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THE GENERICIDE OF TRADEMARKS

JOHN DWIGHT INGRAM†

I.

INTRODUCTION

A trademark is a name, mark, device or sign by means of which the products of a person or entity may be distinguished from the products of others.¹ Trademarks perform four functions: (1) they identify one's products and distinguish them from those of others; (2) they indicate that products bearing that trademark come from a specific source; (3) they signify that products bearing that trademark have the same quality level; and (4) they make a major contribution to the advertising and selling of these products.²

Often a trademark "becomes the common descriptive name" of a certain product; at that point the trademark holder will no longer have "the exclusive right to its use."³ There are many names that were once trademarks that came to be used by the public as the descriptive name for the product. As I grew up as a child in the 1930s I had no idea that trampoline, yo-yo, brassiere, escalator, thermos, aspirin, and cellophane had once been registered trademarks. They were simply the names everyone used to describe those products. There were many other former trademarks that were already generic by then, or became such in more recent years. Those with which I am most familiar would include celluloid (film material), granola (oats and fruit bar), jungle gym (play structure), mimeograph (reproduction machine), pogo stick (bouncing stick), tarmac (runway), and zipper.⁴

Trademarks were probably first used by potters about 3500 years ago to indicate the source of their fired clay pots; the use of marks was also noted in the Old Testament of the Bible.⁵ By at least the 17th and 18th centuries, manufacturers in Britain and the United States were

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¹ 15 U.S.C. §1127 (2000).

² 37 Am. Jur. Proof of Facts 2d 67, §1. (citations omitted).

³ Hans Zeisel, *The Surveys That Broke Monopoly*, 50 U. CHI. L. REV. 896, 896 (1983).

⁴ Wikipedia (the free encyclopedia): *Genericized trademark*, available at http://en.wikipedia.org/wiki/Genericized_trademark.

⁵ Sung In, *Death of a Trademark: Genericide in the Digital Age*, 21 REV. LITIG. 159, 162 (2002).

using names and symbols to identify the source of their products, but there were very few trademark cases as such. Early litigation usually involved the tort of "passing off", that is, passing off one's goods as those of another. Federal statutes providing for trademark registration were enacted in 1870, 1881, 1905 and 1920. The current federal trademark law, known as the Lanham Act, was passed by Congress in 1946.⁶

In order to obtain, and keep, trademark protection, the name used must not be, or become, "primarily understood by the consuming public as referring, to a product category."⁷ Such words are known at common law as "generic" "and cannot be exclusively appropriated."⁸ Under the Lanham Act, generic words should be denied federal registration, and any registration granted "is subject to cancellation if at any time it 'becomes the common descriptive name of an article or substance.'"⁹

In trademark law, all terms have traditionally been divided into four categories. The first involves terms which are "arbitrary", "coined" or "fanciful." "Arbitrary" terms are those whose commonly understood meaning bears little or no relationship to the products to which they are applied.¹⁰ Examples would be "APPLE" computers or "Camel" cigarettes. A "coined" or "fanciful" term is a word which is made up, such as "DACRON" or "KODAK."

The second category consists of "suggestive" terms. These terms convey some information about the products to which they are applied, but do not give an actual description of the product. An example of a "suggestive" term would be "Playboy" for a magazine¹¹ or "Tide" for a laundry detergent.

The other two categories are terms which are "descriptive" and "generic." Whereas terms in the first two categories are entitled to registration and protection without offering proof of a "secondary meaning," because they are presumed to identify the source of the product,¹² a "descriptive" term conveys a description of the nature, or an important aspect of, the product. An example would be "Park 'N

⁶ See Am. Jur. Proof of Facts, *supra* note 2, at 74.

⁷ Ralph H. Folsom and Larry L. Teply, *Trademarked Generic Words*, 89 YALE L.J. 1323, 1323 (1980).

⁸ *Id.*

⁹ *Id.* (citations omitted).

¹⁰ See, e.g., *Jellibeans Inc. v. Skating Clubs of Georgia, Inc.*, 212 U.S.P.Q. 170 (N.D. Ga. 1981) (explaining that "jellybeans" means a kind of candy; if applied to a roller skating rink, "JELLIBEANS" is an arbitrary term).

