

Marques Frontières : Trade marks and information

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EST INTERVENU
SUR CE SUJET,
DANS LE CADRE
DES SÉMINAIRES
AEGIS

Compared to copyrights and patents, the history of trademarks has been relatively neglected. An eminent and well-cited history of intellectual property helps make the point. The authors note that in developing modern ideas of intellectual and industrial property, « the primary source of inspiration was France for copyright and design law, and the United States for patents and trademarks » (Sherman & Bently, 1999). In fact, the French had robust trade mark law some 70 years before either the US or the UK. More significantly, the US and UK laws were written almost directly in response to conditions laid down by the French in bilateral commercial treaties.

The international recognition proposed both in these bilateral treaties and in later multilateral accords such as the Paris Treaty of 1883 and Madrid Agreements of 1891 take trade marks to be reasonably self-sufficient and stable and so capable of moving across frontiers and between markets unproblematically. A mark is presumed to stay the same, whether encountered in France, the UK, or the US. That, certainly, is what the nineteenth-century Champagne *négociants* thought when they registered their marks in the United States, and presumably they still feel that neither time nor space should disrupt their property in a mark. Yet, as I'll try to show in this brief essay, both historical developments and national contexts can change the significance of a mark. These changes, in turn, cast some doubt on conventional economic case for trade marks and the way economists think about information.

The economic case is fairly quickly summed up. Marks, Landes and Posner argue in their much cited article, provide information about goods and in so doing to reduce uncertainty and search costs while increasing the efficiency of markets (Landes & Posner, 1987). If marks work this way, we can then justify robust trade mark legislation, both national and international, and the costs they involve as a means to improve markets.

To test these justifications, let us first consider one of the challenges that information present to classical market theory. The economist George Akerlof suggests that a key cause of dysfunction in markets is « asymmetry of information ». Akerlof's *asymmetry* is a very powerful concept. Information about goods in the market, Akerlof would seem to be saying, needs to be shared, stable, and equally well understood by buyers and sellers (Akerlof, 1970). And this would appear to be an underlying assumption for Landes & Posner. What both seem to take for granted, however, is the notion of information *symmetry* and how it is achieved.



Kenneth Arrow points to some problems with this elegant idea. Introducing a paradox that has its origins in Plato's *Charmides*, Arrow points to the challenge of understanding information in some markets. Socrates took the case of a doctor and suggested that to assess a doctor's advice, we need the skills of a doctor. But if we have those skills, then we probably don't need the doctor's advice. (Here we have a nice case of G.B. Richardson's view that absolute symmetry of information kills rather than helps markets.) Symmetry of information, Arrow would seem to be saying, doesn't necessarily enlighten.

Arrow gets us out of Socrates' trap by noting that to help such markets function effectively society creates institutions. Institutions provide a warrant for market participants and the advice they offer. Thus, in Arrow's example, the doctor's advice or « information » isn't of the sort that if passed around, would create symmetry. Rather, it works by being endorsed by an array of widely accepted certificates and qualifications from universities, hospitals, and medical societies. In such cases, getting the market to work isn't a matter of making information symmetrical. Rather, it's a matter of creating authoritative institutions to vouch for inscrutable information (Arrow, 1963).

In his conclusion, Akerlof indirectly bridges this gap between his analysis and Arrow's by suggesting that the institutions that Arrow conjures up are in effect « brands ». « Doctors, lawyers, and barbers », he argues, « education and labor markets themselves have their own "brand names" ». How much, we might ask, do these « brand names » of Akerlof or institutions of Arrow's resemble ordinary trade marks? (Brands, and the subjective responses they invoke, would seem to me to complicate ideas of « symmetry » even further, but I won't go into that here.) To what extent do marks draw on other institutions in order to inform? And if they draw on institutions, must those institutions travel in order for the mark to travel? And, in order to play their roles, to what extent do marks and institutions require a certain level of stability in their use? Such questions seem to me to be missing from economic discussions of the mark, which tend to take it as a more-or-less stable and self-sufficient information package. In what follows, I propose if not to answer, then at least to raise some of these questions about trade marks through a brief historical overview of early pharmaceutical marks and their institutional context in France, the US, and the UK.

