French Connections: The International Propagation of Trademarks in the Nineteenth Century

PAUL DUGUID

The history of modern brands depends to a significant degree on the history of trademark law, but there are reasons to doubt how comprehensive standard versions of the latter history are. Business, economic, and even legal historians tend to accentuate the importance of the Anglo-Saxon common-law tradition and assume that the continental, civil law tradition followed in its wake. Yet the historical sequence of events suggests that almost exactly the opposite is true. Not only did the French have robust trademark law long before Great Britain and the United States, but the latter two countries only adopted trademark law after signing trademark clauses in diplomatic treaties with France. Drawing on newspaper accounts, public debates, specialist and general newspapers, as well as court cases and diplomatic negotiations, this paper argues that, to a certain degree, Anglo-Saxon trademark law was international before it was national. The evidence suggests that some of the easy verities on which arguments about modern brands,

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PAUL DUGUID is an adjunct professor in the School of Information at the University of California, Berkeley, and a research professor in the School of Business and Management at Queen Mary, University of London. Contact information: School of Information, University of California, 102 South Hall, Berkeley, CA 94720-4600. E-mail: duguid@ischool.berkeley.edu.

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the "second industrial revolution," and institutional economics are based may be more complex than is generally assumed.

The history of modern brands is to a significant degree dependent on the history of trademarks. Yet, while business historians have given the history of brands a good deal of attention, they have generally given less to the history of trademarks and trademark law.[1] Furthermore, what business historians have written about brands and trademarks is generally national. English-language histories, for example, have tended to focus, understandably, on the UK or the United States and the "Anglo-Saxon" common-law tradition.[2] This relatively narrow focus makes it more easy to overlook international aspects of the history of trademarks and to grant by default a certain primacy to the Anglo-Saxon way of doing things.

Economic historians have perhaps been more international. Khan, for example, has contrasted the intellectual property regimes of Great Britain, the United States, and France. In the nineteenth century, she argues, the regime of each country closely reflected its distinctive political structure. Such an approach, while admirably comparative in scope, has nonetheless the paradoxical effect of isolating national traditions almost as much as single-country histories do. For arguments that assume a distinctively national gene in a country's law leave little room for any idea of interbreeding between different systems.[3] From such a perspective, internationalization of trademark regimes among the major economies, if considered at all, is generally assumed to follow the establishment of indigenous, independent, and mature national trademarking systems.

This paper, by contrast, attempts to show that to a curious degree Anglo-Saxon law was international before it was national. It is not hard to understand why this might be. In the area of copyright, for example, historians such as Deazley and Seville have shown that the growing need to deal with imported books provided a significant

1. I argue here that understanding statutory law is important for understanding the history of trademarks. Yet, as I have argued elsewhere, on its own a legislative history is misleading. Particularly for the common-law countries, it is important to understand the changing business practices and evolving case law that preceded the statutory law. See Duguid, "Developing the Brand."

2. See for example, Church, "Advertising and Consumer Goods"; Jones and Morgan, *Adding Value*; Koehn, *Brand New*; Laird, *Advertising Progress*; Strasser, *Satisfaction Guaranteed*; Tedlow, *New and Improved;* Tedlow and Jones, *Rise and Fall*; Wilkins, "Neglected Intangible Asset"; ibid., "When and Why." For the insight provided by an international, indeed global, perspective on brands, see Silva Lopes, *Global Brands*. For work more specifically on trademarks, see Higgins and Tweedale, "Asset or Liability"; ibid., "Trade Marks Question."

3. Khan, *Democratization of Invention*.

spur to early developments in national copyright laws.[4] So it seems reasonable to argue, as I do here, that increasing international trade more generally had a like effect on trademarks. On the one hand, growing trade pushed importing countries to take action against spurious marks on foreign goods. And on the other, it pushed exporting countries to seek adequate protection against local imitations in the foreign markets into which their goods were sent. Nineteenth-century exporters and legislators were often as concerned about foreign as about domestic goods and by extension about foreign as about domestic laws. As business historians trying to understand the laws with which these importers and exporters were concerned, we probably need to be equally international in our outlook. Yet, the standard legal history of trademark law to which business historians have often turned, Schechter's *Historical Foundation of the Law Relating to Trademarks*, focuses predominantly on the indigenous aspects of the Anglo-Saxon tradition.[5]

Recently, however, legal historians have taken a more comparative view of the subject. Sherman and Bently's *Making of Modern Intellectual Property Law*, for example, reminds us, as Schechter does not, that as the laws of any one country came up for consideration "references were frequently made to other legal systems, to how they protected intellectual property." Consequently, Sherman and Bently conclude that any history portraying intellectual property law as "indigenous" and "home grown" is probably the outcome of an unreasonable "process of purification."[6] Yet, in outlining the dominant international influences on the development of intellectual property law, Sherman and Bently conclude that "the primary source of inspiration was France for copyright and design law, and the United States for patents and trademarks." [7] If this is the case, then modern legal history may make our accounts of trademark law more international, but it would seem only to reinforce the preeminence of the Anglo-Saxon, or more accurately American, tradition.

Yet such a view of the genesis of trademark law is not easily reconciled with the simple sequence of events on which history tends to depend. The French developed their modern trademark law and

4. Deazley, *On the Origin*; especially 108–10; Seville, *Internationalisation*, especially 174–91.

5. Schechter, *Historical Foundations.*

6. Sherman and Bently, *Making of Modern Intellectual Property Law*, 213.

7. ibid., 212. Such a view of the different French and U.S. influences echoes widespread if unspoken assumptions that the temperamentally artistic French no doubt understand copyright and design, but that it takes hard-headed, commercially oriented Anglo-Saxon countries to lead in trademarks. Lamoreaux and Rosenthal have recently challenged this kind of national stereotyping. See Lamoreaux and Rosenthal, "Legal Regime."

registration from 1803. By 1857 they had established a law so robust that it survived with only minor changes for another century. By contrast, the British Parliament and United States Congress did not manage to produce statutory law until the second half of the century. And what they produced was so problematic that it needed radical rewriting in the following decades. In what follows, I claim that, in relation to the French, Anglo-Saxon laws were not merely post hoc, but to a significant degree propter hoc: parliament and congress did not pass what laws they did until pushed to do so by France. And where the French were efficient and pragmatic in their law making, the Anglo-Saxon legislatures were hesitant and inept, making them unlikely candidates for taking the lead.

To attempt such a reappraisal of the origins of Anglo-Saxon law, I begin by noting the ways in which, through publications, public meetings, and court actions, pressure built on governments to take action over marks, emphasizing the extent to which these pressures had an international character. I note in particular how as markets internationalized, governments were forced to consider the rights and responsibilities of aliens at home and citizens abroad. In this regard, governments felt increasingly obliged to initiate or at least respond to international initiatives. Consequently, those countries—the United Kingdom and the United States among them—that had been slow to respond to internal, political pressure found themselves pushed into action by external, diplomatic pressure, particularly pressure from France. To explain how France could play this central role, I go back to outline the development of its trademark law and contrast its progress with the problems experienced by parliament and congress.

In conclusion, I try to show that understanding trademarks in an international rather than national tradition, while not on the surface, perhaps, a subject for business history, offers business historians a better vantage point from which to survey the institutional conditions in which modern brands and marketing developed. In closing I caution that a revised history raises some doubts about the generally assumed contribution of trademark law to the "Second Industrial Revolution."

Debate, Litigation, Lobbying

From 1850 to 1880 there was a burst of trademark lawmaking on both sides of the channel and the Atlantic. Of particular relevance to this essay are the French law of 1857; the British laws of 1862, 1875, and 1883; and the U.S. laws of 1870, 1875, 1881, and 1906. In the cases of the United Kingdom and United States, these bursts of lawmaking were preceded by a good deal of debate, litigation, and lobbying. If

we begin by looking at these and reserve for later related diplomatic activity, it is still possible to see that the developing interest in trademarks had a significantly international component. Discussions often began by looking at and pointing to what other countries did, while firms and their representatives sought information on the practices, precedents, and protections for trademarks in potential markets, and often as a result of that information, engaged in litigation or sought legislation.

