

Trademarks and Washing Powder in Old San Francisco

CALIFORNIA LAW WAS THE FIRST TO ALLOW REGISTRATION OF TRADEMARKS

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FOR 150 YEARS, California law has allowed for the registration of trademarks. Chapter 129 of the 1863 Statutes allows individuals to register trademarks with the Secretary of State, who “shall keep a record of all trade marks or names filed in his office, with the date when filed, and the name of claimant, for public examination.” This was not the first law concerning trademarks in the United States, or even in California. It was, however, the first law anywhere in the country allowing for the registration of trademarks, preceding all other states and even the federal government, which did not begin trademark registration until 1870.¹ The 1863 law also provides that any person using a “trade mark or name of another which has been filed . . . with the intent to deceive or defraud . . . shall be guilty of a misdemeanor.”

Several years after the law was enacted, the California Supreme Court dealt with trademarks in the case of *Falkinburg v. Lucy*. Plaintiffs A. B. Falkinburg and R. P. Thomas operated the Standard Soap Company in San Francisco selling “concentrated erasive washing powder.” A trademark for their washing powder was registered with the Secretary of State in 1865 by Thomas and J. P. Cogswell. Falkinburg bought out Cogswell’s interest in the company the following year. Their trademark consisted of a label featuring an image of laundresses with the words “washing powder” and “saves labor and time,” along with directions for preparation and washing and a guarantee not to rot or injure clothes. According to the court:

The plaintiffs’ label commences with a highly colored picture, representing a washing-room, with tubs, baskets, clothes-lines, etc. There are two tubs painted yellow, at each of which stands a female of remarkably muscular development, with arms uncovered, and clad in a red dress, which is tucked up at the sides, exposing to view a red petticoat

with three black stripes running around it near the lower extremity. Each is apparently actively engaged in washing, and clouds of steam are gracefully rolling up from the tubs and dispersing along the ceiling. In the background is extended across the room a clothes-line, upon which are suspended stockings and other undergarments, which have evidently just been put to use in testing the cleansing properties of the plaintiffs’ washing powder. To

the left of the washerwomen stands a lady in a yellow bonnet, red dress, green Congress gaiters, and hoops of ample circumference; upon her left arm is suspended a yellow basket; and in her left hand, which is encased in a red glove, is held a red parasol; while the right hand, which is encased in a green glove, is gracefully extended towards the nearest washerwoman in an attitude of earnest entreaty. . . . The design



Detail of Exhibit A, *Falkinburg v. Lucy*

IMAGE: CALIFORNIA STATE ARCHIVES

is good, for it is eminently suggestive of the character of the plaintiffs’ goods.²

The plaintiffs alleged that defendants George R. Lucy and Charles Hymes in 1866 began selling an inferior brand of washing powder in San Francisco featuring a label intended to imitate their own trademark. They filed a complaint against Lucy and Hymes in the District Court of the Twelfth Judicial District. The label used by the defendants to advertise and sell their own “excelsior washing powder” features an image of a mountain climber with the words “washing powder” and “saves labor and time,” along with directions for preparation and washing and a guarantee not to rot or injure clothes. The court described the mountain climber as:

an enthusiastic young man, with head uncovered, and hair blown out behind by what one, judging of causes by their effects, might suppose to be a strong breeze. He is dressed in a blouse, tights and top-boots; in his right hand he bears a banner,

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upon whose folds, as they flutter in the breeze, appears, in large type, the word “Excelsior.” His left arm is extended upward and pointing toward the summit of a high and precipitous mountain, which towers in front of him, and which, as his bearing indicates, he proposes to climb.³

The two rivals’ labels both included the words “washing powder” and “saves labor and time,” plus a guarantee not to rot or injure clothes and identical directions for preparation and use. They differed, however, in their graphics, the names of the products and the businesses’ street addresses. The District Court agreed with the plaintiffs, and on September 8, 1866, the court issued an injunction against Lucy and Hymes ordering them to refrain and desist from selling their product.

The decision was appealed to the California Supreme Court. Lucy and Hymes argued in their defense that their brand of washing powder was superior to that of the plaintiffs, rather than being a poor imitation, and that they had been manufacturing it longer. They denied that their label was intended to mislead anyone into thinking that they were actually purchasing the competitor’s washing powder. They further argued that “by no strained construction can

‘excelsior’ be tortured into ‘concentrated, erasive’ or ‘Lucy and Hymes’ into ‘Standard Soap Company’; and it would take a poet’s eye, rolling in a phrensy sufficiently fine to qualify him for Stockton [the state’s hospital for the insane], to find one of the plaintiffs’ washerwomen.”⁴ Falkinburg and Thomas’s argument rested in part on the similarities between the written portions of the two labels, including the directions for preparation and washing. They claimed that washerwomen in mid-19th century America were just literate enough to be misled by these similarities and into thinking that both brands were one and the same.

The class of people — laundresses and the like — who form the bulk of the consumers of the plaintiffs’ compound are not supposed to possess more than the most slender rudiments of knowledge in the matter of labels. There was a time, within the century, when one could safely predicate of them as a mass, an absence of knowledge of reading . . . the advance of book knowledge has destroyed, to a

certain extent, the vivid force of hieroglyphic distinctions . . . the washerwoman of to-day has some slight hold upon the world of letters; or if she has not in person, her ignorance is helped by the child at her side . . . the indirect effect of this intellectual acquisition is, that the eye loses its readiness to seize on the minutiae of pictures and colors.⁵

Ultimately the Supreme Court decided for defendants, Lucy and Hymes, and ordered that the injunction be dissolved. Justice Silas Sanderson held in the majority opinion that a label is not entitled to the same protection as a trademark. He also wrote:

No one could mistake the defendants’ young man in a blouse and tights, climbing a mountain with a banner in his hand, for the plaintiffs’ washer-women in red petticoats, with their arms in a washtub and their heads enveloped in clouds of steam . . . or at least only such persons as no amount of legislative care could protect from blunders and mistakes.⁶

These trademarks and labels admitted as exhibits at trial, as well as thousands of other trademarks filed with the Secretary of State, survive today as part of the collections of the California State Archives, a division of the Secretary

of State’s Office. Many of these historic trademarks and labels are currently being featured in a free exhibit in the State Archives building in Sacramento. Visit <http://www.sos.ca.gov/archives/exhibits> for more information. ★



Detail of Exhibit B, *Falkinburg v. Lucy*

IMAGE: CALIFORNIA STATE ARCHIVES

ENDNOTES

1. Paul Duguid et al., “Reading Registrations: An Overview of 100 Years of Trademark Registrations in France, the United Kingdom, and the United States” in *Trademarks, Brands, and Competitiveness*, (New York: Routledge, 2010), p. 12.
2. *Falkinburg v. Lucy* (1868) 35 Cal. 52 at pp. 61–62.
3. *Id.* at p. 63.
4. Appellants’ Brief, *Falkinburg v. Lucy*, WPA No. 16385, Supreme Court of California Records, California State Archives, Office of the Secretary of State, Sacramento.
5. Respondents’ Brief, *Ibid.*
6. *Falkinburg v. Lucy* at pp. 66–67.