¹¹ See *generally* *Playboy Enter., Inc. v. Chuckleberry Publ'g, Inc.*, 687 F.2d 563, 566 (2d Cir. 1982).

¹² See *West & Co. v. Arica Inst., Inc.*, 557 F.2d 338, 342 (2d Cir. 1977).

Fly” for a long-term parking lot service near an airport.¹³ It does not, at the beginning, indicate the source of the product. To achieve trademark protection, the user of the mark must show that the public has come to identify that term with the source of the product rather than the product itself.¹⁴

Terms which are deemed to be “generic” are “not entitled to trademark protection because such words are ‘in the public domain and available for all to use’ . . .”¹⁵ While it might seem that the lines between these four categories are fairly clear, they are in fact “often blurred, and ‘the difficulties are confounded because a term that is in one category for a particular product may be in quite a different one for another . . .’”¹⁶ For example, in *Abercrombie & Fitch Co. v. Hunting World, Inc.*,¹⁷ Judge Friendly gave the example of the word “ivory” which is generic with regard to products made from the tusks of elephants, but arbitrary when applied to soap.¹⁸

The Lanham Act was enacted by Congress to “mak[e] actionable the deceptive and misleading use of marks” and to “protect persons engaged in . . . commerce against unfair competition . . .”¹⁹ According to the United States Supreme Court, federal trademark law has two objectives: protecting consumers’ ability to identify and distinguish among the products of various manufacturers; and protecting the business goodwill which a mark symbolizes.²⁰

The Lanham Act itself does not enunciate any standard for determining if a trademark has become generic. However, Judge Learned Hand did set forth a test in *Bayer Co., Inc. v. United Drug Co.*:²¹ “The single question . . . is merely one of fact: What do the buyers understand by the word for whose use the parties are contending?”²² This standard is often referred to as the “public perception” test, and

¹³ *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189 (1985) (citing 15 U.S.C. §§ 1052, 1064(c)).

¹⁴ See 17 Lanham Act §2(f), 15 U.S.C. 1052(f) (2000); see *Times Mirror Magazines, Inc. v. Las Vegas Sports News, L.L.C.*, 212 F.3d 157, 165 (3d Cir. 2000) (referring to “The Sporting News”); see also *Zipee Corp. v. U. S. Postal Service*, 140 F. Supp. 2d 1084, 1087 (D. Ore. 2000) (referring to “Postal Service”).

¹⁵ *Cellular Sales, Inc. v. Mackay*, 942 F.2d 483, 486 (8th Cir. 1991).

¹⁶ *Clipper Cruise Line, Inc. v. Star Clippers, Inc.*, 952 F.2d 1046, 1047 (8th Cir. 1992) (citation omitted).

¹⁷ 537 F.2d 4, 9 note 6 (2d Cir. 1976).

¹⁸ *Id.*

¹⁹ 15 U.S.C. § 1127 (2000).

²⁰ *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854-55 note 14 (1982).

²¹ 272 F. 505 (S.D.N.Y. 1921).

²² *Id.* at 509.

serves the objectives of the Lanham Act to protect valid trademarks and prevent public confusion as to the source of products.²³

II.

GENERICIDE

A. Failed Attempts to Acquire Trademark Protection

It is not uncommon for a manufacturer to attempt to acquire or assert trademark protection for its product only to be told by a court that the word in question is already being generally used as the generic term for any product of that type. For example, one hundred years ago, in *Charles R. DeBevoise Co. v. H. & W. Co.*,²⁴ the complainant asserted a right to the exclusive use of the word “brassiere” to describe an article of wearing apparel which it manufactured. The parties agreed that the article in question was “a combined corset cover and bust supporter” – “a close-fitting, armless jacket, reaching in a narrow band over the shoulders, and opening at the back.”²⁵

The court noted “[t]hat the word ‘brassiere’ is a familiar French word, found in all the dictionaries, and means simply ‘brace’, but includes, also, the idea of ‘restraint’.”²⁶ Thus, the court found it to be “a singularly appropriate name for the article in question,”²⁷ and thus generic.