Emerging interest

In the legal world, trademark discussions formed part of the larger development of comparative commercial law in the mid-century, promoted by bodies such as the Mercantile Law Association. One of the prominent early figures in this field was the Anglo-Italian Leone Levi. His *Commercial Law* (1850–1852) pioneered international comparisons of commercial law on the premise that, in a world of increasingly international trade, studies "confined to the Law of England" were no longer adequate.[8]

A major contemporary resource for understanding the international scene was the remarkable *Annales de la Propriété Industrielle, Artistique et Littéraire* (hereinafter*, Annales*). This was launched by the French jurists Henri-Jules Pataille and Auguste Huguet in 1855. As its subtitle, *Journal de Législation, Doctrine, et Jurisprudence Françaises et Étrangères,* suggests, though a French publication, the *Annales* had an international perspective. Its early issues contain résumés of a remarkable number of foreign laws, treaties, and cases in all areas of intellectual property. International in its outlook, the *Annales* was, in turn, viewed and admired internationally by the early writers on trademarks. William Henry Browne, author one of the earliest and most frequently republished manuals of trademark law in the United States, noted that the "principles involved in [the *Annales'*s] deliberations are applicable to our own controversies." The French, Browne argued, had given the subject of trademarks "as keen and thoughtful a scrutiny as any jurists in the world."[9]

Discussions of trademarks were not, however, confined to lawyers and the legal press. In Britain, the matter was taken up by reforming organizations such as the National Association for the Promotion of Social Science and the Society of Arts, Manufactures, and Commerce. The former sought to gather diverse expertise in order to inform and

8. Levi, *Commercial Law;* ibid., *International Commercial Law*, quotation in vol. 1, vii. For the Mercantile Law Association, see Lobban, "Preparing for Fusion."
9. Browne, *Treatise*, vi and 57.

influence the government, while the latter had as its mission the promotion of industrial arts at home and abroad and took advancing the interests of business in regard to trademark legislation as part of this remit.[10] The Society's meetings provided a forum for a range important voices and international perspectives to address the question of trademarks, and its publication, the *Journal of the Society of Arts,* regularly reported on events and developments related to the topic.

In the United States, Hunt's *Merchants' Magazine & Commercial Review* sought to keep the world of business well informed, and to this end reported assessments of "the legislation of States and Nations" including notices of new trademark law.[11] The publication in the United States of the first English-language work devoted to the topic, Upton's *Treatise on the Law of Trade Marks*, provided further evidence both of the topic's growing importance by 1860 and of the problematic absence of legislation in the Anglo-Saxon countries. Reviewing the actions of the courts in trademark matters, Upton provided primarily a "digest of . . . English and American authorities," but intermittently he felt forced to "depart from this design" to point to areas where the French and other countries were more enlightened or influential.[12]

In these varied venues and different countries, discussion of trademarks became increasingly international and intertwined. In 1859, the Society of Arts, Manufactures, and Commerce played host to a meeting led by Levi and including some of the most influential figures in British trademark debates.[13] As ever, Levi's attitude was comparative, arguing that "something is wanting at Common Law" before going on

10. For the National Association's activities and goals, see Goldman, *Science, Reform, and Politics*.

11. For the magazine's objectives, see "On the Hundredth Anniversary," quotation id., 70.

12. Upton, *Treatise*, 72. Upton began what would become a torrent of trademark treatises on both sides of the Atlantic. Blanc's *Traité de la Contrefaçon* (1838) is probably the first work in these three countries to deal with trademark infringement in any detail. (Blanc, like Cox in the United States, went on both to write books about and to plead in major trademark cases. See Cox, *Manual of Trademarks*.) Upton aside, the early trademark treatises and manuals were often determinedly international. Those who turned their eyes across borders were easily tempted to exaggerate their own country's shortcomings, which may have been to the benefit of better law all round. See, for example, Underdown, who claims that "the law of France, which having for its basis the highly organised law of the Romans . . . is governed throughout by logical principles, expressed with a clearness to which unfortunately our legal diction is a stranger." Underdown, "On the Piracy of Trade Marks," 370. By contrast, the French jurist Maillard de Marafy was less enthusiastic about his own country's law and saw a certain purity in the English tradition. See Maillard de Marafy, *Grand Dictionnaire,* vol. 1, 372.

13. This meeting included Richard Bethell, the future Lord Chancellor; Henry Vallance, future solicitor for the Trade Mark Society; the secretary of the Law Amendment Society; as well as businessmen who had been victims of international trademark fraud.

to suggest even-handedly that, in terms of punishment, France, where acts of infringement "are held to be *délits* or misdemeanours," might offer a better model, but in terms of redress for aliens, a topic of much interest to exporters, "the state of the law in France is not so satisfactory." Here he believed the English courts of equity provided the better example. The *Annales*, which discussed the matter twice within its first volume, agreed.[14]

By this time, some people were beginning to see the regime of marks as inherently international, if not universal. An early commentary in the *Merchant's Magazine* claimed that as a kind of fraud, "simulat[ing] trade-marks . . . is cognizable in the courts of every civilized land."[15] In practice, as many of the discussions noted, matters were not so clear. The French courts repeatedly denied access to British and U.S. firms while, despite Levi's confidence, access to Anglo-Saxon courts of common law and equity was so encumbered that many rights were better guaranteed in theory than in practice. But the internationalists would not be deterred. In its first volume, the *Annales* argued that the time had come for every country to write laws to make names and marks inviolable. Three years later the journal assimilated marks to the "droit de gens," an evocative or perhaps provocative phrase which suggested that theories of natural law extended to individuals regardless of national origin or national law.[16] Though the English might be less willing to make such grand philosophical statements, Sir Richard Bethell, as we shall see an important figure in the early legislative history of British marks, argued in the same meeting at which Levi spoke that the difficulties presented by multiple trademark regimes called for "international principles of commercial law."[17]

Spreading debate

Debate was also conducted in the general press of the day, which engaged in less lofty, but probably more influential commentaries. Bilateral comparisons were a staple of newspapers. In a still recognizable fashion, the press sometimes sought to shame compatriots with the comparatively shabby state of domestic law and practice, and sometimes sought to encourage *les autres*, by extolling the superiority of that law.

14. Levi, "On Trade Marks," 263, 264. For the *Annales* agreement with Levi, see id., 1 (1855), art 22.

15. "Trade-Marks," *Merchants' Magazine* 21, no. 2 (August 1849): 199–200.

16. See *Annales* 1 (1855), art 8; *Annales* 5 (1859), art 397. This idea of *droit des gens* was echoed in 1860 by the Tribunal Commercial of Geneva and reported in *Annales* 6 (1860), art 516.

17. Bethell's remarks come in the discussion following Levi's address and reported in *Journal of the Society of Arts* 7 (1859): 268.

In France, the national papers were comparatively reticent, though this may reflect the controlled and uncommercial character of the dominant French newspaper, *Le Moniteur Universel.* Nevertheless, by the 1860s, *Le Moniteur* increasingly reported accounts of action in French courts and inaction in foreign courts. For its part, the French trade press was far from reticent. As fraudulent marking in alcohol was pervasive, the press of this particularly influential sector was specially interested. Highly chauvinistic, it tended to distinguish problems at home from those in overseas markets. *Le Cognac*, for example, insisted that because "La loi française est sévère . . .[aussi] les contrefaçons sont-elles rares en France" but it went on to insist that counterfeiting was far from rare "sur les marchés étrangers."[18]

The English press was more even handed. The *Times* both damned compatriots with faint comparisons such as "Neither is Birmingham much worse than the other great workshops of the world" and more directly castigated English manufacturers as "inexcusable . . . fraudulent . . . and dishonest." The paper's editorials seemed to specialize in arousing national shame, reminding readers that their actions were under scrutiny and foreign observers were not too impressed with what they saw: "Not long ago a Continental journal of high repute devoted an article to the great commercial frauds of this country." While accepting that, as the debate was rising in Britain, "we are acquiring an ill name abroad," the *Times* probably exasperated those who were pushing for legislation by proclaiming it was "not the law, [but] commercial morality that is wanting."[19]

Like the *Times*, Arthur Ryland, a Birmingham politician who helped to draft early trademark bills for parliament, was quite clear that the English were not just victims, but also perpetrators of international marking fraud: "England produces American edge-tools and American shirtings, Farina's eau-de-Cologne, and French ribbons and silks." But where the *Times* proposed a moral reawakening, Ryland

18. "Les Contrefacteurs," *Le Cognac* 5, no. 3 (1865): 2. This judgment may in part be a matter of motes and beams. Cognac producers themselves often found it hard to agree on what counted as fraud and what as justifiable innovation. For the particular problems of wine and the question of adulteration versus innovation in France, see Stanziani, "Construction," and Stanziani, "Negotiating Innovation." By 1864, *Le Moniteur Vinicole*, which had primarily focused on manipulation of wine (by dilution, etc.) was increasingly focusing the international aspects of trademark infringement, reporting, for example, Bass's prosecution of printers in Paris (March 5, 1864, 75) and the extensive fabrication of sherry and champagne in Hamburg (October 14, 1865, 313). It picked up the latter story from the English *Wine Trade Reporter*. Conversely, the *Times* began to pick up stories on trademark infringement from *Le Moniteur Vinicole* (see *Times,* August 26, 1864, 4). This echo effect was itself evidence of the way in which countries kept an eye on each other in trademark matters.

