

in no instance does it appear that he has put up his goods, or offered them for sale, in any form of package which directly or indirectly describes them otherwise than as the goods of "Wm. A. Rogers." There seems very little doubt that he has availed of the similarity of name, which naturally tends to confound his goods with those of the original Rogers, who built up a valuable trade in plated ware years before defendant went into the business. But, so far as the mere name produces such confusion, plaintiff has no cause of complaint. It is a reasonable inference from all the testimony that defendant expected that unscrupulous dealers would offer his goods as those of one or other of the original manufacturers, whose name was well known to, and popular with, consumers. The two advertisements reproduced in complainant's brief are most persuasive to that conclusion. But both of those advertisements contain his own name in prominent type, and the statements, "Our goods are 'Rogers' goods," and "The genuine Rogers goods, as used by U. S. government," etc., are technically accurate. There are some points of resemblance between this case and those of *Baker v. Sanders*, 26 C. C. A. 220, 80 Fed. 889, and *Hoff v. Tarrant*, 22 C. C. A. 644, 76 Fed. 959, but there is not enough to warrant an injunction, so long as defendant's goods are packed and labeled with his own name, Wm. A. Rogers, not collocated with other words in such manner as to induce any greater confusion in the minds of purchasers than would naturally be produced by the use of such name. Motion denied.

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AIR-BRUSH MFG. CO. v. THAYER et al.

(Circuit Court, N. D. Illinois, N. D. April 14, 1897.)

1. TRADE-MARKS—DESCRIPTIVE NAMES—"AIR BRUSH."

Whether or not a given word is a trade-mark is a question of fact. The evidence does not show the words "air brush" to be used as a mark of origin by complainant. These words are apparently used descriptively by both parties.

2. FEDERAL TRADE-MARK STATUTE.

The case rests on the federal statute; but defendants have not affixed complainant's registered mark to merchandise of substantially the same descriptive properties as that described in the registration.

This was a suit in equity by the Air-Brush Manufacturing Company against Thayer and others for alleged infringement of a trade-mark.

L. L. Morrison, for complainant.

Barton & Brown, for defendants.

SHOWALTER, Circuit Judge. I do not find from the evidence that complainant in fact uses the words "air brush" as a mark of origin. Complainant calls the patented article made by it an "air brush." The name of the complainant company, "Air-Brush Manufacturing Company," is stamped on said article; but the mark "air brush," as a sign of origin, is not there. In the specification of patent No. 310,754 the patentee says: "My invention relates to that class of instruments or machines designated as 'air brushes,' for the distribution of pigments by means of an air blast to produce portraits, land-

scapes, etc." Complainant preferred the name "air brush" to the name "paint distributor" or "atomizer." But the term "air brush," as complainant uses it, is the name of the article, and it is plainly descriptive, and not arbitrarily selected as a mark of origin. Any licensee of complainant under the patent referred to would speak of his product descriptively as an "air brush," and when the patent expires the public may make the article, and call it by that name. Not only so, but the name is generic. It is so used in the patent office, and was so used at the Columbian Exposition. In the patent, as above quoted, it is declared that the word "air brush" indicates a class of articles. Moreover, the defendants, while they call the particular air brush made by them the "fountain" air brush, do not put said mark on the article. What they make is entirely different in appearance from the article made by complainant. There is no mark on defendants' article which could possibly signify that it was made by complainant. The parties here are citizens of Illinois. This court entertains jurisdiction over the case, therefore, as being strictly a trade-mark case. But these defendants have not affixed complainant's registered mark to merchandise of substantially the same descriptive properties as that described in the registration, within the meaning of section 7 of the national trade-mark statute (21 Stat. 502). Even if a case of unfair competition were shown, the complainant would have no right to litigate in this court, since the parties are citizens of Illinois. The bill is therefore dismissed for want of equity.

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SPRAGUE ELECTRIC RAILWAY & MOTOR CO. v. UNION RY.  
CO. et al.

(Circuit Court, S. D. New York. January 24, 1898.)

PATENTS—NOVELTY AND INVENTION—INFRINGEMENT—ELECTRIC MOTORS.

The Sprague patent, No. 324,892, for an electric railway motor, consisting of a field magnet, journaled, at one end, on the axle of the driving wheels, and hung, at the other, on a spring from the truck or car body, and carrying the armature shaft upon its pole pieces parallel with the shaft of the driving wheels, and connected to them by gearing, *held* valid as to claims 2, 6, and 9; and said claims *held* infringed by structures differing in some respects from those of the patent, and containing improvements thereon, but having all these parts working together in the same relation, for the same purpose, and producing the same result.

This was a suit in equity by the Sprague Electric Railway & Motor Company against the Union Railway Company and others for alleged infringement of a patent.

Frederic H. Betts, for plaintiff.

Charles E. Mitchell and Henry B. Brownell, for defendants.

WHEELER, District Judge. This suit is brought upon patent No. 324,892, dated August 25, 1885, and granted to Frank J. Sprague, for an electric railway motor consisting of a field magnet, journaled on the axle of the driving wheels at one end, and hung upon a spring from the truck or the car body, at the other, and carrying the armature