

# Labels and Trademarks and Prints, Oh My! Legal Evidence of US Interest in Brand Protection in the 1800s

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## Abstract

**Purpose** –This paper examines a number of legal sources for evidence that US marketers were interested in protecting their brand identities in the 1800s.

**Approach** – This research examines historical legal records.

**Limitations** –Many original records were lost in the 1836 Patent Office fire or have been simply lost. However, this research project will continue in an effort to find whatever records may still be available.

**Contribution** –Existing literature examines trademark statutes and federal registration that began in 1870. This work examines several types of evidence and additional sources that both pre-date 1870 and provide a fuller understanding of the period from 1870 to 1905.

**Keywords** – United States, Trademarks, Design Patents, Copyright Registration of Prints and Labels

**Paper Type** – Research Paper

## Introduction

Marketing historians seem to agree that after the American Civil War, improvements in transportation, communication and production/packaging technology allowed marketers to begin to develop national brands (Strasser, 1989; Tedlow, 1990). This effort is thought to have been led by so called patent medicines that accounted for roughly half of all advertising after the American Civil War and were the largest group of advertisers by 1870 when the first federal trademark registration statute was enacted (Laird, 1998; Goodrum & Dalrymple, 1990). By 1880, there were 563 firms producing patent medicines with over \$10 million of capital invested (Billings, 1892). These products were sold under a trade name, often with a logo or picture as well as a slogan and with distinctive packaging. While 86 utility patents for medicines had been granted by 1849 (Billings, 1892), most patent medicines were registered with the Patent Office for other purposes. Their bottles or labels were registered as design patents or copyright protected as labels or prints. Tobacco companies soon followed this formula to sell their brands (Sivulka 1998, p. 48).

This paper examines those two sets of records: design patents and copyrights, as well as passing off and trademark lawsuits decided before the federal trademark registration statute of 1870 and some federal trademark registration records. It suggests that before the concept of brands had emerged, marketers attempted to use copyright registration to protect labels that were largely descriptive (Strasser, 1989, p. 36). By the 1850s, the concept of trade marks (now spelled as a single word in the US) had emerged and marketers were seeking various means to protect their trademarks from imitation. This rise in prominence of trademarks led to the concepts of brand identity, brand equity and brand marketing. The latter was originally called trademark advertising in the early 1900s (Petty, 2011). While patent medicines and tobacco companies actively sought protection for their labels and trademarks, many marketers from a broad range of industries did the same during the middle 1800s.

## Early Attempts at Label Protection

Anecdotal evidence indicates that some courts accepted trade name registrations even before the US was formed. In 1772, a Fairfax Virginia court accepted registration of the mark “G. Washington” for flour (*Trademark Reporter*, 1992). Such colonial laws requiring identification markings on particular goods such as tobacco and flour were likely continued by states after the adoption of the Constitution, but were intended to track product quality not permit product promotion by brand name. After the country was formed, a Boston sail-maker petitioned to be allowed to register his trademark with the

new federal government and his petition was sent to then Secretary of State Thomas Jefferson. Jefferson recommended a statute be passed, but his recommendation was not adopted (Rogers, 1910, p. 41).

This left an unfilled demand for some sort of federal protection. This gap was initially filled by copyright protection. The tradition of court registration continued with the first copyright statute of 1790 which limited copyright registration and protection to books, maps and charts. Authors also were to send a copy of their work to the Secretary of State. Copyright law was expanded in 1802 to include prints (historical or otherwise) that were designed and engraved, etched or worked. In addition to depositing these works, a notice of the copyright registration had to be included on or in the work and a newspaper notice had to be published. In 1819, courts were authorized to enjoin unauthorized copying of copyright protected works (Bowker, 1912). There is no evidence in this early period that the copyright law was used to protect labels, packaging, advertising prints of trademarks. A perusal of a compilation of copyrighted works through 1821 reveals no titles that appear to be anything other than books, directories, gazetteers, maps or charts (*American Museum*, 1822). Roughly one third of all copyright filings from 1831-1859 were missing when the Department of State forwarded copyright materials to the Patent Office (Federico, 1939).

The 1831 copyright amendments simplified protection by requiring notice on the work and filing with the court but then court clerks would annually notify the Secretary of State of new filings. Newspaper publication was no longer required. In addition, the term of protection would be 28 years with a renewal registration for a second 14 years by the author or his or her surviving heirs (Bowker, 1912). It is not clear whether any of these early court records have survived.

