

HIST 4400; DR. BAKER

# How The West Was Won

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## A Brief Study of Patent Infringement in the Wild West

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A brief look at patent-infringement cases filed by Levi Strauss & Co. and the Colt Firearms Co., and how they impacted intellectual property rights in the Frontier West.

The rise in counterfeit goods manufactured in China today has led many commentators, columnists, and economists to refer to China as “The Wild West of Manufacturing”—meaning that the lack of protection afforded to intellectual property in China is analogous to the casual violence and perceived lawlessness in America’s western frontier. While this is certainly a valid comparison, the truth of the matter is that intellectual property—patents, trademarks, and licensing rights—were fiercely protected by the American legal system in the mid- to late nineteenth century. These legal battles laid the foundation for the system in place today, and they also created some of the most enduring and symbolic brands in American history.

There is perhaps no more iconographic figure than that of the American cowboy. Clad in battered jeans—probably Levi Strauss’ brand—covered in dust from a thousand miles of lonely cattle trails, he had his trusty Colt six-shooter strapped to his thigh, and a Winchester lever-action rifle in its scabbard on the saddle. This image has been recreated hundreds, if not thousands, of times in Hollywood westerns, in popular novels, radio programs, and television shows, and for all the liberties that are generally taken with history when it serves as a backdrop for entertainment, this image is certainly accurate.

Levi Strauss, a Bavarian immigrant, began manufacturing his “XX” model “waist overalls”—as his early blue jeans were called—after receiving his patent for “Improvements in Fastening Pocket Openings” through the use of copper rivets in 1873. Based in San Francisco, Levi Strauss operated a thriving dry-goods wholesale business that supplied many of the stores in the western states and territories with imported clothing and fabric. By the late 1850s Strauss had risen to prominence as a local businessman, and, as a Democrat, was active in San Francisco politics and civil affairs. Strauss’ name was often listed as a juror in *The Daily Evening Bulletin*—a major newspaper in San Francisco at the time. As well, he was the co-signer of

various petitions and letters issued by the local Democratic Party. Shipping manifests, published as “Treasure” in the *Bulletin*, routinely listed L. Strauss & Co. for their imported fabrics from China and South America.<sup>1</sup>

In 1872 one of Strauss’ customers, a store-owner in Reno, Nevada, by the name of Jacob Davis, wrote to Strauss describing his process of riveting the corners on his denim pants to prevent ripping. Davis proposed a partnership with Strauss supplying the material, capital, and labor in exchange for an equal share of the patent. Davis’ pants were very much in demand in the mining community, due to their near-indestructible construction. Strauss agreed, and by 1874, the Levi Strauss & Company’s waist overalls were a tremendous success. The “XX” designator was changed to the now-familiar 501 in 1890, and they remain one of the bestselling styles in fashion today.<sup>2</sup>

In 1874, Levi Strauss filed a patent-infringement suit in the Ninth Circuit Court in California against A. B. Elfelt & Co., also based in San Francisco, for using metal rivets on their dungarees. According to the complaint filed by Strauss, this was in direct conflict with his patent. Levi Strauss & Co. sued for twenty thousand dollars in damages, with the court having the right to increase the penalty by up to three times the amount sought. In Strauss’ case, this would mean a potential award of sixty thousand dollars. Adjusted for modern inflation, this would be roughly 1.2 *million* dollars today. The court agreed with Strauss’ legal argument and ruled in favor of the plaintiffs, yet the court seemed to take umbrage at the amount in damages Levi Strauss & Co. sought and awarded them two thousand dollars—plus court costs and

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<sup>1</sup> Lynn Downey, *Levi Strauss & Co.* (Dover, NH: Arcadia Publishing, 2007), 4-12.