A similar example can be found in *Donald F. Duncan, Inc. v. Royal Tops Manufacturing Co.*,²⁸ which involved the word “Yo-Yo.” The court found that “‘Yo-Yo’ [was] a word which originated and was used in the Philippine Islands as the generic name of the toy” It was treated by the U.S. public as the generic name of the toy. Recognizing that, Duncan had made a great effort recently (1955) “to fasten

²³ See *Inwood Labs.*, 456 U.S. at 855 note 14; see also *Dictaphone Corporation v. Dictamatic Corporation*, 199 U.S.P.Q. 437, 439 (D. Ore. 1978) (stating that in determining whether there is a likelihood of confusion, a court will consider these factors: “(1) [s]trength and weakness of the marks; (2) [s]imilarity in appearance, sound and meaning; (3) [t]he class of goods in question; (4) [t]he marketing channels; (5) [e]vidence of actual confusion; (6) [e]vidence of the intention of [the junior user] in selecting and using the alleged infringing name”); see also *Dictaphone Corporation v. Dictamatic Corporation* at 439 (stating that “[O]nly a few of the factors need be present to enable a court to find a likelihood of confusion”).

²⁴ 60 A. 407 (N.J. Eq. 1905).

²⁵ *Id.* at 407.

²⁶ *Id.* at 407-08.

²⁷ *Id.* at 408.

²⁸ 343 F.2d 655 (7th Cir. 1965).

upon the toy the generic term, 'return top.'"²⁹ Its effort failed. The court held that "Yo-Yo" described the product, not the producer.³⁰

B. Trademarks Become Generic

"An originally non-generic, valid trademark becomes generic and invalid when the *principal* significance of the word to the public becomes the indication of the nature or class of an article, rather than the indication of the article's origin."³¹ This same process has occurred frequently over the years. A drug known by pharmacists as "acetyl salicylic acid" was known to the public as "aspirin." To the public, the word "aspirin" was the name of the drug, was therefore merely descriptive, and thus generic.³² Similarly, it was held that most buyers, whether they were manufacturers, retail dealers or retail customers, knew no other name for "cellophane." To everyone that word meant a product used to keep goods "protected and yet completely visible."³³

The same thing happened to the term "escalator." It had "become a descriptive name to both the general public and to engineers and architects . . ." ³⁴ To everyone, it "mean[t] any moving stairway without reference to the maker thereof."³⁵

One clearer example can be found in *Kellogg Co. v. National Biscuit Co.*, which involved the use of the name "shredded wheat" on biscuits in pillow-shaped form.³⁶ The court held that "shredded wheat" was the generic term for the product, since it described it fairly accurately, and was the term by which the product was generally known by the public.³⁷

A trap into which many trademark holders have fallen is the situation where a product is patented and thus no one else can manufacture the product for 17 years regardless of what they call it. That is just what happened to "aspirin"; during the life of the patent Bayer made no attempt to establish in the minds of the public some generic name

²⁹ *Id.* at 662.

³⁰ *See also* *Dryice Corp. of Am. v. Louisiana Dry Ice Corp.*, 54 F.2d 882, 885 (5th Cir. 1932) (stating "The term 'Dry-Ice' [is] descriptive of qualities or characteristics of solid carbon dioxide," and is thus generic).

³¹ *Coca-Cola Co. v. Overland, Inc.*, 692 F.2d 1250, 1254 note 10 (9th Cir. 1982) (emphasis by the court) (citation omitted).

³² *See generally* *Bayer Co., Inc. v. United Drug Co.*, 272 F. 505 (S.D.N.Y. 1921).

³³ *DuPont Cellophane Co., Inc. v. Waxed Products Co., Inc.*, 85 F.2d 75, 80 (2d Cir. 1936) (the court noted that buying public would not recognize or use the supposed generic descriptive phrase: "a transparent glycerinated cellulose hydrate regenerated from viscose. . .").

³⁴ *Houghton Elevator Co. v. Seeberger*, 85 U.S.P.Q. 80, 81 (Comm'r. Pat. 1950).

³⁵ *Id.*

³⁶ 305 U.S. 111 (1938).

