Imitation, Brand Protection and the Globalisation of British Business

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Abstract

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While conventional knowledge on the evolution of multinational business draws on concepts of competition and innovation, this article expands existing knowledge by providing new historical evidence about internationalisation strategies. By focusing on the case of British consumer goods firms and a sample of leading brands 1870s-1929, it shows that counter-imitation strategies and tactics aimed at protecting brand reputation have also played an important role in explaining globalisation and survival of British business. Despite the development of international trademark new legislation in the 1880s, enforcement of trademarks remained expensive, and many firms preferred negotiation with imitators to prosecution in foreign markets. Many imitators were based in the newly industrialising countries of the time - US, Germany and Japan. Imitators were often part of British export supply chains, as licensees, franchisees or wholesalers. British firms responded by lobbying governments, appointing local agents to provide intelligence, and collaborating with other firms. Effective counter-imitation strategies were key to the success of many companies.

Imitation, Brand Protection and the Globalisation of British Business

Introduction

The current demand for global brands by consumers across the developed world has stimulated the proliferation of imitators and counterfeiters, in particular from emerging markets such as China.[1] The globalisation and liberalisation of markets, coupled with developments of new technologies such as the internet, has changed institutional boundaries and re-configured supply chains. In response, the owners of successful global brands have sought protection of their intellectual property rights (IPR) in all parts of the world.[2]

Imitations and counterfeits are not a recent phenomenon. They were an important concern for businesses and governments long before IPR laws came into place.[3] Imitations tend to proliferate in expanding industries with low barriers to entry, and affect in particular successful products and services based on the exploitation of intangible assets such as superior technology and patents, or successful brands and trademarks.[4]

Imitations and counterfeits are analysed here in relation to one particular form of IPR – trademarks. A trademark is a legal right to control the use of a particular name or symbol

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[1] Imitation and counterfeit goods from emerging markets are estimated to account for 5-7% of world trade. "Estimates of International Trade in Counterfeit and Pirated Goods", *Anti-Counterfeiting Coalition* (IACC), (Washington DC, 2008).

[2] The role of IPR protection in enhancing economic growth, and its ability to increase the returns to innovation, have been widely studied in economics and management. Douglass C. North, *Structure and Change in Economic History* (New York, 1981); Harold Demsetz, "Towards a Theory of Property Rights", *The American Economic Review*, Vol. 57, No. 2 (1967): 347-359; Mark Casson, *Information and Organisation* (Oxford, 1997); William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law* (Cambridge MA, 2003); Keith E. Maskus, *Intellectual Property Rights in the Global Economy* (Washington DC, 2000); Ryo Horii and Tatsuro Iwaisako, "Economic Growth and Imperfect Protection of Intellectual Property Rights", *Journal of Economics*, Vol.90, No.1 (2007): 45-85.

[3] Gérard Beaur, Hubert Bonin and Claire Lemercier (eds.), *Fraude, Contrefaçon et Contrebande, de l'Antiquité a nos Jours* (Geneve, 2006); Stephen Mihm, *A Nation of Counterfeiters: Capitalists, Con Men and the Making of the United States* (Cambridge MA, 2007); Maxine Berg, "From Imitation to Invention. Creating Commodities in Eighteenth-Century Britain", *Economic History Review*, 55 (2002): 1-30.

[4] For instance in 1862, before the British Trademarks Act was implemented, evidence presented to a Select Committee, confirmed that there was intense competition in foreign markets by imitators of British successful trademarks, in particular brands with high reputation and market share. Report from the Select Committee on Trade Marks Bill and Merchandise Marks Bill (1862), Q.9, Q.929; Q.2461.

that may be applied to a product or an entire range of products. Trademarks serve to protect the reputation of a product against rival producers.[5] Trademarks are particularly important in industries that rely on product design or image, rather than just proprietary technology, to differentiate their products. Such industries may be termed marketing-based, in contrast to technology-based industries, where patents rather than trademarks hold the key to success.[6] This article focuses on one particular type of marketing-based industry - fast-moving consumer goods. This includes food, drink, household goods and toiletries – all industries where product image, provenance (certification of origin) and the personality of the brand are important.

There are many business histories that analyse successful global consumer-goods brands. They usually attribute success in foreign markets to the entrepreneurial behaviour of managers, the development of efficient organisational structures, unique product design, distinctive advertising, the creation of effective distribution networks and sophisticated pricing strategies. There is hardly any mention, though, of how firms protect their brands against imitation in foreign markets.[7] Conversely, whilst firms are often criticised for lack of enterprise and innovation, poor management and misguided strategy, they are rarely criticised for failing to protect their brands, even when evidence suggests that this has been the case.

Focusing on the period 1870-1929, this study encompasses a succession of international business regimes, from the zenith of the British Empire and the rise of the modern US corporation, to the Great Depression. Before 1914 international trade expanded, aided by a falling international transport costs. Political and cultural change, coupled with the growth of advertising, helped diffuse mass marketing and mass consumption throughout the developed world. The process was patchy and punctuated though. Before 1914 there was also significant protectionism outside the 'free trade area' provided by the British Empire – particularly in newly industrialising countries - notably Germany, and Japan - seeking to

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[5] Mark Casson and Nigel Wadeson, "Export Performance and Reputation", and Per H. Hansen, "Cobranding Product and Nation: Danish Modern Furniture and Denmark in the United States, 1940-1970", both in Teresa da Silva Lopes and Paul Duguid (eds.), *Trademarks, Brands, and Competitiveness* (New York, 2010)

[6] Teresa da Silva Lopes, *Global Brands: The Evolution of Multinationals in Alcoholic Beverages* (New York, 2007).

[7] See for example Stephen J. Nicholas, "The Overseas Marketing Performance of British Industry, 1870- 1914", *Economic History Review* Vol.37, No.4 (1984): 489-506; Derek F. Channon, *Strategy and Structure of British Enterprise* (London, 1973). For an exception see Paul Duguid, "Developing the Brand: The Case of Alcohol, 1800-1880", *Enterprise & Society*, Vol.4, No.3 (2003): 405-441.

catch up with Britain. These countries protected infant industries through tariffs and subsidies, and encouraged indigenous firms to copy British products, posing particular problems for British exporters.

British consumer good exporters often catered for wealthy customers, including expatriates and settlers in the Empire and Latin America. They relied on trademarks to support a socially exclusive image. Prior to 1914 much British foreign direct investment (FDI) was made by free-standing firms in extractive and utility industries, but FDI in manufacturing, including consumer goods, occurred as well.[8] Britain remained competitive in consumer goods after 1929, despite its relative economic decline in many technology-based sectors.[9] Of all British FDI before 1929, that in the consumer goods sector was amongst the most long-lasting. Brands known today as global brands were then in early stages of their internationalisation.

During the period of this study the use of trademarks spread as trade expanded and legal protection was strengthened. As markets expanded, however, the scope for imitation increased, and the law had difficulty keeping up with this challenge. The UK established a trademark law in 1875, but this was of limited value to firms selling overseas. Their businesses required a consistent international application of statutory trademark law, and this was missing. The advance of international law was by no means uniform; it occurred in fits and starts, with some countries taking the lead and others following. France set the pace and the UK and US lagged behind. US and UK firms had to rely on common law, criminal law, copyright or even design law for trademark protection.

