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SEATTLE TRADEMARK HISTORY TOUR

This year, the great city of Seattle, Washington is the location of both the International Trademark Association Annual Meeting (May 19-23) and the American Intellectual Property Law Association Spring Meeting (May 15-17). If you are one of the many lawyers attending these events and you want a Seattle trademark experience, you could do the obvious and visit locations associated with the city’s famous modern brands. Alternatively, you could go back in time a bit further.

Washington became the 42nd state in 1889, the same year the Great Seattle Fire destroyed much of the city. A combination of new railroad lines and post-fire construction led to a boom in population and commercial activity. On July 17, 1897, this already-promising economic climate went into hyper-drive when the S.S. Portland arrived from Alaska, heralding the beginning of the Klondike gold rush. The trademark disputes that arose from this economic activity started working their way into the published opinions of the Ninth Circuit and the newly christened Washington Supreme Court in the first decades of the twentieth century.

We took a look at the first ten trademark disputes involving the city of Seattle (which date from the turn of the century up to the start of World War I). To our delight, we found them riddled with connections to celebrities, shootouts, world politics and the multicultural fabric of migration in the American west. So, if you need something to do in Seattle, why not review our ten part Seattle Trademark History series. You can even create your own Seattle Trademark History Tour by consulting our handy map and visiting one of the locations that gave rise to these disputes. This is Part 1. You can find the other nine parts of the series (once they are published) by clicking here.
The “Gargeline” Shootout at Pioneer Square

We begin where Seattle began: Pioneer Square, the home of George Omar Guy’s flagship drug store. Guy might have earned a footnote in the history books even if he had never set foot in Seattle. As a young man in the 1870’s, while attending the Philadelphia College of Pharmacy (now the University of the Sciences), he supposedly invented the ice cream soda by mistake while working at a drug store.

In 1888, Guy and his family moved to Seattle and he set up his first G.O. Guy drug store at the corner of Occidental and Main (next to Occidental Square Park). The store was burned down in the Great Seattle Fire, so Guy had to sell drugs out of tent for a while. In 1893, he moved into Pioneer Square’s Metropole building at 2nd Avenue and Yesler Way. Financed and once owned by Seattle founding father Henry Yesler, the three-story Metropole was one of the few structures to survive the fire. The Pioneer Square store became a must-visit supply stop for gold prospectors and a gathering place for politicians, business people and the Seattle police.

On June 25, 1901, John Considine, vaudevillian and owner of a well-known Seattle box house (a combined theater and brothel), had a sore throat, so he stopped at the G.O. Guy pharmacy to get some gargling medicine before heading home. While standing outside the store, Considine was spotted by former Police Chief William Meredith. Meredith came running up Yesler Way towards Considine with a mysterious package in brown butcher paper, which turned out to be a 12-gauge sawed-off shotgun. Meredith used to work for Considine, but he later became a police officer and allegedly started demanding protection money from the box house. Considine had recently ratted out Meredith’s corruption to the city, causing Meredith to lose his job. Meredith was out for revenge.
Arriving at the G.O. Guy store, Meredith shot but missed Considine, instead striking train conductor G.W. Houston (who had been sitting inside the drugstore drinking a sarsaparilla and fortunately survived without serious injuries). A deadly struggle ensued, also involving Considine’s brother, who was present on the scene. The brothers wrestled away Meredith’s gun and killed him. They were eventually acquitted of murder charges.

In the wake of the shootout, and the press coverage of the murder trial, Guy apparently took commercial advantage of the situation by advertising his now-famous gargle medicine under the name GARGELINE. This enraged competing pharmacist W.H. Woodcock, who ran the Smith & Kennedy pharmacy, located about a block away at 601 Second Ave, inside the swanky Butler Hotel (which was frequented at the time by the likes of Williams Jennings Bryan and William Howard Taft). Woodcock, who had run pharmacies in Paris, London and New York before moving to Seattle, claimed to have been selling a similar product, which he had been referring to as GARGLINE (same mark without the extra “E”), for over twenty years.

Woodcock filed an infringement action against Guy, and Woodcock v. Guy, 33 Wash. 234 (Wash. Nov. 16, 1903) became what appears to be the first trademark-related opinion published by the Washington Supreme Court. Because Woodcock had never registered the mark with the state, the Court referred to the principles of common law unfair competition. Unfortunately for Woodcock, although he adequately alleged that the words and goods were nearly identical, he failed to alleged precisely how he affixed the mark to his product, or how he was injured by Guy’s product, or that Guy had engaged in “fraudulent conduct” such as “palming off” GARGELINE as GARGLINE. Without such allegations, the complaint was nothing more than a request “to be protected in the exclusive use of a word.” The dismissal of the case was affirmed.

