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TRADEMARKS

WARREN LEHMAN*

The Seventh Circuit last term decided a broad miscellany of what might be called commercial cases: anti-trust, patent, industrial regulation, product liability, and so on. Of these, three cases developing the patent law after the *Lear* case (which held invalid a patent owner's effort by contract to prevent licensees from contesting the licensed patent) were probably the most important and represented the most coherent grouping.¹ The decision of perhaps the greatest immediate impact and most general public interest was that in which the court denied the F.C.C.'s jurisdiction to prevent Sears from constructing the highest building in Chicago, a building that will allegedly affect adversely T.V. reception over a wide area.² The quality of all these commercial cases, however one may regard the result of any one, was respectably workmanlike. It is unfair, with such a variety of important and thoughtful decisions, to choose to discuss in a symposium concerned with the court's work as a whole but one case, and that neither an important nor a particularly well handled one. My only excuse is that the problem it raises is—to me at least—an intellectually interesting one in a field that tends to get short shrift in critical circles. For some reason or another, trademark just doesn't seem as romantic to most people as it does to me.

The single trademark case decided last term was *FS Services, Inc. v. Custom Farm Services, Inc.*³ It was not a difficult case because of finely balanced equities. Indeed, the allegation of infringement was based on the most blatant of bootstrap arguments. But for the intellectual underdevelopment of the trademark law, the case should never

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1. *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969). The Seventh Circuit had the term before last decided *Business Forms Finishing Service, Inc. v. Glowiak*, 452 F.2d 70 (7th Cir. 1971), and the last term followed up with: *Maxon Premix Burner Company, Inc. v. Eclipse Fuel Engineering Co.*, 471 F.2d 308 (7th Cir. 1972); *Panther Pumps and Equipment Co., Inc. v. Hydrocraft, Inc.*, 468 F.2d 225 (7th Cir. 1972); and *Bendix Corp. v. Balax, Inc.*, 471 F.2d 149 (7th Cir. 1972), all of which involved problems arising out of *Lear*.

2. *Illinois Citizens Committee for Broadcasting v. F.C.C.*, 467 F.2d 1397 (7th Cir. 1972).

3. 471 F.2d 671 (7th Cir. 1972).

have been tried, let alone appealed. Neither the district court⁴ nor the Seventh Circuit had any difficulty with reaching the right result. Neither, however, fully succeeded in explaining why that result was correct.

Both plaintiff and defendant sold a variety of products and services (partly in direct competition) to farmers in the same geographic markets. Both had adopted, as business marks, logos or monograms that included the letters *F* and *S*. The difference in type-face, color arrangement, and general design of the two made them readily distinguishable to the eye. Besides, plaintiff used *FS* alone, while defendant used *CFS*, the initials of its business name. Plaintiff was vis-a-vis the defendant a prior user, had succeeded in registering its mark, and by the time of this suit that registration had become incontestable under the provisions of section 15 of the Lanham Act.⁵ That section is designed to quiet the issue of the validity of a mark's initial registration. Had the latter not been the case, it would appear defendant could have urged that plaintiff's initial registration had been in violation of Section 2(d) of the Act, which denies registration to a "mark which so resembles a . . . mark or trade name previously used in the United States by another and not abandoned"⁶ Within plaintiff's trading area, engaged in either partially competing or related businesses, there were at least five prior users of logos including the letters *F* and *S*. Only one, owned by Quaker Oats, was discovered to plaintiff when it applied for registration. Plaintiff reached an agreement with Quaker. The other four users, though smaller than Quaker by far, were not insubstantial businesses: Felton and Sibley, a partnership in the paint manufacturing business, sold its product as *FS* Paint (some of plaintiff's stores sold paint); F.S. Royster, like plaintiff in the fertilizer business, had since 1905 used *FSR* on its products; Farmers' Store, an 11 outlet chain doing a business in excess of \$10,000,000 annually, used an *FS* logo on its storefronts, stationery, paper bags, etc.; and Trowbridge Farm Supply (*TFS*), the smallest of the businesses, another fertilizer supplier, was doing \$300,000 annually when plaintiff registered. Had the incontestability clause not

4. 325 F. Supp. 153 (N.D. Ill. 1970) (Napoli, J.).

