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In Search of a Trade Mark

Search Practices and Bureaucratic Poetics

Introduction

Trade mark registers have long recorded, classified and stored words and signs that, through the act of registration, were turned into *prima facie* property. Registration gradually gave rise to property interests in intangibles, which did not necessarily possess any prior distinct meaning, and stabilised them into objects of property.¹ It is in this sense that trade marks might be regarded as quintessential ‘bureaucratic properties’.² Central to the creation and maintenance of trade mark registers were the accompanying practices of classification, search and retrieval of trade mark records. This article explores the different ways in which the trade mark register was organised, accessed and, more importantly, searched. It argues that the study of these practices reveals a great deal about their impact on the stabilisation, creation and diffusion of trade marks as peculiar species of intellectual property. Our approach to intellectual property scholarship follows Cornelia Vismann’s analysis of legal registries as technologies of power.³ We suggest that the making of trade marks, as a legal category and proprietary strategy, has historically been influenced by practices of search and

¹Lionel Bently (2008), pp 3–41.

² See Brad Sherman and Lionel Bently (1999), p 198. For an initial attempt to ‘chart how bureaucratic culture affects the operation of the trade mark system,’ see Robert Burrell (2008), pp 95–131.

³ On the importance of registry for the functioning of law and law’s constitutive relationship to media technology, see Cornelia Vismann (2008), pp 79–85.

classification, which in turn were affected by the possibilities (and limits) of spatial organisation and by the technological means of access and storage of records.⁴ The article shows how these often overlooked practices gave rise to peculiar temporal and spatial constraints which turned out to be productive in facilitating the development of trade mark law and practice. In particular, we argue that both the organisation of the trade mark registry and its attendant possibilities of access and retrieval conditioned the possibility of conceiving new trade marks as well as served to delineate their proprietary boundaries. By advancing a historical analysis that is sensitive to shifts, both in actual materiality and in the administrative routines of trade mark law, the article highlights legal practice as inherently institutionally and materially shaped. We propose a historical understanding of trade mark law that regards legal and bureaucratic practices as mutually shaping each other.

Bureaucratic Poetics

Biographers of the English poet A. E. Housman (1859–1936) have tended to downplay his time at the trade mark division of the British patent office, referring

⁴ Analyses of the relation between law, media and materiality have been carried out in the patent law context by Alain Pottage and Brad Sherman (2010); on spatial bureaucracy, documentation and classification of patent information, see Hyo Yoon Kang (2012); on the mundane but crucial practice of trade mark watching, see Jose Bellido (2015).

to him as ‘only’ having been a clerk;⁵ but it is no accident that he lasted there for two decades (1882–1902) before taking up the chair of Latin at University College London.⁶ The fulfilment of his clerical duties at the department was not only due to his friendship with his Oxford roommate – and the object of his unrequited love – Moses John Jackson (1858–1923), who also worked at the patent office.⁷ Rather, the task of organising words and devices,⁸ of indexing words and finding meanings in dictionaries, involved particular skills that could explain his long stint in the ‘gutter’.⁹ Even if this is only speculation, a quick glance at his office colleagues reveals a common characteristic that united those

⁵ Although Shaw suggests that the post was not ‘as lowly as we would think from the modern usage of the word clerk,’ he says that the job ‘would give a living and allow time for his real interests’ in Robin Shaw (1995), p 62. However, some scholars who met Housman did not draw such a clear-cut distinction between real interests and job occupations. Differently to what Housman’s biographers imply, the activities and spaces of poetic and trade marks work do not seem to have been strictly separated. Housman continued to write poetry during his time at the patent office and also appears to have coached other poets, such as G.K. Chesterton, in the patent office. In a letter to Chesterton’s widow, Rev. Austin Lee, who had been Housman’s colleague at Trinity College (Cambridge), recalled a lunch with him in which ‘among other things I remember his telling me that GK used to come to him for coaching in the days when he (Housman) was at the Patents office and Mr Chesterton was (I think) either there or shortly afterwards at the Slade’. See Rev. Austin Lee to Mrs Frances Chesterton, 14 January 1938 Add MS 73454, British Library Archives.

⁶ Frank Kermode (2007), pp 7–8; *A Century of Trade Marks 1876–1976* (London, HMSO 1976) p 27; *Patent Office Centenary* (London, HMSO, 1953), p 30.

⁷ ‘By what must have seemed great fortune, the vacancy was for a job in the Patent Office in London, where his friend Moses Jackson had already been appointed to a well-paid position as Examiner of Electrical Specifications’ in Richard Perceval Graves (2009), p 61; see also HR Woudhuysen (2006).

⁸ Housman spent his time ‘scrutinising applications and comparing them with marks already registered’ in Shaw (1995), p 61.

⁹ ‘Housman always felt a special attachment to University College, for having, as he put it, picked him out of the gutter, – if I may so describe His Majesty’s Patent Office’ in Raymond Wilson Chambers (1939), p 61, 79 and c267; P.G. Naiditch (1995), p 29; see also Richard Perceval Graves (2009), p. 61

who came to work at the trade mark department of the patent office: a special sensitivity for words. The trade mark department was conducive to a particular subjectivity. This subjectivity can perhaps be better understood in terms of the categorical distinction between the expertise of trade mark and patent professions, a distinction that also affected everyday routines and the distribution of labour in their respective departments.¹⁰ That difference became evident in the improvised measures taken to set up the trade mark registry in the late nineteenth century, when some patent clerks were moved to the new field of trade marks.¹¹ Those with a background in patents tended to find it easier than their trade mark colleagues to apply their expertise in relation to the subject matter.¹² And this distinction also affected clerical work. If patent clerks were defined as ‘mechanical’ or ‘technical’,¹³ descriptions epitomised by Albert Einstein’s post at the Swiss patent office,¹⁴ we could ask similar questions about Housman and his trade mark colleagues at the office: Griffin, Dickson, Morgan and Webbs.¹⁵

¹⁰ See generally John Hewish ‘Patent office – Career Records of 38 Staff’ in BLCA (British Library).

¹¹ John Hewish (2000), p 89.

¹² For some comments of the rise of patent agents as ‘closed profession’ see Kenneth R. Swan (1908), pp 198–200.

¹³ See, for instance, William Henry Beck appointed ‘mechanical assistant’; in John Hewish (2000), footnote 10.

¹⁴ Peter Galison (2003).

¹⁵ Letter from Housman to Webb, 17 June 1896 in Archie Burnett (ed) (2007), p 87; see ‘Obituary: Ralph Hare Griffin (1854–1941)’ *The Antiquaries Journal*, Vol. 22 (1), January 1942, pp 73–75

What constituted the inner workings of the trade mark department at the patent office? What type of assistance was involved in the creation and running of the trade mark registry? Our suggestion is that a number of poets and antiquarians lurked among the clerks at the trade mark department of the patent office.¹⁶ Whereas patent clerks were increasingly required to be experts in technical or mechanical subfields, trade mark clerks were experts in the delicate art of distinguishing, devising and recombining signs and words. That is to say, some poets and antiquarians were particularly attracted to a secure job dealing with the mundane yet awkward activity of classifying signs.¹⁷ It is as if playing with words and symbols suited a specific personality type. A certain type of person – ‘poet bureaucrat’¹⁸ – seemed to thrive in a particular regime that would become a byword for dullness: examining and searching the trade mark register.¹⁹ In fact, it is no surprise that later commentators have insisted that trade mark work was – and still is – particularly attractive to word-lovers, crossword enthusiasts and readers of dictionaries.²⁰ The appeal of such a job probably increased after section 64 (1) paragraph (c) of the Patents Act 1883 paved the

¹⁶ Although ‘[i]t is true Housman neither looked nor talked like a poet’ in William Rothenstein (1932), p 39

¹⁷ See, for instance, Ralph H. Griffin (1925).

¹⁸ On this, see more generally, James Purdon (2016), p 18, and Friedrich Kittler (1992) p 104.

¹⁹ When Ronald Moorby (1917–2005), who had been the Assistant Registrar of Trade Marks at the UK patent office, summarised the advantages of mechanical searching, he noted that it would constitute a ‘relief to the examiners from the monotony of leafing through and scanning the index slips in the binders and terminal indexes,’ in R.L. Moorby ‘Mechanical Searching in the Trade Marks Branch, 9 January 1963’ I BT209/1283; National Archives, Kew.

²⁰ Felix Liebesny (1972), p 168.

way for ‘fancy words or words not in common use’ to be registrable.²¹ This did not only increase the number of trade mark applications,²² a trend consolidated by the relaxation of registration requirements in subsequent trade mark statutory instruments,²³ but it also stimulated and fostered a particular ability: a feeling for newly invented words and unusual word combinations.²⁴

Classifying Words

We could say that this kind of poetic bureaucratise facilitated the very establishment of trade marks as a form of ‘bureaucratic property’.²⁵ The trade mark registry office in England was inaugurated on 1 January 1876.²⁶ According to Lionel Bently, the introduction of the registration system cemented the

²¹ Lewis Boyd Sebastian (1884), p 41.

²² ‘A considerable part of the increase is due to the provision in the new Act for the registration of fancy words, which are largely used in many trades’ in *Second Report of the Comptroller General of Patents, Designs and Trade Marks for the Year 1884* (London: HMSO, 1885) p 7; see also Lionel Bently (2008), pp 37–38.

²³ Trade Marks Act 1905, section 9; Trade Marks Act 1919 (divided the register into two parts).

²⁴ *Eastman Photographic Materials Company v. Comptroller General of Patents Designs and Trade Marks* (‘Solio’) (1898) H.L. (E.) 571; see also *B. Browne Ltd* (1915), pp 4–7; letter from T.B. Browne to Rowntree ‘Invented Words’ 10 January 1910; Rowntree/R/DP/F/26/2; Borthwick Institute for Archives, University of York.

²⁵ Sherman and Bently (1999), p 198. For a collection of essays that examines the processes of producing and negotiating knowledge surrounding bureaucratic practices, see Riles (2006).

