

## Law

## TRADE MARK PIRACY

BY GEORGE W. GOBLE

THE American law forbids anyone to sell his own goods under the pretense that they are the goods of another. It makes little difference whether the seller's misrepresentation consists in false statements, simulation of the appearance of the other's goods or using the other's trade name or mark. The substance of the wrong is that a name or mark, when used in connection with a business or a particular product, is, in a measure, representative of the owner's good will, and for another to use or simulate it is to appropriate a portion of that good will.

If John Smith places on the market a flour labelled Tea Rose, and Tom Jones goes into the same market with a flour similarly labelled, not only is the public likely to be deceived, but Smith will probably lose sales. Hence the law does not permit such an invasion of his market. But if Jones markets his flour only in localities beyond the limits of Smith's business a more difficult question is presented. If the basis of trade mark protection is good will, is an owner of a mark entitled to protection in a territory into which his business does not extend? Ordinarily, he has no good will where he has no customers, and appropriation of his trade mark in such a territory does not cause him to lose sales, nor does it give an unjust profit to the imitator. Reasoning from this premise, the courts have held again and again that use in one locality does not entitle the owner to protection in other localities into which his business does not extend. This is true even if the trade mark be registered with the Commissioner of

Patents at Washington. Contrary to popular belief, registration does not give a monopoly in the use of the registered mark: its protection against infringement is only coterminous with the business in which the mark is used.

A recent application of this view is found in the case of the United States Printing & Lithographing Company vs. Griggs-Cooper, decided by the Supreme Court of the United States. In this case the registrant and prior user of the trade mark, Home Brand, had a wholesale grocery business which extended throughout a group of States in the northern and western part of the United States. The court held that the registrant could not enjoin others from using the same brand on similar goods marketed in the southern and eastern States.

The view illustrated by this case seems to be deeply rooted in our trade mark law. But is it sound? Is it the rule best adapted to our modern economic life? The writer believes not. When it was devised the world was in the handicraft stage, and each community was served by its own butcher, baker, shoemaker and weaver. Transportation was slow and expensive. Tradesmen seldom operated beyond the area in which they were personally acquainted, and people moved but little from place to place. Under these conditions it was probably true that no harm was done by trade mark appropriation unless there was an actual diversion of custom. Consequently, loss of sales was made the essence of the rule.

But this rule does not fit the modern industrial era, with its swift systems of transportation, elaborate sales organizations, far-reaching advertising, and standardized products. The field of a business is

now nation wide, and people move about over large areas.

The law does not usually give relief unless somebody is hurt. The question then is, When a trade mark pirate uses an appropriated label in territory not yet entered by the owner of the mark, in what respect is the owner or the public harmed? It is true that in such a case there is no diversion of custom, for the owner has no customers in the imitator's territory. But an analysis of the situation discloses at least *three other elements of positive injury*, either to the owner or to the public. First, the owner is required to allow his business reputation to rest in the hands of a trade mark pirate. If the latter should sell inferior goods the result would be no different from a positive slander or disparagement of the owner's business.

Secondly, the policy of the courts unnecessarily hampers large scale production. If a trade mark has come to represent one's good will in a certain locality, one should be free to extend that good will into other localities. One is entitled to the convenience resulting from putting one's goods into all markets under the same label. A large part of the value of a trade mark lies in its *uniqueness*. It is a mark of identification. Use of it anywhere by anyone not the owner impairs its value.

Thirdly, the policy is a positive harm to the consuming public. The constant and increasing movement of people from one part of the country to another makes it highly inconvenient, from the public point of view, to have a trade mark represent goods manufactured by A in one part of the country and by B in another part. Is not a resident of Massachusetts, while temporarily in California, as much entitled to protection from infringers as when at home? One mark for one product enables the public to fix responsibility and to give

credit or blame to whom credit or blame is due. The transient part of the public can identify products and more easily make known its desires. All the arguments for a common language throughout the country support equally well the principle of trade mark monopoly.

As things stand, there is great confusion with respect to trade marks, names and labels. Boston Wafers, Gold Medal Flour, Tea Rose Flour, Yellow Taxis, the Velvet Kind (ice cream), Baltimore Club Whiskey, Blue Ribbon, Anchor, Star, and Universal are a few of the trade names to which the law has permitted the attachment of different meanings in different parts of the country.

Would the manifest convenience of unlimited trade mark protection to the public and to reputable producers and dealers be offset by injustice to dealers who desire to adopt the trade mark of another in new territory? It is difficult to see how it would. There is an unlimited number of words from which trade symbols may be chosen. Unless such dealers expect to profit on the good name established by someone else, there is nothing to be gained by using a mark already in use. Such dealers, by the rule I propose, are not prevented from competing. They are not kept out of the new territory. They are simply prevented from taking another's mark into the new territory.

A problem that has given the courts even greater difficulty is presented by the trade mark pirate who uses the stolen label upon goods of an entirely different character from those sold by the owner of the mark. Here, again, the courts have hesitated to give the owner relief because, since he sells an entirely different commodity from that sold by the imitator, there is no diversion of his custom. The argument is that if the owner uses the

name or mark on automobiles, for example, and the imitator places it on washing-machines, no one will be misled by it into buying a washing-machine when he wants an automobile.

Yet the courts feel that in some cases, even where the respective products are quite dissimilar, the imitator should not be permitted to retain his ill-gotten gains. To reach the worst of these cases the rule has been devised that if the products on which the imitator uses the mark are in the *same class* as those of the owner of the mark, an injunction will be granted against the imitator; otherwise not. But in application this rule has completely broken down. It is impossible to devise a satisfactory test for determining when goods are in the same class. Things can be classified in dozens of ways. To be in the same class must they look alike, feel alike, smell alike or be of the same color or size, or so similar in general appearance that one can be passed off for the other; or must they be used for the same purposes; or be complementary or allied lines; or be such that the thought of one suggests the other by association of ideas? Extremely amusing and fantastic answers have been made to these questions.

