COMMITTEE REPORTS

REPORT ON PATENT LAW REVISION.*

Many, and perhaps a great majority of people, including prominent members of the legal profession, have incorrect ideas of the nature of a patent privilege, and are also very much at sea in regard to the scope and limitations of the trade-mark. Starting from false premises, they reason wrongly about various questions that arise, and are never able to comprehend the nature of a patent grant, and of the reasons upon which the Copyright, Patent and Trade-mark laws are based.

The belief is very generally entertained that inventors have a "natural right" to their inventions, of the same kind given by the statutes, irrespective of the actual passage of the law. Some go even further than this and believe that when a person invests a large amount of money in advertising an alleged invention, a right of property has been created in the article so advertised, rather than in the brand of the article so marked.

"The right to the exclusive use of an invention is not a natural right—that is, pertaining to a man in a state of nature; but, when it exists at all, is a civil right, pertaining to man under the protection of a civil government."[1]

"An inventor has no right to his invention at common law. He has no right of property in it originally. The right which he derives is a creature of the statute and of grant, and is subject to certain conditions incorporated in the statutes in the grants."[2]

The question of "natural right" to prevent others copying one's writings or discoveries is not a new one. If you will turn to the article on Copyright in the Encyclopedia Britannica, you will be interested to read about the Copyright War which was fought out in England many years ago. The question was raised whether an author has a "natural right" to the exclusive use of his writings, so that he may prevent others from copying them, or whether a copyright is only a thing of statute. Quoting from the Encyclopedia: "The nature of the right itself and the reasons why it should be recognized by law, have been from the beginning the subject of a bitter dispute. By some it has been described as a monopoly, by others as a kind of property. As a monopoly, it is argued that copyright should be looked upon as a doubtful exception to the general law regulating trade, and should at all events be strictly limited in point of duration. As property, on the other hand, it is claimed that it should be perpetual. Historically, and in legal definition, there would appear to be no doubt that copyright, as regulated by statute, is a monopoly." Quoting again from the Encyclopedia: "In 1834 was contested in the Supreme Court of the United States the same question which had been so elaborately argued in the English case of Miller *vs.* Taylor, and finally settled by the House of Lords five years later in Donaldson

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* The evidence in support of the Preambles and Resolutions and suggested additions to the copyright, patent and trade-mark laws contained in the first part of our report was not published in the May Journal owing to want of space. I am now sending you the remaining part of the report, by request, as it is considered quite necessary for the members of the Association to have in their hands before the next annual meeting, the entire document for consideration and study. It is believed that this will decidedly facilitate matters and save much time at the annual meeting which otherwise might be used up in unnecessary discussion of the subject.

Your Committee wishes to again emphasize that fact that we have no desire to impose our personal views on the Association. The copyright and patent laws were designed to promote progress in science and the useful arts and the trade-mark laws to protect the public from fraud and imposition. It is generally conceded that the laws as now interpreted and applied fall short in accomplishing their purpose. It is therefore incumbent upon the A. Ph. A., representing the pharmacists of America, to suggest proper modifications of the law, of such kind as to secure the very important objects for which they were enacted.—F. E. STEWART, *Chairman.*

[1] Simonds Manual of Patent Law.

[2] I. Am. H. & L. S. & D. Mach. Co. *vs.* Amer. Tool and Mach. Co., 4 Fisher's Pat. Cases, 294.

vs. Becket, *viz.:* Whether copyright in published works exists by the common law, and is therefore of unlimited duration, or is created by and wholly governed by statute." The Encyclopedia informs us that the Supreme Court, following the authority of the House of Lords, held that there was no copyright except for the limited term given by the statute. That judgment has continued since to be the supreme law.

Those who hold that the right to prevent other persons copying one's writings or discoveries is a "natural right" will continue to oppose any restrictions or limitations in the exercise thereof as an infringement upon their vested rights. Those who believe that the investment of money in advertising creates property in the thing advertised, rather than in the brand of the thing advertised, will join forces with the "natural right" army to prevent, if possible, any legislation having as its object the promotion of science and the advancement of the arts, if in any way such progress and advancement seems to interfere with their selfish interests.

"The policy of the patent law is, primarily, a selfish one on the part of the public, and only secondarily intended for the benefit of inventors, and then as a means to an end only. The Constitution of the United States gives Congress the power 'to promote the progress of science and the useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries,' thus showing, in this fundamental legislation, that the object sought is a benefit accruing to the public."[3]

In relation to the trade-mark, a misunderstanding has arisen on account of failure on the part of manufacturers of and dealers in merchandise to distinguish between a mark used as a commercial signature for the purpose of differentiating between brands of an article of commerce known to the public under a specific name common to the use of all manufacturers of the article, and a patent grant conferred upon the inventor of something new and useful in exchange for the publication of exact knowledge thereof for the benefit of science and the useful arts.

