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the national government to usurp many of the powers of the states, and he cited the various attempts to secure a national child labor law by way of illustration. We all have the feeling, he said, that too much power is being lodged in Washington, and he read Senator Root's statement, made in 1913, to the effect that the preservation of our dual form of government is essential to our national life. He also called attention to President Coolidge's Memorial Day address, at Arlington, last May, in which he had emphasized this question and warned against the menace of unification. Further centralization of government, the speaker said, ought to be avoided. The Mason and Dixon line no longer marks division of opinion on this question of States' Rights. It is not now a partisan matter. He called attention to the fact that both parties had participated in the passage of the so-called "50-50" appropriation bills by which the states and the nation share in the expense of public projects and the federal government directs the expenditure of the money jointly raised. The time has come, he said, to stop this subsidizing or bribery of the states.

Our Duty as Lawyers

The question, Senator Long said, is whether or not we shall destroy this dual form of government and the old story about liberty and government is still on. The effort to reconcile the two—liberty and government—has been apparent everywhere down through the ages, he said, first there is government and no liberty; then liberty and no government, and so on ad infinitum. The petition of Right and Declaration of Right, in England, and the Bill of Rights in the Constitution of the United States, he said, mark great progress in reconciling the two, but the conflict is on and there is the greatest danger of the impairment of the principle of local self government. We, as lawyers, have our part to perform in this contest, he said, and we should appeal to public opinion and see to it that liberty and local self government shall not perish from the earth.

Whitehead Wields Wit on Dry Topic

Genius converts dry land into fertile fields and it takes genius to make an apparently dry topic palatable to an audience unfamiliar with its ramifications. This latter kind of genius Mr. Carle Whitehead possesses to a marked degree, for, in an address at the meeting of December 7, he not only surrounded the subject of "Patents, Copyrights, and Trade Marks" with romance, but injected into it so much spontaneous humor that, far from being dry, it proved to be delightful.

The story of the development of our legal system, Mr. Whitehead declared, is a story of restrictions and prohibitions followed by evasions and circumventions, followed by more restrictions and prohibitions, followed by further evasions and circumventions, and so on, ad infinitum.

Patents, copyrights and trade marks, he charged, now afford the most effective means of accomplishing the objects of combinations in restraint of trade. Witness the Radio Corporation, Shoe Machinery and Oil combines; all made possible by pooling patents. Pooling the principal patents in an industry gives the pool a practical monopoly for a period of seventeen years, the life of the patent, and during that time inventors of improvements upon the inventions pooled must either sell their patents to the pool on its own terms or let them lie idle. The pools, he said, thus acquire many patents extending beyond the 17-year term and in this way are able to maintain their monopoly indefinitely.

Litigation arising out of the subject is complicated and technical, Mr. Whitehead declared, and he likened some phases of it to proceedings before the Interstate Commerce Commission, where "witnesses argue under oath and lawyers testify without being sworn." The prosecution or defense of an ordinary patent suit, he said, involves an expense running into thousands of dollars and the poor inventor cannot afford to fight for his rights. As an illustration of the cost of such litigation, he cited

the oil flotation dispute which had cost many millions to carry through the courts.

The speaker then brought out some points which he said were either misunderstood by the profession or not understood at all. First of all, the patent and copyright laws are sanctioned by the Federal Constitution in the clause authorizing Congress to protect the rights of inventors and authors, while the trademark laws are enacted by Congress under the Interstate Commerce clause. Patent and copyright laws form one class and trademark laws form a distinctly different class

The fundamental difference between patents and copyrights and trademarks is, he declared, that the former depend upon originality, while the exclusive right to the use of a trademark is not dependent upon originality, but upon use of the mark in trade, the mark being a form of trade name. The monopoly of a patent or copyright depends on a grant from the government, while that of a trademark is a common law right independent of statute. Title to a trademark is gained through its use on goods in trade and it can only be registered when used in interstate commerce. The advantage of registration is that proof of registration makes out a prima facie case of ownership and treble damages can be claimed for willful infringement of a registered mark.

The law of trademarks is a part of the law of unfair competition, Mr. Whitehead stated, and copying another's trademark is but a means of stealing another's trade and palming off goods through misrepresentation.

Patents and copyrights, Mr. Whitehead said, are property rights and are susceptible of transfer like other property rights, but a trademark is only an incident to trade, and can be transferred only as part of a business.

Words that are merely descriptive cannot be appropriated and will not be protected as a trademark, he said. For example, "canned tomatoes" cannot be appropriated as a trademark, for if the can contains tomatoes the mark would be descriptive and if not it would be deceptive. "Star Brand," on the other hand, he declared, was a good trademark because it suggested high quality but was neither descriptive nor deceptive. (Judge Butler later took exception to this statement saying that "Star Brand" tomatoes did actually contain stars, which could be distinctly seen very shortly after sampling the can).