Médecin avec frontières

A historical and international enquiry allows us to consider marks moving across both space and time. The three countries offer themselves not only as major trade marking countries in the nineteenth century, but also as countries that moved goods into each others' markets, so helping to explore issues about stability between markets. And pharmaceutical and similar marks offer themselves as a means to explore Arrow's (and Socrates') example of the medical industry most directly. Pharmaceutical marks are particularly interesting because they help examine the connection that interests Arrow between science and technology (and mind and body) and between science and commerce. For the first pair, while medical products are often the outcome of scientific investigation, not easily assessed by the lay person, the lay person encounters the outcome of that research in technologies that very directly confront his or her body. We are forced, to some degree, to accept scientific judgements in a quite material way. For the second, pharmaceutical marks exist in an industry that, as Arrow makes clear must balance the *laissez faire* of the marketplace with the ethics of scientific practice. Moreover, medical goods exist in a

field of human anxiety that makes the market remarkably lucrative. The attempt to balance market power and ethics is never an easy one. In medicine, it can draw on quite different types of responses. The French doctor Pierre Garnier, for example, who travelled across California in the 1850s, was shocked, coming as he did from a country that had strong institutional controls over pharmaceuticals and medical marketing, to discover the concept of the Drug Store. This unfettered commercial outlet confirmed his image of « *l'Yankee, avec cet esprit industriel et mercantile qui le distingue et lui fait considérer tout comme un négoce, l'art de guérir comme autre chose* » (Garnier, 1854). Reciprocally today, some Americans are shocked at the nationalization of health services in France. In all, I suggest, medicine highlights the international variability of Arrow's institutions, and this variability in turn raises questions about the stability and symmetry-making potential of marks as they move, not only between buyers and sellers, but also between these structures.

The laws most directly necessary for understanding nineteenth century trade marking in these three countries are the French trade mark law of June 23, 1857. Trade mark law in France goes back to the law of 22 Germinal, year XI (1803), but the 1857 law revised consolidated earlier decisions and centralized registration. From that year onwards, marks were collected centrally and organized under 57 categories of goods (later expanded to 74). In the United Kingdom, national registration was not introduced until 1876, when marks were organized under 50 categories. (The five French categories for alcohol versus the single English one count for much of the difference.) United States federal trade mark law passed in 1870, and while it centralized registration in Washington DC, it did not produce a canonical category of marks. The person registering could more or less invent a suitable category or subcategory. Consequently, to take unexceptional years such as 1876 or 1900, in the first 959 marks were registered in 532 distinct categories; in the second, 1721 marks were registered in 1128 categories. In 1876, the 99 pharmaceutical marks in the registry came with some 42 self-identified categories and subcategories. (For purposes of comparison, in what follows, I have categorized US marks using the UK's 50 classes). These differences alone indicate how hard it might be to compare data and how speculative some of my figures will be—but equally they suggest how a mark registered in one country under one category might change categories and so significance when changing countries. In such a case, the notions of marks as informing, of information as achieving symmetry, and of institutions inducing stability all become a challenge.

The US law of 1870 presented other problems. Federal authority to pass such a law was assumed to come from the same section of the Constitution as the justification for copyrights and patents. In 1879, however, considering suits brought by French Champagne makers, the US Supreme Court decided that trade marks were not similar enough to copyrights and patents to be justified this way. For the next 25 years, federal law applied for the most part only to marks used in international trade until in 1905 federal law was passed again, justified this time under the « commerce clause » of the constitution.

Setting aside all the noise that these complications throw into the data, in the comparative figures for marking one thing stands out: the French had a large appetite for marks. By 1910, they had registered some 313,500. The UK, which started almost 20 years later, had 144,000, while the US, which started between the two, had only 80,000. Annual averages make the comparison clearer. France was registering almost 6,000 marks a year; the UK a little over 4,000; while the US a little under 2,000. (The US lag is not explained by the absence of federal law. Indeed,

wartime aside, France registered more marks than the US until the 1950s.) It is hazardous to assume much from the gross numbers of marks alone, and perhaps the only clear indication in these figures—but one important for assessing the stability of marks that Landes and Posner presume—is that France had a rather relaxed regime of registration, whereas the US federal system was tightly controlled. Britain's regime came closer to that of the US, yet it managed to register twice as many on average per year. It should be noted, too, that in the US during this period, most individual states had systems of registration, and people who only sold goods within that particular state might register within the state and so not appear in the federal books. A brief survey of some state registrations suggests that these state registrations would not close the gap between French and US national registrations significantly.