While it was questionable whether a consumer product label would constitute a print or engraving, at least by the 1840s, they were deposited nevertheless with federal court clerks for copyright registration. In 1848, the federal circuit court of Ohio refused to enjoin an imitation of a medicine label ("Dr. Rodgers' Compound Syrup of Liverwort and Tar") as a copyright infringement, even though it had been registered as a copyright with the court clerk a year before the lawsuit. After examining British judicial precedent, the court refused to order an injunction because it was not the republication of the copyrighted item that caused injury, but rather the fraudulent sale of the imitation medicine. The label had no intrinsic value beyond identifying the medicine. It was not intended to be read or bought and sold on its own. Ultimately, the court decided the copyright statute did not authorize the protection of labels that merely assert a medicine can cure certain diseases and indicate how it should be used (*Scoville v. Toland*, 1848).

When the Smithsonian was created in 1846, the Library of Congress and the Smithsonian were supposed to receive copies of copyright registered works. According to a Smithsonian report, there were not a lot of commercial labels being registered in courts and forwarded to the Smithsonian at this time. From August 1846 through the end of 1849 there were 46 listings for Maps, Charts, Prints and Labels. Only four of these were for commercial labels: "Musury's compound extract of Sarsaparilla and Wau-a-hoo," and three labels from Dr. Stephen Jewett to cover his "Celebrated health resorting bitters," "Highly celebrated pulmonary Elixer," and "Highly and justly celebrated strengthening plaster" (Board of Regents, 1851, pp. 233-236). In the single year of 1850, this category contained an additional 43 entries including the four labels previously registered (they may have been registered in different courts from the prior registrations). In addition, registrations were received for eight other labels all of which appear to be associated with patent medicines: Dr. Moffat's "The Phoenix Bitters" (in French, Spanish and German), "Compound Syrup of Hops and Boneset," "Equarian Condition Powders," "Fahnestock's Vermifuge," "Forsha's Balm Liniment," "Hoffland's celebrated German Bitters," "Jewett & Co.'s Chromolith Card," and "Moffat's celebrated Phoenix Bitters" (Board of Regents, 1851, pp. 322-325). While there is no way to know how many labels were registered in a court but not forwarded, this increase in labels registered in 1850 over the prior three years, suggests label registrations may have been increasing at this time.

The controversy continued with a few other court decisions refusing to protect labels under copyright law but at the same time court clerks, arguing their duty was the ministerial recording of items not their examination to see if they qualified for copyright protection, continued to register labels as copyrights. In 1856, a year after the enactment of a law that allowed copyright deposits to be mailed for free, the Secretary of State issued a circular to court clerks ordering them to refuse registration of labels (Rosen, 2009a, pp. 5-6). Copyright Account Books from 1856-1864 for the US District Court for the District of Massachusetts (available at the US National Archives ARC Identifier 2945753) identify a number of prints by what appear to be product names suggesting these prints

were intended as labels. Not all print entries were legible or could be identified with certainty as product related or not, but perusal of these records suggested that labels might account for 10% or more of all copyright entries. While many of these entries are for medicines, some were for other consumer products such as fly paper, rat poison, shoe polish and hair dye.

Although copyright law was attempting to disavow labels, interest in label protection continued. In 1845, New York adopted the first state criminal statute that declared counterfeiting “any representation, likeness or similitude, copy or imitation of the private stamp, wrapper or label” affixed on goods to be a criminal misdemeanor punishable by crime or imprisonment (Upton, 1860, p. 247). Similar statutes were enacted in Connecticut and Pennsylvania in 1847. By 1850, these state criminal statutes started explicitly covering trademarks and brands in addition to labels and stamps (United States Congress, 1900, pp. 91-92). Upton (1860, pp. 247-248) could not recall seeing any prosecutions under these statutes, but they continued to be enacted to number about a dozen by 1900 (United States Congress, 1900, pp. 91-92).

Federal law at this time also began to recognize trademarks. In 1859, the copyright responsibilities were transferred to the Department of the Interior which assigned them to the Patent Office. That same year, the Patent Office issued another circular ordering courts not to register “stamps, labels, and other trade-marks of any manufactured articles, goods or merchandise” as copyrights (Rosen, 2009a, pp. 5-7). However as noted above, that did not prevent the court clerk for the federal District Court of the District of Massachusetts from registering trademarks through 1864. The mention of trademarks in this circular on copyright registration reflected the fact that the Patent Office at that time was accepting registrations for “designs as trademarks.”

