

TRADEMARK EVOLUTION: THE CASE OF DAY V DAY, DAY AND MARTIN (1816)

*Shardul R Chouhan

Between 1813 and 1821, Charles Day, the sole owner of the firm Day and Martin, a hugely successful manufacturer of boot polish (‘ blacking ’), brought proceedings on 14 occasions seeking injunctive relief against competitors, succeeding in 11 of these suits.

BACKGROUND TO THE LITIGATION

The product at the centre of the litigation was ‘ blacking ’ ; in modern terms, black polish for leather. It was used primarily on boots and shoes, and was much in demand from those who walked the dirty London streets of the late eighteenth and early nineteenth centuries. A particularly intense shine was provided by so-called ‘ Japan Blacking ’ , the name alluding to the glossy appearance of Japanese lacquer work. The constituents of blacking varied, and while there was evidently a trade in secret recipes for blacking, the standard ingredients would have included a mixture of black colouring made of powdered black bone, oil from sperm whales and oil of vitriol. The partnership of Day and Martin was established in December 1802, when Londoner Charles Day and Yorkshireman Benjamin Martin, then of Maiden Lane, started selling Japan Blacking according to a recipe which Martin had acquired¹. On 1 January 1808 Benjamin Martin retired and returned to Doncaster. Charles Day paid £ 7,000 for the recipe and £ 3,643 for his share of the partnership. The agreement allowed Day to continue to trade with the name ‘ Day and Martin ’ .

Day and Martin ’ s liquid blacking was sold in stone bottles, each containing one pint. On each bottle Day and Martin pasted a label stating:

The real Japan Blacking made by Day and Martin 97 High Holborn

This inestimable composition with half the usual labour produces the most brilliant jet black ever beheld fully equal to the highest japan varnish and affords peculiar nourishment to the leather will not soil the finest linen is perfectly free from any unpleasant smell and will retain its virtues in any climate.

Directions for use. Let the dirt be brushed clean off. Stir up the blacking with a small cane or brush till it is well mixed then lay it on your blacking brush as thin as possible with which you black the boot or shoe equally all over. Apply your shining brush immediately and in one minute it will produce the brilliant lustre and jet black ever behold. No half pints made. Day and Martin. Price 1 ’ 6 each.

Day and Martin engaged heavily in marketing, including billboards, placards, trade bills and, despite the applicable stamp duty (now at three shillings and sixpence per advert), newspaper advertising which became noticeably more frequent towards the end of the decade. Most of the advertising emphasised the quality of the product and its effect, some warned of counterfeits, and some used more literary techniques (poems, rhymes and the like). The

* RGSO IPL, IIT Kharagpur

¹ For an uncorroborated account of how, see ‘ Shining Characters ’ The York Herald (17 December 1836) (Martin acquired the recipe, while visiting the Kings Arms, St Sepulchre Gate, Doncaster, from a soldier, Thomas Florry, for a quart of ale).

business was a phenomenal success. By 1806, it is clear that the firm had distributors all over Great Britain, and by 1814 it was the market leader, styled the 'King of Blacking Makers'². In 1821, in the Court of King's Bench, the doyen of the bar, James Scarlett, observed that their fame 'has spread through every clime', and asked playfully 'for who, with the slightest pretence to polish, could be unacquainted with the name Day and Martin?'³.

Charles Day's tolerance had, however, become clearly strained by 1812, when the firm began to advertise details of the 'counterfeits'. He warned customers that:

Many of the counterfeits say, as made by Day and Martin; others have 97 Holborn, leaving out the word High; and some have a small (nr) before the original number⁴.

Later Charles Day would try to educate purchasers in techniques that would enable them to avoid being taken in by lookalike products. He produced a label with characteristics that were difficult and expensive to copy, and educated customers to look out for such specificities⁵. Perhaps not surprisingly, Day and Martin also sought to use judicial means to suppress these imitators. Over the eight years from 1813 to 1821 Charles Day was to bring at least 14 sets of proceedings to suppress counterfeiting. Although such a campaign of litigation was itself unprecedented (and possibly never repeated), what was legally innovative about these cases is that they were proceedings in Chancery. There had only been two reported cases that could sensibly be regarded as Chancery precedents in relation to misuse of trademarks: *Blanchard v Hill* and *Hogg v Kirby*. The former suggested that proceeding in Chancery was pointless; the latter, however, suggested otherwise.

DAY AND MARTIN V THOMAS DAY, JOHN DAY AND PETER MARTIN

Thomas Day and his son John were (like James) based in Webber Row in Southwark, just south of what is now Waterloo. On 8 September 1815, Thomas Day took a ten-year lease on premises at French Horn Yard which had an entrance from between 87 and 88 High Holborn, a matter of yards from Day and Martin's at 97 High Holborn. Two months later, Thomas sub-leased the premises to his son John Day and Peter Martin. John Day and Peter Martin then became formal partners on 26 December 1815. They put up a signboard stating 'Day and Martin's Blacking Manufacturer No 87 High Holborn' and started selling blacking in similar bottles with similar labels, except for the variation in the number '87' in place of '97'.

