Pain-Killer:  
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Introduction
In 1839 when he was 48 years old, Perry Davis became very ill leading him to experiment and develop what became a globally branded product: “Perry Davis’ Vegetable Pain Killer” (Harris 1879, p. 2). Perry Davis was joined in the business by his son Edmund in 1850 followed by several successor and related companies after Perry Davis died in 1862 including: Perry Davis & Son & Lawrence in Montreal (circa 1875); Davis & Lawrence Ltd. in Montreal (1883); and Davis & Lawrence Co. of Montreal and New York (1895)(Tamburello 2008; and Davis & Lawrence Co. n.d.). This evolving business (simply referred to as “Perry Davis” here) and brand thrived during the latter 60 years of the 19th century and into the early 20th century starting 35 years before arguably the most famous patent medicine “Lydia Pinkham’s Vegetable Compound” that didn’t begin sales until 1876 (Stage 1979).

Using contemporary newspaper accounts, legal records and brand promotional materials, this case study examines the development, branding and marketing of “Perry Davis’ Vegetable Pain Killer.” Consistent with the recommendation of modern brand marketing experts (e.g., Romaniuk 2018), this paper will show how Pain-Killer developed a distinctive brand identity through the creation and protection of several brand elements including the product itself, its name, packaging and advertising. The Pain-Killer brand also offered useful content marketing in terms of almanacs, “advertainment” consisting of a book of rhymes and pictures relating to Pain-Killer and a brand story centered in part on its inventor and founder Perry Davis.
The Pain-Killer brand enjoyed decades of success but ultimately failed because it lost exclusive use of its brand name in some jurisdictions and the popular press. It also faced increasing regulation (both formal government regulation of drugs and “muck-raking” in the popular press) in the early 20th century that limited the product formulation, the ability to advertise in national media and its ability to make curative promotional claims.

Background on Patent Medicines
Colonial America had few doctors particularly for its rural communities. Estimates suggest at the time of the American Revolution there were between 3500-4000 physicians in the colonies but only about 200 of them had formal medical degrees (Starr 1982, p. 40). Americans relied upon domestic remedies often handed down from parent to child. As a result, general stores as well as itinerant peddlers sold both “medical” ingredients as well as purportedly complete medicines. For example, newspaper ads in 1736 for “Dr. Bateman’s Pectoral Drops” claimed they could cure some thirty maladies and diseases. Colonial newspapers also proudly advertised products authorized by “his Majesty’s Royal Letters Patents” that granted exclusive rights to the seller. After the American Revolution, even more American-made nostrums replaced foreign products in both retail inventory and newspaper advertising. The number of newspaper ads for such patent medicines sharply increased by the nineteenth century. The invention of cheap pulp paper and low mailing rates contributed to 2000 newspapers running 11 million medicine ads in 1847 (Larson 1937).
The period from the American Civil War to the passage of 1906 U.S. Pure Food and Drugs Act was the golden age of American patent medicines (pictured below). Because of the history with English “Letters Patent,” the name “patent medicine” commonly was applied to all nostrums sold directly to consumers whether they actually received a U.S. patent (as did Tuscarora Rice and Dr. Lee’s Bilious Pills) or not (Young 1961, pp. 17-43). The U.S. nostrum industry grew from $3.5 million in 1859 annual sales to $40 million in 1882 and nearly $59 million in 1900. On a per capita basis sales increased from 11 to 78 cents during this period (Mactavish 2004, p. 34). In 1905, one drug trade journal listed over 28,000 medicines while others estimate 50,000 distinct medicines were sold in the U.S. (Young 1961, p.
The U.S. population of over 83 million people in 1905 spent $75 million on numerous nostrums (Adams 1905, p. 3).

This industry was important not only because of its size but because it was one of the first to sell consumer-sized packages of uniquely branded products advertised to consumers as opposed to bulk goods sold generically to wholesalers and retailers. Indeed the emerging medical profession sought to persuade nostrum marketers that they should convert their products to “Ethical Preparations” by disclosing their formula and advertise only to medical professionals, not to consumers directly (Starr 1982, pp. 128-129). Despite this effort, proprietary medicines continued to advertise to consumers emphasizing brand identity connected to the product’s purportedly unique ability to treat various maladies cheaply and quickly (compared to doctors who were perceived as expensive and extensive in their treatments) (Laird 1998, p. 18).

Norris (1990, p. 48) estimates that patent medicines placed more newspaper and magazine ads in the latter 1800s than any other industry category. By the 1870s, 25% of all advertising was for propriety drugs (Anderson 2000, pp. 38-41). More than half of the “top advertiser” firms listed in 1893 as spending $50,000 or more annually on national advertising were propriety medicine firms (Laird 1998, p. 23). An 1898 survey of 2,853 national or regional advertisers found that nearly 15% sold medicines (Pope 1983, p. 193). By the early 20th century, patent medicines placed an estimated $40 million per year of advertising (Stage 1979, p. 161). Even as national brands developed in other industries such as Royal Baking Powder, Sapolio, Pear’s Soap and IvorySoap, they were still out-advertised in the 1880s and 1890s by the top patent medicine brands (Laird 1998, p. 192).

Patent medicines also were among the leaders in seeking protection to their brand identifiers. Of design patent trademarks registered between 1855 and 1870, personal care items had the largest number followed by medicines, foods, manufactured items, liquor and tobacco. For trademarks registered during the first year of federal registration (1870), tobacco led with 21 registrations followed by liquor and medicines (Petty 2012).

