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UNFAIR TRADE IN THE SIMULATION OF RIVAL GOODS
—THE TEST OF COMMERCIAL NECESSITY.

JOHN J. GALBALLY †

THE PERSONALITY OF goods plays a vital role in the art of merchandising. By the personality of goods is meant not merely the attractive or eye-pleasing dress of an article, but the striking get-up, the unusual characteristic—the eye-catcher. An oddly shaped container, an exotic wrapping or the unique appearance of the article itself can impart this personality. It proclaims to the prospective buyer: “I am different.” It prompts him to recall on second meeting: “There is a familiar article.” Thus, personality breaks down sales resistance to the unknown. In short, personality sells.

At least two phenomena of recent years have added significantly to the importance of personality. The first is commercial television. Advertising has turned from audio techniques to video. No longer are the nation’s buying habits conditioned by the carefully modulated voice of an announcer saying: “When you need toothpaste, ask for ‘Glistex’.” Today the animated toothpaste tube walks into our living room, dances for us and personally tells us: “The next time you’re at your drugstore, pick me up.” What the radio age did for the trademark by way of giving it a new dimension as an advertising device, television has more than done for personality.

A second important innovation of the last decade or so has been the trend toward “serve yourself.” Merchandise of almost every description is being displayed for the customer’s own selection. The result is that more buying is being done by sight and less by sound than ever before in history. By way of corollary, this sets the stage for “passing off” without the necessity of any overt deception on the part of the retail merchant. An imitation of a familiar article is simply placed in the usual display case and “serve yourself” becomes “deceive yourself.”

How has the law kept pace with these marketing developments? Has it encouraged merchandising enterprise by protecting the personality of goods against copying by the commercial free rider?

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The law protects the appearance of goods only to the extent that their appearance has acquired a secondary meaning. That is to say, copying will be enjoined only where the copied feature "has acquired generally in the market a special significance identifying the . . . goods" as coming from a particular source.¹ This notion of public recognition is expressed by the term "secondary meaning." This is true even of "nonfunctional" features, features which do not affect the "purpose, action or performance, or the facility or economy of processing, handling or using" the goods.² One might call them the "personality" features of goods.

Thus the law in effect says to the legitimate businessman seeking to establish a trade in an unpatented product: "No matter how distinctively you dress your article, no matter how fancifully you shape it or color it, no matter what sort of unique external elements you combine in an effort to give your goods personality, you are fair game to the copyist. That is, unless you have the good fortune—to say nothing of the resources—to escape falling prey until the buying public has become so familiar with the appearance of your article that all goods of that appearance are identified with you as their source. Then, and only then, will the law take a hand. Copying will then be enjoined in the interest of preventing confusion among consumers who otherwise might buy the copy in the mistaken belief that they are buying your product."

This startling, but by no means exaggerated proposition must surely give the entrepreneur pause. He must reflect upon the fact that in the introductory stage of a product, when promotion costs are heaviest and sales returns leanest, when protection is most needed against sales diversion, no protection is afforded. Perhaps, he consoles himself, it might be possible to shorten the time necessary for the product to acquire this "secondary meaning" if an intensive advertising campaign is undertaken. But how justified is the expense of a promotional blitz when success depends upon a fortuitous—and highly unlikely—circumstance, namely, that the copyist will delay until it is too late?

Add to this the fact that during the critical period between introduction and public recognition, the law exhorts the copyist: Be quick! Get your imitative product on the market before the original has had an opportunity to acquire secondary meaning. Capitalize on your competitor's ingenuity immediately or run the risk of losing the chance forever.

1. RESTATEMENT, TORTS § 741(b) (1938).

2. *Id.* at § 742.

At this point the businessman—and his lawyer—might well inquire: How in the name of unfair competition does the law get that way? What interest is served in thus inviting imitation at the expense of ingenuity and industry? Is not the obvious effect to encourage rather than curb sharp business practices?³

The answer is given that copying is permitted in the interest of free competition. "The privilege to engage in business and to compete with others implies a privilege to copy or imitate the physical appearance of another's goods."⁴ And so it does, up to a point. If, for example, red is the natural color of widgets, manufacturer *A*'s prior use of that color cannot be allowed to limit *B*'s right to make red widgets. *B*'s ability to offer effective competition in the sale of widgets would obviously suffer if he were put to the additional expense of giving his product an artificial color.

