

"paintings in oil or water colors * * * not otherwise specifically provided for, * * * and not made wholly or in part by stenciling or other mechanical process." The decision of the board of appraisers is therefore affirmed.

HUNTINGTON DRY-PULVERIZER CO. et al. v. ALPHA PORTLAND CEMENT CO. et al.

(Circuit Court, D. New Jersey. January 9, 1899.)

PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Defendant had in use in its business 21 machines of a kind which had been held by the court, in a suit against another defendant, to infringe complainant's patent, an appeal in which case was pending. Defendant had large orders on hand, requiring the constant use of the machines, and had some 200 persons in its employ. Complainant was unable to furnish its patented machines to replace those used by defendant, except gradually, as they could be built; and their cost, if so supplied, involved the expenditure of a large sum. *Held*, it appearing that defendant was financially responsible for any profits and damages recovered by complainant, that a preliminary injunction against the defendant's use of the infringing machines would not be granted, nor would defendant be required, as a condition, to replace such machines by those of complainant as rapidly as the latter could be built.¹

This is a suit in equity by the Huntington Dry-Pulverizer Company and others against the Alpha Portland Cement Company and others for the infringement of the Huntington patent, No. 277,134, for a crushing mill. On motion for preliminary injunction.

Frederick S. Duncan, for complainants.

Charles Howson and Frederick S. Fish, for defendants.

KIRKPATRICK, District Judge. In the suit of Huntington Dry-Pulverizer Co. v. Whittaker Cement Co. (heard at this circuit) 89 Fed. 323, the court decreed the validity of the patent which is the foundation of the present complaint, and enjoined the defendants therein from the manufacture, sale, and use of the machines declared to be infringing. An appeal has been taken from this decree, which is still pending, and will no doubt be brought to hearing at the next March term of the circuit court of appeals. The defendants herein are users of some 21 of the infringing machines, and with them are engaged in the manufacture of Portland cement, extensively used in the trade, and for which they have large orders for future delivery. They are employing in and about their said business at this time some 200 or more persons. Financially they are said to be perfectly responsible, and able to answer in damages for any award which may be made against them. It is charged by the defendants, and practically admitted by the complainants, that the complainants have not been able at any time prior to the filing of their bill herein to furnish the defendants with their patented machines, nor can they do so now. This is partly owing to the com-

¹ As to infringement, generally, see note to Consolidated Piedmont Cable Co. v. Pacific Cable Ry. Co., 3 C. C. A. 572.

plainants' failure to manufacture such machines for general sale, and partly on account of the provisions of contracts entered into between them and persons not parties to the record respecting a license to use said machines. The latter obstacle, the complainants insisted, had since the filing of the bill been removed, but the former remains in full force. To award an injunction against the defendants at this time would result in throwing out of employment the great number of persons above mentioned, thereby causing much suffering and distress, would bring to a stop a useful industry, prevent the performance of contracts, and cause a disarrangement of business beyond that which is under the direct control of the defendants. The complainants at the hearing recognized the force of these objections, and suggested as a measure of relief the proposition that they would build for the defendants, upon the receipt of a firm order from them, enough machines of complainants' device to take the place of the infringing machines now used by them, and said that they would consent that the injunction order should be operative against the infringing machines only when they should furnish machines of complainants' device capable of doing the work now performed by those now in use, and that, as the work of each infringing machine was provided for by their patented device, such supplanted machine should fall within the scope of the order, and its further use discontinued. The estimated cost of these Huntington machines amounts to a very large sum of money. It does not appear within what time they could be built and made ready for use, nor whether they could be advantageously erected upon the defendants' premises. Apart from the profit which would accrue to the complainants from the sale of their machines, I can find no substantial benefit to the complainants in granting the prayer of their bill. When we consider that the enforcement of the complainants' naked right to an injunction is not necessary to enable them to recover the profits and damages to which they are entitled as against the defendants, and weigh, as we are bound to do, the advantages accruing to the complainants with the injuries (for which there may be no legal remedy) which would result to the defendants, we are of the opinion that, under the circumstances of this case as disclosed in the moving papers, a preliminary injunction order ought not to issue against the defendants as users of the infringing machines. The rule to show cause will be discharged.

**SAXLEHNER v. EISNER & MENDELSON CO. SAME v. SIEGEL-COOPER
CO. SAME v. GIES. SAME v. MARQUET.**

(Circuit Court of Appeals, Second Circuit. January 5, 1899.)

Nos. 86-89.

TRADE MARKS AND LABELS—ABANDONMENT.

The owner of wells of bitter water in Hungary, which water was sold in Europe under the name of "Hunyadi Janos," by contract gave to a corporation the exclusive right to sell the same in this country, at the same time adopting a red and blue label for the bottles, containing a notice, signed by himself, that imitations would be the subject of legal proceedings by the corporation. For several years the company sold large quantities here, until the name had in fact become an established trade mark of the water, and the red and blue labels its distinctive trade dress. For some eight or ten years prior to the commencement of the present suit, however, other Hungarian waters had been sold in this country, the importers using the word "Hunyadi" as a part of the name, and in some cases under red and blue labels closely imitating those of the Hunyadi Janos. Two suits were brought by the company to enjoin the use of the name "Hunyadi," which were discontinued, and the importation of competing waters, all sold under the general name of "Hunyadi," has since that time very largely increased. *Held*, that by the failure of the owner of the wells to take action, either by himself or through the corporation, for the protection of his rights, he abandoned all exclusive claim to the use in the United States either of the trade name or the trade label.¹

Appeal from the Circuit Court of the United States for the Southern District of New York.

These were four suits in equity, brought by Emilie Saxlehner against the Eisner & Mendelson Company, the Siegel-Cooper Company, Rudolph Gies, and Louis Marquet, to enjoin an improper use of trade marks and labels in connection with certain Hungarian mineral waters. From the decree of the circuit court in each case (88 Fed. 61), complainant appeals, and in the first-named case defendant also appeals.

Of these four suits, the first is one against a wholesale dealer in imported Hungarian mineral waters, which it offers for sale as "Hunyadi Matyas," and as "Hunyadi Laszlo," and puts up with wrappings and labels simulating complainant's. The other three suits are against retail dealers. The complainant sought to enjoin the use of the name "Hunyadi," with or without prefix, and also to enjoin the use of any label simulating the well-known red and blue label of "Hunyadi Janos" water, which water complainant owns and controls. The circuit court, at final hearing, upon pleadings and proofs, dismissed the bills as to the name "Hunyadi." It sustained them as to the label, except that it held that the use by defendants of a certain additional label, known as the "seal label," sufficiently differentiated the goods offered for sale. The complainant has appealed in all four cases, and the defendant in the first case has appealed from so much of the decree as finds that the complainant is entitled to the exclusive use of the red and blue label, and that defendant should account for sales under that label prior to the introduction of the "seal label."

Antonio Knauth and Joseph H. Choate, for complainant.
Edmund Wetmore, for defendants.

Before WALLACE and LACOMBE, Circuit Judges.

¹ As to laches as a defense, see note to Taylor v. Sawyer Spindle Co., 22 C. C. A. 211.