This article examines how firms responded to this fitful advance in international trademark legislation. It examines the strategies pursued by imitators and the counter-measures adopted by British firms. It explains how the choice of counter-imitation strategy was adapted to the specific circumstances of each case. It identifies the factors that governed

[8] Geoffrey Jones, *Multinationals and Global Capitalism* (Oxford, 2005); and *British Multinational Banking* (Oxford, 1993); John Benson, *The Rise of Consumer Society in Britain 1880-1980* (London, 1994); W. H. Fraser, *The Coming of Mass Market 1850-1914* (London, 1981); Stanley D. Chapman, "British-based Investment Groups before 1914", *Economic History Review*, Vol.28, No.2 (1985): 230-247; Geoffrey Jones (ed.), *British Multinationals: Origins, Management and Performance* (Hants, 1986); Peter Dicken, *Global Shift: Mapping the Changing Contours of the World Economy* (London, 2010).

[9] Alfred D. Chandler, Jr., *Scale and Scope: The Dynamics of Industrial Capitalism* (Cambridge MA, 1990). About British economic decline see for example Bernard Elbaum and William Lazonick, *The Decline of the British Economy* (Oxford, 1986), and also Stephen N. Broadberry, *The Productivity Race: British Manufacturing in International Perspective, 1850-1990* (Cambridge, 1997).

these choices – in particular, the law and institutions of the foreign country concerned. Most importantly, it examines how trademark protection strategies interacted with other strategies – in particular the choice of foreign entry mode.

The study draws on a multitude of sources, including trademark registrations published by national and regional trademark agencies. Extensive research has been carried out in private and public archives, including the archives of advertising agencies; and parliamentary committee reports, accounts of legal trials, and newspapers have been consulted, together with secondary sources such as commissioned business histories. The trademarks were selected for this study according to the following criteria: they are associated with long-established British brands; they once ranked (or still rank) among the world's top brands in their product categories; accessible records exist; the trademark owners operate in the consumer goods industries specified above; and relevant evidence is provided.

The sample is not representative of all the trademarks employed by British firms in foreign markets. It represents only a subset of the most successful trademarks that have demonstrated survival value. This focus is useful for two reasons. Firstly, successful brands tend to attract more imitators than unsuccessful ones, and so the problem of imitation they face is more severe. Secondly, the behaviour of survivors identifies those counter-imitation strategies that are sufficiently powerful to defend very profitable brands.

Leading brands analysed in this study are listed in Table 1A in the Appendix. They include Apollinaris bottled water, Bass beer, Black & White whisky, Colman mustard, Elect cocoa, Guinness beer, Huntley & Palmer biscuits, Pears soap and Rowntree pastilles and gum drops.[10] A French brand handled by a British agent is also included. The table provides the date of firm formation, the country of origin, the dates on which the trademark was registered in the UK, US, and France, and the type of product.

The remainder of the article is organised as follows. The next section is conceptual: it defines and discusses the key concepts of brand, trademark, imitation and protection, and analyses alternative imitation and counter-imitation strategies. The legal context is then reviewed. The historical evidence is then presented, using the conceptual framework as a template. Three key questions are addressed: what were the most common forms of imitation encountered by British firms in foreign markets; what were the most common forms of

[10] Apollinaris, a bottled water company was first created in Germany in 1851 and in 1874 established itself as a British company. Valentina Romei "Was there a 'Queen of Table Waters?' Apollinaris and its Marketing Strategy", paper presented at the European Business History Conference, Frankfurt 1-3 Sept. 2005.

counter-imitation strategies they adopted; and how did these counter-imitation strategies affect their choice of entry mode? The conclusions are summarised in the final section, where implications for future research are also discussed.

Key concepts: imitation, counterfeiting and trademark protection

It is a well-established economic principle that successful new products attract imitators. The entry of imitators into a market increases competition and reduces price. Other things being equal, therefore, imitation benefits consumers. However, by reducing price, competition reduces the innovator's prospective rewards. Indeed, the innovator may find it difficult to even recover their sunk set-up costs. In this case innovation may be deterred, so that in the long run consumers lose out. To protect the innovator, barriers to entry are required. In response to this, exclusive legal rights may be awarded to innovators, in the form of either patents, or trademarks, or both.

A trademark is a name, symbol or other device that can act as a distinguishing feature of a product, or an entire range of products. Unlike a patent, a trademark is not necessarily linked to a specific product or process. There are other differences too. Patents are awarded for originality but trademarks just have to be different – the product does not have to be new. Patents are normally awarded for a fixed number of years, after which they expire, and they may lapse earlier if they are not used. The life of a trademark may normally be extended indefinitely, however. The differences between patents and trademarks are not always clear in the literature. It is often assumed implicitly that a patented product will be marketed using a trademark, and this has created a false impression that the enforcement of trademarks raises the same issues as the enforcement of patents. In the enforcement of trademarks scientific and technical issues are not so important. Enforcing trademarks does, however, raise difficult questions about whether two trademarks are sufficiently similar to confuse the customer or not. It is also leads to difficulties when individuals with similar names wish to appropriate the same name for themselves. Thus while registration is easier for trademarks than for patents, the opposite may sometimes be true where enforcement is concerned.

Trademarks are often treated as synonymous with brands. A brand may be defined as a product identity that differentiates a product from substitutes by associating it with specific characteristics.[11] These characteristics may be objective – such as performance and reliability

[11] Lopes, *Global Brands*.

– or subjective – such as associations with particular celebrities or lifestyles. Brands are often used to signal quality, or enhance the value of a product to the consumer by signalling that the owner of the branded product is discriminating, wealthy, or of high status. They are particularly useful in non-durable goods where repeat buys are likely, as a memorable brand makes it easy for the consumer to recognise the product on a subsequent occasion.[12]

Brands themselves are not legal entities, but trademarks are. Trademarks can reinforce brand value and can be employed to defend it.[13] The name, typeface, design, colour and symbolism may be chosen to resonate with the values associated with the brand. A trademark design needs to be recognizable – even attention-grabbing. Rivals that attempt to imitate a product may therefore attempt to imitate its trademark too. Not all product imitation involves trademark imitation, however, and conversely not all trademark imitation involves product imitation. The situation is illustrated in Table 1.

Table 1: Two dimension of imitation strategy

	Imitate product	
Imitate trademark	**No**	**Yes**
No	No imitation	Imitation without trademark infringement
Yes	Trademark infringement	Counterfeiting

The table sets out two main dimensions of strategy available to an imitator and explains the relationship between them. The imitator discussed in the table is responding to an innovator who has taken out trademark protection. The imitator must decide whether to

[12] Jennifer L. Aaker, "Dimensions of Brand Personality", *Journal of Marketing Research*, Vol. 34, No.3 (1997) 3: 347-356; C. Lury, *Brands: The Logos of the Global Economy* (London: 2004). P. Milgrom and J. Roberts, "Price and Advertising Signals of Product Quality", *Journal of Political Economy,* Vol 94, No. 4 (1986): 311-29; F. I. Schechter, "The Rational Basis for Trade-Mark Protection", *Harvard Law Review*, Vol. 40 (1927): 813-33; M. Casson, "Brands: Economic Ideology and Consumer Society", in Geoffrey Jones and Nicholas J. Morgan (eds.), *Adding Value – Brands and Marketing in Food and Drink* (London, 1994).

[13] Christian Helmers and Mark Rogers, "Trademarks and Performance in UK Firms", in Lopes and Duguid (eds.), *Trademarks, Brands*: 56; Sandro Mendonça, Tiago S. Pereira and Manuel M. Godinho, "Trademarks as an Indicator of Innovation and Industrial Change", *Research Policy* Vol. 33 (2004): 1385-1404.

produce a look-alike product, and whether to imitate the trademark too. Alternative trademark strategies are indicated along the rows and alternative product strategies down the columns.

