
California Marking & Collective Amnesia

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The history of trademarks in California merits acknowledgement in 2013 because that year marks the 150th anniversary of trademark law and registration in the state. The anniversary is further significant because California's was the first trademark registration law in the country, antedating federal law by seven years. In providing a quick and celebratory overview of the anniversary, this Article also draws attention to the ways in which California's trademark history challenges some of the regularly repeated platitudes about trademark law, its origins, and its development. In particular, this Article shows how the states, led by California, pioneered the development of collective and certification marks, though these are generally attributed to the federal Lanham Act of 1945. The long exclusion of these kinds of marking from both federal law and history, this Article suggests, may be more revealing than their eventual inclusion.

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In 1992, the economist Mira Wilkins scratched the chip on the shoulder of many trademark historians by describing the history of trademarks as “neglected.” She drew support for this claim by quoting from Frank Schechter’s *Historical Foundations of the Law Relating to Trade-Marks*, which, almost seventy years earlier, had argued that

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“nowhere is the obscurity of the origins . . . more apparent than in the field of the law of trade-marks.”¹ While Wilkins held that not much had been done since Schechter’s day, her own essay spurred a great deal of work. Nonetheless, another twenty years along, trademark historians still tend to suffer from a Cinderella complex: feeling that their step-siblings in copyrights and patents get to go to the party while they sit in lonely obscurity. In search, perhaps, of such envied celebrity, much of the work Wilkins provoked has been, like her own, primarily celebratory, extolling the virtues of famously enduring brands from successful corporations in work that is readily assimilated to marketing case studies. In the end, however, to escape the obscurity that Schechter complained about, it may be necessary to eschew the famous and paradoxically embrace the obscure — including, as I shall suggest, the sometimes actively obscured — origins of trademarking. To fight off the charges of “neglect,” we should look to our grubby roots as much as to eye-catching blooms.

Such a suggestion is not, I hope, merely the academic gambit of trying to draw attention to oneself by attending to what others have (often wisely) ignored. Even if it is, the approach can, perhaps, be justified as offering a chance to turn critical-historical eyes towards still-neglected aspects of trademarking that might question unquestioned assumptions, and thereby elucidate not only the unknown, but also the famous and celebrated. In particular, it can help escape what economists call “survivorship bias,” whereby we assume that all salient aspects of a concept can be read from those exemplars that endure.² In trademarks, where the bulk of marks leave little trace beyond their initial, hopeful registration, this bias conveniently, but perhaps problematically, banishes the vast majority of activity to irrelevance, while casting the tinge of presentism across historical analysis. By extension, this bias also tends to point research towards large and successful businesses, and to favor their conventional, individual brands; thus, leaving, for example, collective and certification marks to, in Margaret Chon’s words, the “relative obscurity” of an already obscure history.³ Favoring the famous may further underwrite an evident research preference both for U.S. and

¹ FRANK I. SCHECHTER, *THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE-MARKS* 4 (1925); Mira Wilkins, *The Neglected Intangible Asset: The Influence of the Trade Mark on the Rise of the Modern Corporation*, 34 *BUS. HIST.* 66, 70 (1992).

² See, e.g., Edwin J. Elton et al., *Survivorship Bias and Mutual Fund Performance*, 9 *REV. FIN. STUD.* 1097 (1996) (explaining the concept of survivorship bias within the context of mutual funds).

³ Margaret Chon, *Marks of Rectitude*, 77 *FORDHAM L. REV.* 2311, 2316 n.21 (2009).

U.K. marks, rather than those of other countries, and, within the former, for federal rather than state marks. In an attempt to push against at least some of this cumulative bias, I propose to cling to the dull, rather than the exciting, and offer a brief survey of early trademarking in California. Choosing to do so now allows me (and my readers) to sidestep the elaborate rationalization just presented, for 2013 happens to be the 150th year of California trademark registration, and anniversary celebrations need much less excusing. This anniversary, furthermore, also marks the 150th year of trademark registration in the United States, for though it is rarely acknowledged, California was not only the first state to introduce the practice, but did so some seven years before the federal government. Along the way, the state also introduced us to collective, certification, and service marks, though the parvenu Lanham Act usually gets that credit.⁴ As California's leadership might suggest, turning to obscure corners in this way can uncover unacknowledged innovation.

I. THE MAKING OF CALIFORNIA TRADEMARK LAW

California's "Act concerning trade marks and names" was approved on April 3, 1863.⁵ It allowed anyone using "any peculiar name, letters, marks, devices, or other trade marks or name . . . [to] designate . . . an article manufactured or sold by him," who also registered that mark with the Secretary of State to claim exclusive right to that mark and legal protection from others who might try to use "said . . . or any similar trade mark." As such, it was the first general trademark registration law in the United States.⁶ While accounts of the history of such laws often portray them as part of a long history of signs, seals, and stamps stretching back thousands of years, they also tend to see

⁴ Paul Duguid, *A Case of Prejudice?: The Uncertain Development of Collective and Certification Marks*, 86 BUS. HIST. REV. 311, 319-20 (2012) [hereinafter *A Case of Prejudice?*].

⁵ Act of Apr. 3, 1863, ch. 129, § 1, 1863 Cal. Stat. 155, 155; see also Paul Duguid, *An Anniversary to Mark: The Who, What, When, and Why of California's Trademark Registration Law of 1863* (SSRN Working Paper No. 2345963, Nov. 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345963 (outlining the legislative history of the act and its early ramifications).

