Trade Marks for Medicines and the Origins of English Trade Mark Law

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Eighteenth Century London (1751)
Eighteenth Century Mortality

• Average life expectancy of ordinary Britons, 39.4 years
• Some diseases: bubonic plague, syphilis, gonorhea, malaria, scurvy, smallpox, consumption/tuberculosis, dropsy, leprosy, gall-stones, ulcers, measles, influenza, skin problems (Freckles, spots, redness) and sight issues
Eighteenth Century Remedies

‘The Golden Age of Quackery’

Daffy’s Elixir; Dr James’ Fever Powders and Analeptic Pills; Dr Johnson’s Yellow Ointment; Maredant’s Antiscorbutic Drops; Hooper’s female pills; Greenough’s tincture for teeth; Velno’s Vegetable Syrup...

A few developed by doctors such as Robert James, or surgeons such as Norton. Others by apothecaries and chemists/druggists.
Thomas Rowlandson’s *Death and the Apothecary or The Quack Doctor*
A Route to Enormous Wealth and Prestige...
Significant advertising

As William Helfand explains, medicine sellers developed:

‘[N]ew marketing, publicity and advertising techniques; fashioned the arts of persuasion and salesmanship; created novel distribution systems; pioneered the emphasis on brand-named products; served as an economic link between the hinterland and the center; expanded markets; and helped to provide the entrepreneurship necessary for the growth of a modern society.’
These are the Gna\w o\w ng WORMS,

THAT Keep Persons (and mostly Children) in such an Ill State of Health, that No Body can Tell what they All, Till After their EATING only ONE or 2, of the Famous Li\t e SUGAR PLUMS, They See The WORMS to Come VISIBLY, Away.

ALIVE, and CRAWLING About,

In the CLOSE STOOL, After they are P\v i\d ed, And, In TWO DAYS only, have been Quite Well. Whereas Before, They were Always Ailing. Price 1s. d. a Dozen. Or, Any Person may Buy for ONE only Single PLUM for a PENNY, for a Child, Or, 2, or 3, Or, What They Please. At Mr. Burcheill’s;

At the Sign of the Famous ANODYNE NECKLACE, in LONG ACRE, Next Drury-Lane, London. — Where is GIVEN GRATIS.

For the Year 1748. —— A NEW ALMANACK.

Containing Those Things throughout the Year, which All the Common ALMANACKS ought to mention, Yet None of them Speak a Word of.

But, Beware not only of those COUN\p e\r FEITS, that are At the Royal-Exchange, But also Now of holy COUNTERFEITS, Which the Same Person CRAFTILY Puts at the Old Place at Temple-Bar. To Catch those Customers for ANODYNE NECKLACES, &c. Who Know Nothing of their being Entirely Removed from Thence to LONG ACRE, Where, You’ll Be sure to have No COUNTERFEITS.

“the trade of advertising is [now] so near to perfection, that it is not easy to propose any improvement.”
‘Counterfeiting’

• Medicines priced highly – inevitably attracted counterfeits
• Advertisements often warned public as to existence of counterfeits
• Developed distinctive packaging, with signatures
Signatures...
This Ointment is made up in Gally-pots, Seal'd with a Faulcon, and will hold good at least Seven Years: The Price of each pot is 6d. Is continued to be Sold, where you may have this Ointment pure, and no way adulterated, at several places in and about this City, as followeth. Mr. Longland, Spectacle-maker, at the Ship over against the Royal Exchange in Cornhill. Mr. Cowell
Distinctive Packaging
Newspaper Battles

• E.g over ‘Tipping’s Liquor’ which was supposed to be “good against Stone, Gravel, Chellick etc” in 1709
• One advertiser, accused other of selling counterfeit
• In response, Matthew Clerke, an apothecary from Duck Lane in West Smithfield, claimed that he: “[H]as the said Secret under the original Author’s own Hand, communicated to him by William Tipping his Grandson, ...”
• Clerke arranged for the grandson, Wiliam Tipping, to swear under oath that he had disclosed the recipe to Clerke and no one else.
• Clerke went on to claim that those who pretended to sell Tipping’s Liquor were either selling something that was “Spurious or Counterfeit ....”
Some were patented... eg Dr James Fever Powders
Litigation