³⁷ *Id.* at 116.

for the product other than "aspirin." In fact, they welcomed the public acceptance and use of "aspirin" as the name of the drug. By the time the patent expired, it was too late. "Aspirin" was generic.³⁸ The same thing happened to "linoleum" long ago.³⁹ An inventor obtained patents for preparing floor-cloth by means of a certain solidified or oxidized oil, to which he gave the name "Linoleum." That word was, of course, fanciful, and thus protectable.⁴⁰ However, when the patent expired, it was held that the word "linoleum" "directly or primarily means solidified oil [, and] only secondarily means the manufacture of the plaintiffs, and has that meaning only so long as the plaintiffs are the sole manufacturers."⁴¹

III.

WHAT CAUSES GENERICIDE

Trademark holders, especially those who also have a patented product, often encourage the public to use their trademarks as generic "household words." However, their success in doing so can backfire when consumers, over time, use these terms to identify the product rather than its source. Indeed, as the Second Circuit noted, this genericide process "can be a harsh one for it places a penalty on the manufacturer who has made skillful use of advertising and has popularized his product."⁴² That is just what happened to such well known products as "thermos,"⁴³ "Toll House" (cookies),⁴⁴ "shredded wheat,"⁴⁵ "escalator,"⁴⁶ "cellophane,"⁴⁷ and many more.

Sophisticated trademark owners know the kind of measures which should be taken to prevent generic use of their marks. When a new, innovative product is introduced, it's important to introduce not just a brand name but also a generic name for the product as well, so that the public doesn't have to use the brand name to identify competing products. Examples of this technique would be PALM PILOT connected organizers, WALKMAN personal stereos, and ROLLER-BLADE in-line skates. ESCALATOR might still be a protected

³⁸ See *supra* text accompanying note 32.

³⁹ *Linoleum Mfg. Co. v. Nairn*, 7 Ch. D. 834 (1878).

⁴⁰ *Id.* at 834.

⁴¹ *Id.* at 837.

⁴² *King-Seeley Thermos Co. v. Alladin Indus., Inc.*, 321 F.2d 577, 581 (2d Cir. 1963).

⁴³ *Id.*

⁴⁴ *Nestle Co. v. Chester's Mkt, Inc.*, 571 F. Supp. 763 (D. Conn. 1983).

⁴⁵ *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111 (1938).

⁴⁶ *Haughton Elevator Co. v. Seeburger*, 85 U.S.P.Q. 80 (Comm'r. Pat. 1950).

⁴⁷ *DuPont Cellophane Co., Inc. v. Waxed Products Co., Inc.*, 85 F.2d 75 (2d Cir. 1936).

trademark if the inventors had promoted the product as a “moving stairway.”⁴⁸

Trademark owners should never use the trademark as a verb or noun, which implies that the word is generic. Continual use of the mark as a noun, rather than as an adjective identifying a particular brand, can lead to degeneration of a trademark,⁴⁹ especially if the mark is used as a noun that is not capitalized.⁵⁰

Of course, using a trademark only as an adjective and not as a verb is no guarantee that the mark will not be held to be generic. For example, “Light Beer” and “Lite Beer” were held “to be generic names for a type of beer light in body or taste and low in alcoholic and caloric content.”⁵¹ The same thing happened with “matchbox” toys⁵² and “safari” clothing.⁵³

If consumers and competitors have no word(s) other than the trademarked word(s) with which to indicate the product at issue, no one may have exclusive use of the mark. And the alternative term must not be so unwieldy or complicated that the public will not accept it.⁵⁴

IV.

HOW DO TRADE NAMES BECOME GENERIC

In most cases cancellation of a trademark’s federal registration results from private litigation between the trademark owner and a competitor. A declaratory action may be brought by a competitor

⁴⁸ Donald F. Duncan, Inc. v. Royal Tops Mfg. Co., 343 F.2d 655, 662 (7th Cir. 1965) (not infrequently a manufacturer will recognize this danger too late, as was the case with “Yo-Yo,” which belatedly made a great effort “to fasten upon the toy the generic term, ‘return top’”).

⁴⁹ See, e.g., Singer Mfg. Co. v. June Mfg. Co., 163 U.S. 169, 181 (1896) (owner referred to its sewing machines merely as “Singers” in its advertising and promotion).