Nostrums also played an important role in the development of the modern advertising industry generally. Laird (1998, p. 173) notes that the nostrum industry was particularly important to members of this nascent industry by providing experience in writing advertising copy. Wood (1958, p. 230) states that most advertising agents of the 1890s had not only started in the patent medicine industry but even at that date, patent medicines remained their largest accounts. These agencies included arguably the

**Construction of the Pain-Killer Brand Identity**

When Perry Davis became ill in 1839, he experimented and developed the product he would soon call Pain-Killer. As initially formulated, the product was mostly alcohol with some opiates added. Although it was recommended for either external or internal use, it appears to have the same sort of satisfying customer experience for internal use as any alcoholic beverage. In parts of remote Canada, Pain-Killer was used as a substitute for liquor at social gatherings called Pain-Killer parties (Senate of the Dominion of Canada 1886, p. 208).

McTavish (2004, p. 3) suggests that Perry Davis developed the first product whose primary purpose was pain relief as opposed to products that treated pain and numerous other maladies. Estes (1988, p. 7) asserts that such specialized analgesics were “surprisingly scarce” among patent medicines with Pain-Killer being the notable exception. However, Larson (1927, p. 337) notes that Steer’s Genuine Opodeldoe was a camphorated soap liniment sold as a pain-eradicator in the early nineteenth century. In addition as illustrated below at least by 1848, Pond’s Extract was being sold as The Universal Pain Extractor (Young 1961, pp. 186-187) and Vegetable Pain Destroyer so there was some competition in the pain reliever category (Dormandy 2006, pp. 252-253).

After creating the product and product experience, the next step in brand marketing is creating the brand name. Nostrum sellers were among the first to appreciate the marketing importance of a well-known trademark in both promoting a new product and differentiating it from other similar products (Laird 1998, p. 187). When Perry Davis recovered from his illness (the recovery attributed to his new medication of course) in March 1840, his wife asked him what he was going to call his new medicine. He answered “I will call it PAIN KILLER, for it has killed all my pains.” That same year, just five years after P.T. Barnum began operating his sideshows and circuses which often sold nostrums (Laird 1998, p. 44), Davis began selling Pain-Killer in a “small way.” He claimed the product could be used either internally or externally to treat pain and it could treat a long list of ailments (Harris 1879, p. 2). In terms of full product name, in 1845, he experimented with Davis’s Vegetable Pain Killer (Davis 1845 and the bottle below left) but by 1856, he was committed to Perry Davis’ Vegetable Pain Killer (Adams 1856, p. 228). As discussed below under trademarks, Perry Davis was also not consistent with whether Pain-Killer was two words, two hyphenated words or a single word.
Modern brand marketing theory suggests that a brand name should be distinctive and memorable so it can serve as a consumer memory “platform” for both consumer knowledge/experience and emotional connection with the brand (Romaniuk 2018). Most brand names communicate some inherent meaning about the brand as illustrated above right. Otherwise, a particular brand would have to promote its attributes in conjunction with the brand name to establish the brand meaning. For example, the brand name Xerox meant nothing to consumers until promotion and experience added particular meaning to the brand. In contrast, the name Pain-Killer appears to describe the product function in a memorable and arguably distinctive way.

Perry Davis’ choice of a suggestive made-up compound word for a trademark was consistent with prior judicial holdings that trademark law would not protect a trade name consisting of the inventor or producer’s name and a product description. “Dr. Johnson’s Yellow Ointment,” (Singleton v. Bolton 1783); “Velno’s Vegetable Syrup,” (Canham v. Jones 1813); and “Thomsonian Medicines,” (Thomson v. Winchester 1837) were all purported trademarks declared generic by courts before Perry Davis began selling his medicine. In addition, the Perry Davis Treatise cites a couple of decisions supporting the use of a made-up word as a trademark such as “Cocoaine” (Davis 1861, pp. 40-43).

Since merely descriptive words would not support trademark protection, it was important that Pain-Killer qualify as a suggestive mark so that it would be protected. The 1870 U.S. trademark registration describes Pain-Killer as suggestive as did a later trademark treatise (Williams 1894, p. 282). The mark is suggestive because it is not literally descriptive. Pain cannot be “killed” in a literal sense. In contrast, the asserted trademark Microbe Killer was found to be descriptive not suggestive because microbes can be literally killed so protection as a trademark was denied (Alff v. Radam 1890, p. 541).

The word “painkiller” is so popular today as a synonym for any sort of pain relief medicine (and a particular alcoholic cocktail) that the modern reader would think it had always been a product category name synonymous with pain medications, pain relievers, palliatives, analgesics and even anodynes (a popular term about 150 years ago). However, since the beginning Perry Davis and successor firms have consistently asserted: the Pain-Killer name was entirely original to Perry Davis and had never previously been used in the English language. Therefore, it was entitled to trademark protection. The firm only sought to protect “Pain-Killer” (and its label) as its exclusive property (Harris 1879, p. 5). Perry Davis never claimed exclusive rights to the widely used descriptive word “vegetable.” Including “Vegetable” in the name of a nostrum (e.g., “Lydia Pinkham’s Vegetable Compound” and “Wright’s Indian Vegetable Pills”) re-assured customers that it contained safe natural ingredients rather than dangerous chemicals.

