Part I

Legal and economic history

1 The making of modern trade mark law: the construction of the legal concept of trade mark (1860–1880)

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Although some accounts of the history of trade mark law trace the origin of trade mark protection to Greek or Roman times,[1] and other accounts of the British history locate the origins of British trade mark law in the medieval guilds,[2] or the sixteenth-century case of *JG* v *Samford*,[3] British trade mark law did not really take anything like its modern shape until the latter half of the nineteenth century.[4] The period between 1860 and 1910 witnessed the development of many of the characteristic features of modern trade mark law: a legal understanding of a trade mark as a sign which indicates trade origin;[5] the establishment of a central registry in 1876; the conceptualization of the

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1 E.g. W. Robertson, 'On Trade Marks' (1869) 14 Jo Soc Arts 414–17; E. S. Rogers, 'Some Historical Matter Concerning Trade-Marks' (1910) 9 *Michigan Law Review* 29.

2 Most famously, F. Schechter, *The Historical Foundations of the Law Relating to Trade-Marks* (New York: Columbia University Press, 1925).

3 (1584). See J. H. Baker and S. F. C. Milsom, *Sources of English Legal History: Private Law to 1750* (London: Butterworths, 1986) 615–18; J. H. Baker, *An Introduction to English Legal History* (4th edn, London: Butterworths, 2004) 459. The *Samford* case was referred to in *Southern* v *How*, (1656) Pop R. 144, where it is stated that Doderidge J held that the action would lie, and it was this source that caused the cast to be later relied on. Schechter, *Historical Foundations*, 123, argues that *Southern* v *How* is a dubious authority for the modern law of passing off: 'the sole contribution of that case was at best an irrelevant dictum of a reminiscent judge that he remembered an action by one clothier against another for the mis-use of the former's trade-mark'.

4 F. M. Adams, *A Treatise on the Law of Trade Marks* (London: George Bell and Sons, 1874) 3 (law of trade marks 'much more recent' than that of patents 'being almost exclusively the growth of the last seventy or eighty years'). See, to similar effect, E. M. Daniel, *The Trade Mark Registration Act* (London: Stevens and Haynes, 1876) 1; D. M. Kerly, *The Law of Trade-Marks and Trade Name, and Merchandise Marks* (London: Sweet and Maxwell, 1894) 2; H. Ludlow and H. Jenkins, *A Treatise on the Law of Trade-Marks and Trade-Names* (London: W. Maxwell and Son, 1873) 10; Wadlow, *The Law of Passing Off: Unfair Competition by Misrepresentation* (3rd edn, London: Sweet and Maxwell, 2004) 29.

5 Kerly, *The Law of Trade-Marks* 5 (a 'symbol expressly adopted by the plaintiff to distinguish his goods and identify them with him').

trade mark as an object of property;[6] the recognition of a dual system of protection: one based on registration, the other based on use in the marketplace;[7] and the development of international arrangements for the protection of marks in foreign territories.[8] Looking back from the early twenty-first century, it is clear that, while there were significant developments in trade mark law in the period before 1860 and the period after 1910, the majority of the most salient features of the current trade mark regime were developed (or if not developed, institutionalized) in this period of intense legislative, judicial, diplomatic and scholarly activity. Although all these developments were intertwined, time and space only permits this chapter to attempt to chart one of these developments: the genesis of a legal conception (or a number of conceptions) of 'a trade mark' in the first part of this period.