²⁶ *The Times*, 31 December 1875, p 7 (‘All the possible objects of a Trade Mark had to be classified’).

previously recognised ‘status of trade marks as property’.²⁷ More importantly, he maintains that within the next few decades trade marks evolved ‘from communications to things’.²⁸ However, for registration to work a system of classification was required. Hence, one of the first material concerns of the office was to develop a specific order; since ‘all the possible objects of a Trade Mark had to be classified’.²⁹ The classification brought together fifty classes by which marks were arranged according to different trades and articles.³⁰ The classification principle characterised trade not only as the substance of the goods (e.g. silk) but also occasionally as their function and destiny (e.g. for medical purposes).³¹ In other words, what was classified was not only the mark itself, but the commercial field in which the mark was to be employed. In this sense, trade mark classification was meant to reflect the state of commerce rather than linguistic or visual categories. These classification principles were one of several factors that distinguished trade mark from patent classification.³² The template

²⁷ Bently (2008), p 29.

²⁸ Bently (2008), p. 29.

²⁹ *The Times*, 17 January 1876, p 9.

³⁰ ‘Although a minute classification has its disadvantages in certain cases, we are inclined to believe that it will in the long run tend to secure the property of the ordinary owner of a Trade Mark, and, so far, its adoption in the new scheme is deserving of public approval’ reported see also *The Times* 17 January 1876, p 9; ‘Registration of Trade Marks’ *Engineering*, 2 February 1877, 93; Haseltine, Lake & Co (1922), p 51.

³¹ Trade Marks (1878) *Guide to the classification of goods under the Trade Marks Registration Acts 1875–1877*, London; see also ‘Registration of Trade Marks’ *Engineering* 7 January 1876, pp 14–15.

³² ‘Registration of Trade Marks’ *Engineering* 7 January 1876, pp 14–15; for the role of patent classifications, see Kang (2012), pp 551–594 (inventions are mainly classified according to their intrinsic nature or function, which involves an ontological exercise by the patent examiners and

for classifying trade marks was based on previous classifications used at international exhibitions in the course of the nineteenth century.³³ So, as one commentator suggested, the ‘classification [was] designed to correspond approximately to the conventional grouping of commodities in commerce’.³⁴ However, not only was it difficult to find and agree on the right class for a trade mark,³⁵ but changes in trade mark classifications throughout the twentieth century were often shaped by the conflicting desire to preserve old classes and the need to take into account how people registered their marks; changing representations of ‘commerce’, established and new, or already represented and newly perceived, had to be reconciled.³⁶ In other words, classifications were often adjusted in order to recognise ‘new commodities’ and specialised industries,³⁷ which caused logistical problems as existing classifications required

classification officers, or sometimes also according to their application); M. F. Bailey (1946a), pp 463–507 and (1946b), pp 537–575.

³³ ‘Registration of Trade Marks’ *Engineering*, Jan. 7, 1876, 14–15; ‘It is commonly said that it was based upon the classification of goods made for the Great Exhibition of 1851’ in memo from the Association of Chambers of Commerce to the Board of Trade, 25 November 1913, BT 209/109 (National Archives, Kew); ‘Registration of Trade Marks’ *Engineering*, 2 February 1877, p 93 (‘the chief feature of which was a classification [...] hurriedly put together from old exhibition catalogues and other like sources’).

³⁴ Kenneth R. Swan (1908), p 290.

³⁵ ‘Registration of Trade Marks’ *Engineering*, 2 February 1877, p 93.

³⁶ An American commentator highlighted that ‘[a]ssuming, in any event, that it is desirable to bring our trade-mark classification up to date and more in accord with present-day commerce in trade-marked merchandise, it is obvious that efforts should first be directed to breaking up the classes which now account for such a preponderance of all registrations while combining or transferring those classes which are now largely inactive’ in Chauncey P. Carter (1946), p 435.

³⁷ Memo from the Association of Chambers of Commerce to the Board of Trade, August 1913, BT 209/109 (National Archives, Kew); see for instance the discussion around the classification

updating.³⁸ Although this made some patent offices reluctant to change their existing trade mark classes,³⁹ a major reclassification of trade marks occurred six decades after the registry first opened, with the Trade Marks Act of 1938.⁴⁰ It seems probable that this reclassification was timed to take advantage of the international scheme of classification developed by the International Association for the Protection of Intellectual Property (AIPPI) in the 1930s, in order to take into account ‘the courses of trade in several countries’.⁴¹

The difficulties involved in classification show how the office tried to reconcile different expectations held by the world of trade, by legal professionals and by the public. Over time, classification systems were gradually tweaked to emphasise different elements that could echo the historical evolution of trade marks, from signalling an indication of commercial origin to constituting other qualities and meanings such as symbols, communication, brands.⁴² Perhaps

‘electronic games’ in Informal Meeting between the Institute of Trade Mark Agents and the Trade Marks Registry, *ITMA Information*, March 1994, p 2.

³⁸‘Still it would be a difficult matter to vary the classification now, as probably such a course would necessitate re-classification of all the thousands of Trade Marks already on the Register and re-definition of the rights under them’ in Haseltine (1922), p 47.

³⁹ ‘The whole of the existing registered marks, amounting to something like a quarter of a million, would have to be re-classified’ in memo from the Association of Chambers of Commerce to the Board of Trade, 25 November 1913, BT 209/109 (National Archives, Kew)

⁴⁰ (from 50 to 34 classes) [‘The new classification of goods, for use in registering trade marks, which was introduced by the Trade Marks Rules, 1938, was evolved by an international committee, upon which the Patent office was represented, in connection with the International Union for the Protection of Industrial Property’] Fifty-Sixth report of the Comptroller General of patents, designs and Trade marks, with Appendices, for the year 1938 (1939), HMSO, p 12.

⁴¹ Minutes of Extraordinary General Meeting, Institute of Trade Mark Agents, 16 January 1936, p 2; ITMA Archives.

⁴² Lionel Bently and Brad Sherman (2014), p 810.

precisely because trade marks as signs defied clear-cut identification and categorisation, classification went beyond the source of manufacture and began to emphasise the marketing channels, the industry or the competition at one or more levels of trade (manufacture, distribution, wholesale and retail).⁴³

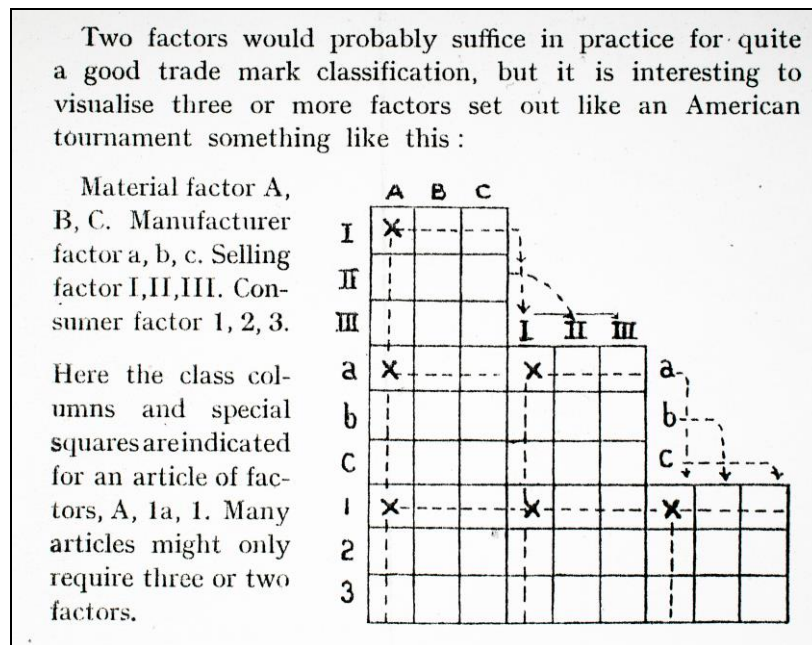


Fig. 1: *Burne Classification of Trade marks*

Courtesy of CIPA

⁴³ 'Notes on the Patent Office: Trade Mark Classification' *TMPDF Monthly Report*, February 1961; IP Federation Archives.

Interestingly, by doing so, and perhaps accidentally, the office was enacting a simulacrum of the marketplace, becoming not only a legal mirror of an existing commercial market but giving rise to a trade mark information marketplace of its own. In this derivative market in information, speed of processing, advertising and distributing trade mark knowledge became its most valuable features⁴⁴ It is therefore not a coincidence that spatial determinants, such as office location, internal bureaucratic organisation and space, were crucial for its creation. This derivative market was clustered around Chancery Lane, where the patent office was located. The geographic concentration of trade mark experts around the patent office was coupled with a very particular anxiety regarding accessibility of information.⁴⁵ While patent offices were also ‘libraries’, giving access to scientific and technological information contained in patent documents,⁴⁶ the

⁴⁴ ‘Mr Cox confessed that when he had first taken charge of the Trade Marks Branch he had been surprised after his experience of the Department’s practice in connection with Patents, that so little information with regard to official objections was given to applicants. It would be, however, appreciated that the first consideration of the Trade Marks Branch was speed’ in ‘Practice of the Patent Office with regard to official objections’ Institute of Trade Mark Agents, Minutes 20 June 1935; ITMA Archives.

⁴⁵ The Assistant Registrar of Designs and Trade Marks, James Lowry Whittle said that ‘preliminary searches may be made by any of the public, but traders in the country, who have no agents in town, cannot make searches without coming up to London themselves, I doubt if it is desirable to encourage people to come to the office without any fee. You would have people loitering about the office’ in *Herschell Committee* (1888), p 123 (Evidence by J. Lowry Whittle)

⁴⁶ Libraries used to be called ‘search rooms’ and were organised by classification. There was a close relation between the ability to manage files within given spatial and physical restraints and the organisation of information contained in legal files. See Hyo Yoon Kang (2012), p 565.

opening of trade mark registries in the patent office gave rise to a different type of commodity: information about legal records of signs and words, the value of which depended on the ability to extract it from the register. The development of trade mark information services was enabled by, and in turn produced, a new kind of expertise. If patent information frequently required a sort of ‘mental gymnastics’ to analyse claims,⁴⁷ the lack of apparent expertise involved in trade mark information posed a significant problem for trade mark agents, who experienced difficulties when it came to ‘closing’ their profession in the way that patent agents had previously succeeded in doing.⁴⁸ Attempts to close the profession were linked to the access to information that the trade mark register provided. This anxiety can clearly be seen in the concern at the implementation of charges for the inspection of the trade mark register amidst fears that the absence of such charges might give rise to soliciting and loitering.⁴⁹ This tension defined trade mark work for the whole of the twentieth century.⁵⁰ Filling in a trade mark application or reading trade mark gazettes were considerably simpler tasks than filing a patent application or reading the patent gazettes. It was the

⁴⁷ Norman T. Ball (1946), pp 384–388, at 384; see also Kara Swanson (2009), pp 519–548

⁴⁸ George Beloe Ellis (1935); ‘Closing of the Trade Marks Profession’ ITMA Minutes, 11 December 1956, ITMA Archives; Norman Waddleton (1981), pp 146–190.