The trade card below emphasizes that Pain-Killer is a “purely vegetable medicine” while also suggesting a heavenly connection with the multiple cherubs and the tagline from the popular hymn “Joy to the World.” While either of these taglines as well as “One thing is certain. Pain Killer kills pain” could have been used over a long period of time to become a brand slogan, none of them were used consistently. The “Joy to the World” phrase appears in this trade card and a few advertisements and reminds consumers that Pain-Killer is popular throughout the world. (e.g., Harris 1879 cover, Adams 1856, p. 228).
After the brand name itself (and perhaps a slogan), a distinctive product package or appearance is a key brand element (Romaniuk 2018, pp. 50-52). Perry Davis first packaged his invention in 1840 in the non-distinctive 12-sided bottle pictured below left. In the early 1850s, he switched to an eight-sided bottle (Schmidt 2013, p. 34). By 1854, sales were sufficiently robust to attract imitators so the firm also changed the labeling by incurring the “heavy expense” of procuring finely engraved steel plates to add detail making it more difficult to imitate. The front side label featured an engraved likeness of Perry Davis and the back side was a monogram. He repeatedly warned his customers and rivals that bogus imitators were a problem that would not be tolerated. He recommended that customers destroy the bottle and label to prevent re-use with a non-authentic compound (Harris 1879, p. 3). At this time, he changed the bottle again to flat panel with “Davis’ Vegetable Pain Killer” blown into the glass on different panels as shown by the center and right illustrations. Again, these changes made the packaging more distinctive and more expensive to imitate.

### Protecting the Brand Identity

While making packaging that is distinctive and expensive to copy can be useful to deter brand imitation, a brand marketer also must be willing to protect its unique brand identity in court. Most of Perry Davis’ court cases involved both imitative packaging likely to confuse consumers (passing off) as well as the assertion to exclusive rights to the Pain-Killer name as a trademark.
U.S. Court Cases

The first U.S. court decision occurred in a jury trial at the Court of Common Pleas in Providence Rhode Island in 1848 against a firm that was selling “Perry & Burke Pain-Killer.” This decision was summarized later in the Perry Davis treatise on trademark law that was published to explain to potential imitators why Perry Davis believed it had the exclusive right to the Pain-Killer name (Davis 1861). Ultimately, the court held it was a question of fact for the jury to decide whether (1) the name “Pain-Killer” was the property of Perry Davis and (2) the defendant had imitated the product seeking to benefit from Perry Davis’ reputation. The jury found in favor of Perry Davis on both questions (Davis 1861, pp. 13-15). U.S. courts did not begin explicitly discussing trademarks until the 1840s, so this Rhode Island decision is among the earliest (Petty 2012, p. 136).

In 1850, two years after its victory in the court of common pleas, Perry Davis won an appeal before a majority of the Supreme Court of Rhode Island involving a firm selling “J.A. Perry’s Vegetable Pain Killer.” The defense was the first to argue that the term pain-killer was a common English term that was descriptive of this category of products. Chief Justice Greene held that Perry Davis had invented the term Pain-Killer and was the first to apply it to a medical compound. Therefore, Perry Davis was entitled to trademark protection for Pain-Killer regardless of whether imitators used it fraudulently or merely by mistake. He then added ambiguity by stating:

But if the defendant state in his label, that the article which he sells was made by himself, although he calls it by the same name as the plaintiff, he will not be liable; because he has a right to make and vend the compound, if he vends it as his own and not as made by the plaintiff (Davis v. Kendall 1850, pp. 569-570).

Justice Greene then indicated the focus in this case was on whether the public is deceived appearing to reject any property right to the trademark Pain-Killer. Although he personally did not think the defendant’s label would deceive anyone, his associates disagreed so he delivered judgement for the plaintiff Perry Davis (Davis v. Kendall 1850, p. 570). Not surprisingly, the Perry Davis trademark treatise summarizes this opinion but omits the language quoted above that suggested the same name might be used by a competitor (Davis 1861, pp. 15-16).

As noted above, the next step taken by Perry Davis to protect the uniqueness of its brand identity was its publication of a “treatise” on trademark law in 1861. The book boasted that the brand was well-known and extensively used in every part of the U.S. and Canada and good demand also had been created in Europe, the East and West Indies, China, South America and almost everywhere reached by American trading ships (Davis 1861, p. 12). The treatise also contained the following warning:

Although we are not desirous of entering into lawsuits with any one, yet we owe a duty to ourselves and to the public, and that duty is to protect our rights to the name PAIN-KILLER as our trademark... For this purpose we have all the law and equity on our side. We have the will and disposition, if necessary, and we have the money. In short, we have every requisite necessary to protect our rights, and we hereby give NOTICE that we shall prosecute, to the extent of the law, any party using the name PAIN-KILLER in any way as applied to a medicine (Davis 1861, p. 56)(emphasis in the original).

This book served as an early model for later trademark-infringement-detering-books, published by well-known brands, presenting judicial decisions and competitor abandonments involving imitations of their trademarks (e.g., Coca-Cola Co 1923; National Biscuit Co. 1906).