5. Trademark Act of 1946, as amended, 15 U.S.C. § 1065 (1946) [hereinafter cited as the Lanham Act].

6. The Lanham Act § 1052, e.g., *Douglas Laboratories Corp. v. Copper Tan, Inc.*, 210 F.2d 453 (2nd Cir. 1954), cert. denied, 347 U.S. 968 (1954). Plaintiff, manufacturer of *Coppertone* suntan lotion, an unregistered mark, was prior user in the New York and Florida trading areas and succeeded in having defendants registered but later mark, *Copper Tan*, cancelled.

tolled, plaintiff would have been in the awkward position of asserting, against a defense of improper registration, that while its *FS* mark was not so likely to be confused with the *FS*, *FSR*, and *TFS* of prior users as to justify cancelling its registration, defendant's *CFS* mark was so like its own—in respect to the initials alone—as to be infringing.

The trial court decided the case on the obvious and appropriate factual ground that confusion had not been shown. The court would not let the plaintiff have its cake and eat it, too. Rejecting some at best ambiguous evidence of confusion,⁷ the court below found that if, as plaintiff in one way or another admitted, there was no confusion between it and prior users, then there was no plausible case for confusion with defendant subsequent user. Deciding on that basis, the trial court was able to avoid the tricky issues plaintiff wanted to raise. The appellate court was more venturesome.

On appeal, plaintiff pressed its claim in the letters *F* and *S* themselves, as distinct from the logo in which they appear. The unsettled area of trademark law, on the basis of which plaintiff apparently thought an appeal might be supported, is the extent of the monopoly rights that may be obtained in letters of the alphabet, and how those rights can be sustained. A similar, though probably not so serious problem, exists with numerals—not so serious because with respect to numerals there is nothing corresponding to the extent to which initials and acronyms are used as business, trade, governmental agency, and radio station names.

Plaintiff's position was that its initials should be treated like words. If a mark is basically a name, there is no doubt that mere differences in design color, or type face would not prevent a charge of infringement lying when the word that is the heart of the trademark is copied. Not all marks are names, however, and it is not obvious in the case of initials or letters that name is the proper analogy. Marks communicate through both eye and ear. The usual trademark, the word

7. *FS Services Inc. v. Custom Farm Services, Inc.*, 325 F. Supp. 153, 158 (N.D. Ill. 1970). Plaintiff's evidence was of the confusion of truckers and railroaders who attempted to deliver plaintiff's goods to defendant's places of business. There was evidence, also, however, that they attempted to deliver the products of Atlantic-Richfield and Monsanto to defendant, as well. There was no evidence of customers being confused, though one may well wonder after *American Cyanamid Co. v. United States Rubber Co.*, 356 F.2d 1008 (2d Cir. 1966), whether such a subtlety would today even bear on the weight to be accorded evidence of confusion. In *American Cyanamid*, the potential confusion of farm workers in applying the chemical preparations involved was sufficient basis for denying registration. The dropping of the word customer from 2(d) of the Lanham Act in a supposed clean-up amendment, has allowed the Lanham Act to be used as a consumer protection device.

mark, can be read and spoken aloud. It is used by the consumer to name the product. A purely graphic logo, on the other hand, cannot be said; it can only be recognized by the eye or described. That this is a valuable function is evidenced by the widespread use of such logos. But they do not provide the consumer a word by which he can ask for the product. The user of a purely graphic logo then loses nothing to the user of another composed of some of the same elements so long as the two are graphically readily distinguishable, as is the case here. The difficulty with monograms as logos is that the letters of which they are composed have pronouncable names; hence the initials can function as words. A monogram logo can, then, be hoisted by its own bootstraps into a word mark; consumers may subliminally think the letters *FS* when looking at plaintiff's logo. They may even say them when asking for a product of plaintiff's. The question plaintiff puts is, has he acquired a monopoly in that function, which the letters no doubt can perform, when he has acquired a registration of the monogram logo embodying them. Judge Pell appropriately draws attention to this distinction and faces plaintiff's claim to a right in the naked letters regardless of their dress.

