

**Shifting Patterns in Marks and Registration: France, the United States and United Kingdom, 1870-1970**

*CGR Working Paper 21 (August 2007)*

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**Abstract**

This paper looks at trademarks and brands, beyond the conventional interests of marketing and law, as a way to explaining the evolution of international business and economies in general. It shows that the perspective defended by many scholars such as Chandler (1990), Wilkins (1991, 1994) and Koehn' (2001), about the Anglo-Saxon countries, and in particular the United States, leading the transition to modern trade-marks is narrow in its focus. Instead of the United States standing out as historically on the leading edge of innovation in the law and practice of trade marking, it appears from several directions to have been on the trailing edge. France and Britain have a more enduring interest in trademarking. The paper also looks at one particular subset of trade mark registration data – non durable consumer goods. These, and in particular food, are the dominant sectors in the three countries in terms of trademarking, reflecting the character of the sectors where imagery associated with the products is so central in competition. The paper relies on original data from three countries, France, the United Kingdom and the United States, in particular trade mark registrations, and the analysis spans for a period of one hundred years period 1870-1970.

**Keywords:** trade marks, brands, international business history, intellectual property rights, trademark law

**JEL Classification:** F14, F31

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Trademarks as we know them today are essentially a nineteenth-century creation. Undoubtedly marks have antecedents stretching back millennia, but as nineteenth-century commentators (Upton, 1860), legal historians (Schechter 1925; Sherman and Bently 1999), and business historians (Chandler 1990; Wilkins 1992) generally agree, it is only in the nineteenth century that a defensible property right in marks sufficient for the task of modern marketing emerges. Most commentators also agree that the affirmation of this property right resulted in part from legal decisions made in courts and in part from statutory law, though they differ on the significance of each. The contribution of registration is less usually noted. In an argument that should gain a sympathetic hearing from institutional economists, however, the legal historians Sherman and Bently (1999: 72) have recently helped to dismiss the conventional view that registration is of ‘little conceptual interest’, insisting rather, on ‘the important role played by registration in determining the scope of intangible property’ more generally. Indeed, it is widely assumed that the United Kingdom had no trade mark law *per se* until it instituted a system of registration in 1876.

In other areas of intellectual property, work on registrations, from the analyses of the early Stationers' Register for copyright (Arber 1950) to more recent analyses of patent registrations (Moser 2005; Khan & Sokoloff 2001), has been highly productive. Among other things, such studies have yielded insightful analyses of intellectual property related activities within individual countries and of the differences in these activities between countries (Khan 2005). To date, despite their importance to modern business practices, nothing of the kind has been done for trade marks. This omission may reflect a more general neglect of trade marks in histories of intellectual property. Yet for business

historians, as scholars since Chandler (1990) have recognized, it is impossible to understand large tranches of modern business activity without acknowledging the evolving contribution of trade marks and modern branding. And we would add that it seems difficult to understand the evolution of trade marks and branding practices without having some grasp of the patterns of registrations accompanying that evolution. Indeed, as we argue below, ignorance of cumulative registration data may have led analysts to underestimate major forces in the development of trade marking.

It is the aim of this chapter to begin a very preliminary analysis of registration data and so doing to indicate the potential (and the pitfalls) they hold in advancing the history of marks and brands. While we accept that in the long term, much of the interest in the various national and international registers will come from detailed analysis (see, for example, Helmers and Rogers, this volume), it is our goal in this chapter to present an overview, painting with a broad statistical brush a comparative picture of registration in three countries important to the history of marks, France, the United States, and the United Kingdom.

Our focus is primarily business-historical. The information collated and published by trademark agencies provides a vast yet intricate record of the ways in which firms invented, protected, and deployed their trade marks to find customers, to open markets, to gain competitive advantage, and to protect that advantage once gained. Thus the registration data give insight not merely into trade marking itself, but also into the development of national and international competitiveness in branded goods and services. Beyond these business-historical matters, the registration data undoubtedly offer an important resource for understanding intellectual property regimes more generally. This topic, however, lies beyond the ambition of this chapter.

Of the three countries chosen, France needs little justification. Starting in 1803, it is perhaps the earliest country to have instituted a national (as opposed to a guild-based) system of trade mark registration. It was only with a law of 1857, as we note below however, that reliable registration data began to emerge. France remained, as we shall see, the dominant register of marks for another century or more as well as a major influence on national and transnational marking practices around the world. By contrast,

the United States only began registering in 1870 and the United Kingdom in 1876.<sup>1</sup> While these two are to a significant degree laggards, the size of their economies and the range of their marking as well as the accessibility and relative reliability of their data make them a worthy foils for historical analysis of the French data.<sup>2</sup>

Before advancing, we need to offer a caution. Neglect of trade mark history aside, the registers have no doubt been ignored because of their unwieldy and often impenetrable nature. The data present anyone attempting to use them with daunting challenges. The numbers can be very large, the details very small. By the end of the nineteenth century, France for example, was regularly registering more than 10,000 marks each year. Fifty years later, it was registering 20,000 marks a year. So too, a little while after, was the United States. Much of this data, however, comprises individual and frequently one-off registrations by small firms whose ambitions outstripped their capabilities and who, for one reason or another, disappear from historical records after this brief appearance. The gross numbers, the minutiae they are built up from, and the evanescence of the vast majority of registrants can easily overwhelm the historian. Indeed, occasionally they seem to have overwhelmed the registrars themselves. The latter grappled continuously with intricate questions concerning who could register and what could be registered. In the process, and faced with unexpected deluges of registrations, they changed their practices almost without explanation and abandoned certain kinds of reporting without apology. The French, for example, published reliable distillations of their data until 1906, after which these useful digests disappear. The British, for their part, floundered initially under the pent up demand for marks. They did produce apparently robust reports on registration quite regularly, but these turn out to be hard to reconcile with one another. The US Patent and Trademark Office (USPTO), for its part, took years to introduce a reliable system of categorization for marks, so for a long time it

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<sup>1</sup> It has been suggested (Rosen 2008) that the United States may have begun registering some marks before 1870. As noted below, some US states had begun registering marks in the decade before 1870.