<sup>2</sup> *Deposition of Jacob W. Davis from Civil Case Files 1853-1912, Case #1211 Levi Strauss et al vs A.B. Elfelt et al, 1874.* National Archives.

attorney's fees—as restitution and damages, an amount equaling forty thousand dollars in today's money.<sup>3</sup>

Four years later, Strauss filed another suit—this time in St. Louis—for patent infringement against M. Lindauer & Co, again for the use of metal rivets in their jeans. As in the California case, Strauss prevailed, this time with the power of precedence on his side.<sup>4</sup> Many years later, in 1943, Levi Strauss & Co. filed for—and was granted—a trademark for the “double arcuate and tab design” on the back pockets of their jeans.<sup>5</sup> This trademark has been at the center of over a hundred infringement suits in the last thirty years alone, proof that Levi Strauss' heritage of energetic, and vigorous, protection of his brand has survived, and no doubt is one of the leading reasons why Levi Strauss & Co.—and their blue jeans—have become synonymous both with the American west and the principals of American freedom and capitalism. When the Iron Curtain began lifting in the late 1980s and early 1990s, Levi's were one of the most popular western-produced luxury goods to hit the markets in the Soviet-bloc nations, both legitimate markets and black markets alike.

Most of Strauss' early legal opponents were small manufacturers that may not have even been aware of Strauss' patented design, and thus the legal ramifications that they were exposed to. This may very well have been the case with A. Lindauer & Co., whereas other companies—such as the Elfelt's—may not have been altogether ignorant of Strauss' design, especially given the close proximity between Elfelt and Strauss, with both businesses being located in San Francisco. In subsequent years, Levi Strauss & Co. has battled more blatant cases of trademark

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<sup>3</sup> *Satisfaction and Order of Judgment from Civil Case File 1853-1912, Case # 1211 Levi Strauss et al vs A. B. Elfelt, 1874.* National Archives.

<sup>4</sup> Author Unknown, “Levi Strauss & Co.” *St. Louis Globe and Democrat*, October 14, 1878.

<sup>5</sup> Downey, *Levi Strauss & Co*, 67.

infringement, as their world-wide recognition as a symbol of status has led to an increase in copy-cat, and counterfeit, manufacturing. If it can be said that imitation is the most sincere form of flattery, then Levi Strauss and Company must be very flattered indeed.

No discussion of the Wild West would be complete without mention of Samuel Colt, whose impact on the plains and deserts cannot be ignored. Although Samuel Colt died in 1862, his firearms would be at every shoot-out in the West, from the Texas Rangers to the OK Corral. Yet it was no coincidence that Colt's firearms would succeed as *the* weapon of choice on the western frontier, but rather through a near fanatical devotion to protecting his patents (especially from rival Edwin Wesson) that would serve to both insure Colt's place in history as *the* predominant firearms manufacturer—not just in the United States, but also in Great Britain. Colt's actions also had the unforeseen consequence of driving innovation among America's other firearm designers, by depriving them of the ability to copy, or even improve, Colt's designs. As was the case with Colt's early revolver designs, some improvements were necessary.

The Colt Paterson Revolver, produced in 1837, was the both the first practical revolver and repeating firearm at the time, yet Colt's design itself was not wholly his own. His design was the nexus of earlier attempts at revolving chambers and the emergence of the percussion cap as a means to replace the older flint-lock firing mechanism—yet Colt was the first to patent the design, and more importantly, he was the first to envision mass-production as a means to insure success.

His patent gave him a monopoly on revolver manufacture until 1857, and Colt's attorney, Edward Dickinson, mounted an effective and vigorous campaign to quash all copy-cats, which they did with systematic precision.<sup>6</sup>

One of the best examples of Colt's Machiavellian tactics can be found in the case of Samuel Colt versus Daniel Leavitt, a fire-arms designer who, in April of 1837, filed with the United States Patent and Trademark Office (USPTO) for a patent for the "Improvement in Many-Chambered Cylinder Firearms". Leavitt's design featured a hemispherical shape to the front of the revolving cylinder. This was done to minimize the chance of accidental discharge from the other chambers when the weapon was fired—an early complaint with the Colt-Paterson revolver. As the hot gases from the expended round escaped the front of the cylinder, they had a tendency to ignite the percussion caps in the other chambers, often resulting in an explosion as the other rounds would then ignite. This often proved fatal to the shooter, and in fact was the largest obstacle that Sam Colt had to overcome if his revolver was to be successful.<sup>7</sup>