The situation in mid-century

At mid-century, as the law of designs, patents and copyright was crystallizing,[9] there was no (coherent) law of trade marks. Giving evidence to the Select Committee of 1862, solicitor Joseph Travers Smith complained of the 'very considerable' evils of the existing law:[10] 'They arise from the fact that trade marks are not recognized as having any legal validity or effect; that there is no written law on the subject of trade marks, and we have consequently no definition by which we can try what a trade mark is, nor consequently what particular symbol amounts to a trade mark.' Indeed, while at this stage we see the publication of textbooks on copyright, designs and patents,[11] there were no textbooks on 'trade

[6] See L. Bently, 'From Communication to Thing: Historical Aspects of the Conceptualisation of Trade Marks as Property' in G. Dinwoodie and M. Janis (eds.), *Trademark Law and Theory: A Handbook of Contemporary Research* (Cheltenham: Edward Elgar, 2008) (describing tendency towards conceptualization of trade marks as property from around 1860).

[7] Registration was provided for under the Trade Marks Act 1875, and the Office opened on 1 January 1876. For the first set of Rules, see (1875–6) Sol Jo 178 (1 January 1876).

[8] Following a period where recognition of British interests abroad largely turned on the existence of bilateral treaties, in 1883 a multilateral agreement was adopted, the Paris Convention for the Protection of Industrial Property, of 20 March 1883. Great Britain was not an original signatory (they were Belgium, Brazil, Spain, France, Guatemala, Italy, Holland, Portugal, Salvador, Serbia and Switzerland) but acceded on 17 March 1884.

[9] B. Sherman and L. Bently, *The Making of Modern Intellectual Property Law* (Cambridge: Cambridge University Press, 1999) Chs. 5–7.

[10] *Select Committee on Trade Marks Bill and Merchandize Marks Bill, Report, Proceedings and Minutes of Evidence* (1862) 12 *Parliamentary Papers* 431, Q. 2619 (Travers Smith).

[11] Textbooks on these areas emerged from the 1820s. Some of these covered both copyright and patents (e.g. R. Godson, *A Practical Treatise on the Law of Patents for Inventions and of Copyright* (London: Butterworth, 1823); others discussed one 'area' alone (e.g., on patents, W. M. Hindmarch, *A Treatise on the Law Relating to Patent Privileges* (London:

marks'. Although the term 'trade mark' had been present in some cases,[12] there was no consensus as to what a trade mark was, nor on what a 'law of trade marks' would look like. In fact, we can probably say that, as of 1850, it made no sense to talk of 'a law of trade marks' in the UK.

To say there was no law of trade marks is not to say that there were no laws regulating misrepresentation in trade. However, the protection afforded to traders who found they were victims of the fraudulent imitation of their names and marks was fragmented, drawing on a variety of jurisdictional sources, some statutory and some based on judicial precedent, and lacked any abstract logic.[13] The statutory systems tended to be confined to specific trades: under this heading, there was the protection of the marks of makers of knives, sickles, shears, scissors and other cutlery wares in Hallamshire by registration with the Cutlers' Company of Sheffield;[14] the protection given over use of the sign LONDON under the Cutlery Trade Act;[15] the protection of marks woven into and fixed on linen;[16] protection of the names of

Stevens, 1846)); while yet others dealt with what today would be thought of as 'sub-categories' of law (e.g. E. M. Underdown, *The Law of Artistic Copyright* (London: John Crockford, 1863)).

[12] *Collins Co.* v *Brown* (1857) 3 K&J 423, 426 (Page-Wood V-C); *Dixon* v *Fawcus* (1861) 3 El & El 537, 546 (Crompton J); *Dent* v *Turpin* (1861) 2 J & H 139.

[13] Britain was not alone in this respect: Belgian law had special regimes for hardware and cutlery (1803), cloth (1820) and pipes (1838): *Reports Relative to legislation in Foreign Countries on the subject of Trade Marks* C-596 (1872) 54 *Parliamentary Papers* 585, 594–610; and the French law prior to 1857 was described as comprising provisions which were 'heterogeneous, incongruous and sometimes contradictory': ibid., 615.