Institutional constraints

If, however, we turn from marks in general to pharmaceutical marks, the French penchant for marking looks, at least initially, rather different. From 1857 to 1870, 3.5% of French marques are for *produits pharmaceutiques*. In the UK, in 1876, the first year of registration, 6.6% of marks are for chemicals for medicine and pharmaceuticals, and the proportion is about the same a decade later. In the US, where there are no formal categories assigned, approximately 12% of marks registered in the first year could be labelled *pharmaceutiques*. This is not an aberrant figure. Indeed, in 1884, the proportion has risen to above 20%. (In states like California, the proportion can approach 40% of all marks.) Thus, though the US registered far fewer marks overall, proportionally they registered far more medical marks.

Were Americans, then, a particularly sickly people while the French comparatively robust? The difference is more likely attributable to institutional regimes, but, and this I think is missing from arguments like Landes and Posner's, not only trade mark regimes. Where marks *per se* were relatively loosely controlled in France, medicine and pharmaceuticals were tightly controlled. In the US, marks themselves were tightly controlled, whereas pharmaceuticals were almost without control. The UK, in contrast to both, had strong institutions in both areas. Indeed, in France and the UK it can be hard to separate these two—marks and medical regulation—and it is plausible to believe that legislators did not. The initial trade mark law of year XI was passed on 22 germinal. Law controlling pharmaceuticals had already passed on 21 germinal. (Both laws were revised in 1810.) In the UK, trade mark law was passed on August 13, 1875. The Food and Drugs Act, controlling pharmaceuticals, was passed on August 12. At the end of the century, the French author Comte Maillard de Marafy argued that pharmaceutical marks were not distinct from other marks. Yet evidently new trade mark regimes in France and the UK could to a significant degree take for granted alternative control of problematic categories such as pharmaceuticals, and assume that this category would be patrolled by other laws and other institutions (Maillard de Marafy, 1890). This was not the case in the US, where federal regulations for drugs passed only in 1906. But outside the US, the medical mark did not exist independent of medical institutions and regulations. (One other important point of distinction, too complex to go into in detail here, concerns the different forms of patenting available. Here, each country was distinct. The UK allowed certain patents, but the term was used more to denote a style of medicine and marketing than a legal category. In the US, the term came to denote medicines that were taxed by the federal government. While in France, the law of 21 Germinal,

year XI (1803) referred to above attempted to abandon the policy of *brevets* awarded under the *ancien régime* and to limit exploitation of proprietary remedies in part by allowing the state to buy and make public useful medicines.)

The significance of pharmaceutical regulations can perhaps also be seen by looking at the proportion of women involved in pharmaceuticals. In the US, women register, on average about 1.6 percents of all trade marks from 1870 to 1900. By contrast, in the lucrative area of pharmaceuticals, they register almost 5 percent of marks. Women, of course, took a great deal of the responsibility for family healthcare. For this reason, they tended to carry a certain degree of authority in this area, and in an area of commerce where degrees in either medicine or pharmacy carried surprisingly little weight, women could take advantage of their caring credibility. By contrast, in France of the first 1,000 medical marks, only 6 are women, at least two of whom are included by virtue of their widowhood. In France, the domain, for better and for worse, was tightly controlled and the established old guard, predominantly male, kept out newcomers by a variety of strategies, many of which were endorsed by medical and pharmaceutical institutions. The disproportionate registrations in the US, then, suggests less an egalitarian policy than that in an area that had little institutional control, barriers to entry were relatively low and women well positioned to surmount them.

On the border

The tight controls exerted in France suggests that neighbouring but uncontrolled categories might reveal a good deal about pharmaceuticals and indeed they seem to do. On the one hand, those who can't get into the most lucrative category, because this is highly patrolled, are likely to try to establish themselves in a neighbouring category and hope to receive some spillover trade. In particular, they might hope this way to receive some of the advantages of being associated with pharmaceuticals while avoiding the disadvantage of being controlled by pharmaceutical laws.

