The Theory of Monopolistic Competition

A Re-orientation of the Theory of Value

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APPENDIX E

SOME ARGUMENTS IN FAVOR OF TRADE-MARK INFRINGEMENT AND "UNFAIR TRADING"

THE analysis of patents and trade-marks in Chapter IV leads to the conclusion that the protection of trade-marks from infringement and of business men generally from the imitation of their products known as "unfair trading" is the protection of monopoly. To permit such infringements and imitations would be a step towards purifying competition by the elimination of monopoly elements. Reasoning, then, from the premise that competition is good and monopoly bad, the conclusion would be that "unfair" competition (in this sense of the imitation of competitors' goods) ought to be permitted and even encouraged. Let us examine the argument further.

Although trade-mark infringement and unfair trading have a different legal origin, and still may be distinguished technically, the former may, for our purposes, be considered as a type of the latter and the whole discussion brought under a single head. The fundamental rule of law is that no one has the right to pass off his goods as the goods of a rival trader.

The methods whereby this may be attempted are various. The successful name or trade-mark itself inevitably has a host of imitations to contend with. For example, "Gold Dust" was held infringed by "Gold Drop," "Lacto-Peptine" by "Lactopepsine," "Uneeda" by "Iwanta," etc.[1] The Waltham Watch Company was protected against the use of the geographic name "Waltham" by another manufacturer locating in the same city, in such a way as to confuse the two products.[2] Even purely descriptive words or phrases may not be used by one producer where they already have associations with the goods of a competitor "unless accompanied with sufficient explanations or precautions to prevent confusion with the goods of the original manufacturer or vendor."[3] In addition to the imitation of names, labels and packages are imitated in general make-up and appearance, color, size, and shape. The degree of ingenuity which has been displayed in many cases is remarkable, and

[1] For many interesting cases of infringements, with illustrations, see Rogers, *op. cit.*, pp. 123 ff.; Dushkind, *Handbook on Trade-Marks*; and Thomson, *Trade-Marks*. Almost any copy of *Printer's Ink* will contain accounts of one or two cases of unfair trading currently before the courts.

[2] American Waltham Watch Co. *vs.* United States Watch Co., 173 Mass. 85; 53 N. E. 141; 43 L. R. A. 826.

[3] C. A. Briggs Co. *vs.* National Wafer Co., 102 N. E. 87; 215 Mass. 100.

it is a matter of nice discrimination just how far one may go and still keep within the law. There are cases in which it has been held that the shape of the product itself cannot be copied, as with a medicine in tablet form (Cascarets) [1] and padlocks.[2] In Coca-Cola Co. *vs.* Gay-Ola Co.,[3] the defendant was enjoined from copying the artificial color of the plaintiff's beverage when it was demonstrated that the imitation was unnecessary since other colors could equally well have been used.

In all these cases, there can be no question as to what the law is doing. It is preserving, not competition, but monopoly. When one producer copies the name, symbol, package, or product of another, the result is goods more nearly standardized, and, if the imitator is successful, a reduction in the profits of his rival. These profits (in so far as they exceed the necessary minimum) are, as has been shown in Chapter IV, due solely to monopoly elements. For if the goods were *perfectly* standardized, buyers would have no basis for discrimination; one producer could secure no larger volume of sales than another and hence no larger profits (exclusive of rents of land and of superior business ability). They are due to the dissimilarity, not the similarity, of the goods, hence to the monopolistic, not the competitive, elements. They must not be confused with the temporary profits which a producer might earn under pure competition during the interim before competitors appeared, or even for a time afterwards, because of his advantage in being first in the field. These tend to be eliminated; not so with the permanent profits made possible by trade-mark protection. The latter are due, not to the "imperfection" of competition, in that the system does not adjust itself promptly to new conditions; they are due to the permanent "imperfection" (if such it must be called) that it never adjusts itself at all — the law prevents it.

It is interesting to note that competition has no *prima facie* case in court. The right to goodwill is the fundamental legal right, and competition is "tolerated" only as a matter of policy on account of its supposed social benefits.[4] Economically, however, the *prima facie* case is in favor of competition, and (unregulated) monopoly is generally recognized as against the social interest. Exceptions there are, but they are by no means to be taken for granted. Monopolies protected by the patent law, for instance, are often justified on the ground that they stimulate invention. It must now be asked on what grounds, if any, monopolies protected by the law of unfair competition and of trade-marks may be justified.

[1] Sterling Remedy Co. *vs.* Gorey, 110 Fed. 372 (C. C. N. D. Ohio).

[2] Yale & Towne Manufacturing Co. *vs.* Alder, 154 Fed. 37 (C. C. A. 2nd Cir., reversing 149 Fed. 783).

[3] 200 Fed. 720 (C. C. A. 6th Cir.).

[4] Cf. Wyman, *Control of the Market*, Chap. II.