[14] Act for the Good Order and Government of the Makers of Knives, Sickles, Sheers, Scissors and Other Cutlery Wares, 21 Jac. 1 c. 31 (1623); An Act for the Better Regulation of the Company of Cutlers within the Liberty of Hallamshire, 31 Geo. 3 c. 58 (1791); An Act for amending and rendering more effectual an Act passed in the Thirty-First Year of the Reign of His Present Majesty, for the Better Regulation and Government of the Company of Cutlers, 41 Geo. 3 c. 97 (1801) (local) (amending the provisions on testamentary disposition and widows' rights); An Act to Repeal certain Parts of An Act Passed in the Thirty-first year of his Present Majesty, for the Better Regulation and Government of the Company of Cutlers, 54 Geo. 3 c. 109 (1814) (local) (liberalizing trade in Sheffield, and entitling traders to register marks, as well as limiting those that could be granted); An Act for Amending the Acts Passed with Respect to the Masters, Wardens, Searchers, Assistants, and Commonalty of the Company of Cutlers in Hallamshire in the County of York, 23 & 24 Vict. c. 43 (1860) (local) (extending Act to all 'using or exercising the Arts or Trades of Manufacturers of Steel and Makers of Saws and Edgetools and other Articles of Steel or of Steel and Iron combined having a cutting Edge' and giving a statutory right to become a freeman of the company and be granted a Mark).

[15] Act to Regulate the Cutlery Trade in England (1819) 59 Geo. 3 c. 7, s. 3 (limiting the legitimate use of hammer symbols to hand-made cutlery; and prohibiting the use of the word LONDON other than on cutlery made within twenty miles of the City of London).

[16] An Act for Better Regulation of Linen and Hemper Manufactures in Scotland (1726) 13 Geo. 1 c. 26 s. 30 (authorizing weavers of linens to weave their name into wares and to fix 'some known mark' on pieces of linen manufacture, and punishing counterfeiting of such name or mark).

patentees;[17] protection of marks used in the hop trade;[18] of marks on gun barrels;[19] and of hallmarks on gold and silver wares.[20] In addition, there was regulation of the use of family crests and insignia under the law of heraldry and arms. In certain circumstances, there was the possibility of criminal action based on forgery,[21] cheat,[22] conspiracy to defraud[23] or obtaining benefits by false pretences.[24] Another possibility, attempted by some, was to try and register labels as designs or, after 1862, with the Stationers' Company, so as to claim copyright protection.[25] Most importantly, there were the general actions at common law and in equity: the action on the case for deceit at common law, which had, at least since *Sykes* v *Sykes* in 1824, been available for cases involving use of marks on goods with intent to

[17] Patent Law (Amendment) Act (1835) 5 & 6 Wm. 4 c. 83, s. 7 (prohibiting the marking of goods with the name, stamp, mark or other device of patentee, and use of the word PATENT).

[18] Hops (Prevention of Frauds) Act 1866, 29 & 30 Vict. c. 37 (repealing and replacing (1814) 54 Geo. 3 c. 123). The 1866 Act uses the term 'trade mark'. For a prosecution, see *R* v *Edward Swonnell*, *The Times*, 27 June 1868, p. 11e.

[19] An Act to Insure Proper and Careful Manufacture of Fire Arms in England (1813) 53 Geo. 3 c. 115, s. 9 (relating to unauthorized counterfeiting of 'mark' or 'stamp' on any gun, fowling piece, blunderbuss, pistol or other description of arms usually called small arms).

[20] Act to amend Laws in Force for Preventing Fraud and Abuses in the Making of Gold and Silver Wares in England (1844) 7 & 8 Vict. c. 22 (repealing and replacing (1798) 38 Geo. 3 c. 69, s. 7).

[21] *R* v *Closs* (1857) Dearsley & B 460, 27 LJMC 54; *R* v *Smith* (1858) Dearsley & B 566, 27 LJMC 225 (not forgery because baking powder wrappers were not documents or instruments). Forgery was placed on a statutory footing in the codification of 1861: 24 & 25 Vict. c. 98.