19. *Times* July 1, 1858, 9; ibid., July 12, 1858,11; ibid., May 26, 1860, 9; ibid., December 20, 1859, 6.

put forth a range of practical solutions, from "a convention with France ... [to] a Court of Registration for Marks in England ... [or] a law making it a misdemeanour or a felony." In offering the gamut from diplomacy through bureaucratic management to statutory intervention, Ryland encompassed the strategies that Britain would approach piecemeal but ultimately engage collectively.[20]

In the United States, newspapers in major commercial centers—New York and Chicago in particular—also followed trademark litigation and legislation in other countries, keeping a particular eye, as we shall see, on the English courts. In general, however, public discussion in the United States seems to have arisen more slowly than on the other side of the Atlantic, as, indeed, did national legislation. There are several reasons for this delay. In the mid-century, as interest rose elsewhere, the United States was occupied with internal problems—in particular the looming Civil War, which cast its shadow even over trademarks.[21] Furthermore, from copyrights to patents and on to trademarks, the country was isolationist, becoming in many eyes something of a rogue state. Finally, of course, international trade developed later in the United States than it did in either France or the United Kingdom. Nonetheless, foreshadowing rising interest, the *New York Times* in 1851 drew particular attention to the growing number of trademark cases being reported in the annual *English Reports in Law and Equity*.[22]

Court reporting

While the trademark question intermittently rose into the general sections of the newspapers, it was a regular preoccupation of the court reports. Among the most widely discussed cases were those involving foreign nationals, either as aggressor or aggrieved. The trade press of the particular sector involved would follow such cases closely while general newspapers reported major cases, particularly of scurrilous foreign behavior, on occasions following litigation over several years.

In Britain, one of the first celebrated international cases was *Montebello v. Gemmer* (1849), which involved false labeling of champagne, a perennial problem. (Montebello was still alluding to its victory in advertisements in the English press 15 years later.[23]) Starting a little earlier and running a little later, one of the most reported groups of cases in this period involved the Cologne firm Farina, which from

20. Ryland, "Fraudulent Imitation," 229–30.

21. Historically, the industrial north was generally pro-trademark, whereas the agrarian south was generally anti.

22. *New York Times*, April 14, 1854, 3.

23. For reporting on *Montebello v. Gemmer*, see *Times*, May 9, 1849, 7; for Montebello advertisements, see, for example, *Wine Trade Review,* February 8, 1864, 6.

1846 fought aggressively in the English courts to defend its "eau de Cologne" brand. The cases took on extra significance after 1851. That was the year of the Great Exhibition, and potential exhibitors at such events worried a good deal whether the host country would protect their marks against local infringers. Moreover, that same year, Prussia passed trademark law granting foreign citizens access to Prussian courts if Prussian citizens were granted reciprocal rights, guaranteed by law or by treaty, in the country from which the plaintiff came. This kind of conditional arrangement, an outgrowth of the Napoleonic Code, probably first appeared in relation to trademarks in Bavaria in 1840. And as we shall see, it became a key mechanism in spreading trademark law.[24]

Because Prussian law was not quite clear on what laws would satisfy its condition of reciprocity, Farina's cases were widely followed, particularly among British manufacturers, where concern about German products with forged British marks was high.[25] One of the Farina cases, *Farina v. Silverlock*, which wound through Chancery from 1855, became a kind of test case.[26] While Levi argued that the case showed that Prussian firms indeed had standing, foreigners doubted whether the tortuous process involved (the case ran until 1858) really met the standard set for reciprocity in Prussian law.[27]

As *Montebello* primarily interested French and British and *Farina* Prussians and British, neither drew much interest in the United States.

24. For the early Farina cases, see French, *Equity Reports*, 887; for Prussian law and the interest it aroused, see Ryland, "Fraudulent Imitations," 232, Levi, *International Commercial Law*, 616 and Browne, *Treatise*, 572; for Bavaria, see Browne, *Treatise*, 563; for France, see below.

25. Hamburg in particular was known as a source of forgeries, with wine traders joking mordantly that it produced more port than Portugal and more sherry than Jerez. *Ridley's Wine & Spirit Circular* and the *Wine Trade Review* complained about this throughout the 1850s. In 1856, *Le Moniteur Vinicole* noted a seizure of fake Montebello champagne at Le Havre and probably from Hamburg. See id., March 31, 1856, 1. The Germans were also accused of putting forged British marks on low quality goods to deprecate the value of the brand. See, for example, *Report of the Select Committee*, para 272ff.

26. Levi, "On Trade Marks," 265. At the Great Exhibition of 1851, some four Farinas claimed to be the original owner of the mark. (See Nicholls, "Trade Marks."). Consequently, one of the difficulties for the English court involved deciding, in the absence of registration, whether the plaintiff really had a right in the mark, but, in the absence of registration, this was a standard conundrum for the English courts.

27. During the 1850s, a series of decisions threw doubt upon the rights of alien authors to have their works protected under English copyright law. The inconsistent behavior of the English courts did not support the idea that they were inherently open to aliens. As copyright was a matter of statute but trademarks at this time matters of common law or equity, the two issues were in fact distinct, but the distinction was not readily made in the eyes of the public. See Seville, *Internationalisation*.

European trademark decisions, however, were intermittently brought to United States' attention. In 1854, for example, in the case of *Compere v. Bajou,* the French imperial court ordered a glove maker from Grenoble, who had imitated a Parisian mark on gloves sold in New York, to publish the judgment against him "in two French newspapers and two American newspapers." The *New York Times* published the court's decision in full, as did the *New York City*, thus raising the profile of this kind of multinational problem.[28]

Americans were not, as this case might suggest, merely injured third parties. In the *Journal of the Society of Arts*, a letter from Paul Simmonds, noted that fraudulent use of major foreign marks in the United States was common: "We have counterfeit Heidseck's champagne, Piesse and Lubin's extracts, Rodgers' cutlery, Cognac brandy, Worcestershire sauce."[29] Moreover, as the Farina cases wound down in London, a series of cases winding up interested the United States more directly. These involved the Collins Company, a steel maker from Connecticut, whose cutlery mark had been widely imitated by Birmingham manufacturers. Four Collins cases ran in Chancery from 1857 to 1859 and helped establish the right of U.S. citizens to appear in English courts—and, many thought, the rights of foreigners in general.[30] While press discussion of these cases included both court reports and editorials, correspondence columns drew the participation of other steel manufacturers, of defendants in the cases, and of Samuel Collins, the founder of the firm, who used the columns of the *Times* to complain of partisan reporting.[31]

In 1860, as Collins' cases receded, a new group of international cases brought further attention to the United States. French courts ordered the seizure at Le Havre of sparkling wine en route to New York illegitimately marked at the behest of the importer with the

28. *New York Times,* February 5, 1855, 2; *New York City,* February 1, 1855, 2. The case was sufficiently important that Upton, though in general focused on Anglo-American cases, reported both the lower court's and the appeal court's decision, which was handed down six years later. See Upton, *Treatise*, 73–79.

29. See the letter from Simmonds published along with Levi's address, *Journal of the Society of Arts,* 7 (1859), 272; spelling as in original.

30. As a consequence, Upton believed that the UK courts would even allow enemy aliens to sue for trademark infringement before them. Upton, *Treatise*, 22.