The top left-hand cell indicates a successful outcome for the innovator, in which there is no imitation of either its product or its trademark. The case in which imitation occurs without trademark infringement (top right-hand cell) is the case normally discussed in the economics literature. The bottom left-hand cell corresponds to a case of trademark infringement (or unauthorised brand extension), in which the imitator applies the trademark to one of its own products rather than to a copy of the innovative one. The bottom right-hand cell corresponds to the most damaging scenario for the innovator – counterfeiting. The counterfeiter's aim is to confuse the consumer and thereby take trade away from the innovator.

Consumers may be confused even when an imitation is not an identical copy. The name on the label may differ only in a single letter, or sound the same when spoken, while small variations in design and colour may also go undetected. Impulse buyers of low value products are particularly vulnerable to such confusion. From the imitator's point of view, an inexact copy may be preferable to an exact copy because the courts may rule on technical grounds that, because of the discrepancies, trademark infringement has not occurred.

Counterfeiting itself can take various forms. Two further dimensions of strategy are investigated in Table 2; namely the quality of the product and the price for which it is sold. Quality strategies appear along the rows and price strategies down the columns. The imitator may either match the quality of the innovator' product (top row) or produce an inferior variant that is superficially similar (bottom row); they may charge the same price as the innovator (left-hand column), or undercut them (right hand column).

Table 2: Two dimension of counterfeiting strategy

Quality of imitation	**Price of imitation**	
	Same	**Lower**
Same	High-quality imitation selling for regular price	High-quality imitation selling for lower price
Lower	Low-quality imitation selling for regular price	Low-quality imitation selling for low price

Matching both price and quality (top left-hand cell) reduces the risk of detection, whilst selling a low quality imitation at the regular price (bottom left-hand cell) maximises the imitator's unit profit. Selling a high quality imitation at a low price (top right-hand cell) steals long-run market share from the brand-owner, whilst selling a low-quality item at a low price can build a new mass market alongside the brand-owner's one. Choice of strategy will reflect the imitator's assessment of the discernment of consumers and their price elasticity of demand. The worse possible outcome for the brand owner is a variant of the final outcome; namely that a mass market develops in cheap counterfeit items and the brand's reputation for exclusivity is destroyed.

This discussion leads naturally to the issue of the strategies available to the innovator for protecting a product against imitation. The most direct way to tackle trademark infringement is to take the offender to court, but this is not so straightforward as it seems. Objective evidence of deliberate infringement may be difficult to obtain. The judicial process itself may be costly, and in certain countries the system may be prejudiced against foreign firms. Trademarks have to be enforced in local courts; they cannot be enforced extra-territorially. Furthermore, a court case may attract publicity that undermines consumers' confidence in their ability to identify the authentic product.

An alternative strategy is to 'buy off' the offender. For a valuable brand, however, the compensation that has to be paid may be large. To reduce the payment, the offender may be threatened with legal action, but if there is no intention of pursuing the action then the firm's bluff may be called. Furthermore, if news of a payment leaks out, other imitators may start to 'blackmail' the firm.

Trademark owners can, however, invest in preventative measures at the time their trademark is registered. They can, for example, design their trademark so that infringement is costly to implement and/or easy to detect. Using a simple and striking symbol, a powerful and distinctive colour and an unusual name all increase the costs of successful imitation.

A trademark owner may avoid selling in countries where legal protection of trademarks is weak. Alternatively, they may take a local partner. Partnering strategies such as licensing, franchising and joint ventures are 'double-edged' however. While local partners may be well placed to detect and prosecute local infringements, the partners themselves may be potential imitators. As authorised users of the trademark, franchisees have access to advertising material, and contact with customers who may be looking a cheaper variant of the product. Licensees will normally have access to production technology as well. It may not matter to the imitator if a local customer discovers that the product is not authentic, provided that they have confidence in the quality of the imitation product. The key point is simply that the trademark owner does not find out. The solution is for the trademark owner to monitor its partners at the same time that it relies on them to monitor others. Employing an agent or local representative may be useful for this purpose. Alternatively the trademark owner can integrate forward into distribution using a wholly-owned sales subsidiary

Third parties can also be encouraged to play a part in deterring imitation. A trademark owner may lobby their own government to put pressure on foreign governments to sign up to international treaties that protect IPR. Small firms can lobby through trade association representation. Foreign governments can also be encouraged to impose rigorous health and safety standards, and other forms of consumer protection, on their local producers, thereby making it more costly for cheap imitations to be produced.

The historical context

The first UK trademark law of 1875 resulted from the combined efforts of firms, governments and the courts. It reflected the traditional way in which traders differentiated their products at that time and the conservatism of the lawyers who oversaw the writing of the initial law.[14] Although there was a reasonable fit between the law and the characteristics of the markets, there were loopholes that were exploited by some imitators. For example in the 1880s there were many court cases about shapes, because shapes were not protected legally.[15] Over time innovators felt the need to also protect this part of their intellectual property and lobbied in its favour.

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[14] The Trade Mark Act of 1875 only allowed registration of one of more of the following: a name of an individual firm printed in a particular and distinctive manner; a signature by an individual firm; a distinctive device, mark, branding, label or ticket; any special and distinctive word or words or combination thereof used before the act came into force. Devices and labels, packaging and advertising/marketing were for a long time protected by copyright law as they related to the tangible aspects of the brand's appearance. See also Paul Duguid, 'French Connections: The Propagation of Trade Marks in the Nineteenth Century', *Enterprise & Society*, Vol.10, No.1 (2009): 33-37.

[15] Cases such as Re James Trademark Application in 1886 show that traders used shapes as marks although they were not protected by law. As a result companies such as Coca Cola were only able to register the shape of their bottles in 1994. Only in the 1993 Trademark Act was the word 'brand' used for the first time.

Legal systems and concepts of protection varied between countries.[16] The first international convention, the Paris Convention for the Protection of Intellectual Property, was only created in 1883.[17] This Convention was advantageous for business because it granted reciprocal rights for registration by citizens of the participating states. However, Britain only joined in March 1884.[18] The Treaty of Madrid of 1891, which was a specialised agreement under the Paris Convention, facilitated simpler international registration of marks. After initial registration in their home country, a trademark proprietor could make an international registration that was then passed to the required country or countries.[19]

Early internationalising firms had nonetheless begun extensive foreign registration prior to the Paris Convention and the Madrid Agreement (see Table 1). Figure 1 in the Appendix illustrates the evolution of the proportions of total foreign registrations in France by different countries 1886-1905. It reveals a significant proportional increase in foreign registrations in the late nineteenth century. By 1890 British firms accounted for approximately two-thirds of all registrations, although the percentage decreased thereafter. Figure 2 in the Appendix shows that the number of trademarks registered internationally by firms in countries that were signatories of the Treaty of Madrid was surprisingly small relative to the total number of registrations made in the UK.

Before 1870 trademarks were often mainly an indicator of provenance, and provenance was, in turn, an indicator of quality (e.g. Sheffield cutlery).[20] With changes in legislation and the globalisation of trade, however, trademarks became allied to brands and

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[16] Douglass North, *Structure and Change in Economic History* (New York, 1981); A. Greeley, *Foreign Patent and Trademark Laws: A Comparative Study with Tabular Statements of Essential Features of such Laws* (Washington DC, 1899). For a overview of national systems of trademarks registration in the United Kingdom and France see Lionel Bently, "The Making of Modern Trademark Law", in Bently et al (eds.), *Trade Marks and Brands – An Interdisciplinary Critique* (Cambridge, 2008), and Paul Duguid, "French Connections: The International Propagation of Trademarks in the Nineteenth Century", *Enterprise & Society*, Vol.10, No.1 (2009): 3-37. Latin American countries and Japan had quite different systems of registration in relation to European countries.

