



THE DEATH OF WEBSTER'S AS A DICTIONARY TRADEMARK: A SHAGGY-DOG STORY

PART ONE, 1844 TO 1915

Bryan A. Garner

AS NOAH WEBSTER WAS coming to be known as the father of the American dictionary, his name took on a life of its own. In the United States, *Webster* came to be synonymous with “the dictionary.” The name began losing the distinctiveness that allowed it to serve as a trademark; it is now available to anyone who might create or publish a dictionary of any kind or quality. How did this happen?

A full account of the legal maneuvers has never been given. Yet it's a story worth telling – a lexicographic version of *Jarndyce v. Jarndyce*. The saga played out over 150 years, from 1844 to 1994. It involved some of the most famous judges in the United States, including (twice) the U.S. Supreme Court.

Although Noah Webster lived a long and storied life, this particular narrative unfolded after his death in 1843. The next year, G. & C. Merriam Co. acquired from Noah Webster's estate the rights to his magnum opus, *An American Dictionary of the English Language*, commonly called *Webster's*

Bryan Garner is the chief editor of Black's Law Dictionary and the author of many other works. Copyright 2023 Bryan A. Garner.

Dictionary. Merriam also secured the right to create revised editions of his work. For a time after 1847, Merriam was the sole possessor of American rights to Noah Webster's lexicography.

Merriam published its first significant revision of *Webster's Dictionary* in 1847, and then 17 years later came out with its new unabridged version of *Webster's Dictionary* (known to connoisseurs as the *Webster-Mahn* edition). Thanks to the success of that dictionary – together with the 1865 death of Merriam's primary competitor, Joseph Worcester – Merriam had almost 30 years of serene successes. Although the success might last, the serenity wouldn't.

In the 19th century, copyright and trademark law played a crucial role in Merriam's legal battles. When Merriam first purchased the rights from Noah Webster's estate, the Copyright Act of 1831 was in effect. It was a statute that Noah Webster himself had fought to get enacted – as a result of which he also acquired the moniker “the father of American copyright law.” How strange that this statute played a role in both promoting his posthumous fame and detracting from the rights of his legal successors.

The 1831 Act allowed for an initial protected period of 28 years, with a renewal period of 14 years. Once the copyright expired, all aspects of the protected work – including its title – entered the public domain. So the copyright for Merriam's 1847 revision of *Webster's Dictionary*, after the one allowed renewal, was set to expire in 1889. All its content would enter the public domain.

Meanwhile, in that year of expiration, the then-current trademark statute was the Trademark Act of 1881. Although it offered some protections, the 1881 Act didn't allow an applicant to obtain a trademark on an ordinary name. So nobody could acquire a statutory right by registering such a name.

By 1889, Merriam was selling successor editions, including its 1864 edition of *Webster-Mahn*, as revised and supplemented in 1879 and 1884. The title was emblazoned across the front cover: *An American Dictionary of the English Language*. On the back appeared the words *Webster's Dictionary, Unabridged*. Meanwhile, other publishers had begun printing and selling almost identical copies of Merriam's newly unprotected 1847 revision under the name *Webster's Dictionary* or *Webster's Unabridged Dictionary*. Naturally, these publishers used the name *Webster's* in advertisements.

Merriam's first attempt to retain exclusivity came in an 1890 federal

The Death of Webster's as a Dictionary Trademark, Part One

lawsuit in Missouri against Holloway Publishing, which had reprinted the 1847 *Webster's Dictionary* and copied Merriam's customary picture of an open book in its advertisements.¹ Merriam claimed that Holloway infringed its trademark in three ways: (1) using Merriam's open-book device in ads, (2) using the title *Webster's Dictionary* or *Webster's Unabridged Dictionary* on its copied dictionaries, and (3) replicating the text of the 1847 *Webster's Dictionary*.

On the first two claims, the court sided with Merriam. Even though the open-book device hadn't been trademarked, the court found it necessary to determine whether Holloway's use of Merriam's open-book device in advertisements was intended to – and actually did – deceive consumers. The court also said that by using *Webster's Dictionary* in its title, Holloway might have had some fraudulent intent to capitalize on Merriam's reputation.