<sup>2</sup> It was noted in 1862 that trademark registration was functioning in Austria, Bavaria, Belgium, France, Hanover, the Netherlands, Portugal, Prussia, Russia, Sardinia, Saxony, Spain, Sweden, Norway, and Württemberg (Select Committee on Trademarks 1882: paragraph 72).

produced fairly reliable gross numbers (though these too can be hard to reconcile with one another) but very little by way of further analysis. As a consequence, in this preliminary look at these data, we have not always managed to resolve or even explain many discrepancies. Thus we view the data reported here as usefully illustrative or indicative of trends, but far from dispositive or probative.<sup>3</sup>

Given the scale of the data and the growing number of national and international systems that developed almost simultaneously, this chapter is of necessity limited to an overview the development of the three national systems mentioned. With some glances back and forward, we look primarily at the period years from 1860 to 1970, arguing that within this period a multilateral system of trade mark registration developed that shaped the national and international systems in place today. We begin with a quick look at the relevant law for each country. From there, we give an account of the annual totals for each country over the period under review. The gross numbers are limited in what they can show. They nonetheless offer the chance to compare different countries and their appetite for marks with, as we shall see some unexpected results.

Next, to get a little closer to the data, we look at one particular subset of the whole, the registrations for non-durable consumer goods in a set of benchmark years. We have picked these sectors because, as we shall show, they were dominant in each of these three countries as they embarked on registration. These are also sectors where branding and imagery is central in competition (Lopes and Casson, 2007). While its dominance diminished over time, this sector has remained highly important.<sup>4</sup> Very briefly, we turn to

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<sup>3</sup> Our primary sources for registration data are as follows. In France, the *Bulletin Officiel de la Propriété Industrielle*. This was published from 1884 onwards and as noted above provided reliable digests of data until 1906. For annual French data, In the United Kingdom, *Annual Reports of the Patent Office* and the *Trade Marks Journal*. And in the United States, the *Official Gazette of the US Patent Office* and related indexes published in the Patent and Trade-Mark Office's annual reports. Other sources will be indicated where relevant. Where these publications did not produce digests, we have counted individual marks. As noted above, it has often been impossible to reconcile inconsistencies between our counts and those of the various official publications.

<sup>4</sup> One reason we look at the dominant sector is that dominant players tend to get their way when law is made. To consider not only the effects that law has on business but also that business has on law, it is

look at some international aspects of national trade mark registers before finally concluding with some comments on what our brief analysis shows and what further investigation might reveal.

### **An overview of the law**

For the Anglo-Saxon tradition that shaped the law of the United States and the United Kingdom, rights in names were restricted until the nineteenth century by the limitations of the Statute of Monopolies [1624], cases such as *Blanchard v Hill* [1742], and the decline of guilds. Systems of marking that did endure from earlier periods, such as the cutlers' (Higgins & Tweedale 1996a) and the silversmiths', are best understood as part of vestigial guild systems that declined in the United Kingdom from the seventeenth century. Thus it is not surprising that in France, where the guild system survived until the revolution dissolved them in 1791, the tradition of protecting marked goods had greater continuity. So strong was that tradition that many rights dissolved in 1791 were reinstated quite quickly: cutlers and jewellers regained many of their rights in years VI and VII [1797-99], while the law of 22 germinal year XI [1803] attacked the counterfeiting and usurpation of marks of artisans more generally. This law made registration with the local *Tribunal de Commerce* a precondition for prosecution, and thus established a tradition of regional registration in France. A law of April 24, 1824 extended protection from artisans to the names of businesses and places as well. Finally, French trade mark law underwent a thorough revision with the law of June 23, 1857. Among other things, the new law sought the protection of French-owned names in foreign countries by establishing a principle of reciprocity to be guaranteed by treaty. Consequently, France embarked on a round of bilateral agreements, beginning with Russia in 1857, and taking in the United Kingdom in 1860 and the United States in 1869, so helping precipitate related legislation past soon after in the last two countries. Following the law of 1857, registration in France was still organized regionally, but a summary of all registrations was gathered annually

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useful to know what were the dominant businesses. If we take North's (1981) image that if businesses are the players, then national institutions, such as trade mark regimes, are the referees, we need to recognize that dominant players often 'play the referee' with great success.

and made available for inspection in Paris. Here, too, a register for foreign marks was opened in 1860 at the Tribunal de Commerce of the Seine. It was, however, only in 1884, with the launch of the *Bulletin Officiel de la Propriété Industrielle*, that the registrations and registration data were published.<sup>5</sup> The law of 1857 proved as stable as it was influential. As one commentary argues, ‘although modified in 1874, 1890, and 1920, it was a law destined to last 100 years’ (Beltran, Chauveau, & Galvez-Behar, 2001: 91).

In the United States, trade mark law first developed in individual states. New York led in 1845.<sup>6</sup> But it was only with a California law of 1863 that state registration began.<sup>7</sup> In 1870 federal trade mark law passed, bringing with it federal registration.<sup>8</sup> This was overseen by the US Patent Office, in Washington, DC, which published registered marks weekly in the *Official Gazette of the United States Patent Office* and annually in its annual report from 1873.<sup>9</sup>

Nine years after it was passed, however, the Supreme Court declared the federal law unconstitutional.<sup>10</sup> Attempts to amend the law or the constitution failed, but under its treaty obligations, the United States enacted law to allow registration by foreign citizens from countries with reciprocal agreements and Indian tribes, who remained the primary focus of US federal law until 1905, when new federal law embracing US citizens was enacted. In the interim, however, the Patent Office continued to register marks from US firms. The 1905 law proved more robust than its predecessor, and led to a spike in trade mark registrations, after which registrations continued at a significantly higher rate than

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<sup>5</sup> Consequently, our data for France before 1884 is limited.

<sup>6</sup> Connecticut and Pennsylvania followed in 1847, Massachusetts and Iowa in 1850, Ohio in 1859, California and Michigan in 1863, Oregon and Kansas in 1864, Nevada in 1865 and Maine and Missouri in 1866.

<sup>7</sup> Along with California, Oregon, Kansas, Missouri, and Nevada instituted systems of registration.

<sup>8</sup> Though see note 1.

<sup>9</sup> Before the trade mark repository was established, however, some companies registered marks as designs, as, indeed, was the case in the United Kingdom, where marks had occasionally been registered under copyright provisions. This tradition of registering designs under copyright law in the United States led to label registrations, which began in 1874 (Hopkins 1905).