Similarly, if a demand exists for widgets of a particular size because that size is convenient, *B* must be given an equal right with *A* to satisfy the demand by making widgets of that particular size. And this, even though *A* may have been the first to recognize the demand and even though he may have created the demand.⁵

However, we are here considering *non-functional* personality features. Not the natural but the *arbitrary* color red; not the convenient, but the *fanciful* size or shape. What considerations of competitive effectiveness make the copying of these features permissive?

The point could no doubt be made that the number of suitable colors, sizes and shapes available to successive manufacturers of a particular product is limited, and that to permit the appropriation of these forms would confer a monopoly upon the first few appropriators.⁶ The answer is that the late comer need not, in this case, be precluded from selecting a color or shape already in use. Under such circumstances, where compelling competitive considerations would exist, copying would be permitted. The requirement of commercial necessity would here be satisfied.

3. Admitting that the theory of secondary meaning "is most severely tested by saying that this would make the diligent thief immune," the only answer which the Sixth Circuit could offer was, "[T]here can be no larceny, unless the title or possessory right of the first holder is better than that of the second taker. . . ." *Upjohn Co. v. Wm. S. Merrell Chemical Co.*, 269 Fed. 209, 214 (6th Cir. 1920).

4. RESTATEMENT, TORTS, Introductory Note to Ch. 35, Topic 3, p. 622; *West Point Mfg. Co. v. Detroit Stamping Co.*, 222 F.2d 581 (6th Cir.), cert. denied, 350 U.S. 840 (1955).

5. See *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938); *Flagg Mfg. Co. v. Holway*, 178 Mass. 83, 59 N.E. 667 (1901).

6. This argument is effective in cases where trademark registration of a color is sought, since the effect of registration is to confer a monopoly in that color. See *A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co.*, 201 U.S. 166 (1906). For a case in which the argument was made as applied to the color of a container, see *Chun King Sales, Inc. v. Oriental Foods, Inc.*, 136 F. Supp. 659 (S.D. Cal. 1955).

By what stretch of the imagination, however, is a bubble gum manufacturer limited in his ability to compete for the bubble gum market if denied the right to copy the unconventional cylindrical form of his competitor's product?⁷ Or a manufacturer of garden rakes similarly limited unless he is permitted to ape the fanciful details of handle construction first adopted by another rake producer?⁸ Or a drug manufacturer limited if prevented from putting his laxative preparation up in wafers of the same distinctive shape and color as a competitor?⁹ It might as well be argued that freedom of competition demands that every tap room operator be given the right to call his establishment "The Stork Club."¹⁰

Perhaps it is time for the courts to take a critical look at, instead of merely quoting, Judge Learned Hand's famous statement, made forty years ago in the *Crescent Tool* case:¹¹ "The defendant . . . may copy the plaintiff's goods slavishly down to the minutest detail . . . [so long as] he does not represent himself as the plaintiff in their sale."

In point of fact, the earlier cases of product and label copying furnish little, if any, basis for the Hand pronouncement. The concept of privileged copying in the absence of secondary meaning is not discernible in the cases prior to 1911.¹² Indeed, the term "secondary meaning" was not introduced into the law of product copying until six years later, by Judge Hand himself, in the same *Crescent Tool* case. Prior to 1911 the test of permissive copying was quite simply: Could the copying be justified on the basis of actual commercial necessity?¹³ In other words: Did the imitator have a legitimate reason for the copying or was he simply trying to generate consumer confusion in the hope of diverting sales from his competitor?

7. *Gum, Inc. v. Gummakers of America, Inc.*, 136 F.2d 957 (3d Cir. 1952).

8. *American Fork & Hoe Co. v. Stampit Corp.*, 125 F.2d 472 (6th Cir. 1942).

9. *Upjohn Co. v. Wm. S. Merrell Chemical Co.*, 269 Fed. 209 (6th Cir. 1920).

10. If there is any doubt as to the outcome of this argument, see *Stork Restaurant, Inc. v. Sahati*, 166 F.2d 348 (9th Cir. 1948).