Yet the court rejected Merriam's third claim – that the 1847 *Webster's* was “their book” – as “nonsense.”² The court decided that Merriam was attempting to extend its copyright of *Webster's Dictionary* indefinitely “under the pretense that it is protected by trademark law.” The court reasoned that the 1847 dictionary was “Merriam's book” only in the same way that all consumers can claim a purchased copy would be “their book.” Because the copyright had expired, the law no longer protected *Webster's* or *Webster's Dictionary*. Both were “unrestricted public property.”³

A year later, in 1891, Merriam returned to the same court seeking to enjoin Famous Shoe & Clothing Co. from republishing the 1847 *Webster's Dictionary*.⁴ Here Merriam studiously avoided copyright claims. Instead, it was now suing for (1) trademark infringement over Famous's use of *Webster's Dictionary* in the title, (2) trademark infringement given that Famous's reprints were of the same size and shape as Merriam's current dictionary, (3) trademark infringement for Famous's use of the open-book device with the words *Webster's Dictionary* in ads, and (4) unfair competition, meaning that the competitor was engaging in a deceitful misappropriation akin to counterfeiting.

¹ *Merriam v. Holloway Pub. Co.*, 43 F. 450, 450 (C.C.E.D. Mo. 1890).

² *Id.* at 452.

³ *Id.* at 451.

⁴ *Merriam v. Famous Shoe & Clothing Co.*, 47 F. 411, 413 (C.C.E.D. Mo. 1891).

Siding with Famous on the three trademark claims, the court found the open-table book device insufficiently arbitrary to be a trademark. It also reiterated that the 1847 *Webster's Dictionary* was public property, adding that Famous's right to use the words *Webster's Dictionary* on the 1847 version was just as clear as Merriam's right to use those words. Likewise, "no publisher can claim an exclusive right to make a book of a certain form or size."⁵ So Merriam had no right to relief based on trademark law.

Yet the court sided with Merriam on its unfair-competition claim, holding that Merriam was entitled to a final hearing on whether relief was justified.⁶ Famous had removed from its reprint all information that would have signaled that Famous was publishing an out-of-copyright work – including the title page's acknowledgment of the editor, Chauncey A. Goodrich, a preface giving a history of that edition, and the copyright date. Hence a final hearing was needed to determine Merriam's relief because, without the omitted information, a consumer would be hard-pressed to differentiate between Merriam's then-current dictionary and Famous's reprint of the old 1847 edition.⁷ Merriam's victory was only to win the right to further hearings – in short, more litigation, of which there is no record. The lawsuit probably settled.

Merriam was becoming litigious. The following year brought another legal contest. Undeterred by setbacks in the first two cases, Merriam sought to enjoin Texas Siftings Publishing Co., which produced a weekly humor magazine (*Texas Siftings*), from reselling cheap reprints of the 1847 edition.⁸ But the complaint this time was not based on any supposed trademark rights in the name *Webster's Dictionary*. Merriam was instead claiming unfair competition because Texas Siftings represented through advertisements that its 1847 reprints were copies of Merriam's "latest dictionaries."

Texas Siftings was offering new magazine subscribers a bargain price on the dictionary. The publisher of these reprints was Ogilvie & Co., run by one George W. Ogilvie, who would bedevil Merriam well into the 20th century.

In the Texas Siftings case, the court noted with approval the previous Merriam cases, reiterating that the 1847 edition's copyright had expired

⁵ *Id.* at 412-13.

⁶ *Id.* at 414-15.

⁷ *Id.* at 412, 414.

⁸ *Merriam v. Texas Siftings Pub. Co.*, 49 F. 944, 944 (C.C.S.D.N.Y. 1892).

The Death of Webster's as a Dictionary Trademark, Part One

and that the name *Webster's Dictionary* "is not a trademark."⁹ Yet the court did enjoin Texas Siftings from continuing its ads in their current form because they "made free and ingenious use of misrepresentations, which were intended and calculated to mislead the public into a belief that the book was the one which had long been produced and sold by [Merriam]."¹⁰ This was another success based on the law of unfair competition.

The trio of cases from 1890 to 1892 concerned only reprints of Noah Webster's or Merriam's previous works. Although the copyright law of the time so implied, no court had expressly declared *Webster's* or the phrase *Webster's Dictionary* to be utterly generic and available to any dictionary. Yet the legal landscape was changing.

