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Transcendental Nonsense and the Functional Approach
35 Colum. L. Rev. 809, 814-817 (1935)

What's in a Trade Name?

The divorce of legal reasoning from questions of social fact and ethical value is no a product of crusty legal fictions inherited from darker ages. Even in the most modern realms of legal development one finds the thoughts of courts and of legal scholars trapezing around in cycles and epicycles without coming to rest on the floor of verifiable fact. Modern developments in the law of unfair competition offer many examples of such circular reasoning.

There was once a theory that the law of trade marks and tradenames was an attempt to protect the consumer against the "passing off" of inferior goods under misleading labels. Increasingly the courts have departed from any such theory and have come to view this branch of law as a protection of property rights in divers economically valuable sale devices. In practice, injunctive relief is being extended today to realms where no actual danger of confusion to the consumer is present, and this extension has been vigorously supported and encouraged by leading writers in the field. Conceivably this extension might be justified by a demonstration that privately controlled sales devices serve as a psychologic base for the power of business monopolies, and that such monopolies are socially valuable in modern civilization. But no such line of argument has ever been put forward by courts or scholars advocating increased legal protection of trade names and similar devices. For controversial issues of politics and economics. Courts and scholars, therefore, have taken refuge in a vicious circle to which no obviously extra-legal facts can gain admittance. The current legal arguments runs: One who by the ingenuity of his advertising or the quality of his product has induced consumer responsiveness to a particular name, symbol, form of packaging, etc., has thereby created a thing of value, a thing of value is property; the creator of property is entitled to protection against third parties who seek to deprive him of his property. This argument may be embellished, in particular cases, with animadversions upon the selfish motives of the infringing defendant, a summary of the plaintiff's evidence (naturally uncontradicted) as to the amount of money he has spent in advertising, and insinuations (seldom factually supported) as to the inferiority of the infringing defendant's product.

The vicious circle inherent in this reasoning is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected. If commercial exploitation of the word "Palmolive" is not restricted to a single firm, the word will be of no more economic value to any particular firm than a convenient size, shape, mode of packing, or manner of advertising, common in the trade. Not being of economic value to any particular firm, the word would be regarded by courts as "not property," and no injunction would be issued. In other words, the fact that courts did not protect the word would make the word valueless, and the fact that it was valueless would then be regarded as a reason for not protecting it. Ridiculous as this vicious circle seems, it is logically as conclusive or inconclusive as the opposite vicious circle, which accepts the fact that courts do protect private exploitation of a given word as a reason why private exploitation

of the word should be protected.

The circularity of legal reasoning in the whole field of unfair competition is veiled by the "thingification" of property. Legal language portrays courts as examining commercial words and finding, somewhere inhering in them, property rights. It is by virtue of the property right which the plaintiff has acquired in the word that he is entitled to an injunction or an award of damages. According to the recognized authorities on the law of unfair competition, courts are not creating property, but are merely recognizing a preexistent Something.

The theory the judicial decisions in the field of unfair competition law are merely recognitions of a supernatural Something that is immanent in certain trade names and symbols is, of course, one of the numerous progeny of the theory that judges have nothing to do with making the law, but merely recognize pre-existent truths not made by mortal men. The effect of this theory, in the law of unfair competition as elsewhere, is to dull lay understanding and criticism of what courts do in fact.

What courts are actually doing, of course, in unfair competition cases, is to create and distribute a new source of economic wealth or power. Language is socially useful apart from law, as air is socially useful, but neither language nor air is a source of economic wealth unless some people are prevented from using these resources in ways that are permitted to other people. That is to say, property is a function of inequality. If courts, for instance, should prevent a man from breathing any air which had been breathed by another (within, say, a reasonable statute of limitations), those individuals who breathed most vigorously and were quickest and wisest in selecting desirable locations in which to breathe (or made the most advantageous contracts with such individuals) would, by virtue of their property right in certain volumes of air, come to exercise and enjoy a peculiar economic advantage, which might, through various modes of economic exchange, be turned into other forms of economic advantage, e.g. the ownership of newspapers or fine clothing. So, if courts prevent a man from exploiting certain forms of language which another has already begun to exploit, the second user will be at the economic disadvantage of having to pay the first user for the privilege of using similar language or else of having to use less appealing language (generally) in presenting his commodities to the public.

Courts, then, in establishing inequality in the commercial exploitation of language are creating economic wealth and property, creating property not, of course *ex nihilo*, but out of the material of social fact, commercial custom, and popular moral faiths or prejudices. It does not follow, except by the fallacy of composition, that in creating new private property courts are benefiting society. Whether they are benefiting society depends upon a series of questions which courts and scholars dealing with this field of law have not seriously considered. Is there, for practical purposes, an unlimited supply of equally attractive words under which any commodity can be sold, so that the second seller of the commodity is at no commercial disadvantage if he is forced to avoid the word or words chosen by the first seller? If this is not the case, i.e. if peculiar emotional contexts give one word more sales appeal than any other word suitable for the same product, should the peculiar appeal of that word be granted by the state, without payment, to the first occupier? Is this homestead law of the English language necessary in order to induce the first occupier to use the most attractive word in selling his product? If, on the

other hand, all words are originally alike in commercial potentiality, but become differentiated by advertising and other forms of commercial exploitation, in this type of business pressure a good thing, and should it be encouraged by offering legal rewards for the private exploitation of popular linguistic habits and prejudices? To what extent is differentiation of commodities by trade names a help to the consumer in buying wisely? To what extent is the exclusive power to exploit an attractive word, and to alter the quality of the things to which the word is attached, a means of deceiving consumers into purchasing inferior goods?

Without a frank facing of these and similar questions, legal reasoning on the subject of trade names is simply economic prejudice masquerading in the cloak of legal logic. The prejudice that identifies the interests of the plaintiff in unfair competition cases with the interest of business and identifies the interests of business with the interests of society, will not be critically examined by courts and legal scholars until it is recognized and formulated. It will not be recognized or formulated so long as the hypostatization of "property rights" conceals the circularity of legal reasoning.