Water offers one such case. French *produits pharmaceutiques* included water, whereas in the UK (and so in my categorization of US marks as well) water was in a separate category. Hence in the UK we see copious water companies, led by Apollinaris, making numerous health claims, but keeping themselves out of the category of and therefore beyond the formal controls of medicine and pharmacy regimes. Here, too, French water companies, like Vichy and Bains de Mer, which could have registered as pharmaceuticals as they did in France (and as indeed, Bains de Mer does on one occasion in the UK), took advantage of the British system to register in the less restrictive category of water. In the US, by contrast, where there is no penalty to calling yourself a medicine, and much to gain, Vichy translates its traditional label with all the health-giving claim and boasts of its government control. It had extra incentive for doing this not only did companies such as the Congress & Empire Spring Water of Saratoga, happily designate their product medical, but others designated their US spring water as « Vichy ». In general, what appears to the consumer as a pharmaceutical may as a result of that claim be subject to state scrutiny. A similar product, however, can make all the same health-giving claims and generate all the same appeal but yet be subject to none of the scrutiny

Yet more notable is the French category of *liqueurs*. This contained many alcohol products which, while not precisely pharmaceutical, nonetheless often made quite explicit health claims. The economic value of this ambiguous category is evident in literature of the century. In Balzac's *César Birotteau* and *Illusions Perdues* or Maupassant's *Pierre & Jean*, among numerous others, proprietary liqueurs of one



sort or another are, when accompanied by suitable marketing, seen as means to fortunes. Here we find the restoratives, tonics, cordials, and elixirs—names that carried a promise of health-making, and which, as names, turn up with almost as great a frequency in the pharmaceutical marks as in the liqueurs, thus managing to smudge the boundary between the two. The sort of double-act that could be achieved in a peripheral category, without transgressing is evident, for example, in the product Vals Quinquina. The name establishes an association both with the water of Vals and with the rage for quinine-laced tonics of the period. Moreover, the label claims it is an « *apéritif tonique, reconstituant au vin de Grenache, recommandé contre les faiblesses d'estomac et le manque d'appétit* ». Having laid out its appeal both indirectly and directly in this way, it then adds a note by way of disclaimer: « *ce vin n'est pas un médicament* ».

The value of a fashionable *liqueur* is particularly evident in the courts where goods in this category were among the most contested names in French trade mark litigation in the nineteenth century. Probably no other mark of the period was involved in as many cases as the *Elixir de Chartreuse*, and close behind it are the Amers de Picon. The makers of both registered their mark as *liqueurs*. The extent of the litigation suggests that one value of these marks may have been that they sat usefully on the border, advertising health-giving properties but avoiding medical regulation.

The relationship between these two categories, one controlled and one not, and the ways in which they reflect their national context is perhaps best revealed by comparing the combination of the *liqueurs* and *produits pharmaceutiques* in France with the marks that claim to be one or the other (medicine or liquor) in the US. As noted above, the French *produits pharmaceutiques* alone is a far smaller category than pharmaceuticals in the US. Over the last 15 years of the nineteenth century, however, the combination of *liqueurs* and *produits pharmaceutiques* makes up on average 15.8 percent of French registrations, close to the figure of 16.7 percent for similar products in the US. (It is interesting to note that when the US introduced a voluntary list of categories in 1906 it followed the French and not the UK tradition by including the ambiguous category of liquor. The UK, by contrast, faced markers with the stark choice of either alcohols or medicines.)

As it travelled, Chartreuse maintained its opportunistic attitude to categories. In the UK, where there was no *liqueur* category, it was classified as « for medical use ». Given the choice of UK categories, alcohol or medicine, the latter was presumably thought preferable for the monks' image. When it arrived in the US, however, the monks chose the ambiguous category of « *liqueur or cordial* ». (Benedictine chose the same category.) When it ends up in a US court, however, Chartreuse is quick to defend itself as a « *tonic cordial... for the use of the monks and for those of ill health* ». In all, then, whereas in France it seems to have found it prudent to shun the patrolled category of pharmaceuticals, and in the UK to shun the category of alcohol, in the US it took advantage of some useful ambiguity and agilely lurked between the two. The reason for this is not hard to see. In France *liqueur* may not be unambiguous, but it is generally unashamed. Drinking alcohol is a respected practice, often assumed to be health-giving. In the US in the late nineteenth century, by contrast, the teetotal movement was growing and public sentiment was strongly

