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UNFAIR COMPETITION - UNAUTHORIZED BROADCASTS OF BASEBALL GAMES

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UNFAIR COMPETITION — UNAUTHORIZED BROADCASTS OF BASEBALL GAMES — The Pittsburgh Athletic Club sold to sponsors the exclusive right to broadcast the home baseball games of the Pittsburgh Pirates. The sponsors contracted with the National Broadcasting Corporation for the use of two stations. Station KQV, knowing of this arrangement, posted observers on leased premises outside and overlooking the ball park and proceeded to broadcast play-by-play accounts of the games. Each admission ticket contained a stipulation that the holder was not to transmit or aid in transmitting reports of the games outside the park. The athletic club, the sponsors, and the N.B.C. jointly brought an action for an injunction against KQV's acts. *Held*, that the athletic club had a property right in the games and the news thereof during and for a reasonable time after the games, and that defendant's acts were enjoinable since they constituted unfair competition as to each of the plaintiffs. *Pittsburgh Athletic Club v. KQV Broadcasting Co.*, (D. C. Pa. 1938) 24 F. Supp. 490.

The field of unfair competition is one of the most tenuous in the law. This

is due to the fact that courts, well grounded in the folklore of free competition, have viewed with alarm anything approaching monopoly and have come to grant relief against marauding competitors only after a long series of hesitating and confused steps.[1] Courts first gave protection where defendant's acts were closely analogous to a traditional tort.[2] But ingenious competitors forced courts to manufacture competitive or business torts, relief being given under cover of protecting some proprietary interest in the plaintiff.[3] Familiar doctrines were distorted beyond recognition; in the field of trade marks and trade names even the need for actual competition has gradually disappeared.[4] It was not until the famous *Associated Press* case [5] in 1918 that the foundation was laid for a specific principle of unfair competition. Here for the first time was a qualified realization that it is an actionable wrong per se to interfere with, appropriate, or take a "free ride" on the business or custom of another unfairly and without privilege.[6] Here the phrase "unfair competition" begins to be predicated on the fundamental tort principle that when one man intentionally inflicts temporal damage upon another, he is liable unless he can justify his conduct.[7] At first,

[1] Grismore, "Are Unfair Methods of Competition Actionable at the Suit of a Competitor?" 33 MICH. L. REV. 321 (1935).

[2] Intimidation of another's customers by assault or threat of infringement suits, trade slander and libel, inducing breach of contract, inducing breach of trust, and bribery are among the more common acts analogous to traditional torts that are deemed to be "unfair competition." See NIMS, UNFAIR COMPETITION AND TRADE MARKS, 3rd ed., cs. 11, 12, 17, 19 (1929).

[3] In this category may be placed those acts having no close analogies at common law—trade mark and trade name infringement, pirating good will, false advertising, misbranding, and copyright and patent infringement. Statutes are important in this field.

[4] Here the courts have marched steadily from requiring deception and "passing off" by competitors to giving protection to non-competitors on the basis of injury to reputation. Compare Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 25 S. Ct. 609 (1905), with Vogue Co. v. Thompson-Hudson Co., (C. C. A. 6th, 1924) 300 F. 509, and Churchill Downs Distilling Co. v. Churchill Downs, Inc., 262 Ky. 567, 90 S. W. (2d) 1041 (1936). See also Wolff, "Non-Competing Goods in Trademark Law," 37 COL. L. REV. 582 (1937).

[5] International News Service v. Associated Press, 248 U. S. 215, 39 S. Ct. 68 (1918). See also the lower court's reasoning in (C. C. A. 2d, 1917) 245 F. 244.

[6] In this case there was no traditional or business tort on which to base protection. Despite remarks about there being a "quasi-property" in news, relief was given on the broad ground that each competitor is under a duty so to conduct his own business as not to injure that of another unfairly or unnecessarily and that the right to acquire property was entitled to as much protection as the right to guard property already acquired. International News Service v. Associated Press, 248 U. S. 215 at 235, 236, 39 S. Ct. 68 (1918).