31. For discussions see, *Times* July 1, 1858, 9, and January 27, 1859, 8; for interventions by Collins, see *New York Times*, July 24, 1858, 3. Collins's letter refers to "several articles" that have been "copied into American papers," though I have not found any examples. In England, not only did Collins write to the *Times* about his case, (id., August 7, 1858, 11), but so did the defendant accused of imitating *Collins*'s mark, Charles Reeves (id., July 5, 1858, 5; July 17, 5; and July 26, 6). Reeves also took part in a meeting sponsored by the Birmingham Chamber of Commerce on the subject, see "A Meeting of the Birmingham Chamber of Commerce."

labels of the French champagne firm, Mumm & Co.[32] The same year, the New York courts deliberated over the infringement of a famous schnapps label, and in *Colman v. Bleasby* the British mustard company prosecuted a New York grocer for infringing its mark. The last case presaged a wave of Colman prosecutions in U.S. courts that eventually raised the condemnation of the "Importers and Grocers Board," which thought U.S. law gave the foreign company too much latitude in the protection of its mark.[33]

In 1864, a letter in the *New York Times* argued that U.S. manufacturing skills had now reached such a level that it was beneath them to imitate European marks.[34] But unsurprisingly infringements and debate continued. In 1867, the *New York Times* reported a case involving Heidsieck and Clicquot, two particularly litigious champagne companies. Perhaps encouraged by California's new trademark law and pioneering system of registration, these firms won injunctions against imitators of their brands.[35] In 1873, in the wake of the new federal law, but as complaints were mounting that its penalties were inadequate, Browne reported in terms reminiscent of Simmonds' comments 15 years earlier, "Heidseick [sic] champagne, ... Lubin's extracts, ... Rodgers' cutlery, Worcestershire sauce, Burton ales ... are imitated, falsely marked and sold."[36]

Lobbying

Newspaper reports of trademark prosecutions raised awareness of international trademark fraud. To the extent that outcomes were seen as unsatisfactory—the *Times*, for example, excoriated Vice-Chancellor Stuart for his reasoning in one of the Collins cases—well-publicized litigation also raised awareness of the inadequacies of national legislation. So doing, they put indirect pressure on governments while

32. This was the case of *Mumm v. Staempfli*, before the Tribune Correctionel du Havre (1860), reported in *Annales* 6 (1860), art 596. Jules Mumm & Co. published the verdict at Staempfli's cost in an advertisement in the *New York Times*, March 3, 1860, 3.

33. For the schnapps case, *Wolfe v. Goulard*, see the editorial of the *Sunday Courier*, picked up by the *New York Times*, February 23, 1860, 1, and April 24, 1860, 8. For *Colman et al v. Bleasby* see *New York Times*, June 18, 1860, 2. For the cumulative effect of the Colman cases, see "Mustard Pots," *New York Times*, February 1,1872, 2 and the letter from J. & J. Colman in the *Times*, February 11, 1878, 7.

34. "Honesty in Trade" *New York Times*, September 11, 1864, 5. Similar arguments were being made about literature and copyright.

35. *New York Times*, August 13, 1867, 1. The California law was passed in 1863, though under an earlier statute governing "container brands," some marks had been registered since 1861 ("Trademark Registrations," California State Archives).

36. Browne, *Treatise*, 49.

providing interested parties with ammunition for more-direct lobbying efforts. Rodgers became to English steel what Collins was to U.S. steel: a mark as widely known for being imitated as it was for its quality. The celebrated case of *Rodgers v Nowill,* which wandered through Chancery courts from 1846 to 1853 costing more than £2,200 but earning just £2 in damages, became particularly notorious. While this was a purely British case, in 1858, a New York company Jellinghaus & Co was forced to admit being "unable to furnish any substantial defence" for infringing Rodgers' mark and to publish the judgment against it.

Almost a celebrity victim, George Rodgers was called before a parliamentary select committee on trademarks in 1862. Here he testified that his mark had been imitated in France, in the United States, in Germany in particular, and beyond. But by this time Rogers was just one more in a lobby for trademark reform that had been growing for some time.[37] In 1846, as *Rodgers v Nowill* was opening in Chancery, Charles and John Chubb, the lock makers, had presented a petition to the House of Lords protesting against spurious goods bearing their mark, which were being "exported to foreign countries." In 1848, a society had formed to lobby against fraudulent imitations of manufacturers' names. A decade later, cutlers had sent a deputation to London calling for international action to protect their marks. The same year (1858), the Birmingham Chamber of Commerce had held a meeting on the improper use of trademarks. This condemned the counterfeiting of Collins' mark in Birmingham, but also deplored the number of "foreign made goods coming into this country bearing English names."[38]

As the lobby against international double standards grew, they found increasingly receptive listeners. Among them was Sir Richard Bethell, a member of the crusading "Law Amendment Society," which had long been committed to shaking up the Chancery courts, a primary resort of trademark plaintiffs.[39] Bethell would go on to become Lord Chancellor after two sessions as Attorney General and in those roles play an important part in trademark legislation. To the satisfaction of the lobbyists, his opinions were formed by the discussions

37. For criticism of Stuart, see *Times*, July 1, 1858, 9. For *Rodgers v. Nowill*, see Kerly, *Law of Trade Mark*. For *Rodgers v. Jellinghaus*, see *New York Times*, July 24, 1858, 5. For Rodgers's testimony, see *Report from the Select Committee,* paras 440–584.

38. For the Chubbs, see *Times*, March 24, 1846, 1. For the 1848 society, see Underdown, "On the Piracy of Trade Marks"; Higgins and Tweedale, "Asset or Liability"; "A Meeting of the Birmingham Chamber of Commerce," 596.

39. Levi, "On Trade Marks." For Bethell's reforming character, see Lobban, "Preparing for Fusion.

described above. When Levi presented his comparative analysis of the state of trademark law in different countries to the Society of Arts, Manufactures & Commerce, Bethell had presided over the meeting. He had, moreover, established his credentials in *Monteblello v. Gemmer*. In the debate that followed Levi's presentation, it had been clear that everyone including Bethell felt that, compared with other countries, the British approach to marks was inadequate, endangering British manufacturers at home and abroad. Something, the consensus was, had to be done—but that had been the consensus for some time. In the end, influential though he was, it took more than friends like Bethell to get the government moving.

Irresistible Pressure

In applying pressure, nothing was as effective as the sort of conditional access to the courts that had been written into Bavarian, Prussian, Russian, and French trademark law. In Prussia, the law simply stated that reciprocity had to be provided by law or treaty, leaving it unclear how to decide whether foreign countries met the reciprocity condition—hence the importance of cases like *Farina v. Silverlock*. The French law of 1857, however, made it clear that countries required *conventions diplomatiques* to ensure reciprocity.[40] Without such diplomatic agreements between governments, individual importers would have no protection. And in writing their agreements, the French, as we shall see, began to require some kind of legislation.

By the middle of the nineteenth century, bilateral trade agreements over intellectual property were already well established. Denmark had entered bilateral treaties over copyright soon after its law of 1741. Almost a century later, the German states, led by Prussia, began a similar process among themselves. France had begun a decade of copyright treaty-making in 1843.[41] It was thus well prepared and positioned to

40. *Collection Complète des Lois*, 57, 184–96, art 6. The first chapter of the Napoleonic civil code had two clauses concerning the civil rights of foreigners. Article 13 guaranteed equal protection to anyone domiciled in France, whether French or not; article 11 made the same guarantee to anyone, whether domiciled or not, if they came from a country that, by treaty, guaranteed civil rights to French citizens.

41. For Denmark, see Ricketson and Ginsberg, *International Copyright*, vol. I, 1.27 n. 173; for Prussia, id., 1.29, for France, id, 1.30 and *Annales* 1 (1855), art. 470. For the French treaties, see Boiteau, *Traités de Commerce*. France abandoned conditionality in copyright about the time it was taking the question up with trademarks. See Branders Matthews, "The Evolution of Copyright."

enter international negotiations concerning reciprocal rights for trademark holders. Its first agreement, with Russia, was written in 1857, the year France revised its trademark law to include reciprocity for those with whom it had treaties.[42] Within a decade France had a dozen more in place, starting with its great trading rival Great Britain. In the following decade, it took on the Americas, beginning with the United States in 1869.[43]

In stark contrast to France, the United States was a reluctant treaty maker in this area. It resisted international copyright agreements for most of the century, it resisted international patent agreements, and it had up to the late 1860s resisted federal trademark law, let alone trademark treaties.[44] Great Britain fell between the French readiness to treat and the United States' reluctance. Britain had begun to negotiate copyright treaties following its law of 1844. It began with Prussia in 1846 and included France in 1851. (It also pursued bilateral patent agreements after 1852.) But the common-law tradition in general disdained the sorts of conditional agreements that worked so powerfully for the French.[45] Moreover, for Britain to move on from copyright to trademark treaties was not quite as easy as for France. Whereas copyright treaties were usually self-contained, diplomacy concerning trademarks was likely to involve bilateral trade negotiations, and since 1846, Britain's commitment to free trade militated against commercial treaties.[46] Nevertheless, in January 1859, Great Britain executed a treaty of commerce and navigation with Russia, which it excused as part of the formal mopping up of the Crimean War. In this treaty, article XX committed the queen to recommend that parliament "adopt such measures as may be required to" protect

42. The Russian treaty, which was signed into law on June 2/14, 1857, may seem to antedate the French law, which passed on June 27, but the appearance is deceptive. Not only was law of 1857 presented to the French parliament in April of 1856, well before the treaty, but also it was based on a law that had originally been presented in 1845 (see below).

43. The other countries that had treaties with France by the end of the 1860s were Austria, Belgium, Hanseatic States, Italy, Mecklenburg, the Netherlands, Sweden and Norway, Switzerland, Portugal and Prussia. Boiteau, *Traités de Commerce*. The Ministry of Foreign Affairs prepared a summary for the Ministry of Agriculture (see "Marques de Fabrique," Archives Nationales f/12/6413.) and I have used this to supplement Boiteau's list.