The question of whether a mark is descriptive or deceptive, Mr. Whitehead declared, is one of psychology and the judge in a given case must guess at the effect on the public. He illustrated this by pointing out that while there was no ivory in Ivory Soap, no gold in Gold Dust, and Palm Beach suits were not made in Palm Beach, still these words may not actually deceive and may be permissible trademarks. He was surprised to discover recently, he said, that the familiar picture of the dog and phonograph was now being registered as a trademark for cigarettes, but thought a mistake had been made in using the slogan, "His Master's Voice" underneath, without leaving the letter "O" out of the word "voice."

A judge, he said, must guess whether the general purchasing public will be misled by a trademark which resembles another. He referred to the story of the Englishman who failed to get "Lucky Strike" cigarettes when he asked for "Fortunate Blows," and propounded the query as to whether the latter name would be an infringement of the former.

A monopoly of literary, artistic and scientific works, he said, was secured by attaching a notice to the first publication of the work and was perfected by filing duplicate copies of the work in the office of the Librarian of Congress accompanied by a fee of one dollar. A dozen or more different forms were supplied on cards by the copyright office. Commercial prints and labels, he said, could be protected by copyright because of the presumption that they have artistic merit, and originality.

The question of infringement of a copyright is often a psychological one, Mr. Whitehead stated, and in many cases it is largely a matter of personal opinion on the part of the judge.

Each week the patent office issues an official Gazette which contains lists of patents, with the names of patentees, one view of the invention, and one claim. A copy of any given

patent may be obtained by sending ten cents to the Commissioner of Patents and giving him the number of the patent desired.

Over a million and a half patents have been issued, Mr. Whitehead explained, since the patent office was established.

After a patent is issued, Mr. Whitehead said, if it fails to fully disclose and protect the invention, the patentee may surrender it and apply for its reissuance in proper form. This leads to many abuses, such as trying to cover inventions made by others since the filing of the original application.

Design patents are also granted on artistic designs used for manufactured articles such as wall paper, silverware, furniture, etc., Mr. Whitehead stated.

A patent, he said, is usually described as a contract between an inventor and the government. The inventor is presumed to have discovered something of value to the public and the government grants him a monopoly upon the invention for a period of seventeen years in consideration of his disclosing his invention so that the public shall have the benefit of it thereafter.

In a patent application, the formal petition is followed by specifications; then come the claims defining the scope of the invention; and last the oath. Generally speaking, Mr. Whitehead said the shorter the claim the broader the patent, and the fewer elements specified, the better and stronger the claim. Illustrating this point, he cited the Bell telephone patent, explaining how it might easily have specified too many elements to be valuable and how it might have been made broad enough to include the radio or, by inserting the words "over wires," not broad enough to include the radio. The long claim with many elements is generally not valuable, but the short one with few elements is broad and if none but essential elements be included the claim is basic.

A patent, Mr. Whitehead declared, gives the patentee no right to do creative work that he could not otherwise do; all it does is to make his right to the manufacture, use and sale of the invention exclusive—simply gives the right to stop others.

Patentability and infringement, he said, are separate and distinct questions, again citing the Bell patents by way of illustration. If Bell's receiver had been impractical and someone other than Bell had developed a practical one, Bell could have enjoined the use of the receiver and at the same time could have been enjoined from using the other receiver. Consolidation or mutual licensing is the only way out of such a difficulty.

An invention must have utility, Mr. Whitehead pointed out, and he illustrated this by telling of a rat trap which had so many devious and difficult entrances provided for the rat that the examiner had remarked in denying the application that "any rat with brains enough to get into the trap would have brains enough to stay out."

Also, Mr. Whitehead declared, invention must be involved or a patent is invalid. Invention contemplates something new, he said, and many statements had been made as to what is not invention. He then read from Hopkins on Patents where it is said that the absence of a definition of what constitutes invention is an obstacle to the development of patent law, but it cannot be defined and is largely a matter of personal opinion. The defense of want of invention is omni-present in patent litigation, Mr. Whitehead said, and no attorney can definitely advise his client what the decision on this question will be in a given case. Systems involving so much of psychology and indefiniteness, he said, make the "patent game" largely a gamble. But the stakes are large, he said, and the odds long, and there is also a large field for legitimate, intelligent and conservative use of patents, copyrights, and trademarks.

Any system of rewards, especially those involving monopoly, lends itself to misuse, Mr. Whitehead said in closing, and urged that "we as lawyers be ever on the watch to eliminate the misuses and hold true to the original purposes—protection of lawful business by trademarks and the promotion of the progress of science and useful arts by patents and copyrights."

J. C. S.

It Frequently Happens. In Millard v. Loser, 52 Colo. 205, the winner was loser.