The Perry Davis treatise noted that after the 1850 Rhode Island Supreme Court decision, it had to seek injunctions against other firms “in a few instances” but challenged imitators mostly did not contest the proceeding and abandoned use of the name “Painkiller” (Davis 1861, p. 16). A “Scrapbook of material related to Perry Davis and Son of Providence Rhode Island, 1856-1875” at Brown University Library (Call No. A89-39) contains less formal materials. Unfortunately, they are often undated or unsourced. For example, an undated newspaper story reports that Perry Davis filed a criminal case against Andrew J. White for counterfeiting. The criminal case was dismissed but the story further noted White would likely owe $2000 in private damages. The Scrapbook also contains a “cease and desist” form letter prepared in the 1860s by Perry Davis’ agent in Ohio to send to infringers. The 1880
The most recent U.S. case involving Pain-Killer is an unreported 1903 decision of the Federal Circuit Court, District of Massachusetts against the makers of Sure Pain Killer and Star Pain Killer (pictured below). After arguing unsuccessfully to dismiss the complaint, the defendants promised but never filed an answer to the complaint. Therefore, the court ruled the allegations of the complaint were deemed to be confessed by the defendant. This case only challenged the use of the distinguishing name Pain-Killer because, as illustrated below, the product packaging (the middle and right side pictures) was dissimilar from the Pain-Killer package (on the left). The court ordered an injunction against using Pain Killer as a name or trademark on any medical product and awarded an accounting of defendant’s profits of $250. The plaintiff had claimed its trademark was worth $2000. It also maintained that the courts had fully maintained its trademark, which as discussed below, was not true in Great Britain (Davis & Lawrence Co. v. Henry Thayer & Co. 1903).
The first court case outside of the US occurred in Upper Canada in May 1867 a few months before Canadian unification when it would become Ontario. The defendant in the case agreed to keep an accounting for sales during the case, so it avoided a temporary prohibition of sales until the matter was resolved (Davis v. Kennedy, 1867). This case is interesting because the full names of each product had obvious differences from one another—“Perry Davis Vegetable Painkiller” versus “The Great [at one point misspelled “Cheat”] Home Remedy Kennedy’s Painkiller.” In addition, Vice Chancellor John Godfrey Spragge found there was an obvious difference between the bottles and labels of the two products. Perhaps most interestingly, the defendant/imitator argued an “unclean hands” defense against the plaintiff, i.e. by claiming its product cured almost all diseases internal and external, the plaintiff must be misleading the public and therefore should not be entitled to the equitable relief of an injunction against another firm that arguably was misleading the public. If this defense were accepted, it could have halted most patent medicine trademark or advertising lawsuits, but Spragge denied this defense holding that the defendant failed to prove any specific factual statement to be false and the plaintiff merely exaggerated the product benefits (Davis v. Kennedy, 1867, pp. 532-533).

Spragge held Painkiller was not a description of the article but rather was chosen by the product creator to be a distinctive designation of his particular preparation:

“[T]he manufacturer did not mean to indicate simply that his preparation was an alleviator or remover of pain, but that he chose to designate it by an odd and entirely new phrase, that it might be known by that name in the market. He thought it attractive, no doubt, and a sort of catchword that could be remembered, and he intended it not merely as descriptive, but as a distinctive name by which his preparation should be known. (Davis v. Kennedy, 1867, pp. 530-531).

Spragge also found that many consumers, albeit those who were careless, likely would be misled by the name itself to buy defendant’s product when they sought that of the plaintiff. Even if a majority of consumers took greater care and were not misled, this was still “stealing” another’s trademark. He enjoined further use of the trademark Painkiller by the defendant (Davis v. Kennedy, 1867, p. 537). According to a clipping in the Brown University Scrapbook, defendant Kennedy denounced this decision for awarding a monopoly in the name and changed the name of his product to “Pain Kurer.”

The next court case occurred in New Zealand when Perry Davis & Co. discovered that another party registered Painkiller as a trademark in New Zealand in early 1877. The complaint before the Supreme Court of New Zealand argued the defendants fraudulently obtained the trademark registration by
knowingly falsely claiming exclusive use of Painkiller and the imitation package of “Dr. Wilckens Vegetable Painkiller” was confusingly similar to plaintiff’s “Perry Davis Vegetable Pain-killer” package (Davis v. Wilckens 1878).

Most of the defendants did not appear to defend their actions, so it is not surprising that the injunction was issued and no further trial was held. Justice Williams began the court’s decision by echoing the concerns of Chief Justice Greene of Rhode Island to the effect that because there was no patent on the product, anyone else who discovered the formula should be free to produce the product and call it Painkiller—the product name according to the original inventor. However any such imitator also had a duty not to intentionally or knowingly pass off its product as the original. The court found the imitation’s many similarities were “calculated to mislead.” The court did not cancel the defendant’s trademark holding instead that the plaintiff’s prior use of “Painkiller” would make the registration “inoperative as against the plaintiffs.” The court held that enjoining the defendants from using a label “in any way resembling that of the plaintiffs” would resolve the matter (Davis v. Wilckens 1878, pp.37-38). Apparently, Wilckens could continue to use the name so long as nothing else on the label was similar to Perry Davis’ label and bottle. However, since most of the defendants did not appear to try to defend the lawsuit, it seems likely they stopped marketing Pain-Killer.

