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TRADEMARKS AND UNFAIR
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BOOK REVIEW

TRADEMARKS AND UNFAIR COMPETITION By J. Thomas McCarthy. Rochester, New York: Lawyers Co-Operative Publishing Co., (2d ed. 1984). Pp. 2269, including Index, Table of Cases, Table of Statutory Citations, Table of Figures, Table of Forms, and Appendices.

*Review by Kenneth B. Germain**

Eleven years passed between editions of Professor J. Thomas McCarthy's comprehensive, two-volume treatise on trademark law and related aspects of unfair competition.¹ During that interim period, a time of major expansion of relevant legal doctrines,² Professor McCarthy was active in his professional role per se, teaching at "home" (University of San Francisco) and "away" (University of California at Berkeley [Boalt Hall], University of California at Davis). In addition to his participation in trademark/unfair competition and civil procedure areas, he focused upon antitrust law and copyright law. He also remained active in the practical sphere, serving as "counsel" to law firms, advisor to legal associations, and lecturer at seminars and mini-courses. Moreover, he stayed active as a scholar-author, branching out into the antitrust law area.³ All of these experiences apparently provided meaningful cross-fertilization and maturation.

Eleven years also have passed since this reviewer committed his thoughts about Professor McCarthy's first edition to writing.⁴ During this interim

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1. J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION (2d ed. 1984) [hereinafter cited as TRADEMARKS 1984]; J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION (1973).

2. See McCarthy, *Important Trends in Trademark and Unfair Competition Law During the Decade of the 1970's*, 71 TRADE-MARK REP. 93 (1981).

3. See S. OPPENHEIM, G. WESTON & J. MCCARTHY, FEDERAL ANTITRUST LAW (4th ed. 1981).

4. Germain, Book Review, 61 KY. L.J. 931 (1973).

period, this reviewer has had numerous opportunities to use the first edition, in teaching, research, seminar presentation, and in practice. Thus, use of the first edition, along with post first edition entries⁵ to the field—notably Jerome Gilson's fine treatise published in 1974⁶—put this reviewer in a good position to appraise the second edition.

A glance at Professor McCarthy's second edition informs the reader that it is a comprehensive, carefully-documented, well-organized work. Examination of the treatise shows that the tone is generally rather neutral, albeit obviously reflecting the views of one who believes in the legitimacy of the trademark system; this is quite appropriate for a professor-lawyer such as Professor McCarthy. The organizational structure is clear and helpful, and, in fact, a bit better than the first edition because of the addition of extra subsections to the already sound thirty-three chapter (with subchapters, sections, and subsections) format. The illustrations and charts dotting the text are quite welcome and go beyond those earlier available. The depth of the authorities cited in the footnotes, notably such secondary literature as law review articles, is improved.⁷ While especially good reference is made to many useful pieces published in *The Trade-Mark Reporter*, an odd omission is the series of "Annual Review" articles written since the effective date of the Lanham Act⁸ by the late Professor Walter Derenberg for twenty-five years and continued to the present by others (most recently, this reviewer and a collaborator).⁹ References to these "Annual Reviews" from time to

5. Two of the preexisting treatises have not been revised since 1973. E. VANDENBURGH II, *TRADEMARK LAW AND PROCEDURE* (2d ed. 1968); A. SEIDEL, S. DUBROFF & E. GONDA, *TRADEMARK LAW AND PRACTICE* (1963). The other preexisting treatise has undergone a major revision by a successor to its late originator. See R. CALLMANN, *UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* (4th ed. 1981). This later multi-volume work, though prodigious and encyclopedic (including "unfair competition" in its broadest sense plus the law of monopolies), still suffers from a very old-fashioned orientation, weak organization (intermingling of too many disparate sources of law), unclear writing, and a peculiar format of separation of text and "foot" notes. It may be worth consulting for its voluminous coverage, but it is not an apt educational resource.