G.O. Guy’s business prospered in the years that followed, expanding even during the Great Depression and becoming a 12-store chain by the 1940’s. The chain was sold in 1987 to another company and rebranded “Pay ‘N Save.” The locations that survived under this new name eventually fell into the hands of Rite Aid. The Metropole building that housed Guy’s store is still there on the corner of 2nd Ave and Yesler, where it’s being turned into a boutique hotel. The Butler Hotel building (now known as the “Butler Block”), became home to one of Seattle’s most
famous speakeasies, where waiter John Edmondson Prim saved his tips to pay for law school and became the first African American judge in Washington State. Considine later achieved respectability, establishing an empire of theatrical and cinema venues featuring dry and legal entertainment. His theater at Madison and Third Ave. gave rise to another trademark dispute, *New York Life Ins. Co. v. Orpheum Theater & Realty, Co.*, 100 Wash. 573 (Wash. March 15, 1918), in which he was established as the owner of the ORPHEUM mark for Seattle theaters.
Behaving Badly at the St Francis Since 1907

In 1905, the Hotel St. Francis opened for business at 816 Union Street. Likely named after the much more famous St. Francis Hotel in San Francisco (which opened the previous year), Seattle’s Hotel St. Francis was a modest wooden structure of forty-eight rooms and a dining room, where families could stay for about $3.50 a week.

In January 1907, the brand new swanky St. Francis Hotel opened for business a mere four blocks away, at the corner of 9th Avenue and Madison Street. The new St. Francis Hotel was made of brick and cement, had seventy-eight rooms and all the modern conveniences, including private baths, a barbershop, a billiard room, and even its own telephone exchange. Guests were charged $4.50 a night.

Actual confusion ensued. The old Hotel St. Francis started receiving phone calls, deliveries, luggage, and even an emergency medical visit intended for the new St. Francis Hotel. The owner of the old Hotel St. Francis got fed up and sold the property to W. Martell in May 1907. Martell marched right into court and asked for an injunction against the new St. Francis Hotel’s use of the name.

But King County Superior Court Judge Robert Brooke Albertson dismissed the case. As grounds for dismissal, Judge Albertson noted that (1) the defendant didn’t know about the plaintiff’s hotel when it opened the new St. Francis Hotel, and thus there was no fraudulent intent; (2) the plaintiff Martell was aware of the defendant’s new hotel when he purchased the old hotel in May 1907 from the previous owners, so he knew what he was getting into; and (3) the defendant’s new hotel was much fancier and unlikely to attract the sort of riff-raff that was staying in the plaintiff’s old dive.

Justice Wallace Mount, writing for the Washington Supreme Court in Martell v. St. Francis Hotel Co., 51 Wash. 375, 98 P. 1116 (Wash. January 05, 1909), disagreed. As to the defendant’s argument that its new establishment was of a higher class, Justice Mount held:

They are both hotels, and necessarily in competition with each other. . . If the right to adopt a name already used by a hotel depends upon the size of the building, or the rates charged, or the number of servants
employed or capital invested, then, as remarked by the appellants in their brief, this rule would permit another company with more money than the defendant to establish a larger better and more exclusive hotel across the street from the defendant’s hotel under the same name, and its business could be thus injured or event ruined without redress. Of course, that is not the rule.

The bottom line here was that were two hotels in the same Seattle neighborhood with confusingly similar monikers. The St. Francis Hotel would have to change its name. It later became known as “The Madison.”

In 1953, The Madison came to house one of Seattle’s most colorful watering holes, Vito’s, the slogan of which is “Behaving badly since 1953.” For nearly six decades, Vito’s became a haunt for politicians, teamsters, lawyers, gangsters and police. Even the F.B.I. stopped by once in a while to plant a bug, and Senator Warren Magnuson’s wake reportedly took place in the back room. Guests used to wander in from the Hotel Sorrento across the street (Justice Mount was right – a “larger, better and more exclusive” hotel was built just a cross the street only months after his opinion issued). Dan Aykroyd and Snoop Dogg even showed up together one night after attending the opening of the Experience Music Project (now Seattle’s Museum of Pop Culture). But the fun came to a stop on November 23, 2008, when Nathaniel Thomas, an alleged member of the Hoovers gang, was shot dead on the premises by the member of a rival club.

In 2010, new owners took over and reincarnated the old St. Francis Hotel location as Vito’s jazz club and restaurant. It’s still there, just a four block walk from the Washington State Convention Center. And if you happen to be at the Washington State Convention Center while reading this, you are standing just about on top of the old Hotel St. Francis location at 816 Union Street. What would have been the 800 block of Union Street is just next to the loading dock entrance and the tunnel to the I-5.
The Man Who Fed the Klondike

Restaurateur Chauncey Wright was a Seattle legend in his own time. He had moved to Seattle from Los Angeles as a boy in the 1880’s, headed up to the Klondike for the gold rush, where he sold coffee and sandwiches to prospectors, and then returned to Seattle in 1900 to open a series of restaurants.

It was once said that Wright never turned a hungry man away. In 1912, a reporter tested that story by walking into his bustling restaurant at 110 Occidental Ave. (now a parking lot right next to the Pioneer Square Pizza Professionals) and announcing: “Mr. Wright . . . I am hungry, and I have no money.” Wright, a big jovial man in shirt sleeves, snapped his fingers and ordered a waiter to get the reporter whatever he wanted. When the reporter later revealed himself, he questioned the practicality of Wright’s charitable attitude. “You can’t afford to feed all the down-and-outs,” the reporter opined. Wright laughed, gestured around him at a restaurant packed with customers, and responded: “Can’t I?”