<sup>10</sup> The court ruled that trademarks did not fall under the ‘progress’ clause of the US Constitution, the grounds on which the congress had claimed the right to legislate.

during the legal "interregnum" of 1880-1904. This law held sway until US trade mark law was consolidated in the Lanham Act of 1946.<sup>11</sup>

The United Kingdom, as noted, was the last of the three to enact trade mark law. Registration only began in 1876, following Trade Marks Registration Act of the previous year. Legend has it that the brewers Bass parked a dray outside the door for the week before the register opened on January 1, 1876, to ensure that its was the first name on the list. (True or not, the story reflects the position of the alcoholic beverage business in particular and consumer non-durables more generally among the more influential sectors that shaped the law directly and indirectly.) Bass was not the only enthusiastic company. In its first year the register was overwhelmed and the deadline for existing marks to be registered was twice extended. At the same time, the registration of marks from the cotton sector, which had a tradition of shared marks that had to be reconciled with the register's purpose of recording unique marks (Higgins and Tweedale 1996b), was postponed, causing a delayed surge when these were eventually admitted to the register. While – indeed, perhaps because – it was the last of our three countries to introduce registration, the registration scheme in the United Kingdom – and particularly its published data – came to enjoy greater stability than those in France or the United States. The same cannot be said of the related law. In the period under review, UK trade mark and merchandize marks law had to be amended or substantially revised in 1876, 1877, 1883, 1887, 1888, 1905, 1919, 1926 and 1938.<sup>12</sup>

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<sup>11</sup> This Lanham Act added a 'supplemental register' in which applicants could register marks that were not currently registrable, but might become so in the future. This register, while not guaranteeing protection, served to provide evidence of usage and ownership. The federal registers were kept open during the interregnum of 1879-1905 on the same principle. We have not used data from the supplementary register in this chapter.

<sup>12</sup> Rather as the Lanham Act would do later in the United States, the UK act of 1919 separated the register into two parts. Owners were now able to record in "part B" of the register some marks that did not satisfy the existing criteria for distinctiveness. This was an attempt to enable registration of *de facto* trademarks, and, as with the laws of 1862 and 1875, to help UK firms register their marks overseas by making registration of overseas marks in the United Kingdom easier. The 1938 law retained this division in the



## An overview of registration

**Table 1: Number of trade mark registrations to 1960, France, United States, United Kingdom**

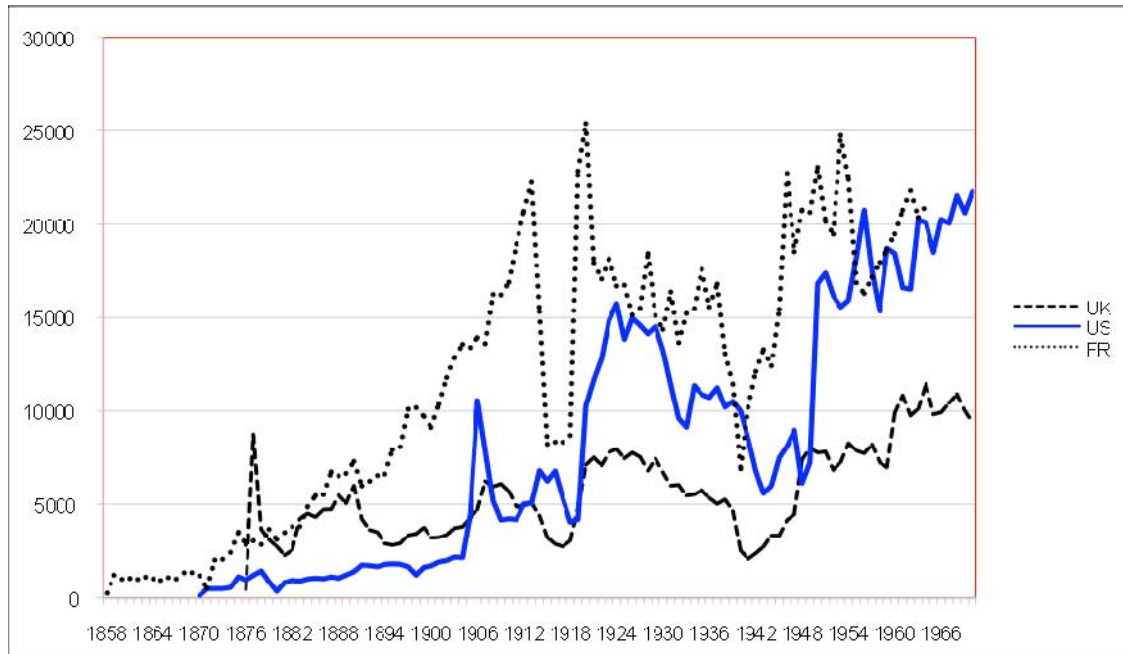
Country	First year	Marks to 1960
France	<b>1856</b>	<b>1,142,367</b>
United States	<b>1870</b>	<b>639,849</b>
United Kingdom	<b>1876</b>	<b>436,744</b>

Table 1 shows the number of marks registered by each country before 1960. France, the table reveals, recorded more marks than the other two countries put together. This has little to do with France's earlier beginning. The predominance of France was maintained for a century, as Figure 1, which plots the number of marks registered in each country by year, shows.

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register, but introduced a new list of categories under which marks had to be classified. This law remained in place until 1984.

**Figure 1: Annual trade mark registrations, France, United States, United Kingdom, 1858-1970<sup>13</sup>**



With few exceptions, more marks were registered in France each year than in either of the other two countries. The early exceptions are easily understood. As noted above, in the United Kingdom pent up demand for marks was remarkably strong when the firms were allowed to register in 1876 — so strong, indeed, that most applications made in 1876 were not included in the register until the following year, a delay which had a further knock-on effect on 1878. Hence the clear initial spike in the UK line in Figure 1. The United Kingdom surpass French marks once more, in 1883 after the UK law was broadened and a surge of cotton marks flooded the register (Higgins and Tweedale 1996b). These exceptions aside, France maintains its lead over both countries until 1940, when under pressure of war and occupation its annual registrations dip below those of the United States, but only briefly. The brevity is noteworthy given the different effects the

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<sup>13</sup> Annual registration data for France come from Empotz and Marchal (2002), for the United Kingdom from the *Annual Report of the Patent Office* for the relevant years, and for the United States from *Index of Patents* (later the *Index of Trade Marks*) and the *Official Gazette of the US Patent Office* again for the relevant years.

Second World War had on the economies of the two countries. Finally, French registrations dip below US registrations for three years in the late 1950s, though quite why is not immediately clear. By 1960 it has taken the lead again.

