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Unfair Competition

Edward S. Rogers

UNFAIR COMPETITION.

IN the recent case of *International News Service* v. *The Associated Press* (U. S. Sup. Ct. Dec. 23, 1918), suit was brought by the Associated Press to restrain the defendant from its systematic appropriation of complainant's news, first, by bribing employes; second, by inducing Associated Press members to violate its by-laws and permit defendant to obtain news from publication; and third, by copying news from bulletin boards and from early editions of complainant's members' newspaper and selling this, bodily or after re-writing it, to defendant's customers. The question as to the right of complainant to relief against the third of these methods was the principal question in the case.

The District Court granted a preliminary injunction against the first two practices but, although satisfied that defendant's acts were wrongful, refused relief against the third, because the legal question was one of first impression and the court preferred to await the outcome of the appeal.

The Circuit Court of Appeals remanded the cause with directions to issue an injunction against the bodily taking of the words or substance of complainant's news until its commercial value as news had passed away. Upon certiorari to the Supreme Court the decree was affirmed.

The court based its decision squarely upon unfair competition in business and refused to waste any time over the questions as to whether there was a violation of any common law property right in news matter and whether this was lost or still remained after publication by reason of the copyright act. The words of Mr. Justice Pitney, who delivered the opinion of the court, are particularly instructive:

> "The right (he said) of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted; but to transmit that news for commercial use, in competition with complainant—which is what defendant has done and seeks to justify—is a very different matter. In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money,, and that defendant, in appropriating it and selling it as its own, is endeavor-

ing to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself, and a court of equity ought not to hesitate long in characterizing it as unfair competition in business."

* * * * *

"Regarding news matter as the mere material from which these two competing parties are endeavoring to make money, and treating it, therefore, as quasi-property for the purposes of their business because they are both selling it as such, defendant's conduct differs from the ordinary case of unfair competition in trade principally in this that, instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own."

This case shows the adaptability of the courts to meet new conditions and reveals the elasticity of the term "unfair competition." The subject matter was news,—obviously mere news is not property and it has been held that news as such is not copyrightable.[1] Books containing information can be protected under the copyright statute, but the information itself, as distinguished from the literary form in which it is cast, is not protectible under the copyright acts.[2] While common rights before publication are perhaps broader than rights after publication,[3] which are created by statute, still news, to be of value for newspaper purposes, must be published, and if published without copyright, the common law right terminates and, as previously pointed out, the copyright statutes do not embrace such things. There was much discussion in the early quotation cases on this

[1] *Tribune Co.* v. *Illinois Publishing & Printing Co.*, 76 Publishers Weekly 643, 947. *Springfield* v. *Thame*, 89 L.T. (N.S.) 242; *Clayton* v. *Stone*, 2 Paine 382; *N. Y. Times* v. *Sun. Assn.*, 195 Fed. 110; 204 Fed. 586; *Walter* v. *Steinkopf*, (1892), 3 Ch. 489.

[2] *Baker* v. *Selden*, 101 U. S. 99; *Perris* v. *Hexamer*, 99 U. S. 674.

[3] See article by George E. Brand "Property in Notion" 1 Bench & Bar (July 1912) 100, for a full citation of cases.

point,[4] but the consensus was that rules of law which had grown up concerning literary property and copyright could not be expanded to reach and protect news as such. The principles governing unfair trade, as that term is commonly understood, seemed inadequate. Unfair trade was perilously close to being crystalized and limited to mere passing off. The term "unfair trade" by common consent seemed to be regarded as an outgrowth or expansion of trade-mark infringement. The unfair trader of early days usually contented himself with pirating trade-marks and trade names. The courts, after some hesitancy, made this sort of piracy unprofitable by stopping it. Then the trade parasite, by various unscrupulous and ingenious contrivances, sought to steal his successful rival's business by ways other than infringing his trade-mark, by the imitation of packages, by the deceptive use of personal or descriptive or geographical names, by the simulation of labels, and in the countless ways in which a man is able to make the false representation that his goods are his rival's. For a while these efforts, to the reproach of the courts, seemed to succeed until finally the judicial conscience awoke sufficiently for judges, with an appreciation of good sportsmanship as well as a sense of justice, to realize that trade could be stolen in other ways than by the mere infringement of trade-marks, that trade-marks are simply one way of identifying merchandise, that copying trade-marks was only one way of stealing good will, and that it was the sale of one trader's goods as and for another's which was the wrong and the condition demanding relief rather than the particular means by which it might be accomplished. There seemed to be no name for such commercial depravity and for want of a better, the phrase "unfair competition" was adopted. It was probably a loose translation of the French expression "concurrence deloyale" and because the words "unfair competition" were so commonly used to describe the wrong where, by artifice, one trader's goods were represented to be those of another, other than by trade mark infringement, it became dangerously close to being limited to this kind of unfairness. Many courts assumed that, unless there was a false representation that the goods of A were the goods of B,