6. J. GILSON, *TRADEMARK PROTECTION AND PRACTICE* (1974), reviewed by W.M. Webner, in 61 A.B.A. J. 426 (1975). This treatise, comprised of one text-and-footnote volume of approximately 800 pages plus one appendix volume, is neither as extensive nor as intensive in its coverage as Professor McCarthy's almost 2000-page-plus-appendices work.

7. Useful citations to the publisher's *Total Client-Service Library References* are also provided at the beginning of each chapter. Also, citations to secondary sources properly—and helpfully—include the precise pages of interest, whether or not a passage is being quoted, an improvement over the first edition.

8. 15 U.S.C. §§ 1051-1127 (1982).

9. See, e.g., Derenberg, *The First Year of Administration of the Lanham Trademark Act of 1946*, 38 TRADE-MARK REP. 831 (1948); Derenberg, *The Twenty-Fifth Year of Administration of the Lanham Trademark Act of 1946*, 62 TRADE-MARK REP. 393 (1972); Germain, *The Thirty-Fourth Year of Administration of the Lanham Trademark Act of 1946*, 71 TRADE-

time, particularly with regard to cases of major consequence, would have complemented the coverage existing in the treatise. Where the treatise is not deep enough or perhaps not critical enough, the Annual Review commentator sometimes has been able to shed additional light.¹⁰

Before launching into some substantive comments on the second edition, a few somewhat technical matters should be mentioned. First, the new edition consists of two volumes of approximately the same size as those in the original edition. The additional bulk of cases and commentary—undoubtedly necessary due to the explosion of relevant legal principles—is accommodated by lighter weight, slightly less opaque (and thus less visually comfortable) paper; the print is still dark, decent-sized, and readable. The appendices include a copy of the Lanham Act with useful up-to-date notes on legislative changes,¹¹ and a compendium of other statutes relating to trademarks. This compendium is helpfully trichotomized (direct trademark statutes, other statutes regarding trademarks, relevant portions of patent statutes); the first part is organized alphabetically by the name of the “beneficiary” of the special legislation.¹² Also included are an updated copy of “Trademark Rules of Practice,” with an index,¹³ and a table of citations in the treatise to various sections of the Lanham Act. On the downside, however, the Table of Cases is still by section number only (rather than page number) and the overall index no longer even includes subsection numbers (as the first edition did).

The crux of this review—now overdue—is a run-down of substantive highlights of the second edition. Some obviously are more significant than others; the more significant will be summarized and critiqued, whereas the less significant will merely be mentioned.

Near the beginning of the treatise is a section¹⁴ that serves as a good scene-setter for the entire work. This section lists some of the developments (since the first edition) that signal the major growth and shrinkage in the overall area of unfair competition. Referenced here are the United States

MARK REP. 285 (1981); Germain & Weinberg, *The Thirty-Sixth Year of Administration of the Lanham Trademark Act of 1946*, 73 TRADE-MARK REP. 577 (1983).

10. Compare the reviewed treatise's treatment of the famous (infamous?) *Anti-Monopoly II* case (*Anti-Monopoly, Inc. v. General Mills Fun Group, Inc.*, 684 F.2d 1316, 216 U.S.P.Q. 588 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983)) in §§ 12.2, 12.3, 12.11, 12.15 with the reviewer's handling of it in Germain & Weinberg, *supra* note 9, at 683-86. Also compare the reviewed treatise's dispersed treatment of the interesting *Jaycees* case (*United States Jaycees v. Philadelphia Jaycees*, 639 F.2d 134, 209 U.S.P.Q. 457 (3d Cir. 1981)) with Germain, *supra* note 9, at 370-74.

11. TRADEMARKS 1984, *supra* note 1, at app. A:1.

12. *Id.* at app. A:2.

13. *Id.* at app. A:3 (reproducing 37 C.F.R. §§ 1.1-2.6, 2.1-2.189 (1983)).