⁶ Like Lionel Bently, I take registration to be a key feature of the "making of modern trademark law," and thus see California in 1863 as taking a significant departure from the tradition of criminal statutes instigated by New York in 1845. Lionel Bently, *The Making of Modern Trade Mark Law: The Construction of the Legal Concept of Trade Mark (1860-1880)*, in TRADE MARKS AND BRANDS: AN INTERDISCIPLINARY CRITIQUE 3, 3 (Lionel Bently et al. eds., 2008).

statutory registration as a radical break within this long history.⁷ For where antecedents were usually collective endeavors of guilds and the like, or the requirements of government regulation relating to particular sectors or goods, this kind of general law is instead seen as the outcome of modern industrialization, long-distance trade, and the capitalist firm. Under the shadow of Schechter and Alfred Chandler (both heavy influences on Wilkins), Anglo-American histories suggest a gap stretching almost from the Statute on Monopolies (1623) to the Second Industrial Revolution, bridged primarily by the intermittent case law of the early nineteenth century.⁸ No doubt there is much truth in such accounts, but they nonetheless overlook the importance of foreign influence, a curious omission given the emphasis on long-distance trade.⁹ Furthermore, attention to discontinuity and distance tends to miss important aspects of continuity and locality. Case law aside, trademark laws can appear to arise, if not from across the sea, then out of it, and almost fully formed.

California offers a useful corrective. In the first place, pressure from foreign countries, particularly the French, overlooked in accounts of federal law, is acknowledged in contemporary accounts of the California law.¹⁰ Secondly, the states that introduced trademark

⁷ See generally SCHECHTER, *supra* note 1 (providing historical background on trademark law).

⁸ See Beverley W. Pattishall, *Two Hundred Years of American Trademark Law*, 68 TRADEMARK REP. 121, 133 (1978) (viewing the rise of trademarks as “[c]oncomitant with our industrial-commercial explosion”). See generally ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977) (discussing the development of the American Business structure and its relation to the industrial revolution).

⁹ See Paul Duguid, *French Connections: The International Propagation of Trademarks in the Nineteenth Century*, 10 ENTERPRISE & SOC’Y 3, 4-5 (2009) [hereinafter *French Connections*] (arguing that international relations helped to spur the development of trademark law).

¹⁰ Act of May 18, 1861, ch. 478, 1861 Cal. Stat. 528, 528 (noting that the Act Concerning Trade-Marks of 1861 explicitly and remarkably acknowledges foreign interest, and probably pressure, too, in its opening: “Every person engaged in manufacturing, or bottling, *foreign*, or native California, wine” (emphasis added)); Editorial, *Our Legislative Correspondence: Trade Marks*, DAILY ALTA CAL., Jan. 18, 1863, at 1. And reciprocally, the editor of the monumental French *Grand Dictionnaire International de la Propriété Industrielle* was so impressed by California’s leadership and the security it offered to foreigners (“notament des Français”) in its laws of 1872 and 1885 that he explicitly decided to give the state separate treatment from the rest of the country. 6 COMTE DE MAILLARD DE MARAFY, *GRAND DICTIONNAIRE INTERNATIONAL DE LA PROPRIÉTÉ INDUSTRIELLE AU POINT DE VUE DU NOM COMMERCIAL DES MARQUES DE FABRIQUE ET DE COMMERCE ET DE LA CONCURRENCE DÉLOYALE* 309 (Paris, Chevalier-Marescq & Cie 1892).

registration before the federal government — California (1863), Oregon (1864), Nevada (1865), Kansas (1866), and Missouri (1866) — were primarily agricultural and their laws show much continuity with those farming roots.¹¹ In California the connection is evident. In keeping with older states, the legislature from its first session established laws for the registration of cattle marks and brands with the county recorder.¹² In succeeding years (and in unhealthy anticipation of later federal practice), the law was constantly tinkered with.¹³ In 1853, in a law that echoes not only the widely acknowledged New York law of 1845, but also the equally influential French law of 1803, the remit was generalized beyond agriculture to the forging of stamps or labels of any mechanic or manufacturer, which is deemed a punishable misdemeanor.¹⁴ In 1861, the law became specific again, and the marks of anyone “manufacturing or bottling wine, cider, porter, ale, beer, soda water, or mineral water” were protected with the help of registration.¹⁵ While such marks, like cattle marks, were still registered locally, a duplicate was to be sent to, and published by, the Secretary of State, no doubt because it was recognized that goods might roam further than cows. (Nevertheless, as we shall see, the geographic limits of the law’s application remained problematic.) These sector-specific marks, which were to be “stamped on, or blown in, the bottle or bottles” containing the particular drink, became known as “container brands.” Finally, in 1863, modern trademark

¹¹ See Act of Apr. 3, 1863, ch. 129, § 1, 1863 Cal. Stat. 155, 155 (California trademark registration); Act of Feb. 3, 1864, ch. 67, 1864 Kan. Sess. Laws 173, 173-74 (describing the history of Kansas trademark registration); Act of Mar. 6, 1866, Miscellaneous: Trade Marks, 1866 Mo. Laws 99, 99-100 (concerning Missouri trademark registration); Act of Mar. 8, 1865, ch. 82, 1865 Nev. Stat. 268, 268-70 (describing the history of Nevada trademark registration); Act of Oct. 21, 1864, ch. 33, 1864 Or. Laws 658, 658-60 (concerning Oregon trademark registration).

¹² Act Concerning Marks and Brands, ch. 89, 1850 Cal. Stat. 214, 214-215 (containing session laws passed at the first session of the California Legislature).

¹³ The main change was the introduction of a counterbrand and restrictions on the kind of mark that could be used. Compare Act of May 1, 1851, ch. 101, 1851 Cal. Stat. 411, 411-13 (concerning marks and brands), and Act of Apr. 29, 1851, ch. 102, 1851 Cal. Stat. 413, 413 (supplementary act concerning marks and brands), with Act of May 3, 1852, ch. 57, 1852 Cal. Stat. 129, 129-31 (concerning the inspection of flour).

¹⁴ Compare Act of May 3, 1852, ch. 274, 1852 Cal. Stat. 272, 272-73 (amending an act entitled “An Act to provide for the Inspection of Flour”), with Act of May 14, 1845, ch. 279, 1845 N.Y. Laws 304, 304-05 (punishing and preventing frauds in the use of stamps and labels), and Loi 325 du 17 mai 1804 de 27 Floreal, An XII, COLLECTION COMPLÈTE, DÉCRETS, ORDONNANCES, RÈGLEMENTS ET AVIS DU CONSEIL D’ÉTAT [Duv. & Boc.] [COMPLETE COLLECTION, DECREES, ORDINANCES, REGULATIONS AND WITH THE COUNSEL OF STATE], May 17, 1804, pp. 129-33.