against alcohol, seen as ruinous to health and to society. The change in what was viewed as acceptable behaviour gave rise to the enormous popularity of drinks such as « bitters » (the market for Picon) and other elixirs. Many of these contained ferocious amounts of alcohol but in the US their consumption could be excused as a medicinal necessity. By implication, and in contrast to the Vals Quinquina label above, they can be thought of as carrying the message « *ce médicament n'est pas un vin* ». By taking to itself the class of « cordial » and later « tonic », Chartreuse managed to shun association with alcohol and embrace pharmaceuticals without damaging its appeal. The content inside and the mark on the outside a flacon of Chartreuse was the same as it moved from France to the UK and the US, yet it was in some ways a different product in each location. The sociologist Anthony Giddens talks about the disembedding and reembedding of information goods as they move among different social contexts, so it is not entirely surprising to something of this sort happening with marks (Giddens, 1990). The challenge is to conceive of a notion of « information symmetry » when the information of this sort is moving across the multiple borders of nations and institutions.

The real thing

In other cases, the content may change as the product weaves a path to the consumer among different regulations and changing fashions. In such cases, the one thing constant across time is the name, but then it becomes hard to accept that this can be a stable, symmetry-producing indicator of the product as trade mark theory would suggest. Here, as a final example, let me offer the case of Coca-Cola in its early years, a product much influenced by French practice and one that wove its way between product categories, regulatory systems, and IP regimes, changing its internal constitution as it did so, and yet clinging to the mark determinedly, and some how managing to persuade people there was a « real thing » at the core of this chameleon behaviour.

Coca-Cola was developed by John Pemberton, the product of a « Botanico-Medical College », whose medical curriculum was shaped by the anti-establishment herbalist Samuel Thomson. In business in Atlanta in the early days of US trade mark law, Pemberton with various partners made and trade marked products such as « Queen's Delight », « Compound Syrup of Globe Flower », as well as « Queen's Magic Hair Dye ». At this time, the market for pharmaceuticals was transformed by products containing cocaine. In France various solutions of cocaine in wine became fashionable in the 1860s and one, Vin Mariani, became particularly popular when it arrived in the US. In 1885, Pemberton produced and trade marked his own version of this wine and cocaine combination as Pemberton's « French Wine Coca », an « ideal nerve tonic health restorer ».

Eighteen eighty-five, however, was not the best year to do this. That year a popular vote brought prohibition to Atlanta. Alcohol was not only socially anathematized but legally outlawed. Pemberton judiciously withdrew the wine from his product and instead added the fashionable Kola or Cola nut (sometimes used in treatments of dipsomania), offering Coca-Cola as an alternative to alcohol. Though he had trade marks for several earlier products, including the French wine Coca, Pemberton did not register a trade mark for Coca-Cola at first. Instead he registered a « label ». Labels were an odd and controversial form of US intellectual property that, in essence, claimed a copyright for the design of a commercial label without necessarily linking it to a particular product or claiming a trade mark. Registering a label was one strategy producers could adopt if they wanted protection from imitators but

feared that their mark would not meet the usual standards for registration. This might have been Pemberton's opinion as the term « Coca-Cola » was at the time almost completely descriptive, and if deemed so by the registrar could not have been registered. Playing around contemporary trade mark restrictions, contemporary law in Atlanta, and contemporary social mores, then, all that Pemberton registered in 1887 was a label with the celebrated swash script so famous today.

If the wine strategy failed, so too did the label strategy, for in 1891, the US Supreme Court questioned the category of copyright for commercial labels. In consequence, label registrations was suspended and those already registered regarded with uncertainty. Doubts about labels may have pushed the company (Pemberton was now dead) to risk seeking a trade mark. Despite its descriptive nature and even though the name had turned up elsewhere (a Koka Kola mark was registered by a pharmacist in Nantes in 1889 as a vin tonique), the application was successful and Coca-Cola was registered in the US 1893 with suitable ambiguity as a nutrient or tonic beverage.