"The Supreme Court of the United States, in President, etc., of the Del. and Hudson Canal Co. *vs.* Clark, repeated a proposition that as a rule has been frequently enunciated and settled beyond question, *viz.:* The office of a trade-mark is to point out distinctively the origin or ownership of the article to which it is affixed, or in other words, to give notice who was the producer."[4]

Trade-marks are branded on cattle to indicate ownership. When the cattle are sold, the brand-mark no longer indicates ownership, but origin. Trade-marks branded on articles of commerce indicate origin of the products upon which they are marked. They do not indicate ownership in the products themselves. As stated on page 91 in the Report of the Commission appointed under Act of Congress, approved June 4, 1898, to revise the Statutes of the United States relating to Patents and Trade-marks,[5] "The adoption of a trade-mark or a device to indicate the manufacture or origin of a certain article does not give any right to the exclusive production of the article so marked. Any article of manufacture, unless it be protected by a patent, may be made and sold by any person."

A trade-mark may be used as many times as there are classes of goods. The classification of goods in the Patent Office is arbitrary. The classification of materia medica products under the general term "medicines" is very misleading under the circumstances. Each medicinal article must have a name of its own by which it may be manufactured and dealt in. Therefore, each product constitutes a class by itself. As well might all foods be classified under the general term "food" and the names "salt" and "sugar" be registered as trade-marks on the class "food." But the word "salt" cannot be a trade-mark on salt, neither can the word "sugar" be a trade-mark on sugar. Each article of food must have a name of its own to distinguish it from other articles of food, and the same applies to medicines and chemical substances. Words in general use may be used as trade-marks. On page 107 in the Report of the Commission already referred to, appears the statement that "the representation of a star or the word 'star' has been registered in the United States Patent Office" as a trade-mark for nearly every recognized class of goods, having been registered nearly four hundred times. On page 108 occurs the following statement: "It will, of course, be understood that a star or an anchor or any other mark may be used by manufacturers of or dealers in different classes of goods without conflict. For in-

[3] Day *vs.* Union Rubber Co., 3 Blatch, 500; Randall *vs.* Winsor, 21 Howard, 327.

[4] Patent Office Official Gazette, March 26, 1872.

[5] This report was printed in 1900 and is known as Senate Document No. 20.

stance, the use of a star as a mark for tobacco does not conflict with the use of a star as a mark for matches or dress braid."

For reasons just stated, it has been decided by the courts that "No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name or a name merely descriptive of an article of trade, or of its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to protection." (Canal Co. *vs.* Clark, 13 Wall, 323.)

As pointed out in this report, trade-marks differ from patents. By registering a name, the person who registers it does not receive a grant from the Patent Office, conferring upon him the exclusive right to the use of the name. Irrespective of registration, a manufacturer may adopt a word as his trade-mark and as long as he uses it as a commercial signature to distinguish his brand of the article from other brands of the same article, said article being open to competition under its specific designation, he will be protected in such use of the word. As already shown, it is not necessary that the word should be a coined word. Any word may be so used provided it is used as a trade-mark and not used as the name of the article itself.

The difference between copyrights and patents on the one hand and trade-marks on the other, is pointed out on page 100 of the report of the Commission in the following words:

"Criminal prosecution being had under the statutes of 1870 and 1876, in the southern district of New York and the southern district of Ohio, and a difference of opinion having been certified to the Supreme Court on the question whether these Acts of Congress on the subject of trade-marks were founded on any rightful authority in the Constitution of the United States, the cases came before the court for review at the October term of 1879. (Trade-mark Cases, 100 U. S., 82.) The court showed with admirable clearness that because of the distinction between patents and copyrights and trade-marks, pointed out in the decision, the power of Congress to enact the law could not be derived from that paragraph of Article I, Section 8, of the Constitution which related to authors and inventors, since the right of ownership in trade-marks is created by *adoption* and not by authorship or invention."

It is evident, therefore, that "the policy that the mere use of a name to designate an article would give to those employing it the exclusive right to designate such article by such name, would be giving a copyright of the most odious kind, without reference to the utility of the application or the length of the title, and one that would be perpetual. Neither the Trade-mark Law, nor the Copyright Law, nor the Patent Law, affords any such right, or, under the pretense of the same, allows any one to throttle trade under the alleged sanction of law." (Browne on Trade-marks.)

