LAW AND CONTEMPORARY PROBLEMS

VOLUME 14 SPRING, 1949 NUMBER 2

FOREWORD

While it is undoubtedly an institution of ancient lineage, the modern trade-mark bears little resemblance in function and significance to its remote progenitors. What was once a device for fixing responsibility on the shoddy workman, or for establishing a claim to shipwrecked goods, has become the cornerstone of the multi-billion-dollar advertising business, the foundation of marketing policies in consumer goods industries, a powerful influence on the buying habits and cultural pursuits of people all over the world, and a force to be reckoned with in evaluating the state of our competitive economy.

To the casual observer, a trade-mark infringement suit is a "private dispute between hucksters,"[1] involving the public welfare only in the sense that the public has an interest in rudimentary commercial honesty and in preventing the deception of consumers through one trader's "passing off" his goods as those of another. To many specialists in trade-mark law and to some economists it has seemed that much more is involved: the struggle to gain increasingly comprehensive and effective protection for trade symbols has been pictured as one to secure the very bulwarks of competition.[2] A few years ago, however, Professor Edward Chamberlin published an economic analysis which has become the widely accepted basis for critical appraisal of the role of trade-marks in a competitive system.[3] According to this analysis, the marketing function of a trade-mark is indistinguishable from that of a patent or a copyright: each serves to differentiate the product with which it is associated from all others in some respect, and thus leads to control over a defined market. Each has elements of competition as well as monopoly, since patented, copyrighted, and trade-marked products all must compete with other similar, though not identical, products; but the distinctive contribution of the trade-mark, as of the patent or copyright, is the monopolistic element.[4] Chamberlin's conclusion was that "the protection of trade-marks from infringement . . . is the protection of monopoly."[5]

The force of this kind of reasoning has not been lost on the courts. From the Court of Appeals for the Second Circuit, whose decisions in this field are probably

[1] *Cf.* Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols,* 57 YALE L. J. 1165, 1167 (1948).

[2] See SEN. REP. No. 1333, 79th Cong., 2d Sess. 3 (1946).

[3] EDWARD CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION (1933).

[4] *Id.* at 56-70, 204-208.

[5] *Id.* at 204.

more significant than those of any other court, has come clear recognition of the fact that "the legal protection of trade-names does not engender competition; on the contrary, it creates lawful monopolies, immunities from competition."[6] The courts have not embraced Professor Chamberlin's suggestion that trade-mark infringement should be encouraged as a means of purifying competition;[7] monopolies can, of course, serve a useful purpose, and merely to recognize the monopolistic function of trade-marks is not to condemn them. Notice has been served, however, that the purpose which justifies the exception from the normal rule of competition measures its limits: "The protection of the interest of consumers is an ever-present factor in considering the allowable extent of monopolies in trade-names . . ."[8]

More or less contemporaneously with the emergence of this restrictive attitude, a movement has been under way to strengthen and enlarge the scope of trade-mark protection. Its crowning achievement is the Lanham Trade-Mark Act of 1946, the avowed purpose of which is to fortify the position of the trade-mark owner. The Act is comprehensive and far-reaching; it introduces important new concepts into trade-mark law; and, while the implications of many of its provisions are still unclear, it is evident, as Judge Learned Hand has recently said, that the Act "did indeed put federal trade-mark law upon a new footing."[9] Moreover, certain controversial provisions of the Act focus attention on the possibility that trade-marks may lend themselves, after the fashion of patents and copyrights in the past, to patterns of abuse which are particularly offensive to the policy of the antitrust laws.

It may fairly be suggested, therefore, that trade-marks are in a period of transition. Perhaps, with the enlarged protection afforded by the Lanham Act, they will grow in strength and power as instruments of market control. Perhaps, on the other hand, the influence of common-law tradition, economic criticism, and the protective provisions of the Act will operate to restrain any such growth, or even to induce some retreat from extremes attained independently of this legislation. Judge Charles E. Clark has already detected what appears to him to be a tendency in his court to "cut this Act . . . down to a size consistent with the court's conceptions of public policy."[10] There is even a possibility that the economic significance of the trade-mark may be gradually diluted from another quarter if we should become convinced, with Professor Auerbach, that the real promise of protection for the consumer interest lies not in a restrictive attitude toward the protection of trade symbols but in the development and acceptance of informative labeling and grade labeling. Some of the problems are examined in this symposium.

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[6] Eastern Wine Corp. v. Winslow-Warren, Ltd., 137 F. 2d 955, 957 (C. C. A. 2d 1943), Judge Frank speaking for the court.

[7] CHAMBERLIN, *op. cit. supra* note 3, at 204.

[8] Eastern Wine Corp. v. Winslow-Warren, *supra* note 6, at 959. *See also* the concurring opinion of Frank, J., in Standard Brands v. Smidler, 151 F. 2d 34, 37 (C. C. A. 2d 1945).

[9] S. C. Johnson & Son v. Johnson, 81 U. S. P. Q. 509, 511 (C. C. A. 2d 1949).

[10] *Id.* at 514.