**Figure 2: Annual trade mark registrations per 1,000 population, France, United States, United Kingdom, 1858-1960<sup>14</sup>**

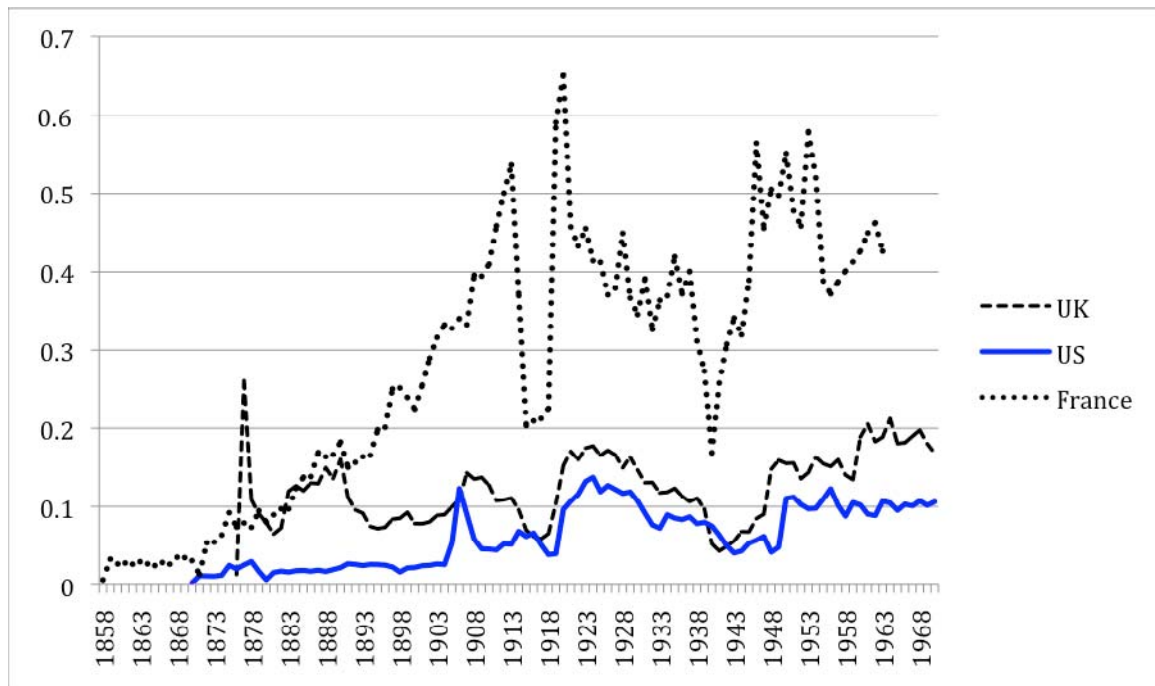


Figure 1 represents the absolute number of registrations. A more accurate sense of France's dominance in this area is provided by Figure 2, which adjusts the registration data to allow for the relative differences in population in the three countries. As this chart shows, allowing for population differences, the only time when France is not the leading per capita registrant is during the surge in UK marks in 1877-8 and the adjustments of UK law in 1883-4. During these two two-year periods, the United Kingdom takes the lead. In all but a handful of years, the United States trails both countries.

<sup>14</sup> Source, as for Figure 1; population data from Maddison (2003).

These annual figures are undoubtedly limited in what they can reveal. Nonetheless, what little they do reveal is intriguing. Business-historical interest in trade marks is fairly recent. A key moment comes with Chandler's (1990) *Scale and Scope*. He identifies a sequence of changes in business practice - first in production, then in packaging, then in branding, and finally in advertising - that prompted a revolution in the way goods, and particularly consumer goods, were sold. This change, in Chandler's view is part and parcel of the 'second industrial revolution', a revolution led by the United States. Taking up Chandler's argument, Wilkins's (1992, 1994) much cited articles echo the importance of modern trade marking in this process, identifying 'modern brands' with changes in the law of the United States. This perspective is echoed in numerous essays and books such as Koehn's (2001) *Brand New*, which is almost wholly Anglo-Saxon in its outlook. In general, it seems fair to say that in the burgeoning literature on trade mark history, when it is not assumed that the United States led the transition to modern marks, then it is at least taken for granted that that the story of this remarkable transformation can be told from the US point of view. Figures 1 and 2 throw some doubt on that assumption. They show, after all, not only that the United States did not lead, either chronologically or in the number of marks registered, but also that of the three nations under discussion, in terms of per capita registrations, it seems to have come in last.

Business historians are not alone in their narrowness of focus. The economic historian Kahn (2005) suggests that the US democratic system made the country inherently superior in protecting and developing intellectual property systems. Her argument, moreover, emphasizes that qualitative conclusions about these systems can be reached from quantitative registration data. That the United States registered more patents than the United States, Kahn suggests, is evidence of the superiority of the system. If we accept this problematic transition from quantity to quality, it is quite clear that in regard to one particular kind of intellectual property at least, on Kahn's own terms, the United States, for all the strengths of its democratic system, was not superior. Finally, it seems worth noting that legal historians seem equally unwilling to take the French into account. Schechter's (1925) ground-breaking study of trademark history has almost no place for the French. The more recent work by Sherman and Bently simply asserts that 'the primary

source of inspiration' for the international spread of trade marks was the United States (Sherman and Bently 199: 212).

We should also add that the difference between France and the other two countries shown in figure 2 seems particularly to be a feature of trade marks. The data for per capita patent registration show the three countries moving more or less in step. If, then, France was uniquely influential and dominant in this particular area of trade marks, not only in the nineteenth century — when they both forged path-breaking law and foisted it onto often reluctant trading partners — but well into the second half of the twentieth — when they continued to register more marks than either the United Kingdom or the United States — then, on the evidence of the registration data, the history not only of marks and marketing, but also of the law and even of the second industrial revolution may need to be reassessed.

Differences in national registration data suggest other avenues for research. The different appetites of the three countries discussed here may reflect the relative levels of competition and concentration within particular industries and countries. Heavily concentrated industries are likely to have less interest in marks than heavily competitive ones, and the rise and fall of monopolies and 'trusts' are suggested in the rise and fall of sectoral data (see below). On the other hand, some sectors have long established, innovative traditions. In France, for example, champagne registered large numbers of marks from the 1820s on. As noted, Helmers and Rogers (2009) have suggested, too, the level of marking may reflect levels of innovation, not only in marketing and but in economic activity more generally. The data we present here cannot resolve these questions, but they do suggest that they need further and closer comparative analysis.