### **Design Patents**

In 1841, Patent Commissioner Ellsworth recommended that Congress enact a statute to protect “new and original designs for articles of manufacture, both in the fine and useful arts, to the authors and proprietors thereof.” The following year, the statute to protect design patents was enacted to protect any new and original design for: . . . (4) Any new and original impression or ornament to be placed on any article of manufacture, the same being formed in marble or other material; (5) Any new and useful pattern, print, or picture to be either worked into or worked on, or printed, painted, case or otherwise fixed on any article of manufacture . . . “. This statute provided for a seven year term for design patents which was changed in 1861 to either three and a half, seven or fourteen years, at the discretion of the applicant, plus one possible seven year extension (Hudson, 1948, pp. 380-384). Many of these early design patents covered stove, fireplace, utensils and clock face designs. The function of an ornamental design is to provide a distinctive aspect of design that is pleasing and attractive (Symons, 1914, p. 14). As the Supreme Court would note in 1870:

The law manifestly contemplates that giving certain new and original appearances to a manufactured article may enhance its salable value, may enlarge the demand for it, and may be a meritorious service to the public (*Gorham Co. v. White*, 1872, p. 525). The quoted statutory language and subsequent Court interpretation appears to allow for new prints, pictures, or ornamental designs to be registered as design patents based on their novelty rather than their ability to identify a distinct source of a product.

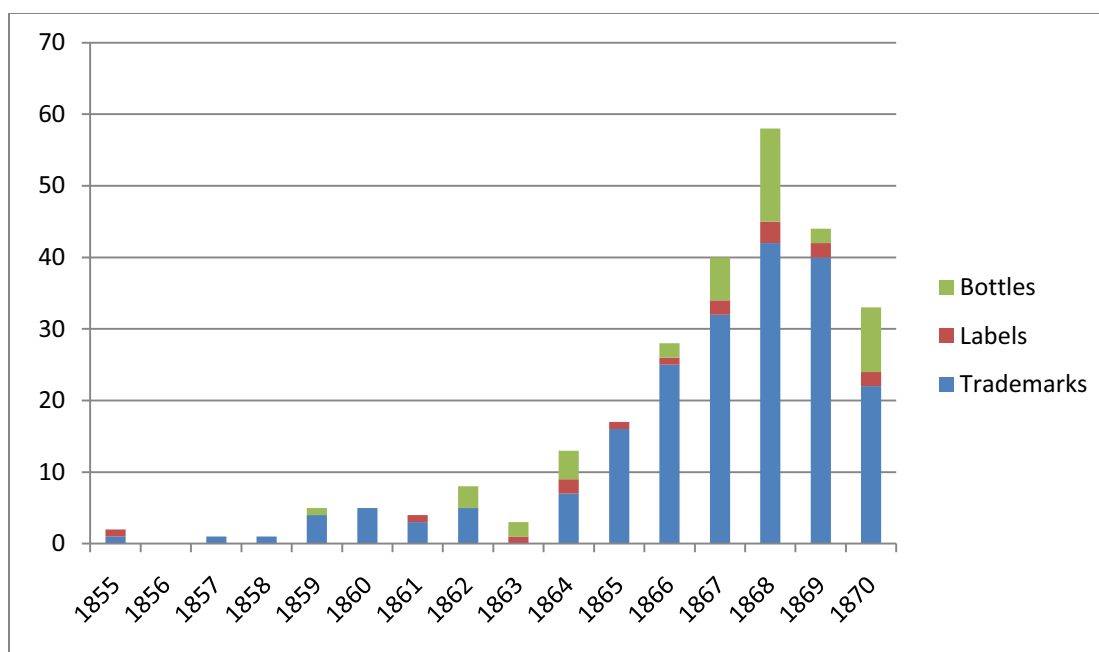
Because the protection of labels was put in doubt by the 1850s, the design patent system began registering designs for labels and trademarks (as well as occasional bottles or containers). For example the design patent below was identified as for “Labelling Barrels:”



(available at the U.S. National Archives website <http://www.archives.gov/research/arc/>,  
ARC Identifier 305884 / Local Identifier 241-PATENTDES-1897)

Symons (1912) notes that the Patent Office began to issue design patents on “designs for trade marks.” A search of the *Annual Reports of the Commissioner of Patents* from 1849 through 1854 reveals no trademark designs in those years. The first patent on a design for trademark appears to be design patent number 725, one of 71 design patents issued in 1855. That year also saw the issuance of design patent number 717 –“a design for labels on bottles and jars.” This label design might also be a trademark if it was intended to identify a particular source of the product for consumers. Thus, these two design patents may be the first federally registered “trademarks” from a brand marketing (but not legal) perspective. These two potential trademark design patents amount to about 3% of the total design patents issued in that year.

Design patents on trademarks, labels and bottles (including an occasional match box or other container) trickled in until the end of the Civil War as shown by the chart below. 1865 saw 17 purported trademarks registered as design patents out of 221 design patents (8%) and the peak occurred in 1868 when 58 potential trademarks were registered as design patents out of 446 total design patents (13%). Although the number of design patents registered in the next two years increased to 508 (1869) and 737 (1870), the number of potential trademarks registered as design patents decreased to 44 (1869) and 26 (1870). Symons (1912) notes that “some two hundred” design patents for trade-mark designs were issued. The count here is 202 plus additional design patents on labels and bottles. A total of about 3800 design patents were registered by 1870, so trademarks on designs were only about .5% of all design patents from 1842-1870.



