[64]

In responding to such attacks, Whiting had both personal and business interests. A report on his divorce in 1874 had accused him of being an alcoholic.[65] Such an accusation was no doubt bad for business for any wine merchant, but particularly bad for Whiting who since the late 1860s had portrayed himself as a provider of "pure" and health-giving alcohol and implicitly a promoter of temperance. In general, he claimed to be resistant not to the principles, but only to the intolerance of the temperance movement, which for the *Gazette* was typified in the "Bedlamite literature" of the *Rescue* and its allies.[66] For

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[63] See *SDU*, 1870, November 4, 2; 1873, January 1, 3.

[64] Quoted in "Wine Dealers' Gazette," *WDG* 3(4) (1874), 1.

[65] "Unhappy Union," *San Francisco Chronicle*, 1874, February 7, 3. Whiting himself responded to some of these accusations. See "Mr. and Mrs. Whiting," *San Francisco Chronicle*, 1875, January 18, 3

[66] In 1871, M.S. Whiting & Co advertised tickets for a "lecture on temperance" as well as their standard "fine wines and liquors (unadulterated)."

some time, the alcohol trade had learned to project itself in this way, as a provider of pure alcohol, in contrast to the counterfeiters and frauds.[67] If people fell sick from alcohol, the argument from purity implied, they were victims of tainted goods. The swelling temperance movement, however, required a better-fortified response, and claims that alcohol did not make you sick gave way to claims that it made you better.

This portrayal of alcohol was not entirely new. The first two medicinal registrations, for Wolfe's Schiedam Schnapps and Hostetter's bitters, show the strategy in place. Wolfe insisted that his schnapps, though mostly gin, was a medicine, and that the term, though a German word for grain alcohol, was proprietary. With both assertions he was reasonably successful. For its part, Hostetter & Co promoted its bitters through its own "medical" almanac, positioning the company's product in California as good for "Merchants, Mechanics, Miners and General Family Use." "It is well known," the *Almanac* boasted in 1866,

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[Advertisement], *Alta*, 1871, May 23, 2; "Sumptuary Laws," *WDG* 3(4) (1874), 1

[67] Whiting was evidently exemplary in this tactic. By 1869, despite rejecting the claim that Whiting was among San Francisco's "first citizens, an article in the *Alta* gave him "much credit for introducing the sale of pure wines and liquors into this community." [Untitled], *Alta*, 1869, December 22, 2.

> that during the first ten years of the History of California as a Gold Region, the mortality of the mines was frightful ... At length Hostetter's Stomach Bitters, which had already become celebrated in all the Eastern States, found their way to California ... It sustained the vigor of the frame ... strengthened the digestion and toned the bowels.[68]

In its label, Hostetter's claimed its bitters could treat nervous affections, diarrhea, dysentery, constipation, fever, bilious habit, colic or griping, want of appetite, constitutional weakness, heartburn, flatulency, age, delicate health, minor ailments, unnatural languor, malarial diseases, rheumatic or gouty disease, vigor, kidneys, wakefulness.[69] (Later investigation of the industry revealed that what efficacy these bitters hade came from the thirty-two percent alcohol they contained.[70]) Hostetter was not alone in attaching such claims to bitters. When the federal government began to register marks, the United States Patent and Trademark office deemed *bitters* so uncertain as to whether it described medicine and alcohol as to make the category meaningless (though it still continued to

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[68] *Hostetter's California Almanac for Merchants, Mechanics, Miners, and General Family Use*, 1866, 1.

[69] See the label for Hostetter's "Plantation bitters" and Hostetter's *Almanacs*, passim

[70] James Harvey Young, *The Toadstool Millionaires: A Social History of Patent Medicines in America before Federal Regulation* (Princeton: Princeton University Press, 1961).

accept registrations).[71]

As the temperance movement grew, so did the medicinal claims. As we have seen, Whiting registered a medicinal whisky in 1870, but Cutter and numerous others had preceded him and he was succeeded by products such as Vin Mariani, a mixture of wine and cocaine that had been enormously successful both in France and the United States (and gave rise to Coca-Cola, which initially sold itself as a health-giving tonic). In California, Prosser's "Vin Tonique Pasteur, a la coca et a la noix de cola" (#2705) sought the same market. The names of scientists and doctors, like Pasteur, were also regularly invoked to validate some of the more ambiguous products. ("Doctor" is surpassed only by "Golden" as the most common term among the California marks of the nineteenth century.)[72]