These issues aside, undulations in the data suggest that a national rate of trade marking is responsive to a number of stimuli. One is clearly legislation and regulation. As Figure 1 shows, there is a noticeable decline in US registrations after the Supreme Court ruling of 1879 and a countervailing surge after 1905, at which point it briefly outpaces the annual rate of registrations in the United Kingdom. In the United Kingdom, registrations climb noticeably after adjustments to the law in 1883, 1888, 1906, and again in 1919. That last surge, however, is hard to separate from the effects of war and its aftermath, pointing to another set of influential factors on rates of registration. War's

contribution can be seen early on in the French data, where the Franco-Prussian war of 1871 causes a brief but steep decline. It is yet more noticeable in the data for all three countries between 1914 and 1918 and between 1939 and 1945, with the later entry of the United States into both wars postponing the fall in its annual registrations, while all three countries experience the postwar surge at about the same time.

Another contribution to the rates of registration comes, of course, from economic cycles. French gross domestic product (GDP) shrank in the late 1870s and between 1899 and 1904. Registration figures seem to reflect the initial downturn, dropping in 1878 and in 1899 and 1901, but in both cases they turn around more quickly than the general economy. The UK economy contracted between 1891 and 1894 and again 1899 to 1902, and it is noticeable that UK annual registrations peak in 1890 and do not achieve the same level again until 1907, when the rate of registration may have been helped by a relaxation of certain registration restrictions in 1906. Given the anomalous state of its law, it is harder to read the economy into the US data in this period. If the data are less clear cut in the 'depression' of the 1890s, the effect of the business cycle on registration can be read more directly in the steady fall across the 1930s in UK, US, and to a lesser extent French registrations.

While economic cycles have clear effects, economic growth is less easy to trace. Even though increases in GDP have indeed tended to be associated with increases in the number of annual registrations, our attempt to track trade marking in the United States and the United Kingdom with growth in GDP in the postwar years found little relation between the two variables.<sup>15</sup> Other factors are far more important in explaining the evolution of trademark registrations. One is globalization. The constant rise in the rate of registration up to 1914 took place against a background of increasing globalization. Similarly, the decline in marks in the 1920s accompanies the retreat from internationalization during that period, while the steady rise in the 1950s again follows

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<sup>15</sup> Linear regression between the size of annual increases in GDP at constant prices and the number of trade mark registrations in each year show that the relation is not statistically significant. (Source for GDP : Maddison, 2003). Higgins argues that the rate of growth of GDP is "negatively correlated with the trends in registration" (Higgins, 2008: note 41).

the recovery of international trade after the Second World War.<sup>16</sup> In all these cases, the rate of registration is more of a lagging than a leading indicator.

### **Consumer goods**

The trade mark data make possible the analysis of annual registrations by various categories. For the business historian, analysis by firm is a tempting possibility, though as we have noted this involves dealing with a vast array of company names, many of which are hard to trace outside the register. The data also allow analysis of registration by sector. The task, while easier than analysis by firm, is not quite as easy as it may seem. While France and the United Kingdom obliged applicants to identify their sector from a set list of categories, the United States provided no such list until 1923. Consequently, though US applicants do declare their sector, there is no consistency in the data. Furthermore, the French changed their categories intermittently, while the British changed theirs once in the period under review.<sup>17</sup> In order to allow the comparisons that follow, we have tagged the US registrations for a set of benchmark years with the categories found in the initial UK list and identified equivalent categories in the French lists. Inevitably, this has led to some subjective judgements. Again we must acknowledge that, given the inevitable variability, our argument attempts primarily to be indicative of trends rather than definitive.

As we noted earlier, we have chosen to focus on the category of 'non-durable consumer goods' (hereafter, 'consumer goods'). Our groups, some of which merge multiple categories in the French and UK lists, are paper and stationery, food including

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<sup>16</sup> These waves of globalization are probably better traced in the international registration of marks following the Madrid conference of 1891. As France was initially far more active in the international register than either the United Kingdom or the United States, it is quite likely that figure 1 actually underestimates the French appetite for marks.

<sup>17</sup> The French had introduced three lists in the nineteenth century alone, beginning with 57 categories and climbing to 74 in 1886. In 1920 it introduced a list of 80 categories. The British used 50 categories in 1876 and stuck resolutely by them for 60 years, though the growth in registrations under the category "miscellaneous" indicated that the system was increasingly under strain. In 1938, they changed to a system of 34 classes.

tea and coffee, alcoholic and nonalcoholic beverages, tobacco and tobacco products, household goods and toiletries, and medicines. The last category is not usually recognized in the class of consumer non-durables today, as advertising for medicine is subject to its own set of regulations (Corley 2005) and sales are also highly controlled. Nevertheless, our inclusion seems appropriate for the early years of the register, when things such as "bitters" were sold both as alcohol and as medicine and many medicines were little more than rebranded food. For consistency, we have kept the category in our consumables group throughout.

**Figure 3: Proportion (%) of non-durable consumer marks in the registrations, France, United States, United Kingdom, benchmark years, 1880-1970**