**Figure 1.**  
Select Design  
Patents Issued by  
Year

It is worth noting that interest in trademarks during this period also crept into utility patents. Patent No. 56,068 issued in 1866 covered a method of making a bar of soap out of different color soaps arranged to form an “ineffaceable ornamental design or trade-mark in one or more contrasting colors.”

While counting the number of design patent trademark registrations is relatively straightforward, identifying the products subject to design patents trademarks is more challenging because neither reports nor the filings necessarily identify the relevant product and some of the original filings were damaged leaving only blurred images. Nonetheless, records indicate that the single design patent (#971) for a trademark registered in 1857 was for plough springs. A second design for that year (#918) was for “Medallions of Franklin to mark Pens and Pen-Holders” but it is difficult to tell if this an ornamental feature of the pens or intended to identify the pens as “Franklin” brand. Two out of four designs for trademarks in 1859 identify their respective products as soap boxes and “Bragg’s Arctic liniment.” Similarly two out of five design trademarks in 1860 identified their products as “S. Armitage’s Neuralgic Pills” and lead pencils. In 1862, design trademark industries that were identified included an elixir, a medicine, shoes and a sword blade. The 1863 reported did not list any designs as being trademarks, but the text of the reported indicated that at least one design was a trademark. The 1864 and later reports contained larger numbers of registrations but shorter descriptions generally including only the registrant, assignee if there was one, a vague category such as trademark, bottle or label and the design patent number. Nonetheless a lead pencil trademark was identified in 1865 and again in 1866 and 1868. 1866 also included a trademark for pens and pen boxes. Thus, while a good number of medicines were registering trademarks as design patents, a variety of other products also followed this practice.

Francis Upton (1860, pp.18-19) in the first U.S. treatise on trademarks criticized the practice of issuing trademarks as design patents:

It is quite obvious that such was not the purpose of the law, but, on the contrary, it was manifestly intended, that the design, for which such protection was provided –should constitute a portion of the manufactured articles, either as an ornamental adjunct, or as controlling its figure of proportions –by no means, as a mere name or designation, by which to identify or distinguish the article. . . . The policy of continuing such an unwarrantable construction of the law –resorted to for such a purpose [to be able to label the product as “patented” “thereby inducing the public to believe that a patent exists for the thing itself –not for the mere device or mark attached to it”] –is, to say the least, very questionable.

Despite this criticism, the practice of issuing design patents for trademark designs continued through 1870 when the first federal trademark statute was enacted. Thus the 1870 report included 22 designs designated as trademarks, none of which indicated the product or industry, and 121 trademark registrations all of which included the industry of registration (Commissioner of Patents, 1870). Trademarks could only be registered in a single industry. The final design for a trademark patent was # 4266, dated July 26, 1870. It was for a self-sharpening hoe. True to Upton's criticism, the label design noted "H.C. Rogers, Patentee" suggesting the hoe itself was patented when in fact only the label/trademark design was patented.

In the September 1870 Patent Commissioner decision (*in re William King*), Commissioner Fisher acknowledged past practice of issuing design patents "for a trademark" but asserted the latter words were merely descriptive and did not guarantee use as a trademark. In addition, any lawsuit for patent infringement would have only recovered damages for infringement of the design. Such an infringement lawsuit could not recover any damages for injury to the manufacturer's trade from the use of the design by another as a trademark. The Commissioner also noted that the application fee for trademark registration was cheaper (\$25 instead of \$30) and trademark protection at 30 years was more than double the fourteen year term of a design patent, so why would anyone still want a design patent on a trademark? He further noted that only "forced construction" of the statute allowed the practice in the first place and the revised statute that included trademark registration made it clear that trademark protection could only be obtained by following the trademark registration provisions (Simonds, 1874, pp. 85-87).

### Trademark Litigation

By the 1850s, the concept of a trademark was well established in the Patent Office because it was well accepted in court as well. The earliest "passing off" U.S. court decisions did not mention trademarks by name. Cox (1871) assembled all the reported US court decisions he could find up to 1870. Although Rogers (1914, pp. 48-49) counted a total of 62 court decisions up to 1870, Cox (1871) included 77 distinct court cases some of which had multiple decisions (e.g., trial court and then appellate court).

The earliest cases did not mention trademarks by name. Cox's first case was an 1825 decision by the New York (state) Chancery court that refused to issue an injunction against the New York National Advocate newspaper for having a name similar to an earlier newspaper titled The National Advocate. The decision noted one name was nearly identical to the other, but held the name was sufficiently distinct and because readers of the original paper were solicited to subscribe to the second paper that consumers would not be deceived into thinking they were the same. Cox's second decision and the first counted by Rogers was a 1837 Massachusetts Supreme Judicial Court decision overturning a jury verdict in a case involving a "patent" medicine. This decision discussed whether the words "Thomsonian Medicines" indicated a single source of the product or was a generic description of a type of medicine. The court ordered a new trial to make this determination (*Thomson v. Winchester*, 1837).