11. *Crescent Tool Co. v. Kilborn & Bishop Co.*, 247 Fed. 299, 301 (2d Cir. 1917).

12. There should be mentioned here the 1870 Illinois case of *Candee, Swan v. Deere & Co.*, 54 Ill. 439, which held that the defendant had an absolute right to copy plaintiff's plows, "even to the 'curve of the mould-board' and 'the tip of the handles'—in the minutest, as well as in the most important parts." It is doubtful, however, that even a clear showing of secondary meaning would have induced this court to enjoin the copying, for, in the words of the opinion, "what can be more odious and oppressive than the monopoly of the manufacture and sale of plows?"

13. Nims uses the phrase "commercial necessity" in discussing the case of *George G. Fox Co. v. Hathaway*, 199 Mass. 99, 85 N.E. 417 (1908). He comments: "This is a test which might well be applied far oftener than it is." NIMS, UNFAIR COMPETITION AND TRADE MARKS 382 (4th ed. 1947).

Thus, in the well-known case of *Enterprise Mfg. Co. v. Landers, Frary & Clark*,¹⁴ decided in 1904, an injunction was granted against the slavish copying of plaintiff's well-known coffee mills. The court could find no reason for defendants' imitation other than "an intent to appropriate the trade of their competitor." Similarly, in 1905 the Supreme Judicial Court of Massachusetts enjoined the copying of the shape and appearance of plaintiff's unwrapped loaves of bread on the ground that no commercial necessity existed for the copying.

"[I]f the defendants had required the use of this combination for the successful prosecution of their business, they would have had a right to use it. . . . But the evidence shows that the defendants had no occasion to use this combination, and therefore were not justified in producing an imitation of the plaintiff's loaves."¹⁵

Other cases of this period prohibited the copying of labels,¹⁶ containers¹⁷ and commercial articles¹⁸ on the same bare ground, namely, that no bona fide need for the copying existed.

Conversely, copying was permitted where commercial considerations justified it. In *Globe-Wernicke Co. v. Fred Macey Co.*,¹⁹ decided in 1902, defendant's imitation of the sizes, styles, material and finish of plaintiff's bookcases was held permissive, since otherwise "it would be impossible [for the defendant] to construct and sell a bookcase having the most desirable characteristics." And in 1904 an injunction was refused in a case involving the copying of a syringe on the ground that the copied features were "essential to the successful practical operation [and served] to promote its efficiency."²⁰

The point is that these early cases recognized no "right of copying." The burden was not upon the originator of the distinctive article to establish public recognition as a condition to relief against copying. Rather, it was incumbent upon the imitator to show that his copying was commercially justifiable.

The concept of privileged copying probably first appears in the case of *Rathbone, Sard & Co. v. Champion Steel Range Co.*,²¹ decided

14. 131 Fed. 240, 241 (2d Cir. 1904).

15. *George E. Fox Co. v. Hathaway*, 199 Mass. 99, 102, 85 N.E. 417, 418 (1908).

16. *Collinsplatt v. Finlayson*, 88 Fed. 693 (S.D.N.Y. 1898); *Societe Anonyme v. Western Distilling Co.*, 43 Fed. 416 (E.D. Mo. 1890); *Wirtz v. Eagle Bottling Co.*, 50 N.J. Eq. 164, 24 Atl. 658 (1892).

17. *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, 77 Fed. 869 (2d Cir. 1896); *Royal Baking Powder Co. v. Davis*, 26 Fed. 293 (E.D. Mich. 1885).

18. *Rushmore v. Manhattan Screw & Stamping Works*, 163 Fed. 939 (2d Cir. 1908); *Yale & Towne Mfg. Co. v. Adler*, 154 Fed. 37 (2d Cir. 1907); *Putnam Nail Co. v. Bennett*, 43 Fed. 800 (E.D. Pa. 1890).

19. 119 Fed. 696, 704 (6th Cir. 1902).

20. *Marvel Co. v. Pearl*, 133 Fed. 160, 161 (2d Cir. 1904).