The protection of the law may be regarded as given (*a*) to the producer, or (*b*) to the consumer. Let us consider first the producer. There seem to be no grounds upon which he may justly claim such protection. Given that the consumer is equally satisfied with the goods of two sellers, the entrance of the second into the field must be regarded as the natural flow of capital under competition to check the profits of the first and to adjust the supply of the commodity to the demand for it at cost. Lord Hardwick, in 1742, put it plainly when he declined to enjoin a trader from using another's mark, saying:

> Every particular trader has some particular mark or stamp; but I do not know of any instance of granting an injunction here, to restrain one trader from using the same mark with another and I think it would be of mischievous consequence to do it.
>
> An objection has been made, that the defendant, in using this mark, prejudices the plaintiff by taking away his customers.
>
> But there is no more weight in this, than there would be in an objection to one innkeeper, setting up the same sign with another.[1]

A producer has no right to exclude others from manufacturing and selling the same product, even the *identical* product. He can claim protection only against anyone forging his name, and it seems to be the *theory* of the law that he be protected only in this respect. The Court in Ball *vs.* Broadway Bazaar [2] defined a trade-mark as "any sign, mark, symbol, word or words which indicate the *origin* or ownership of an article *as distinguished from its quality*, and which others have not the equal right to employ for the same purposes." Legal cases and text books agree that the function of the trade-mark is to show origin, to identify. The question is, where does identification leave off and differentiation begin? There would be *mere* identification, without further differentiation of product, in the case of two competing goods, identical in every respect, — as to color, shape and design, labels, marks and names, everything excepting only an inconspicuous identification mark or the name and address of the producer. Obviously "protection" which went no further than this would have no economic value to the producer, for it would mean no more to the buyer than does the slip found in a container (and which identifies perfectly), "Packed by No. 23." Except where the buyer deals directly with the seller, as in retail trade, and where personal relations therefore enter in, origin is of absolutely no significance to him *except* as it indicates quality. The purchaser of "Lux" probably does not even know that it is made by Lever Brothers Company, to say nothing of caring

[1] Cited in Rogers, *op. cit.*, p. 272. Rogers regards this as an indication of the lax development of the "judicial conscience" at the time.

[2] 194 N. Y. 429; 87 N.E. 674. (Italics mine.) See also G. W. Cole Co. *vs.* American Cement & Oil Co., 130 Fed. 703 (C. C. A. 7th Cir.)

whether it is or not. If the identical product were made by another company, put up in the same box and given the same name so as to guard against his being foolishly deluded, he would be equally ready to take it. The name stands for a certain quality, a certain product, not a certain producer, and to permit only one producer to use the name is to grant him a monopoly of this product. The law does vastly more than to identify.

Let us turn to the consumer. It will be said at once that trade-marks are necessary in order to protect him against deception and fraud. If producers were free to imitate the trade-marks, labels, packages, and products of others, no one would have any incentive to maintain the quality of his goods, for they would inevitably be imitated by inferior products at lower prices, put up to look identical. It is evident at once that, in fields where differentiation is possible, the consumer needs legal protection against inferior quality. The law of trade-marks and unfair trading safeguards him by putting a premium on differentiation and protecting the monopolies thereby established. Equally effective, however, would be a policy of permitting imitation provided only it were perfect, or of defining standards of quality by law. The former is, perhaps, condemned by its impracticability. The latter, however, has large possibilities, especially in the case of staples, where trade-marks and brands are patently useless so long as quality is assured. The consumer is defrauded only if goods actually different are deceptively similar. So long as he is able to recognize a variety of product, a package, or a mark, and to know that it is of the same quality as others like it, he is fully protected.

A final argument in favor of trade-mark protection might be that it stimulates variety and hence gives the consumer a wider choice. This is desirable, to be sure, but within limits. The question is one of weighing variety at a higher price against a more uniform product at a lower one, and theory affords an answer neither as to how far differentiation will "naturally" be carried, nor as to how far it should be carried. (The fact that it *is* carried to a certain point is no indication that this is in accord with the wishes of consumers, for producers are prevented by the law from directing resources freely into the channels where a strong demand is creating large profits.) However, in so far as individual initiative would be checked in the creation of variety by allowing perfect duplication, there is reason to believe that such a check would not be without advantages. Since less monopoly could be created, there would be less attention given to trying to create it and correspondingly more to production. There might be fewer "business" men and more laborers. Useless differentiation would be discouraged. Complete standardization would not follow, for the consumers' desire for variety would still have its natural effect in guiding

production. As to innovations, there would still remain the possibility of a patent for a limited period if a new idea were significant enough, and, in any case, the "enterprise" profit accruing temporarily to the first producers in any field before competitors have had time to appear. If this were insufficient, the exclusive use of a trade-mark might be granted for a limited period, under the same principle as that of the patent law, say for five years, after which anyone could make the identical product, and call it by the same name. The wastes of advertising, about which economists have so often complained, would be reduced, for no one could afford to build up goodwill by this means, only to see it vanish through the unimpeded entrance of competitors. There would be more nearly equal returns to all producers and the elimination of sustained monopoly profits. All in all, there would be a closer approach to those beneficent results ordinarily pictured as working themselves out under "free competition."