44. Barnes, *Authors, Publishers, and Politicians*; St. Clair, *Reading Nation*; Seville, *Internatinalisation*.

45. Common-law disdain is evident in Levi's work. See also, for example, Ilbert, "Centenary."

46. For copyright, see *British and Foreign State Papers, passim*; for patents, see Rines, "Some areas of basic difference"; for free-trade attitude to treaties, see Iliasu, "Cobden-Chevalier."

Russian marks in Britain.[47] Then in January 1860, over the protests of some free traders, Britain signed a commercial treaty with France—the Cobden–Chevalier treaty. Here article XII guaranteed the subjects of both countries "in the dominions of the other, the same protection as native subjects."[48]

As the Russian treaty made explicit and the French treaty implied, the British parliament was expected to act. It did, of a sort, contemplating full-blown trademark registration before, as we shall see, retreating to the Merchandize Marks Act of 1862. The timing was not mere coincidence. In the select committee set up to address the proposed legislation, William Smith, secretary of the Sheffield Chamber of Commerce, who had helped prepare one of the bills before the committee, insisted that the country was "not in position to comply with the twelfth article of the [French] treaty" unless it enacted suitable law, while Thomas Milner Gibson, president of the Board of Trade and a member of the committee, was examined solely to make the point that the treaty with Russia "required us to alter our law . . . for the protection of trademarks."[49]

A decade later, in January 1868, the United States and Russia signed a single additional article to their commercial treaty of 1832. Modeled on clause XX of the Russian treaty with France, this specifically guaranteed protection for each other's marks by supporting suits for damages against infringers.[50] To this end, the two countries agreed that companies from one country could register their marks in the other. In July of the same year, the United States agreed to modify its treaty of 1858 with Belgium to the same effect, guaranteeing protection for each other's marks and providing registration. And in April 1869, the United States and France entered into a trademark convention, allowing each other's citizens to pursue damages, but making such actions conditional on the registration of marks in the relevant country.[51] As the United States did not at that time have a federal system of trademark protection or registration, the treaty demanded a new law. This was passed in 1870. It is difficult to look at these sequences of events and conclude that that the Anglo-Saxon countries in general or the United States in particular took the lead in modern trademark law.

47. *British and Foreign State Papers* 49 (1858–1859), 49–65, quotation at 64. For Anglo-Russian relations after Crimea, see Marriott, *Anglo-Russian Relations*.

48. *British and Foreign State Papers* 50 (1859–60), 13–25, quotation at 23. Britain went on to treat with Austria, Belgium, Columbia, Germany, Italy, and Prussia. See *British and Foreign State Papers, passim*.

49. *Report from the Select Committee on Trademarks,* 1862, quotations at paras 681 (Smith) and 3119 (Gibson). For Smith's role in drafting the bill, see Poland, *Trade Mark*, 9.

50. See Rosen, "In Search of the Trade-Mark Cases."

51. *Treaties, Conventions, International Acts*, 1910, vol. 1, 86–87 (Belgium), 534–35 (France), and vol. 2, 1524–25 (Russia).

First Mover?

As treaties with both France and Russia prompted lawmaking in Great Britain and the United States, it remains to be decided whether it was France or Russia that took the lead, or whether both were equally important.[52] As I have indicated and will now try to defend, I believe France was by a significant degree the more important of the two.

The case against Russia

The Franco-Russian treaty of 1857 was, like the later Anglo-Russian treaty, part of the process of winding up the Crimean War. The Russians were eager to open their trade to the west, and France, which had made significant investments in Russia before the war, moved quickly to draw any profits from Russia's postwar expansion as far as possible into French hands and away from British ones.[53] In terms of trade, Russia negotiated from a position of weakness, France from a position of strength. With regard to trademarks, the two countries were similarly distinct. Russia had a reputation as a safe haven both for native counterfeiters sending goods overseas and for foreign (particularly German) counterfeiters selling bogus French goods in Russia. Russian civil code provided some protection for marks, but only for Russian manufactured goods. France, by contrast, had a reputation for taking infringement seriously, both at home and abroad, and its civil code offered the protection of French courts to anyone from a country that had entered into a suitable treaty with France. The Russian treaty seems to have been France's first attempt to write such a treaty explicitly with regard to trademarks.[54]

In keeping with their different reputations, both direct and indirect evidence suggest that the trademark clause was also of greater interest to the French, whose firms complained of the lack of protection in Russia. Leading up to the commercial treaty, the Ministry of Agriculture, Commerce, and Public Works urged the Foreign Ministry to address the question of marks in negotiations. The former ministry was in turn under pressure from the wine trade, which had recently been alarmed by Russia's casual attitude to marks. Early in 1857,

52. Although Belgium also had treaties with Britain and the United States, as it did not sign a trademark agreement with Britain until 1862, I am excluding it from this chain of causality. Belgian law on trademarks was, furthermore, based closely on French law.

53. For French interests in Russia, particularly those connected to the Grande Société des Chemins de Fer Russes, see Cameron, *France and the Economic Development of Europe*, 276–80.

54. For Russia's trademark law, see Browne, *Treatise,* 1873, 572–73.

Russian customs in Riga had seized a consignment of champagne with false Veuve Clicquot markings. As was its right in cases of seizure, the customs intended to sell the consignment at a public auction. The sale would not doubt punish the counterfeiters and reward the customs. But, as the infringing labels were still on the consignment, the firm infringed upon would lose as much of its reputation as if the goods had not been seized at all. Madame Clicquot herself wrote to the minister to have the sale stopped and the wine destroyed, or at a minimum to have the marks removed. French firms and chambers of commerce took the opportunity to press the Ministry of Agriculture, and through it, the Foreign Ministry to raise the question of marks during the trade negotiations expected that spring. In fact, exchanges between the two ministries show, the Ministry of Agriculture had been talking along these lines with the Foreign Ministry since at least 1855.[55]

For their part, Russian firms showed little interest in trademark reciprocity. The first three countries to sign trademark agreements with France were Russia, the United Kingdom, and Belgium. As soon as French registers were opened to foreign signatories, UK names flooded the register. Of the first one thousand foreign marks registered in the next 5 years, only fifty-six are not British; the majority of the remainder are Belgian. None is Russian.[56] Similarly, when the U.S. register opened in 1870, the first foreign firms to register are British, Canadian, French, and Prussian. No Russian firms apply in the first three years.[57] And finally when the British register opens in 1876, of the almost five thousand applications made in the first year, the dominant foreign country of origin is France, followed at a significant distance by Germany and the United States. No Russian firms apply.[58] In all, the Russian government and Russian firms seem to have shrugged their shoulders at these agreements, taking neither registration nor litigation very seriously. As late as 1890, the French were still complaining about the inadequacy of Russian protection, noting that Russian indifference was evident in the small number of legal cases pursued by the Russian government, despite widespread falsification of marks.[59]

55. See "Contrefaçons des Vins Français et des Marques de Fabriques," Archives Nationales f/12/2682,

56. "Dépôt des Marques," vol. 15, 16, Archives de Paris, D18U3. The 1,000th registration was reached in 1865. Of the 56 marks not claimed by British firms, 19 are from Germany, and 5 from Holland. These were registered under treaties with Prussia (1862) and Holland (1865). The remaining 33 are Belgian, allowed by the treaty of 1861.

57. *Annual Report of the Commissioner of Patents*, 1871–1874.

58. *Trade Marks Journal*, 1877.

59. See the entry on Russia in Maillard de Marafy, *Grand Dictionnaire*, vol. 6, 376–407, especially 385.

Finally, British exchanges during negotiations over their treaty with Russia support the case against the Russians. These suggest that the British, not the Russians, took the lead while also showing that the British, for their part, were evidently following the lead of France. In contemplating a treaty, the Board of Trade wrote to the Foreign Office:

> The French Treaty with Russia stipulates in Art. 22 for the mutual respect and protection of the Trade Marks of Manufacturers. As the fabrication of these has been a subject of frequent complaint, the present opportunity may be favorable for effecting its prevention so far as concerns Russia.