21. 189 Fed. 26 (6th Cir. 1911).

by the United States Sixth Circuit Court of Appeals in 1911. There the plaintiff sought an injunction against the close imitation of the design of its natural gas heaters. The defendant, it appeared, had actually used parts of the plaintiff's stove to make molds from which it cast its own heater, introducing certain minor changes in appearance. Plaintiff's own model, it happens, was relatively new and consequently had not achieved wide public recognition. Relief was denied. The actual ground for the denial, it seems clear, was that the design of the stove played an important part in consumer acceptance, hence copying of that feature by a competitor was justified on the basis of commercial need. The opinion states:

"In our opinion, defendant's intent, as shown by the record, in copying complainant's cut and patterns, was not to derive a benefit from complainant's name and reputation, but to avail itself of a design which, by imitating it, defendant has confessed is attractive and desirable."²²

As we have seen, this holding is entirely consistent with the reasoning of the earlier cases.

For some reason, Judge Knappen saw fit to say, without the benefit of any cited authority:

"[T]he case before us is . . . one of alleged unfair competition, predicated upon the simulating of the dress of a competitor's product. And in such case it is clear that identification in the mind of the purchaser of such distinctive dress, as belonging to the complaining manufacturer, is necessary. . . ."²³

Only one explanation of this statement suggests itself. Judge Knappen, in his study of the earlier product copying cases, apparently discovered that all those in which relief was granted had one fact in common. In each, the copied article was a well-known product. Here, he concluded, was the common denominator. Judge Knappen fell victim to a fallacy reminiscent of the familiar: *Post hoc, ergo propter hoc*.²⁴ He reasoned: A fact, therefore a condition precedent. It was also true, he might have considered, that the successful party in each of these cases was a manufacturer, each was denominated plaintiff in the lawsuit, and each was represented by an attorney. Yet it would be absurd to say that any of these factors was a condition precedent to the granting of injunctive relief against the copying.

²² *Id.* at 33.

²³ *Id.* at 32.

²⁴ Freely translated, for any whose Latin dictionary may be out of reach: After this, therefore because of it.

The presence of the other fact which these cases had in common, namely, a well-known product, is understandable on grounds unrelated to any finding of unfair competition. The originator of each product was losing sales to a copyist. And the obvious reason was that purchasers were buying the copy in the mistaken belief, predicated on the appearance of the article, that they were buying the plaintiff's original. This necessarily implies that the latter's product was "well-known" to the deceived purchaser. But why else had the originator incurred the expense of a lawsuit in the first place? Businessmen do not sue to vindicate theoretical rights. What the cases really had in common was the hard fact of actual or threatened sales diversion. But if this was a condition precedent, it was a condition to the bringing of the suit, not to the relief granted.

While it is true, therefore, that Judge Learned Hand did not originate the doctrine of "privileged copying," it is to him that credit must go for giving it a vitality which has sustained it for more than forty years. For it was Judge Hand who first saw in the earlier product copying cases, exemplified by the *Enterprise* case, an application of the trade-mark doctrine of secondary meaning to the copying of "non-functional" features of goods.

"The cases of so-called 'nonfunctional' unfair competition, starting with the 'coffee mill case,' *Enterprise Mfg. Co. v. Landers, Frary & Clark*, 131 Fed. 240, 65 C.C.A. 587, are only instances of the doctrine of 'secondary' meaning. All of them presuppose that the appearance of the article, like its descriptive title in true cases of 'secondary' meaning, has become associated in the public mind with the first comer as manufacturer or source, and, if a second comer imitates the article exactly, that the public will believe his goods have come from the first, and will buy, in part, at least, because of that deception. Therefore it is apparent that it is an absolute condition to any relief whatever that the plaintiff in such cases show that the appearance of his wares has in fact come to mean that some particular person—the plaintiff may not be individually known—makes them, and that the public cares who does make them, and not merely for their appearance and structure."²⁵

Thus, Hand concluded:

"The defendant has as much right to copy the 'nonfunctional' features of the article as any others, so long as they have not become associated with the plaintiff as manufacturer or source."²⁶

25. *Crescent Tool Co. v. Kilborn & Bishop Co.*, 247 Fed. 299 (2d Cir. 1917).