In 1896, a sewing-machine case in the U.S. Supreme Court provided the basis for declaring *Webster's* generic.¹¹ Famous for its patented sewing machines, Singer Manufacturing Co. had registered a trademark using the word. But the company never registered the term *Singer* itself. After Singer's patent expired, competitors began making identical machines. One even called its machine an "improved Singer."¹² Singer sued for an injunction, which was denied. On appeal to the Supreme Court, Singer raised specific questions: Had Singer become a generic designation for a sewing machine? Or did it exclusively identify the manufacturer?

The Court answered right up front: *Singer* was a "generically descriptive" name for the company's machines.¹³ The Court reasoned that during the patented period, Singer became a generic name for a sewing machine while also alerting the public to the machine's manufacturer. But the company had failed to place the name Singer on all its machines, even if they were described in ads as Singer machines. Likewise, Singer didn't use the word to reflect the origin of manufacture until after the copyright had expired.¹⁴ Singer had abandoned any right to the name through generic use.

⁹ *Id.* at 942-48.

¹⁰ *Id.* at 948.

¹¹ *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169 (1896).

¹² *Singer Mfg. Co. v. June Mfg. Co.*, 41 F. 208, 209-11 (N.D. Ill. 1889), *rev'd on other grounds*, 163 U.S. 169 (1896).

¹³ 163 U.S. at 180.

¹⁴ *Id.* at 181-83.

Crucially, the *Singer* Court cited the earlier Merriam cases – a signal that should have alerted Merriam that it had no exclusive right to *Webster's*. Its own death-knell approached.

Then came George W. Ogilvie's full-on guerrilla war against Merriam. After being the behind-the-scenes instigator in the *Texas Siftings* case, Ogilvie reemerged with new ploys intended to topple Merriam. It took vigilance and stamina to defend against his business and legal stratagems.

Before exploring the fresh lawsuits, we might look into this pertinacious, mysterious man George W. Ogilvie. Born in New York in 1860, he was the son of Scottish immigrants. He established his publishing business in Chicago at the age of 24, with a New York branch two years later and a London branch five years after that. He published bibles and many other works. In 1896, the poet James Whitcomb Riley publicly claimed to have won a judgment in a Chicago federal court against Ogilvie for "publishing unauthorized collections of his poems." It was said that the court ruled in Riley's favor "upon every point in contention, including an order confiscating all books, sheets and plates of the unauthorized edition and a permanent injunction."¹⁵ There was no official report of the lawsuit.

According to a 1905 publication, Ogilvie devoted the years 1897 to 1904 readying for publication "the first complete Webster's dictionary of the English language ever edited and published west of Massachusetts." Under the pseudonym George W. Conklin, he reportedly wrote and sold 8,000,000 copies of various reference books.¹⁶ He was never afraid of a controversy: in 1902, he walked into a Brooklyn Church and announced that prayers were needed for the soul of his brother, the rival publisher J.S. Ogilvie (a member of that church). George publicly wagered \$10,000 that he could prove that these prayers were needed, asserting: "I invite him to a contest. . . . Let him place \$10,000 in the hands of some trust committee. I will do likewise. Let an unprejudiced committee decide upon the question as to whether he needs the saving-grace of prayer." The principal charge was that J.S. Ogilvie had misappropriated an inheritance from their grandfather in Scotland. It concerned some Scottish property that

¹⁵ "Infringed Copyright: James Whitcomb Riley Secures Judgment Against Chicago Publishers," *Sidney Daily News*, Mar. 16, 1896, at 1.

¹⁶ *The Book of Chicagoans: A Biographical Dictionary of Leading Men of the City of Chicago* (John W. Leonard ed., 1905), p. 438.

The Death of Webster's as a Dictionary Trademark, Part One

allegedly descended jointly to George and J.S. from their grandfather through their father.¹⁷ Nothing seems to have come of the flamboyant wager, but George succeeded in causing great chagrin to his brother – and not just about this alleged wrongdoing.