But at least one person didn’t think Chauncey Wright was such a great guy: his former business partner, Charles Gearheart. In 1909, the popular Chauncey Wright Café was located at 164 Washington Street (now the Fuel sports bar). The establishment was owned by the Wright Restaurant Company” of which Wright and Gearheart each owned 50%. But Wright had big plans to expand. In 1910, he sold his half of the Wright Restaurant Company to Gearhart and opened up a new restaurant (the one at 110 Occidental Avenue). The new restaurant was a modernist marvel: open twenty-four hours; “lightning” fast service, refrigeration units and breakfast all day. The sign on the new restaurant read: “Chauncey Wright, President, Seattle Restaurant Company.” The words “Chauncey Wright” were in great big text, and the rest was printed in smaller font underneath.

Gearheart sued for unfair competition, claiming that he owned the rights to the CHAUNCEY WRIGHT trade name and that customers were being confused into thinking that the Washington Street restaurant had moved to Occidental Avenue. Wright’s motion to dismiss was allowed, but the Washington Supreme Court reversed in Wright Restaurant Co. v. Seattle Restaurant Co., 67 Wash. 690 (Wash. March 28, 1912). The Court held that the trade name CHAUNCEY WRIGHT was an asset of the Wright Restaurant Company, not Wright personally, unless there had been some specific contractual arrangement otherwise, because:
A man may not so use any name, not even his own name, as unfairly to compete with another person or corporation by confusing in the public mind his business with that of the competitor.

By the Court’s reckoning, Wright’s new sign “could hardly have been adopted for any other purpose” than to create such confusion, and therefore dismissal of the unfair competition claim was inappropriate. The lower court was reversed and the matter remanded for trial.

But Wright had the last laugh. On remand, he won the trial. He testified that the transfer of shares to Gearheart had been made with the express provision that Gearheart was to stop using the CHAUNCEY WRIGHT trade name. The Court believed him, and held that it was Gearhart who had to change his sign. Gearhart appealed, but the Washington Supreme Court affirmed in *Wright Restaurant Co. v. Wright*, 74 Wash. 230 (Wash. March 28, 1912).

Wright went on to own several other restaurants, including a tea room on the top floor of the Smith Tower, which was the tallest building west of the Mississippi River when it opened in 1914. However, Wright became ill and died in 1917. His widow, Annie Wright, carried on the business for a time, even opening a new location in the iconic Colman Building in 1919. Annie had a great idea for this new restaurant: make the tables slightly shorter to accommodate the fastest growing consumer subset: women. Despite her innovations, by 1926 the Chauncey Wright restaurant empire was no more.
The Feuding Fremont Undertakers

The feud between Jacob Bleitz and Matthew Carton probably started as soon as they met. Carton moved to Seattle from Oklahoma and, in 1903, started an undertaking business in the Fremont section of the city, where he became known by the trade name FREMONT UNDERTAKER. Bleitz (originally from Wichita, Kansas) had an undertaker business across town in the Green Lake neighborhood, but in 1906 he moved his business to Fremont, only a few blocks away from Carton.

The two did not get along. For a time, Bleitz antagonized Carton by changing the Bleitz Funeral Home sign to include the words: “Fremont Undertaking Company,” but he stopped doing this by the end of 1906. Carton retaliated by allegedly telling anyone who would listen that:

Bleitz is not a fit man to associate with decent people. He has another wife back east, and a wife and child here. He has been in jail two or three years back east. I have the documents to prove all this.

This caused Bleitz to sue Carton for defamation, and Bleitz won a jury trial. But on appeal, the Washington Supreme Court identified a reversible error. The witnesses had testified that Carton accused Bleitz of having another “woman,” not another “wife.” Having another “wife” was a crime (bigamy), but having another “woman” was not, and only a crime could be defamatory per se. Also, at the time, any variance between the pleading and proof was fatal to a defamation action. So, in Bleitz v. Carton, 49 Wash. 545 (Wash. June 3, 1908), the verdict was overturned. Justice Mark Fullerton dissented, arguing that what Carton actually said was bad enough to be actionable and close enough to the pleadings.

In 1908, Carton sold his business to a Mr. Rosenberg. Rosenberg decided to continue the goodwill developed under Carton by continuing to use the mark FREMONT UNDERTAKER. Meanwhile, Bleitz decided to continue the bad will, and perhaps indirectly get revenge on Carton, by changing his sign for a second time to include the words “Fremont Undertaking Company.”

Rosenburg sued for unfair competition, and lost in the trial court. On appeal, Rosenberg argued that he and his predecessor were the first to use the trade name FREMONT UNDERTAKER, that Bleitz use of “Fremont Undertaking” was close enough to cause confusion, and that any rights
Bleitz might have acquired when he first changed his sign back in 1906 (which he did briefly to antagonize Carton) had been abandoned. Rosenburg also argued that Bleitz had no special right to use the word “Fremont” simply because he was located in Fremont. Justice Fullerton got involved again, this time writing for the majority. In Rosenburg v. Fremont Undertaking Co., 63 Wash. 52 (Wash. April 10, 1911), Justice Fullerton agreed with Rosenburg’s position and reversed, remanding the matter with an order for the lower court to enjoin Bleitz from further use of confusingly similar names.