14. TRADEMARKS 1984, *supra* note 1.

Supreme Court's retrenchment¹⁵ from the severe "Sears-Compco" doctrine,¹⁶ the prodigious expansion of Lanham Act section 43(a) on a few fronts (false advertising, trademark protection, product simulation), the emergence of "reverse confusion" as a discrete theory,¹⁷ and the recognition and definition of the right of publicity.¹⁸ Also, near the beginning of the treatise are various sections that indicate that the tone will be "neutral"¹⁹ and that trademark/unfair competition law will be treated as an integral part of the greater law of intellectual property²⁰ and trade regulation,²¹ a matter for which Professor McCarthy's training and experience ably prepared him.

"Functionality" is a topic that Professor McCarthy takes on very effectively. In particular, he undertakes to clarify the distinction between two subspecies of "functionality," utilitarian and aesthetic. With regard to the first of these, the leading recent case from the Court of Customs and Patent Appeals (now the Court of Appeals for the Federal Circuit) is emphasized²²—*without* some of its confusing semantic terminology ("de facto" and "de jure" functionality). Regarding the second of these, the progeny of *Pagliero*,²³ including the sensible *Vuitton* decision,²⁴ are clearly discussed. A

15. See *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 201 U.S.P.Q. 1 (1979); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 205 U.S.P.Q. 741 (1977); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 181 U.S.P.Q. 673 (1974); *Goldstein v. California*, 412 U.S. 546, 178 U.S.P.Q. 129 (1973).

16. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 140 U.S.P.Q. 524 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 140 U.S.P.Q. 528 (1964).

17. See *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 408 F. Supp. 1219, 189 U.S.P.Q. 17 (D. Colo.), *aff'd and modified*, 561 F.2d 1365, 195 U.S.P.Q. 417 (10th Cir. 1976), *cert. denied*, 434 U.S. 1052 (1978).

18. This topic is nicely covered in § 10:21, which has double the coverage of the first edition.

19. See, e.g., TRADEMARKS 1984, *supra* note 1, at § 2:14 (the unemotional views presented on the oft-emotional issue of "irrational advertising"). In particular, see the "Author's Comment." *Id.* § 2:14, at 101-02.

20. For example, § 6:4 accommodates the Copyright Act of 1976, 17 U.S.C. §§ 1-810 (1982), and § 6:5A contains a considerably expanded discussion of the copyright/trademark interface regarding labels and slogans. Moreover, a series of useful reminders that the term "public domain" means different things in different contexts is provided. TRADEMARKS 1984, *supra* note 1, at 148, 156, 170, 356.

21. Expanded treatments of the trademark/antitrust interface are seen in §§ 1:16, 2:1, 2:5C.

22. TRADEMARKS 1984, *supra* note 1, § 7:26C (discussing *In re Morton-Norwich Products*, 671 F.2d 1332, 213 U.S.P.Q. 9 (C.C.P.A. 1982)).

23. *Pagliero v. Wallace China Co.*, 198 F.2d 339, 343, 95 U.S.P.Q. 45 (9th Cir. 1952) ("If the particular feature is an important ingredient in the commercial success of the product, the interest in free competition permits its imitation in the absence of a patent or copyright.").

24. *Vuitton et Fils S.A. v. J. Young Enterprises*, 644 F.2d 769, 210 U.S.P.Q. 351 (9th Cir. 1981).

closing "Author's Comment"²⁵—one of many excellent perspective pieces dotting the treatise's landscape—makes the interesting argument that "aesthetic functionality" is an unnecessary doctrine because the less controversial doctrine of ornamentality is sufficient to weed out nondesignative terms. A brief follow-up "Comment" reminds the reader that in certain "hard cases," that is, situations in which a commonplace phrase like "apply hook to wall" are involved, such phrases are denied trademark or copyright law protection because they lack sufficient originality or creativity.²⁶

In the chapter on "distinctiveness," there is a very good discussion of the difference between "deceptiveness" under section 2(a) of the Lanham Act and "deceptive misdescriptiveness" under section 2(e) of that Act.²⁷ The author notes that this difference is significant because section 2(e) marks are salvageable via secondary meaning "distinctiveness" under Lanham Act section 2(f),²⁸ whereas section 2(a) marks are flatly barred from registration; he further notes that the pivotal question is the materiality of the deceptive suggestion, thereby adopting a position taken by this reviewer some years ago.²⁹ (After the second edition went to press, the Trademark Trial and Appeal Board formally adopted this position with regard to "geographically deceptively misdescriptive" marks.)³⁰