¹⁵ Act of May 18, 1861, ch. 478, 1861 Cal. Stat. 528.

registration was ushered in with an act that encapsulates the generality of the law of 1853 with the state-wide reach of 1861, calling, like the latter law, for all marks seeking protection, and not just those found on “containers” of drinks, to be registered directly with the Secretary of State.¹⁶

The California law of 1863 was seen as sufficiently radical for people to question whether the registration requirement disrupted the understanding of common law — even though section nine of the Act stated that “[a]ny person who has first adopted and used a trade mark or name, whether within or beyond the limits of this State, shall be considered its original owner, and the ownership may be transferred in the same manner as personal property.”¹⁷ The issue soon came to court, where a definitive judgment in *Derringer v. Plate* (1865) affirmed “that the statute does not take away the remedy at common law; that it is an affirmative statute, and that an action may be maintained both at common law and under the statute.”¹⁸

Given the importance of this question, it is intriguing, but perhaps not unexpected, that California’s quixotic struggle with codification in the following decade made a hash of things.¹⁹ The new Political Code of 1872, while acknowledging the connection to and continuity with prior agricultural brands, noted in section 3199 that the law protects “anybody who has first adopted, *recorded*, and used a trade mark.” Consequently, the central question thought settled in *Derringer v.*

¹⁶ Of the other four states to introduce registration for all goods and services, Oregon and Nevada also made registration state-wide. Missouri and Kansas initially organized registration by county. See sources cited *supra* note 11.

¹⁷ Doubts hemmed the law from its conception. Apparently without understanding the fledgling law, one newspaper claimed, “An illiberal trade-mark law was adopted, better than our previous statute, but still defective, because it permits the counterfeiting of all trade-marks not filed with the Secretary of State; it has no penalty for swindling a man who does not pay something into the State Treasury.” Editorial, *Legislation of the Last Session*, DAILY ALTA CAL., May 4, 1863, at 1. The ready acknowledgement of a trademark as property may reflect French influence.

¹⁸ *Derringer v. Plate*, 29 Cal. 292, 293 (1865). *Derringer* had in fact registered its mark, but Rhodes J. ruled that it was not obliged to. Curiously, both the judgment, and Browne’s later account of it, cite the statute as 1853, though, in fact, they are discussing the 1863 Act. See WILLIAM HENRY BROWNE, A TREATISE ON THE LAW OF TRADE-MARKS AND ANALOGOUS SUBJECTS 437 (Boston, Little, Brown, & Co. 1885).

¹⁹ There are several discussions of similar unfortunate consequences following the codification, but this one has, to the best of my knowledge, not been noticed. See Ralph N. Kleps, *The Revision and Codification of California Statutes 1849-1953*, 42 CALIF. L. REV. 766, 771 (1954). See generally Perry Miller, *The Common Law and Codification in Jacksonian America*, 103 PROC. OF THE AM. PHIL. SOC’Y 463 (1959) (discussing the difficulty of codification in the United States generally during Jacksonian America).

Plate was resurrected twenty years later with *Whittier v. Dietz* (1884). This time the judge ruled that whereas the “Act of 1863 contained sections which clearly indicated the legislature did not intend to divest of existing rights in trade marks those who had acquired the right at common law,” the same did not hold for the codes: “No one, since the codes went into operation, can acquire the exclusive use of a name or trade mark in this State, except by filing it for record with the Secretary of State.”²⁰ The ruling caused a rumpus, and as late as 1905, James Hopkins’s influential *Law of Trademarks* still noted the “evil effect of this decision,” even though the legislature had moved quite quickly (in 1885) to change the wording of section 3199 to: “Any person who has first adopted and used a trade mark or name.”²¹ As if to emphasize the possibility of legislative amnesia, the same routine was weirdly repeated some twenty-five years after the *Whittier* decision, when the legislature again amended section 3199, this time to read: “Any person who has first adopted a trade-mark or name by filing same in the office of the [S]ecretary of [S]tate . . . is its original owner.”²² Like Hopkins before, a contemporary manual, *Things to Know about Trade-Marks*, fulminated against this “obnoxious law.” Yet when that manual was published in 1911, what the *San Francisco Chronicle* called an “error” had probably already been fixed: in March of the same year the legislature returned to the 1885 wording of “Any person who has first adopted and used”²³

Despite the missteps, California has thus had robust trademark registration law since 1863, the first such law in the nation. The development of that law suggests that in the United States, trademark registration began in agriculture and spread to industrial sectors and states, and not, as is usually argued, the other way around.²⁴ Balancing

²⁰ *Whittier v. Dietz*, 66 Cal. 78, 78 (1884).

²¹ JAMES LOVE HOPKINS, *THE LAW OF TRADEMARKS, TRADE NAMES, AND UNFAIR COMPETITION* 17 n.31 (2d ed. 1905); see also Act of Mar. 12, 1885, ch. 113, § 2, 1885 Cal. Stat. 94 (amending section 3199 concerning marks and brands).

²² Act of Mar. 6, 1909, ch. 103, 1909 Cal. Stat. 150, 150 (amending section 3199).

²³ J. WALTER THOMPSON, *THINGS TO KNOW ABOUT TRADE-MARKS: A MANUAL OF TRADE-MARK INFORMATION* 25 (1911); see also Act of Mar. 21, 1911, ch. 245, § 2, 1911 Cal. Stat. 428 (amending section 3199 concerning marks and brands); S.F. CHRON., Feb. 23, 1911, at 10. As late as 1913 the charge was still being made: “Recently the state of California passed a law to the effect that the first person to register a trademark” WILLIAM HENRY ELFRETH, *PATENTS, COPYRIGHTS, AND TRADE-MARKS* 10 (1913).

²⁴ Wilkins is wisely agnostic on the question of causality, talking of “legal protection only bec[oming] of key importance with the rise of the giant enterprise,” of the “trade mark’s legal support” being “closely associated with the emergence of the modern firm,” and the trademark “serv[ing] the modern corporation.” Wilkins, *supra*

influence of French code and Anglo-American common law, registration was (thrice) affirmed to be declarative, and common law rights remained undisturbed.