Leavitt's design was approved by the USPTO in April of 1837—Patent No. 182—but it would take several years before his idea would be produced by the Massachusetts Arms Company, run by Edwin Wesson. Wesson, whose brother Daniel would later start Smith & Wesson, incorporated Leavitt's design on the Wesson & Leavitt Dragoon model, and was awarded a patent, posthumously, in 1850. The Wesson and Leavitt model was a success, even though the company only manufactured 800 pieces before Colt filed suit in 1852.

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<sup>6</sup> Bern Keating, *The Flamboyant Mr. Colt and His Deadly Six-Shooter* (Garden City, NY: Doubleday, 1978), 63-137.

<sup>7</sup> Daniel Leavitt, *Improvement In Many-Chambered Cylinder Fire-arms*. US Patent No. 182, 1837.

The case was sensational. It garnered national newspaper coverage—which was unusual for a civil case—and included both sides accusing each other of tampering with the United States Patent and Trademark Offices’ records—a most serious, if highly implausible, claim.<sup>8</sup> In the end, as in every other case, Colt emerged victorious, and the tiny Massachusetts Arms Company soon found itself insolvent. Yet Colt’s draconian methods may not have been all that detrimental to the American firearms industry: the Smith & Wesson company emerged from the ruins of the Massachusetts Arms Company, and rival gunsmiths, wary of any design that would raise the ire of the mighty Colt’s Patented Firearms Company, began to innovate and create new designs, such as Dr. Richard Gatling’s multi-barrel machine gun, as well as innovations in cartridge design, which quickly replaced the percussion cap-and-ball type of ammunition, due to the consistency and durability of pre-manufactured cartridge rounds. This, in turn, would lead to what was undoubtedly Colt’s most venerated design: the Colt Single Action Model 1860 revolver, two years before his death in 1862. The Model 1860 became the preferred side-arm of Union and Confederate officers alike during the Civil War, and was also the weapon of choice on both sides of the law in the Wild West. Colt’s unwavering methods in challenging any manufacturer that copied his designs, as well as his uncompromising approach to mass-production had a two-fold result: Colt’s original weapons, manufactured in the nineteenth century, are among some of the most valuable, and highly sought-after, weapons in the world—highly prized by collectors and fire-arms enthusiasts alike—as well as insuring that Colt Firearms would enjoy a thriving future while remaining on the cutting edge of innovation.<sup>9</sup>

Their subsequent successes with both the Colt Model 1911A1 .45 caliber service pistol—

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<sup>8</sup> Author Unknown. “Colt’s Revolvers, Important Suit for Infringement of Patent.” *New York Times*, October 14, 1852.

<sup>9</sup> Martin Ryell, *The Trial of Samuel Colt: Complete Report of the Trial of Samuel Colt vs. the Mass. Arms Company, Tried June 30, 1851, in U.S. Circuit Court, Boston, Mass., Before Hon. Levi Woodbury, Associate Justice, U.S. Supreme Court* (Harriman, TN: Pioneer Press, 1953)

designed by John Browning—and the M-16 assault rifle, which was designed by Eugene Stoner in 1955, both of which are still carried by US armed forces today, stand as a testament to Samuel Colt's vision as an innovator and industrialist.

Patent infringement is one thing. It can be coincidental—the by-product of innovation and the Industrial Revolution, or intentional, but it is a matter that is decided by the civil courts. With the bulk of the history of crime in the Wild West focusing on violence, there is little evidence of counterfeiting or forgeries in the West, although a few isolated incidents can be found, like the case of Moses Frank.