It is sometimes said that letters, numerals and basic geometric shapes are available to all, implying that—nakedly at least—they cannot be monopolized and ought not be registered.⁸ The cases, however, are not very conclusive. Where directly posed, the issue has been, if possible, side stepped. In *Goldsmith Silver Co. v. Savage*, a case finally decided in 1915,⁹ both the majority¹⁰ and the dissent¹¹ state that there had 'til then been no authoritative statement whether numerals might alone constitute valid technical trademarks. Plaintiff had used *108* (its street address) on cigars and the boxes in which they were sold and displayed. Defendant, formerly an agent of plaintiff, began to market in the same area a cigar branded *208*, though the numeral was on the box only. A master had found that a numeral could not, without more, constitute a technical trademark. The trial court apparently agreed, concluding that "this cause belongs to the line of unfair competition cases, rather than to the technical trade-

8. *E.g.*, R. CALLMANN, *THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* § 73.3 (3d ed. 1967) [hereinafter cited as CALLMANN] and *Dollfus-Meig et Société Anonyme v. Richardson Silk Co.*, 55 App. D.C. 226, 4 F.2d 302 (D.C. Cir. 1925).

9. 229 F. 623 (1st Cir. 1915).

10. *Id.* at 626-27.

11. *Id.* at 629.

mark cases," though it notes some contrary authority.¹² On appeal to the First Circuit, the majority concluded that plaintiff had failed properly to raise the general legal issue of the protectability of numbers as technical trademarks and declined to consider it.¹³ The dissent, convinced the issue had been properly raised and that the plaintiff had the right of it, attempted to distinguish earlier authority in which it was said that monopoly could be obtained in neither numbers nor letters.¹⁴ (As the public interest in letters seems to me the greater, I think that if numerals were not nakedly registerable, *a fortiori* letters ought not be.) In *Alfred Schneier Co. v. Bramson*,¹⁵ plaintiff's registered mark, a simple rectangle, was found valid over the objection of defendant infringer. The rectangle was impressed in the metal surface of a siphon head of the sort used when carbonated water was put up in bottles with levered handles. To obtain registration, which was granted within six months of plaintiff's adopting the usage, plaintiff had been required to show no secondary meaning. That would imply no special limitations at all were put upon the registration of a simple geometric shape.¹⁶ The case is particularly troublesome because the siphon head was apparently sold to bottlers, and for their benefit plaintiff framed within its claimed rectangle mark the marks of the bottlers. Plaintiffs therefore had the exclusive right to a frame built into his product in which to mount his customers' marks. The use surely verges on functional. Functional design features are not protectable, even where they are claimed to have developed seconding meaning.¹⁷ In *Sparklets Corp. v. Walter Kiddie Sales Co.*,¹⁸ plaintiff had been

12. *Goldsmith Silver Co. v. Savage*, 211 F. 751, 752; 4 TMR 268, 269 (D. Me. 1914).

13. *Goldsmith Silver Co. v. Savage*, 229 F. 623, 626 (1st Cir. 1915).

14. *Id.* at 631-32 (dissenting opinion).

15. 16 F. Supp. 493 (E.D.N.Y. 1936), a case CALLMANN cites for the proposition that numerals, letters and common geometric forms cannot be protected as marks, *id.* at § 73.3.

16. Actually the only special treatment generally recognized is that provided by § 2(f) (The Lanham Act § 1052(f)), which requires either proof of the development of secondary meaning or five years use. 2(f) is normally applied only in respect to 2(e) cases. Those are cases in which the mark is descriptive or geographic or a personal name. We shall see below that this is not a necessary limitation and the 2(f) test could be applied to numbers, letters, geometric shapes, and perhaps to colors as well.

17. *E.g.*, *Crescent Tool Co. v. Kilborn & Bishop Co.*, 247 F. 299 (2d Cir. 1917) (L. Hand, J.). Plaintiff manufactured the adjustable head wrench that has come to be known by its manufacturer's name, Crescent. Plaintiff had the same right to copy the non-functional features as he had the functional unless it was proven that the non-functional features claimed had developed a secondary meaning identifying product source in the public mind.