[22] *R* v *Closs* (1857) Dearsley & B 460, 27 LJMC 54 (per Cockburn CJ). (A copy of a painting by John Linnell, with forged signature, could be a cheat, describing the scope of 'cheat' as encompassing the placing of 'a false mark or token upon an article, so as to pass it off as a genuine one when in fact it was only a spurious one, and the article was sold and money obtained by means of that false mark or token'. On the facts, the prosecution had not demonstrated that the purchaser bought the painting on the basis of the signature.)

[23] *Select Committee* (1862), Q. 2273 (J. Dillon).

[24] An Act for Consolidating and Amending the Law in England Relative to Larceny and other offences Connected therewith (1827) 7 & 8 Geo. 4 c. 29, s. 53 (offence of obtaining money by false pretences); Larceny Act (1861) 24 & 25 Vict. c. 96, ss. 88–90. *R* v *Smith* (1858) Dearsley & B 566, 27 LJMC 225 (per Pollock CB, Willes J and Chanell B.: D's labelling of its product as BORWICK'S BAKING POWDERS was not a forgery but was obtaining money by false pretences); *R* v *Dundas* (1853) 6 Cox Crim Cas 30 (Erle J, Northern Circuit) (two years' imprisonment for obtaining money by false pretences where D had sold seventy-two bottles of blacking marked EVERETT'S PREMIER in labels imitating Everett's labels); *R* v *Suter & Coulson* (1867) 10 Cox Crim Cas 577 (pawning watch with false mark of Goldsmiths' Company was obtaining money by false pretences). Cf. *R* v *Bryan* (1857) 7 Cox Crim Cas 312 (representing that spoons were 'equivalent to ELKINGTON'S A' was exaggeration as to quality and not a false pretence). See also *Select Committee* (1862), Qs. 2747–8 (Travers Smith).

[25] Copyright of Designs Act 1842 (5 & 6 Vict. c. 100); Fine Art Copyright Act 1862 (25 & 26 Vict. c. 68); *Select Committee* (1862), Q. 2465 (Browning).

deceive;[26] and an action in equity ancillary to the common law action for deceit, under which the Court of Chancery would grant injunctive relief pending establishment of the claimant's rights at law.[27] From 1839, with the case of *Millington* v *Fox*,[28] the action in Chancery seemed to have made a tentative move towards an independent status, insofar as relief was made available without evidence of intent to deceive.

By the 1850s, the complex state of the law had become a real cause of inconvenience and expense to traders who wished to gain protection in the United Kingdom.[29] Moreover, the complexity of the law was also seen as an impediment to attempts to gain protection for British traders abroad. And there was certainly a sense that British traders needed protection abroad, as the markets for their goods, in the UK, the British colonies and elsewhere, were being penetrated by counterfeit goods originating outside the UK. If British traders were to get protection in other European countries, the United States or Russia – the countries where counterfeit goods originated or were sold – then some form of international arrangement was almost certainly necessary. And British traders foresaw that it would be difficult to base any arrangement of a principle of reciprocity when British law itself was so difficult to comprehend and expensive to apply.[30]

The development of a law of trade marks, 1860–1875

The period from 1860 to 1880 was one of particularly intense activity in relation to trade mark law. Although there had long been complaints about the prevalence of misleading use of trade marks,[31] little effort had

[26] E.g. *Morison* v *Salmon* (1841) 2 Man & G 385 ('Morison's Universal Medicine'); *Crawshay* v *Thompson* (1842) 4 Man & G 357 ('WC' in oval on iron); *Rodgers* v *Nowill* (1847) 5 CB 109, 136 ER 816 ('J. Rodgers & Sons' on pen-knives).

[27] *Motley* v *Downman* (1837) 3 My & Cr 1, 14 per Lord Cottenham LC.

[28] (1838) 3 Myl & Cr 338.