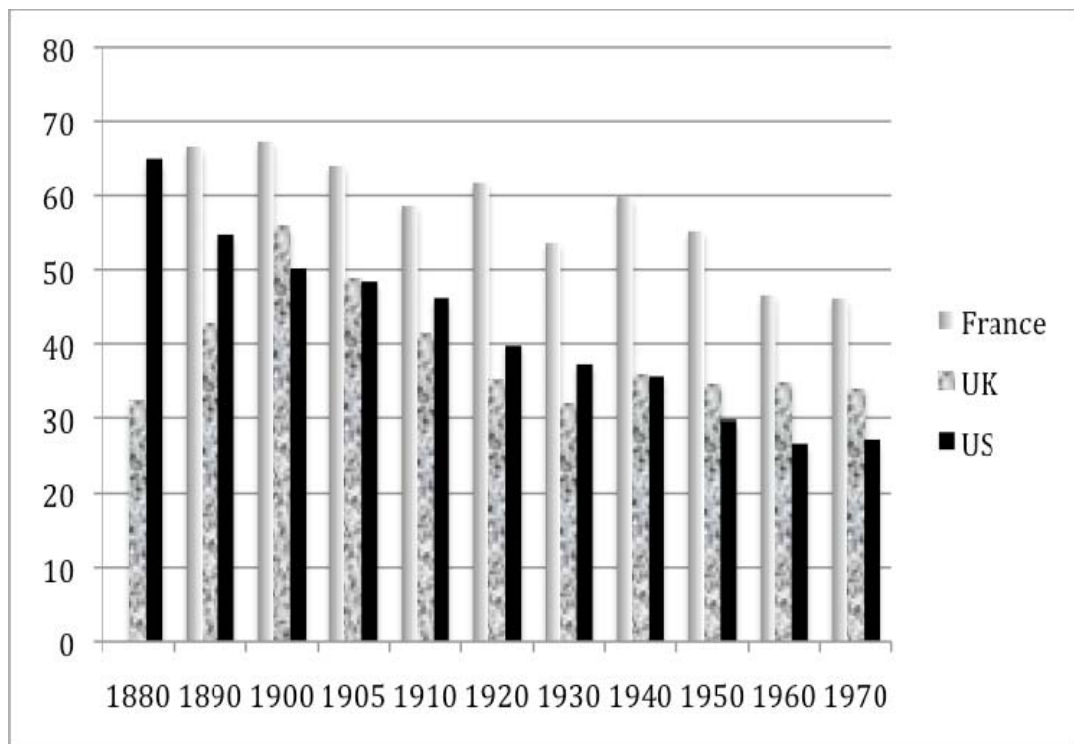


Figure 3 compares the rate at which each of the three countries registered these kinds of goods. The table indicates that in the early registers of France and the United States, consumables made up more than sixty per cent of the register. Their dominance in part justifies our focus on consumables. In France, the proportion of consumables stays



above fifty per cent for all but the last two of the benchmark years, when it is still a little over forty-six per cent. In the United Kingdom, by contrast, consumables only once surpass fifty per cent, reaching 55.85 per cent in 1900. Having climbed to this point, the proportion of consumables in the UK register declined significantly to 1910 and hovers at around one third of total registrations in each of the succeeding benchmark years, suggesting that the sector was able at best to hold its own against the new technologies that presumably account for much of its decline in the register. On the other hand, it is clear that goods other than consumables have always held a significant part of UK trademarks.

The United States presents an interesting contrast to the other two countries. The portion of the register taken by consumer goods begins almost as high as in France a much higher point than the United Kingdom, but this is the high point, and from here it begins a steep and steady decline, as other goods take up more and more of the register, until in 1970, the proportion of consumables in the US register is just over a quarter (27.21 per cent). In sum, the French in general maintain their enthusiasm for this category across the century, the United States loses its early enthusiasm, while (1900 aside) the British can barely be said to be enthusiastic at all.

Tables 2 to 4 break the category of consumables down into its constituents, showing again some variance among countries.

**Table 2: Proportion of non-durable consumer goods in trade mark register by category: France, 1858-1970**

Category	1858-73*	1886	1890	1900	1905	1910	1920	1930	1940	1950	1960	1970
Stationery	7.83	3.12	2.94	3.38	2.34	2.28	2.57	3.19	2.13	8.92	4.06	9.04
Food	<b>14.86</b>	13.33	10.27	13.61	14.88	<b>13.79</b>	13.09	13.59	<b>16.13</b>	<b>14.05</b>	<b>11.42</b>	9.26
Drink	14.44	<b>25.29</b>	<b>28.01</b>	<b>18.19</b>	<b>16.61</b>	13.44	14.11	<b>15.00</b>	15.15	12.68	11.21	<b>13.18</b>
Tobacco	-	2.46	2.64	1.81	1.70	1.53	1.64	0.97	0.93	0.64	0.80	0.43
Household & toiletries	11.73	15.85	15.40	14.71	13.79	15.42	<b>18.29</b>	9.58	12.01	10.57	9.00	6.55
Medicine	3.35	7.08	7.25	15.51	14.75	12.10	12.05	11.33	13.46	8.40	10.18	7.75
	<b>52.21</b>	<b>67.14</b>	<b>66.51</b>	<b>67.20</b>	<b>64.08</b>	<b>58.57</b>	<b>61.76</b>	<b>53.65</b>	<b>59.80</b>	<b>55.27</b>	<b>46.66</b>	<b>46.21</b>
leading category† (all categories)	food	drink	drink	drink	drink	food	h'hld	drink	food	food	food	drink

\* Before 1884 the French did not publish their trade mark data and the registration data were kept in manuscript. In 1874, however, the *Annales de la Propriété Industrielle, Artistique et Littéraire* (vol 19, pp 19-20) published an analysis of the first 15 years of registration, from which the numbers for this column are compiled.

† This is the category (not necessarily a non-durable consumer good) that has most marks in the register for that year. Data have not been found for all years

In France, as Table 2 indicates, in the benchmark years the dominant category lies in the register as a whole and not just among consumables are usually either for food or drink, with exception of 1920, when the category of household goods and toiletries briefly dominates (before dramatically dropping almost fifty percent by the next benchmark year). Food, drink, and cosmetics are, of course, categories for which French leadership is well recognized and the data do little more than reflect this. Tobacco, subject to a monopoly in France, is a relatively insignificant category, while stationery plays a larger part than in either of the other countries. The final row in the table shows the leading overall category for the benchmark years. In France, this is always a consumer category.

**Table 3: Proportion of non-durable consumer goods in trade mark register by category: United Kingdom, 1876-1970**

Category	1876	1880	1890	1900	1905	1910	1920	1930	1940	1950	1960	1970
Stationery	5.95	4.94	2.98	2.14	3.97	3.62	3.43	4.18	3.68	5.04	4.22	4.98
Food	<b>15.42</b>	5.49	10.08	<b>15.33</b>	<b>15.61</b>	<b>13.89</b>	<b>10.33</b>	<b>11.94</b>	9.41	8.77	<b>10.10</b>	7.07
Drink	9.47	<b>6.29</b>	<b>10.84</b>	6.67	5.20	5.28	3.00	3.73	3.84	5.07	4.14	5.26
Tobacco	5.07	5.27	7.62	14.71	6.77	3.25	4.17	1.46	1.82	1.22	1.57	1.84
Household & toiletries	2.86	5.41	7.57	9.18	10.04	7.69	8.99	5.11	5.46	5.53	4.92	6.56
Medicine	6.17	4.87	3.79	7.82	7.21	7.65	5.25	5.53	<b>11.74</b>	<b>8.98</b>	9.95	<b>8.30</b>
	<b>44.93</b>	<b>32.27</b>	<b>42.87</b>	<b>55.85</b>	<b>48.80</b>	<b>41.38</b>	<b>35.17</b>	<b>31.94</b>	<b>35.94</b>	<b>34.60</b>	<b>34.90</b>	<b>34.02</b>
leading category (all categories)	food	cotton*	cotton	food		food	food	food	med.	clthng	food	med.