About a month after the prayer incident, George accused J.S. of smuggling pornography with the intent to publish it. George somehow managed to steal from J.S.'s publishing house the plates of a mildly salacious novel, *Madame du Barry* (a sort of 19th-century *50 Shades of Gray*). He handed them off to an anti-vice organization headed by Anthony Comstock, the infamous censor. George's intent was to expose and humiliate J.S. for the un-Christian scheme to publish the book, and it became quite a scandal. Pretending innocence of any involvement in the strange delivery of J.S.'s property to Comstock's vice squad, George pledged to reporters that he would "continue to make it uncomfortable for his brother until he had adjusted matters."¹⁸

Deprived of any Scottish inheritance and thoroughly alienated from his brother, George W. Ogilvie turned to American law to gain every possible advantage in his publishing business. After all, he claimed to have devoted seven full years to lexicography, and he had dictionaries to sell.

In 1905, Congress dramatically changed trademark law by amending the 1881 Trademark Act.¹⁹ You could now trademark a proper name if it had been in use for ten years under conditions named in the statute. The legislative amendments also made the circuit courts the final courts of appeal – with no further appeals to the U.S. Supreme Court. Copyright law, meanwhile, remained unchanged: all aspects of a protected work entered the public domain after a copyright expired.

Against this backdrop, Ogilvie conjured two new schemes in 1904-1905. The first involved acquiring a copy of *Webster's Brief International Dictionary*, published in London by George Bell & Sons under license from Merriam. The dictionary was almost identical to Merriam's *Webster's High School Dictionary*. Ogilvie's copying was an especially brazen move, given that the Bell

¹⁷ "Will Bet Prayer Is Needed: G.W. Ogilvie Makes a Peculiar Offer Concerning His Brother, J.S. Ogilvie," *Brooklyn Daily Eagle*, 26 Jan. 1902, at 10. See also "Asks Prayers for Brother He Quarreled with," *Chicago Trib.*, 23 Jan. 1902, at 4 (adding that J.S. had bought out George's business some years before, engendering bad blood).

¹⁸ See "Ogilvie Gives Up Controversial Book," *Leavenworth Times* (Kansas), 22 Feb. 1902, at 7.

¹⁹ 33 Stat. at L. 724, chap. 592, Comp. Stat. 1913, § 9485.

firm acted as Merriam's London agent.²⁰ After retypesetting the dictionary and trying to publish it stateside, Ogilvie claimed that because the London-published *Webster's Brief International Dictionary* didn't have the copyright notice required by U.S. law, it was unprotected in the United States.²¹ Merriam promptly sued, and the case wound its way through the courts. Unsurprisingly, the Seventh Circuit was not amused by Ogilvie's scheme, holding that U.S. copyright law could not require the copyright notice abroad because the law did not have an extraterritorial effect.²²

Ogilvie's other scheme was reminiscent of those from the 1890s. Ogilvie had begun advertising his *Webster's Imperial Dictionary*, which was merely an enlarged and revised version of Merriam's 1847 book.²³ In the ads, Ogilvie claimed it to be the latest "complete authentic" Webster's Dictionary. Merriam responded by sending threatening letters to the trade, claiming that only Merriam had the exclusive right to *Webster's* in dictionary titles. Ogilvie sued Merriam, asking the court to enjoin Merriam from sending the threatening letters. Merriam cross-claimed, asserting that Ogilvie's use of *Webster's* in books and in advertising infringed on Merriam's latest dictionary, *Webster's International Dictionary*.

The district court granted Ogilvie's injunction against Merriam, holding that if Merriam indeed had the exclusive right to use *Webster's* even after the 1889 expiration of copyright, it would be perpetuating "the monopoly secured by copyright."²⁴ But in a small victory for Merriam, the court enjoined Ogilvie from sending out his circulars if they copied Merriam's ads for its *International Dictionary*. The court also expanded the order to require Ogilvie's company to signal unmistakably its status as the publisher of its dictionaries.²⁵

²⁰ *G. & C. Merriam Co. v. United Dictionary Co.*, 146 F. 354, 355 (7th Cir. 1906), *aff'd sub nom. United Dictionary Co v. G & C Merriam Co.*, 208 U.S. 260 (1908) (United Dictionary Co. being another of Ogilvie's companies).

²¹ *Id.* at 356-57.

²² *Id.* at 358-59.