[7] "It has been considered that, *prima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape. . . . If this is the correct mode of approach it is obvious that justifications may vary in extent according to the principle of policy upon which they are founded, and that while some . . . are absolute . . . others may depend upon the end for which the act is done." Holmes, J., in Aikens v. Wisconsin, 195 U. S. 194 at 204, 25 S. Ct. 3 (1904); POLLOCK, TORTS, 13th ed., 20-23 (1929); Winfield, "The Foundation of Liability in Tort,"

courts appeared fearful of accepting this elastic doctrine,[8] though it was uniformly applied in newspaper cases.[9] But slowly and undeniably, courts today are using it in diverse situations.[10] When considered in the light of this background, the principal case appears to be a step forward in this development. The athletic club created a news event at great expense and effort, and had an interest in deriving profits therefrom free from unwarranted interference. Courts uniformly pay lip service to tradition by calling such intangible interests "property rights."[11] But whether there is a property right depends on whether equity

27 COL. L. REV. 1 (1927). Under this principle, the law is plastic enough to meet new situations as they arise. The contrary rule, requiring that defendant's acts be within some recognized pigeon hole of tort, tends to make the law static; this view is expressed by Dixon, J., in Victoria Park Racing & Recreation Grounds Co., Ltd. v. Taylor, 58 Com. L. Rep. 479 at 505, 43 Argus L. Rep. 597 at 605 (Australian High Court, 1937).

[8] Cheney Bros. v. Doris Silk Corp., (C. C. A. 2d, 1929) 35 F. (2d) 279 (denied injunction against appropriating dress designs); Gotham Music Service v. Denton & Haskins Music Pub. Co., 259 N. Y. 86, 181 N. E. 57 (1932) (denied injunction against use by D of new name popularized by P in selling an old song); Crump Co. v. J. L. Lindsay, Inc., 130 Va. 144, 107 S. E. 679 (1921) (denied injunction against copying an uncopyrighted catalog).

[9] Associated Press v. KVOS, Inc., (C. C. A. 9th, 1935) 80 F. (2d) 575, reversed on jurisdictional grounds, 299 U. S. 269, 57 S. Ct. 197 (1936); Associated Press v. Sioux Falls Broadcast Assn., (D. C. S. D. April 8, 1933) (unreported), 4 AIR L. REV. 323 (1933).

[10] Madison Square Garden Corp. v. Universal Pictures Co. Inc., 255 App. Div. 459, 7 N. Y. S. (2d) 845 (1938) (enjoined taking of motion pictures of hockey games for a feature film after defendant had been licensed to take pictures for news reels); Time, Inc. v. Anschel Barshay, (D. C. N. Y. 1937) (unreported) (enjoined use of name "Voice of Time" on defendant's phonograph records after plaintiff had built up distinctive name of "March of Time" on radio program); Twentieth Century Sporting Club, Inc. v. Transradio Press Service, Inc., 165 Misc. 71, 300 N. Y. S. 159 (1937) (enjoined broadcasting prize fight by obtaining tips from authorized broadcast and authenticating them by independent observation from outside the stadium); Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 A. 631 (1937) (broadcasting by sub-purchaser of records marked "not licensed for radio broadcasting" enjoined on basis of unfair competition and equitable servitude on chattels); Uproar Co. v. National Broadcasting Co., (D. C. Mass. 1934) 8 F. Supp. 358, noted in 33 MICH. L. REV. 822 (1935), modified in (C. C. A. 1st, 1936) 81 F. (2d) 373 (appropriation of good will enjoined on ground of unfair competition); Coca-Cola Co. v. Old Dominion Beverage Co., (C. C. A. 4th, 1921) 271 F. 600 (enjoined use of name "Taka-Kola" on basis of "free ride" doctrine).

[11] Pittsburgh Athletic Club v. KQV Broadcasting Co., (D. C. Pa. 1938) 24 F. Supp. 490 at 492. This view is apparently motivated by the old maxim that equity will only protect "property rights." Courts reason that plaintiff by his efforts has created a thing of value, a thing of value is property, and hence he is entitled to protection. But the reason the thing has value is because the court gives it protection. Property follows instead of leads the law. See Cohen, "Transcendental Nonsense and the Functional Approach," 35 COL. L. REV. 809 at 814 (1935), and Holmes, J., concurring in International News Service v. Associated Press, 248 U. S. 215 at 246, 39 S. Ct. 68 (1918).

gives that interest protection. This in turn depends on whether defendant is privileged to inflict intentional injury on plaintiff's business.[12] Here, defendant has the right to look out the windows of leased premises and observe the ball games; that is no trespass or nuisance.[13] It has been argued that this privilege of observation is cut off whenever the plaintiff is injured through an invasion of his right of privacy and that this right should be extended to business interests.[14] But the infusion of this doctrine only adds an unnecessary element that is too narrow in view of the basic concept of unfair competition under consideration.[15] A more practical formula is to place on the defendant the burden of setting up some strong affirmative reason why he should be allowed to inflict the injury. Public interest in the free distribution of news may be an affirmative reason in defendant's favor.[16] Or perhaps to give plaintiff protection would set up an undesirable monopoly and deprive the public of the benefits of free competition.[17] Such situations require delicate balancing of policies and may even require legislation for final settlement. But in the principal case, no such affirmative reasons appear. No public policy is served by allowing the infliction of this injury; even though defendant is enjoined, the public will be able to hear authorized broadcasts over powerful stations. Defendant is not privileged on

[12] All the plaintiffs claimed injury and the court held that defendant's acts constituted unfair competition to each of them. Findings of Fact No. 34 (unpublished) and Conclusions of Law No. 4, Pittsburgh Athletic Club v. KQV Broadcasting Co., (D. C. Pa. 1938) 24 F. Supp. 490.