⁴⁹ The Assistant Registrar of Designs and Trade Marks, James Lowry Whittle said that ‘I doubt if it is desirable to encourage people to come to the office without any fee. You would have people loitering about the office’ in *Herschell Committee* (1888), p 122 (Evidence by J. Lowry Whittle)

⁵⁰ The trade mark profession in the US faced similar problems; see ‘Annual Report of the Committee on Trade Marks and Unfair Competition for 1928–1929’ in *The Association of the Bar of the City of New York Yearbook* (1929) The Association of the Bar of New York, p 291.

development of classification systems and the need to specify goods within classes that helped to establish trade mark agents as experts. As trade mark and patent offices grappled with new ways of classifying trade marks, knowledge of the multiple ways in which the register worked and could be accessed constituted a fundamental feature of the expertise claimed by trade mark agents.⁵¹ It could therefore be argued that the closing of the trade mark profession was linked to the gradually increasing openness of trade mark registers.⁵² The enhanced status of trade mark agents was achieved by means of their expertise in the intricacies of accessing, observing, systematising, processing and selectively distributing trade mark information.⁵³

Citations and Indexes

Although the classification of goods was a crucial step in establishing the register, the register needed to be organised to facilitate the retrieval of trade

⁵¹ ‘You should then examine the trade mark registers of a number of likely markets. This is a specialist job’ in Derek Rositter (1992), p 9; Francis W. Campbell (1979) ‘Trademark Searching in the United States and Abroad’ in *1979 Trademark Conference: The Lanham Act and Beyond*, Bureau of National Affairs, pp 1–47: p 2 (‘Searching and understanding search reports is probably the single most important task performed by the trademark counsel’s office in large corporation’).

⁵² When the ‘guide to the use of the trade marks public search room’ was published, the Institute of Trade Mark Agents noted that the ‘guide was unlikely to be of special interest to the Institute Members, whose staffs were well versed in certain procedures’ see ITMA Minutes 27 September 1966; ITMA Archives.

⁵³ It is not a coincidence that trade mark agents often described their expertise as a ‘service’; for a thought-provoking history of servants as ‘search engines,’ see Markus Krajewski (2010), p 6.

mark forms and materials for assessment, renewal or submission to ‘the practical test of comparison’.⁵⁴ Although it may seem an unimportant detail, the system of registration had to be adapted to facilitate investigation of previously registered marks. As part of the push for retrievability, trade mark applications were numbered at the point of receiving them, thus creating ‘files’ that could be accessed subsequently. The patent office stamped every application for a trade mark with a number and the date, a feature that had legal effects (‘priority’) within the framework of international conventions.⁵⁵ Since trade marks had to be advertised later in the *Trade Mark Journal* and then, after a three-month opposition period, were granted or rejected, the numbering of applications enabled the information to be retrieved (and referred back to) during and after the application stage.⁵⁶ However, the publication of trade marks did not follow the numerical order of the initial filing. The publication of trade marks in the *Trade Mark Journal* was organised by classes and a set of interrelated issues: the period in which the application was reviewed or whether or not the trade mark was going to be used in foreign markets.⁵⁷ The lack of correspondence between the

⁵⁴ *The Times*, 17 January 1876, p 9.

⁵⁵ Article 4 (1) of the Paris Convention (1884): ‘Any person who has duly filed an application for a patent, or for the registration of a utility model, or of an industrial design, or of a trademark, in one of the countries of the Union, or his successor in title, shall enjoy, for the purpose of filing in the other countries, a right of priority during the periods hereinafter fixed.’

⁵⁶ ‘The first number of an official paper for the advertisement of Trade Marks, entitled the Trade Marks Journal, appeared on the 3rd May 1876’; see *Report of the Commissioners of Patents for Inventions for the Year 1876* (London, HMSO, 1877), p 8.

⁵⁷ ‘The Trade Marks Journal’ *Engineering* (5 May 1876), p 368.

initial application number and its publication in the *Journal* meant that indexing devices were necessary in order to map, navigate and enable access to the trade mark register and the *Journal*. Indexes served as an essential technique for linking these two sources.⁵⁸ Trade mark information held by patent offices could be accessed in two ways: through reading the trade mark journal or inspecting the register. These two distinct ways of accessing information gave rise to two different forms of generating trade mark knowledge and expertise. While routinely reading trade mark journals led to the appearance of trade mark watching agencies, trade mark agents relied on *ad hoc* searches of trade mark registers to give advice to clients as they filed applications.⁵⁹

In the meantime, patent offices paid increasing attention to methods of indexing, in part because the volume of applications grew.⁶⁰ That special focus can be seen in certain discussions following the first years of the existence of the system of registration. Less than a decade after the inauguration of the registry,

⁵⁸ ‘Considerable skill and practice are necessary to use this search material to advantage’ in Reginald Haddan (1938), p 106. See also on the importance of the index for files, Cornelia Vismann (2006), p 103: ‘A lost file, after all, can only be discovered if there exists a hint that something is missing. In order to detect a gap in a stack of records, it is necessary to combine the real and the symbolic. A retrieval system for files such as index cards or a registration of some kind serves as a reference between the two universes. So even if files are destroyed, the signifier of the destruction still exists and reveals the loss – unless it is destroyed itself. In an administration becoming more and more interlinked, that kind of total elimination seems less and less likely. At least records kept in parallel files point at what is missing’.

⁵⁹ See Bellido (2015), pp 130–151; see also Campbell (1979) p 1 (‘[T]rademark searching is an integral and vital part of the law of trademarks’); Earl H. Thomson (1945), p 785 (‘Attorneys today and even the courts and the Patent Office know that a new trade mark is adopted only after many weeks of searching [...].’).

⁶⁰ *A Century of Trade Marks 1876–1976*, London, HMSO, 1976, p 23.

for instance, the Herschell Committee (1888) was already emphasising the need to prepare satisfactory indexing tools in relation to trade marks; ‘a good subject matter index would be of great value’, the committee concluded.⁶¹ Such logistical anxiety can also be seen in the creation of special posts at the British patent office in the early 1890s, such as ‘index clerks’ and ‘trade mark abstractors’.⁶² What emerged from these concerns, and lasted for many decades, were three different indexes: (a) an index including a general collection of marks; (b) a divisional index of devices (pictorial marks or logos); and (c) an alphabetically arranged index of words appearing as parts of trade marks or alone.⁶³ The qualitative difference of these indexing tools was their distinct capacity to provide access to trade mark records, not via the trade mark gazette, but directly from the register.⁶⁴ The divisional index was particularly interesting,

⁶¹ ‘We think that indexing of the trade marks is capable of improvement, and that a good subject matter index would be of great value’ in *Herschell Committee* (1888), p viii. Similarly, the patent agent Alfred Julius Boulton suggested that ‘indexes ought to be very much better than they are, I think. There should be at all events, an alphabetical index open to the public which at the present time appears not to be the case. An alphabetical index would very much assist, both as to the subject and as to owners of marks’ *Herschell Committee* (1888), p 96 (Evidence by Mr Alfred Julius Boulton). And the President of the Institute of Patent Agents, John Imray also said that ‘a very good register of trade marks should be kept and published, with proper indexes, as with respect to patents’ in *Herschell Committee* (1888), p 110 (Evidence by John Imray).

⁶² ‘F Newbery (Index Clerk) Special Post’ in Trade Marks Registry – Distribution of Business and Staff January 1892 in Patent Office Copies of Staff Registers vol 1 and JG Poulton (Abstractor) Trade Marks Registry – Distribution of Business and Staff January 1892 in Patent Office Copies of Staff Registers vol 1; BLCVA (British Library Corporate Archives).

⁶³ ‘Instructions to Persons who wish to register Trade Marks, 1906, p. 8’; John Harvey & Sons Ltd and Cockburn Smithes & Co; 40913/L/2/5; Bristol Record Office; see also Reginald Haddan (1938), p. 106.

⁶⁴ Although the patent office published a separate annual index of the trade mark gazette, this index was more relevant for the development of trade mark watching services than for searching the register; see Bellido (2015).

in that device marks were arranged in separate books according to a different classification (e.g., birds, beasts, buildings).⁶⁵ However, the most influential index was the alphabetical index, which created two entries for any given trade mark: words were not only ordered by their prefixes, but what were then called ‘terminal indexes’ (suffixes) were also entered.⁶⁶ Although these indexes were first conceived as tools to be used by official searchers at the patent office, they were quickly made available to trade mark agents and then gradually to the public.⁶⁷ The rationale for the decision to give access to trade mark records was that ‘if the public had recourse to them, the expense of many abortive applications would be saved’.⁶⁸ In other words, these indexes functioned as keys to the register; and these keys framed the possibilities for future trade mark strategies.

⁶⁵ ‘Trade Mark Terminals’ in Minutes of Meeting held on 25 July 1928, The London Chamber of Commerce, Patents, Trade Marks and Design Section, p 5 in LMA (London Metropolitan Archives).

⁶⁶ Memo by Mr Hawkes, 16 November 1953, in *Proposed creation of a centre for searches of anticipation in respect of Trade Marks*, BT 209/1133 (National Archives, Kew).

