

or with foreign nations. It avers merely that by means of the acts alleged they had monopolized the manufacture and sale of distilled spirits, without stating that in so doing they had monopolized trade and commerce in distilled spirits among the several states or with foreign nations. It is true that the indictment charges that the defendants have done certain things with intent to monopolize the traffic in distilled spirits among the several states, and that they have increased the usual prices at which distilled spirits were sold in Massachusetts, and have prevented and counteracted the effect of free competition in such traffic in Massachusetts. But none of these things are singly made offenses by the statute. The indictment in this particular is clearly insufficient according to the elementary rules of criminal pleading, and charges no offense within the letter or spirit of the second section of the statute.

Other questions presented upon this indictment were argued by counsel, and among them the important questions whether the acts charged constitute an unlawful monopoly, within the meaning of the statute; and, if they do, whether congress has the constitutional authority to declare such acts to be unlawful and criminal, and whether the things charged against the defendants were not rather the doings of the corporation than of its officers. In regard to these questions it is only necessary to remark that they seem to be of such a character as to require that they should not be decided finally against the government by the trial court, but should be reserved for the determination of the appellate court, when presented upon an indictment not otherwise insufficient in law. Indictment quashed. Judgment for the defendants.

---

CUERVO v. JACOB HENKELL Co. *et al.*

(Circuit Court, S. D. New York. March 14, 1892.)

1. TRADE-MARK—INFRINGEMENT—INJUNCTION.

A cigar manufacturer, to protect his trade-mark, may have an injunction restraining a box maker from furnishing boxes with those trade-marks to other cigar manufacturers, and against all who knowingly combine for that purpose.

2. SAME—DEFENSES—INFRINGEMENT BY OTHERS.

It is no defense that Spanish labels similar to such trade-mark had been used by various manufacturers for many years, nor that imitations of the trade-marks were sold or used, in the absence of evidence that it was with the consent or acquiescence of the owner.

In Equity. Bill by G. Garcia Cuervo against the Jacob Henkell Company and others for infringement of trade-mark. Heard on motion for a preliminary injunction. Granted.

*Jones & Govin*, for complainant. *Wise & Lichtenstein*, for defendants.

LACOMBE, Circuit Judge. There is no dispute as to the facts of this case. The complainant, a manufacturer of cigars, is concededly the owner of a trade-mark, which as an entirety is embodied in four sepa-

rate labels placed inside and outside the boxes containing his cigars. The goods thus marked and put up have obtained a wide celebrity, and for the last 25 years have had an extensive sale in this and other states of the Union. The defendants do not make or deal in cigars. They manufacture cigar boxes, which they sell to cigar makers. They also procure from lithographers labels which are almost an exact reproduction of those used by the complainant, even the signature being copied therein. That boxes, thus labeled, are so close an imitation of the packages in which complainant sells his goods, that an ordinarily careful purchaser would be deceived thereby, is not controverted. Not only do the defendants affix to their boxes the three labels which are placed thereon before packing, but with each box they also sell to their customers a fourth label, which can only be placed on the box, as complainant places it, after the box is filled and closed. Were there any conflict as to the intent of the defendants, it would be difficult to escape the conviction that they prepare these boxes for the express purpose of enabling their customers to foist upon the public goods not of complainant's manufacture, representing them to be genuine. But there is no conflict; defendants concede that they know for what purpose their labeled boxes are to be used, and that they make and sell them for that purpose. In defense it is urged that it has been for many years the custom of the cigar trade in this country to use what are known as "Spanish labels;" that labels like those complained of in this suit have been on open sale at various lithographers, and could be obtained by any one; and that nearly all the cigar box manufacturers in this city, as well as in other cities in this country, have made and sold boxes bearing labels similar to those complained of in this suit. As to the imitation of labels of other manufacturers,—“Spanish labels” generally, as defendants call them,—that is wholly immaterial. Complainant is not to be deprived of his trade-mark because other owners of other trade-marks suffer infringement without objection; and as to other imitations of his own trade-mark there is not a particle of evidence to show that these were made or sold with his consent or acquiescence. This defense has been so frequently and forcibly condemned by authority that further discussion is profitless. *Taylor v. Carpenter*, 3 Story, 458; 2 Woodb. & M. 7; Browné, Trade-Marks, § 685, and cases cited. Nor is there anything to the suggestion that injunction will not lie against defendants, because they do not themselves make, pack, or sell the fraudulent cigars. No doubt they may make the boxes without objection. There is no trade-mark, so far as appears, in the style, size, or shape of a cigar box. But they do much more. They procure labels counterfeiting the complainant's, and assemble these labels with their boxes, with the obvious purpose of enabling others, by the use of the labels, to palm off their goods upon the public as the goods of the complainant. Complainant is clearly entitled to an injunction against all who knowingly combine together to accomplish that purpose. *De Kuyper v. Witteman*, 23 Fed. Rep. 871; *Hostetter Co. v. Brueggeman-Reinert Distilling Co.*, 46 Fed. Rep. 188. Motion granted.

SCRIBNER v. CLARK *et al.*

(Circuit Court, N. D. Illinois. April 9, 1888.)

## 1. COPYRIGHT—INFRINGEMENT—TITLE OF COMPLAINANT.

In a suit for the infringement of a copyright, where it is shown that the copyright was taken in the name of the complaining publisher as "proprietor," defendant cannot object that the author was a married woman, and that her husband was entitled to the fruits of her literary labor; for it will be presumed that the legal title of the author was properly vested in complainant.

## 2. SAME.

Complainant's title is sufficiently made out to enable him to maintain the suit where it is shown that he took the copyright in the name under which he did business, the name of a firm to all of whose rights he had succeeded on its dissolution.

## 3. SAME—MEASURE OF DAMAGES.

Where the infringing publication uses only a part of the matter of the original, and is issued in a different and much cheaper form, the measure of damages is the amount of profits realized by the infringer, and not the amount of profits that would have been realized to the copyright owner by the sale of an equal number of copies of the copyright edition.

## 4. SAME—DECREE—FORFEITURE.

Though the bill prays the forfeiture of all the infringing books, and the plates used in their production, it is unnecessary to grant any other relief than damages, where it is shown that the infringer's place of business, with all the books and plates in question, has been destroyed by fire.

In Equity. Bill by Charles Scribner against Belford Clark & Co. for infringement of copyright. Decree for complainant. Affirmed in 12 Sup. Ct. Rep. 734.

*W. C. Larned*, for complainant.

*Hutchinson & Partridge*, for defendants.

BLODGETT, District Judge. This is a bill in equity charging the defendants with infringement of a copyright owned by the complainant of a publication entitled, "Common Sense in the Household: a Manual of Practical Housekeeping. By Marian Harland." The case was referred to one of the masters of the court to take proofs and report findings upon the question of infringement, and he has reported that the defendants, by the publication and sale of two books set out and described in the bill of complaint, one under the title of "How to Cook," and the other under the title of "Economy Cookbook," have infringed upon the complainant's copyright by incorporating into their said publication something over 50 pages of the matter of complainant's book, as well as substantially following the arrangement of subjects and headings. *Myers v. Callaghan*, 10 Biss. 139, 5 Fed. Rep. 726. I have carefully examined the proof upon which the master bases his findings, and am satisfied that the finding was fully justified by the testimony. The case is now before me on defendants' exceptions to the master's findings, and on complainant's motion for a decree in pursuance of the master's report. It was objected at the hearing that the complainant could not recover in this case, because the proof shows that Mrs. Terhune, the author of this book, whose *nom de plume* is Marian Harland, was a married