Rosenburg’s (and before him Carton’s) building was located at what used to be the corner of 32nd and Fremont Ave. The building was likely demolished just after World War I to make way for the Fremont Bridge, and the location is now part of Google’s Seattle Campus. Rosenburg was represented in the case by Seattle legal pillar Vivian Carkeek. To this day, students at his alma mater, the University of Washington School of Law, can still win the “Vivian Carkeek” prize for best contribution to the law review.

The Bleitz funeral home was located on a plot abutting what was then Kilborne Street and is now located just about at 36th Street and Phinney Ave., a short walk from Seattle’s Lenin Statue. In 1921, probably unable to stomach staying in Fremont without being able to stick it to Rosenburg, Bleitz moved across the Fremont Bridge to 316 Florentia Street (the Queen Anne neighborhood), where he built the architecturally iconic Bleitz Funeral Home building. Last year, the building was designated as a landmark by the Seattle Landmarks Preservation board, and the property recently sold for $4.2 million dollars. It is reportedly being converted into office space.
The Old Rainier Brewery

Wisconsin native Andrew Hemrich (the son of a master brewer from Germany) emigrated to Seattle in about 1883 and, with partner John Kopp, established the Bay View Brewing Company in what was originally a rickety barn-like structure at the base of Beacon Hill and on the corner of 9th and Hanford Street; then the site of a natural spring and now the site of an industrial zone next to Interstate 5.

In 1893, Bay View merged with two other breweries to form the Seattle Brewing & Malting Company, the flagship brand of which became RAINIER BEER, named for the mountain that dominated the view. As the Ninth Circuit described, the bottle featured a:

. . . peculiarly colored label in blue and red, containing at the top the words ‘The Seattle Brewing & Malting Co.’s’ in the center, at the right the word ‘Rainier’ above the word ‘Beer,’ [and] at the left a circle displaying a picture of Mt. Rainier . . .

The beer was a success, and quickly achieved distribution outside of Seattle, which is probably where it came to the attention of Fred Kostering, a Los Angeles Brewer. Kostering decided to imitate Rainier Beer’s trade dress. Kostering’s label bore a different product name (RHEINGOLD), a different brewery title (the “Los Angeles Brewing Co.”), and a picture of a waterfall in place of Mount Rainier. But everything else was the same: the color scheme, the shapes, the layout, the fonts, etc...

Seattle Brewing brought suit for trademark infringement and prevailed in the District Court. Kostering appealed to the Ninth Circuit. In Kostering v. Seattle Brewing & Malting Co., 116 F. 620 (9th Cir. Cal. June 06, 1902), the Court held that, although the labels certainly had differences, those variations were wholly insufficient to avoid consumer deception. Writing for the Court, Judge William Ball Gilbert (a distant relative of George Washington), held that:

A consumer who has been accustomed to purchase an article in a dress or package which has become familiar to him does not stop to read and

Image Courtesy of BreweryGems.com
examine. Many of the consumers of beer are unable to read, and many are foreigners, and unacquainted with the English language. All consumers, whether able to read or not, are in fact guided by the general appearance of the package or label which is before them.

Kostering was enjoined from further use of the strikingly similar labels.

After the lawsuit, the RAINIER BEER brand continued its success for a while, achieving international and overseas distribution in Canada, Hawaii, the Philippines, Singapore, and elsewhere. However, in 1915, Washington enacted prohibition. Seattle Brewing relocated to San Francisco, changed its name to the “Rainier Brewing Company,” and opened an expensive new factory just in time for the introduction of national prohibition in 1920. The company survived only by using its new facility to make soda and “near beer.”

Meanwhile, the original Seattle brewery (modernized but still in pretty much in the original location at the base of Beacon Hill) had been converted into a flour mill. Just after prohibition (1933), baseball impresario and brewer Emil Sick converted it back into a brewery and licensed the RAINIER BEER mark so that the beverage could once again be brewed in the shadow of its namesake. The brewery and the brand (which is still marketed although it’s unclear if it’s still available for purchase) were eventually sold to the Pabst Brewing Company, and the plant was closed in 1999. The building, now known as the “Old Rainier Brewery” serves as multi-purpose (and multi-colored) commercial and residential loft space. You can see it from Interstate 5 (on your left) as you come into town from the airport.
The Store Where Your Credit is Good

Polish Jewish immigrant Alfred Shemanski started out by selling curtains door-to-door from a horse-drawn wagon, but his business grew. In 1887, he and brothers (Adolf and Joseph) founded a department store empire, which came to include locations up and down the west coast doing business under various marks, including PACIFIC OUTFITTING COMPANY, COLUMBIA OUTFITTING COMPANY and EASTERN OUTFITTING COMPANY. Historians have referred to Shemanski and other Jewish immigrants to the region as “urban pioneers,” because they were the first to link Washington’s small towns and big cities through commerce.