⁶⁷ ‘It was agreed that a letter should be prepared for despatch to the Comptroller of Patents, asking him to make the official indices available for search by the representatives of firms’ in ‘Trade Mark Terminals’ in Minutes of Meeting held on 14 August 1928, The London Chamber of Commerce, Patents, Trade Marks and Design Section, p 5 in LMA (London Metropolitan Archives); E. M. Bennett ‘The Search Files in the English Patent Office (London, Patent Office, 1948)’ in BT 209/43, National Archives (Kew) [concerning patent search files]

⁶⁸ ‘UK-Trade Mark Terminals’ in Minutes of Meeting held on 25 July 1928, The London Chamber of Commerce, Patents, Trade Marks and Design Section, p. 5 in LMA (London Metropolitan Archives); the first search location [in the US Patent Office] comprised the classified registered marks that were – as one commentator explains – located ‘in vertical tiers of individually labelled drawers, technically known as shoes’; see Arthur H. Seidel (1959), p 26; see Kenneth W. Dobyms (1997), p 193.

Over the course of the late nineteenth and early twentieth centuries, different countries instituted their own trade mark registers, and in turn developed a variety of infrastructures to provide access to their respective trade mark records. Perhaps the most important of them were ‘card files’ or ‘yellow slips’, pieces of paper or index cards of various sizes and colours, filed in the innumerable drawers⁶⁹ of the ‘search rooms’ of every trade mark and patent office.⁷⁰ Trade mark agents frequently pushed for improvements in the material conditions of these search rooms that could enhance their ability to perform searches and thus give better advice to their clients.⁷¹ For instance, they often argued for better quality rubber stamps in order to improve the legibility of the records.⁷² They also frequently complained when records were misfiled.⁷³ It is interesting to note that, regardless of the differences in the national administration, almost all patent and trade mark offices around the world decided

⁶⁹ Henry Charles Thomson (1922); E. M. Bennett (1949) ‘Documentation of Search Material in the Patent Office’, in BT 209/43, National Archives (Kew); RLM ‘New Zealand Patent and Trade Mark Office: Public Records’ *ITMA Newsletter*, No. 121, September 1985, p 1.

⁷⁰ For instance, Mr E Johnson asked for better facilities to conduct searches by the public at the *Herschell Committee* (1888), p 78 (Evidence by Mr E. Johnson); see also RLM ‘New Zealand Patent and Trade Mark Office: Public Records’.

⁷¹ ‘Trade Marks Registry: Improvements in the Public Search Room’ *ITMA Minutes*, 20 November 1956, ITMA Archives.

⁷² *ITMA Minutes*, 13 December 1949; ITMA Archives.

⁷³ ‘William John Andrew Beeston, WP Thompson & Co, had written on the 17th April 1973, suggesting that the accuracy of the search room records at the registry could be improved. As a result of misfiling in the search room he had recently given incorrect information to clients on two occasions. It was agreed to reply to Mr Beeston that this particular point had already been covered in the submissions to the Mathys Committee, but nevertheless, it would be placed on the agenda for the next informal meeting with the Registry’ in ‘Trade Mark Registry’ *ITMA Minutes*, 12 December 1972; ITMA Archives.

to organise their records in a similar way, providing searchers with indexes created around two alphabetical registers: prefixes and suffixes.⁷⁴ It was assumed that isolating roots of words and identifying these letter strings at the beginning or at the end of the marks was the best way to elucidate word formations and to find or select trade marks.⁷⁵ Although this might seem like a mere linguistic and logophile technicality, it is our contention that this practice had a subtle yet significant impact on the development of trade mark law. A brief survey of trade mark litigation in the late nineteenth and early twentieth centuries shows how often word sources were elicited precisely by sequences of letters, demonstrating how the capacity to invent trade marks was often tested against these ‘terminals’.⁷⁶ While trade mark scholars and historians often remember *Solio*⁷⁷ and similar cases as doctrinal milestones in the relaxation of restrictions on registration,⁷⁸ a salient aspect of these cases was precisely that the wordplay had

⁷⁴ See David C. Newton (1991), p 49; Memos from the Norwegian, Canadian, Spanish, French, German, Australian, Austrian, Danish, Hungarian, Israeli, Swedish, Swiss Patent Offices to Jacques Secretan, Director of BIRPI, 1958 in *Proposed creation of a centre for searches of anticipation in respect of Trade Marks*, BT 209/1133 (National Archives, Kew).

⁷⁵ Charles S. Parsons (1938), pp 100–105.

⁷⁶ *Meyesrestein’s Application* (1890) 7 RPC 114 Ch. D [‘Satitine’]; *Kenrick and Jefferson’s TM* (1890) 7 RPC 321 Ch. D [‘Palmilla’]; *Talbot’s TM* (1894) 63 L.J. Ch. 264 [‘Emolliolorum’ and ‘Molliscorium’]; *Meaby and Co. Ltd v Triticine Ltd and Others* (1898) 15 RPC 1 Ch.D [‘Tricumina’ and ‘Triticine’]; *Christy and Co. v Tipper and Son* (1905) 1 Ch. 1 [‘Absorbine’];

⁷⁷ *Eastman Photographic Materials Company v. Comptroller General of Patents Designs and Trade Marks* (‘*Solio*’) (1898) H.L.(E.) 571.

⁷⁸ Jennifer Davis (2002), pp 342–367; H. Fletcher Moulton (1922), p 52; Carl W. Ackerman (1930), p 141; Duncan Mackenzie Kerly, Frank George Underhay (1913), p 171; Llewellyn Boyd Sebastian (1911), p vi.

already been embedded in trade mark registration endeavours.⁷⁹ These cases were often predicated on ways of looking at words that had been developed and ordered at the trade mark registry. Deconstructing words into prefixes, suffixes and part-words was often a strategic response to the organisational specificity of the registry, and in turn, such indexes delineated the very possibility of creating (or not creating) new trade marks.⁸⁰ The importance of the register's specificities can also be seen in the searches used by the British pharmaceutical industry before deciding on the appropriate names for its products. To cite one of many examples, in 1941, the Therapeutic Research Corporation (TRC), a collaborative group formed by Glaxo Laboratories, May & Baker, Boots Pure Drug Company, British Drug Houses and the Wellcome Foundation,⁸¹ sent its searchers to the office to explore the possibility of registering 'TERCE' (and 'TERSE') as trade marks.⁸² Albert E. Warden, responsible for trade mark matters, liaised with the secretary, L. G. Matthews, as to the desirability of adopting trade marks derived from these searches. The paper slips containing lists of words generated during visits to the patent office show how the formal and semantic motivation in

⁷⁹ Megan Richardson, Julian Thomas (2012), pp 93–94.

⁸⁰ In this sense, the creative role which trade mark index played parallels Markus Krajewski's observation that index cards, together with expert skill, allow new associations to be formed: '...the index database blazes associative trails that may serve as clarifying creative prompts for different connections and unexpected arguments.' in Krajewski (2011), p 63.

⁸¹ For some references to the group, see 'Therapeutic Research Corporation' *Nature* 148, 658–658 (29 November 1941); David A. Hounshell, John Kenly Smith (1988), p 448.

⁸² Explorative note concerning the registration of 'Terce' (and 'Terse'). File belonging to A E Warden (responsible for trade mark matters at The Wellcome Foundation until his retirement in 1942); WFA WF/TRC/02/094; Wellcome Library Archives.

adopting names was heavily influenced by trade mark searches. They also reveal how searches were often performed by breaking up words into prefixes and suffixes in order to establish whether any conflict with registered or pending marks was likely.

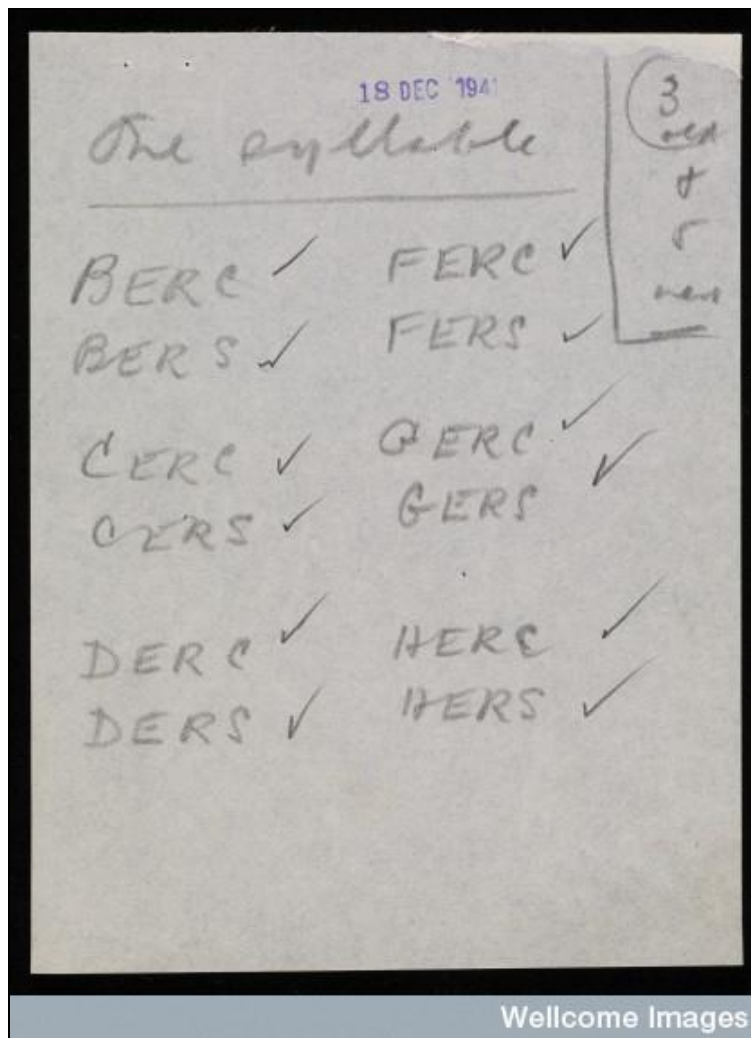


Fig. 2: Explorative note (Selection of Trade Marks) 18 December 1941

Courtesy of Wellcome Archives]

Searching

More than a century ago, a trade mark specialist had already highlighted an essential characteristic of this emerging system: ‘one of the most important advantages of trade-mark registration, in addition to its protective features, is the fact that an application *develops information* as to whether the mark has already been registered.’⁸³ Although trade mark work is often seen as mainly taking place in the acts of registration, renewal and opposition, a considerable amount of business flourished around this medial operation: the act of searching the register.⁸⁴ Public searches of office records began to be conducted for a variety of reasons. Most important were, not surprisingly, searches that attempted to ensure a successful registration, by anticipating official objections and oppositions⁸⁵ –

⁸³ Henry Thomson (1913), p 127.