II. THE REGISTER

Prompted by the law of 1861, the Secretary of State opened a register that year for container brands. With the law of 1863, this was turned into the first general trademark register in the nation. As such, it can help us trace what might be thought of as the original constituency of such law before the “giant enterprise” and “modern firm” to which Wilkins traces the origin.²⁵ Evidence from the registrations may not deny standard verities of law and economics about the nature of trademarking, but it may make some of these a little less assured.

To indicate questions raised by these registrations, let me offer a quick overview of the first forty years of registration (with an occasional eye on registrations of the period from outside California).²⁶ In that period, some 2,550 registrants recorded some 4,000 entries. Only 151 of these were recorded in the first decade.²⁷ In

note 1, at 79, 81-82.

²⁵ *Id.* at 68-69.

²⁶ Figures were all compiled from the trademark applications and trademark register in the California State Archives, Sacramento. I am grateful to the state archivists for help with this work. This less-than-rigorous survey runs from May 1861 to February 1902. The register antedates the law of 1863 (underlining my point about continuity) because the first seven marks are for “container brands” registered under the law of 1861. (In subsequent years container brands continue to be mixed in with other marks and names, though marked as “CB” — some 35 are included by 1902.) The eighth registration and hence the first trademark was recorded by B.J. Fish and Norman Coon on May 2, 1863, a month after the act was signed into law. The registration was for “Fish’s Infallible Hair Restorative.” California Trademark Applications, Registrations, and Renewals, Vol. 1, registration No. 8 [hereinafter CA #8]. As if to signal the rocky road of trademarking that lay ahead, although Fish had fought for his mark in court in 1862 (see *Fish v. Redington*, 31 Cal. 185, 186 (1866)), his landmark registration was challenged six weeks later when Charles Story registered the same name with an affidavit claiming that he was its legitimate owner (see CA #12). Story seems to have been a partner of the plaintiff in *Fish v. Redington*. I end my sample in February 1902 for convenience because, for reasons as yet unclear to me, in March 1902 the register starts numbering at one again. Thus, to avoid confusion in an overview like this, that seemed a suitable place to stop.

²⁷ I note registrations rather than marks as, particularly in the early years, multiple marks were sometimes entered under a single registration. A notable example is the registration by Apollinaris (CA #1576, 1887), which recorded 18 marks. I also use round numbers to reflect the lack of precision inevitable in the face of such multiple registrations.

the last decade of the century, by contrast, there were almost 1,800.²⁸ Apart from early years, when small figures allow for large percentage growth, the most sustained period of double digit growth comes in the late 1870s and early 1880s, which may, in part, reflect the fallout of the *Trade-Mark Cases*, when in 1879 the U.S. Supreme Court ruled federal trademark law unconstitutional. Firms, unsure of the validity of federal registration, may have registered in states as an insurance policy.²⁹ If so, this correlation suggests a certain level of complementarity between state and federal systems in this period.³⁰

California registrants were predictably male — only three percent were women — and a little less predictably, they were overwhelmingly Californian.³¹ Only 180 registrations, or four and one-half percent of the marks, came from out of state.³² These were submitted by eighty-six registrants from eighteen states, led by New York and Pennsylvania (though in the 1870s and 1880s, two other early-to-mark states,

²⁸ If the numbers seem low, it should be remembered that for all the apparent pressure for U.S. trademark law, only 121 registrations appeared in the first year of federal registration. And while the total of 7,789 U.S. registrations in the first decade might be taken as evidence of pent-up demand, 32,367 were registered in the first decade in the United Kingdom. For more comparative data, see Paul Duguid, Teresa da Silva Lopes & John Mercer, *Reading Registrations: An Overview of 100 Years of Trademark Registrations in France, the United Kingdom, and the United States*, in TRADEMARKS, BRANDS, AND COMPETITIVENESS 9-30 (Paul Duguid & Teresa da Silva Lopes eds., 2009).

²⁹ In the *Trade-Mark Cases*, 100 U.S. 82, 93-99 (1879), the U.S. Supreme Court held that trademarks were distinct from copyrights and patents, and so the Congressional collective justification for all three in the federal law of 1870 was inadequate. The ruling created a 35-year hiatus that was only fully bridged by the law of 1905. See Zvi S. Rosen, *In Search of the Trade-Mark Cases: The Nascent Treaty Power and the Turbulent Origins of Federal Trademark Law*, 83 ST. JOHN'S L. REV. 827, 827-904 (2009). Unlike California registrations (which grew every year), between 1870 and 1901, U.S. registrations drop year-over-year in 11 of the 31 years.

³⁰ This complementarity probably ended with the law of 1905, except in areas like collective and certification marks where the states offered an option not provided by the federal government. See *infra* Part III (describing Californian Collectives).

³¹ The figures are about the same for Oregon and Missouri. Nevada, by contrast, had no women registrants in the first 40 years. As with European registrants, several of the women were widows taking over their late husband's business.

³² These figures may be skewed by local agents registering out-of-state marks. In contrast, barely nine percent of Nevada's marks are from *in state*. In this regard, Nevada looks rather like Portugal, where in the first 30 years of registration, foreign registrations predominated. These and further comparisons below are made possible from data compiled from the trademark registers in the Oregon State Archives in Salem, Oregon, the Missouri State Archives in Jefferson City, Missouri, the St. Louis City Recorder of Deeds & Vital Records, and the Portuguese Instituto Nacional da Propriedade Industrial in Lisbon. I am grateful to the archivists in each venue for help with this work.

Missouri and Oregon, made major contributions).³³ A further forty-one registrations and twenty-eight registrants came from overseas. Great Britain and Ireland contributed most (with fourteen).³⁴ France was second with thirteen. Foreign registrations picked up in the 1880s, again suggesting local effects of the *Trade-Mark Cases* ruling. While the figures have the tedium of minutiae, their very minuteness offers a check on accounts of long-distance corporate capitalism shaping the early mark.