18. 104 F.2d 396 (2nd Cir. 1939).

denied registration as a mark of a groove around the kind of compressed air-bulb used to charge water and run toy cars. The examiner said that the groove lacked the distinctiveness that would allow it to indicate origin or ownership. He then reversed his stand and allowed publication in the Patent Office Gazette. That generated an interference proceeding on the part of Kidde, another compressed air bulb manufacturer. Kidde pressed the original argument of the examiner, but the court found it unnecessary to decide that issue because plaintiff had also applied for a patent on the container and had, therein, asserted that the groove was a functional design feature, which meant it was not protectible as a trademark in any event.¹⁹

Did the principle suggested exist, it would be as if letters, numerals and perhaps simple geometric figures were to be treated like colors, which, though they may be an element of a total mark are not in themselves protectible.²⁰ The analogy is not unreasonable because the pallette of the alphabet is almost as restricted as the colorist's. The point is clearly demonstrated in the instant case. *F* and *S* keep recurring in the market area, partly because they are initial letters of many words (*F*—farm, farmer, fertilizer, federal; *S*—sales, supply, service, store) related to the kind of business the parties are in, but also because one person's given and middle names begin with them, and two people whose last names begin one with *F*, one with *S* joined in partnership.

The trouble with asserting a principle with respect to letters (with which I am here primarily concerned) that is of the same breadth and certainty as the color rule is that in fact so many letter marks have been both registered and given judicial protection.²¹ We can be fairly sure when a court is convinced the letters are really being used as grade marks rather than to indicate common origin they will be denied protection. But where letters are clearly used as identifiers

19. See *supra* note 17.

20. *E.g.*, *Campbell Soup Co. v. Armour & Co.*, 175 F.2d 795 (3rd Cir. 1949). The court in notes 10 and 11 (*id.* at 798-99) distinguished the cases on which plaintiff relied on the ground that they all involved the use of color in a distinctive form. *Campbell*, by contrast, was claiming all half red half white labels for food products (and all shades of red in that combination). The court did not consider plaintiff's simple, sweeping color combination to have obtained that design distinctiveness that will allow color to be protected as a mark element.

21. While it is in fact true that the color rule is more uniformly applied (*see* note 20 *supra*), it may be that this is only the case for the practical reason that color names are so imprecise—as noted in the *Campbell* case, red covers a very wide range of tones—and therefore as we describe them, their range seems even more limited than the 26 discrete elements of the alphabet. If so, the reasoning suggested here for dealing with letters, numbers, and geometric forms would deal adequately with colors as well. The reasoning of a case like *Campbell* certainly would support that conclusion.

of origin, it seems highly likely they will be protected. Two dozen or more, primarily letter marks are listed as an example by the author of the standard trademark treatise.²² Familiar ones are *A & P*, *R.C.A.*, and *G.E.*

The most that was ever contended for, we must remember however, is that naked letters, numerals, or geometric shapes cannot be protected. That is how the master put the matter in respect to the mark *108* on cigars. There has never been a contention that letters (again, our central interest) cannot be protected as marks when they are, as the master put it, "associated with some name or device to characterize and distinguish them."²³ There is no doubt that F.S. Service Inc.'s mark meets that test. The characterizing devices are simple but elegant—the bold *sans-serif* type in black, framed by a red stripe in the shape of a canted quadrilateral, two diagonally opposite corners of which are rounded. It is a device familiar to anyone who has driven Illinois highways. Further, it has never been denied that naked letters may be entitled at least to limited protection under the common law of unfair competition. I cannot claim to have reviewed all the cases of letter protection to see whether on their facts any significant portion of them violate the rule as here more fully expressed. In a field where courts have long been criticized for their inconsistency, that some cases should violate the principle (presuming it exists) ought neither surprise nor seriously disturb us.

Treatment of letter marks by analogy to color marks is treatment of them as if they operated exclusively as visual marks—logos—and never as word marks. The implication is that letters are part of a visual vocabulary open to all and that when combined into distinctive designs, and then only, can they be monopolized. It would seem to follow that the monopoly would be in them only as visual images and not preclude uses not visually confusing, even if possibly aurally confusing. Something like that is certainly what the master was saying in the *Goldsmith* case.

Surely, however, we want to give some recognition to letter marks that in fact operate as distinctive words used to identify origin and that are used by customers to name and ask for products. Were there

22. CALLMANN § 73.3. Lists with more extended comment can be found in two articles by Greenberg, *Initials as Trade-Marks*, 16 J. PAT. OFF. SOC'Y 367 (1934) and *The Grouped Letter Type of Mark*, 30 J. PAT. OFF. SOC'Y 299 (1948). The latter includes a several page table listing all cases through the date of the article.