⁸⁴ The President of the Institute of Patent Agents, John Imray, linked the creation of the index with the act of searching when he said that ‘a very good register of trade marks should be kept and published, with proper indexes, as with respect to patents, so that applicants might go and search for themselves and see whether the thing was new or not –whether they could have a good trade mark or not’ in *Herschell Committee* (1888), p 110 (Evidence by John Imray)

⁸⁵.J. S. Withers & Spooners (1912) p 21; H. Thomson (1913), p 161; T. B. Browne Ltd (1915), p 16.

what today is defined as ‘clearance’.⁸⁶ Searching existing representations became more and more common as a precautionary effort to ascertain that the desired mark was not in conflict with an already registered mark.⁸⁷ Since searches made by the patent office were neither compulsory nor comprehensive enough,⁸⁸ and because official searches often took a substantial amount of time,⁸⁹ the burden (and the possibility) of independently searching the register began to be placed on the applicant.⁹⁰ In that sense, searches represented preemptive knowledge, as they identified citations of marks that could preclude a prospective application. As searches began to be considered an essential preliminary step to be taken by applicants, trade mark and patent offices throughout the world found it necessary to structure access to their trade mark records. From their inception, nearly every patent office began to charge a fee based on the length of time a person spent

⁸⁶ Glenn A. Gundersen (2000) p 11; for recent cases in which it is possible to see how companies still commission trade mark searches before filing applications, see *Starbucks and others v British Sky Broadcasting and others* [2012] EWCA 3074 (Ch) before Mr Justice Arnold at para 75.

⁸⁷ Quite evocatively, Oscar A. Geier defined this as ‘search as to novelty,’ see Oscar A. Geier (1934), p 96; see also John Harvey & Sons Ltd and Cockburn Smithes & Co (1890) *Instructions to Persons who wish to register Trade Marks*, 40913/L/2/4, Bristol Record Office, p 3.

⁸⁸ Section 95 Trade Marks Rules 1906 (‘The registrar, if requested so to do in writing upon a Form TM No. 28, may cause a search to be made in any class to ascertain any marks are on record at the date of such search which may resemble any mark sent in duplicate to him by the person requesting such search and may cause that person to be informed of the result of such search’) [our emphasis]

⁸⁹ Reginald W. Barker (193?) *Trade Mark Notes*, Geo. Pulman & Sons, p 13 in 4.00.62; The National Brewery Centre.

⁹⁰ For instance, the search prescribed by ‘Rule 112 of the Trade Marks Rules, 1920 ceased to extend to the list of unregistered Cotton Marks at Manchester, the object in view being to expedite and economise the work of searching by excluding from consideration the large number of marks in this List which were known to have fallen into disuse’ in *Forty-Fourth report of the Comptroller General of Patents, Designs and Trade Marks with appendices for the Year 1926*, London, HMSO, 1927, p 8.

accessing the records.⁹¹ Regulating searching time by sequences (turn-taking) was important as the majority of searchers seemed to have ‘an ineradicable preference for searching during the late afternoon’.⁹² Although the establishment of a rota system was a practical solution adopted in most trade mark offices throughout the world, this system of managing and regulating access to records was often a cause of confusion and frustration in England as it tended to generate tension and rivalry between trade mark agents in London and those in the rest of the country.⁹³

Amidst these growing complexities, the late nineteenth century and the first decades of the twentieth century saw the emergence of trade mark professionals, or ‘information brokers’, specialising in searching the register in depth.⁹⁴ There are many examples of patent and trade mark firms throughout the world who added reports on searches to their typical portfolio of trade mark services. For instance, Henry Thomson in Boston, Massachusetts, advertised his searching services as more ‘comprehensive’ than those of the US Patent and

⁹¹ ‘The fee payable by a person making a search amongst the classified representations of trade marks was 1s. for each quarter of an hour’ in John Harvey & Sons Ltd and Cockburn Smithes & Co (1890); see also Reginald Haddan (1922), p 224.

⁹² ‘Trade Marks Registry: Improvement in the Public Search Room’ *TMPDF Monthly Report*, 19 February 1957, IP Federation Archives.

⁹³ Although copies of the Trade Mark Journal were available at the Museum of Science and Art (Edinburg), the National Library of Ireland (Dublin) and at Free Libraries of many of the principal towns in the UK, trade marks records were only available in London (and Manchester regarding textile trade marks); see ‘Form R. Ren. 3 (trade mark renewal), 1907’ John Harvey & Sons Ltd and Cockburn Smithes & Co; 40913/L/2/4; Bristol Record Office.

⁹⁴ Richard B. Owen (1925), pp 25–26.

Trade Mark Office since, he said, his strategy was to ‘find both the identical and the similar words in each file’.⁹⁵ His firm had developed a new system of searching that overcame what he saw as ‘defects’ in the government’s indexing system.⁹⁶ Similarly, the English patent and trade mark agency Marks & Clerk hired special clerks, called ‘searchers’, who regularly visited the patent office not only to jot down registered marks but also to search pending applications.⁹⁷ In fact, as one commentator noted, ‘trade mark searching differed from patent searching in that information was able to be secured regarding pending trade mark applications, whereas pending patent applications were preserved in secrecy.’⁹⁸ Although securing information about pending marks could be important,⁹⁹ since occasionally official search reports cited pending marks that had yet to be advertised marks,¹⁰⁰ just as important were the particular routines and networks these agents developed. Trade mark agents established their skills and practical expertise by advertising their specific connection with the office ‘to

⁹⁵ ‘Trademark Searching’ *Patent and Trademark Review* 29, December 1930, p 86.

⁹⁶ Henry Charles Thomson (1922).

⁹⁷ ‘Reports on Searches and Cases for Opinion’ (1910–1944), Marks & Clerk; SCM Archive; for a history of the firm, see Michael R. Lane (1986); Stathis Arapostathis and Graeme Gooday (2013), pp 64–68.

⁹⁸ Arthur H. Seidel (1959), p 26.

⁹⁹ ‘Trade Marks Monthly Search (Pending Applications)’ WFA WF/TRC/02/094; Wellcome Library Archives. Similarly, in the US, a commentator suggested that ‘it is quite important to search the pending application file in the Patent Office. These applications have been made public only since November 1949’ in Earl H. Thomson (1954) ‘Selection of Trade marks from a Legal Point of View’ 44 *TMR* 784–793, p 787.

¹⁰⁰ ‘Particulars of new applications in the public search room’ see ITMA Minutes 9 July 1968; ITMA Archives.

obtain the best results'.¹⁰¹ Trade mark agents did not only publicise such intimate bureaucratic relations to their clients;¹⁰² contacts with trade mark officials were also taken into account in membership criteria to the Institute of Trade Mark Agents.¹⁰³

Although the search for registrability was the basic purpose of most visits to and investigations in trade mark offices,¹⁰⁴ searches also fostered unexpected results. Writing in 1913, Henry Thomson described the possibility of retrieving information 'relative to the registration of new trade-marks by competitors'.¹⁰⁵ A visit to the office and a search through the records opened different opportunities, including the possibility of acquiring commercially valuable information.¹⁰⁶ Those who 'desire[d] to learn' what their competitors might be doing, were well

¹⁰¹ 'Those who are in frequent intercourse with the Trade Mark officials, and who have numerous and complicated applications constantly under their notice are able to obtain the best results' in Reginald W. Barker (193?).

¹⁰² 'What's in a Name? Goodwill, Profit, Reputation [...] Cases are personally dealt before the Registrar' in 'T.B. Browne circular, January 1906'; Rowntree/R/DP/F/20/2; Borthwick Institute for Archives, University of York.

¹⁰³ '[Mr FH Bucke] was well known to Mr Faulkner of the Patent Office, and he had been acquainted with the late Mr EM Griffin, at whose suggestion he first applied to join the Institute.' in ITMA Minutes 20 November 1947; ITMA Archives.

¹⁰⁴ 'Search reveals trade mark Liberty Application 17007 and title establishment Casa Liberty for textiles – class 23' in letter from Boulton, Wade & Tennant to Liberty & Co, 30 June 1949; cc 1932–272; Liberty & Co.; City of Westminster Archives Centre.

¹⁰⁵ Thomson (1913), p 162.

¹⁰⁶ 'A search of the TM register has now been made and has revealed three registrations of SUNRIPE in the name Rowntree & Co, York [...] We are a little surprised that the registrations of the word SUNRIPE in respect of fruit juices was accepted, but you will notice that the registration is in part B and that it was effected during the war when conditions at the Patent Office were a little chaotic' in Letter from WJ Buttimer (TM Department) to Mr A Ryrie (Reckitt & Colman) 24 November 1954 in Box 166; Legal Trade marks; Unilever archives.

advised to look at these registrations since trade marks were usually ‘registered before the product’ was ‘placed on the market’.¹⁰⁷

Another significant feature facilitated by search practices was the possibility of assessing the scope of the intangible property acquired through registration. By conducting a search through the records of the registry, it was possible to trace previous marks. The outcome of searches was useful to counter arguments of similarity made by opposing parties.¹⁰⁸ Searches were also important in ascertaining what marks had been struck off the register.¹⁰⁹ Additionally, searches enabled prospective applicants to give free rein to their imagination by speculating on how far putative words could be extended.¹¹⁰ It comes as no surprise, then, that search reports have been used as evidence in trade mark litigation.¹¹¹ The interplay between classification schemes and trade mark practices demonstrated a particular and selective way of filtering results

¹⁰⁷ Thomson (1913), p 162.

¹⁰⁸ ‘Do you know anything about the opponents? You will no doubt have the latest publications of whisky trade marks and we wonder if you can give us particulars therefrom of all marks in use containing the word LOCH. Of course we can have a search made through the British Trade mark records [...]’ in Marks & Clerk to D. Johnston & Co (Laphroig) Ltd, 5 August 1966; Allied Distillers; UGD 306/1/34/15/11; University of Glasgow Archives.