[17] Bently, "The Making of Modern Trademark Law": 14; Duguid, "Developing the Brand".

[18] International Convention for the Protection of Intellectual Property (1883); British Accession: Industrial Property Convention of March 20 1883 (17 March 1884), National Archives: FO 93/33/124.

[19] The Madrid Agreement Concerning the International Registration of Marks from 1891 to 1991 (Geneva, 1991).

[20] David Higgins and Geoffrey Tweedale, "Asset or Liability? Trade Marks and the Sheffield Cutlery and Tool Trades*", Business History* Vol.37, No.3 (1995): 1-27.

began to play an important role in reinforcing the image of the product. Trademark owners began to license or franchise their products to local partners, often on different continents, and in some cases they engaged in FDI.[21]

The agent or traveller was a key figure in British business, both at home and abroad. Travellers were the brand-owners' appointed sales agents, assigned to specific territories. They sold goods to retailers, either in their own name or as representatives; they could be independent re-sellers, fee-earning associates, or ordinary employees. Travellers often acted as sources of information and advice to trademark owners on how to counter competition. They understood the way that customers used the product, and were in a good position to detect counterfeiting and trademark infringements. In fact, many of the cases of infringement discussed below resulted from reports prepared by travellers and agents in foreign markets. Once reported, firms would take advice either from local trademark agencies, in-house lawyers or legal firms.[22]

Some firms went even further than employing travellers and invested in their own distribution facilities. To spread the costs of these facilities, firms often went into partnership – sometimes with local firms and sometimes with other British firms. The trading company Atlantis, for example, was an alliance established by two competitors, J & J Colman and Reckitt & Sons in 1913, to facilitate distribution to the South American market.[23]

Imitation and Brand Protection: The Evidence

This section reviews the historical evidence on the use of trademarks to protect British consumer brands in overseas markets. It shows that brand owners faced a range of duplicitous strategies pursued by imitators. Imitators not only copied trademarks but added their own brand name to products bearing the trade mark, and even claimed that they had been the first

[21] Herbert C. Ridount, 'National TM is Unsound Advertising', *Advertiser Weekly*, 14 February 1919: 5; 'Proprietary articles', *Advertising World*, May 1905: 576; F. I. Schechter, *The Historical Foundations of the Law Relating to Trade-Marks* (New York, 1925); Mira Wilkins, "When and Why Brand Names in Food ad Drink?" in Jones and Morgan (eds.), *Adding Value*.

[22] Algernon Warren, *Commercial Travelling: Its Features, Past and Present* (London, 1904); Walter Friedman, *Birth of a Salesman: The Transformation of Selling in America* (Cambridge, Mass., 2004); *Salesmanship - Special issue of Business History Review*, Vol.82, No.4.

[23] Colman's, 3 April 1914, Directors' and Managers Meetings Minute Books CON/1996/127, Vol.1 (Box Label 191), Unilever Archives.

to develop the trademark they had infringed. Most imitators opted to produce counterfeits – *i.e*. they imitated both the product and the trademark. They sometimes produced convincing imitations of a high standard. The probable explanation is that many imitators were already part of the British firms' international supply chains and therefore had ready access to labels and, in some cases, the production technology too. It was partners that cheated, and not wholly independent firms. The imitators were not generally based in low-income low-skill countries but in newly industrialising countries with highly skilled workers such as the US, Germany and Japan. They could produce high quality imitations if they wanted to, but sometimes preferred to produce low-quality imitations in order to reduce costs.

British firms dealt with different types of imitation using multiple strategies. Choice of strategy depended to a great extent on the market and its institutional environment, and also on the brand and its importance in the firm's portfolio of products. Firms had to decide whether to incur the cost of registering their trademarks in foreign markets, and also whether to incur the costs of litigation when they were unfamiliar with local law or faced discrimination against foreigners in the courts. Many firms chose to negotiate with their imitators and to extract undertakings from them. Where negotiation did not work, firms might join together to lobby foreign governments (sometimes using their own government as an intermediary). Where local partners had proved untrustworthy, an agent might be appointed to report directly back to Britain on the integrity of local distributors, and where local sales were sufficiently large, firms might opt for foreign direct investment, as indicated above. While conventional international business theory suggests that foreign investments were often made to protect property rights in technology, the evidence in this paper highlights their importance in protecting the integrity of the brand instead. In smaller markets, however, firms might simply withdraw altogether to prevent local imitators gaining access to product they could copy.

Imitator's strategies

The form of imitation

The evidence from the sample reveals that all significant infringements involved both imitation of the trademark and imitation of the product. Established trademarks were not copied for use on novel products produced by the imitator. Potential imitators, it would appear, believed that consumers could not be deceived by applying an established name to a product that was not already associated with the brand concerned. Unauthorised 'brand extensions' were not therefore a threat; brand extension was probably regarded as being difficult enough to achieve with an authentic product, and so doubly difficult to without one. Conversely, when products were imitated the trademark of the imitated product was imitated as well. Although there are well-known industries today, such as fashion textiles, where product designs are copied but labels are not, such cases do not appear in this study. All the cases therefore exemplify counterfeiting, as defined in Table 1 above.

The quality of the imitation

While some imitations matched the quality of the authentic product, poor quality imitations were also a recurrent problem. This was the experience of the British merchant Henry Browning, who shipped Hennessy cognac to Ireland, Australia and other colonies from Britain. He received letters from many different parts of the world informing him about piracy of brandy labels, and complaining about the poor quality of the brandy. It was believed that German and Japanese firms, and also some UK firms, were mainly responsible for this piracy. German imitators filled Hennessy casks with coloured common spirits, and these were sent out to the colonies as Hennessy brandy.[24] It seems that the counterfeit brandy was sold at regular prices, rather than at heavily discounted prices that might have alerted consumers to the inferior quality of the product.

Confusing the customer without exact imitation of the trademark

Some imitators did not directly copy a trademark but merely imitated key features of its design in order to confuse the customer. This strategy allowed them to defend themselves in court by claiming that their design was different, or indeed, to portray themselves as victims by claiming that the originator had, in fact, imitated their design instead. An example of this is the case of Colman's mustard in the US and its action against Samuel Crump, a printer of mustard labels in 1870, the same year US trademark law was introduced. J & J Colman began

[24] Mr Henry Browning, Merchants and Agents, of Messrs. James Hennessy & Company of Cognac to the Select Committee on Trade Marks Bill (1862), Q. 2462 - 2479.The primary concern was preventing use of trade marks abroad, especially in Germany. R. J. S. Hoffman, *Great Britain and the German Trade Rivalry*, 1875-1914 (New York, 1964); C. Bucheim, "Aspects of XIXth Century Anglo-German Trade Rivalry Reconsidered", *Journal of European Economic History* 10 (1981): 273-89.

internationalisation soon after its success at home.[25] As early as 1840, Colman's sent a representative to the US to select dealers for the brand. This representative had various roles, such as providing advice on marketing and packaging of the product and also on the best ways to protect the trademark. When Colman's began prosecution for infringement of its trademark in 1870, it had not yet registered the trademark in that market. Colman's claimed infringement of its distinctive labels, which had featured a bull's head device on a yellow background since 1855. The final judgement came in 1877 from the Superior Court of New York; it was that Colman's was entitled to the exclusive use of the figure of a bull's head as their trademark on labels attached to the mustard.[26] Following this success, Colman's moved to take additional action against the other counterfeiters in the supply chain, such as manufactures, dealers, and grocers who were also selling cans of mustard bearing a bull's head.[27]