26. *Ibid.*

Here then, in 1917, is the first clear articulation of the concept that one is privileged to mimic the nonfunctional features of a competitor's article.²⁷

However, one point has been lost sight of by the courts in applying the *Crescent Tool* doctrine to the imitation of the purely "personality" characteristics of goods. This is the fact that the term "nonfunctional" meant something quite different in 1917 than it does today. To Judge Hand at the time of the *Crescent Tool* opinion the word conveyed the limited notion of "nonoperational." This is clear from another Hand opinion, written a year earlier in the case of *Champion Spark Plug Co. v. A. R. Mosler & Co.*²⁸

"[N]or does it seem an entirely adequate answer to say that the features enjoined are nonfunctional. It is only when the mechanical operativeness of the thing is certainly all that determines the buyer's choice that such a criterion is safe."

This is the meaning consistently assigned to the term "nonfunctional" by the pre-1917 cases from the time of its first discovered use by an appellate court nine years earlier.²⁹ Indeed, it was traced during this period³⁰ to the patent law, where operativeness was the only meaning which could be intended.

We see, then, that all that Judge Hand was saying in the *Crescent Tool* case was: A second comer has as much right to copy the *non-operational* features of competing goods as those which are *operational* so long as no secondary meaning can be claimed. It is quite a different matter to say, as the law of nonfunctional unfair competition now says, that absent secondary meaning one is free to copy even those characteristics which have no effect upon "purpose, action or performance, or the facility or economy of processing, handling or using" the goods.³¹

Another point which has been generally overlooked in connection with *Crescent Tool* lies in Judge Hand's reference to the original secondary meaning cases, which arose in the field of trade-marks. These cases involved geographical and descriptive trade-marks. In the one case,³² a starch manufacturer located in a town called Glenfield claimed the right to call his product "Glenfield" starch to the exclusion

27. It is a curious fact that the opinion does not cite Rathbone, Sard & Co. v. Champion Steel Range Co., discussed in text at note 21.

28. 233 Fed. 112, 116 (S.D.N.Y. 1916). (Learned Hand was a District Judge at the time of both the *Champion Spark Plug* and the *Crescent Tool* cases.)

29. The term first appears in *Rushmore v. Manhattan Screw & Stamping Works*, 163 Fed. 939 (2d Cir. 1908). See also *Margarete Steiff v. Bing*, 206 Fed. 900 (2d Cir. 1913); *Rushmore v. Badger Brass Mfg. Co.*, 198 Fed. 379 (2d Cir. 1912).

30. *Coca Cola Co. v. Gay-Ola Co.*, 200 Fed. 720 (6th Cir. 1912).

31. RESTATEMENT, TORTS § 742 (1938).

32. *Wotherspoon v. Currie*, L.R. 5 H.L. 508 (1872).

of another starch maker of the same town. In the other case,³³ a manufacturer of camel hair cloth sought to appropriate the exclusive right to call his belting product by the name "Camel Hair." The courts decided these cases in a rather ingenious way. Each of the words in question, it was said, had not one, but two meanings as applied to the goods in question. The first was its literal, dictionary sense (made in Glenfield; made of camel hair). In addition, however, each had acquired an added or "secondary" meaning, denominating the product of a particular manufacturer (original "Glenfield" starch; original "Camel Hair" belting). It was therefore ruled that to the extent the word conveyed the first of these meanings, its use was open to both manufacturers. To the extent of its secondary meaning, however, its use was foreclosed to all but the originator of the new meaning:

If a true analogy is to be found in these original secondary meaning cases to instances of product copying, the parallel would appear to be the copying of functional rather than nonfunctional features. The conflict which these cases presented grew out of the fact that the disputed words were actually necessary to tell prospective purchasers something about the goods themselves. Each had a "function" in connection with the goods.³⁴

It was this function, moreover, which dictated the limit of permissive use of the words. To the extent that the word was needed to acquaint potential buyers with the goods, to tell them where they were made or what their ingredient was, the second comer's use was held permissive. To the extent that his use could only result in confusion as to source, his use was enjoined. But is this anything more than the test of commercial necessity?³⁵

CONCLUSION.