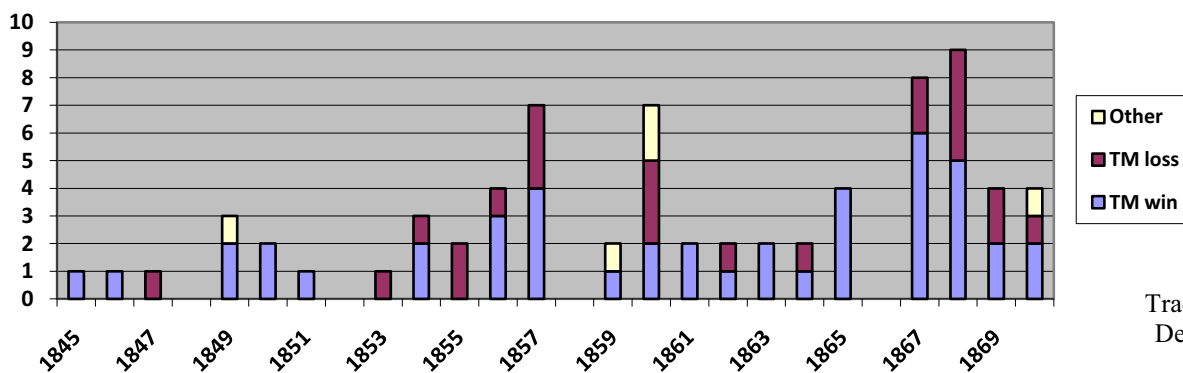
The third court case in 1840 dismissed the complaint between two competing newspapers because the appearance of the two was so dissimilar that confusion was unlikely (*Bell v. Locke*, 1840). By 1849, another court cited this decision for the proposition that "fraudulent use of a mark was a ground for relief (*Coffeen v. Brunton*, 1849). Yet the result in *Bell v. Locke* (1840) was that despite the similarity of the names, the appearances of the newspapers were sufficiently different to prevent consumer confusion. Thus overall appearance, the equivalent of the package or label for consumer products, was more important than the similarity of names at this time.

The first mention of trademarks in US court decisions occurred in the mid-1840s in cases involving brands of thread from Great Britain whose spools and labels were imitated by US companies. The first set of cases involved a Massachusetts company that began imitating the British product, "Taylor's Persian Thread" and selling it in New York City. In October 1844 the Federal Circuit Court of the District of Massachusetts New York Chancery Court issued a short decision enjoining this practice without mentioning trademarks (*Taylor v. Carpenter*, 1844). A trial then took place and the court's 1846 opinion denying the motion for a new trial repeatedly mentioned "marks." One defense that was raised in this case was that it was customary for businesses to imitate trademarks that were used by foreign companies. This was asserted to be a widespread practice in several countries for at least the past 20 years. The court rejected this assertion that wrongful usage of another's trademark somehow made the usage legal (*Taylor v. Carpenter*, 1846). Meanwhile, a New

York Chancery Court December 1844 decision in a case between the two same parties also issued an injunction but explicitly discussed the pirating of “trade-marks” (*Taylor v. Carpenter*, 1844). A similar New York Chancery Court decision in 1845 in another British tread case also enjoined the practice of trademark and label infringement while explicitly discussing marks and trade-marks. This decision also notes the consistency of its ruling with the newly enacted 1845 New York label counterfeiting statute (*Coats v. Holbrook*, 1845).

The recognition of the concept of trademarks in the second half of the 1840s did not automatically mean that trademark considerations rose above packaging. In *Partridge v. Menck* (1847), the court affirmed the chancellor’s decision to overturn a previous decision to issue an injunction. The court recognized the importance of preventing the pirating of another’s goodwill that had built up in a label or trademark, but ultimately decided the packaging differences made confusion unlikely. Again this suggests that while trademarks had become important, they are not more important than labels and packaging at this time.

These examples suggest that courts were not always sympathetic to brand marketers in these early cases. Despite similar names, dissimilar appearance was found to make trade diversion unlikely. A few early English cases and at least one US decision required trademarks to explicitly identify the manufacturer and would not enforce rights to arbitrary or fanciful names that did not. A few US decisions refused to get involved in disputes between sellers of “quack medicines” and other decisions attempted to distinguish trademarks from generic names and quality indications. Some courts condemned fanciful names as deceptive whereas others were more troubled by their brazen imitation holding that the fact that the original name was fanciful did not excuse imitation (Upton, 1860). The results of the 74 judicial cases from 1845 to 1870 are summarized in the chart below. Of the entire 77 cases, the plaintiff brand marketer obtained some relief in 45 (nearly 60%) of them.



