

A Lard Trade Mark Disputed

What Limits Confusion With a Neighboring Product As Illustrated in the Purola Trade Mark Case?

By WALDON FAWCETT

THE industry has to thank one of its members for vindication of a branding right that has long been in jeopardy, or at least, in doubt. The Vegetable Oil Products Company was, of course, serving its own ends in fighting for special and particular recognition for oil and fat products. But, at the same time, or incidentally, it did a valuable service for the trade at large. This vegetable oil concern is responsible for an object lesson that is destined to stand as an epoch-marker and pacesetter.

It is not easy to tell, in a single sentence, all that the "Purola" case has done for the community of oil and fat producers. This is because the question which is answered by the decision in this test case is a complex one. Broadly, it might be phrased thus: What is the market span of an oil or fat trade-mark? When are oil and fat products akin to other commodities? Or, where are the boundary lines between the oil and fat group and its neighbors on either side?

To realize why this question of brand-range is so important, it is necessary for the reader to bear in mind that bound up with this element is the very essence of trade mark rights. Our American trade mark system, insofar as it is controlled or supervised by the Federal Government, is organized on this basis—a basis of limited or restricted jurisdictions. There is no such thing, under the law, as a universal property right in a brand. No brander, even if he is the first to hit upon a novel scheme of goods identification, can monopolize that idea, as such, in its application to every and all kinds of merchandise.

For purposes of trade mark administration, the Government has broken up or subdivided the mass of brandable commodities into groups or classifications—some fifty in all. When the Government, in effect, grants a trade mark franchise, by register-

ing the mark at the U. S. Patent Office, it grants what might be described as a sectional license. The registrant obtains Federal recognition of the fact that he is entitled to a monopoly of use of his trade mark within his zone of operations or within the scope of his commodity line. This registration at Washington vindicates the pioneer's right to use the mark not only upon the wares first put out under the brand but likewise upon related products, the inclusion of which within the original line would constitute a normal extension or logical expansion of the business.

The boundaries of a marketer's trade mark domain are mighty important to him under any circumstances. But this importance is sharpened when, under the U. S. trade mark rules, ownership of a trade mark in one commodity corridor leaves other parties free to lawfully use the same or very similar trade marks in other commodity lanes. Even the fact that a trail-blazer has invented a trade mark device or coined a trade-mark name does not prevent other traders from borrowing the idea without permission if they operate in more or less distant commodity areas. It is a case where, literally "over the fence is out."

With the whole commodity map thus broken up, for trade mark purposes, into sectors, it follows that every user of brands is due to be tremendously concerned as to just where his group boundaries are. How close may he go to the other fellow who is sharing his mark in a different environment? Or, how close may the other fellow come to him? This is precisely the momentous question which has been at stake in the "Purola" case. The reader will readily realize too that, while the instant case might seem to concern only one firm in the trade, the principle of oil and fat jurisdiction vitally affects every last member of the industry that has brands in his keeping or that ever expects to have brands. Because,

brands gain in value as good will grows and an owner cannot know too much about the dimensions and the right-of-way of his most valuable intangible asset.

Rationing of Trade Marks

BEFORE seeing how the system of Governmental rationing of trade marks is actually working out in oil and fat circles, perhaps it were well to pause for just a moment to explain how the Government lays out the boundaries it sets between commodity classifications. This is not done arbitrarily or in hit and miss fashion. The main subdivisions are, to be sure, just naturally dictated by the variances in the physical character of commodities. Thus, it is all but inevitable that Foods and Ingredients of Foods should constitute one grand division. But when it comes to subdividing, the Department of Commerce has provided itself with a novel yet thoroughly practical measuring stick.

This diviner of commodity boundaries is nothing less than that state of commercial being known as "confusion in trade." The rule is that if there is "confusion" as between two articles of commerce or two lines of goods, the respective offerings are too close to one another to permit the same or very similar trade marks to be used by two parties in the neighboring communities. If, on the other hand, it appears that there is no danger of "confusion," the Federal umpires may be expected to rule that there is no harm in permitting parallel branding in the two lanes.

In the case of specialties such as oil and fat products, which are surrounded by commodities that are near or distant relatives, the determination of when and where there is danger of trade confusion is a mighty ticklish task. The Federal censors have to put themselves in the places of average everyday consumers in order to guess whether the rank and file of citizens would be likely to be deceived or to mistake one article for another under a duplicate brand or near-duplicate. It is difficult enough to determine when there is risk of substitution of goods because of brand repetitions. It is even harder to appraise the dangers of "confusion of reputation"—the chance that old customers will accept a new article under a familiar brand in the belief that it was manufactured by the same firm that made the trade mark famous, when, as a matter of fact it comes from another factory.

Protests Not Unethical

IT IS only human nature that every owner of a trade mark should strive to establish the widest possible swath for his trade mark. For selfish but wholly natural reasons, he likes to hold other users of his mark as far off as possible or, if possible, to prevent their participation entirely. This attitude has been clearly illustrated by the episode which has just made news for the oil and fat industries. The Vegetable Oil Products Company had no sooner sought to register its mark "Purola" than vigorous objection was raised, before the Patent Office tribunals by the Pure Oil Company.

There was nothing irregular or unethical in the lodging of a protest. Any person who deems that he would be injured by the registration to another of a coveted trade mark is empowered by law to rise and object. What gave zest to the current case was the length to which the opposition was carried. The Vegetable Oil Products Company uses its trade mark upon hard fat shortening, a lard substitute. The Pure Oil Company had already registered the same trade mark but for use on lubricating oils and greases, motor fuel oils and miscellaneous lubricants.

Perhaps a member of the oil and fat industries who was given to splitting hairs in differentiating between classes of goods might instantly come to the conclusion finally arrived at by the Federal umpires—viz the radical disparity between a food product and a line of products not for internal use. But, if one pauses for reflection it is seen that there was at least the shadow of an excuse for "fighting it out" as was done. To many minds, the name "Purola" might suggest the idea of "pure oil," without any definite preconception as to just what kind of oil was referred to. And the word "Oil" is a prominent feature of the corporate name of each of the concerns sharing the mark. The Pure Oil Company has other trade marks, such as "Puro," "Pured" and "Purolene," and the conclusion was inescapable that it resented any other user, over a wide commercial horizon, capitalizing the idea of "pure" in abbreviation.

Worth of Priority

ADMINISTRATORS of the governmental clearing house for trade marks are always prone to give the benefit of the doubt to the old-established house as against a
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