Diluting the original brand by adding a local brand

A variant of this strategy involved an imitator associating their own name with the counterfeit product by combining their name with that of the brand. An example is the sale of bottled beer by Guinness's US bottler 'Burke', who by 1910 was using the label and advertising Guinness's exported beer (Guinness beer mixed with other beer of lower quality) as 'Burke's Bottled Guinness Stout', thus implying the stout was the product of the bottler rather than Guinness.[28] Guinness, the Irish stout manufacturer, had embarked on a rapid process of internationalisation soon after it went public in 1886. It franchised out much of the bottling of its stout to independent bottlers, requiring them to sign agreements restricting their bottling of stout to only the Guinness brand. From the turn of the twentieth century, however, the company sought to promote bottling in the country of destination. In the US, where much of Guinness's foreign trade was located, this involved establishing new agreements with local bottlers, and the transferral of UK-based bottling plants to the US. Guinness's system of

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[25] Its also rapid success abroad was such that it introduced brands such as Savora, the first ready made mustard (which was sold in stone jars), in foreign markets in 1907 which only became available in Britain in 1914. "The Advertising Art of J. & J. Colman Ltd.", October 1977, Unilever Archive (BRA, 120).

[26] "Colman's vs. Samuel Crump", Nov.1870, Superior Court of the City of New York, Book of US Cases, Unilever Archives, 1996/27 (Box label 167).

[27] "Mustard Pots", *New York Times*, 1 Feb. 1872: 2.

[28] S. R. Dennison and Oliver MacDonagh, *Guinness 1886-1939: From Incorporation to the Second World War* (Cork, 1998): chapter 5.

labelling further complicated the protection of its trademarks, as the bottlers could choose their own label design featuring Guinness's name, subject to the label being approved by Guinness. From 1895, Guinness began to restrict bottlers in the domestic market and overseas markets to using Guinness's own trade mark label - a buff oval label featuring its famous harp design. Bottlers were permitted to add their name in the lower half of the label.[29]

Claiming legal priority for a local brand over a foreign brand

Imitators also presented themselves as injured parties by claiming that they had greater rights to the trademark than the trademark owner. This ploy was often adopted by foreign firms seeking to protect their domestic market from entry by British firms. They seem to have hoped that nationalist sentiment would persuade the court to rule that they had a prior claim to the mark. This situation seems to have been particularly common in newly-industrialising countries like Germany and Japan that were trying to 'catch up' with Britain. An example is Huntley & Palmers which had registered its trademark featuring its buckle and garter design in Germany. In 1899 it was confronted by several court cases instigated by German rivals trying to remove the label from the trademark register. Eventually the German Imperial Trademark office ruled in favour of Huntley & Palmers.[30] Until then Huntley & Palmers had not been very proactive at protecting its trademarks. The firm had not registered the names of its biscuits in France, discovering soon after that another company was using the brand name for one of its biscuits. Meanwhile the company became aware that it was not keeping systematic records of its global registrations, and so it commissioned a register of such marks.[31] This led, in the German case, to the board appointing an individual to oversee the case and authorising legal counsel to be appointed on his authority. Following the trial, in February 1900, Huntley & Palmers sought to register its labels in a large number of foreign markets where its biscuits were being sold.[32]

Defensive strategies of brand owners – registration, litigation, negotiation

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[29] *Ibid.*

[30] Minute Books 1, 5 December 1899, 24 January 1900, and 19 February 1900, Huntley & Palmers Archives.

[31] Minute Books, 5 December 1899, 20 January 1900, 13 February 1900, and 26 November 1901, Huntley & Palmers Archives.

[32] These markets were Holland, the Dutch East Indies, Hong Kong, Cape of Good Hope and Natal, France and Australia, and China. Minute Books, 19 February 1900, and 24 January 1900, Huntley & Palmers Archives.

The propensity to register trademarks.

Given the availability of trademark protection, it is surprising that some firms did not register their trademarks when they could easily have done so. Two main considerations seem to have weighed against registration. The first was the legal costs, both of registering, and then of enforcing the rights. Registration was quite expensive in the early years, making it a deterrent for small firms with only a small export business, and therefore limited exposure to the risk of foreign imitations. Secondly, some firms trusted their business partners and their rivals, and believed that disagreements between businesses over imitations should be resolved without recourse to law.

Rowntree, a biscuit and chocolate producer, was very late at registering trademarks in foreign markets, and avoided litigation as much as possible. Prior to the interwar period Rowntree's exports were an insignificant part of its total sales. Foreign registrations and trademark protection were not considered important. T. H. Appleton, the factory manager, was responsible for the management of trademarks. He also accumulated other roles, such as being in charge of exports, employees' welfare, wages, holidays, timekeeping, machinery and new building, factory and office rules.[33] The board of directors considered the question of a world-wide registration of Rowntree's trademarks (such as 'Rowntree' and 'Elect') to be onerous and not justified in markets other than those in which they already operated, and had already applied for registration. Their argument was in that markets where the Rowntree brand was small and unknown to consumers there were no incentives for pirates to imitate the trademark. Rowntree only applied for registration once exports into a particular market achieved a significant level.[34]

Although reluctant to embark on potentially unnecessary foreign registrations, Rowntree did, however, systematically review its existing overseas marks, aware of the potential for imitation if its rights lapsed.[35] For Rowntree, much of its awareness of the need to register and of the risks posed by infringers may be attributed to its trademark legal agent, T. B. Browne based in London. It was Browne who suggested extensive foreign registration

[33] Papers of T. H. Appleton- Factory Manager, R/DP/F (19-33), Rowntree Archives.

[34] Correspondence to and from T. B. Browne, 19 August 1912, R/DP/F/2; 30 January 1915, R/DP/F/26/2, Rowntree Archives.

[35] There are, for example, instructions for the routine for renewing foreign and domestic marks in the Book of Trademark Registration Information: 2, R/DP/F/19, Rowntree Archives.

and, when this idea was rejected by Rowntree, Browne reminded the firm that other clients who delayed registering had found their mark registered by others in those countries.[36]

An illustration of how Rowntree dealt with cases of infringement in foreign markets is the case of Gregg & Co. in New Zealand, who produced fake "Rowntree's Table Jelly Powders". Rowntree received advice from its agent in New Zealand and Browne on this matter, and tried to deal with the case without having to go to court. Gregg & Co agreed to stop using the word 'Rowntree' in future, but they refused to remove existing counterfeit products from the market or to pay any expenses incurred by Rowntree regarding the case.[37]

Ultimately the lack of both registration and legal protection of the trademark contributed to the demise of the firm, under its original ownership.[38] This is also what happened to Pears soap which, despite its very high success internationally, was acquired by Unilever 1915. After its acquisition, Lever Brothers changed radically Pears's mode of entry into most foreign markets and also its counter-imitation strategies, by setting up wholly owned distribution channels and, when possible, by suing imitators, their distributors and other agents. Pears toilet soap was created in 1789 by Andrew Pears, a hairdresser. In 1835 Andrew Pears, with his son Francis, formed A & F Pears and began selling the product. In 1865 Thomas Barratt, who had married into the family, joined the company as an investor and manager and restructured it. He used wild promotional plans, bold eye-catching advertisements, and outrageous publicity stunts.[39] He was later called the 'father of modern advertising'.[40] However, Barratt disregarded the strategic importance of protecting a successful brand from imitation. As the reputation of Pears' Original Transparent Soap grew, rivals began to copy the product with scrupulous accuracy. The secret process could not be copied exactly, but competitors at other levels of the distribution were now producing

[36] Browne considered that money spent on world wide registration was not like money spent in advertising, which expenditure must be kept up to be of value, but the name was one of the foundation stones of business. Report on interview with Mr Griffin of TB Browne, R/DP/F/21, Rowntree Archives.