In its response, the Foreign Office noted that "two articles on the subject of manufacturers marks and of copyright, founded upon articles in the Treaty between Russia and France, have been added to the draft." It would seem that these articles were not of Russia's seeking, nor of Britain's innovation. Rather, they show France's influence in treaty making extend beyond those treaties in which it was directly a participant.[60]

The case for France

The idea that France was the principal country prompting the Anglo-Saxon countries to adopt trademark legislation runs counter not only to arguments made by economic, business, and legal historians, but also to conventional accounts of the Anglo-French Cobden–Chevalier treaty of 1860. Iliasu, for example, implies that it was the British member of parliament, Richard Cobden, who took the lead, teaching the French what free trade was all about.[61] This assumption no doubt reflects the understandable emphasis on free trade and not on trademarks in most analyses of the treaty. Yet even there, the assumption has more ideological than empirical justification. Britain was not the free-trade paragon it thought itself, nor was France as incapable of leading in this area as such an assumption would suggest.[62]

In fact, both Cowley, the British minister in Paris, and Cobden, who was given plenipotentiary authority to negotiate the treaty, acknowledged that France had taken the lead on the treaty. Moreover,

60. "FO Correspondence, Russia", National Archives FO 65/529; quotations from Board of Trade to Foreign Office, April 15, 1858, and Foreign Office to Board of Trade, May 18, 1858.
61. Iliasu, "Cobden-Chevalier."
62. Nye, "The Myth of Free-Trade Britain and Fortress France."

in the matter of trademarks specifically, the papers of Cowley and Cobden reveal no interest in the topic whatsoever.[63] This is not the case with Michel Chevalier. The first known draft of the treaty appears to be annotated in Chevalier's hand, well before Cobden arrived in France.[64] The draft includes a rough outline of the trademark clause, indicating that here as well as in the treaty more generally, the French were already at work. The draft article itself provides further internal evidence that the trademark clause was a French initiative. It begins by invoking the principle of reciprocity and, in pursuit of this goal, concludes:

> Les dépots nécessaires pour la contestation du droit de propriété des marques et dessins de fabrique seront faits à Paris, au Greffe du Tribunal de Commerce de la Seine et à Londres, du

Here, the writing breaks off, leaving room for the British to say where in London registration would take place. Chevalier is clearly following the standard French approach, used earlier with Russia and later with, among others, the United States. Britain, however, had no mechanism for registration, nor would it develop a taste for one for another 16 years. Its distaste becomes evident in succeeding drafts. The next draft has, alongside the same putative article 8, a long pencil line and the note "red^{on} anglaise," suggesting that the British negotiators had objected to this wording and would be submitting their own revision or *rédaction*. By the subsequent draft the matter of registration has been omitted entirely. In all, the drafts suggest that the French put forward the trademark proposal; got the British to accept an agreement, despite inhibitions, on reciprocity; tried to get one on registration, but could not push that far. Nonetheless, with this agreement and suitable law, the French accepted that the British met the reciprocal conditions of the French law. In acknowledgement, France opened its registration process to firms from countries with treaties in 1860. For their part, and in accordance with both French and Russian agreements, the British turned to parliament.

63. Dunham is quite clear that Chevalier "was the principal author of the treaty . . . he proposed the negotiation." Dunham, "Chevalier's Plan," 75. For Cowley's comments on the treaty, see National Archives, FO 27/1286; for Cobden's, see BL Add Ms 43,675, A-C.

64. For the draft, see "Traiter de commerce de l'angleterre," Archives Nationales, f/12/6454 & 6455. For the idenfification of Chevalier's hand, see Dunham, "Chevalier's Plan."

Comparative Law

The sequence of events—French trademark law in 1857 with its conditional demand for reciprocity, an Anglo-French treaty in 1860 guaranteeing reciprocity, a British law in 1862 attempting to meet treaty obligations, French-American treaty in 1869 obliging legislation, a U.S. federal law in 1870 providing registration—argues strongly that the French led rather than followed. A look at the trademark laws involved helps see why.

French law: destin séculaire[65]

Noting the importance of French law does not entail ideas of national superiority, as sometimes feels the case in claims for Anglo-Saxon law.[66] By the mid-century, when Great Britain and United States were just beginning the process of laying down the law, France had been at it for more than 60 years. Their law wasn't perfect, but it was well practiced.

We can understand why the French law came first by considering the different histories of the countries. The contrastingly late attention paid to trademark law by the Anglo-Saxon tradition is usually traced via the case of *Blanchard v. Hill* (1742), which denied the right to monopolize a mark, to the Statute of Monopolies a century earlier. It might as well be traced to the decline of most craft and merchant guilds in Britain and its colonies by the eighteenth century, as these were the bodies that traditionally patrolled early marking.[67] Where English guilds remained strong, among cutlers and cloth makers for example, marking remained strong.[68] But elsewhere, where there was no constituency to protect the right to mark, antimonopolistic statutes, judgments, and sentiment prevailed. In France, by contrast, strong and far-reaching guild structures survived up to the revolution of 1789. Consequently, where the English had to look across a gap of

65. The description "destin séculaire" for the law of 1857 comes from Beltran, et al, *Des Brevets et des Marques*, 91.

66. See, for example, Khan, *Democratization of Invention,* and Stone, "The Common Law."

67. Schechter traces the history of trademarks to the English guilds, in particular cutlers and cloth makers. The decline of the guilds is contested historical turf, but it is generally agreed that by at least the middle of the eighteenth century, guild-like structures had lost most of their former powers in England. See Epstein, "Craft Guilds"; Snell, *Annals of the Labouring Poor*; Richardson, "A Tale of Two Theories."

68. For an account of the continuity of marks within the cutlery and cloth trades, see Higgins and Tweedale, "Asset or Liability" (for the cutlers) and "Trade Marks Question" (for the cloth trade).

more than a century to find reliable antecedents and overcome prejudice, the French had an almost continuous tradition, with only a brief interruption, to summon.

That interruption, moreover, only provided more reason for protecting marks. The abolition of French guilds in 1791 was followed by a surge in counterfeiting, and with marks as with copyrights and patents, the government was pressured to reimpose controls quickly. Chaos led to order.[69] Marks for plate and jewelry and for cutlers were quickly brought back under the law in year IV (1794–1795). Then in Year XI (1802–1803) a law against the counterfeiting of goods and marks of manufacturers passed. While this law primarily addresses what the Anglo-Saxon tradition would call "passing off," it also attacks goods marked "façon de . . .," which comes closer to trademark infringement. Significantly, the law also made prior registration of a mark with the local Tribunal de Commerce a precondition for prosecution. Modified over the intervening years, the law was reinforced in 1824 specifically to protect the names of manufacturers, businesses, and places of manufacture against imitation and appropriation. The law of 1824 treated imitation and counterfeiting more or less equally.[70]

The French legislature took up revisions to the law of 1824 in the 1840s, and a new law was brought forth in 1845 only to be derailed by the revolution of 1848.[71] It was a version of this proposal that passed on June 23, 1857. Thus the new law had a heritage stretching back to the *ancien régime,* prior law in place for half a century, and revisions under contemplation for more than a decade. The law of 1857 unequivocally asserted a property right in marks. (The first part is called "Du droit de propriété des marques"). And, in pursuit of this goal, it reinforced the system of registration. For the first time a nationwide register of the regional registrations was compiled annually in Paris.[72]

69. For the progression from order to chaos and back again see Labbé, *Caractères Distinctifs*, 19, Bédarride, *Commentaire*, vol. 2, 711. Hesse*, Publishing and Cultural Politics* discusses similar problems with French copyrights.

70. For year XI, see *Bulletin des Lois* 3 8 (year XII, i.e. 1804–1805): 129–33; under a law of February 20, 1810, registration was transferred to Councils of Prud'hommes, which had been organized nationally the year before. For 1824,.id., 7, no. 19 (1825): 65–66.

71. For the 1845 bill, see *Projet de Loi*, which notes that reciprocity was under consideration from the start. For the long journey of the law, see Labbé, *Caractères Distinctifs*. For the law itself see *Collection Complète* 57 (1857): 185–96.

72. The administrative rules appeared in "Décret Impérial Portant Réglement d'Administration Publique pour l'Exécution de la Loi du 23 Juin 1857 sur les Marque de Fabrique et de Commerce", published July 26, 1858. See *Collection Complète* 58 (1858): 307–9.

Having defined a mark and laid out the implications of registration in the first section, the law of 1857 turns immediately to the matter of foreigners. In accordance with the Napoleonic code, but now made explicit in the case of trademarks, foreigners with an establishment in France are given unequivocal rights; those without, conditional rights. Aliens have access to French courts "if in the countries where they are situated diplomatic conventions have established reciprocity for French marks."[73] Like Levi, the influential *Grand Dictionnaire International de la Propriété Industrielle* deplored this conditional clause for its lack of clarity.[74] But the law aimed perhaps less at clarity in French law than clarity in France's trading partners. Countries that sought French goods, French markets, and French protection for their citizens' marks had to negotiate and usually to legislate. After 1857, with well-honed law in place, the French could turn attention from legislation to diplomacy. As we have seen, for the next 15 years, they did.[75]

Rédaction anglaise

While the British may have been influenced and prompted by the French, they certainly did not take their law any more than their treaty under dictation. In general they seem to have tried to meet their obligations by doing little more than absolutely necessary, and as we shall see, some particularly influential figures felt that registration, a keystone in the French law, was far more than necessary.