Shemanski formed the Eastern Outfitting Company of Seattle, Washington as a California Corporation. In 1902, he registered his business and its name as a foreign corporation with the Washington Secretary of State. The Eastern Outfitting Company of Seattle prospered at its 424 Pike Street location, offering “cloaks and suits, also gent’s clothing” on weekly and monthly installment plans. Eastern Outfitting was advertised as: “The Store Where Your Credit is Good.”

In 1909, Shemanski decided to expand the franchise to Spokane. However, he found that there was already a similar business there using the EASTERN OUTFITTING mark, which had been founded in 1905. Undeterred, and relying on his 1902 business registration with the Secretary of State, Shemanski opened a store in Spokane and advertised it as the only authentic “Eastern Outfitting Company.” Shemanski also decided to file suit against the local company and move to enjoin its use of the name. For the litigation, Shemanski hired attorney Samuel Rika Stern, who had given up a theatrical litigation practice in New York City (he represented, among others, the stage actress Fanny Davenport) to become a railroad lawyer.

But Spokane Superior Court Judge John D. Hinkle was unimpressed by Stern’s arguments and had a different view of the case. In Judge Hinkle’s view, Spokane was a different universe than Seattle. Owning a store in Seattle and having a fancy statewide corporate registration was no excuse for “invading” the territory of Spokane, confusing its citizens, and depriving the local defendant of its hard-earned good will. It was Shemanski, not the defendant, who was enjoined
from using the EASTERN OUTFITTING mark in Spokane. Judge Hinkle’s decision was affirmed by Washington Supreme Court in *Eastern Outfitting Co. v. Manheim*, 59 Wash. 428 (Wash. July 28, 1910). Two justices dissented, arguing that, because Shemanski registered with the state, his territory was not Seattle but the entire state. Dissenting Justice George Morris wrote:

I do not comprehend upon what theory appellant can be clothed with greater powers in Seattle and less in Spokane.

In 1910, the same year the Washington Supreme Court’s decision issued, the Pike Street block where the original Eastern Outfitting Seattle store was located became the 10-story *Northern Bank and Trust Building*, which dominated the Seattle skyline for years (and is now known as the Seaboard building). As a result of the new building taking over the block, it appears that the store moved down the street to 388 Pike. Alfred Shemanski continued to be successful in business and active in civic participation. In 1933, he became the first Jew to be named a regent of the University of Washington. This news was important enough to be reported on page two of the *February 6, 1933 edition* of New York’s Jewish Daily Bulletin. Chillingly, page one was dominated by reports of the January 30 appointment a new German chancellor: Adolph Hitler.
Old German Lager Won’t Give You a Headache

In 1902, Samuel S. Loeb was President of the Tacoma’s Milwaukee Brewery, but he had plans for a bigger facility in Seattle. Construction of his new brewery began in 1902 at 4202 8th Avenue (now 4200 Airport Way). After construction was delayed by arson (possibly motivated by antisemitism – Loeb and his partners were the only Jewish brewers in the Pacific Northwest), the Independent Brewing Company of Seattle opened for business in 1904.

In 1910, Independent Brewing introduced the OLD GERMAN LAGER brand. The product was nicknamed “Fatherland Beer” and its slogan was “Prosit! Es Giebt Kein Kopeweh,” which means “Good Health! It won’t give you a headache.” OLD GERMAN LAGER soon became the flagship product of the company, and was a popular quaff down the western seaboard as far as San Francisco. The OLD GERMAN LAGER label featured a landscape tableau, including an inn bearing the name of the beverage, with guests drinking outside underneath its sign; a group of monks at a table in a cellar sitting near three barrels of beer bearing the product name, and various workers standing over boiling kettles in bucolic settings.

Does that sound familiar? It does if your last name is Heileman. The G. Heileman Brewing Company of La Crosse, Wisconsin, manufacturer of the OLD STYLE LAGER brand, got wind of the OLD GERMAN LAGER label and claimed it was a copy of their own label. The OLD STYLE LAGER label, like the OLD GERMAN LAGER label, featured inn patrons drinking under a sign bearing the product name, monks sitting at a table in a cellar next to three labeled barrels of beer, and boiling kettles scenes. G. Heileman brought suit in the Western District of Washington, asserting claims for trademark infringement and unfair competition, and alleging that Independent Brewing had copied its label in order to deceive consumers.
The Western District dismissed the action on the ground that the labels, while they bore certain similarities, were not at all identical, as any side by side comparison readily revealed. But in *G. Heileman Brewing Co. v. Independent Brewing Co.*, 191 F. 489 (9th Cir. 1911), the Ninth Circuit reversed. Oregon Judge Charles Wolverton (sitting by designation) held:

> Now, to one scanning the detailed description of these two Dutch scenes, or laying the pictures side by side, there could be no trouble in distinguishing the one from the other. But this is not the test. Will confusion result to the purchasing public by the use of the two not brought into direct or special comparison? Would the ordinary customer applying at the counter for ‘Old Style Lager’ observing the care customary with purchases in that way, be likely to be deceived or misled into buying ‘Old German Lager,” if it was offered him marked with defendant’s label? We are impressed that he would.