[37] Correspondence with T. B. Browne & Co regarding the Table Jelly Powder Infringements in New Zealand from 19 October 1909 until 15 September 1910, R/DP/F/26/2, Rowntree Archives.

[38] Teresa da Silva Lopes and Mark Casson, "Entrepreneurship and the Development of Global Brands", *Business History Review* 81 (Winter 2007): 651-680.

[39] In 1899 Thomas Barratt was honoured by newspapers around the world for his work in advertising. Unilever, "A Brief History", Pears Collection, Unilever Archives; Wilson, *Unilever*: 72.

[40] For example in 1887 he created the famous Bubbles advert, based on the painting by Millais. He also created glamour advertisements using famous people such as the actress Lillie Langtry. Pears Collection, AFP 12/5/1, Unilever Archives.

‘counterfeits’ packed in wrappers exactly similar to those which Pears was using, or using similar soap shape as Pears. This led eventually to the sale of Pears to Unilever.

The majority of firms in the sample, however, made full use of the law, and registered their trademarks whenever they were eligible to do so. Typical of this group is the drinks company Guinness, famous for its Irish stout. Guinness was very pro-active in protecting its marks by registering them in foreign markets. It registered the label for its stout and Foreign Extra Stout soon after it was created.[41] In 1910 the company introduced a new standardised label for its foreign stout, and by the following year registration of the label had been completed in 64 foreign territories.[42]

Litigation

Bass was one of the most aggressive firms at registering its trademark and prosecuting infringers.[43] Bass began exporting to continental Europe in 1784, and established a substantial trade abroad from the 1820s. Bass either exported beer (in barrels or in bottles) or subcontracted to agents in or near UK ports. Apart from bottling the beer, these agents also labelled the bottles, which from 1854 also included Bass’s trademark. However, this policy made Bass vulnerable to imitation by UK bottlers, some of which produced counterfeit Bass beers for export.[44] Later Bass also hired bottlers abroad. In markets such as India, after the beer had been consumed, the labelled bottles were often filled with beer of inferior quality. During the late nineteenth century there were multiple cases of beverages firms (either brewers or other drinks companies such as wine, or bottled water producers) using a triangle of virtually any description.

[41] It spent almost £300 registering its mark in 22 countries or territories in 1887 – six years before international registration was simplified under the Treaty of Madrid. General Purposes Sub-Committee Minutes (12 July 1887), Guinness Archives, Dublin. However, it was not until 1889 that the company trademarked the word Guinness in the UK. Board minutes London (1 June 1889).

[42] Secretary’s Report 1912: 206, Guinness Archives. A steady flow of registrations continued in the intervening years: for example in 1904, the company registered its marks in a further seven countries. 1904 Secretary’s Report, Guinness Archives.

[43] For example, it was the first company to register its trademark in the United Kingdom when the Trademark registry opened on 1 January 1876. See Paul Duguid, Teresa da Silva Lopes and John Mercer, “Reading Registrations: An Overview of 100 years of Trademark Registrations in France, the United Kingdom and the United States”, in Lopes and Duguid (eds.), *Trademarks, Brands and Competitiveness*: 9-30.

[44] Colin C. Owen, *The Greatest Brewery in the World: A History of Bass, Ratcliff & Gretton* (Derbyshire, 1992).

In the case of Bass vs. Wendell in 1894 a Boston bottler was accused of selling ale under forged Bass labels. Bass's agents in the US employed detectives to monitor Wendell, who purchased stocks of the offending product, and even went as far as renting office space in his building to spy on his activities.[45] This was considered to be a far reaching investigation of dangerous fraud, a view clearly shared by the trial judge, as Abraham Wendell received five years imprisonment with hard labour as a result of this.[46] The outcome of the case attracted quite a lot of press attention. This was heightened by the publication of notices by Bass in numerous newspapers concerning the outcome. These advertisements publicised the sentence handed down to Wendell to warn against future infringement of the Bass label.[47]

Negotiation

Bass only initiated litigation after failing to reach agreement with Wendell. Litigation was normally a last resort as it was expensive and slow. It was usually cheaper and quicker to make a private agreement with an offender. Private agreements were also useful if customers were unaware of the imitation problem, as it avoided alarming them unduly concerning quality, and also avoided alerting them to the possibility of acquiring a substitute at a cheaper price. In the case of Bass, imitators would initially received a letter from Bass alleging infringement. This strategy was often applied to European companies, particularly Belgian and German brewers. Bass's strong position in the British market and its reputation for aggressiveness induce offenders to compromise and desist. Typically they would agree to amend their label to exclude any objectionable mark. To facilitate the process Bass usually paid for any stock of labels, and other stationery, which it required to be replaced and destroyed. Sometimes a formal agreement would be signed defining limitations on the right of the imitator to use a similar mark that could confuse customers.

An illustration of such an agreement is provided by the case of Bass vs. Wielmans-Ceuppens a Belgium brewery in 1921. This case was agreed after Bass had begun Tribunal of Commerce proceedings, ensuring Bass of an outcome that was acceptable to them. The agreement provided for the abandonment of the case, in exchange of destruction of the

[45] "Henry T. Nichols to Bass", 16 February 1894; "Jim Stewart to Bass", 18 September 1894, both in Label Book, Bass Archives.

[46] "Price & Stewart to Henry T. Nicholas", 31 July 1894; "Price & Stewart to Bass", 6 December 1894, both in Label Book, Bass Archives.

[47] "Agreement between Bass with Wielmans-Ceuppens", June 1921, Label Book, Bass Archives.

defendant's stock of contentious labels for which Bass paid half the costs, and renunciation by Wielman-Ceuppens of the objectionable label and the non-use of a diamond design thereafter. [48]

Damaging the imitator's reputation

Firms often publicised their victories over imitators in legal cases, as noted in the Bass v. Wendell case above. A similar approach was sometimes used even when litigation had been avoided. Negotiated settlements often required a written apology from the imitator, and such apologies were sometimes published by the trademark owner in newspapers.[49] For instance, in 1908, Guinness's US representative reported on the sale of bogus stout under the company's label. This case followed increased efforts by Guinness to protect their brand; the previous year the firm had approved the registration of the word 'Stout' in the US.[50] Although the firm reached agreement with the offender, it published an apology designed to testify to the superiority of the authentic brand. A similar strategy was employed at other times by White Horse, Johnnie Walker and Apollinaris.[51]Although this strategy ran the risk of alerting consumers to a potential problem with the product, it seems that its value to the firm as a deterrent to potential future imitators outweighed this concern. Certainly the publicity that the incident attracted served to raise public awareness of the brand.

Long-term strategies

[48] Agreement with Wielmans-Ceuppens in Belgium (June, 1921) Label Books, Bass Archives. Other similar cases include the Agreement with Les Brasseries Breuvart D'Armentieres in France for using an inverted triangle on their own label, and the case with H. Deetzan, a brewer and bottler in Bremen Germany who sold imitations of Bass beer in New Orleans in the United States. Agreement with Les Brasseries Breuvart D'Armentieres (March, 1926), Label Books, Bass Archives; Mr Thomas Coxon, Manager in London of Bass & Company, representing Bass in the Select Committee of 1862: Q. 2480 - 2567.

[49] Guinness preferred to prosecute individual firms rather than prosecute a number of limitations together. Trade (Dublin & Vicinity) *Annual Report 1898*, Guinness Archives.