The chapter on "acquisition and priority" of trademarks contains a helpful subchapter on "ownership." The chapter's first section,³¹ concerning who, within such pairings as individual and corporation, parent and subsidiary, and landlord and tenant, owns the trademark used by one of the members of each pair, is nicely expanded from the first edition. Another section³² contains a very useful discussion of the peculiar concept of joint ownership of a trademark—by usual definition a designation of a *single* source. Professor McCarthy's analysis, and conclusion—"such problems can only be dealt with adequately by giving weight to customer perception

25. TRADEMARKS 1984, *supra* note 1, § 7:26E.

26. *Id.* § 7:26F.

27. *See id.* § 11:19A, discussing 15 U.S.C. §§ 1052(a), 1052(e) (1982).

28. 15 U.S.C. § 1052(f) (1982).

29. TRADEMARKS 1984, *supra* note 1, at 486 (citing Germain, *Trademark Registration Under Sections 2(a) and 2(e) of the Lanham Act: The Deception Decision*, 44 FORDHAM L. REV. 249 (1975), 66 TRADE-MARK REP. 97 (1976)).

30. *In re House of Windsor, Inc.*, 221 U.S.P.Q. 53 (T.T.A.B. 1983) (BAHIA for cigars not emanating from the famed Bahia area of Brazil "deceptive"). *Cf. Evans Prod. Co. v. Boise Cascade Corp.*, 218 U.S.P.Q. 160 (T.T.A.B. 1983) (basically adopting the materiality test for nongeographically deceptively misdescriptive marks).

31. TRADEMARKS 1984, *supra* note 1, at § 16:13.

32. *Id.* § 16:14 (admittedly adapted from McCarthy, *Joint Ownership of a Trademark*, 73 TRADE-MARK REP. 1 (1983)).

and the identification of source and quality policies of trademark law"³³—are far superior to the counterproductive view recently taken by a majority of the Court of Customs and Patent Appeals, suggesting that two unrelated parties could have protectable rights in the identical mark for the identical goods in the same market.³⁴

Chapter eighteen, on licensing/franchising, constitutes a major improvement in Professor McCarthy's treatise. It contains very good sections on the rules regarding trademarks in modern licensing,³⁵ the meaning of "related company" under Lanham Act sections 5 and 45,³⁶ a summary of special rules applicable to franchise investments,³⁷ and a good discussion of the significant area of franchisors' liability for the torts of their franchisees.³⁸ These are matters of great modern commercial significance, and it is a real plus for the second edition to do such a complete job of dealing with them.

Chapter nineteen provides an exhaustive treatment of federal registration (other than "inter partes" proceedings). Of special interest is its careful coverage of the broadened concept of "use in commerce" of trademarks under the *Silenus* case³⁹ and its handling of the controversial matter of "token use," both for initial application and later registration maintenance purposes.⁴⁰ (Unfortunately, two interesting decisions of the Trademark Trial and Appeal Board interpreting very narrowly "token use" regarding initial use were decided too recently for inclusion in the text.)⁴¹

Volume two of the revised treatise contains a nicely expanded chapter on likelihood of confusion, the very heart of trademark infringement (and also of confusing similarity determinations under section 2(d) in registration proceedings). This chapter starts with the pivotal question "Whose Confusion and About What?"⁴² This, of course, focuses attention on the matter of confusion of customers (usually) about the source of manufacture or distri-

33. TRADEMARKS 1984, *supra* note 1, at § 16:14E, at 757.

34. *Wallpaper Mfrs. v. Crown Wallcovering Corp.*, 680 F.2d 755, 214 U.S.P.Q. 327 (C.C.P.A. 1982).

35. TRADEMARKS 1984, *supra* note 1, at § 18:14.

36. *Id.* § 18:16B (interpreting 15 U.S.C. §§ 1055, 1127 (1982)).