23. *Goldsmith Silver Co. v. Savage*, 229 F. 623, 624 (1st Cir. 1915). Compare the reasoning re color in the *Campbell* case, *supra* note 20.

no distinctive design aspects to *A & P*, *R.C.A.* or *G.E.*, we would still want to recognize rights in those letter combinations, largely independent of design, just as with any normal word mark, for they have a clearly developed secondary meaning and in their capacity as words a commercial value that courts should be loath to destroy.

Pell, J., for the court, bravely tackles from another point the problem how much protection in the letters themselves is to be given monogram marks. Unfortunately, he leads us into a cul-de-sac. But the effort is instructive nonetheless. He considers first the protection given to words. Not all words, he notes, are given protection under the same circumstances or to the same extent. Those that are generic or descriptive rather than arbitrary or made-up can be protected only when they have obtained what is called secondary meaning—that is, when they have come to be recognized in the marketplace as identifying the source of the good rather than as characterizing or naming the good itself. The same is true of geographic and personal names.²⁴ Many descriptive words have obtained secondary meaning. Familiar examples include *Book-of-the-Month Club*, *National Geographic Society*, *TV Guide*, *U-Drive-it*. All literally describe the business engaged in or the product, but all, through use, have come to be identified with particular organizations using the marks. Marks of this sort are protected, but are called weak and are given less protection than those that are strong by virtue of being fanciful or arbitrary. The desire to effectively distinguish products by their marks is in large measure over-balanced in their case by the need of others to use the same words to describe similar products or businesses.

Judge Pell offers the suggestion that initials should be treated in exactly the same way as the words they may be taken to stand for. The unprotected initial would be the beginning letter of a word that is itself, without proof of secondary meaning, unprotectible. Such a letter could be protected only when it had been shown to have developed a secondary meaning. Judge Pell would find for defendant, then, because plaintiff's particular *FS* stood for farm supply, a descriptive term, and no adequate proof had been offered that *FS* as initials had developed a secondary meaning—none that there was a belief in the public that the initials alone identified plaintiff as a source. The implication is that if initials are chosen arbitrarily, they ought to be protected as strong marks, without proof of secondary meaning.²⁵

24. The Lanham Act § 1052(e) & (f).

25. A similar argument had been made for defendants where the allegedly in-

This is surely not a satisfactory result. As *Callmann* has said, "It is evident . . . that numerals or letters actually describe nothing and have no patent connection with the article or its characteristics. "The letters themselves do not suggest anything, and require explanation [Judge Pell would say "expigetic words"] before any meaning can be attached to them.'"²⁶ Without more, we do not know if the *F* and *S* of FS Services, Inc. are the initials of founding partners' last names; perhaps they stand for the name of the elderly, kind auntie, who, upon the death of the mother of the firm's president, took him to her bosom; perhaps *FS* is without more the full name of the horse bet on by the firm's president, whose victory provided the capital with which he got started. In fact, prior to registering its mark, plaintiff's business name had been Illinois Farm Supply, and the *FS* of its new name was probably derived from the farm supply portion of that older name.²⁷ Is there any reason why a set of initials chosen under these circumstances should be less likely to obtain protection than the same initials derived from nondescriptive sources? It hardly seems so.

In fact, however, in this particular case, the letters had ceased to serve as initials of a descriptive business name, for plaintiff had abandoned that name, adopting as business name the initials themselves. Therefore, to the person not knowing their history the initials would appear to be perfectly arbitrary, and in consequence likely to cause none of the problems occasioned by the adoption of descriptive words. As a result, on Judge Pell's theory, plaintiff's case seems on the facts then far stronger than it ought.

Judge Pell evades the problem that plaintiff's use has arguably become arbitrary by making descriptiveness an objective rather than a subjective issue. It is not tested by plaintiff's use but by the fact that in the trade *F* and *S* are the initials of words—farm, service, store, etc.—that are in frequent use. The implication is that where *F* and *S* were in fact derived from Felton and Sibley, the real names of the founding partners, and if Felton and Sibley were in the farm supply business

fringing letters used by defendant were initials of his name. Defendants claimed that the right to use the initials of their names ought to be treated the same as the generous right, even when some confusion might result, to use one's name itself, as in *S.C. Johnson & Son, Inc. v. Johnson*, 116 F.2d 427 (2d Cir. 1940). Such an argument was at least twice rejected on the grounds that the initial is not the word from which it is derived. *W.B. Mfg. Co. v. Rubenstein*, 236 Mass. 215, 10 TMR 368 (1920); *William P. Goldman & Bros., Inc. v. Samuel Goldstein*, 15 TMR 540 (Sup. Ct. N.Y. 1925).