[29] On the expense of litigation see *Select Committee* (1862) Qs. 1681–3 (D. Sinclair); Qs. 1970, 1987 (Polson); Qs. 2450–3 (Morley); Qs. 2503, 2511 (Coxon); Q. 2613 (Joseph Travers Smith).

[30] See L. Levi, 'On Trade Marks' (1859) Jo Soc Arts 262, 265 (explaining that the French law of 1857 would only protect foreigners where a treaty existed between France and the relevant country affording reciprocal protection to French traders); *Select Committee* (1862), Q. 2619 (Travers Smith) ('the defective condition of the English law prevents foreign governments from giving any remedy, because there is no sufficient reciprocity in England').

[31] 'Instances of tradesmen endeavouring to obtain an advantage to themselves by the use of the name and reputation of others, have, unfortunately, of late become too common.' Lord Langdale MR in *Franks* v *Weaver* (1847) 10 Beav 297, 302 (medicine case). See also 'Proposed Alterations in the law of Trade Marks' (1861) Sol Jo & Rep 2; *Select Committee* (1862), Q. 2754–5 (Hindmarch); H. B. Poland, *The Merchandise Marks Act 1862* (London: J. Crockford, 1862) 5.

hitherto been made to develop the law.[32] This changed in the late 1850s, when the Chambers of Commerce around the UK started to involve themselves in an attempt to procure legislation.[33] The case was made for amendment of the law in arenas such as the Royal Society of Arts[34] and the National Association for the Promotion of Social Science,[35] as well as provincial law societies.[36] Having determined that some kind of reform was essential, the Chambers of Commerce engaged lawyers to draft legislation,[37] which was presented to the government. In 1861, the first Bill dealing with the matter was introduced by Lord Campbell into the House of Lords,[38] but ultimately was not proceeded with beyond the Committee stage in the Commons. By this point, the Government had

[32] But note F. Crossley's claim to the meeting of the Association of Chambers of Commerce on 6 Feb 1861, that 'deputation after deputation from Sheffield had been before the Government on that subject [trade marks], but without effect'. See 'Association of Chambers of Commerce', *The Times*, 7 Feb. 1861, p. 12f; 'Proposed Alterations' ('There have been numerous deputations upon the subject to the President of the Board of Trade . . .').

[33] 'Trade Marks' (1858) 6 Jo Soc Arts 595 (20 August 1858) (reporting meeting of Birmingham Chamber of Commerce unanimously approving motion that improper use of trade marks was wrong and should be discouraged in every way by the Chamber). On the influence of Chambers of Commerce, see A. R. Ilersic and P. F. B Liddle, *Parliament of Commerce: The Story of the Association of British Chambers of Commerce, 1860–1960* (London: Association of British Chambers of Commerce and Newman Neame, 1960) Ch. 9 (explaining activities in field of patents and trade marks); G. R. Searle, 'The Development of Commercial Politics, 1850–70' Ch. 5 in *Entrepreneurial Politics in Mid-Victorian Britain* (New York: Oxford University Press, 1993) (analysing political activities of Association of Chambers of Commerce).

[34] Professor Leone Levi, an academic and barrister active in the Association of British Chambers of Commerce, gave a significant paper at the Fifteenth Ordinary Meeting of the Royal Society of Arts on 16 March 1859: see (1859) Jo Soc Arts 262.

[35] A. Ryland, 'The Fraudulent Imitation of Trade Marks', (1859) *Transactions of the National Association for the Promotion of Social Science* 229, with responses at 269. For background to the activities of the Social Sciences Association, see L. Goldman, 'The Social Science Association, 1857–1886: A Context For Mid-Victorian Liberalism, (1986) 101 *English Historical Review* 95–134, and L. Goldman, *Science, Reform and Politics in Victorian Britain: The Social Science Association, 1857–1886* (Cambridge: Cambridge University Press, 2002).