¹⁰⁹ Stevens Langner, Parry, to Clark & Co. 2 October 1964 [‘Desert’] CJC 86/14; Clarks Archives.

¹¹⁰ ‘We should add that we are under the impression that there are (already) quite a number of – Mist- trade marks already on the Register for Whisky. If such is the case you will not have a monopoly of the word – Mist- and in consequence you might not be in a position to prevent the registration of – Dawn Mist-’ Letter from Marks & Clerk to D. Johnston & Co, 22 January 1946; Allied Distillers; UGD 306/1/34/15/11; University of Glasgow Archives.

¹¹¹ Campbell (1979) p 15. Although the evidence is often treated with caution, the remarkable aspect to be noted here is precisely its introduction in trade mark hearings as a way to argue phonetic similarity; see *DNET (Trade Mark: Opposition)* [1999] *UKIntelIP* (16 February 1999) at para 5 [‘Compu-Mark search material’]; *SEMPRE / SEIMPRE (Trade Mark: Opposition)* [1999] *UKIntelIP* (26 February 1999) [‘Gibbins & Co, trade mark searchers’] at para 30.

from the register. The emergence of cross-searches outside the specific class within which a proprietor's actual goods were registered was arguably an effect of the concern regarding a system of classification that embraced different organising features to make up classes (manufacture, material, trade channels and selling points).¹¹² In that sense, the rise of cross-searching procedures was intimately related to attempts to anticipate and flag 'goods of the same description' in the register.¹¹³ Again, it is not surprising that the practice of cross-searches became more crucial with the introduction of marks covering services, as they could reflect many levels of trade.¹¹⁴ Rather than seeing brands and trade mark extensions as effects generated exclusively by consumer perception, our suggestion here is that the emergence of brands and the elusive boundaries of trade marks were also linked to the expansion and development of these search activities in the register.

¹¹² Minutes of Extraordinary General Meeting, Institute of Trade Mark Agents, 16 January 1936, p. 8; ITMA Archives.

¹¹³ ITMA, Minutes 28 September 1965, ITMA Archives.

¹¹⁴ See Trade Marks (Amendment) Act 1984.

Coining Trade Marks

As we can see, rather than being a subsidiary or post-facto activity, search practices actively facilitated the creation and adoption of trade marks.¹¹⁵ Intellectual property scholarship tends to consider the market as the place in which trade marks (and brands) originate,¹¹⁶ looking either at the producer or the consumer as generators of meaning. This predominant understanding overlooks the fact that search practices themselves have been a key generator of meaning from which many trade marks (and brands) have been constituted. By revealing what could be a desirable trade mark attribute,¹¹⁷ the results of a search were often used by trade mark agents to give advice about the best available options when applying for a trade mark.¹¹⁸ In fact, trade mark treatises in the twentieth century began to include chapters on the features, or ‘desirable’ attributes that

¹¹⁵ Stevens, Langner, Parry & Rollinson to Clark & Co; 4th October 1955 [Trade Mark Search ‘Cignet’, ‘Cygnet’, ‘signet’ and ‘Swan’]; CJC 86/13 ; Clark Archives.

¹¹⁶ Dev Gangjee (2013); Jennifer Davis (2008).

¹¹⁷ Munn & Co (1912) *Trade Marks – Trade Names*, New York, pp 27–31; Henry Thomson (1913), p 123.

¹¹⁸ ‘The writer has in his possession a complete library of official trade mark registration records from the earliest period to the current date. These records are invaluable and constantly being searched to ascertain particulars of prior registrants for all classes of goods’ in Christopher G.A. Yate Johnson (1950), p 13.

would constitute the ‘perfect’ trade mark.¹¹⁹ For instance, some trade mark agents and scholars gave advice about useful techniques of thinking about trade marks.¹²⁰ Others emphasised the need to focus on registration practices as the most important aspect in building a brand.¹²¹ The most adventurous trade mark agencies, such as T.B. Browne, even offered as part of their services the ability to ‘invent’ trade marks suitable for registration.¹²²

These offers and recommendations were not just reflections of the marketplace. They also echoed practices and constraints within the registration system itself. In fact, formal constraints in the registration process prompted the emergence of techniques to work around some of those difficulties. For instance, Rowntree’s trade mark agents, W.P. Thompson, registered in 1899 the words ‘LECT’ and ‘ELECTOR’ as they were unable to obtain registration for the word ‘ELECT’.¹²³ These words, though registered as second best options, were nevertheless used as trade marks; the company sold a small quantity of cocoa

¹¹⁹ Homer C. Underwood (1913); Frank S. Moore (1936), pp 14–25 (‘The Best Kind of Trade-Mark’); Parsons (1938), pp 93–99 (‘The Selection of Trade Marks’); VVAA (1955) *Trademark Management* 1, USTA (‘Choosing the Right Trademark’).

¹²⁰ H.T.P. Gee (1936), *Patents, Trade Marks and Designs*, London, p 30 (‘lexical inventiveness’); Charles S. Parsons (1938), pp 100–105.

¹²¹ Rayner & Co., *Unbranded* (London, 193?) p. 3 in 2000.0159.00; The National Brewery Centre.

¹²² ‘What’s in a Name? Goodwill, Profit, Reputation [...] T. B. Browne invent words capable of registration, and supply suitable pictorial designs’ in ‘T.B. Browne circular, January 1906’, Rowntree/R/DP/F/20/2; Borthwick Institute for Archives, University of York.

¹²³ ‘Memorandum – 3 July 1908’ Rowntree/R/DP/F/20/1; Borthwick Institute for Archives, University of York.

under these marks in order to keep the registrations alive.¹²⁴ Some trade mark agents went even further, creating tools and devices to help their clients to coin marks.¹²⁵ These devices facilitated the permutation and combining of letters to form distinctively different marks from those already registered. ‘Names finders’ were used as word generators and included in some textbooks, as well as being distributed by some trade mark and advertising agencies.¹²⁶ By the end of the last century, some of these agencies considered that ‘the biggest constraint on developing new brand names [was] the fact that trade marks registers [were] becoming increasingly cluttered’.¹²⁷ These comments do not only reveal the state of trade mark registers, but also the way they were perceived: as crowded pools which both enabled and limited the creation of trade marks and brands.

¹²⁴ For an interesting history of foreign trade mark registration by Rowntree, see Teresa Da Silva and Mark Casson (2012).

¹²⁵ Harry Bennett (1949), pp 203–230.

¹²⁶ Even more, some trade mark agencies such as Interbrand and TMOA (Nucleus IP) began offering brand selection advice; interview with Ken Sewell, March 2014; see also (2000) ‘Trade Mark Searches’ in *Naming* 71.

¹²⁷ ‘The Future of Naming’ in (2000) *Naming* 106.

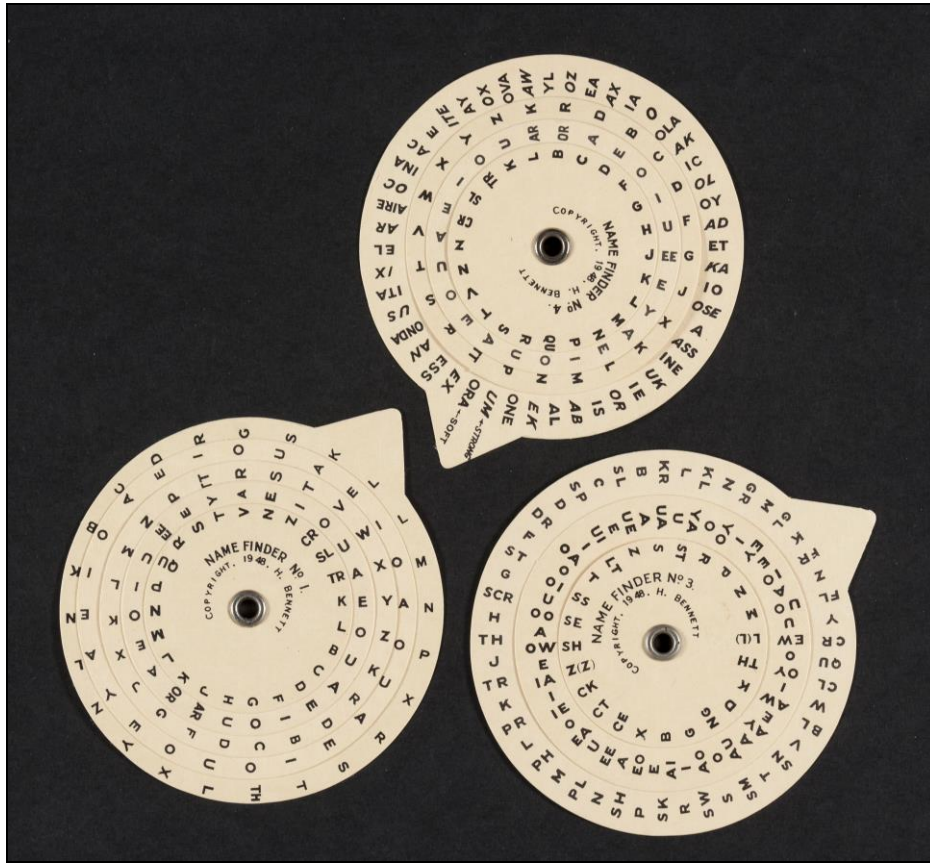


Fig. 3: *Name Finders* (Copyright H. Bennett, 1949)

Courtesy of UCL Photography Department

From Mechanical Searches to Computerised Searching

The rise of punched cards

As trade mark registers became increasingly cluttered, a recurrent preoccupation in patent offices throughout the world was the layout of their trade mark search rooms.¹²⁸ As the importance of searching trade mark records was not initially foreseen, the establishment of rooms for searching was linked to problems of space and storage at each office. The scale of the problem can be seen in the fact that by the 1950s, the British patent and trade mark office had more than 150 volumes covering just device marks entered prior to 1938. Although proposals to revise the collection by removing expired records were voiced,¹²⁹ eventually a different decision was made: the removal of a fireplace in order to create a

¹²⁸ ‘Trademark Search Room Problems’ Departments of State, Justice, and Commerce, the Judiciary and related agencies appropriations for fiscal year 1980: hearings before a Subcommittee of the Committee on Appropriations, United States Senate, Ninety-sixth Congress, first session on H.R. 4392 (U.S. Govt. Print. Off., 1979) 1480–1483.