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[71] *Official Gazette of the United States Patent and Trademark Office* 5(8)(1875), 320. Some of the most intriguing registrations among the California trademarks--those for "temperance" bitters and related dipsomania cures--show how elastic this description of alcohol could be. There were numerous other health-giving tinctures of one sort or another, including Benedictine and Chartreuse, which also sold alcohol under health-giving claims. For these, their evident religious connections no doubt helped face down the pieties of the temperance movement.

[72] Like wine, water has a long history of health promoting claims, but--perhaps because it had to deal with new non-alcoholic rivals like sarsaparilla, one brand of which claimed succinctly to be "the California

As a wine dealer, Whiting not only registered particular "medicinal" marks as he did for his whiskey, he also portrayed his role as closer to a pharmacy or druggist than to the deprecated "groggists." In 1869, Langley's *Directory* no longer announced that Whiting dealt in fine wines and spirits, but rather in "wines and spirits for medicinal and family use."[73] His wife became manager of the Hospital for Females, and Whiting & Berry advertised that it provided them with "wines required for medical purposes." Medical faculty were "invited to send for samples" and the store promised to stay open late on Christmas day "to accommodate physicians." His *Gazette* offers two sets of Whiting advertisements, one claiming to sell "medical whiskey, medical gin, medical brandy, medical port and sherry wines ... bottled expressly for invalids." The other set

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Remedy"--those in the California register seem particularly bold. An early registration for "New Almaden Vichy" water (#145) claimed to treat "impoverishment of the blood ... nervous system ... liver, stomach and spleen." It was easily exceeded by the British company, Apollinaris, which in 1888 included eighteen marks under one registration (#1576), claimed in its various labels that it could deal with constipation, digestive problems, inflammation of the bowels, gall stones, piles, gout, scrofula, affections of the organs of respiratory circulation, fatty degeneration, disorders of the liver, and many female diseases.

[73] Henry G. Langley, *The San Francisco Directory For the Year Commencing December 1869* (San Francisco: Henry G. Langley, 1869), 637.

offers the same list but without the word "medical" or the invalids. The former kind of whisky, gin, brandy, port, and sherry at least could "be obtained of respectable druggists in almost every city and town on the Pacific coast." The *Daily Morning Chronicle* announced that Whiting, "of medicated liquors fame" also proposed to establish a branch in Chicago.[74]

There is no evidence that the branch was ever established. For Whiting however, it was less what went to Illinois than what came that caused concern. After that state's successful "local option" and "civil liability" law, the local Temperance Alliance pushed hard for one in California. A bill was proposed by W.W. Pendegast, state senator from Napa.[75] Despite the efforts of the alcohol interests, the *Gazette,* and Whiting himself, the bill

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[74] "Hospital for Females," *Alta*, 1868, February 24, 1; [Advertisements] *Alta*, 1868, March 22, 2; 1868, December 25, 2; *WDG* 1(1) (1871) 3 (cols. 2 and 5); "Californians in Gotham," *Daily Morning Chronicle*, 1869, July 8, 1. Carosso notes that Kohler and Frohling, one of the first wine merchants in the state, did establish a business in Chicago in 1868, which might have tempted Whiting to try to compete. Carosso, *California Wine Industry*, 34.

[75] Prohibition arising in Napa undoubtedly strikes modern eyes as odd. The *Alta,* however, confidently denounced the region as an "obscure nook of the State" meddling in liquor laws but with no understanding of the issues at stake. "Regulation, Not Suppression," *Alta*, 1874, June 26, 2.

passed to the "unfeigned pleasure" of the temperance movement.[76] It was a major defeat for the wine interest, but after his recent rebranding Whiting at least was prepared. His *Gazette* took credit for the removal of the civil damages clause, which, despite the bill's having been referred to a sympathetic Committee on Public Morals, had been dropped during the amendment process. And perhaps as important, a critical exception to the law had been added: "[n]othing contained in the provisions of this Act shall prevent the issuing of licenses to druggists for the sale of liquors for medicinal and manufacturing purposes." The previous years' rebranding of his business and his products had served Whiting well. He had productively both made his mark, and, in changing times, made it serviceable to his interests.[77]

Conclusion

The goal of this essay has been not only to show that California led the way in trademarking but also to attempt to explain why

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[76] "An Act to Permit the Voters of Every Township or Incorporated City in this State to Vote on the Question of Granting Licenses to Sell Intoxicating Liquors," *Statutes of California recorded in the Twentieth Session* (Sacramento, CA: State Printer, 1874) Cap. CC. "Mass Temperance Meeting," *SDU*, 1874, March 30, 1.