²³ *Ogilvie v. G. & C. Merriam Co.*, 149 F. 858, 860 (C.C.D. Mass. 1907), *aff'd as modified*, 159 F. 638 (1st Cir. 1908).

²⁴ *Id.* at 860.

²⁵ *Id.* at 861, 863-64.

THE LATEST GENUINE WEBSTER'S DICTIONARY. SUPERSEDING ALL OTHERS
NEW FROM A TO Z RESET FROM NEW TYPE. NEW PLATES. THOUSANDS OF NEW WORDS

WEBSTER'S
IMPERIAL DICTIONARY
OF THE ENGLISH LANGUAGE

BEING THE AUTHENTIC UNABRIDGED DICTIONARY
BY
NOAH WEBSTER, LL.D.

WITH AN EXHAUSTIVE APPENDIX, INCLUDING SCRIPTURE PROPER NAMES, AND PRONOUNCING
VOCABULARY OF GREEK AND LATIN PROPER NAMES PREPARED
UNDER THE DIRECTION OF

NOAH PORTER, D.D., LL.D.

THOROUGHLY REVISED AND GREATLY ENLARGED AND IMPROVED
BY OVER ONE HUNDRED EDUCATORS, SPECIALISTS, AND OTHER SCHOLARS

UNDER THE EDITORIAL SUPERVISION OF

THOMAS H. RUSSELL, LL.B., ALBERT C. BEAN, M.E., LL.B. AND L. B. VAUGHAN, PH.B.

WITH SEVERAL THOUSAND ILLUSTRATIONS, COLORED PLATES, AND TABLES

CHICAGO, ILLINOIS, U. S. A.
GEORGE W. OGILVIE, PUBLISHER
1907-8

George W. Ogilvie's "Webster's Imperial Dictionary."

More important, the district court was the first to identify the twofold significance of *Webster's*, which at first signaled a generic name for a dictionary – one now in the public domain. But it also now suggested to the public a dictionary published and sold by Merriam.²⁶ If the first point alone had been true, publishing works from the public domain would be a free-for-all. Yet when the first significance accompanies the second, those recreating the work must alert the public that they aren't the work's "original" publishers.

The First Circuit agreed with the lower court's reasoning, upholding the injunction against Merriam.²⁷ In denying Merriam's appeal, the court followed the Supreme Court's reasoning in *Singer*, explaining that there was an explicit right to re-create works in the public domain. But this right was subject to the prohibition against seeking to deceive potential purchasers into believing they were buying the original publisher's work.

Neither the district court nor First Circuit declared *Webster's* or *Webster's Dictionary* to be a generic term available for *all* dictionaries. Those names were only generic terms for Merriam's old dictionaries now *in the public domain*: namely, the 1847 edition. So *Webster's* and *Webster's Dictionary* were not yet fully generic terms, and Merriam – for the time being – still had exclusive right to call new dictionaries *Webster's*.

Throughout this litigation, George W. Ogilvie engaged in lexicographic muckraking. In the February 1907 issue of the journal *School Education*, for example, he wrote an article excoriating G. & C. Merriam Co. for publishing dictionaries that were inauthentic: they didn't even resemble what had come from the pen of Noah Webster. In many lawsuits against publishers of more genuine Webster dictionaries, Ogilvie asserted, "the Merriam Company were whipped, unqualifiedly and absolutely."²⁸ Ogilvie quoted various letters in support of his *Webster's Imperial*, including a minister who said he was so pleased with it that he had discarded his copy of Merriam's 1890 *Webster's International*. Ogilvie then called the Merriam work "an obsolescent, if not wholly obsolete, dictionary." Pointing out one supposed error

²⁶ *Id.* at 860.

²⁷ *G. & C. Merriam Co. v. Ogilvie*, 159 F. 638, 643 (1st Cir. 1908) (Ogilvie did not appeal).

²⁸ George W. Ogilvie, "Interesting Facts About Webster Dictionaries," 26 *School Education* 37 (1907). He made the same claim in an advertisement in the same issue of *School Education*, and in the March and April issues.