⁵⁰ See, e.g., Haughton Elevator Co. v. Seeberger, 85 U.S.P.Q. (80), 81 (Comm’r. Pat. 1950).

⁵¹ Miller Brewing Co. v. G. Heileman Brewing Co., Inc., 561 F. 2d 75, 79-81 (7th Cir. 1977).

⁵² J. Kohnstam, Ltd. V. Louis Marx & Co., 280 F.2d 437 (Cust. & Pat. App. 1960).

⁵³ Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 4-15 (2d Cir. 1976).

⁵⁴ See Bayer Co. v. United Drug Co., 272 F. 505 (D.C.N.Y. 1921) (consumers knew only the word “aspirin,” and did not know the term “acetyl salicylic acid”); see also DuPont Cellophane Co., Inc. v. Waxed Products Co., Inc., 85 F.2d 75 (2d Cir. 1936). (similarly, the availability of the phrase “transparent glycerinated cellulose hydrate regenerated from viscose” did not prevent “cellophane” from being held to be generic); see also Q-Tips, Inc. v. Johnson & Johnson, 108 F. Supp. 845, 863 (D.N.J. 1952) (alternative terms available, e.g., “medical swab,” “applicator,” or “cotton-tipped applicator,” so term “Q-Tips ha[d] not come to mean to the consumer the product double tipped applicator as distinguished from a certain brand of applicator”); see also Dictaphone Corp. v. Dictamatic Corp., 199 U.S.P.Q. 437 (D. Ore. 1978) (similarly, the availability of the descriptive “dictating machine” and “dictation equipment” prevented “Dictaphone” from becoming generic).

against the trademark owner, seeking cancellation of the trademark.⁵⁵ Genericness may also be used as a defense by a competitor in an infringement action brought by the trademark owner.⁵⁶

“There is a presumption in favor of a registered trademark, and the burden of proof is upon one who attacks the mark as generic, but the presumption can be overcome by a showing by a preponderance of the evidence that the term was or has become generic.”⁵⁷

V.

METHODS OF SUCCESSFUL RESISTANCE TO GENERICIDE

In many of the cases where genericide occurred, the blame could be placed primarily on the trademark owner himself. First and foremost, failure to give a new product an easily recognized generic name in addition to the trademark name can lead to disaster down the road, when it will be too late to convert the public to the use of some term other than the trade-name term as the generic name of the product.

Over the years trademark owners must be constantly vigilant to prevent generic use of their trademarks by competitors, consumers, the media, dictionaries, and so on. Xerox, for example, has regularly run ads in newspapers and magazines reminding the public to “photocopy” documents instead of “Xeroxing” them, and to produce “photocopies” instead of “Xeroxes.”⁵⁸ Another approach is that of Johnson & Johnson to follow its trademark with the word “brand,” that is “BAND-AID brand.”⁵⁹

Trademark owners should also be proactive in policing improper usage of the mark, by promptly contacting any publications or competitors who incorrectly use the mark in a generic sense, and requesting that there be no further improper usage. The Coca-Cola Company has been notably aggressive in defending its trademark. Coca-Cola employs people to visit retail establishments which do not serve Coca-Cola products and specifically order Coca-Cola or a Coke. If the es-

⁵⁵ See, e.g., *Anti-Monopoly, Inc. v. General Mills Fun Group, Inc.*, 684 F.2d 1316 (9th Cir. 1982).

⁵⁶ See, e.g., *Linoleum Mfg. Co. v. Nairn*, 7 Ch. D. 834 (1878).

⁵⁷ *Anti-Monopoly, Inc. v. General Mills Fun Group*, 684 F.2d at 1319 (1982) (citation omitted).

⁵⁸ See Xerox advertisement in June 2004 ABA Journal, at 14. (“When you use ‘Xerox’ the way you use ‘aspirin’ we get a headache. There’s a new way to look at it. Boy, what a headache! And all because some of you may be using our name in a generic manner. Which could cause it to lose its trademark status the way the name ‘aspirin’ did years ago. So when you do use our name, please use it as an adjective to identify our products and services, e.g. copiers. Never as a verb: ‘to Xerox’ in place of ‘to copy’ or as a noun: ‘Xeroxes’ in place of ‘copies.’ Thank you. Now, could you excuse us, we’ve got to lie down for a few minutes”).