• Others litigated on basis of trade marks.
• In the eighteenth century, England had two legal regimes known as ‘common law’ and ‘equity’, and a range of courts in which these were administered
• Equity was administered primarily by the Lord Chancellor and the Court of Chancery
• Common Law was administered in King’s Bench, Exchequer and the Court of Common Please
Proceedings in Equity seemed Impossible

- Blanchard’s mark, a picture of the “Great Mogul,” the emperor of Delhi, with the words “The Great Mogul” above, on playing cards.
- Lord Hardwicke refused to grant injunction preventing the defendant from using the mark.
- Referred to mischievous consequences. Understood to indicate that there was no remedy in Equity.
Trade Mark Cases at Common Law

• *Swinton v. Claphamson*, (July 10, 1765) (KB)
• *Greenough v. Dalmahoy*, (Dec. 9, 1769) (KB)
• *Godfrey v. Ellison*, (June 13, 1770) (KB)
• *Norton v. Atkinson*, (Dec. 1774) (CP)
• *Greenough v. Lambertson*, (Dec. 18, 1777) (KB)
• *Greenough v. Staveley*, (Feb. 14, 1783) (KB)
• *Norton v. Hayman*, (July 15, 1783) (KB)
• *Singleton v. Bolton*, (1783) (KB).

...There may well be more....
Until recently, we only knew about *Singleton v. Bolton*.

- *Singleton* was the first reported case (in fact reported only in 1831).
- But we have found more. Partly, as a result of digitisation of newspapers (in particular the Burney collection) which has made searching easier.
- Some disputes reported, others referred to in advertisements.
- Then to the court records...
Searching the ‘Plea Rolls’ (King’s Bench)
But five were also mentioned in Lord Mansfield’s Manuscripts

- Lord Mansfield was Chief Justice (the leading judge in Kings Bench) from 1756-1788
- Summaries prepared by clerks, with his own notes of the evidence presented
The Mansfield Manuscripts

- His manuscripts survive in the family seat in Scone in Scotland
- Transcribed by Professor James Oldham
- Swinton v. Claphamson, (July 10, 1765)
- Greenough v. Dalmahoy, (Dec. 9, 1769)
- Godfrey v. Ellison, (June 13, 1770)
- Greenough v. Lambertson, (Dec. 18, 1777)
- Singleton v. Bolton (1783)
Swinton v. Claphamson (1765)

- Daffy’s *Elixir Salutis*
- Invented by Anthony Daffy, in the mid-seventeenth century.
- The elixir was sold by Mrs. Mary Swinton of 46 Salisbury Court, signified by a sign comprising two large golden balls.
- Defendants, Mrs. Elizabeth Snell and Thomas Claphamson, who traded in the name Trubshaw.
- The deception involved putting a sign outside the house, also of two golden balls, and confirming orally that the goods were “Daffy’s.”
The Guildhall 1805
Swinton v. Claphamson (1765)

The case was heard before Lord Mansfield at the Guildhall

Reports state Defendants ‘imposed an Elixir on many persons as and for the true Daffy’s Elixir, made by the Plaintiff; and for a false publication, to the Plaintiff’s prejudice, that his wife is not niece and representative of Anthony and Mary Daffy, deceas’d, or possessed of his original receipt . . . .’

Swinton received £49 plus costs.

LONDON EVENING POST, July 13–16, 1765, at 3; PUB. ADVERTISER (London), July 13, 1765, at 3; PUB. LEDGER (London), July 12, 1765, at 662; LLOYD’S EVENING POST (London), July 10–12, 1765, at 6, col.B.
Greenough v. Dalmahoy (1769)

• Claimant, apothecary Thomas Greenough
• Made and sold “Pectoral Lozenge from Balsam of Tolu” for treating coughs, a medicine based on the South American tree Tolu Balsamum (aka *Myroxylon toluferum*).
• Greenough advertising this for sale at least from 1765.
• Defendant, Alexander Dalmahoy, also an apothecary, advertising himself as “the chemist to her Majesty.”
• Operating from ‘Glauber’s Head, Ludgate Hill’
(Johann Rudolf) Glauber’s Head
Greenough v. Dalmahoy (1769)

- Tried before a special jury (that is, a jury formed of experts) under the supervision of Lord Mansfield.
- Greenough had a substantial trade, selling 8000 lozenges a year
- D had sold lozenges to one of the witnesses as “Greenough’s.”
- The jury found for Greenough, and awarded £50 damages (and, with cost of £45, a total award of £95).
- The newspaper report adds,

  - “It is hoped that this will prevent such gross impositions for the future....”