Within a decade, however, public sentiment that formerly turned against alcohol (Atlanta allowed that back in 1887) now turned against cocaine. Again the company moved to keep up with public opinion. Yet the mark was sufficiently popular that this time that the company understandably did not want to change the name. Adapting once again to public sentiment, the company removed the cocaine around 1903. And then adapting to changing law, the company again registered « Coca-Cola » as for a *tonic* beverage under the new trade mark law of 1905. This allowed the firm to continue the suggestion of medicinal properties in the drink but to avoid some of the restrictions on medicines that came with the following year's Pure Food and Drug Act, which is the law with which the US began federal regulation of its medical products sector. In all, some twenty years from its conception, Coca-Cola still sought a market that the company had once chased with a mix of wine and cocaine, then with a mix of cocaine and cola, and now with a mix of caffeine and cola. For the last two transformations, the name had remained the same. But where it was once a usefully informative description of the content, the exact same words now repudiated description. That was the only way it could claim to be a trade mark. Indeed, the mark, if informative at all, was now quite confusing about the content. Recalling its heritage label might almost have added « *ce vin n'est pas encore un vin* ». Magritte would have enjoyed the imagery.

It is perhaps appropriate that the new trade mark law of 1905 under which Coca-Cola registered was now justified under the « commerce clause » of the US Constitution. In the original US trade mark law, marks were justified as part of an intellectual property bundle that included patents and copyrights with marks. Together these were justified under the « progress clause » of the constitution, which granted federal protection in the name of the public interest. Denied this justification by the Supreme Court when it struck down the law in 1879, the new law of 1905 justified marks simply as an aspect of commerce. This may have helped sever the relationship between a particular product and the mark's obligation to be informatively stable. Consequently, as in Coca-Cola's case, the product could change while the mark remained the same. The label was primarily commercial property. What it signified was not a stable product, nor a stable relationship between mark and product, not even between a mark and the maker of a product, but, if anything, a relationship between the mark and the owner of the mark (a relationship that was ultimately confirmed in a case concerning the Arsenal Football Club logo). Looking back at the French laws of 1810, a critic wrote that « property rights triumphed over

the right to health » (Ramsay, 1994). In 1905, it might be appropriate to say that property rights triumphed over the right to information.

The period is distant, the data obscure, and the point a small one, but together they suggest to me that it is an oversimplification, and perhaps a problematic one, to assume, as discussions of and treaties for trade marks tend to do, that products and their marks move with consistency across space and time, that they maintain a stable relationship that keeps consumers informed, reduces search costs, and achieves symmetry. What the product is, how it is marked, and how the mark is read is to a significant degree dependent on where they are, what different kinds of controls rule over marking practices, and how those controls can simultaneously be invoked and yet avoided by firms that seek to live on the edge of regulatory regimes and thereby garner power without responsibility. If that is so, then the examples may also require us to rethink aspects of the notion of information symmetry and how it can be produced. For if we take trade marks as a critical means of producing symmetry in markets, they raise as many problems as they solve once they move across space and time. The power of the notion of information *asymmetry* is undeniable, but how we get from there to symmetry is not so clear.

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DÉBAT

Matthijs Van Besten : comment savez-vous que votre sélection n’est pas biaisée ?

Paul Duguid : Je suis très biaisé... Mais je suis le premier à faire ce travail, donc je peux me permettre de dire ce que je veux, c’est l’avantage ! Je plaisante. J’ai regardé à peu près la totalité des marques américaines déposées dans les premières années. Ensuite, j’ai regardé les marques médicales. En France, le problème est compliqué,

parce que les premiers registres sont manuscrits. En ce sens donc, l'échantillon est à peu près complet.

Hervé Dumez : Je voudrais soulever deux problèmes méthodologiques. Le premier : les catégories se définissent dans le temps – le « médical » n'a pas la même signification aujourd'hui qu'au XIXe siècle. Et l'histoire des marques est un point de vue extraordinairement intéressant pour regarder comment la signification de « médical » a évolué. Mais peut-on par contre, projeter la catégorie sur le passé ? Second point : l'accent est mis sur l'histoire des marques. Mais, le problème intellectuel est : qu'est-ce que le processus de symétrisation de l'information ? On parle tout le temps d'asymétries d'information, mais qu'est-ce que la symétrisation ? Or, pour comprendre ce processus, l'histoire des marques est-elle la bonne unité d'analyse ? Ou ne faut-il pas prendre un ensemble de dispositifs, assez lâche, difficile à définir, mais plus large que les marques ? C'est d'ailleurs dit dans le texte, puisqu'il est noté que la loi sur les marques en France doit être rapprochée des lois sur la salubrité et sur la contrefaçon.