For example, automobiles and radio tubes have been put in the same class: they are both electrical instruments. So Rolls-Royce succeeded in preventing the use of its name on radio tubes. Bicycles and kodaks are in the same class because frequently one takes one's kodak when one goes cycling. A bicycle company was therefore denied the right to call its bicycle a kodak. The same is true as to drugs and cigars (both sold in drug-stores), locks and flashlights (both sold in hardware-stores), hats and a fashion magazine (the magazine featured styles in hats), pancake flour and syrup (both used in pancakes). But

on the other hand the courts have put the following in different classes: flour and pancake flour, crackers and cakes, milk and ice cream, food products and tobacco.

As might be expected, this same-class requirement has produced a number of unfortunate results. Vassar College was unable to restrain another from using the word Vassar and the college seal on candies. The Borden Malted Milk Company could not enjoin a newly organized company from using its name on ice cream. The Beechnut Packing Company, a wholesaler of food products, failed to prevent another from using Beechnut on tobacco products. The manufacturers of Gold Medal Flour were unable to stop the use by another of Gold Medal on pancake flour.

If the register of trade marks in Washington be closely examined it will be found that the fanciful trade mark, Simplex, may be lawfully used by over sixty concerns, Star by over four hundred, Anchor by over a hundred, Bull Dog by over a hundred, Universal by over thirty, Lily White by over twenty, and Gold Medal by over fifty.

It seems to have been overlooked that products need not be similar or even related for the public to suppose that those marked alike have a common producer. How many farmers have assumed that Ford's Milker, now on the market, is the product of Henry Ford? The initials A & P upon any kind of commodity would cause immediate association with the Great Atlantic & Pacific Tea Company. Any housewife familiar with Arm & Hammer Soda would associate that product with any other commodity carrying that mark. Nor can the principle be different if the mark is less generally known. The question should be, Are the people misled who know the mark? That the two

articles would naturally be associated *without* the same mark seems unnecessary, if they would ordinarily be associated *with* it. General characteristics, construction or use would not normally cause anyone to associate a Rolls-Royce automobile and a radio tube. But let the name Rolls-Royce be placed on the radio tube and they are likely to be immediately associated as to origin.

That value of a trade mark which comes from its *uniqueness* is materially impaired by the view which the courts have adopted. But in seeking a remedy it must be realized that a rule permitting a recovery in *all* cases where one person profits at the expense or upon the labor of another would be too broad. Followers in any line of endeavor gain by the work of the pioneer. The progress of society can come about only through wide liberties of imitation. However, such imitation is only justi-

fied by the resulting economic benefit. For the good of society there should be a limit to the privileges men have with respect to the ideas of others.

In favor of the view now prevailing it might be said that it encourages competition by giving the small business man an efficacious weapon with which to fight powerful competitors. But on the other hand there is almost an infinite number of names and marks that one may use without hurting anybody else. Therefore, to deprive an imitator of the use of another's mark does not prevent his use of a mark, nor, of course, does it keep his goods off the market.

Unless he profits by the owner's good name, he gains nothing that he would not gain by the use of another mark. In the ordinary case, therefore, it is hard to see what good is accomplished by upholding his infringement.

# HOW THE STATES RANK IN CRIME

BY WILLIAM C. BAGLEY

EIGHT years ago I published a comparison of the forty-eight States based on ten measures of intelligence, leadership, economic efficiency, basic morality, and respect for fundamental law. On each of these measures the several States distributed themselves in approximately the same way: that is, the States that ranked high on one measure tended to rank high on all measures and the States that ranked low on one measure tended to rank low on all measures. On a ranking that combined all ten measures Massachusetts had first place and the other five New England States followed. The Southern States, and particularly those bordering the Gulf east of Texas, were the lowest.

In 1931, a series of three articles appearing in *THE AMERICAN MERCURY* under the title of "The Worst American State" presented comparisons of the States on the basis of some of the measures that I had used and many additional measures. A combination of the rankings again gave Massachusetts the most enviable place; Mississippi stood lowest.

The least satisfactory measures in both studies were those that compared the States on the basis of respect for law. Chief use was made of the homicide rates published annually by the Bureau of the Census in Mortality Statistics. There has been disagreement among the criminologists, however, first as to the reliability of these rates, and secondly as to the degree in which the

homicide rates, even if accepted as fairly accurate indices of the prevalence of homicide, may be regarded as indices of the prevalence of other serious crimes.

Recently data have become available which throw light on both of these questions. Apparently on the recommendation of the Wickersham Commission, the Department of Justice began in 1930 to collect each month from the cities information regarding all major and minor crimes *known to the police*. (This category, "Crimes known to the police," has long been used in the official reports on crime in England and Wales. It constitutes quite obviously a much more reliable index of the total volume of crime than do statistics of either arrests or commitments.)

In 1932, the number of cities making these reports was sufficiently large to permit valid comparisons of different sections of the country. Seventy-nine per cent of all cities of 10,000 population and over, representing 81% of the total population of such cities, made monthly reports which are summarized in a quarterly bulletin of the Department of Justice, *Uniform Crime Reports*. The issue for the third quarter of 1932 presents data covering the first nine months of the year. I have taken the average monthly rate for each section and multiplied it by twelve, thus obtaining an approximate annual rate. I have also changed the base from the 100,000 of the population to the million of the population, thus avoiding decimals.