In 1865 Moses Frank, the former president of the Utah Mining Company, was put on trial in San Francisco for forging a draft—a financial instrument somewhere in-between a check and a bearers' bond—from H. Bloomingdale and Co. in the amount of six hundred dollars, which he offered to sale to a Mr. Howard at a discount, \$585. According to the newspaper account of the trial, which only lasted a few hours, the issue was whether or not the words “payable in United States gold coin” were in fact present when the check was originally offered to the firm of Howard and Sanchez by Franks, or if they were added later by a Mr. Connor, a secretary with H. Bloomingdale and Co—at Franks' request—after Howard and Sanchez declined to purchase the draft without the inscription mentioned above. In an incredible display of legal (and testicular) fortitude, Franks' attorney argued that since the phrase “payable in United States gold coin” was not on the original check presented by Moses Franks, the altered draft was not the same check that Franks' had originally presented to Howard (which was stretching the limits of the truth), and therefore Franks was innocent of any crime (which may have been even more of a stretch). The defense was aided in this claim by the fact that Mr. Howard was unable to remember if he had given Franks the \$585 before or after the inscription was added, a nifty legal point because



the money could then be considered an advance or loan if it was paid to Franks before the inscription was added, whereas if it was paid after the inscription was interpolated by Mr. Connor, Franks could indeed be guilty of forgery, but the defense's argument that the modified check was not the same check—while certainly a defense that plumbs the very depths of ethics and morality—would serve to absolve Franks of any blame if the inscription was proved to have been added after payment was rendered. In addition, contended the defense, the tax revenue stamps on the check were not for the correct amount—which might actually have been proof of forgery—and therefore the draft was not an official document, rendering it invalid as evidence under the Revenue Act. Incredibly, the judge agreed with the defense on the issue of the revenue stamps, which left the district attorney with no choice but to halt the proceedings. Judge Cowles then instructed the jury to return a verdict of not guilty, which was not long in forthcoming.<sup>10</sup>

The trial of Moses Franks is unique in that it is one of the few criminal trials for counterfeiting or forgery in the Wild West, even if the outcome is more typical of the lawlessness that has long characterized the Wild West. Counterfeiting schemes, money and banknotes, were more prevalent in the cities of the eastern United States, as were forgeries, and virtually all crime statistics from the Wild West focus primarily on homicide rates. Information on almost all other types of crime—robbery, rape, burglary, and arson—is almost non-existent, but it is not hard to draw the obvious conclusion: In the Wild West, it was easier to rob someone—even a stage-coach or a train—than it was to recruit and develop the kind of skilled forgers and artisans necessary to produce counterfeit currency that could pass scrutiny. In the “Boom-Or-Bust” economies on the frontier, and in cattle and mining towns, the longevity of many settlements was uncertain, and without a stable base of operation, such as a major

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<sup>10</sup> Author Unknown, “The Trial of Frank For Forgery.” *Daily Evening Bulletin*, January 13, 1865.

metropolitan area like San Francisco, most counterfeiters limited their activities to the older, more established cities of the eastern seaboard. The transitory nature of the western life-style also meant that a man could commit an armed robbery, and then pick up stakes and move hundreds of miles across the plains and prairie. This opportunity to literally disappear is almost unparalleled in American history, and many criminals took full advantage in doing so.

There is no question that the American frontier west had a well-deserved reputation for lawlessness. The vast territories and limited resources of local, state or territorial, and federal governments resulted in a region with more than ample opportunity for crime, vigilante justice, and range wars as various interests clashed over resources and property, yet intellectual property was defended much more peacefully—as well as more thoroughly—in the courts of the West, as evidenced by Levi Strauss' cases, and even though the major arms manufacturers were located in the east—primarily Massachusetts and Connecticut—the impact that their legacy has had on the West has endured to this day. The case of Moses Franks also illustrates the shortcomings in the frontier justice system as well as another example of some of the creative means by which western attorneys defended their clients. In a small way, these cases can be viewed as representative of the West in general, a land of contradictions, a land of vast and often inhospitable beauty and savagery, but also a land of opportunity, where a man can work hard and prosper, or—if he's lucky—he can succeed beyond his wildest dreams. While the very phrase “Wild West” has become synonymous with flagrant disregard of the law, in America's Wild West, protection of intellectual property *was* the law.

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