The overwhelmingly local nature of registration is further emphasized when we look within California. Of the 190 California locations in the register, sixty percent had only one registration (only a dozen have ten or more). In contrast, San Francisco accounted for over sixty percent of all registrations, with its nearest rival, Sacramento, a distant second with under five percent, and Los Angeles third with just over two percent (and none in the first decade — when the registrations of southern California did begin to grow, they followed the growth of the citrus orchards).

The figures also cast further doubt on the leadership of industrial firms. In the first decade, eighty-three percent of registrations came from medicines, food, drink, alcohol, tobacco, and cosmetics — almost all of which were, at that time and in California, the output of individuals or small companies. While this share did fall as the Second Industrial Revolution might be assumed to be taking hold, it only fell to seventy-five percent.³⁵ It might seem possible to explain this high proportion as an aberration reflecting California's status as an agricultural state, but in the first year of the federal register, this barely industrialized grouping accounted for fifty-one percent of the registrations, and by 1878 it was sixty-one percent.³⁶ Moreover, the registrations coming into California from out of state — even from the industrial states of New York, Pennsylvania, and Massachusetts — reflected the overall sectoral makeup of the California-based products in the register.

³³ See *supra* note 27.

³⁴ By contrast, in the registrations of Missouri and Oregon, France is less evident.

³⁵ Neither California nor the federal registers had a prescribed system of categorization, thus marks were classified, often eclectically, by their owners. I have tagged the registrations, using the U.K. system established in 1876 and used there throughout this period. Inevitably, this tagging reflects some subjective decisions on my part (for more on this see below), some of which are smoothed out by the aggregating across sectors done here.

³⁶ I have chosen 1878 to escape short-term noise introduced by the *Trade-Mark Cases* the following year. See *supra* note 32.

Early California marks were dominated by medicines, which accounted for thirty-three percent of the first decade's registrations.³⁷ These fell to fourteen percent by the 1890s, while food, which accounted for only seven percent in the first decade, became the dominant sector in the 1890s with thirty-seven percent. The early predominance of medicine is echoed in other states and the national registers.³⁸ The rise of food, however, is particular to California. Alcohol also fell across the period, from fifteen percent of registrations at the beginning to eleven at the end. Oscillating in between are tobacco registrations, which rose from thirteen percent in the 1860s to nineteen percent in the 1880s, then fell to five percent in the last decade of the century.

These fluctuations no doubt have numerous contributing causes. Consolidation, leading brands rising to dominance, and the development of trusts all raised the cost for new entrants into certain sectors and allowed early registrations to subdue later ones. In the tobacco sector, for example, the rise of the cigarette-making machine led to sectoral consolidation, while the decline of cigar-making reduced its accompanying plethora of marks. In the last decade of the century, the large citrus growers from the southern part of the state started to register marks, while also forming a trust. (Flour shows a similar trend.) Also, at this period, temperance was beginning to take hold across the country and alcohol-laced "tonics," and "medicinal" and "pharmaceutic" whiskies shifted emphasis in claims from alcohol to medicines, while the registrations for wine were all but equaled by registrations for bottled water over the period. Nevertheless, in general, the number of registrations for medicine, alcohol, and tobacco rose by decade, and their fall in percentage reflects growth in food, which rose from ten registrations in the 1860s to 650 in the 1890s, dwarfing medicine's nonetheless impressive growth from forty-nine to 244.

Some of these sectors were affected by foreign contributions — in medicine, Angostura from Trinidad; in alcohol, Bass and Guinness from Great Britain and Ireland, Clicquot, Heidsieck, and Krug from Champagne; in food, Lea & Perrins from England; and in non-

³⁷ Medicine and alcohol present the two most difficult categories to distinguish as medicine was often heavily laced with alcohol. "Medical" or "medicinal whiskey" (CA #152, #215) are fairly easy to recognize, while temperance bitters (CA #176) suggest the wisdom of lumping all bitters, while heavily alcohol laced, into the medical category, though whether "tonic beer" should go there as well is less clear. Act to Prohibit the Sophistication and Adulteration of Wine, ch. 36, 1887 Cal. Stat. 46, 46 (addressing the "juice of grapes fermented . . . for use as a beverage, or as a medicine," indicating the interweaving of the two sectors in law).

³⁸ See *supra* note 35.

alcoholic drinks, Apollinaris from England. Local firms also challenged the exclusivity of these long-distance goods, treating regional designations as all but generic. Thus Port, Sherry, and Claret were claimed for California, along with Vin Tonique Pasteur and various combinations of Koka and Kola. But overall, this sprawling, innovative market is fundamentally local, with long-distance trade primarily represented by occasional Californian forays into Nevada and Oregon, or Oregonian forays into California and Nevada. In general, despite the scholarly talk of long-distance trade inspiring the modern mark, Californians ate, drank, smoked, washed, and dosed themselves with local and locally marked products, and it was around these that marking conventions developed — with surprisingly little case law to accompany it.

In contrast to these consumer sectors, the industrial sectors that are said to have driven legal innovation are almost invisible. Despite California's agricultural status, there are only eleven registrations for agricultural equipment: eight for edge tools, and three for seeds. Equally, though associated with the taming of the "Wild West," California recorded only two registrations for guns (one Deringer's) and four for ammunition (all from the same San Francisco firm) in the period. There were as many marks for millinery.

The California Register quashes another theoretical expectation. Landes and Posner (1987) associate their economic theory of marks with an economic theory of "the market in languages."³⁹ They draw indirectly on Shannon's theory of communication and suggest that ordinary language seeks efficiency by choosing new words that are as distinct as possible from the existing set.⁴⁰ For them, a producer (Landes and Posner's branders are all producers) needs a distinctive name — "unless . . . he [they are also all *hes*] is trying to pass off his brand." Hence, they argue, "[T]he universe from which trademarks are picked is very large." If Landes and Posner's theory of communication does not look very much like ordinary language, where resemblance, ambiguity, obfuscation, association, and shibboleths are ever present, so their theory of brand names does not look much like the primal trademark register. Judge Learned Hand famously noted, "With the whole field of possible coinage before them, it is strange that merchants insist upon adopting marks that are

³⁹ William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 271(1987).