¹²⁹ ‘The Council considered a letter dated 12 August 1960 from Mr JG Wallis, which referred to the fact that a great deal of time was wasted by having, when searching, to look through files of expired marks. So were the number of expired marks that it was becoming increasingly difficult to ascertain what marks still remained on the Register’ in ‘Trade Mark Searches in Schedule III’ in TMA Minutes 27 September 1960; ITMA Archives.

further bay into which indexes could spread. Additional ‘shelves and brackets’, aptly called ‘index furniture’, were ordered.¹³⁰

Although rearranging furniture no doubt helped to deal with the problem of space,¹³¹ the emergence of new search tools was, in the long run, far more significant. The tool for trade mark searching that became ubiquitous in the post-war years at the majority of patent offices was the punched card.¹³² According to E.M. Bennett, principal examiner of the British patent office, punched cards were ‘an ideal medium of search when an association of facts can be searched’.¹³³ Punched cards worked by assigning specific holes to certain criteria, such as class and index; a trade mark official would then use a ‘stick’ – typically a foot-long metal rod – in order to retrieve the cards that matched the desired criteria. This enabled files to be simultaneously classified and indexed. The holes on their edges, furthermore, helped to prevent the accidental misplacement of records, a

¹³⁰ ‘Trade Marks Registry: Improvement in the Public Search Room’; *TMPDF Monthly Report*, 19 February 1957; IP Federation Archives.

¹³¹ ‘Organisation of Search Records (shelvings and brackets)’; ITMA Minutes, 11 July 1972; ITMA Minutes.

¹³² Ball (1946), p 384; J. Frome and J. Leibowitz (1957); Bernd Redies (1958).

¹³³ E. M. Bennett ‘Some observations on a Common Patent Classification’ (London, Patent Office, 1948) in BT 209/43, National Archives (Kew). The sociologist, Niklas Luhmann’s use of index cards and his *Zettelkästen*, is well-known. He did not only use them as knowledge organising devices, but also noted their ability to enkindle unexpected associations. Digital versions, inspired by Luhmann, are *Zettelkasten nach Niklas Luhmann* <www.zettelkasten.danielluedecke.de> or *Synapsen by Markus Krajewski* <www.verzetteln.de/synapsen>. On the arrangement of index cards as proto-computer, see Krajewski (2011).

recurring concern for patent and trade mark offices.¹³⁴ They facilitated the filtering and sorting of records by the mere act of handling and retrieving cards.

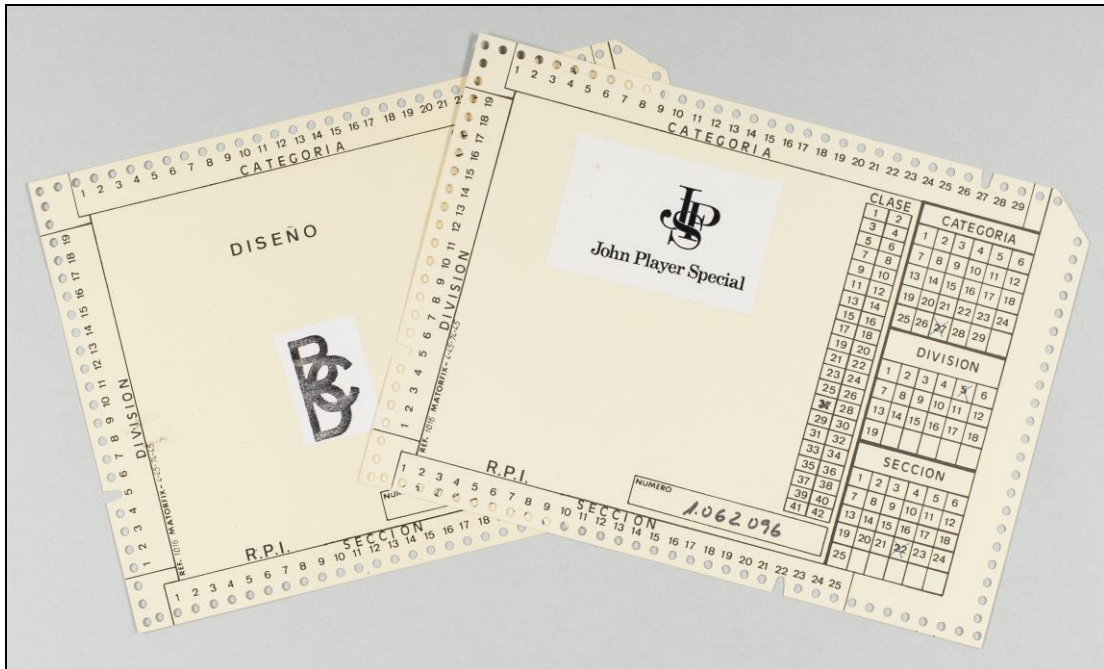


Fig. 4: Punched Cards

Courtesy of the Spanish Patent and Trade Mark Office

¹³⁴ 'Trade Mark Registry' ITMA Minutes, 12 December 1972; ITMA Archives.

The introduction of punched cards as pre-digital proto-computer search instruments reflects the technological and epistemological transformation of patent offices in the mid-twentieth century. Patent and trade mark offices steadily moved from being libraries holding books and documents (repositories of legal records) to be regarded as databases of information that were accessible and amenable to accelerated multiple searches.¹³⁵ One of the factors that influenced this change towards more automated search techniques was the growth in the international coordination of trade mark and patent classifications.¹³⁶ Trade mark and patent offices throughout the world experienced increased call for accessibility, which highlighted the difficulty of providing an adequate response. In 1956 the World Intellectual Property Organization created a Committee of Experts with the hope of establishing an international centre for trade mark searches.¹³⁷ Although the centre never materialised, some of the experts from those meetings began to establish their own private enterprises to provide trade mark search services.¹³⁸ Perhaps the most prominent expert turned private

¹³⁵ See generally Ronald E. Day (2014).

¹³⁶ E. M. Bennett 'Some observations on a Common Patent Classification (London, Patent Office, 1948)' in BT 209/43, National Archives (Kew);

¹³⁷ 'Berne Bureau: Proposed creation of a Centre for searches of Anticipation in respect of Trade Marks' in BT 209/1133, National Archives (Kew); 'International Centre for searches of anticipation in respect of trade marks' *Industrial Property Quarterly*, January 1957, No 2, pp 56–60.

¹³⁸ That these services were going to be provided by private companies was predicted at the Institute of Trade Mark Agents when they noted that 'it might be preferable for this work to be undertaken by private agencies rather than by government sponsored bodies', 'Trade Marks Search Centre' ITMA Minutes, 12 May 1959; ITMA Archives.

entrepreneur was Vincent Gevers,¹³⁹ a Belgian patent agent who founded CompuMark, a company specialising in trade mark information retrieval.¹⁴⁰ CompuMark became the most significant specialist in the new field of computer searching, and the latter formed the key part of the service that they soon offered to trade mark agents, corporations, and even to patent and trade mark offices themselves.¹⁴¹ Typing in the data from both UK and US patent offices was a crucial factor in reaching its dominant market position.¹⁴²

Computerisation of Search

By the mid-1970s it was already clear that retrieval of information by computer was going to be the most important way of organising, accessing and processing trade mark information.¹⁴³ As early as 1972, the UK *Trade Mark Journal* announced a new company that offered computerised lists of trade marks and

¹³⁹ 'International Search Centre for Trade Marks'; ITMA Minutes, 20 November 1956, ITMA Archives; see also Derek Rositter (1987) 'Let us now praise famous men' *Trademark World* 51; 'International Centre for searches of anticipation in respect of trade marks' *Industrial Property Quarterly*, October 1958, No 4, pp 59–64; see also Craig A. Bailey 'Interview: Florent Gevers', *ECTA Bulletin*, June 2015, pp 10-11.

¹⁴⁰ See, for instance, Vincent Gevers (1973) 'The Problem of 'Noise' in Mechanical Research' *Compu-Mark (formerly Documentation Gevers)*, Antwerp, 1973; 'Facts about Compu-Mark S.P.R.L. (1980)' *Compu-Mark*, September 1980, p 2.

¹⁴¹ 'Compu-Mark' *Trademark World*, December 1987, p 5; Gevers' testimony: 'Defendant Thomson & Thomson Inc.'s Proposed Findings of Fact and Conclusion of Law', p 6, *Corsearch v Thomson & Thomson* (91 Civ 6706), p 4, US District Court for the Southern District of New York, NARA Archives.

¹⁴² Compu-Mark arrived in London by acquiring a small firm of patent and trade mark searchers and translators called Woolcott & Company; interview with David Sheppard, December 2013.

¹⁴³ Micheline Dellinger (1976), pp 142–145 .

other computerised products.¹⁴⁴ Furthermore, an association of trade mark searchers was established to aid a study by the UK government about the computerisation of trade mark records.¹⁴⁵ Although these first attempts were often beset by the anxieties and heightened expectations typically generated by technological innovations,¹⁴⁶ the introduction of computers had a direct and immediate impact on searching and indexing practices. Computers were not only used as tools to retrieve records, but the process of computerisation soon affected the system of registration itself: both the ways in which trade mark data was recorded *into* digital files and also how this data could be extracted *from* those files.¹⁴⁷ In other words, computerisation affected the very format and forms of trade mark law. First, trade mark forms were gradually redesigned for mechanisation purposes.¹⁴⁸ Second, computer algorithms began to expand the ways in which searches could be conducted: by the mid-1980s, these technological innovations enabled faster, hyper-linked, cross or multi-subject

¹⁴⁴ Trade Mark Journal, 29 November 1972 [‘UK Trade Mark Applications: Trade Mark Computer Services and Applications’]

¹⁴⁵ ‘The formation of the Association was prompted in particular by the rapid development of sophisticated information retrieval systems [...]’ in ‘Patent and Trade mark Searchers’ Association’ *CIPA Bulletin*, June 1975, p 312.