[13] Victoria Park Racing & Recreation Grounds Co., Ltd. v. Taylor, 58 Com. L. R. 479, 43 Argus L. Rep. 597 (1937). Here the High Court of Australia, in a case very similar to the principal one, refused to enjoin defendant radio station from broadcasting horse races from a tower erected outside plaintiff's track. See also the lower court decision in 37 New So. Wales 322 (1937).

[14] 48 YALE L. J. 288 at 299 (1938), citing dissenting opinions in Victoria Park Racing & Recreation Grounds Co., Ltd. v. Taylor, 58 Com. L. Rep. 479, 43 Argus L. Rep. 597 (Australian High Court, 1937). But it must be remembered that the English courts have not yet developed any specific principle of unfair competition as such, like that laid down in the Associated Press case. This is pointed out by Dixon, J., in the Australian case. English plaintiffs are thus forced to argue for an extension of the right of privacy, which would not be so great a burden on the judicial conscience, though so far the effort has been vain. See Paton, "Broadcasting and Privacy," 16 CAN. BAR REV. 425 (1938).

[15] The doctrine under consideration covers many situations where it would be impossible to use a right of privacy, such as inducing breach of contract, misrepresenting, and infringing a trade mark. Furthermore, the plaintiff in these competition cases is not really seeking a right of privacy; he is seeking to be free from interference with his legitimate profits. To speak of a right of privacy here is to indulge in a needless fiction, fully as tenuous and as question-begging as a "property right."

[16] Such a situation may exist where radio stations copy and broadcast newspaper items. See 2 SOCOLOW, LAW OF RADIO BROADCASTING, c. 27 (1939) and notes in 34 MICH. L. REV. 738 (1936) and 44 YALE L. J. 877 (1935).

[17] Such a feeling moved the court in Kellogg Co. v. National Biscuit Co., 305 U. S. 111, 59 S. Ct. 109 (1938), to overrule the injunction granted by the lower court against the use of the form and name of plaintiff's shredded wheat product, (C. C. A. 3rd, 1937) 91 F. (2d) 150.

the basis of free competition in describing news events open to all, for this event was held within a confined area with an express intent, largely successful, of limiting the publication of news thereof.[18] No undesirable monopoly is created by giving plaintiff relief. The fact that defendant was outside the ball park does not aid it.[19] Inside or outside, defendant has diverted to itself profits created by plaintiff's efforts; it is has reaped where it has not sown.[20] In a clear case of unfair competition like this, the court should freely grant the injunction without blurring the issue with antiquated maxims. It should recognize the need today for a clear cut principle of unfair competition, designed to promote a better functioning of the economic order and flexible enough to cover unfair practices that unscrupulous competitors will create in the future.[21] The court in the principal case, while devoted to the artificial requirement of a "property right," has gone a long way toward meeting this need.

[18] 2 SOCOLOW, LAW OF RADIO BROADCASTING 807 (1939).

[19] An injunction against taking pictures inside a dog show, where the tickets had no stipulations thereon, was denied in Sports & General Press Agency, Ltd. v. "Our Dogs" Pub. Co., Ltd., [1916] 2 K. B. 880; dictum also stated there was a clear right to take pictures from outside the exhibition. This is another indication of the lack of a basic doctrine of unfair competition in England. See note 14, supra.

[20] Apparently the first to recognize that the unauthorized reporting of news directly from the source, when that source was created at great expense and at the very moment when a legitimate return could be made therefrom, constituted unfair competition was the memorandum decision in Rudolph Mayer Pictures, Inc. v. Pathe News, Inc., 235 App. Div. 774, 255 N. Y. S. 1016 (1932), enjoining the taking of motion pictures of a boxing match held on Ebbets Field from an overlooking building. The same principle was expressed in Twentieth Century Sporting Club, Inc. v. Transradio Press Service, Inc., 165 Misc. 71, 300 N. Y. S. 159 (1937). Contra: National Exhibition Co. v. Tele-Flash, Inc., (D. C. N. Y. 1936) 24 F. Supp. 488.

[21] This problem will undoubtedly come to the forefront again with the development of television. See 2 SOCOLOW, LAW OF RADIO BROADCASTING, c. 48 (1939).