⁴⁰ See generally CLAUDE E. SHANNON & WARREN WEAVER, *THE MATHEMATICAL THEORY OF COMMUNICATION* (1964) (discussing communication through a mathematical lens).

so nearly descriptive.”⁴¹ It is probably not that strange. George Zipf, on whom Landes and Posner draw, offers a more complex theory than they perhaps allow, weighing the search for unique names (which Zipf sees as “expensive”) with borrowed words that are “widely and favourably known.”⁴² Hence, the Zipf curve, and hence too, probably, nonce words are surprisingly rare compared to words that are or resemble the “widely . . . known” in the California register. I found some 140 nonce words. Almost half of these are adaptations that end in *-ene* (e.g., *Linsene*), *-ine* (*Eucolyptine*), or *-yne* (*Neuralodyne*), suffixes that seek to establish family resemblance and association or some kind of scientific sanction rather than the pure independence, Landes and Posner posit. For as Zipf argues, uniqueness must struggle against other needs — association, identification, evocation, intelligibility — and perhaps as a result what we find in California are less heroic brand names, and much more a litany of bland names.⁴³

The nonce words, furthermore, are not distributed across the sectors, but cluster for the most part among medicines, food, soaps, and cosmetics. Here the quasi-scientific tone of many of these does battle with a lot of names that seek by contrast to establish a claim to history, tradition, and natural origins. “Electro” soaps and doctor-sanctioned compounds fight against “Indian” (and more specifically “Navajo,” “Shoshone,” and “Cherokee”), “African,” “Native,” and “Aborigine” associations with purity.⁴⁴ While nature and commodity fight in the area of medicine, nonce words are rarely used for alcohol or tobacco. Here we see much more the use of celebrity names. With medicines, proper names generally suggest a source or inventor (“Sir Astley Cooper’s Restorative,” “Tonique Pasteur,” or “Injection Ricord”). With alcohol and tobacco, the association is much more vague, invoking the names of military celebrities (Sherman, Grant, Burnside, Bradley, Farragut) and artists (Richard Wagner, Walter Scott). While these might be assumed to smoke a good cigar, this is

⁴¹ *Franklin Knitting Mills, Inc. v. Fashionit Sweater Mills, Inc.*, 297 F. 247, 248 (S.D.N.Y. 1923).

⁴² George Kingsley Zipf, *Brand Names and Related Social Phenomena*, 63 AM. J. PSYCHOL. 342, 363 (1950).

⁴³ The California names show the struggle to be what Cori Hayden nicely describes as “distinctively similar.” Cori Hayden, *Distinctively Similar: A Generic Problem*, 47 UC DAVIS L. REV. 601 (2013). In part, marketers want to say “mine is one of those,” where the “mine” may be no more important than the “one of those.” *Id.*

⁴⁴ For a discussion of back-to-nature claims in nineteenth-century U.S. marketing, see Terri Lonier, *Alchemy in Eden: Entrepreneurialism, Branding, and Food Marketing in the United States, 1880–1920* (Sept. 2009) (unpublished Ph.D. dissertation, New York University) (on file with ProQuest).

less likely to be the case with the actresses (Maggie Moore, Kate Kastleton, Jersey Lily (Langtree)) or plays and books (Trilby, Mikado, Waverly) that also name cigars. Several of these names cast doubt on assumptions about the intended longevity of marks. Many, particularly the names of celebrities passing through San Francisco and recent books and plays, seem aimed not only to catch transient fashion, but also to fade with it.⁴⁵ By contrast, enduring marks in the register are few. Martinelli, Levi Strauss, Sperry, Ghiradelli, and Del Monte form the core of a select group of California original marks. Where the British register opens with the celebrated Bass triangle and several other well-known marks, the U.S. and California registers open with long forgotten ones, some of which might have carried with them the registrant's hopes for longevity, but others are as likely to have been designed to catch a passing moment.

Overall, the early Californian marks undoubtedly make dry reading. Though they throw a questioning light on many conventional assumptions about trademarks, anyone who has read this far is entitled to ask "so what?" and look for evidence whether, for all its precedence, California had any influence. It has been suggested that some of the state's influence was international and that, as they expanded into China, the California flour cartel was behind article nine of the Sino-American commercial treaty of 1903, which established trademark registration in China.⁴⁶ In fact, the most innovative part of the treaty was the agreement on patents; the Chinese had already agreed to a system for registering "foreign trademarks" in the treaty signed a year earlier with the British.⁴⁷

⁴⁵ In France, similar transience is evident in the naming of gloves. The registers in Grenoble, the center of glove-making for most of Europe, provide a map of rising and falling celebrities in the names given to new styles of gloves. In fact, as with California cigars, the glove itself may not have been new, but rather reinvigorated by association with a new celebrity. I am grateful to the Archives Départementales de l'Isère for access to this data.

⁴⁶ Daniel Meissner, *Bridging the Pacific: California and the China Flour Trade*, 76 CAL. HIST. 82, 90 (1997–1998).

⁴⁷ *Anglo-Chinese Treaty*, 3 T'OUNG PAO 324, 326 (1902); see also Treaty Between the United States and China for the Extension of the Commercial Relations Between Them, U.S.-China, Oct. 8, 1903, 33 Stat. 2208, 2213. In design, the two articles are much the same and reflect the standard reciprocal trademark protection clauses first perpetrated by the French in 1857. See Duguid, *French Connections*, *supra* note 9, at 17. The Anglo-Chinese treaty, however, generalized registration to "foreign trademarks" (so embraced U.S. marks), while the Shanghai treaty only asked for "like protection to citizens of the United States." For contemporary reaction, see *China Accepts the Treaty: Commercial Agreement with Great Britain Completed*, WASH. POST, July 28, 1902, at 28; *Chinese Patents and Trade Marks*, TIMES, May 23, 1904, at 9.

If influence overseas is hard to trace, influence at home is not much easier. Nineteenth century trademark authors — such as William Henry Browne and Arthur Greeley, as well as the definitive *Report of the Commissioners*, which led to the revision of U.S. trademark law in 1905 (see below) — all overlook California's claim to precedence, let alone influence, as did Beverley Pattishall's more recent celebration of *Two Hundred Years of American Trademark Law*.⁴⁸ In the end, the most significant question may be not *how* was California influential, but rather why was it *not*, for the registrations show that it was innovative in more than merely establishing a trademark register.