[77] "Local Option Law," *WDG* 3(6)(1874), 1; "An Act to Permit ... ," Sect 4.

and to what effect. Standard accounts of the role of marks lead us to expect them to emerge in classically industrial manufacturing states, yet they arose in California, which was at the time agricultural. Moreover, if the law was to arise in an agricultural state and not an industrial state, there were many of those for this to happen in. As suggested here, one distinctive feature of California's agricultural sector was its wine interest, which grew rapidly in the 1860s. The wine trade had several features that made California fertile ground for trademark law. In the first place, it was a sector rampant with fraud and counterfeiting that, as the sector grew, called for legislative protection for marks in not only the sector's, but also the state's interest. Second, the interest in wine developed connections with other wine regions, particularly those of France. Haraszthy himself and the travels he wrote about in *Grape Culture* shows how California wine growers turned to Europe for advice and guidance. Conversely, in 1862 the French Consulate reported that wine-growing conditions in California drew French and German *vignerons* to work there.[78] And Meinecke's defense of the Veuve Clicquot mark also makes clear that the California market appreciated, but also faked, French

[78] "Rapport Commercial pour 1861, Consulat de France à San Francisco," Archives Nationales de France, f12/2593.

wines. Internationally, the French, and in particular the French wine interest, had led development of trademark law. Thus it is not surprising that those ideas were in varying degrees imposed on and picked up by California. Further, these aspects of the state's economy emphasize that California was itself not a conventional agricultural economy. Rather, as Richard Walker has argued, it specialized in a new kind of capitalist agriculture, one that invested a good deal in commodifying its crops, and here wine, readily commodified and packaged, led the way.[79] For this approach to succeed, products and producers had to be individuated and their distinctive names protected. The California trademark register indicates that, with time, commodification and individuation become more evident in other areas of California agriculture than wine, particularly food. By that time, the wine interest's attention had shifted to the challenges of temperance and prohibition where, it was discovered, trademarks could play a different role. But even if other sectors came to dominate the register, wine, early both to protect its names and project them over long distances into new markets, had helped to show the way.

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[79] Richard A. Walker, "California's Golden Road to Riches: Natural Resources and Regional Capitalism, 1848-1940" *Annals of the Association of American Geographers* 91(1)(2001): 167-199.

Finally, given how important registration was to modern trademark law, another contributing factor might be that if California was not a classic industrial state, it was in striking ways a pioneering "informational" one. In its first year, the state set up numerous offices (state archive, library, printer) and officers (secretary of state, comptroller, treasurer, commissioner of deeds, notary, surveyor, assayer) with responsibility for registering, monitoring, and tracking multiple aspects of life and commerce. Such arrangements around the artifacts of information undoubtedly developed elsewhere, but given the time of its statehood, the development was more concentrated, deliberate, and interwoven in California, aligning commodities and information about them with state interests in control and protection in a short space of time. As John F. Burns has argued, unlike any state before it, civil, political, and commercial California developed around assumptions of a reliable "governmental order." This required the creation and curation of what Christopher Bayly has called an "information order." Trademarks became one facet of these developing orders, one that was particularly well suited to the state's developing agricultural capitalism.[80] Ultimately, Whiting left his mark

[80] John F. Burns, "Taming the Elephant: An Introduction to California's Statehood and Constitutional Era" *California History* 81(3/4)(2003): 1-26, quotation at 5; C.A Bayly, *Empire and Information: Intelligence Gathering*

because the state was ready for it, yet both Whiting's and the state's seminal roles have passed into oblivion, perhaps because the informational state naturalized such acts to the point of transparency.

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and Social Communication in India, 1780-1870 (Cambridge: Cambridge University Press, 1998).