It would, nonetheless, be misleading to suggest that the history of English statutory law on marks begins in 1860. There had been at least a couple of earlier attempts: one in 1851, in response to the challenges presented by the Great Exhibition, another at some time around 1859.[76] Of course, neither of these attempts provided the legislative or practical experience the French could draw on when they finally passed the law of 1857. So, when the English legislative process began in earnest, following the Cobden–Chevalier treaty, parliament seems to have been quite uncertain about what such a law entailed. In 1861,

73. The English version of the text comes from Browne, *Treatise,* which is not the most elegant; quotation at 570.

74. See Maillard de Marafy, *Grand Dictionnaire*, articles on conventions (1: 347–50) and on France (4: 188–215).

75. Administrative changes were made in 1873, 1890, and 1891. The law of November 26, 1873, which was primarily administrative, removed the treaty-only provision, reverting to the Prussian condition that either law or treaty could meet the French standards of reciprocity. See *Collection Complète*, 73 (1873): 369–70, especially art 9.

76. For events in 1851, see Nicholls, "Trade Marks," and for the bill proposed in 1859, see, Ryland, "Fraudulent Imitation."

Lord Chancellor Campbell, at the behest of Milner Gibson and the Board of Trade, introduced a bill "to amend the law relating to fraudulent marking of merchandise."[77] M. T. Bass, head of the brewery and member of parliament, promoted the bill and Joseph Travers Smith, a solicitor who had, among other things, represented the Bass and Guinness breweries in trademark cases, helped to draft it. The bill, which included a provision for registration, died in the Lords.

The following year, a series of bills came forward. These were distinguished from one another by the critical question of registration. Most countries writing trademark law around this time included registration of some sort. France, as we have seen, had had some kind of registration since the beginning of the century, and when parliament took up the issue, registration was also available in Austria, Bavaria, Belgium, Hanover, the Netherlands, Portugal, Prussia, Russia, Sardinia, Saxony, Spain, Sweden, Norway, and Württemberg.[78]

Unsurprisingly, then, when two members for Sheffield, John Roebuck and George Hadfield, introduced a "trade marks" bill, it included a provision for registration. The bill indirectly acknowledge French influence by including in its title both the hint of property rights and a direct allusion to its international character: "to secure the proprietors of trademarks in certain cases, the benefit of international protection."[79] This approach was countered, however, by another bill from Milner Gibson, who with the Attorney General (William Atherton) proposed a "merchandize marks" bill intended to meet treaty obligations but exclude registration. The contending bills were passed off to the select committee of 1862, with Roebuck in the chair and Atherton, Milner Gibson, and Francis Goldsmid, QC, among the most active participants.

From the first witness (Robert Jackson, vice-president of Sheffield Chamber of Commerce, and partner of Spear & Jackson) the world of commerce pleaded for registration. The lawyers on the committee and their prize witness, William Hindmarch, QC, a barrister who had written extensively on patents and copyrights and had helped draft Milner Gibson's bill, opposed it.[80] Hindmarch raised the argument, later echoed by the U.S. Supreme Court, that marks are not like patents and copyrights: they provide no public benefit, so it would be "mischievous" to endow them with a property right. Without a

77. For background to the bill see Poland, *Trade Marks*; Wood, "Registration of Trade Marks."

78. *Select Committee on Trade Marks,* para 72.

79. *Journal of the House of Commons*, 117 (1862–1863), 55–56, quotation at 55 (February 18).

80. See Poland, *Trade Marks*, 9; *Report from the Select Committee*, 2773; and Wood, "Registration of Trade Marks," 21.

property right, Hindmarch argued, there is no need for registration. Another committee member Edmund Potter, who spoke for the textile industry and appears to have acted out of this industry's distaste for the laws on design registration, joined the lawyers. Despite the pleas of most witnesses and the support of the chairman, the committee passed out the "Merchandize Marks" bill, which did not include registration and passed into law on August 7, 1862, a law that, while it might just meet the stipulations of the treaties, didn't come near to meeting the interests of industrialists and merchants.[81] Parliament had responded to the growing national and international pressure for statutory law inadequately, if not petulantly.

In his dismissal of registration, Hindmarch made one slight concession: "if [the law without registration] should be found defective, then registration may be had recourse to."[82] It wasn't long before many found the law of 1862 defective and by 1866 a powerful trademarks lobby had been formed to push for change.[83] Despite the heft of this committee and Hindmarch's blithe assumption that if needed the law could be changed, it took until 1875 and yet more public meetings and lobbying to provide registration. By that time, several more countries and territories, including the United States, had been added to the list of registrants.[84]

By the time it came, the foreign influence on the making of UK trademark law had become inescapable. The *Times* justified the new law by arguing that in the absence of a register, "British subjects ... in foreign countries [were] unable to show that those trade marks had been registered in this country."[85] The register was opened in 1876. So great was pent-up demand, that the registrar, H. Reader Lack, who had taken part in the negotiations following the Cobden–Chevalier treaty that help set this whole process in motion, was overwhelmed by almost five thousand applications, and parliament had to extend the time allowed for applications to cover marks already in use.

81. Roebuck's bill also included a reciprocity clause. This too failed to make it into the law.

82. *Report from the Select Committee,* para 3006.

83. A committee was formed, among whose members were Henry Allsopp, M. A. and M. T. Bass, all members of parliament and of major brewing families and all with a major interest in international trade; John Clark and Thomas Coats, both cotton thread manufacturers in Scotland; John Rylands of the Manchester cotton trade; John Gassiot, of the Martinez Gassiot port wine house; George Palmer, of the biscuit firm; Robert and William Jackson, Joseph Mappin, and John Rodgers of Sheffield steel firms; along with Roebuck, seven other MPs, and even a couple of QCs, see "Trade Marks Committee."

84. These included, Hong Kong, Italy, New South Wales, Orange Free State, and Turkey, along with the states of California, Kansas, Missouri, Nevada, and Oregon. See Greely, *Foreign Patent and Trademark Laws,* chap. 2.

85. *Times,* June 22, 1876, 8.

American law: problematic progress

The pressure that bore on Great Britain in 1860 bore down on the United States a decade later. As already noted, in 1868 the United States negotiated an article to be added to its existing treaty of commerce with Russia, and a little later that year did the same with Belgium. The two additions are almost identical, taking aim at counterfeiting, opening grounds for damages, and (here conceding more than the British) allowing citizens who "wish to secure the right of property" in marks to register in either country. The Belgian agreement was proclaimed in 1869, and a little later that year, the United States signed a trademark convention with France. Together the three seem to have provided sufficient weight to push a hesitant congress to write a law.

As in Britain, there had been prior, unsuccessful attempts to pass national trademark law.[86] But in 1869, a variety of senate bills took life from the treaties. Bill S 264 was proposed "to execute the provisions of a certain treaty between the United States and Russia," and S 265 to "prevent the counterfeiting of foreign marks protected by treaty stipulation."[87] The need to honor the treaties garnered support for a more comprehensive domestic law, in part out of fear that foreigners might otherwise be accorded rights by treaty that would not be available to citizens by law. Introducing a trademark amendment into the house, Thomas Jenckes of Rhode Island again invoked the treaties: "we are at present in a anomalous condition ... by certain treaties or conventions with Belgium, France, and Russia, we have agreed to recognize the validity of the trademarks of those countries upon their being registered in the Patent Office of the United States."[88] When he spoke, however, no process of trademark registration was available.[89] The law that passed made registration available to U.S. citizens for the first time. And like the French law of 1857, it made foreign access to U.S. conditional on treaties and conventions. Indeed, in 1877 it was realized with shock that the British, who had been registering copiously since the registers opened in 1870, having no treaty, had

86. In 1860, 1862, and 1867, John Moorhead of Pennsylvania had introduced trademark bills into congress, but had been successfully opposed by representatives of agrarian states, who saw little to interest them. See *Report of Commissioners*, *passim*.

87. *Report of Commissioners,* 384 and 385.

88. *Report of Commissioners*, 392.