III. CALIFORNIAN COLLECTIVES

Standard histories of U.S. trademark law credit the Lanham Act (and its 1938 antecedent) with the development of collective, certification, and service marks.⁴⁹ Lanham, especially, is seen as leading marking, and by extension marketing, into a new era. Few notice that these forms of marking, particularly collective (or as they were usually called at the time “association”) marks, have a much longer history. Other countries had had them since the nineteenth century and had put considerable pressure (through treaties) on the United States to adopt them. Lanham was not pace-setting, but catch-up.⁵⁰ Several states had acknowledged collective, certification, and service marks, as well. Here, again, California was in the vanguard, though it remains unacknowledged.

From early on, California had been granting marks to the service sector (auction houses, dental offices, debt collectors, express delivery services, insurance agents, pawnshops, savings unions, shoe repairers, stables, removal and storage, and undertakers, among others).⁵¹ It also

⁴⁸ See generally BROWNE, *supra* note 18 (providing a comprehensive review of trademark law that does not mention California's influence in the development of trademark law); ARTHUR P. GREELEY, FOREIGN PATENT AND TRADEMARK LAWS: A COMPARATIVE STUDY WITH TABULAR STATEMENTS OF ESSENTIAL FEATURES OF SUCH LAWS (John Byrne & Co. 1899) (discussing foreign patent and trademark law, and notably failing to credit California with influence over U.S. trademark law); Pattishall, *supra* note 8 (failing to make any mention of California's claim to precedence or influence in the development of trademark law); see also S. REP. No. 56-20 (1900) (making no mention of California's influence over U.S. trademark law).

⁴⁹ The Lanham Trade-Mark Act, 60 Stat. 427 (1946); 52 Stat. 638, 638 (1938).

⁵⁰ The argument in this section is given more fully in Duguid, *A Case of Prejudice?*, *supra* note 4.

⁵¹ Among such registrations are several for colleges, led by business colleges from Stockton (CA #1568, 1888) and Fresno (CA #1960, 1891).

granted marks to various associations and cooperatives.⁵² Significant among these is the Manufacturers and Producers Association of America (CA #2786, 1896), a group of canning firms that supported the Californian “Pure Food Movement,” fighting against impure and improperly labeled food (usually said to come from the “East”), and also against food made by prison labor.⁵³ For this the Association sought the help of the unions. It is not clear how much they received, but it was at the time a sensible place to look. California unions had much experience of similar fights in the process of which they had developed the first major collective certification mark, what became known as the “union label.”

Labels that sought to mark the nature of the labor involved in products perhaps began with a Boot & Shoe Cooperative, which registered a mark (“United Workingmen’s Cooperative Shoes”) in 1873. It was followed the same year by a label for “White Men’s Labor Cigars,” a barely hidden salvo in the developing anti-Chinese agitation that spread through San Francisco at this period. The “White Men’s Labor” label was registered by a cigar manufacturer, but three years later the first union label appeared, registered with the message “White Men” by the local cigar employees union, the Cigar Makers’ Association of the Pacific Coast. This idea of a union label spread from here to other causes, including fights against prison, child, and sweatshop labor, and for the eight-hour day. In 1879, however, the Patent Office rejected an application for a federal trademark from the California Cigar Makers’ Association on the ground that associations had no right to register marks.⁵⁴ While unions did fight to change federal law, they fought more successfully to have states recognize the right to such labels.

Again California led the way, amending the Political Code by adding sections that explicitly gave “any trade union, labor association, or

⁵² Among these are the Orleans Hills Vinicultural Association (CA #252, 1873), Hop Growers Association (CA #877, 1882), Newcastle Fruit Growers Shipping and Preserving Association (CA #1127, 1885), the Orange Growers Association (CA #1800, 1890), Point Reyes Creamery Association (CA #1995, 1891), and Raisin Growers Association (CA #3746-3749, 1900).

⁵³ The Association was led by Isidor Jacob, who had been manager of the Lusk Canning Concern, one of the state’s most prolific registrants of trademarks, and of the California Canned Goods Association, which sought to introduce standards for canned goods and their labeling. *SAN FRANCISCO: ITS BUILDERS PAST AND PRESENT* 114-15 (1913).

⁵⁴ *Ex parte* CMAPC, 16 Off. Gaz. Pat. Office 411, 958 (Nov. 18, 1879). The ruling also rejected what it saw as “restraint of trade” in the vilification of the Chinese. Nonetheless, the same year, the registrar allowed a mark showing a top-hatted cigar punching a pig-tailed cigar above the word “Smasher.” Federal Registration #6975.

labor organization” the right to “adopt and use a trademark” under the same terms allowed to individuals and corporations.⁵⁵ In subsequent years, the boot- and cigar-makers were joined by unions of retail grocers, teamsters, typographers, lasters, horseshoers, woodworkers, shirt waist and laundry workers, lithographers, tailors, marble workers, dairymen, musicians, joiners, coopers, hat makers, hotel and restaurant employees, bartenders, painters, glovers, upholsterers, building trades, bakers and confectioners, brewers, cement workers, milkers, printers, photo engravers, electrical mechanics, barbers, and, in 1906, “Wobblies” (the Industrial Workers of the World). In 1911, just before the legislature clarified the standing of state trademark law with regard to common law (see above), it also clarified the nature of the union label, making it a misdemeanor to misrepresent the “kind, character, or nature of the labor employed or used” in the making of products.⁵⁶ This approach paralleled pure food legislation concerning the mislabeling of ingredients.

Union labels were widely used, and by the end of the century, almost all states recognized them under state law.⁵⁷ Though union certification marks were primarily American, they filled some of the roles played by association marks in other countries that had, as noted, placed an obligation through treaties on the United States to recognize such marks. The U.S. representatives who attended the conventions of Paris, Madrid, and Brussels accepted the country’s responsibility. Nevertheless, when, after a long process, the law was revised in 1905, there was no recognition, and almost no mention, of association marks. Conversely, after Lanham was passed, it became conventional to look upon that act as though it had invented collective, certification, and service marks.