[36] See 'On Fraudulent Trade Marks', (1861) Sol Jo & Rep 820, reporting a paper by John Morris given to the Metropolitan and Provincial Law Association, Worcester; and 'The Registration of Trade Marks' (1861) Sol Jo & Rep 839, reporting a paper by Arthur Ryland to the same Association.

[37] 'State of Trade', *The Times*, 3 December 1860 p. 4f. (reporting a meeting of representatives of Sheffield and Wolverhampton Chambers of Commerce with the Birmingham Chamber and consequent resolution that the Sheffield Chamber should prepare a Bill to provide for the registration of trade marks at home, as well as to empower the Crown to conclude conventions with foreign powers for reciprocal protection).

[38] Bill 1861 (based on Bill by Travers Smith on behalf of Chambers of Commerce). Parl. Deb., vol. 161, col. 327, 12 February 1861; col. 1272, 4 March 1861; col. 1940, 14 March 1861; col. 2153, 18 March 1861; Parl. Deb., vol. 162, col. 543, 15 April 1861; 164 Parl. Deb., vol. 164, col. 1089, 18 July 1861.

decided that a Select Committee of the House should be convened to consider the matter carefully.[39] So, in February 1862, following the introduction of a Government Bill on 'merchandise marks',[40] and a private member's bill on 'Trade Marks' (drafted by solicitor William Smith on behalf of the Sheffield Chamber of Commerce and introduced by John Arthur Roebuck, MP for Sheffield),[41] a Committee was convened.[42]

The Select Committee, comprising 'lawyers and mercantile men of great experience and representing different interests',[43] met and heard evidence from a wide range of traders (file makers, edge tool manufacturers, cutlery manufacturers, gun makers, thread manufacturers, needle makers, button makers, lace makers, starch and confectionery makers, brewers, paper makers), merchants,[44] bureaucrats[45] and lawyers.[46] Following its deliberations, it was decided – not, it seems, unanimously – to pursue the Government Bill,[47] and this was done, so that in 1862 the Merchandise Marks Act was passed. This Act created criminal offences for uses of mis-descriptions in trade with intent to defraud, and specifically referred to misuse of trade marks, which were defined broadly to encompass 'any Name, Signature, Word, Letter, Device, Emblem, Figure, Sign, Seal, Stamp, Diagram, Label, Ticket or other Mark of any

[39] Parl. Deb., vol. 164, col. 1089, 18 July 1861; Parl. Deb., vol. 165, col. 274, 14 February 1862.
[40] Parl. Deb., vol. 165, col. 988, 3 March 1862.
[41] Parl. Deb., vol. 165, col. 442, 18 February 1862; col. 770, 26 February 1862.
[42] Parl. Deb., vol. 165, col. 1231, 7 March 1862; col. 1280, 10 March 1862; col. 1489, 13 March 1862. Roebuck resisted particularly the addition of Moffatt.
[43] Poland, *Merchandise Marks Act* 7. Chaired by Roebuck, the Committee comprised three barristers (Selwyn, Hugh Cairns and Sir Francis Goldsmid, a lawyer and MP for Reading), two members of the Government (Milner Gibson, President of the Board of Trade, and Sir William Atherton, the Attorney General), manufacturers (Sir Francis Crossley, a carpet manufacturer; Alderman William Copeland, a pottery manufacturer and MP for Stoke; Edmund Potter, a calico printer and MP for Carlisle); George Moffatt, a tea-broker and MP for Southampton; and Crum Ewing. Selwyn, who generally appeared before the Master of the Rolls, was counsel in *Hall* v *Barrows* (1863) 4 De G J & S 150, (1863) 32 LJ Ch 548; *Bury* v *Bedford* (1863) 32 LJ Ch 741; *In re Uzielli*; *Ponsardin* v *Peto* (1863) 33 LJ Ch 371.
[44] R. Smith and J. Dale of Westhead, and J. Dillon of Morrison, Dillon and Co.; H. Browning. W. H. Teulon and Adolphus Baker, hop merchants. Some of the merchants actually dissented from the dominant assumption that trade marks were of public benefit. Dillon, for example, was concerned about the proliferation of marks introducing 'obstructions to business': Select Committee (1862), Q. 2268 (Dillon, in response to a question from Moffatt).
[45] George Wilkinson, the master cutler of the Cutlers' Company; Bennet Woodcroft, Superintendant of Specifications in the Patent Office; and Lewis Edmunds, Clerk of the Patents.
[46] William Smith, Arthur Ryland, Joseph Travers Smith and William Hindmarch QC.
[47] Parl. Deb., vol. 167, col. 1418, 4 July 1862.