89. It may have been this absence that excluded the explicit mention of reciprocity from the Russian, Belgian, and French agreements. For Belgium and Russia, reciprocity was added in 1884 and 1874 respectively. See *Treaties, Conventions, International Acts* 1: 87–88 (Belgium) and 2: 1525 (Russia).

no right to register. For a brief period, the British were excluded from the register while a treaty was quickly written and signed.[90]

While the United States wrote better law than the United Kingdom, with regard to registration, it created other problems for itself. The law of 1870 was included as Section IV of a bill overhauling the Patent Office, a legislative convenience that fatally undermined the constitutionality of the law. In 1878, a federal judge overseeing a case of trademark infringement in Wisconsin questioned the right of congress to rule on trademarks. A year later, three trademark cases, two by chance involving French firms, came before the Supreme Court, which ruled that, because of the legislative association with patents and copyright, congress's prerogative must be assumed to come from the "progress" clause of the Constitution, which gives congress the right to make laws concerning these issues.[91] But the Constitution does not mention trademarks. Like Hindmarch in Great Britain, the court did not see trademarks in the same light as the other two forms of intellectual property. It ruled that marks were not subject to congressional control and threw out the trademarks provisions in the act.

After failed attempts either to introduce a constitutional amendment or to pass a law that would in turn pass muster with the court, the United States eventually had to settle in 1881 for a law minimally designed to meet its outstanding treaty obligations, thus built around the concept of reciprocity. The bill was restricted to "the owners of trade-marks used in commerce with foreign nations or with Indian tribes, provided such owners shall be domiciled in the United States or located in any foreign country or tribes, which, by treaty, convention, or law, affords similar privileges to citizens of the United States," although the register was kept open to all.[92] Consequently, until 1905, by which time it was conceded that congress had powers under the commerce clause of the Constitution to regulate marks and new law could be written, the country was left in the position that had first pushed it to write law in 1870, whereby it granted by treaty more rights to foreigners than it granted by law to natives. If nothing else, the intervening 25 years remind us as they no doubt reminded

90. See *Annual Report of the Commissioner of Patents for the Year 1876*. viii; House of Commons Papers, *Declaration between Great Britain and the United States for the Protection of Trade Marks*, 1878; *New York Times*, April 7, 1877, 1. The French, too, it should be noted, tripped up over the validity of some of its bilateral agreements. See Clunet, *L,État Actuel; ibid., Du Défaut de Validité*.

91. See Housewright, "Early Developments" and Rosen, "In Search of the Trade-Mark Cases."

92. The phrase "by treaty, convention, or law," takes us back to the Prussian treaty of 1851 and anticipates the French adjustments to their law in 1873. For continuing registration, see "Registration of Trade-Marks," 46th Congress, 3d session (1881) Ex. Doc 83.

U.S. firms at the time, how much international litigation and diplomacy could influence national law. The United States, despite what has been written about its leading role in these matters, was not in a strong position to influence anyone else.

In sum, if we take registration as a critical aspect of modern trademark law, the French had a system of registration in place in 1803, and a robust, nationally coordinated system from 1857. The United Kingdom couldn't countenance the idea in its initial attempts at legislation and waiting until almost every major trading country had a system in place before it began registering in 1876. And while the United States did establish a system in 1870, it was not available in any particularly useful way to United States domestic traders until 1905, more than a century after the initial French system. In trademarks, as in other areas of intellectual property, it seems fair to say, the French led and the Anglo-Saxon countries followed. Nor was the French role as first mover ephemeral. Between 1857 and 1960, the French registered more marks than the United Kingdom and the United States combined. If, following Khan, we are willing to take the quantity of marks as an index of the quality of the system, then the French clearly led the other two countries not only chronologically but also qualitatively.[93]

Conclusion: Impure History

This paper has attempted to show that, to use Sherman and Bently's term, nationally "purified" accounts of trademark laws and practices—accounts which try to tell the history from within one country or tradition—miss a great deal about the way the regulation of marks spread and laws were adopted in the nineteenth century. These, however, are the sorts of accounts that have tended to dominate business history. In fact, for many countries, legislation was not the product of home-grown, indigenous law. Rather, major trading countries as well as minor ones developed their law under the influence of direct and indirect international pressure. Moreover, as laws propagated and were standardized by conditional demands of reciprocity in bilateral treaties, it was not the Anglo-Saxon nations that took the lead and made robust, influential law. To the contrary, it would be nearer the truth to say that Great Britain and the United States, despite the importance of trade to both countries, had to be dragged into agreement with the developing international regime. The

93. For the registration data, see Duguid, Lopes, and Mercer, "Shifting Patterns."

uneasy careers of the laws they passed suggest that, even when they did, these countries only conformed with a mixture of ill will and ineptitude.

Even if this account of the history is right, it remains to be asked does it matter? Does amending the history leave us any more enlightened? There are, I suggest, some advantages to seeing the law this way. First, it reminds us that trademarks and laws are not children of the second industrial revolution. Rather, they accompany and even precede the great industrial changes of the end of the century, spreading across Europe in the 1850s and 1860s and across the Americas in the 1870s and 1880s. Nor, on seeing the international trade that accompanied the development of marks in the mid-century, can we return to the old verities about trade to this point being still predominantly "face to face." The English were drinking French wine and wearing German eau de Cologne, the French were drinking English beer and sewing with English needles, and the Americans were spreading mustard from Norfolk with knives from Birmingham. And all were stealing each other's marks.

Second, this version of history also suggests that, while Britain's treatyless free-trade policy no doubt helped stimulate international trade and bring down barriers, treaty-making nevertheless played an important part in opening up and regularizing markets, including Britain's. While the Cobden–Chevalier Treaty remains an important if paradoxical landmark in free trade because of the way it reduced tariffs and removed trading barriers for the two major trading nations of the day, the longest-lasting effect of that treaty may in fact come from the little-discussed article XII, which helped propagate the transnational regime of marks which we still live with today.

A third reason why getting the history right may be useful is that a revised account challenges stereotypes that are probably more widespread in business, diplomatic, and legal history than just this area of trademarks. Contrary to stereotype, the United States and Britain did not lead, while continental Europe followed. Nor were the French abstract thinkers, and the Anglo-Saxons pragmatists. For better or for worse, the French took the lead, drew up pragmatic and robust laws, and set about having their terms and conditions reciprocated by an increasingly large number of trading countries in a way that benefited French citizens, certainly, but the citizens of other countries too. Equally, the French were not merely artistic, concerned with copyrights and designs, though they certainly played an influential part in the internationalization of laws in these areas. As their trade expanded in the economic boom under Louis Napoleon, they seem to have believed that good markets require good marks and pursued the latter internationally with the aim of achieving the former.

The French forged their laws in practice, over decades, changing the law when they saw fit and responding to sectors as they saw appropriate. For their part, the supposedly pragmatic British were slow to act and, when they did, agonized to little good effect over questions concerning registration and property, while most other trading countries, following in France's wake, left them well behind.

The particularly uneasy progress of the United States brings up a fourth point. Looking at modern intellectual property laws, it is easy to conclude that if such laws in general are good, then stronger ones are better. Certainly, as Wilkins argues, the theories of institutional economics would seem to insist on the importance of clear and well-established rights, protected by committed governments.[94] These arguments all make sense if we accept the conventional story of how trademarks came into the world. But they don't seem to have come in that way, suggesting that the theory may need to be readjusted to suit the historical facts. During the early "second industrial revolution," the period that transformed the United States' economy and made it a power in branded goods, the country had barely functioning, and highly confusing trademark law, governed in part by common law, in part by state law, and in part by federal statute. Several states had statutory law, but most did not. Of those that did, few had registration, and where it was available it was lightly used. Meanwhile the national registration system limped on after 1879 without, from the point of view of domestic business, a particularly good rationale. From 1881, the federal law protected primarily foreign firms, Indian tribes, and U.S. firms engaged in international trade. It may be that this weak and uneasy system, if it can even be called a system, was good enough for the world of brands that developed under its rule. Such an explanation, however, throws some doubt on general calls for strong law. In 1875, as the British were finally modifying their law, a paper published by the Society of Arts noted how strange it was that "the greatest trading nation in the world, ha[s] been so far behind in protecting our own interests and particulars."[95] The statement was intended to spur the country to action, but indirectly it raises the question of how, if strong trademark law is critical, such greatness had been achieved without it. To return to the case of the United States, it may be that the people who drove its startling early growth in consumer goods were to a significant degree protected by the international regime that was coming into place. This explanation, however, throws us back upon the international aspect of trademark law, which is generally missing

94. In "Neglected Intangible Asset," Wilkins points to North and Weingast, "Constitutions and Commitment."

95. Wood, "Registration of Trade Marks," 18.

from nation-based accounts. These doubts about the extent to which trademark law was important for economic growth cannot be resolved within this essay, but they can only be recognized if we begin, as is attempted here, by revising conventional history and its conventional assumptions.

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