A key actor in the chain of events was the commission appointed by President McKinley in 1898 to revise the trademark statutes and, as newspapers reported at the time, to “bring [laws] into conformity with . . . Paris . . . [and] Madrid.”⁵⁸ Two members of the commission, Francis Forbes and Arthur Greeley, had a strong familiarity with foreign law.⁵⁹ They, and their colleague, Peter Grosscup, were

⁵⁵ Act of Mar. 17, 1887, ch. 150, 1887 Cal. Stat. 167.

⁵⁶ Act of Mar. 14, 1911, ch. 181, 1911 Cal. Stat. 357.

⁵⁷ S. REP. No. 56-20, at 103 (1900).

⁵⁸ CHI. TRIB., Oct 7, 1898, at 4.

⁵⁹ Forbes had attended both the Madrid and Brussels conventions and written the section on French law in Coddington’s *Digest of the Law of Trademarks*, and Greeley had written on foreign laws in general. See CHARLES E. CODDINGTON, *A DIGEST OF THE LAW OF TRADEMARKS: AS PRESENTED IN THE REPORTED ADJUDICATIONS* 379-466 (1878);

surprisingly less well-versed in U.S. state law, because their report is among early offenders who overlook the innovation of California, both with regard to registration and union marks. That the commission overlooked, or more probably ignored, unions is less surprising. Grosscup seems to have known little about trademark law, but a lot about unions, which he viscerally disliked throughout his life, and, before the commission was formed, had clashed in court and in person with Samuel Gompers of the cigar makers' union, which had led the early development of labels.⁶⁰

That they overlooked other aspects of California law is more curious. The commission split over the recommendations for trademark law, with Greeley writing a minority report that was nonetheless the basis for the eventual law of 1905. To some degree the split was over the question we have already seen spin the law in circles: whether statutory law affected common law. Forbes and Grosscup favored rewriting the statute entirely and even making registration attributive, whereas Greeley sought to cling as tightly as possible to the law of 1870 (albeit now justifying it under the "Commerce" rather than the "Progress" Clause of the U.S. Constitution).⁶¹ This, of course, was a battle that had been fought not once, but twice in California (in 1865, with *Derringer v. Plate*, and again with the adjustment of the Code after *Whittier v. Dietz* — and was to be fought out once more in 1911). With some difficulty, California had managed to keep a balance between statutory and common law. The commission seemed unwilling to try. In consequence, rather than falling into step with the nation's treaty partners, the law it produced resolutely broke stride.

Curiously, the law proposed by Forbes and Grosscup came closer to recognizing some of the issues for which not only treaty partners, but also unions and groups like the Manufacturers and Producers Association of California, had fought. Forbes and Grosscup sought trademarks that would allow a purchaser of goods to know "without question, the country of their origin and the identity of the manufacture, and, to a large extent . . . the quality and character of the article."⁶² Had they been able to regulate identification of country of origin they would, of course, have produced a collective certification

GREELEY, *supra* note 48, at 142.

⁶⁰ Samuel Gompers, *Letter on Labor in Industrial Society*, in 2 GREAT ISSUES IN AMERICAN HISTORY: A DOCUMENTARY RECORD 120 (Richard Hofstadter ed., 1960); *Mr. Gompers on the Strike*, N.Y. TIMES, Aug. 23, 1894, at 2.

⁶¹ S. REP. No. 56-20, at 63.

⁶² *Id.* at 60.

mark. (And it was, if not countries, then regions of origin that treaty partners primarily wanted to identify in association marks.) In seeking, also, certification of the “quality and character of the article,” Forbes and Grosscup raised a trickier question. The Pure Food movement recognized that this required honest labeling of ingredients, to the point, as was suggested at the San Francisco Pure Food Congress of 1897, that labels would be “a contract between the manufacturer and the consumer.”⁶³ But as the Manufacturers and Producers recognized in their charge against prison labor, honest labeling probably also required revealing something about the labor involved. This the unions had pursued in their campaigns against child, prison, and sweatshop labor. As Chon has shown, today, valiant attempts are being made to certify the character of goods in ways that Forbes and Grosscup would probably have applauded.⁶⁴ Attempts are also being made to certify particular characteristics of the labor involved. Many of these are almost certainly antithetical to Grosscup’s thinking. Indeed, as we look at contemporary attempts to mark “fair” and similar labor characteristics, it might appear that much of the trademark law and practice from 1905 has been directed at obscuring the conditions of labor in which goods have been produced — something modern retailers have been particularly eager to encourage. And that long process has probably been helped by the amnesia, some real and perhaps some feigned, about the origins of our trademark law in California legislation of 150 years ago.

CONCLUSION

While trademark historians have argued that their area of research has been neglected, attempts to rectify that neglect have nonetheless produced accounts that generally leave the canonical view undisturbed. That view has long suggested modern trademarks, protected by legislation and registration, were significantly a U.S. innovation, driven by the industrial firms of the Second Industrial Revolution and written into innovative federal law in 1870. When the appropriate time came to adapt to the modern market, the Lanham Act innovatively brought forth collective, certification, and service marks, and in recent years these have been adapted to address modern concerns not merely about the content of the product, but also about the conditions of production. A look at California’s historical and historic trademark legislation suggests that much of this is mistaken.

⁶³ *The Week*, PAC. RURAL PRESS, May 8, 1897, at 290.

⁶⁴ See Chon, *supra* note 3.

U.S. trademark legislation and registration arrived late, rather than early, having been preceded both in European countries and in several states, in particular California, where the driving force was less industry than agriculture. Moreover, the “innovations” of Lanham were anticipated by more than seventy years in California, where collective, certification, and service marks were being registered in the 1870s. Among these registrations were union labels, which determinedly, though not uniquely, sought to make the conditions of production evident to the consumer, whom, after all, the mark is generally assumed to be designed to inform. Why California’s leadership had so little influence on both law and history deserves further investigation, but while we wait for that, we might at least pause to acknowledge the state’s 150th anniversary.