26. CALLMANN § 73.2 and note 25 *supra*.

27. *FS Services Inc. v. Custom Farm Services, Inc.*, 325 F. Supp. 153, 154 (N.D. Ill. 1970).

that their initials might still be treated as descriptive, hence weak, hence in need of proof of secondary meaning.²⁸ I cannot help but conclude that none of the distinctions based upon this theory makes much sense. Yet there is a reason behind its apparent madness.

I have a suggestion for another approach that will, I hope, appeal to Judge Pell as both luculent and astutious, two more words I've learned from him. The reason this case came out right at the appellate level is that the court applied to the initials *FS* the same standards of proof of secondary meaning that is required where a mark is a generic or descriptive word. It seems to me it might make more sense to treat all initials not as colors, but as descriptive, regardless of the words from which they may have been derived. One would do this not because they are descriptive, but because treatment as descriptive would require the establishment of secondary meaning as a precondition to any protection. This would not accord with the one traditional rule expression that letters and numbers are not nakedly appropriable under any circumstances, but it would accord with the reality that letters and numbers are protected, if not inevitably, not infrequently either, in their potential function as names of products and services. The only reason granting any monopoly in letters of the alphabet for putting any limit on the public right to use them, is that the letters have in fact come to operate in the public mind as name-marks. If there were a way of treating letters as descriptive, federal registration would require either proof of secondary meaning or five years continuous use as a mark. There is, however, as we have seen, no obvious way that a letter could be called descriptive in the meaning of section 2(e) of the Act, and hence apparently no way of making a letter-mark subject to the requirement of 2(f).

That conclusion is, however, not a necessary one. There is at least one circumstance other than a words falling within 2(e) (the descriptive word provision) that a mark's registerability can be tested under 2(f) (the proof of secondary meaning provision). Section 2 of the Act says that no mark "by which the goods of the applicant can be distinguished" should be denied registration.²⁹ There then follow five exceptions: 2(a) through 2(e), the first four of which are absolute. Section 2(f), while usually read as referring to 2(e), in fact asserts on its face that it applies to all of section 2 except 2(a)

28. Of course, if one followed Judge Pell to the bitter end, *FS* as the initials of personal names would likewise be weak marks because personal names are weak and subject to registration only under 2(f). The Lanham Act § 1052(e) & (f).

29. The Lanham Act § 1052.

through 2(d). It therefore refers to the three line introductory phrase as well as to 2(e). That introductory phrase includes the little-noticed requirement that a mark be capable of distinguishing goods: "No trade mark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration" While little noticed, this requirement has not gone completely without remark.³⁰ It is perfectly proper to question whether initials are, without more, capable of distinguishing goods. The question is raised on the same principle that standard geometric forms—rectangles, diamonds, circles—are, without more said to be incapable of distinguishing goods and hence not subject to exclusive appropriation.³¹ The problem is that they are in such common use. The same is clearly true of initials, as the instant case amply demonstrates. Confusingly similar initials are in use all over the midwestern agricultural market. The initials *FS* by themselves would distinguish nothing. It is plaintiff's elegant logo, backed with \$15,000,000 in advertising,³² that is the origin of the distinctiveness.

Courts, as we have noticed, have from time to time decided that a claimed mark failed to meet the distinctiveness test and hence was unregistrable or at least generally not to be treated as a technical mark.³³ If the Lanham Act be found to require in section 2 that for registration a mark must be capable of distinguishing goods, an applicant would have to make a case in the face of an assertion, raised either by an examiner or in an opposition proceeding, that a naked letter, number, a group of either, or a color or geometrical form was inherently incapable of distinguishing. The applicant could make one of two responses, either of which properly supported, would provide a basis for registration. Each, however, would have a different result.