**Figure 2.**  
Trademark Court  
Decisions 1845-  
1870

Francis Upton’s book, *A Treatise on the Law of Trade Marks* (1860) was the first American book on the subject of trademark law. In the preface, he notes that trademark law had become an area of interest and importance in the past quarter of a century. Indeed, the US Supreme Court in 1871 seem to share this narrow focus on trademarks:

[I]n all cases where rights to the exclusive use of a trade-mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another; and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. This is the doctrine of all the authorities (*Canal Co v. Clark*, 1871, pp. 322-323).

However, this case involved the sale of “Lackawanna Coal” so that no label or packaging was involved. In addition, despite the pro-trademark language quoted above, the Court found the term to be geographically descriptive and therefore not a valid trademark. Nevertheless it appears by this time, the concept of trademark infringement had obtained preeminence over the broader concept of passing off through confusingly similar appearance. The latter would be reserved for cases involving descriptive names that were not entitled to trademark protection (Petty, 2011).

Before leaving this analysis of early court cases, it is worth noting the industries involved in the. Of Cox’s (1871) 77 pre-1870 cases, eleven involved medicinal products with another ten involving personal care items including hair preparations, perfumes and cosmetics. Ten cases also involved

thread or cloth products with another one involving sewing needles. Retail cases, often hotels, accounted for nine cases and newspapers and alcoholic beverages each amounted to five cases. Thus again anecdotal legal evidence suggests that marketers other than those of patent medicines and tobacco also were interested in protecting their brand identities. Most of these decisions outside the retail category also did not involve simple name similarity but also passing off through the imitation of labels, packaging and even product instructions.

### **Trademark Registration**

In 1863, California copied other states by enacting a criminal trademark counterfeiting statute. The California statute was the first to require that trademarks be registered with the state before imitators could be criminally prosecuted. Oregon followed this model in 1864 (United States Congress, 1900, pp. 91-92). In 1865, A California court held that the new state statute did not preempt common law and equitable remedies (*Derringer v. Plate*, 1865). This allowed private trademark litigation to continue for both unregistered and registered trademarks.

By 1868, the federal government negotiated a treaty for the mutual condemnation of trademark counterfeiting with Russia. This treaty was the first authorization for the filing of trademarks, albeit it Russian trademarks, with the Patent Office. Similar treaties with Belgium and France quickly followed. Given that these foreign trademarks could now be registered with the US patent Office, it is not surprising that the first trademark registration statute proposal was introduced in Congress in 1869. The new statute passed in 1870 (Rosen, 2009b, pp. 836-840).

The new trademark statute called for federal registration of marks that had been established by use in commerce. By the end of 1870, 121 marks were registered federally. 21 registrations were for tobacco or snuff; 10 for whisky or liquor; 9 for medicines; 6 for soaps and other cleaners; 5 for fertilizers; 4 for brooms, dry and other types of goods, and white lead; 3 for metal and metal tubing, bitters, burning fluids, various foods, and various powders. Even items like steam governors, sewing machines, wagon axles and wheels and watches received trademarks (Commissioner of Patents, 1870, pp. 260-261).

However, the 1870 statute and its 1876 amendment were declared unconstitutional in 1879 for being improperly based on the patent and copyright clause of the Constitution (*Trade-Mark Cases*, 1879). At this point some 8000 marks had been registered (Wilkins, 1992). Another federal statute was adopted in 1881 but it only authorized registration for trademarks used in foreign commerce (or in commerce with Indian tribes). The impact of this change on trademark litigation was unclear until 1903 when the US Supreme Court held that federal courts lacked jurisdiction to enjoin the use of an infringing trademark unless it was used in foreign commerce (*Warner v. Searle & Hereth Co.*, 1903).

Congress again acted swiftly by enacting a new trademark statute in 1905. It provided for federal registration of trademarks that had been used in interstate commerce for more than ten years. Almost 4500 trademarks were registered in 1905 (Commissioner of Patents, 1905). Trademark registrations from 1870 through 1905 are presented graphically in the next section compared with label and print registration.