The Ninth Circuit also rejected Independent Brewing’s alternative argument that the Heileman label was deceiving customers by falsely claiming, in the lower right hand corner, that the label had a registered copyrighted when in fact it did not. The Court held that this was irrelevant to the trademark proceedings, because no consumer was injured by the alleged copyright misrepresentation.

In 1912, in the wake of the ruling, Independent Brewing changed its label. Many more changes were to come. In 1915, Loeb moved the company to San Francisco just ahead of the effective date of state-wide prohibition in Washington (which was effective January 1, 1916). Upon discovery that there already was an “Independent Brewing Company” in San Francisco, Loeb changed the name of his operation to the “Old German Lager Brewing Company.” But when the United Stated entered World War I, the word “German” had to go, so Loeb changed the company name again to “Old Lager Brewing Co.” and the name of the product to OLD ORIGINAL LAGER. Loeb got all of these changes implemented just in time for nationwide prohibition to shut him down entirely in 1920. By 1924, Loeb was out of the beer game and selling real estate in Los Angeles.

The G. Heileman Brewing Co., which had been founded by German immigrant Gottlieb Heileman in 1872, survived prohibition and was acquired by Stroh Brewery Company in 1995. Stroh in turn was acquired by the Pabst Brewing Company in 1999, and Pabst still markets Heileman’s Old Style Beer. Ironically, the OLD STYLE LAGER brand itself was the product of an even earlier trademark dispute: Heileman had called the product OLD TIMES LAGER until 1899, when he got a cease and desist letter from another brewer.
Ostrea Lurida & the San Francisco Oyster House

Oysters and Seattle go way back. The native Ostrea Lurida (common name: Olympia oyster) had been feeding the human denizens of Puget Sound for thousands of years before the first European set foot in the area. Once the Europeans did arrive, oysters became an important trade good between natives and settlers, and ultimately Washington became the main source of oysters for cities up and down the coast. Oysters were so important to Washington that the Bush and Callow Acts, which were intended to promote commercial oyster cultivation, were among the first major projects of the state’s new legislature in the 1890’s.

Oyster industries breed oyster restaurants, and Seattle had more than its share. In December 1911, restauranteur Lars Peterson secured what he thought would be the perfect location for an oyster eatery: 216 James Street. Peterson decided to brand the establishment as the SAN FRANCISCO OYSTER HOUSE. On December 15, he dutifully checked the records of the Washington secretary of state to make sure nobody else was using the name. Seeing no impediments, Peterson incorporated on December 20. Then he registered his incorporation papers and business name with the county clerk on December 22. Peterson prepared, carefully and deliberately, to open his business the following month. Peterson was acting in compliance with state law, which provided that:

No person or persons shall hereafter carry on, conduct, or transact business in this state under any assumed name or under any designation, name or style, corporate or otherwise... unless such person . . . shall file a certificate in the office of the county clerk ... which certificate shall set forth the designation, name or style under which said business is to be conducted.

J. Mihich was a less careful and less deliberate entrepreneur. He also had bad timing. During the seven day interim between the time Peterson had checked the state records and the time he registered his business name with the county clerk, Mihich checked the county records (on December 19, to be exact) to see if he could use the brand name SAN FRANCISCO OYSTER & CHOP HOUSE. Seeing nothing to prevent his use of this name, Mihich decided to dispense with
the formalities of incorporation and registration of his business with the county. Instead, he had temporary cloth signs painted and opened for business right away. He didn’t have any permanent signs until the next month, and finally got around to registering with the county the month after that. His location was at 216 Cherry Street, exactly one block from Peterson’s not-yet-opened restaurant.

Peterson opened for business as planned in February. Then he sued Mihich. The parties stipulated that there was a likelihood of confusion, and the evidence apparently demonstrated that, despite the coincidence in timing, neither party was intentionally copying the other. So the only disputed issue was one of priority: one party had registered a name with the authorities first, but the other had opened for business under the name first. The trial court held that Mihich had priority because he was the first to use the mark in commerce. But in San Francisco Oyster House v. Mihich, 75 Wash. 274 (Wash. September 06, 1913), the Washington Supreme Court reversed. Peterson followed the rules; Mihich didn’t. Therefore, irrespective of when Mihich opened for business, Peterson was the first to acquire the legal right to use the name and acquire trademark rights.

The block straddled by the competing oyster houses is now dominated by the Pioneer Square Courtyard Marriott. After 1914, Peterson moved his business to 714 First Avenue, inside the Right Hotel (now a parking garage), and renamed it the Lion Oyster House. By the 1920’s, the native Olympia oysters had been overharvested, but the Washington oyster industry continued to grow with non-native Japanese Pacific oysters, which thrived in the environment after they were seeded in the local beds. Today, Washington remains the largest producer of hatchery-reared and farmed shellfish in the United States.
The Invention of the Super Market

The Seattle Groceteria was both created and destroyed by World War I. At the turn of the twentieth century, grocery shopping wasn’t like it is today. You gave the grocer a list of items (in person or by phone); the grocer did the labor-intensive work of collecting the goods for you, and often took care of delivering them to your door.