37. *Id.* § 18:23.

38. *Id.* § 18:24.

39. *Id.* § 19:37A, at 964 (discussing *In re Silenus Wines, Inc.*, 557 F.2d 806, 192 U.S.P.Q. 261 (C.C.P.A. 1977)). *See id.* § 19:38.

40. TRADEMARKS 1984, *supra* note 1, §§ 19:37B-:37D, 19:37G.

41. *On-Cor Frozen Foods, Inc. v. Ralston Purina Co.*, 220 U.S.P.Q. 567 (T.T.A.B. 1983) (application void ab initio because the registered mark was used before the filing date only on a product different from the final product actually intended to be sold under that mark); *Miles Laboratories v. Int'l Diagnostic Technology, Inc.*, 220 U.S.P.Q. 438 (T.T.A.B. 1983) (similar ruling as *On-Cor*). *But cf.* *Pennwalt Corp. v. Sentry Chem. Co.*, 219 U.S.P.Q. 542 (T.T.A.B. 1983) (unusually liberal view of experimental first use).

42. TRADEMARKS 1984, *supra* note 1, at § 23:1D.

bution of the marked goods or services. A new subsection on "reverse confusion" follows.⁴³ An excellent treatment of whether the determination of the ultimate issue of likelihood of confusion is a question of law (and thus fully reviewable on appeal) or of fact (and thus subject to the "clearly erroneous" rule of Federal Rule of Civil Procedure 52(a)) also appears.⁴⁴

Matters concerning the territorial effect of trademarks are covered extensively in chapter twenty-six of the treatise. Of particular note are the expanded treatment of "good faith" in relation to a junior user's claim of "remote" territory (both at common law and under the constructive notice resulting under section 22 of the Lanham Act)⁴⁵ and the substantially rewritten, insightful explication and analysis of the respective roles of Lanham Act sections 33(b), 33(a), 15 and 43(a).⁴⁶

The all-important, fast developing scope of Lanham Act section 43(a), the Act's so-called "unfair competition" provision,⁴⁷ as a weapon against false advertising is covered in a chapter that is substantially revamped from the first edition. Introductory sections highlighting the precedence of section 44 as a matter of legislative history⁴⁸ and the expansion of section 43(a) into the trademark infringement arena⁴⁹ are well done in general, albeit perhaps too accepting of judge-made doctrine without enough statutory scrutiny.

Some of the second edition's most significant modifications show up in its remedies chapters. Three areas are of special noteworthiness: laches, fraud on the Patent and Trademark Office, and commercial speech.

As to laches, Professor McCarthy provides a solid historical background, rooted in early major cases of the United States Supreme Court⁵⁰ followed by explanations of the philosophy of the laches doctrine, especially as it relates to injunctive and monetary remedies individually.⁵¹ A distinction is drawn between "laches" (unreasonable delay per se) and "estoppel by laches" (judicial refusal to enforce certain "rights" because of "laches" and resulting prejudice to the defendant).⁵² This distinction, new to the second

43. *Id.* § 23:1E. See *supra* note 17 and accompanying text.

44. TRADEMARKS 1984, *supra* note 1, at § 23:22.

45. *Id.* §§ 26:3-26:4.

46. *Id.* §§ 26:18-26:19.

47. Professor McCarthy warns his readers that "[section] 43(a) is not totally synonymous with the whole law of unfair competition." *Id.* § 1:9, at 24 n.20 (citing Germain, *Unfair Trade Practices Under Section 43(a) of the Lanham Act: You've Come a Long Way, Baby—Too Far, Maybe?*, 49 IND. L.J. 84 (1973), 64 TRADE-MARK REP. 193 (1974)).

48. TRADEMARKS 1984, *supra* note 1, at § 27:2.

49. *Id.* § 27:3.

50. *Id.* § 31:3A (discussing, inter alia, McLean v. Fleming, 96 U.S. 245 (1878); Menendez v. Holt, 128 U.S. 514 (1888)).