Day and Martin filed a bill on 27 June 1816, seeking an injunction⁶. Charles Day was convinced that the supposed partnership with Peter Martin was a wholly sham relationship designed to afford spurious justification for the deception that the use of the name and

² The Morning Chronicle (31 January 1814).

³ (1821) Annual Register (June) 99.

⁴ The Times (23 October 1812). As noted below, the rival operating at 97 Holborn was Alexander Christie, who Day and Martin would attempt to enjoin in 1814; the small 'nr' before '97 High Holborn' was included by John and James Bowling, against whom Day would commence proceedings in January 1817.

⁵ In 'Fraud Prevented', an advertisement in The Times (25 January 1817), Day informed readers that 'many attempts ... are daily made to impose on the unwary a spurious composition instead of the GENUINE BLACKING ...' To counter these, Day and Martin announce that it had adopted a new label with 97 'to be placed so conspicuously that they trust an attention to this, and the differences of the type, which is unlike all letter-press, will enable purchasers at once to detect the imposition'.

⁶ C13/2129/24.

address would inevitably cause. The bill noted that this was not the first time that the Day family of Webber Row had tried to take advantage of the reputation Day and Martin's blacking had garnered, as only the previous August it had obtained an injunction against John Day's brother, James Day. Thomas Day put in his answer on 13 August 1816; and John Day and Peter Martin did likewise. The former admitted involvement in leasing French Horn Yard and sub-leasing it to John and Peter Martin. As for the co-partners, they denied deliberately seeking to defraud the claimant and argued that their packaging and representations were merely legitimate uses of their own names and the address of the business. They stated that not only had they leased French Horn Yard, but also that Martin had leased a floor of 87 High Holborn, where he planned to live, and this had been used, among other things, as a counting house for the business. They denied they imitated Day and Martin's labels, seeking to explain the similarities as inevitable in descriptions of the nature, function, method of use and price of blacking. Indeed, they highlighted differences in language and typescript between the labels of Day and Martin and their labels, observed that they had already modified their labels once, and indicated a willingness to distinguish them further. Lord Chancellor Eldon asked to see the labels and bottles, 'I wish to see the bottles; much will depend upon the eye'⁷. He noted there were differences in language: for example, where Day and Martin used beautiful jet black', Jonathan Day and Peter Martin's label said 'brilliant black'. Despite these differences, Eldon LC concluded that there was sufficient to indicate a fraudulent intention on the part of the defendants. The Lord Chancellor observed:

As there was no patent, a monopoly in the case of blacking of the plaintiff, if any other could make the same article, he was at liberty to sell it, but not as the composition of the plaintiff ... If Day could find a man of the name Martin, the blacking might be sold as that of Day and Martin, and they might set up their shop next door to that of the plaintiff, but still they must not sell their blacking for that of the plaintiff. The article was sold to the retail dealer, and their customers might think that the firm of 97 had been removed to 87. His Lordship was of the Opinion that the injunction, with some alterations, must stand; but he was quite ready, if wished for by the defendants, to direct an issue to be tried in a court of law⁸.

In the end, Eldon LC decided to maintain the injunction but in form that differed from that proposed in Charles Day's bill. He had altered the injunction, he explained, to preserve the legal rights of the new company, 'and at the same time to guard the original Company from being imposed on'. He had given the issue 'the best attention [he] could possibly bestow on it'. The Order book stated:

That an injunction be awarded to restrain the defendants Thomas Day, Jonathan Day and Peter Martin their agents, servants and workmen, from pasting or affixing to the Bottles containing the Composition or Blacking in the Petitioners bill mentioned made and prepared or sold by them the Said defendants the Labels hitherto used by them or Said Labels being the same as or colourable imitations of the Labels used by the Petitioner as continuing partner of the firm Day and Martin in the Plaintiffs bill mentioned and from fraudulently imitating in the mode and form of subscribing and annexing their names to the Labels the mode and form

⁷ The Morning Post (17 August 1816); The Times (19 August 1816) 2; The Morning Chronicle (17 August 1816) ('Show me the blacking bottles').

⁸ The Times (19 August 1816) 2.

of the Signatures prepared by the Plaintiff and with this variation it is Ordered that the Injunction be continued to the hearing of this Cause or the further Order of this Court⁹.

Therefore, trademark law as we see it today has its evolution from myriad cases including Day & Martin. But the fundamental premise remains and will ever remain the same that is that no man has a right to sell his own goods as the goods of another : to do so is to commit a fraud.



⁹ C33/624, f 1753v, at f 1756v.