The Death of Webster's as a Dictionary Trademark, Part One

in the big Merriam dictionary as representative of “hundreds that we know of,” Ogilvie asserted: “If you want a *dictionary* and not a ‘joke book,’ get Webster’s Imperial Dictionary.”²⁹

Invited to respond, Merriam issued this statement: “We have no wish to enter into a newspaper controversy, preferring to leave the matter for the Courts to decide.”³⁰ Perhaps the editors were heeding the modern proverb, sometimes wrongly attributed to George Bernard Shaw: Never wrestle with a pig; you will both get dirty, and the pig likes it.

Yet as we’ve seen, the litigation didn’t go well for Merriam.

Soon George W. Ogilvie reemerged with yet two more anti-Merriam maneuvers, one in Ohio and the other in New York. In the Ohio case, Merriam sued Saalfield Publishing Co., which had acquired part of Ogilvie’s publishing enterprises after he had supposedly exited the publishing business.³¹ But this was something of a sham. Although the exact nature of the contract wasn’t revealed, Saalfield had begun selling copies of the English *Twentieth Century Dictionary*, mostly under the title *Webster’s Intercollegiate Dictionary*, with the same marketing methods that Ogilvie had used.³² (Saalfield was also publishing *Webster’s Imperial Dictionary* (1908-1909) and *Webster’s Reliable Dictionary for Home, School and Office* (1911).) Merriam sued, complaining that the name *Intercollegiate* was confusingly close to Merriam’s 1898 book *Webster’s Collegiate Dictionary*. As it turned out, Saalfield was found to be a proxy for Ogilvie, who secretly directed and paid for Saalfield’s legal defense. Ogilvie was trying to avoid the injunction issued

²⁹ *Id.* at 38.

³⁰ “Dictionary Controversy,” 26 *School Education* 38 (1907).

³¹ *G. & C. Merriam Co. v. Saalfield*, 190 F. 927, 932 (6th Cir. 1911). See “George W. Ogilvie Bought Out by Saalfield Publishing Company and Thousands of Bibles and Dictionaries Will Be Made Here,” *Akron Beacon J.*, 21 May 1908, at 1 (announcing that (1) “the enormous publishing business of one of Chicago’s greatest publishing firms, the George W. Ogilvie & Co.,” would be brought to Akron, (2) “the largest part of the purchase . . . is that of the Webster Imperial dictionary, which was prepared by over 100 educators, specialists and scholars under the supervision of Thomas H. Russell, editor-in-chief,” and (3) “Mr. Saalfield becomes owner and publisher of three other dictionaries known as Webster’s Intercollegiate dictionary, Webster’s Adequate dictionary, and Webster’s Sterling dictionary”). It’s true: in 1907, George W. Ogilvie published a book titled *Webster’s Adequate Dictionary*!

³² *Saalfield*, 190 F. at 933-34.

Bryan A. Garner

THIS DICTIONARY IS NOT PUBLISHED BY THE
ORIGINAL PUBLISHERS OF WEBSTER'S
DICTIONARY, OR BY THEIR
SUCCESSORS

Webster's
Sterling Dictionary
OF THE ENGLISH LANGUAGE

PRESENTING AN UNUSUALLY LARGE VOCABULARY
WITH
DEFINITIONS OF EXTRAORDINARY COMPLETENESS

Based on the Rules of
NOAH WEBSTER, LL.D

and Edited by
THOMAS H. RUSSELL, LL.B., LL.D., A. M.
Editor-in-chief of Webster's Imperial Dictionary
(Unabridged Edition)

With Illustrations wherever Needed to
Elucidate Definitions

Prepared for publication by Geo. W. Ogilvie

- THE SAALFIELD PUBLISHING CO.
CHICAGO AKRON, OHIO NEW YORK

*Saalfeld Publishing Company's (or was it George W. Ogilvie's)
"Webster's Sterling Dictionary."*

The Death of Webster's as a Dictionary Trademark, Part One

against him by the First Circuit. The Sixth Circuit saw through the ruse and held that Saalfeld was subject to the same injunction that had been issued against Ogilvie years earlier.³³

Ogilvie found more success in New York. He sought to publish an English dictionary – the *British Empire Dictionary* – under a new name, *Webster's Crown Dictionary*. After suing Ogilvie's new company, Syndicate Publishing Co., Merriam adopted another argument: how could Ogilvie call his dictionary a *Webster's* when the base material – the *British Empire Dictionary* – was not a *Webster's* at all?³⁴ The answer, unfortunately, eroded Merriam's position even further.