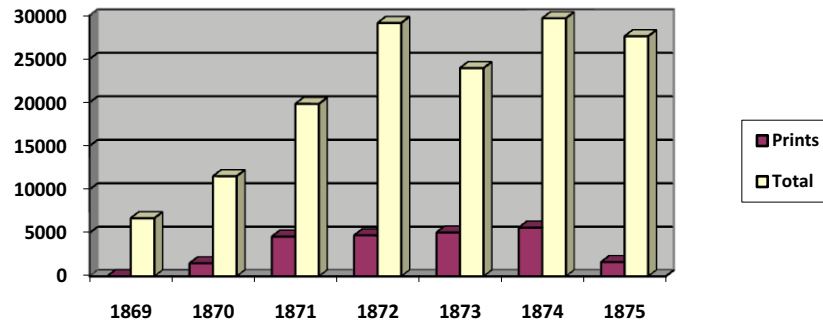
### **Label and Print Registration Eventually Clarified**

One might think that the growing interest in trademarks would have diminished the interest of marketers in label registration and protection, but this was not the case. In 1870, not only was the Patent Office authorized to register trademarks, but the Library of Congress was charged with collecting and preserving copyright documents and records. By the end of 1870, the number of engravings, photographs and chromos had increased from 423 to 1175 and the new category of prints that were registered totaled 1496 for the year even though they were only registered after July when the new statute was passed (Librarian of Congress, 1869, 1870). In the 1871 report photographs dropped to 769 because engravings and chromos were now categorized with prints and totaled 4571 (Librarian of Congress, 1871). No wonder in 1872 when the number of prints, engravings and chromos registered for the year was 4719 (over 20% of the total number of registrations -22,140), the Librarian of Congress argued that commercial labels were never intended to be protected by copyright laws because they did not “promote the progress of science and the useful arts” as required by the Constitution. He recommended instead that they be registered in the patent office as either trade-marks or designs of labels (Librarian of Congress, 1872, p. 5). He noted that it had “always been customary to enter for copyright large numbers of printed labels, with or without pictorial embellishment, designed



for use on cigar-boxes, patent medicines, and other articles of manufacturer” (Librarian of Congress, 1872, p. 4).

In response, Congress enacted a confusing law in 1874 that stated commercial prints and labels could not be registered under the copyright laws at the Library of Congress, but could be registered by the Patent Office. The statute also said that labels and prints registered in the Patent Office could not be trademarks. Attempts to register labels with the Library of Congress continued for twenty years, but such applications were usually forward to the Patent Office (Rosen, 2009a, p. 11). As the chart below illustrates, the change in registration location for commercial prints and labels caused the numbers of prints registered in the copyright office to drop from 5598 in 1874 to 1639 in 1875. The number of engravings and chromos still increased from 922 to 1490 suggesting that relatively few of these were commercial despite being included with prints in the 1871 and 1872 reports.



**Figure 3.**  
Copyright  
Registrations  
1869-1875

While the number of prints registered as copyrights by the Librarian of Congress dropped by almost 4000 between 1874 and 1875, the Patent Office did not see a large number of label (including prints) registrations. Only 151 labels out of 221 applications were registered with the Patent Office in 1874 and 313 the following year out of 566 applications. Just over 400 labels were registered annually between 1876 and 1879 (Rosen, 2009a, p. 44). While the number of label registrations was significant during this time, often twice as many trademarks were registered.

The number of labels registered by the Patent Office probably does not reflect the total number of labels for which copyright protection was sought. Labels were still being submitted to federal district courts. The US District Court for the District of Massachusetts registered 33 labels and trademarks between 1874 and 1878. Most of the entries in the record book include a copy of the actual label or trademark (Record for Applications for Labels and Trade Marks from 1874-1878 is available at the US National Archives ARC Identifier 2945743). It is not clear what proportion of these labels and trademarks also were registered with the Patent Office.

The meaning and implications of the language of the new statute was debated for years. For example, the statute did not define labels or prints. Initially both were registered in a single category, but the Commissioner of Patents believed prints were pressed onto articles of manufacture whereas labels were slips of paper attached to articles of manufacture. In 1881, the Commissioner changed his position and asserted that prints were simply printed labels (Rosen, 2009a, p. 11).

The Patent Office also refused to treat label registration as a ministerial copyright registration so that any submission was registered. Rather, the Patent Office examined labels and prints for appropriateness of registration, just as they did for patents and trademarks. Indeed, in the Patent Office’s 1885 rules, it described the prior practice of the Librarian of Congress to register commercial prints and labels as copyrights as merely providing a “semblance of protection to many trade-marks, of which the labels and prints entered by him were the mere vehicles” (Rosen, 2009a, pp. 15-17). Thus the new Patent Office label registration authority was based on its authority of trademarks. This close relationship meant that when the Supreme Court declared the trademark registration statute unconstitutional in 1879 (*Trade-Mark Cases*, 1879), this also caused label applications to drop as well. However, a lower court decision the following year refused to declare the label law unconstitutional so filings rebounded. 1883 saw a new record of filings with 834 label applications filed and 906 registrations issued (Rosen, 2009a, pp. 13-14).