51. See TRADEMARKS 1984, *supra* note 1, at §§ 31:3B-:3C, 31:4.

52. *Id.* § 31:2.

edition, is of major usefulness and deserves to be noted by all persons interested in trademark infringement remedies. Also of note is Professor McCarthy's definition of "laches by acquiescence" (creation of complacency by something more than mere nonobjection to another's use of a mark).⁵³

As to fraud on the Patent and Trademark Office, Professor McCarthy provides some interesting introductory perspectives on why so many litigants plead such an often unsuccessful theory.⁵⁴ He then describes the elements of a prima facie case of "fraud"⁵⁵ and meaningfully categorizes the types of "fraud" that are possible: failure to disclose information regarding nondistinctiveness; signing of the ownership oath when there is some question of the applicant's exclusive ownership of the mark; misstatement of the date of first use; failure to disclose others' uses of the mark; fraud regarding filings under sections 8, 9, and 15.⁵⁶ Along the way, one overly restrictive case was properly criticized⁵⁷ while another case of undisciplined nature was accepted without disapproval.⁵⁸ Oddly, an important recent decision by the Federal Circuit was relegated to a footnote.⁵⁹

On the commercial speech doctrine, the second edition's coverage is entirely new because the doctrine, especially as it relates to trademark law, is of recent origin. Here, the foundational cases are cited and discussed.⁶⁰ The wisdom of another commentator, that the first amendment is not likely to have any substantial effect on typical trademark infringement suits because the likelihood of confusion requirement necessarily imports an element of regulable deception, is also applauded.⁶¹ Professor McCarthy makes an interesting suggestion that "purely communicative, non-trademark setting" uses of a firm's marks for such purposes as critical comment upon a company's policies should be permitted. He also draws an interesting analogy between the first amendment in relation to trademark matters, on the one

53. *Id.* § 31:14.

54. *Id.* § 31:21.

55. *Id.* § 31:21B.

56. *Id.* § 31:21C.

57. *See id.* § 31:21C, at 616 (discussing *Skippy, Inc. v. CPC Int'l, Inc.*, 674 F.2d 209, 216 U.S.P.Q. 1061 (4th Cir.), *cert. denied*, 459 U.S. 969 (1982)).

58. *See TRADEMARKS* 1984, *supra* note 1, at § 31:21C, at 613 (discussing *Money Store v. Harriscorp Finance, Inc.*, 689 F.2d 666, 216 U.S.P.Q. 11 (7th Cir. 1982)).

59. *See TRADEMARKS* 1984, *supra* note 1, at § 31:21C, at 613 n.9 (citing *Rosso & Mastocco, Inc. v. Giant Food, Inc.*, 720 F.2d 1263, 219 U.S.P.Q. 1050 (Fed. Cir. 1983)).

60. *See TRADEMARKS* 1984, *supra* note 1, at § 31:37 (discussing, *inter alia*, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.*, 447 U.S. 557 (1980); *Friedman v. Rogers*, 440 U.S. 1 (1979); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)).

61. *TRADEMARKS* 1984, *supra* note 1, at 663 (citing Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 Wis. L. REV. 158, 165).

hand, and the doctrine of “fair use” in copyright law, on the other.⁶² The subchapter is wrapped up with a treatment of the role of parody—another copyright law analogue—in trademark cases, with Professor McCarthy taking a position that is anything but “protectionist.”⁶³

Now that *some* of the highlights of Professor McCarthy’s second edition have been chronicled it remains only to reiterate that in the opinion of this reviewer it is a very fine treatise indeed. It is highly recommended to all—practitioners, general or specialized, and academicians alike—interested in the legal crazy quilt known as trademark/unfair competition law.

62. TRADEMARKS 1984, *supra* note 1, § 31:37, at 666-67.

63. Professor McCarthy noted:

No one likes to be the butt of a joke, not even a trademark. But the requirement of trademark law is that a likely confusion of source, sponsorship or affiliation must be proven, which is not the same thing as a ‘right’ not to be made fun of.

Id. § 31:38, at 670.