It is perhaps too much to hope that the courts will find their way back, after forty years of *Crescent Tool* influence to the standards of commercial necessity. On the other hand, there are signs which offer hope.³⁶ There is evident a general dissatisfaction among the courts

33. *Reddaway v. Banham*, [1896] A.C. 199.

34. It is possible for geographical words to be used in an arbitrary or nongeographical sense, e.g. Vienna bread. In such cases of "nonfunctional" use, appropriation is possible without proof of secondary meaning. See *DERENBERG, TRADEMARK PROTECTION AND UNFAIR TRADING* 346 (1936).

35. See *Handler & Pickett, Trade-Marks and Trade Names*, 30 *COLUM. L. REV.* 168 (1930).

36. Some courts, notably those in New York and California, have recently begun to apply a test which, if not the test of commercial necessity, achieves the same sound result. *Santa's Workshop v. Sterling*, 282 App. Div. 328, 122 N.Y.S.2d 488 (3d Dep't 1953); *Haeger Potteries v. Gilner Potteries*, 123 F. Supp. 261 (S.D. Cal. 1954). See also *Flint v. Oleet Jewelry Mfg. Co.*, 133 F. Supp. 459 (S.D.N.Y. 1955); *Fancee Free Mfg. Co. v. Fancy Free Fashions, Inc.*, 148 F. Supp. 825 (S.D.N.Y. 1957); *Hesse v. Grossman*, 47 *TRADE-MARK REP.* 1484 (Cal. Dist. Ct. of App. 1957).

with the artificial requirement of secondary meaning as applied to the purely fanciful features of an article. The courts are obviously straining in a variety of ways to reach results more in keeping with commercial reality.³⁷ Practically speaking, New York and California have abandoned the secondary meaning test.³⁸

If these are hopeful signs, however, they are not without their disturbing side. The difficulty is that while the courts are gradually turning away from the test of secondary meaning, they are looking to no single standard in its place. The concern here is not with academic considerations such as preserving the mosaic of the law. It is rather with the confusion and uncertainty which will inevitably beset businesses everywhere. Consider the manufacturer of a product with national distribution. The situation is becoming such that his goods are open to differing degrees of copying in different geographical areas. What is unfair competition in California is privileged copying in Michigan.³⁹ Sales returns will soon become a jurisdictional matter.

The concern here is also for the practitioner of unfair competition law. When courts abandon known rules in favor of vague and subjective standards of ethics and morality, the practice of law becomes hazardous. Judges become as unpredictable as juries. Business decisions, however, must be predicated on the reasonable predictability of legal consequences. Business clients demand answers. And it is difficult to know the answers when they depend upon a court's notions of what is fair and what is unfair.

Finally, when courts feel strongly impelled toward a particular result, unsound law is frequently a consequence. To illustrate, the United States Court of Appeals for the Second Circuit recently decided a case involving the copying of the appearance of the expensive "Atmos" clock.⁴⁰ The holding of the case, in which the imitation was enjoined, is found in the following, taken from the opinion:

"[S]ome customers would buy [the imitator's] cheaper clock for the purpose of acquiring the prestige gained by displaying what many visitors at the customers' homes would regard as a prestigious article. [*The imitator's*] *wrong thus consisted of the fact that such a visitor would be likely to assume that the clock was an Atmos clock.*" (Emphasis supplied.)

37. One device used is to shorten the time ordinarily required before the goods will be deemed to have acquired secondary meaning. See *Noma Lites, Inc. v. Lawn Spray, Inc.*, 130 F. Supp. 124 (E.D.N.Y. 1955).

38. See note 32, *supra*.

39. Compare the *Flint* case, *supra*, note 32, with *West Point Mfg. Co. v. Detroit Stamping Co.*, *supra*, note 4.

40. *Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Le Coultre Watches, Inc.*, 221 F.2d 464, 466 (2d Cir. 1955).

We are witnessing in this and other cases a natural revulsion to the idea of privileged copying. Here is a classic illustration of the maxim that hard cases make bad law. The case is made hard because of an artificial concept of secondary meaning which serves no purpose in the struggle of competition. Bad law need not be the result. The courts need only revitalize the older and economically sounder principle of commercial necessity.