From 1885 through 1890, Patent Office label registrations stabilized to 300-400 annually (Rosen n.d.). However, this stopped when the Supreme Court issued a decision in 1891, denying registration

Confusion and controversy continued until an 1891 Supreme Court denied registration to a simple label “Waterproof Drawing Ink.” The Court held that registering such a descriptive label did not advance science or the useful arts and therefore was not authorized under the patent and copyright provision of the U.S. Constitution. It also held that copyrighted works must exhibit some originality and be “founded in the creative powers of the mind” (*Higgins v. Keuffel*, 1891, p. 431; Zimmerman, 2006, p. 89). That decision again discouraged label registrations, but trademark registrations, as shown in the figure below, continued strong.

The Patent Office quickly responded to this decision by holding in 1892 that commercial labels that were sufficiently artistic could be registered and by recognizing for the first time that prints were a separate category under the 1874 and could be registered as prints. However, in 1893, it issued rules that denied label registration for labels that contained a trademark. Five years later in 1898, the Office discarded its rule and held that prints could contain trademarks and still be registered and that trademarks could even appear on labels as long as they were not the totality of the label (Rosen, 2009a, pp. 22-24).

The Patent Office’s expansive eventual interpretation of the law was soon supported by the Supreme Court. In a case involving a circus advertising poster, Justice Holmes held in his majority opinion that “A picture is none the less a subject of copyright that it is used for an advertisement” (*Bleistein v. Donaldson Lithograph Co.*, 1903, p. 431). This support for copyrights on commercial labels and prints led to a new high of 1732 in 1904 and registrations to peak at 1365 in 1906 (Rosen, 2009a).

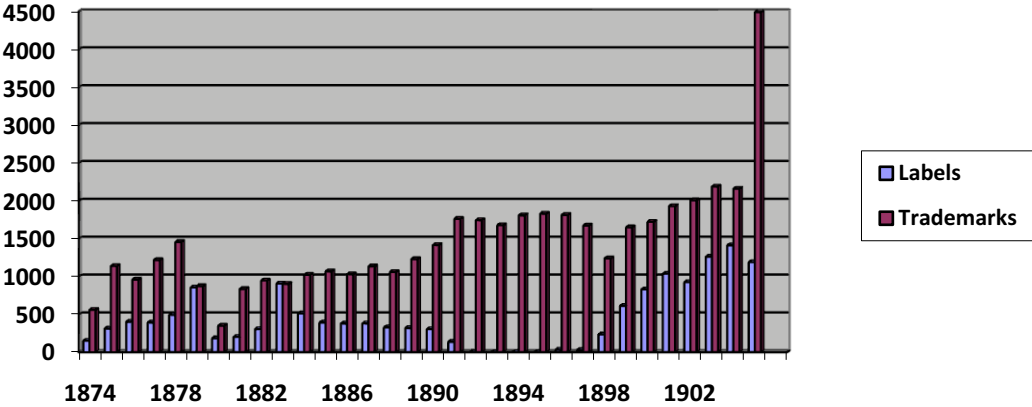


Figure 4.  
Label (including  
Print) and  
Trademark  
Registrations  
by Year

As the chart above illustrates, the 1905 Trademark statute that was based on authority to regulate interstate commerce rather than the patent and copyright clause of the Constitution also stimulated trademark registrations which continued to be numerically more important than commercial label and print registrations. By 1940 the 1874 Act was repealed and copyrights of pictures, whether of fine art or commercial prints or labels were handled by the Copyright Office in the Library of Congress (Rosen, 2009a).

**Conclusion**

Although research into these legal sources of the 1800s continues, this paper suggests two conclusions. First, these legal sources suggest that strong interest in brand marketing existed in the US beginning in the 1840s and 1850s. At the beginning label and product appearance protection was viewed as most important, but within a short period of time, the idea of protecting trademarks as indicia of trade identity rose to the forefront. This shift to trademarks finessed the problem of similar products using similar labels with similar lists of ingredients or attributes, similar directions for use, and similar recommendations for uses. No one seller should have exclusive rights to such descriptions of its products. But sellers could claim the right to particular non-descriptive names and other marks such as distinctive symbols or characters. It’s these trademarks that became the basis for the concept of selling the brand through its specific identity rather than merely selling the product.

The second conclusion here is that interest in brand protection from the 1840s onward was not the exclusive domain of patent medicines and tobacco brands. While these two industries certainly exhibited strong early interest so did international brands of consumer products such as thread and

other mundane products like pencils. Not only were inexpensive items, such as personal care goods, interested in brand protection, but more expensive items such as sewing machines, plows and even steam generators sought to develop and protect their trade identities.

Petty (2011) argues that brand marketing literature developed not in the 1950s, but much earlier in that century. The legal sources examined here suggest that the practice of brand marketing may have spread from predominantly patent medicines to include other consumer products before the US Civil War. This broadening of interest in brand identity protection to industries other than patent medicines appears to have increased after the War. Further research is needed to document the industries and individual brands that developed during this period.

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