In the most influential decision discussed here, the celebrated Judge Learned Hand examined what it means when the public sees the word *Webster's*. Merriam advocated an analysis that would align with past decisions: *Webster's* signaled to the public a dictionary published by Merriam. Judge Hand was unconvinced. *Webster's*, he said, “at least denotes what I should call literary descent from Webster's original books . . . and that this succession goes back without break to some work by Webster himself.”³⁵

If Merriam succeeded in its argument that *Webster's* signaled both literary descent from Noah Webster and a work published by Merriam, Judge Hand wrote, it would be “foisting upon the public a spurious work” because Merriam's current dictionary (the 1909 edition) had “almost totally different literary contents from any book with which Noah Webster had anything to do.”³⁶ As a result, the “constant iteration” that Merriam, and only Merriam, had the exclusive right to use the term *Webster's* in a dictionary title was “merely a childish extravagance.”³⁷ So the question became whether Ogilvie's *Webster's Crown Dictionary* could trace its lineage back to Noah Webster.

Luckily for Ogilvie, it could. About 70% of *Webster's Crown Dictionary* was based on the *British Empire Dictionary* – a revised version of the *British Imperial Dictionary* (1855), whose title page announced that it was made

³³ *Id.* See also *G. & C. Merriam Co. v. Saalfeld*, 238 F. 1, 14 (6th Cir. 1917).

³⁴ *G. & C. Merriam Co. v. Syndicate Pub. Co.*, 207 F. 515, 515, 517 (2d Cir. 1913).

³⁵ *Id.* at 516.

³⁶ *Id.* at 516-17.

³⁷ *Id.* at 517.

“on the basis of Webster’s English Dictionary.” (The *Imperial*, believe it or not, was by a Scotsman named John Ogilvie, LL.D., who may have been distantly related to George.) So the publishing world learned a valuable lesson. If any dictionary could somehow trace its ancestry back to Noah Webster, it could call itself a *Webster’s* as long as it included the following disclaimer:

This dictionary is not published by the original publishers of Webster’s Dictionary or by their successors.³⁸

Oddly, this statement, which was soon attached to many mediocre dictionaries, had almost the opposite of its intended effect. It essentially enhanced the dictionaries on whose title pages it appeared, as if the publishers were purposely boasting about distancing themselves from old-fashioned “original publishers.”

Equally important, the publishers no longer had to revise the much-out-of-date 1841 *Webster’s*. They could now update and revise more recent works descended from Noah Webster.

The Second Circuit affirmed Judge Hand’s decision, commenting only to say that it didn’t agree with Merriam’s proposition that the phrase *Webster’s Dictionary* had the distinctive meaning suggesting a Merriam publication.³⁹

Merriam appealed to the U.S. Supreme Court, which dismissed the appeal because the 1905 amendment to the Trademark Act had made decisions of the intermediate federal appellate courts final in the absence of a claim based on a federal statute or the Constitution – neither of which Merriam had established.⁴⁰ The Court commented:

After the expiration of a copyright . . . , it is well settled that the further use of the name by which the publication was known and sold under the copyright cannot be acquired by registration as a trademark; for the name has become public property, and is not subject to . . . appropriation.⁴¹

³⁸ *G. & C. Merriam v. Ogilvie*, 170 F. 167, 168 (1st Cir. 1909); accord *G. & C. Merriam v. Saalfeld*, 198 F. 369, 378 (6th Cir. 1912).

³⁹ *Syndicate Pub. Co.*, 207 F. at 520.

⁴⁰ *G. & C. Merriam Co. v. Syndicate Pub. Co.*, 237 U.S. 618, 621, 624 (1915) (citing Act Feb. 20, 1905, 33 Stat. 724, c. 592).

⁴¹ *Id.* at 622.

The Death of Webster's as a Dictionary Trademark, Part One

It further noted that in the *Singer* case, it had approved the reasoning of the early Merriam cases. Because *Webster's* and *Webster's Dictionary* were common names for literary descendants of Noah Webster's work, they were now altogether generic terms. Merriam therefore had no exclusive right to them.

Meanwhile, there was some behind-the-scenes sleaze at play. . . .

To be continued in the Autumn issue . . .