[50] The legal agents in New York, Messrs Masten & Nicholls, failed to learn where these traders procured the bogus stout, 1907 Secretary's Report, Guinness Archives.

[51] Appolinaris used the letter of apology from one of its imitators (Fisher) more repeatedly. This led Fisher to begin legal procedures against Apollinaris to stop them from publishing the apology repeatedly. "Police Court: Apollinaris Water", *Times*, 19 October 1874: 14; and 28 November 1874: 11; "Fisher & Co (Ltd) vs Apollinaris Company Ltd., *Times*, 24 March 1875: 12; "Guinness Extra Stout Apology from Hugh McMullar", *Belfast Telegraph*, 25 March 1939; "Apology to White Horse Distillers Limited", *Daily Record*, 1 June 1932; "Apology to John Walker & Sons", *Kilmarnock Herald*, 16 March 1933.

Focus on problematic markets

In some foreign markets trademark protection was very weak. Even if there were no local producers, British exporters could face competition from imitators based in third countries. It was important to monitor all markets in which a product was sold in order to identify imitation problems and establish the provenance of counterfeit goods. This is exemplified by the experience of Pears soap in India soon after its acquisition by Lever Brothers – an experience which forced a radical change in strategy.[52] In 1916 in India Pears sued distributors that were selling imitations such as 'Erasmic soap' and also 'Pare Po Soap' produced in Japan. In the first case the soap used very similar wrapping and labelling, and also the same lettering as Pears. In the second case the name of the soap was intended to be similar to Pears and to deceive illiterate natives, and also displayed a similar design with an oval shape.[53] Because Indian law offered only weak trademark protection,[54] it proved difficult to stem the flow of counterfeits.[55] Despite many successful prosecutions, Pears still found it necessary in the early 1930s to prosecute Indian traders for marketing imitation soap.[56]

Under Lever's ownership Pears arranged for imitation stocks to be confiscated and obtained injunctions to stop firms importing further supplies. This was done either by negotiation or litigation.[57] Nevertheless Pears found it difficult to stem the flow of counterfeit goods. The company would respond to infringement in one market to find that product was being manufactured in another country, and going through a chain of dealers and retailers to reach the final consumer.

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[52] "Imitations and Infringements", AFP/04/3, AFP/04/4, AFP/04/5, AFP/04/6, AFP/04/7, AFP/04/8, AFP/04/9, Pears Collection, Unilever Archives. See for example "Letter from Payne to Pears", 16 August 1916; "Letter to Rishton at Lever Brothers from the Secretary of Pears", 12 October 1916.

[53] The names of the Japanese manufacturers were respectively Harumoto Soap Factory and Kinjiyau Tohoku Sa-Toru, respectively. "Suit No.1151 of 1916 in the High Court of Judicature at Fort William in Begal", AFP/4/7/1-36. About infringement of the label see for example "Letter from Payne & Co – Solicitors to A & F Pears Limited", 28 Feb. 1916 and 11 March 1916, "Imitations and Infringements", Pears Collection, Unilever Archives.

[54] "Letter from Payne in India to Pears", 19 August 1916, and "Letter to Rishton Lever Brothers from the Secretary of Pears", 12 October 1916., AFT/04/3, "Imitations and Infringements", Pears Collection, Unilever Archives.

[55] "Letter to Rishton, Lever Brothers from the Secretary of Pears", 12 October 1916; "Letter from Payne to Pears", 19 August 1916, "Imitations and Infringements", Pears Collection, Unilever Archives.

[56] *Times of India*, 4 March 1929, and 20 February 1933.

[57] "Letter from Pears to Gollin & Co", 2 April 1917, "Imitations and Infringements", Pears Collection, Unilever Archives.

Around this time other counterfeit soaps from Germany and Austria were found in India, Japanese soaps were being sold in Australia, and US-made soaps in South Africa.[58] In South Africa, for instance, with the 'Unscented Colonial transparent soap' case of 1916, the infringement was related to the substantial similarities in the pressing and the wrapping of the soap, as well the shape (with a depression at the top and bottom of the cake), the use of the word 'colonial', and the general typographical style of the wrapper (including colour and outline scheme).[59]

Pre-emptive trademark registration

Japanese law was different from British trademark law. By a protocol attached to the Anglo-Japanese Treaty of 1894, Japan joined the International Convention for the Protection of Industrial Property and Copyright, and in light of this the Japanese government revised its trademark law in 1899. Under the revised law, if an existing foreign trademark had been registered by a local Japanese firm before the arrival of the foreign firm in Japan, the foreigner would be liable to criminal prosecution if it used its trademark in Japan.

Many well-known foreign trademarks were registered by Japanese firms, and in many cases the registrants had no intention or ability to apply the trademark to production.[60] They simply wished to blackmail the rightful owners when they sought to enter the Japanese market. In 1905, for example, James Buchanan and Co., owner of Black and White Scotch whisky, had given power of attorney for registration of Black & White in Japan. However, the trademark had already been registered and an imitation was being produced by Nishikawa, a wine and spirits company in Osaka. The bottles contained a mixture very different from the actual Black & White whisky, but the labels were almost identical. Buchanan alleged fraudulent imitation, but the case was dismissed by the court, on the grounds that the labels were not absolutely identical. Buchanan took the case to the Court of

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[58] Correspondence between Gollin & Co (Proprietary Limited), A & F Pears Ltd., Ed. Waters (Patent Attorneys) and D. Tilley about the infringement by the latter of Pears trademarks, for their unscented soap label in Melbourne, 7 February 1917, 12 February 1917, 2 April 1917, AFP/04/8 and AFP/04/9, "Imitations and Infringements", Pears Collection, Unilever Archives.

[59] "Letter from Armour & Company (Chicago, Illinois)", 8 August 1916, "Imitations and Infringements", Pears Collection, Unilever Archives.

[60] The law was changed in 1907 but, even then, cases where the trademark had been infringed before the change of the law were dismissed. That is what happened to Buchanan in 1907, when it took the Nishikawa case to the Court of Appeal. "Imitations of Trademarks in Japan", *The Economist*, 14 December 1907: 1-2

Appeal, which also dismissed the charge.[61] In the long run the solution was for British firms to register trademarks in Japan at an early stage, so that they had priority later if and when they wished to enter the market. Given the costs of registration, however, the uncertainty of the legal process, and doubts about the potential size of the market, it is perhaps not surprising that few British firms appear to pursued a pre-emptive registration policy at this time.

A similar problem arose elsewhere. In Argentina and Mexico[62] the first user of a trademark was entitled to its exclusive use, which meant that any local manufacturer, by registering an existing foreign trademark, could exclude the innovator from that market. This situation created opportunities for unscrupulous businessmen to register well-known trademarks and thereby prevent imports to South America.[63] In some countries, however, British companies obtained protection by becoming members of local trade associations such as *Sociedade União Industrial contra a Contrefacção* (Industrial Union Society against Counterfeiting) in Brazil. An illustration is Apollinaris, which at the turn of the century was exporting bottled water to Brazil, and found multiple counterfeits for sale in that market. By becoming member of the association it was able to re-establish its trademark rights.[64]

Lobbying

An interesting example of a pro-active strategy to counter discrimination against foreign firms in a problematic market is the lobbying carried out by British businessmen doing business in China in 1907. They discovered many Japanese imitations of British brands in that market. British merchants in China complained that Japan's open door policy was a delusion. As a way of protecting their businesses, which relied on the production of imitations, the Japanese government declined to enter into an agreement with the UK for the mutual protection of trademarks in China. In the meantime Russia, Germany, France, and

[61] "Imitation of Trademarks in Japan", *The Economist*; 'Power of Attorney for the purpose of Registration of the Words Black and White in Japan", James Buchanan, 4 April 1905 and 5 Nov. 2007, Minute Books, Diageo Archives.