⁵⁹ *Id.*

tablishment serves a cola-type beverage without comment, the Coca-Cola employees send a sample of the beverage to Coca-Cola's laboratory for chemical analysis. If the beverage is determined to not be a Coca-Cola product, the company will ask that retail establishment to stop the deceptive practice. If the practice continues, Coca-Cola will bring suit for trademark infringement.⁶⁰

Even though a trademark has not become generic it may still be the first thing consumers' think of in connection with the product. One approach often used by competitors is to use an alternative generic name in connection with their products. For example, "Kleenex" competitors can use the term "facial tissue"; "Chap Stick" competitors can use the term "lip balm"; "Vaseline" competitors can describe their product as "petroleum jelly."⁶¹ Another possible strategy is to "plac[e] a picture of the product on the front of the package, or . . . us[e] see-through packaging⁶² . . .," as is done by "Frisbee" competitors.⁶³

VI.

TRADEMARKS WHICH MAY BE IN DANGER

As I discussed in Part I,⁶⁴ there are many trademarks which became generic names for the products during the past 100 plus years. There is every reason to believe that, despite the great efforts of many trademark owners,⁶⁵ some currently protected trademarks will become generic and lose their protection. Among those that come readily to mind, at least for me, as being in some danger of genericide, are: Aqua-Lung (scuba equipment), AstroTurf (artificial grass), Baggies (food bags), Corn Flakes (cereal), Crock-Pot (slow cooker), Cuisinart (food processor), Dixie cups (disposable cups), Dumpster (large trash container), Fiberglass (glass fiber), Frigidaire (refrigerator), Frisbee (flying disc), Go-Kart (mini racing cars), Hula Hoop (dancing ring), Jacuzzi (whirlpool bath), Laundromat (self-service laundry), Magic Marker (felt-tip marker),⁶⁶ Masonite (fiberboard),⁶⁷ Milk Bone (dog treats), Muzak (background music), Ping-Pong (table tennis), Plexi-

⁶⁰ See *Coca-Cola Co. v. Overland, Inc.*, 692 F.2d 1250, 1252 (9th Cir. 1982).

⁶¹ Folsom & Teply, *supra* note 7, at 1344.

⁶² *Id.* at 1345.

⁶³ *Id.* note 103.

⁶⁴ See *supra* text accompanying notes 3 and 4.

⁶⁵ See *supra* Part V.

⁶⁶ *Speedry Products, Inc. v. Dri Mark Products, Inc.*, 271 F.2d 646 (2d Cir. 1959) (acknowledging 'Magic Marker' as still a registered trademark).

⁶⁷ *United States v. Masonite Corp.*, 316 U.S. 265 (1942) (recognizing 'Masonite' as a registered trademark).

glas (clear plastic sheets),⁶⁸ Polaroid (instant photographs),⁶⁹ Post-It (self-adhering note paper), Rolodex (rotary card file), Saranwrap (transparent plastic wrap), Scotch tape (transparent adhesive tape), Styrofoam (polystyrene filler), Tabasco (hot spicy sauce), Vaseline (petroleum jelly), Velcro (re-usable fastening tape), Zamboni (ice resurfacing machine), Ziploc Bags (zipper storage bags), and Zodiac (inflatable boat). I have seen or heard people use all of these generically to describe a product. While many of us realize that these were, and perhaps still are, trademarks indicating the source of the products, that aspect has lost most if not all of its importance. Despite that, our diligent search has found no recent litigation involving these marks. Perhaps the trademark owners have quietly acquiesced in genericide. Perhaps there are no real competitors. Perhaps competitors have refrained from using these terms generically and have found other ways to describe their products. It will be interesting to see what transpires in the years ahead.

⁶⁸ Rohm & Haas Co. v. Polycast Tech. Corp., 174 U.S.P.Q. 293 (D. Del. 1972) (holding that the term 'plexiglas' is not generic).

⁶⁹ Marks v. Polaroid Corp., 129 F. Supp. 243 (D. Mass. 1955) (holding that the term 'Polaroid' is not generic).