\* the precise category in the register is "cotton piece goods", there were in all three cotton categories

Table 3 looks at the same categories in the UK data. Apart from the UK's relative indifference to the consumables sector, already noticed, it is interesting to see that, as in

France, food and drink dominate the consumer category in the early benchmark years, though drink slips away fairly dramatically after 1890, while medicine rises to dominate three of the last four years selected. In general, the UK consumable marks are spread more evenly across the six categories (with the later exception of tobacco, which falls under two per cent in each benchmark year, and under one in France) than in either of the other two countries, though this results in the individual categories holding a lower proportion of overall registrations than in the other countries. The final row of table 3 shows that the registers for the benchmark years were not always led by a consumer category. The early dominance of cotton piece goods (1880 and 1890) is partly attributable to the way these were added to the registry.

**Table 4: Proportion of non-durable consumer goods in trade mark register by category: United States, 1870-1970**

Category	1870	1880	1890	1900	1905	1910	1920	1930	1940	1950	1960	1970
Stationery	2.48	1.43	1.99	0.87	3.40	4.21	3.66	4.17	3.94	3.61	3.09	2.51
Food	7.44	15.71	15.32	<b>17.49</b>	<b>14.71</b>	<b>20.92</b>	<b>17.19</b>	<b>15.36</b>	<b>13.64</b>	<b>13.12</b>	<b>7.53</b>	8.39
Drink	12.40	6.86	7.16	6.53	13.41	3.69	2.90	2.22	4.28	2.29	2.22	2.20
Tobacco	<b>19.01</b>	<b>20.57</b>	3.33	2.45	3.20	2.19	1.32	1.13	1.15	1.26	0.73	1.65
Household & toiletries	7.44	6.29	11.49	7.76	4.84	6.84	7.84	7.42	7.49	4.92	5.73	<b>8.97</b>
Medicine	9.09	14.00	<b>15.53</b>	15.04	8.79	8.46	6.81	7.08	5.21	4.59	7.35	3.49
	<b>57.85</b>	<b>64.86</b>	<b>54.82</b>	<b>50.15</b>	<b>48.36</b>	<b>46.31</b>	<b>39.72</b>	<b>37.38</b>	<b>35.72</b>	<b>29.79</b>	<b>26.65</b>	<b>27.21</b>
leading category (all categories)	tobacco	tobacco	med		food	food	food	food	food	clthng	food	food

The early dominance of tobacco in the early benchmark years for the United States make these noticeably distinct from the other initial years for the other two countries. The dramatic fall in tobacco no doubt reflects the formation of the tobacco trusts, though there is no noticeable rebound when the trusts were broken under the Sherman Act (Hannah 1976). The portion of drink registrations, on the other hand, had shrunk into insignificance well before the Volstead Act of 1919. In the United States, the proportion of drink marks falls more steeply and further than in the United Kingdom. The effects of legislation are probably more recognizable in the diminishing portion of medicine marks.

This can probably be traced to the Wiley Act of 1906, whose section 8 was directed specifically at "misbranding", though it must be acknowledged that food, also subject to the act, evidently overcame the restrictions and dominates the selected years from 1900 to 1960.

Looking across the years and across the countries, we can see that drink (predominantly alcohol) has predominated in French trade marking, with food close behind, which is not surprising, while food is the dominant category in both the United Kingdom and the United States, which is perhaps a little surprising. The appearance of clothing in both the United Kingdom and United States in 1950 also merits further explanation.

### **International marking**

We suggested earlier that the initial UK and US trade mark laws arose in response to international pressure, particularly from the French. Given the international origins of the law, it is interesting to see to what extent registrations were themselves international, that is to what extent did non nationals register in national registers. The registers provide some geographical data (usually city and country) for each registrant, though if the registrant is established in the country of registration, the local address will usually be given, whatever the firm's national origin. Nevertheless, this aspect of the register does offer one way to gauge the internationalization of trade, though here as elsewhere our data are preliminary and at the moment only address the early years of registration.

The French Napoleonic Code had guaranteed foreign firms with a base in France the same access to the registers as natives had, but the law of 1857 also allowed nondomiciled firms that came from countries with a reciprocal agreement to register marks and gain protection. By the end of 1879, 20 years after the register opened, approximately 6.6 per cent of all marks registered over those two decades were foreign owned. The first countries with reciprocal access were Russia, the United Kingdom, and Belgium. UK firms were quick to take advantage. (The Russians were not.) Of the

foreign firms to register in the first 20 years, the British account for more than 75 percent. US firms, which could only start registering after the convention of 1870, less than 3.<sup>18</sup>

The French reliably published data on the number of marks registered by foreign firms from 1886 to 1906 (after which they unfortunately seem to have stopped). These indicate that the number of foreign registrants rises steadily across this period. British firms remain dominant, though the register becomes increasingly international, and the number of US registrants is rising in the first years of the twentieth century.

Though we do not yet have a comparably robust series for foreign registrations in the United Kingdom or United States, the UK register also had early appeal for foreign firms. Among the first year's applicants (many of which were only registered in the following year), nine percent are foreign firms. They come from seven countries, with the French providing more than six per cent of total applications, and states that now make up Germany accounting for just under two per cent of total applications. The 14 US applications account for under one percent of the total. A decade later, foreign registrations account for about 7.6 per cent of total marks registered in the United Kingdom, with Germany accounting for just over 1.5 per cent of all marks registered, France for just under 1.5 per cent, and the United States for just over 1.25 per cent. These are the three major countries of origin. More remarkable, perhaps, is that the foreign marks come from a total of 36 countries, suggesting the extent to which the British market presented a large magnet to trade marked goods from around the world in 1886.

In the first year of registrations in the United States, by contrast, it is noteworthy that no foreign firms register. The following year (1871), seven UK marks and two Canadian make up the foreign contingent, accounting for a little over two per cent of the total. Nine years later, just before the Supreme Court decision against the federal law, foreign marks had crept up to just over six per cent, with Britain accounting for more than half the foreign registrations, trailed by France then Germany out of a total of seven countries. International interest would seem to have continued climbing: in 1890, foreign firms hold 8.6 percent of the marks registered that year, with the United Kingdom holding just over four per cent and the French close behind. These figures come fairly

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<sup>18</sup> These data come from the registers for foreign marks in the Archives de Paris.

close to the proportion of foreign marks in the French register. They cannot be taken at face value, however: as a result of the Supreme Court's decision in 1979, the federal law of 1881, written primarily to fulfill international treaty obligations, heavily favoured foreign firms. In 1905, when the law once again protected US firms engaged in domestic commerce, foreign firms' registrations shrink dramatically to a mere 1.5 per cent of registrations as US firms flood the register (see the spike in registrations in Figure 1). The year 1910 might then be a more reasonable benchmark for measuring the international character of the early US register. That year, foreign firms from 21 countries account for almost 10 per cent of registrations.