It has been decided by the courts in certain cases that names used as titles and claimed as trade-marks are either descriptive or deceptive. If descriptive, they are not trade-marks; and if deceptive, those claiming them as such are not in position to go into court with "clean hands" in the defense of their claims. This doctrine carried to its legitimate conclusion would annul a great many so-called trade-marks, because of the fraudulent claims made in advertising.

An effort is being made in this country and also in other parts of the world to establish what may be properly described as a "secret patent system" under the guise of trade-marks legislation. The method of protection adopted by this class of "protectionists" is to register a coined name in the Patent Office as a trade-mark, and then instead of using it as a trade-mark to point out the brand and distinguish it from other brands of the same article, they employ the name as the title of the article itself. The name as thus used becomes descriptive of the article. By extensive advertising, it is forced into the common language as a noun or the name of a thing. The control obtained over an article of commerce in this way is far more restrictive than that obtainable by a patent grant. No invention is required except that of a name. No publication of the alleged invention is made. The advertising machinery is set to work for the purpose of creating a demand, and the claims usually made for the article are false and misleading. This so-called "proprietary" system has done much to throw into disrepute the entire patent system. Instead of promoting progress in science and the useful arts, it has not only hindered the same, but protected secrecy and lasting monopoly, and enabled manufacturers of comparatively valueless products to rob the public by imposing high prices entirely unwarranted by the actual value

of the products advertised. In this way the "proprietary system" has in many instances defeated the object of the Patent Law and proved of decided disadvantage to public welfare.

Now, there can be no question that the proper application of the Patent Law is capable of greatly promoting the public welfare. "The theory of the law is, that the promotion of science and the useful arts is of great benefit to society at large, and that such promotion can be attained by securing to inventors and authors, for limited times, the exclusive right to their inventions and writings. That such theory is correct, is needless to say. It is almost self-evident, or at any rate readily susceptible of proof that the magnificent prosperity of the United States of America is directly traceable to wise patent laws and their kindly construction by the courts.

"The patent laws promote the progress of the useful arts, in at least two ways: first, by stimulating inventors to constant and persistent effort, in the hope of producing some financially valuable invention; and second, by protecting the investment of capital in the working and development of a new invention till the investment becomes remunerative."[6]

Taking the above facts into consideration, your Committee has formulated its conclusions in the following Preambles and Resolutions,* the object being as already stated to place the subject before the country in such form as to permit its free and impartial discussion, hoping thereby to harmonize the divergent views now existing on the subject; so that you may be in position to ask the coöperation of the professions, the manufacturers and the commercial interests involved, in securing a proper revision of our Copyright, Patent and Trade-mark Laws.

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MERCHANTS' AND MANUFACTURERS' ASSOCIATION.

N. E. Cor. Thirteenth and Market Sts.,
PHILADELPHIA, PA., Dec. 18, 1914.

F. E. STEWART, M.D.,

DEAR DR. STEWART:

At a meeting of the Board of Directors of the Merchants' and Manufacturers' Association, held Thursday, Dec. 17th, the report of our Committee on Revision of U. S. Patent Laws was accepted, and the resolutions embraced in the report were adopted.

The Board of Directors authorized a vote of thanks to you for your untiring and indefatigable zeal along this line.

Trusting this will be satisfactory to you and will enable you to make rapid progress along the lines of your endeavor, I am, with kindest regards,

Yours very truly,
(Signed) C. W. SUMMERFIELD, *Secretary.*

"DR. F. E. STEWART,
PHILADELPHIA.

Philadelphia, November 17, 1914.

DEAR SIR:

As a member of your Committee on Patent Law Revision, I have received a copy of your treatise, preambles and resolutions sent by you to Mr. Summerfield. I have been over this very carefully, and am in thorough accord with it.

I desire to take this opportunity of congratulating you on the completeness and excellence of your report, and feel that the Association is to be congratulated on having secured your services in this matter.

Very truly yours,
(Signed) ERNEST T. TRIGG."

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[6] Simonds Manual of Patent Law.

* The Preambles and Resolutions Relating to the United States Copyright, Patent and Trade-mark Laws referred to, were published in the April number of the Journal of the A. Ph. A. The same was part of the report of the Committee on Patent Law Revision of the Merchants' and Manufacturers' Association of Philadelphia, of which Dr. Stewart was chairman. This report met the approbation of the Association, as reference to the copies of letters by the secretary, Mr. C. W. Summerfield, and Mr. Ernest T. Trigg, one of the members of the Committee and now President of the Philadelphia Chamber of Commerce, will show.