This “victory” in New Zealand without removing the Wilckens’ mark from the trademark register was followed by a Perry Davis defeat in Great Britain where the Perry Davis Pain-Killer trademark was removed from the register. Perry Davis registered “Pain-killer” as trademark No. 4489 in Britain in 1877 asserting (incorrectly) it had been used as a trademark for more than 40 years before enactment of the British Trade Mark Registration Act of 1875. Perry Davis also registered a second trademark for the full product name in conjunction with the picture of Perry Davis. This latter registration was neither challenged nor alleged to be infringed and therefore survived (“Legal Reports: The Title “Pain-Killer” 1890).

Ten years after these registrations, Perry Davis sued Lancaster Harbord, a Liverpool chemist, for selling “Pen’s Pain Killer” using the Pain-Killer trade name but with a distinctive label. So passing off was not alleged. Harbord agreed to an injunction for the duration of the trial and then filed for an order of rectification of the trademark register to remove Pain-Killer as a trademark. The judicial proceedings focused on whether Pain-Killer was correctly registered as a trademark under the 1875 Act. To be registered under the Act, the mark had to be used before enactment of the act and the words used as a trademark had to be “special and distinctive” (In the Matter of Perry Davis’ Trade Mark 1888, p. 334)(the mark was consistently spelled as Pain-Killer).

Ultimately, this case was appealed to the House of Lords which dismissed the Rhode Island and Canadian decisions as not being applicable to the British trademark statute and agreed with the lower courts that Pain-Killer was not a proper trademark under the Act. All four lords who heard the appeal agreed that Pain-Killer by itself had not been used as a trademark prior to enactment of the Act as required by the Act. Rather the two words had only been used as part of the larger trademark “Perry Davis’ Vegetable Pain Killer” and therefore the two words, Pain-Killer were improperly registered. This decision is consistent with modern trademark doctrine that a party arguing a shorter part of a trademark also functions as a trademark it bears the burden of proving the shorter version is perceived by consumers as a mark by itself (Petty 2016, pp. 66-67,166).

Two of the four lords also argued the words Pain Killer were neither special nor distinctive as required for registration but the other two lords explicitly refused to discuss this issue since its resolution was not needed to decide the case (Perry Davis v. Harbord 1891)(the mark was consistently spelled as two separate words). However, a British trade journal recognized that the Harbord decision did not make the Pain Killer name or description freely available. Perry Davis could still seek an injunction against anyone selling a “colourable imitation” of their product that appeared intended to deceive consumers as to the product source (“The “Pain-Killer” Trade-mark” 1890).

Trademark Registrations

During this time of Perry Davis judicial enforcement of its trademarks and packaging against unauthorized imitation, trademark law was changing to a system where trademark registration could augment judicial enforcement. Registration would put other firms on notice that a particular marketer enjoyed exclusive use of a trademark for a specified category of products. U.S. Courts adapted to registration by eliminating any “knowing intent to deceive” element in registered trademark
infringement cases making them easier to prove than “passing off” cases that still required plaintiffs to prove intent. For this reason, trademark registration became popular with brand marketers in the U.S. (Petty 2012, pp. 143-145; Petty 2011, pp. 90-91) and in other developed countries (Petty 2016a, pp. 103-104).

Perry Davis & Son first applied to register Pain-Killer in 1871 in the U.S. under the new Trademark Law of 1870. It also could have registered its mark in Canada under the Trade Mark and Designs Act of 1868. However, it chose not to do so, perhaps thinking the 1867 court case was sufficient. In 1877, after it discovered that someone else had registered Pain-Killer in New Zealand, Perry Davis then sought registrations in Canada, Great Britain and Australia. The first two registration were for the two words Pain Killer but the Australian registration sought to cover the single word Painkiller in any form and a second mark for the engraved label including the entire name, ornamental border, the engraved picture of Perry Davis and the slogan “joy to the world” (“Application for Registration of More than One Trademark – (Nos. 66 and 67)” 1877).

After the debacle in Britain where two lords and some of the lower court justices found pain killer to be two non-distinctive words that couldn’t be registered as trademark, Perry Davis decided to register the single word Painkiller in Australia in 1877, in Canada in 1903 and in the US in 1906. The Canadian registration was not renewed in 2002 and the U.S. mark was cancelled in 2017 for non-renewal. The U.S. registrations are pictured below, both claiming (perhaps inaccurately) first use in commerce in 1839.

**Pain-Killer Brand Story**

At a time when many people were skeptical about doctors and the professional practice of medicine, many patent medicines were offered to consumers for self-treatment of their ills, but how could consumers trust these medicines any more than they trusted doctors? One answer is to offer a trustworthy sponsor of the medicine. Often it was a man purporting to be a doctor or to have some medical or scientific expertise. In fact, Perry Davis identified himself as a physician in the Providence Rhode Island City Directory of 1843. However from 1848 onward, he listed himself as the “Manufacturer of Painkiller” and he never used the title “Doctor” or “M.D.” (Holbrook 1962, p. 149). Thus, Perry Davis portrayed himself as a humble entrepreneur like Lydia Pinkham. Both sought to be a symbol promoting the product they worked hard to make available to the masses (Holbrook 1962, pp. 63-72). They did not seek to develop their own personal brand to become famous celebrities. In contrast, their contemporary P.T. Barnum promoted his various products and services but also sought fame and celebrity-look for himself (Harris 1973). Today, such spokespeople are recognized as important brand assets (Romaniuk 2018, pp. 136-137).