other Description lawfully used by any person to denote any chattel, to be the Manufacture, Workmanship, Production or Merchandise of such Person'.

While the 1862 Act was welcomed in many quarters as a great improvement,[48] it was recognized as being of limited value, particularly because liability was dependent on a demonstration of intent to defraud.[49] Moreover, the Act treated fraudulent use of trade marks as just one type of fraudulent trade practice, failing thus either to establish the trade mark as property, or even to recognize its specific characteristics. Not surprisingly, therefore, the Chambers of Commerce and Royal Society of Arts persisted in lobbying for a registration system.[50] This resulted in Bills being introduced into Parliament in 1869,[51] 1873[52] and finally – and successfully – in 1875.[53] The 1875 Act established a registration system for trade marks, and made the existence of such registration equivalent to public use. This, it was anticipated, would save traders the expense of establishing rights in the mark every time legal action was taken, as well as allowing all traders to know what marks had been protected.

[48] Vice-Chancellor Page-Wood had said that 'no-one rejoiced more than he had done at the passing of the Act ... in this branch of the Court he had been on all occasions most anxious to correct the mischiefs against which the Act was directed': *Farina* v *Meyerstein*, *The Times*, 1 February 1864, p. 10f. Even the President of the Association of Chambers of Commerce welcomed it as a 'valuable addition to the statute book': see Ilersic and Liddle, *Parliament of Commerce*, 94. See also Poland, *Merchandise Marks Act*; Robertson, 'On Trade Marks' 414, 415; E. Johnson, 'Trade Marks' (1881) 29 Jo Soc Arts 493, 505.

[49] J. S. Salaman, *A Manual of the Practice of Trade Mark Registration* (London: Shaw and Son, 1876) 3 (describing the Act as 'less useful than might have been expected'); *Special Report from the Select Committee on Merchandise Marks Act* (1862) *Amendment Bill 203* (1887) 10 *Parliamentary Papers* 357, 376, Qs. 17–18; Kerly, *The Law of Trade-Marks* 7. For an example of its limitations, see *R* v *Scotcher*, *The Times*, 24 March 1864, p. 11e. For some examples of sentencing, comparable to those under the provisions of the Trade Marks Act 1994, see (1865–6) 41 *Law Times* 126 (6 Jan. 1866) (reporting sentencing of defendant to two months' hard labour for making pianos bearing BROADWOOD & CO); (1866–7) 42 *Law Times* (22 Dec. 1866) (six months' imprisonment without hard labour for defendant who had applied BASS & CO to beer).

[50] 'Association in Birmingham' (1866) 14 Jo Soc Arts 131; 'Birmingham Chamber of Commerce' *The Times*, 2 August 1872, p. 12e; 'Associated Chambers of Commerce' *The Times*, 24 Sept. 1873, p. 12c.

[51] (1868–9) Bill No 126 (13 May 1869; withdrawn, July). *The Times*, 8 June 1869, p. 12e. Two years later it was said that the earlier Bill which represented the Board of Trade's views received 'a very cool reception in the House': Parl. Deb., vol. 204, col. 1387, 6 March 1871.

[52] (1873) Bill No 133. It received a first reading on 21 April 1873, and was withdrawn on 7 July 1873. Sampson Lloyd commented that 'the opposition of one member of the house was sufficient to prevent it being proceeded with': *The Times*, 24 September 1873, p. 12c.