¹⁴⁶ Some members of the Institute of Trade Mark Agents feared that these new companies were offering trade mark legal advice instead of providing trade mark ‘data’.

¹⁴⁷ In 1986, the UK patent office launched Pergamon InfoLine, a database that offered a comprehensive range of services to the public such as online word searches; see ‘The Search and Advisory Services; the Patent Office’ *Trademark World*, December 1986, 5; Charles Oppenheim (1986) ‘The Patent Office databases on Pergamon InfoLine’ 8 *World Patent Information* 3, pp 185–192; ‘Trade Mark Search Services’ *ITMA Newsletter*, July/August 1986, p 1.

¹⁴⁸ ‘Mechanisation of the Trade Marks Registry’ ITMA Minutes, 16 September 1975, ITMA Minutes.

searches with fewer geographical restrictions.¹⁴⁹ The introduction of computerised searching eventually meant that the informational role of patent and trade mark offices shifted from documentation retrieval to data retrieval.¹⁵⁰

Computerisation also facilitated the deterritorialisation of patent and trade mark offices. While the location of the office had always been a politically contentious issue, the move of the UK patent and trade mark office to Wales and the establishment of Office for Harmonization in the Internal Market (OHIM) in Alicante, Spain, were only possible with a system that relied on computer access (and retrieval) of trade mark records.¹⁵¹ Besides obliterating spatial restrictions in accessing trade mark information, computerisation also diluted the distinction between trade mark searching and watching, by allowing searches to be conducted at any stage of the application process without the need to go to the patent office. Whereas for the first century of the registry's existence, a search could only be conducted in person at the patent office, the computer database arguably narrowed, if not even closed, the temporal gap between filing and publishing by allowing applications to be searched anywhere and anytime. The increased level of access also meant that there was more possibility for contesting the proprietary boundaries of a trade mark.

¹⁴⁹ 'Computerisation: Trade Marks Registry' *ITMA Newsletter*, No. 119, June 1985, pp 3–4.

¹⁵⁰ As it was anticipated by the Trade Mark Registry, computerisation would 'reduce the need to access the paper files considerably' in 'Trade Mark Office Administration System' *ITMA Newsletter*, March 1985, p 6.

¹⁵¹ 'These days most trade mark searching is done electronically in various locations around the country.' *ITMA Newsletter*, No. 179, February 1991, p 1.

The trend towards computerisation went hand in hand with a new wave of private companies offering trade mark searches.¹⁵² The greater flexibility of computer searches facilitated and enhanced the adoption, selection and coining of trade marks.¹⁵³ Unlike manual searches, computer-based searches allowed experimenting and combining different words with a speed and ease which would not have been possible before. In fact, the search for trade mark similarity had always depended on a series of contingent factors and constraints: such as the skill and diligence of the searcher, the way a particular index was designed, and the time the searcher spent at the patent office looking for similar marks.¹⁵⁴ While computers undeniably enhanced the retrieving of trade mark information in many different ways, companies such as CompuMark began to create their own separate databases.¹⁵⁵ By creating their own proprietary trade mark records, these companies managed to control some of the risks and contingencies of searching.¹⁵⁶ The quality of the search had always depended on the indexes.¹⁵⁷ The most innovative effect of computers was the creation of new indexes and the possibilities of search and retrieval that these opened up. The best example of a

¹⁵² 'Trade mark Searches' *Trademark World*, April 1987, p 38.

¹⁵³ For instance, the trade mark EXXON was computer-born, that is, adopted after searching directories, registers and conducting interviews. However, computer listings was the infrastructure that initially provided multiple combination of words. Similarly, many of the coined trade names by DuPont in the late 1960s were computer created; see Jan Praninskas (1968), pp 13–14.

¹⁵⁴ 'Using manual card indexes displayed in the public search room, searchers were traditionally limited to the search of a word or prefix.' in Marie Pinsonneault (1986), p. 286.

¹⁵⁵ 'Compu-Mark' *Trademark World*, December 1987, p 5.

¹⁵⁶ Rositter (1987), pp 51–54.

¹⁵⁷ Interview with David Sheppard, January 2014.

completely new index is the one created by CompuMark, which was based neither on prefixes nor on suffixes, but on infixes.¹⁵⁸ As one commentator noted, the promise of computers was that ‘any fanciful combination of letters, words, or even numbers’ could be located.¹⁵⁹

Several offices, such as the US patent office, entrusted their computerisation process to private organisations such as CompuMark.¹⁶⁰ Such public reliance on a private company raised concerns, of course, about corporate control of trade mark records. Perhaps even more interesting for this article’s purpose was the impact of these developments on the way in which marks could be searched. Several companies, including CompuMark, used court decisions as a yardstick to frame ‘searching questions’.¹⁶¹ But their most important contribution was the rise of a calculated measure of similarity tailored to linguistic and legal questions. This technology meant that trade marks could be searched by other criteria: phonetic equivalences and even according to

¹⁵⁸ ‘Compu-Mark’ *Trademark World*, December 1987, p 5. Infixes are parts of words which are floating and can be inserted into another word base, such as ‘absobloominlutely’. They enabled enhanced searches for word units in the middle of preexisting trade marks.

¹⁵⁹ Marie Pinsonneault (1986), p 286.

¹⁶⁰ ‘Computer Column’ *ITMA Newsletter*, May 1984, 6

¹⁶¹ Working Group for the Mechanization of Trademark Anticipation Searches (1978) ‘Organization of searches at Compu-mark’ pp 16–18, in *Proposed creation of a centre for searches of anticipation in respect of Trade Marks*, BT 209/1133; National Archives, Kew.

translations, synonyms and antonyms.¹⁶² And computer programming made the development of suitable procedures possible which took linguistic particularities in searches, such as phonetic similarities between different languages, into account.¹⁶³



Fig. 5: CompuMark UK Data Point Terminal (circa 1980)

Courtesy of David Sheppard

¹⁶² Working Group for the Mechanization of Trademark Anticipation Searches (1978).

¹⁶³ CC Nicholas to Moorby and Ward Dyer, 3 February 1971; BT 209/1283; National Archives, Kew.

Interestingly, the shift from paper to screen also helped to elucidate and render visible the application status of any given trade mark. This potential to ‘reach through’ the register instantaneously – from the moment of filing until grant – also enabled the searcher to retrieve relevant citations and thus flag potential conflicts that could not have been anticipated by manual searches. As a result of private companies offering these services, ex-officio searches gradually disappeared from trade mark laws throughout the world.¹⁶⁴ This arguably shifted the balance between consumer protection and the protection of trade mark owners.¹⁶⁵

Patent offices and private companies offering trade mark services increasingly began to be populated by computer analysts.¹⁶⁶ Their task was to find bugs and inefficiencies in the computer systems.¹⁶⁷ This development is symptomatic of the long way trade mark practices have come from the days when poets and linguists like Housman worked as trade mark clerks in the patent office. Today these practices are marked by an increasingly complex and thoroughly technological trade mark registration system and the cumulative importance of systems administrators to run it. They reflect the transformation of

¹⁶⁴ Jonathan Radcliffe and Esheta Shah (2008), pp 85–89.

¹⁶⁵ ‘Review of UK Law’ *ITMA Newsletter*, No. 135, January 1987, p 1.

¹⁶⁶ ‘A team of system analysts in the Office has now reached the stage of providing...’ in ‘Word Mark Search System’ *ITMA Newsletter*, March 1985, p 7.

¹⁶⁷ ‘Bugs!’ *ITMA Newsletter* No. 208, January 1994, p 5.

the trade mark registry from a repository of visual markers of property boundaries into a meta-level database. The new poets in the regime of the database are the digital linguists – computer programmers, IT systems engineers and database librarians – whose work is built upon the linguistics of codes and their possibilities: hyperlinks, cross-combinations, multiple tags and quantitative modelling.

Conclusion

The history of trade mark law and practice has been profoundly shaped by bureaucratic routines and techniques instituted by the patent office. These bureaucratic systems – for categorising, indexing, accessing and searching registers – were fundamental to the very possibility of a functioning trade mark law. They had a significant impact on the different ways trade marks were adopted, imagined and litigated. By tracing the evolution of the trade mark register, the article conveys how the first decades of clerical work at the trade mark division of the patent office relied on an acute sensitivity for words, as well as a feeling for their construction and deconstruction. Such linguistic expertise and facility enabled those involved to distinguish between existing trade marks, along with the concomitant possibility of creating and inventing new trade marks.

The article also highlights how shifts in information technology and bureaucratic practices in the twentieth-century affected the function of the trade mark register and gave rise to new kind of trade mark expertise. This new form of expertise did not necessarily render the former linguistic expertise superfluous, but it was more concerned with keeping track of the growing mass of registered trade marks and therefore with the ability to order, store and retrieve relevant trade mark data with speed and accuracy. As such, it required an additional mastery of the changes in technology by which trade marks could be stored and retrieved. The specific media forms shaped the questions that arose around them: whereas indexing required a linguistic sensibility, computer databases further required a technical facility in information management. The fashioning of trade mark information did not merely involve representational work, such as cataloguing and indexing, but elicited another form of knowledge: those bits and fragments of trade mark details needed to be interpreted in order to be turned into useful and strategic information. On the one hand, such technological changes and the emerging new data market can be understood as an effect of the inherent difficulty of classifying and indexing signs; while on the other, they can be considered as a by-product of search devices, the mastery of which became a valuable expertise in itself.

The last development which the article explored was the computerisation of trade mark information, which pushed the deconstruction of signs and words into data even further. The new bureaucratic poetics is faster and coded: the ability to make up signs began to be determined by the right search phrases, and the speed of word combinations started to depend on server capacity and - in the case of networked databases - server locations. The search for trade marks has become more far reaching by revealing information from the moment of filing until grant. This means that systems technology has become the central technique and the organising rationale of trade mark bureaucracy. From bureaucratic poetics in the age of Housman, perhaps now it would be more accurate to talk about trade marks as computerised poetics.¹⁶⁸ In this process of historical transition from a bureaucratic system of record keeping to the management of trade marks as data, the article depicts trade marks as emergent properties, which both shape and are shaped by these technological shifts.

¹⁶⁸ 'Review of UK Law' *ITMA Newsletter*, No. 135, January 1987, p 1.

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