According to promotional materials, the lame Perry Davis distributed his initial batch of Pain-Killer by walking from Providence to Boston (some 50 miles!) in an attempt to get druggists in the latter city to carry his product but they refused as illustrated below. Discouraged, he gave away the bottles of Pain-
Killer to needy people on his return trip (Davis 1880, pp. 6-8). In 1843, he hawked Pain-Killer near the gates of the state fairs in Pawtucket and Taunton (Tamburello 2008).

In March 1844 while making a batch of Pain-Killer in Fall River Massachusetts, Perry Davis claims he was badly burned when a can of alcohol ignited as illustrated below left (Davis 1845, p. 16). He later would claim that after four weeks of using his own medication, his burns were “all healed” (Harris 1879, p. 4). There is no independent record indicating that this fire actually occurred. The story may be fictional but inspired by the July 1843 fire in Fall River that was started by two boys playing with a small canon and destroyed some 250 buildings including Perry Davis’ dwelling (and lab).

The fame and sales of his medication slowly grew by word of mouth and classified newspaper advertising beginning in 1846. An 1846 advertising poster proclaimed Perry Davis had offices in Providence and New York that together served New England and the southern, western and middle states. One common advertising format was a testimonial letter from a satisfied user who was often a minister or missionary. Sales also were boosted by the cholera epidemic of 1849 (see the middle left illustration below). For example Samuel Clemens’ (Mark Twain) mother gave him Pain-Killer hoping to prevent cholera (Tamburello 2008). By the end of 1849, 6000 bottles of Pain-Killer were being sold monthly in New England, New York and Pennsylvania (Holbrook 1962, p. 162). As a result of this strong demand, Perry Davis expanded his production as shown below center right (Davis 1880, p.8).

Sea captains and missionaries carried Pain-Killer “around the world” in 40 years according to a promotional booklet printed in 1880 in Montreal and pictured above far right (Davis 1880). The product was introduced in Canada around 1850 and sales grew sufficiently large to justify a Montreal warehouse by 1867 (Davis v. Kennedy 1867, Davis & Lawrence, Co. n.d.). The Canadian trademark registration application claims a first use in Canada in 1839 that might have been a single sale across the border with New England. The first sale in Australia occurred in 1852 (Holbrook 1962, p. 152). In 1866, Perry Davis & Son opened their branch office in London, England (Davis 1880, pp. 21-24). The 1871 U.S. Trademark registration declares at that time the company had offices in Providence, Cincinnati, Montreal and London.
Achieving national and international distribution was facilitated by the growth of large wholesale nostrum distributors (Young 1961, p. 106). The second half of the 19th century is known as a time when large wholesalers with specialized skill developed in many industries. Marketing became transactional as product was sold from one level of the channel to the next (Sheth and Parvatiyar 1995, p. 402). At the same time, some brand marketers promoted their brands directly to consumers to circumvent distributor control over product selection (Petty 2011, pp. 91-92).

In the case of Perry Davis, it appears that Perry Davis worked cooperatively with at least two of its agents/wholesalers. He allowed J.N. Harris & Co (1868; 1879) in Ohio (self-described as the Western and Southern Proprietors of Pain-Killer) and Davis & Lawrence (Davis 1880) in Montreal (owned by the same shareholders as Davis & Lawrence Corp. of New York) to produce and distribute promotional materials for the Pain-Killer brand. Both also seemed involved with protecting the Pain-Killer brand identity against unauthorized imitation. The Brown University Scrapbook contained a “cease and desist” form letter by J.N. Harris & Co presumably used to notify any potential infringer within its territory that the infringer should stop or face potential legal action. Thus in at least two cases, Perry Davis adopted what appears to be more akin to modern relationship marketing with distributors rather than the traditional arm’s length transactional approach to distribution that was common in the second half of the 19th century (Sheth and Parvatiyar 1995).

**Pain-Killer Brand Promotion**

As noted above, advertising agencies were being formed in the second half of the 19th century. Patent medicines were the “backbone” of the typical agency business and offered the ad-writer his ‘greatest opportunity” according to Claude Hopkins (Young 1961, p. 101). In addition to advertisements in newspapers and magazines, posters and trade cards were common. All of these promotional forms explained the benefits of using Pain-Killer. Indeed, Fox (1984, p. 65) describes patent medicine advertising as the “lineal ancestor” of “reason why” advertising copy.

Pain-Killer also published almanacs and medical advice booklets (e.g., Harris & Co. 1879). For example, the “Pain Killer” Almanac and Family Receipt Book contains information about the Zodiac, a month-by-month calendar and of course numerous advertisements for Pain-Killer and several other nostrums (Harris & Co. 1868). Other patent medicines had advertised in almanacs since the 1820s and commissioned the entire almanac by the 1850s (Laird 1998, pp. 48, 87). Today, this type of advertising that contains useful information for consumers is called “content marketing” (Pulizzi 2016).

Another modern brand promotion practice is called “advertainment” – the combination of promotional practices with the content of entertainment. This practice reportedly dates back to the 1930s when marketers would offer filmmakers the free use of branded products in exchange for publicity stills from the movie that the marketers could use in their advertising (Russell 2007, pp. 3-4). However, some fifty years earlier, Perry Davis published its 16 page booklet: “A Household Necessity” (Davis n.d.) around 1890. This booklet contains numerous rhymes and cute black and white sketches about people using Pain-Killer. Many of the rhymes ended with the tagline “One Thing is Certain Pain-Killer kills Pain.”