[53] Introduced by Lord Cairns on 22 June, the Act received royal assent on 13 August. See Parl. Deb., vol. 225, col. 155, 15 July 1875; Parl. Deb., vol. 226, col. 703, 7 August 1875; *The Times*, 10 September 1875, p. 8a.

Although the two Acts and the Select Committee constitute key developments in the period, trade mark protection was being developed apace in other fora.[54] The 1860s witnessed a surge in case law on trade marks, with some fifty-nine reported cases, compared to twenty-five in the 1850s, fifteen in the 1840s and ten in the 1830s.[55] In part, this case law was driven by a growth in the use of marks and a sharp increase in advertising,[56] following the reduction in stamp duty on newspaper advertising in 1833 and its removal in 1855,[57] as well as the triumph of the spectacular Great Exhibition of 1851.[58] The desire to litigate may also have been facilitated by the progressive reforms of the judicial system (in particular, the procedural rules applicable in the courts of equity).[59]

[54] 'Lord Langdale, Lord Cranworth and Lord Justice Mellish had given ... recognition to the Law of Trade Marks, and Lord Westbury and Sir William Page-Wood, afterwards Lord Hatherley, had finally established the rights of owners of Trade Marks. The nature of this property being once established, the next step was to give it statutory recognition, and supply facilities for securing it protection, and this Lord Cairns undertook in the Trade Marks Act 1875, which for the first time established a system of Registration of Trade Marks in accordance with the practice of Foreign countries, in which perhaps English Trade Marks are, from the reputation of the English manufacturer, a property more important even than in the British dominions.' J. Lowry Whittle, 'The Late Earl Cairns' (1885–6) 11 Law Mag & L Rev (5th ser.) 133, 150. Whittle was Assistant Registrar of Trade Marks and Designs from 1876.

[55] The numbers are derived from an examination of the cases digested in Lewis B. Sebastian, *A Digest of Cases of Trade Mark, Trade Name, Trade Secret ... decided in the courts of the United Kingdom, India, the Colonies and the United States of America* (London: Stevens and Sons, 1879).

[56] The claimant in *Holloway* v *Holloway* (1853) 13 Beav 209, for example, spent £30,000 per annum on advertising, 'a sum equal to the entire revenue of many a German principality': see 'Advertisements' (1855) 97 *Quarterly Review* 183, 212. Nevett tells us that this increased to £40,000 in 1864, and £50,000 in 1883, the year of Thomas Holloway's death: T. R. Nevett, *Advertising in Britain: A History* (London: Heinemann / History of Advertising Trust, 1982) 71.

[57] One of the few histories of advertising focussed on Britain describes the period between 1855 and 1914 as the period of 'the great expansion' of advertising: Nevett, *Advertising in Britain* Ch. 5.

[58] T. Richards, *The Commodity Culture of Victorian England: Advertising and Spectacle, 1851–1914* (London: Verso, 1991). Aspects of Richards' argument are criticized by Roy Church in 'Advertising Consumer Goods in Nineteenth-Century Britain: Reinterpretations' (2000) 53(4) *Economic History Review* 621, 629–30. Church, at 633, suggests that in the 1850s manufacturers attempted to distance themselves from the excesses of hyperbolic advertising by adopting a minimalist approach announcing 'the products coupled with the name of the supplier and sometimes a message of no more than two or three words intended to associate name with product such as ... "Glenfield's Starch", "Colman's Mustard", ... "Pear's Soap"'. It was precisely these pithy designations that were involved in many trade mark cases.

[59] The Chancery Regulation Act 1862, usually known as Sir John Rolt's Act, required Chancery courts to determine issues of law and fact rather than, as was previously the practice, staying proceedings for equitable relief and requiring parties to have these matters determined in a court of law. This was clearly a significant development in