[62] "Trademark Piracy in Mexico", *New York Times*, 10 August 1919. Several attempts were made to change the position, through the United States Trade Mark Association, the Pan-American Union, and through a convention of the American governments among other initiatives. See for example 'Trade Mark Forgeries", *Grocery*, July 1906.

[63] "Urge Trademark Reform – Latin American Laws Held to Open Avenue for Extortion", *New York Times*, 15 April 1915: 14.

[64] *Grocers Journal*, 11 February 1905.

other powers had agreed to sign agreements with the UK for reciprocal protection of trademarks in China.[65]

Use of special devices to deter imitation of the label or tampering with packaging

Some brand owners designed their products or their labels so that they were hard to copy. By raising the costs of potential imitators, they hoped to deter them – even if they persisted with their imitation strategy, they might choose an easier product to imitate. This could benefit the brand owner if their rivals then suffered from counterfeiting problems from which they were immune. Holograms were sometimes attached to labels, and distinctive forms of packaging employed to differentiate the product. For example, the appearance of imitations in India led Johnnie Walker first to create a fitment for sealing its whisky bottles. This later changed to a square bottle and wired cork stopper.[66]

Hiring a representative

As noted earlier, many firms found that their problems originated with their local business partners, who could not be trusted to develop the local market in the interests of the brand owner. As a way of overcoming this problem in the US market, Guinness hired a permanent representative, and set up a local office. The representative provided information to Guinness headquarters about the evolution of the US market, the problems associated with having a high retail price for imported beer, and the target markets (at that time Guinness was sold as a medicine). He estimated US sales, the percentage of beer sold as Guinness which was in fact forgery (around 10 per cent in 1900), and stressed the advantages of advertising the brand. Soon after his appointment US sales began to increase, and the US market rose from under 30 percent of total foreign sales in 1900 to over 40 per cent in 1914.[67] Many other firms, including Pears, used the same approach, which proved to be very successful.

[65] In this period China did not have trademark law in place, but the Chinese were not yet considered to be a threat in the production of imitations. "British Trade Hurt by Japan in China", *New York Times*, 19 May, 1907: C1.

[66] These were adopted for home and foreign markets. Minute Books, 10 October 1912 and 26 February 1920, 14 May 1935, and 9 December 1935, John Walker & Sons, Diageo Archives.

[67] A.T. Shand had been a former traveler for Allsopps in the American market. Dennison and McDonagh, *Guinness*: Chapter 5.

Cooperation between firms

Firms often made alliances to deal with particular imitators that posed a common threat. Lobbying is only one example of this. Co-operation was used to share the costs of applied to litigation, negotiation, and the employment of agents. The allies could be firms at different stages within the same supply chain, and also the owners of competing brands.

The alliance between Guinness, Bass, and their US bottler and labeller E & J Burke in 1907, against Bowie & Co in Canada for fraudulent labelling is a good illustration. Bass had detected Bowie selling an ale under the 'Black Bass' label, and also a stout with a 'Guinea Stout' label, very similar to that used by the US bottler E & S Burke. Through their attorneys the allied companies arranged for the withdrawal of the imitation labels, and for a new label to be issued bearing the name of the brewery (Bowie & Co Brewery Ltd. Porter to replace the Guinea Stout design).[68] Another example of co-operation concerns the appointment of a traveller to the West African coast in 1914 made by an alliance of food and drink firms including J & J Colman, Huntley & Palmers, A. Gilbey and others.

Conclusion

This article has introduced a new dimension to the study of the evolution of international business. It has shown that in marketing-based industries it is necessary to analyse global competition based on imitation as well as innovation. Focusing on consumer goods, where brands and trademarks are key sources of competitive advantage, it has argued that protection of these intangible assets is key to a firm's long-term survival and growth. Trademarks are the aspects of a brand that can gain legal protection through registration. They are different from other forms of intellectual property, such as patents and copyright, as they are not necessarily indicative of invention. Their management on a global scale involves dealing with multiple institutional environments, and in particular different legal systems.

Given their importance, trademark infringement and counterfeiting have received surprisingly little attention in the literatures on international business, business history, and business strategy in general. Counter-imitation strategies based on trademark protection have played an important role in the history of British business and their omission strategies from

[68] "1907 Secretary's Report", Guinness Archives.

established historical narratives has in some cases given a misleading impression of the successes and failures of British business.[69]

Despite the perception that imitation is a phenomenon associated with the recent wave of globalisation, where countries such as China play a key role, this article has shown that imitation has been a serious issue for over 100 years. Significant strategic thinking has been applied to it. During the period 1870-1929 the most powerful imitators of British brands were mainly from the US, Germany and Japan, although other European and Asian countries, and some Latin American countries were implicated too. All the major imitators subsequently became leading economic powers, indicating an apparent connection between learning by imitation and economic growth.

This article also reveals clear patterns in terms of the most common types of imitation. Imitators tended to market products of similar design using similar trademarks, although the trademarks were often not identical. But they were sufficiently similar that they can confused the customer. The imitations were generally of lower quality than the originals, although this is often a subjective assessment on which opinions differ. Technically, these imitations were counterfeits, and were illegal under trademark law when the mark had been registered. Registration and enforcement could, however, be costly and time-consuming, and therefore there was an advantage in informal agreement if this could be reached.

Many imitations arose from partners in the supply chain. They entered the distribution channel downstream with the connivance of licensees, franchisees or independent distributors – notably labellers, bottlers and wrapper manufacturers. The imitations might be produced locally, or imported from low-cost sources of supply. Newly industrialising countries often favoured local imitation as a mechanism for catch-up industrialisation, and obtaining trademark protection in such countries could be difficult; furthermore, the existence of a law did not always mean that it would be enforced.

Trademark owners facing enforcement problems in foreign countries had a number of options. They could design their trademark so that it was inherently difficult to imitate. Once a trademark has been established, however, it was costly to change it just because internationalisation had increased the risk of counterfeiting. Trademark owners could avoid producing or selling in markets where IPR is insecure, although they might lose valuable markets as a result. Firms could take outright ownership of their foreign operations (FDI), excluding licensees and franchisees on the grounds that they could be trusted. This could be a

[69] P.L. Payne, *British Entrepreneurship in the Nineteenth Century* (London, 1974).

very expensive strategy, however; it raised the capital requirements of foreign market entry and thereby slowed the growth of the firm. A more flexible strategy was to employ a trusted foreign agent – typically an expatriate – who reported on the activities of independent franchisees and licensees, and provided forecasts of market growth.

Co-operative strategies were also available to trademark owners. They could join industry trade associations and lobby their government to persuade other countries to strengthen their IPR. This strategy could be refined by advising their domestic government of the foreign markets that were most crucial to them. Firms could also collaborate in prosecuting imitators in foreign countries, or in operating secure distribution channels that excluded potential local imitators.

In the light of these conclusions, there are several issues relating to brand protection strategies that need to be added to studies of the evolution of international business. They include questions such as: what happens if a firm does not create and register its own trademark in a foreign market that it intends to enter; how should the firm deal with imitators; what are the advantages of using the legal system to prosecute imitators; should the firm use informal approaches such as letters, hired consultants or lawyers to stop imitations; or instead should it use formal mechanisms such the use of the legal system and the court to enforce its rights; and should these measures be taken individually or with other firms facing similar problems. It is hoped that future research will address these issues further by extending the range of industries, countries and periods that are studied.