[4] *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236; *Hunt* v. *N. Y. Cotton Exchange*, 205 U. S. 322; *Cleveland Telegraph Co.* v. *Stone*, 105 Fed. 794; *National Telegraph News Co.* v. *Western Union Teleg. Co.*, 119 Fed. 294; *Board of Trade* v. *Consolidated Stock Exchange*, 121 Fed. 433; *McDermott Commission Co.* v. *Chicago Board of Trade*, 146 Fed. 961; See also *Sports and General Press Agency Ltd.* v. *"Our Dogs" Publishing Co., Ltd.* (1916) 2 K. B. 880; *Board of Trade* v. *Hadden-Krull Co.*, 109 Fed. 705; *Board of Trade* v. *Thompson*, 103 Fed. 902; *Board of Trade* v. *Cella Co.*, 145 Fed. 28; *Kiernan* v. *Manhattan Tel. Co.*, 50 How. Pr. 194; *Gold & Stock Exch.* v. *Todd*, 17 Hun. 548; *Dodge* v. *Construction Information Co.*, 183 Mass 62; *Exchange Telegraph Co.* v. *Gregory*, 74 L.T. (N.S.) 85; *Exchange Tel. Co.* v. *Central News Co.* (1897) 2 Ch. 48.

there could be no unfair competition. Unfair competition was regarded only as a branch of trade-mark law and causes involving it were digested under some such caption as Trade Marks and Analogous Cases. Indeed the 5th Edition of Sebastian's great work, "The Law of Trade Marks", published in 1911, treats the subject in one chapter under the subject "Passing Off and Analogous Cases," and devotes 60 pages out of a treatise of 892 pages to it. The first edition of Mr. Hopkins' Book, published in 1900, was called "The Law of Unfair Trade", but the second and third editions are entitled "The Law of Trade Marks, Trade Names and Unfair Competition," probably for the reason that the legal profession did not know what unfair competition was and the title hindered the same of the book. Unfair competition was supposed to be a species of trade mark law. It was not until 1916 that the Supreme Court stated the proper relationship of the two in *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, 413, where Mr. Justice Pitney said (p. 412):

> "Courts afford redress or relief upon the ground that a party has a valuable interest in the good will of his trade or business, and in the trade marks adopted to maintain and extend it. The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another. * * *
>
> This essential element is the same in trade mark cases as in cases of unfair competition unaccompanied with trade mark infringement. In fact, the common law of trade marks is but a part of the broader law of unfair competition."

Therefore, it is now established that unfair competition is the genus and trade mark infringement the species.

Many cases digested under various captions, such as contracts, injunctions, libel, combinations, involving such facts as inducing breach of competitors' contracts, enticing employes from service of competitors, betrayal of confidential information, unfair appropriation of values created by competitors' expenditures, disparagement of competitors and of competitors' goods, misuse of testimonials, intimidation of competitors' customers, attempts to cut off competitors' supplies or destroy their markets, bribery of employes, and the like, are in reality cases of unfair competition.[5]

[5] There is a discussion of this aspect of the subject in Dr. Stevens' book "Unfair Competition." University of Chicago Press 1917. See also XII Illinois Law Review (Oct. 1917) p. 218, and the various bulletins issued by the Federal Trade Commission with reference to their enforcement of Section 5 of the Federal Trade Commission Act. See Article "Disparagement of Property" by Jeremiah Smith, Columbia Law Review Vol. 13, No. 1, p. 13, and Vol. 13, No. 2 p. 121.

In an attempt to indicate the cases which should be classed as cases of unfair competition an article was published in this Review in March, 1913, (Vol. XI, MICH. LAW REVIEW, p. 373), entitled "The ingenuity of the infringer and the courts." In the course of this article it was said:

> "If the law has not yet arrived at that point, the next step in advance should be that a trader is entitled to be protected not only against any device by which the good will of his business or any part of it is being stolen away from him, but that he is also entitled to the custom which would naturally come to him, and that he should be protected against any unfair interference with his business by means of which this custom is diverted or prevented. He should be protected against any acts by which his customers are taken away from him by fraud, actual or constructive, by force, intimidation, threats or by meddlesome persuasion, and further, that his good will and business and the things that he has created in which they are embodied should be secured to him against *unfair (though not necessarily fraudulent) appropriation by others in any way that will diminish their value to the original creator.*
>
> Relief in these cases ought not to be made to depend upon principles of law evolved in past centuries concerning contracts, trade marks, literary property and the like, when conditions were different, affairs less complex, and when parasitic ingenuity was less highly developed, but should frankly be accepted as a thing made necessary by modern conditions."

The Supreme Court, in the case under consideration, keeps pace with modern conditions and protects the honest trader from unfair interference with his business. It approaches the question from the point of view of defendant's wrong, rather than a discussion of the complainant's rights. The defendant's conduct was parasitic and immoral. Immoral conduct is usually unfair to some one.

EDWARD S. ROGERS.

Chicago, Ill.