At this point, after a slow start, the US market seems to have been approaching a high point of internationalization, albeit a little more slowly than the European ones. The trend was curtailed by the war, and the contrast with the postwar data from 1920 is particularly dramatic, reflecting among other things the sharp turn against globalization. Foreign marks have shrunk to just over four per cent of the US total. UK firms still lead, with 1.9 per cent of all marks, though this is almost as low as 1871. The French are in second place, while Germany, in the aftermath of the war, has fallen behind Canada, Bohemia, Norway, Spain, and Switzerland.<sup>19</sup>

These data are partial and as hard to interpret as to gather so we do not want to read too much into them. If we use international registrations as our evidence, in the years before the First World War, France, the United Kingdom, and (though here our evidence is less direct) Germany stand out as highly international in their commerce; the United States, until the immediate prewar period, significantly less so. In the case of the first two, the registers suggests that this international character is evident both in the degree to which firms from these countries operated (and registered marks) in foreign markets and to the extent to which they were open to foreign firms operating (and registering marks) in their national markets. The United States clearly went through a transition in this period, from one with relatively few firms selling in foreign markets and

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<sup>19</sup> Our category of Germany here includes firms from Prussia, though these were registered separately at the time.

relatively few foreign firms working in the United States towards a position in the early twentieth century more like the other three.

The data hint at the notion of a healthy 'balance of trade marks', whereby countries with robust economies both attract foreign firms and trade in foreign markets with comparable vigour. It is illuminating in this regard to look at preliminary data for Portugal between 1884 and 1905, albeit that because of its historical relationship with the United Kingdom the data need treating with special caution.<sup>20</sup> The figures for registration in Portugal suggest that country had a very high level of foreign activity. By 1885, two years after the Portuguese began registering marks, foreign firms account for almost two-thirds of marks registered. Although the figure falls to 13 per cent in 1905, over the 20 years in between foreign firms account for one-third of all marks, a far higher proportion of foreign firms than is found in the registers of the three countries at the centre of this discussion. From 1885 to 1895, the United Kingdom contributes more than one-fifth of the applicants and almost the same proportion of the marks registered. France contributes one-sixth of registrants but almost one-fifth of the marks. (French firms in general tend to register multiple marks more than firms from other countries.) Germany accounts for just under four per cent of the applicants and under five per cent of the marks.

As the Portuguese share of the marks increases over the next decade (1896-1905), a period, it must be noted, of significant political tension between the United Kingdom and Portugal, the British share falls to just under 14 per cent of marks, while by contrast, Germans account for a little over 10 per cent. The French shrink to around three per cent in both categories, but of course over this decade, the French and the Portuguese were both able to register marks internationally under the Madrid convention so French figures from this period deserve caution. The United States, without such alternatives, nonetheless accounts for less than the French. From the perspective of Portugal, in comparison to the large, trading economies of France, the United States, and the United Kingdom, these figures reveal a significant imbalance of trade marking, for while foreign firms make up a large part of registrations in Portugal, Portuguese marks are rare in the

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<sup>20</sup> These data come from the archives of the INPI Portugal.

foreign registers we have looked at.<sup>21</sup> In all, the Portuguese case suggests the extent to which foreign marks could dominate an economy, keeping local firms not only out of foreign markets, but even out of their own domestic markets.

## **Conclusion**

This paper has given a very preliminary reading of trade mark registrations in three countries, France, the United Kingdom, and the United States. Its overall goal has been less to report on the contents of the registers than to indicate ways in which they offer fertile ground for further research, providing a little-used vantage point to throw light on many questions concerning national and international trade in marked goods.

One of the major advantages of these resources is that they allow direct international comparisons of trade mark regimes. Debates about the intrinsic superiority of different countries' laws and regulations are legion (Stone 1936, Kahn 2005), but they are more likely to reach a conclusion when comparable data are used. Yet in the area of trade marks, conventional accounts have tended to stay within one country. As we have showed, the conventional picture changes a good deal when international comparisons are made. Instead of the United States standing out as historically on the leading edge of innovation in the law and practice of trade marking, it appears from several directions to have been on the trailing edge.

The data allow us not only to compare the overall appetite for marks in different countries; they also allow us to compare the appetite of different sectors. Thus we have shown France's enduring interest in marks for consumer goods, which may to some extent account for its overall enthusiasm for marks in general. By contrast, we have seen that the British appetite for these marks was always rather restrained. For its part, the United States went from early enthusiasm to continually diminishing interest. Unsurprisingly, food is a dominant sector in all three countries, though in France drinks, (in particular alcohol) are almost as important. The overall decline in consumer goods

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<sup>21</sup> These proportions are not a function of international registration under the Madrid convention. Between 1903 and 1906, the final years of the decade under consideration, that international register recorded 1,064 marks, but only 41 of these are Portuguese.



over the first century of marking is no doubt a reflection of the growth in new sectors in non consumer and durable goods, where change has been much more dynamic across the twentieth century. It also reflects the 'first mover' status of consumer goods, where marks were established early and many still hold up today.

Such results indicate that registration data can address questions beyond the interests of marketing and law, taking in topics relevant to the development of national economies more generally. Furthermore, as our glance at the international aspects of national registers suggests, the registers also help trace the extent to which nations were receptive to imports and foreign direct investment and to which national firms were willing to venture into foreign markets. Here, as we have shown, the French and the British were early to internationalize, while both US firms and US registers were slower. A sideways glance at the case of Portugal, in this context, leads us to suggest the concept of a balance of trade marking, whereby a healthy economy has a manageable proportion of foreign marks in its own registers and a significant proportion of its domestic firms in foreign registers.

Although our purpose is primarily business historical, for the purposes of this essay, we have not ventured down to the level of individual firms, which demands a more painstaking and rigorous analysis of the data than we have so far achieved. This omission leads us to our final conclusion, which is that, while the registers are remarkably rich resources, there is a great deal more work to be done.

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