With the onset of World War I, food prices rose. New store models began to surface in which some of the labor, and the associated cost-savings, was shifted to the customer. This was the birth of the modern self-service supermarket. Tennessee’s Piggly Wiggly chain, founded in 1916, became the most notable and successful purveyor of this new model. But before the Piggly Wiggly, there was the Groceteria.

Alvin Monson was born into a merchant family in Osceola, Nebraska. After observing grocery store innovators in his home state and during a trip through California, Monson and his brother Walter settled in Washington and set out to create a state-of-the-art economic model for grocery sales, which transformed both the food distribution chain and the consumer experience. On November 6, 1915, they opened for business under the brand name GROCETERIA. It was Seattle’s first self-service discount grocery market, located in the O’Shea Building at 5th and Pine (now the home of the GAP and Old Navy). Economic forces and clever advertising helped drive customers to the store, and the Monsons quickly became the owners of a successful mini-empire.

Tacoma grocer M.C. Tibbett decided to take advantage of the new self-service fad, and the Monsons’ good will, by changing the name of his store to “Pacific Groceteria.” The Monsons, who had been planning to open their own stores in Tacoma, sued Tibbett for using their trademark name (never mind that the Monsons themselves likely borrowed the name from an even earlier store in Santa Monica). A Tacoma judge told the Monsons to go back to Seattle, citing the Washington Supreme Court’s controversial precedent in Eastern Outfitting Co. v. Manheim, 59 Wash. 428 (Wash. July 28, 1910), in which a divided court held that certain Seattle trademark rights didn’t extend as far as Spokane. The Tacoma judge held that, since Tacoma and Seattle...
were separate cities in separate counties, the Monsons’ exclusive rights to the GROCETERIA trade name essentially stopped at the city limits.

On appeal, in Groceteria Stores Co. v. Tibbett, 94 Wash. 99 (Wash. Dec. 29, 2016), the Washington Supreme Court reversed. The Court distinguished the earlier Eastern Outfitting ruling on the ground that in the present case, the Groceteria chain was already servicing the greater Tacoma area and getting ready to open stores there before Tibbett put up his sign. Tibbett also argued that a merchant who was merely sold goods made by others, and not manufacturing them, could not acquire trademark rights in his business name, citing to Section 9492 of Remington’s Codes and Statutes of Washington, which provided that for trademark rights in “goods, wares, merchandise or other product of labor.” But the Court disagreed, holding:

There can be no doubt that . . . a person is entitled to a trade-mark and the protection afforded thereby, not only when is the originator and manufacturer of the goods bearing the trade-mark, but also as a label when the goods are only packed and put on sale by such person, which was exactly what was done by appellant in this case, as all the goods sold by appellant were put in wrappers marked with the label ‘Groceteria.’

Finally, the Court rejected Tibbetts’ argument that GROCETERIA was merely descriptive of the grocery business, because there is no such word in the English language. The Court thus enjoined Tibbett’s “piratical” use of the GROCETERIA mark anywhere within the state.

At the two year anniversary of the Monson’s Groceteria, the chain had grown to thirty stores. Then World War I took back what it had given. Alvin was drafted in 1917, and in 1918 he was sent to France along with another brother, Martin. Within weeks of his infantry unit’s arrival in Europe, Monson was involved in one of history’s most gruesome train wrecks, in which 30 soldiers were killed and over 50 wounded. Shortly after the accident, the remains of Monson’s unit fought in the Battle of the Argonne Forest, which ended over 50,000 lives. Although Monson only served a few months on active duty, he returned from the war a broken man, crippled by posttraumatic stress disorder.

With Alvin unable to work at the same level as before, Walter ran the Groceteria chain for a while, and it even expanded to forty stores. But Alvin had been the heart and soul of the company. By 1921, the Piggly Wiggly chain (and other competitors) had reached Seattle. By 1926, the Groceteria chain was down to one store in Pike Place Market, which closed in 1928. In the 1930’s, Monson sued the United States Government in United States v. Monson, 84 F.2d 1018 (9th Cir. 1936). As a result of this lawsuit, Monson was awarded disability pay related to his military service, but he never fully recovered.
“The Milk from Contented Cows”

In 1899, North Carolinian Elbridge Amos Stuart founded the Pacific Coast Condensed Milk Company in Kent, Washington. In 1901, he changed the name to the Carnation Evaporated Milk Company, and began selling CARNATION brand, the milk “from contented cows.” Because fresh milk was not universally available, the product filled a market need and flew off the shelves.

Just 19 miles up the road in Seattle, Charles Frye was packing meat. Frye had moved to Seattle from Iowa in 1885 and started a meat packing company, which boomed into a major food empire during the Klondike gold rush. Frye also opened retail markets, where he sold food under the WILD ROSE brand. Profits were so high that Frye took up art collecting as a hobby.