Greenough v Lambertson (1777)

• George Lambertson a “chymist of Oxford Street”
• Tried before a special jury.
• The evidence was that Greenough had a very substantial trade, his shopman suggesting to the value of £30,000 per year
• Various witnesses had bought lozenges from the defendant, asking for “Greenough’s” at two shillings per dozen.
• The defendant’s witnesses suggested that he bought the stock innocently from a “walking druggist” named Savage, but had since stopped dealing with him and thereafter stopped selling the lozenges as the plaintiff’s.
• The jury found for the plaintiff ordering £20 damages and costs of £37.
• The reports state that the
• “Language of the learned Judge on this Occasion was so very severe against every Imposition of this Nature, that it will no Doubt have the Effect of checking such injurious Practices in future.”
Points of Interest

• Trade mark law thought of as a nineteenth century invention. Duncan M. Kerly, The Law of Trade-Marks, Trade-Name, and Merchandise Marks 2 (London, Sweet & Maxwell 1894) stated “The law on this subject cannot be traced back further than the present century.”

• Common Law origins extend earlier, and to cases concerned with medicines
But Claimant’s did not always succeed...

- In three cases, the claimants were “non-suited”
- *Godfrey v. Ellison* (1770) (“Godfrey’s Cordial”)
- *Norton v. Hayman*, (July 15, 1783) (KB) (“Maredent’s Anti-Scorbutic Drops”) (because D had learned recipe from plaintiff’s deceased husband)
- *Singleton v. Bolton* (1783)
Singleton v Bolton (1783)

- “Dr Johnson’s Yellow Ointment”
- A cure for “ruby faces”, later remarked as “eye ointment”
- Said to have been invented by Dr Johnson. Possibly late 16th century.
- Advertised by George Hinde in “Fox Hall” in 1700s.
- Lineage traceable thereafter to William Singleton, who came into possession in 1779
- (business archive survives at London Metropolitan archive)
Win. Singleton acquaints the Public, that in order to render the above Ointment of as great public Utility as possible, and to put a Stop to the Shameful Impostures which are practised, he is induced to publish it in this and many other London Papers, that every Person may know the real Proprietor of this Ointment, and be cautious of whom they purchase it. He is well informed that a Per-
Singleton v. Bolton

- Singleton claimed Bolton was selling counterfeits at his shop in the Royal Exchange
- Brought action before King’s Bench
- Initially non-suited, Singleton brought motion for new trial. This was rejected.
- Report published in 1831. Not clear where manuscript came from. Nor does the report offer clear reasons.
The reasoning in the report

• That Singleton did not own (no letters of administration)...
• That “Dr Johnson’s Yellow Ointment” was generic ... so others could use the name
• Or...
Or... A Case of Exhaustion

- Clue from advertisement in Whitehall Evening Post
- “[S] believes [B] does not attempt to counterfeit or adulterate it (conscious of its great and superior efficacy), but buys the Ointment of him, vends it at a very advanced price, and in the Bills which he gives along with it, expresses that he and he alone is the sole and only Proprietor.”
So: why did S try and restrain resale?

• Because, with ‘counterfeiting’ common identification of authorised vendors was crucial part of strategy:

• ‘Beware of counterfeits. If sold at any other Shop near the ‘Change Gate, except Mrs Randall’s, it is not the Ointment prepared by Wm Singleton.’
Conclusions

• Eighteenth century medical practices led to some of the earliest trade mark cases
• These seem to have been overlooked or neglected
• From the 1810s cases in Equity allowed for grant of injunctions in trade mark cases, and from 1830s even where trade marks had been adopted innocently
• Equity came to be the primary forum and the older practices in courts of common law forgotten.