The booklet also included testimonials and instructions for use. While this was not highly artistic poetry or art work, the booklet clearly seeks to entertain and well as promote the brand. Another form of “advertainment” was the composition of the Pain-Killer Polka by F. Archer. Young (1961, p. 105) provides other examples of patent medicine brands appearing in popular music songbooks or handbill ballads. These two forms of “advertainment” are pictured below.
Given all the sea captains and missionaries that transported Pain-Killer to distant locations and the broad variety of uses and users of the product, it is hardly surprising this product was promoted through testimonials. This was a common practice with many patent medicines (Young 1961, pp. 185-189; Segrave 2005, p. 3; Petty 2013, pp. 15-16; Larson 1937, pp. 337, 341). So much so that testimonials fell out of favor and use until the 1920s (Segrave 2005, p. 14). These testimonials were the predecessors of today’s emphasis on social media influencers and celebrities. The goal of these practices was to influence consumers by use of other people with whom they could identify be it celebrities or ordinary people (Romaniuk 2018, pp. 129-142).

The People’s Pamphlet (Davis 1845) contains numerous testimonials and “certifications” by Perry Davis himself, other distributors and those who appear to be ordinary users, some related to clergy. A few testimonials are addressed to “Friend Davis” perhaps suggesting they are from Quakers. The 1868 Pain-Killer Almanac (Harris 1868) adds testimonials from clergy, missionaries, doctors, a diplomat and people outside the United States. The Montreal distributor published pamphlet Around the World in 40 Years (Davis 1880) presents the brand story as outlined above interspersed with testimonials from travelers and other people not based in the U.S. (a large number of Canadians) as well as praise quoted from an assortment of newspapers again largely in the U.S. and Canada. It also continues the brand story with descriptions of how the medicine has helped every sort of person in all parts of the world.

Pain-Killer reportedly helped the following people: factory girls, farmers (and their children and stock), old sea captains, merchants and their clerks, fisherman, lumbermen and raftsmen, hunters and trappers (animals are attracted to the smell of Pain-Killer), Indians, travelers, families who live near swamps, miners, students and club athletes, hospitals, nunneries and other public institutions, drunkards (who may be completely cured by continued use), missionaries and people living all over the world, including Europe, Australia and several countries in Asia. In Australia, a trader attempting to sell Pain-Killer learned to send samples to a mining camp and then conduct an auction among the camp inhabitants to receive the highest possible price for his product.

As Davis (1880) and other materials illustrate, in addition to printed testimonial for consumers to read, Perry Davis liked to use visual images to tell quick stories and present attractive and sympathetic situations with which consumers could identify. Perry Davis also produced illustrated trade cards and posters to attract interest, develop a sympathetic emotional bond with consumers as well as to communicate several themes visually (Berg and Clifford 2007). One theme was the global nature of the brand as suggested by trade cards showing a bottle ship traveling to other countries and the cards in French and German.
Another popular theme was Pain-Killer was an effective substitute for expensive and mistrusted doctors who were often ineffectual (Young 1975 p. 18; Starr 1982, p. 56). The neck of one of the Pain-Killer bottles displayed above says “Medicine Chest in Itself.” One testimonial stated: “it was his family physician ever ready at a moment’s call” (Davis 1880, p. 9). The lower right illustration continues this theme by depicting a wealthy family saying “Good-By Doctor” with the father happily toasting the doctor’s departure with a bottle of Pain-Killer that apparently is helping his injured foot. The mother is presumably feeding Pain-Killer to their infant by spoon.

Other print and image advertisements suggested that smart people should always be prepared with a handy bottle of Pain-Killer nearby whether at home, traveling or even cycling.
Lastly, Perry Davis used images of young children to create an emotional bond with parents as well as communicate the message that Pain-Killer can ease the suffering of children.

![Images of Perry Davis's Pain-Killer Poster and Perry & Burke's Imitation Poster](image)

Given that other firms imitated the name and packaging of Pain-Killer, it is not surprising some also imitated its poster advertising. The best example of such an imitation is from the 1848 Providence lawsuit and is reproduced below. Note how the Perry & Burke’s imitation poster on the right carefully imitates but does not exactly copy several aspects of the Perry Davis poster. Furthermore, for the careful reader who realizes this is a distinct product, the Perry & Burke poster presents a claim in smaller print of superior performance at a lower price compared to the Perry Davis product.¹

![Imitation Posters](image)

**Killing Pain-Killer**

Two forces are responsible for the demise of Perry Davis Vegetable Pain-Killer. First, despite Perry Davis’ threatening letters and court filings, it appears that imitators were common and the term Pain-Killer became generic. In addition to the trademark enforcement efforts discussed above, the Brown University Scrapbook contains at least twenty examples of medicine names that contained the words

¹ I am indebted to Andrew Smith of the Judicial Records Center of Rhode Island for obtaining these images.
“pain killer” in one form or another. A couple of other medicines used the words “pain killing” as an adjective such as “Davis’ Original Pain Killing Compound.” Other imitations were in slightly different forms such as “Dr. John Bull’s King of Pain Killers,” “The New Pain-Killer –Henry’s Vermont Liniment,” “Hindoo Pain Conqueror,” and “Dr. Gano’s Pile-Killer.” It is not clear from the Scrapbook how many of these uses were challenged and discontinued but it seems clear as Perry Davis recognized, the use of similar names to Pain-Killer caused competitors to think it was a generic term for the product category rather than a trademark under the control of Perry Davis.