One response an applicant might make is that the initial mark is associated with some name or device to characterize and distinguish it from other uses of the same letters. The claim, in other words, would be that the mark is visually distinguishable from other uses of the same or similar letters or numbers. Were the test of distinctiveness met on this ground, the claim would be limited to the logo as a whole

30. CALLMANN § 69; *Avrick v. Rockmont Envelope Co.*, 155 F.2d 568, 573 (10th Cir. 1946); *Sparklets Corp. v. Walter Kiddie Sales*, 104 F.2d 396 (2nd Cir. 1939); *Goldsmith Silver Co v. Savage*, 229 F. 623 (1st Cir. 1915).

31. CALLMANN § 73.1. *Contra Alfred Schneider Co. v. Bronson*, 16 F. Supp. 493 (E.D.N.Y. 1936). Obviously (it seems to me) erroneous. See text at note 8 *supra*.

32. *FS Services, Inc. v. Custom Farm Services, Inc.*, 471 F.2d 671, 672 n.2 (7th Cir. 1972).

33. See note 30 *supra*.

and exclusive right in the numbers or letters no more a consequence than would be an exclusive right in the colors used. That, it seems to me, is a proper description of the position of plaintiff in the instant case. It was attempting to convert this visual distinctiveness—ample basis for registration for use as a logo—into an exclusive right in the letters.

An arrangement of letters claimed incapable of distinguishing goods might also be registered upon proof of its having developed a secondary meaning under 2(f), which would be direct evidence of the fact that the mark is succeeding in distinguishing. Proof of secondary meaning could refer either to the visual or verbal element of the mark. Where proof of secondary meaning was offered, the likelihood would be that plaintiff was claiming the verbal use of the mark as a name for his product or service. (Where only the visual element is an issue, visual examination without reference to 2(f) and secondary meaning, would likely be sufficient to dispose of the claim.) One can conceive of a case, however, where the visual distinctiveness issue is sufficiently uncertain to require proof of secondary meaning to establish even a right to register the visual aspect of the mark. It would have to be made clear in such a case exactly what was being contended for and what granted, but protection of the initial, distinctive and used as a name, could through this method be obtained.

Section 2(f) includes a provision that five years continuous use prior to application creates a presumption that secondary meaning has been obtained. By obviating, in that way the need to inquire into the nature of the secondary meaning claimed, the registration of a letter or number mark under this proviso would be ambiguous. I see no way to avoid this ambiguity without raising at application exactly the proof problem that the five-year clause was designed to eliminate.

I do not think, however, that this creates a fatal problem for this approach. For even after the rights in a mark become incontestable, it is possible to consider just what those uncontestable rights are. That, in effect, is what Judge Pell was doing. Therefore, the question whether a naked right in letters or numbers attached to a mark right obtained under the five-year presumption rule remains open regardless of the tolling of the incontestability clause.³⁴

If this analysis is correct, I emphasize, no rights in letters or numbers as such arise unless the applicant meets the standard of 2(f).

34. The Lanham Act § 1065.

Where this has not been the case, it may be presumed that the letter or number had been accompanied by design features that made it capable of distinguishing as a monogram or logo, but that no rights have been obtained in the letters themselves. The same argument should apply to numbers, colors, and simple geometric forms. The lack of ability to distinguish under section 2 is the measure of the utility of the basic elements of communication to all the public. It is not a separate or new standard suggested here. It is but a different way of looking at the long recognized priority of the public's right to the fundamental elements of verbal and symbolic communication. These elements do not distinguish because of the universality of their use.³⁵

35. This interpretation is supported by the more full explication of "capable of distinguishing" to be found in the Trademark Act of 1870, 16 Stat. 211 § 79, where it states:

The commissioner of patents shall not receive and record any proposed trademark . . . which is merely the name of a person, firm, or corporation only, unaccompanied by a mark sufficient to distinguish it from the name when used by other persons

If what is merely a person's name is incapable of distinguishing goods without the addition of some device, it would seem to follow *a fortiori* that the same would be true of the initials standing for the same name. The point regarding personal names is expanded upon in *McLean v. Fleming*, 96 U.S. 245, 252-53 (1877). *Leidersdorf v. Flint*, 13 AMER. L. REV. 390, 391 (C.C.E.D. Wis. 1878) (Harlan, Circuit Justice, concurring), is not to the contrary. Though it is said there that a mark may consist of a letter, it also says a mark may consist of a name. There is no effort in the context to indicate the circumstances under which either may be true.