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UNFAIR COMPETITION -- APPROPRIATION OF GOOD WILL BY A NON-COMPETITOR -- LITERARY PROPERTY

UNFAIR COMPETITION — APPROPRIATION OF GOOD WILL BY A NON-COMPETITOR — LITERARY PROPERTY — The Texas Co. and the National Broadcasting Co. sought to enjoin the unauthorized publication and sale by the Uproar Co. of a pamphlet containing the subject-matter of Ed Wynn's advertising program, broadcast under the auspices of the Texas Co. The name "Graham," which was associated with the announcer Graham McNamee and had acquired a secondary meaning in connection with the N. B. C., appeared frequently in the pamphlet. The court found that the Texas Co. had the sole right under a contract with Wynn to the use of Wynn's script, that the N. B. C. had the exclusive right under a contract with McNamee to the use of the name "Graham" for commercial purposes, and that the publication of the pamphlet was detrimental to these interests because of the confusion likely to arise in the minds of the public with respect to the identity of the parties. *Held*, use of the script and the name "Graham" amounted to an appropriation of good will created at great expense which would be enjoined as unfair competition, and that literary property in the script was not lost by radio broadcast. *Uproar Co. v. National Broadcasting Co.*, (D. C. Mass. 1934) 8 F. Supp. 358.

The decision in the principal case raises the question of whether the courts

shall recognize a separate and generic tort, unfair competition.[1] Few of the grounds upon which relief in unfair competition cases is commonly predicated were present in the principal case. The court relied in part upon protecting literary property [2] in the script, radio broadcast of which was held not to constitute a dedication, upon analogy of a public representation of a dramatic composition not being a publication.[3] Implicit in the decision, however, is the suggestion that good will rather than literary property was the interest for which relief was primarily sought. Another element present in the facts was the possibility of the public being misled.[4] Significantly absent, on the other hand, was an invasion of the right of privacy [5] of either the Texas Co. or the N. B. C., a technical infringement of trade-mark or copyright,[6] a breach of trust,[7] or interference with contract.[8] Furthermore, the parties were not competitors,[9] nor was there any inverse passing-off [10]— another's goods as one's own — since from all that appears in the report due credit was given to the source of the published material. There was no disparagement of goods.[11] In short, a grant of relief necessarily went upon the broad ground of appropriation of good will created at great expense. Danger has been seen in the protection of such nebulous interests, of whatever economic value, by the regulation of the right of free competition.[12] Policy dictates a carefully adjusted medium between the extremes of allowing free appropriation of ideas and recognizing an absolute property interest in the

[1] Edward S. Rogers, "Unfair Competition," 17 MICH. L. REV. 490 at 494 (1919).

[2] Fisher v. Star Co., 231 N. Y. 414, 132 N. E. 133 (1921), annotated 19 A. L. R. 949 (1922), citing numerous cases.

[3] Ferris v. Frohman, 223 U. S. 424, 32 Sup. Ct. 263 (1912); McCarthy & Fischer, Inc. v. White, (D. C. S. D. N. Y. 1919) 259 Fed. 364 (1919) (musical composition sung in vaudeville).

[4] 30 HARV. L. REV. 166 (1916), criticizing Meccano, Ltd. v. Wagner, (D. C. S. D. Ohio 1916), 234 Fed. 912.

[5] Edison v. Edison Polyform & Mfg. Co., 73 N. J. Eq. 136, 67 Atl. 392 (1907).

[6] Coca-Cola Co. v. Old Dominion Beverage Corp., (C. C. A. 4th, 1921) 271 Fed. 600, cert. denied 256 U. S. 703, 41 Sup. Ct. 624 (1921).

[7] Board of Trade of Chicago v. Christie Grain & Stock Co., 198 U. S. 236, 25 Sup. Ct. 637 (1905); F. W. Dodge Co. v. Construction Information Co., 183 Mass. 62, 66 N. E. 204 (1903); Nat. Tel. News Co. v. Western Union Tel. Co., (C. C. A. 7th, 1902) 119 Fed. 294.

[8] Carpenter, "Interference with Contract Relations," 41 HARV. L. REV. 728 at 755 (1928); Bitterman v. Louisville and Nashville R. R., 207 U. S. 205, 28 Sup. Ct. 91 (1907).

[9] Oates, "Relief in Equity Against Unfair Trade Practices of Non-Competitors," 25 ILL. L. REV. 643 (1931), tracing the development in cases dealing with the appropriation of trade-names.

[10] International News Service v. Associated Press, 248 U. S. 215, 39 Sup. Ct. 68, 63 L. ed. 211 (1918).

[11] American Law Book Co. v. Edward Thompson Co., 41 Misc. 396, 84 N. Y. S. 225 (1903).

[12] Grismore, "Are Unfair Methods of Competition Actionable at the Suit of a Competitor?," 33 MICH. L. REV. 321 at 333 (1935).

originator.[13] Obviously such a line must be drawn upon the facts of each case.[14] When detrimental conduct is counter to contemporary business morals and the protection of a party's interest is deemed desirable, situations like the present argue for a frank recognition of the tort, unfair competition. In this respect, the principal case is a commendable affirmance and extension to the case of a non-competitor of the doctrine enunciated in *International News Service v. The Associated Press*,[15] that an individual is entitled to protection in the enjoyment of the fruits of his labor.

A. H. R.

[13] Grismore, "Are Unfair Methods of Competition Actionable at the Suit of a Competitor?," 33 MICH. L. REV. 321 at 330 (1935).

[14] Crump v. Lindsay, 130 Va. 144, 107 S. E. 679, 17 A. L. R. 747 at 751 (1921).

[15] Supra, note 10.