As discussed above, several courts recognized the theoretical right of imitators to produce the same product and call it the same name, so long as consumers were not confused into thinking the imitation was the Perry Davis original product. With the benefit of this legal hindsight, Perry Davis should have created a category name to use with its trademarked brand name – e.g. PAINKILLER Brand Pain Relief Medication. This stratagem is well understood today (Petty 2016b, p. 141). Modern brand marketers agree with this legal advice. Ries (2007) argues that new brands should try to create new product categories. If consumers accept a new category, the new brand that created it is insulated from competition because of its unique category. However, existing brands will try to defeat the new category casting the new brand merely as a new entrant in an existing category. For example, Miller tried to create a new product category of Light Beer, but when it lost its LITE trademark, light beer became just a sub-category of beer. Similarly, Pain-Killer became just another patent medicine rather than the leading brand of a new category of Pain Relief Medications.

This genericide/category name problem among competitors was exacerbated by the popular press. A search of the New York Times historical database finds classified advertising for “A Genuine Pain Killer” being sold by Guion for 25 cents per bottle in 1860. The first generic references to pain killer in a news articles occur in 1868, 1870 and 1871 but then not until 1891 and later. Perhaps most troubling is an 1898 listing of proprietary medicines that included “Davis’ Pain Killer” but also used the term “pain killer” as a possible name for products in two categories: “Expellers” and “Liniments” (Hiss 1998, pp. 99, 124,183, 248). Although “Perry Davis’ Vegetable Pain Killer” was not specifically identified by name in Samuel Hopkins Adams’ expose “The Great American Fraud,” it did use the term “pain killer” generically as it is still used today (Adams 1905, pp. 38-39). There is no evidence that Perry Davis attempted to educate the media or public against using Pain-Killer as a generic term in public discourse. While that would be common practice today, at the time when trademark law was still developing, the genericity of a proposed word mark was judged by its commonly understood meaning rather than use in the popular media (Petty 2016b, pp 235-238).

The second force that curbed Pain-Killer’s success was the growing criticism of patent medicines and the call for their regulation (Young 1975, pp. 28-40) as illustrated below left. This led to regulatory prohibitions of curative claims, so Pain-Killer changed its advertising copy.

The condemnation of patent medicines also led newspapers and national magazines to refuse to accept their advertising (Segrave 2005, p. 10; Pope 1983, pp. 189-195). For example, Ladies Home Journal announced in 1892 that it would no longer accept medical advertising (Norris 1990, pp. 48-49). At this time, patent medicine firms accounted for over half of top advertising companies. Twenty years later, no patent medicine firms appeared on the list of the top 104 advertisers (Norris 1990, p. 99). One commentator accused Pain-Killer and numerous other products of foolishly slashing their advertising causing a precipitous drop in sales (Life of Patent Medicines 1903), but it may be they simply had trouble placing ads and also spent less because their claims were less compelling. In any event, other patent medicines had experimented with cutting advertising and found that sales dramatically declined. One of these nostrums, Lydia Pinkham’s Vegetable Compound, like Pain-Killer did survive well into the 20th
century (Fox 1997, pp. 17-19; Stage 1979). Pain-Killer survived in North America at least until 1958 but as a Liniment (for topical use) perhaps to avoid regulation of its alcohol content. Like Lydia Pinkham, the picture of Perry Davis continued on the package long after his death (Holbrook 1962, p. 153).

Conclusion

Perry Davis Vegetable Pain-Killer offers a remarkable “rags to riches” story about an inventor and his product that at least initially combined alcohol and opiates. In a period of forty years before modern drug regulation, Pain-Killer enjoyed sales “around the world” (Davis 1880). To obtain this level of brand marketing success, Perry Davis fought to prevent confusingly similar imitation by rivals and employed many brand marketing techniques thought to be more recent in their development. He developed and protected a distinctive brand name and package and other distinctive brand elements that appealed to consumers. He also employed relationship marketing with some distributors and employed social influencers (endorsers), content marketing, interesting images and music (“advertainment”) to attract and connect with consumers.

However, this single case study does not suggest that Perry Davis alone anticipated the tactics of modern brand marketing. For example, many patent medicine (and other) firms offered an extensive line of products each intended in the case of medicines to treat different conditions (Larson 1937, p. 339; Laird 1998, p. 186). Perry Davis did not follow this family of brands stratagem. Therefore the unique lessons from this case study suggest the value of conducting other case studies both within the nostrum industry (e.g., Stage 1979) and in other pioneer brand marketing industries such as food, alcoholic beverages, and tobacco.

Lastly, the Pain-Killer story provides a window into an early period of brand marketing for marketing historians while it also highlights lessons that are still important to today’s brand marketers. Pain-Killer lost its trademark status and became the generic product category name because Perry Davis did not fight against popular use of the term Pain-Killer to describe a product category and because it did not emphasize only the name Pain-Killer in the marketing of its product. Rather the product was labeled and advertised as “Perry Davis’ Vegetable Pain Killer.” Perry Davis maintained control over this more extensive trade name. Curiously, today Pain-Killer is once again a trademark (U.S. Reg. No. 2758165) registered in 2005 by Pusser’s Limited for an alcoholic cocktail. So once again, Pain-Killer parties could be in vogue. Cheers.

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