Paul Duguid : On voit bien le problème de la catégorisation dans le dépôt d'une marque dans un pays et dans un autre. Dans un pays, la marque est déposée comme un alcool. Dans un autre pays où l'alcool est combattu, elle est déposée comme un produit médical. Il y a donc un jeu stratégique possible. Et, bien sûr, il y a le problème de l'évolution dans le temps, souligné dans la question. J'ai rencontré le problème lorsque j'ai été invité à parler du sujet devant une société médicale : les médecins d'aujourd'hui considèrent qu'il n'y a pas continuité, la médecine d'aujourd'hui n'a rien à voir avec celle du XIXe siècle, donc le sujet ne les concerne pas. Mais la continuité des catégories est un problème pour moi. Les frontières entre nourriture et médicament, entre alcool et médicament, bougent dans le temps. L'idée est que la marque a été officiellement déposée va de pair dans l'esprit du public avec celle d'une approbation du gouvernement. D'où, en France le SGD : Sans Garantie Du Gouvernement. Ce double problème des catégories, dans l'espace des catégories et dans le temps, est bien sûr central.

Nicola Mirc : Le marché médical n'est-il pas particulier dans la mesure où la marque s'adresse rarement directement au consommateur final ?

Paul Duguid : Il y a eu de grands combats pour savoir qui faisait ou devait faire les médicaments : un pharmacien, un docteur, quelqu'un d'autre ? Mais, dans certains pays, le lien entre la marque et le patient est direct. Il y a de la publicité pour les médicaments à la télévision. Elles se terminent par « ask your doctor », qui peut vouloir dire : demandez à votre docteur si ce médicament est pour vous, ou qui peut vouloir dire : faites pression sur votre docteur pour qu'il vous prescrive ce médicament.

Florence Duboc : Le travail historique est très intéressant pour comprendre ce qu'est cette notion, la trademark. Mais est-ce qu'elle nous aide à comprendre comment les entreprises utilisent aujourd'hui stratégiquement la notion de marque ? Ce qui se passe actuellement apparaît très différent de ce qui s'est passé. Comment faire ce lien entre passé et présent ?

Paul Duguid : Je pense effectivement que l'étude du passé sur les marques médicales n'éclaire pas la médecine d'aujourd'hui. Par contre, la question des biens informationnels peut sans doute être éclairée différemment en remontant dans le passé et en ne se contentant pas de regarder le présent. Ce qui apparaît aujourd'hui,

par exemple, les marques certifiées (commerce équitable) semblent assez proches de phénomènes anciens, comme l'apparition des A.O.C. en France. Les marques certifiées n'ont existé aux USA que depuis 1945. Ce phénomène m'intéresse parce que j'essaie de comprendre s'il est complémentaire à celui des marques déposées, ou s'il est une autre manière de régler le même problème de symétrisation de l'information.

L'une des premières marques déposées au Royaume-Uni est Bass. Ils voulaient déposer leur propre nuance de rouge. Il y a eu un problème juridique autour de la question : est-il possible d'identifier le rouge de Bass de manière à le protéger avec précision ? Bass a essayé de déposer le triangle à la place. On voit que la protection de la marque peut être utilisée très clairement pour protéger un monopole.

Anni Borzeix : Ton approche est très documentée, reposant sur l'utilisation des archives. Je m'interroge sur la performativité. Est-ce que tu estimes que tu étudies la manière dont les marques existent par un processus de performativité ?

Paul Duguid : Je ne suis pas historien de formation. Je me pose parfois la question : pourquoi est-ce que je fais les choses comme je les fais ? Les historiens de la propriété intellectuelle ont réellement évité la question des marques. Il y a quelque chose de terrifiant à se trouver devant cette montagne de matériau et se dire : est-ce que je peux en sortir quelque chose d'intéressant ? Je me raccroche à une chose : je pense qu'il y a derrière la démarche d'Akerlof beaucoup de choses à analyser et à comprendre ■



Henri Rousseau,
La bougie rose, (1910)