In 1915, Frye decided to add condensed milk to his array of WILD ROSE brand products. The label he adopted gave Elbridge Stuart fits. The words on the label were completely different than the CARNATION label, but the trade dress was similar. It was divided into two parts, one red and one white (just like the CARNATION label); it featured a cluster of three flowers placed on the border between the red and white sections (just like the CARNATION label); and was flanked by two scepters running vertically from the top to the bottom of the can (the CARNATION label had torches in the same place).

Stuart filed suit against Frye for unfair competition and requested an injunction. Frye opposed, arguing that customers buy milk products based on their names, and the names here were not similar. Rather, the only thing that was similar was the color scheme. In addition, Frye presented six affidavits from retailers avowing to a total absence of confusion since WILD ROSE milk was introduced. Nevertheless, the lower court issued an injunction against Frye. Part of this decision was no doubt motivated by the fact that Frye’s other WILD ROSE products featured a black and red label with a single rose, while only the new condensed milk product veered into the trade dress territory previously occupied by the CARNATION brand.
On Appeal, the Washington Supreme Court agreed that trade dress could be protected by trademark law, and also agreed that color could be a protected element when considered in combination with other elements. However, Justice Overton Ellis, writing for the Court in Pacific Coast Condensed Milk Co. v. Frye & Co., 85 Wash. 133 (Wash. April 17, 1915), disagreed with the lower court on two grounds.

First, Justice Ellis noted that the labels bore prominent and clearly distinct brand names and manufacturer names, and held that this was sufficient to help a consumer of ordinary prudence distinguish the products. Anyone paying even a little bit of attention can see that the word marks CARNATION and WILD ROSE look and sound nothing alike. As to less careful consumers who may nevertheless have been confused, the Court held that the defendant had no duty to educate “the negligent or the indifferent,” and that the plaintiff had no right “to a monopoly of the trade of the careless.”

Second, Justice Ellis articulated an aesthetic functionality argument. The main element the labels clearly had in common was a color scheme, and “similarity in color alone is not sufficient to constitute an infringement.” The Court continued:

> Primary colors are few, and ... those suitable for light products, such as milk, are even more limited. To the allow them to be appropriated as distinguishing marks would foster monopoly by foreclosing the use by others of any tasty dress.

Moreover, such monopolization would quickly lead to a depletion of available colors for newcomers, thus stifling competition. On these grounds, the Washington Supreme Court reversed and dissolved the injunction. By the way, “tasty dress” is not a typo. Judge Ellis appears to have invented the term to describe what courts back east were calling “trade dress.” His alternative term was adopted by a few west coast courts for a while, but faded into nonexistence by the 1950s.

Anyway, the adverse ruling didn’t do too much damage to the CARNATION brand, which has thrived ever since and was acquired by Nestle in 1985. The Frye business also continued to thrive. Charles Frye died in 1940, after which his extensive art collection was stored in the main Frye meat packing plant, a huge complex located at the corner of Walker and 8th Avenue, south of downtown and just north of Boeing Field.

On February 18, 1943, office workers in the Smith Tower (still the tallest building on the West Coast at the time) noticed an odd site – an airplane bigger than they had ever seen leaking smoke and dropping towards the ground. This is how Boeing’s B-29 Superfortress (until then a closely guarded military secret) was introduced to the world. The prototype bomber crashed
into the meat packing plant, killing the test pilot (ironically a vegetarian) and about 30 meat packers. After the crash, Frye’s art was removed from the ruins and found its way to a new home: the Frye Art Museum (a/k/a “the Frye”), which first opened its doors in 1952, and remains one of Seattle’s premiere cultural institutions.

Special thanks to the following excellent sources, all of which were consulted for this blog series: Gary Flynn’s Brewerygems.com; Historylink.org, a free online encyclopedia of Washington state history; Blackpast.org, an online reference guide to African American History; librarian Alan Michelson’s Pacific Coast Architecture Database; the University of Washington library digital collection; the Orbis Cascade Alliance’s Archive West; Lost Restaurants of Seattle by Chuck Flood; the Pacific Shellfish Institute website; Historian Rob Ketcherside’s ba-kground blog; the Capitol Hill Seattle Blog; the DorpatSharrardLomont blog Seattle Now & Then Series; the Seattle Times; the Seattle Department of Neighborhoods website; and Seattle-Tacoma radio station KNKX.
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1. Metropole Building: G.O. Guy Store (2nd Ave. & Yesler)
2. Butler Hotel (601 2nd Ave.)
3. Hotel St. Francis (Washington State Convention Center)
4. St. Francis Hotel (9th Ave. and Madison)
5. Chauncey Wright Restaurant (110 Occidental Ave.)
6. Chauncey Wright Café (164 Washington)
7. Old Rainier Brewery (3100 Airport Way)
8. Eastern Outfitting Co. (424 Pike Street)
9. Independent Brewing Co. (4200 Airport Way)
10. San Francisco Oyster House (216 James St.)
11. San Francisco Oyster & Chop House (216 Cherry St.)
12. The Groceteria; O’Shea Building (5th Ave. and Pike St.)
13. Frye Meatpacking Plant (8th Avenue and Walker St.)
14. Fremont; home of the Feuding Fremont Undertakers

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