

Trade Marks—Registration—Right to Use—Infringement.

A dealer in dairy products who registers name, brand or trade mark with State Department of Agriculture, Labor and Industry, is entitled to exclusive use of same. It is an infringement for other dealers in dairy products to use same name, brand or trade mark, even though combined with other words, in conduct of business dealing in similar merchandise.

B. F. Thraikill, Esq.,
Chief of Dairy Division,
Department of Agriculture,
Helena, Montana.

December 7, 1928.

My dear Mr. Thraikill:

Your letter, enclosing letter from the Thomas F. Farley Co., of Missoula, Montana, containing the following, has been received:

“We are enclosing herewith a letter from the Thomas F.

Farley Co., of Missoula, asking us if it can use the enclosed label for its butter, which is the 'Arcade Farley Co.'

"Sometime ago the Missoula Creamery registered the brand 'Arcade' in this office, and we would like to know if the 'Arcade Farley' brand would conflict with the 'Arcade' brand."

Section 2629, Chapter 35, Laws of Montana of 1923, governing dairy trade marks is as follows:

"When any dealer in dairy products wishes to retain for himself a name, brand or trade mark, the same may be registered with the State Department of Agriculture, Labor and Industry, and on no account shall that name, brand or trade mark be used by another, unless duly consigned, given or sold to him by the originator or the one to whom it belongs."

Since the Missoula Creamery Company has registered the "Arcade" brand as a trade mark for its products under this section it has a right to the same, and it is my opinion that the use of the "Arcade Farley Company" as a trade mark for the latter's products, which are of similar character, would conflict with it and would be held by the courts to be an infringement. But the question is one for the courts.

In *Esselstyne v. Holmes*, 42 Mont. 507, our Supreme Court said:

"It is not necessary that the designation used by the defendant should be identical with that used by the plaintiff. As was said by Mr. Justice Bradley, in *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. 94: 'Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances. We may say generally that a similarity which would be likely to deceive or mislead any ordinary unsuspecting customer is obnoxious to the law'."

"A trade mark consisting of a name or word is infringed by use in any form or style of print, either with or without additions." (38 Cyc. 743).

In the case of *Weinstock, Lubin & Co. v. Marks*, 42 Pac. 142, the plaintiff used the trade mark or store name of "Mechanic's Store" and the defendant was enjoined from using to designate his store the name "Mechanical Store," and in the *Dodge Stationery Co. v. Dodge*, 78 Pac. 879, the court said:

"The names 'The Dodge Stationery Company', and the 'J. S. Dodge Company' when taking into consideration the fact that the business conducted by the latter is the same as that conducted by the former, are sufficiently similar to warrant an injunction restraining the latter from conducting its business under the name adopted by it."

Very truly yours,
L. A. FOOT,
Attorney General.