North Dakota Law Review

Volume 28 | Number 1 Article 4

1952

Unfair Competition - Common Law Liability for Interference with Prospective Business Relations

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to decide over the subject matter – the marital relation–if both of the spouses voluntarily confer *in personam* jurisdiction upon the court. It does not matter that the court *in fact* lacks jurisdiction over the subject matter because it is dependent upon at least one spouse's being domiciled in the state,[58] since the decree will be nevertheless "airtight" whether against an attack within the rendering state or in any other state by virtue of the Full Faith and Credit Clause, whether against an attack by one of the spouses or by third persons. This development would indicate a growing tendency toward the liberalization of divorces based upon mutual consent of the spouses at the cost of states whose laws and public policy are more conservative in this regard. Whether or not the United States Supreme Court will sanction such a development remains to be seen.

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UNFAIR COMPETITION – COMMON LAW LIABILITY FOR INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS. The common law of unfair competition involves the judicially developed morals of the market place, founded on the almost Biblical precept: No man shall reap where he has not sown. Unfair competition is an abuse of the privilege of free competition, constituting a tort [1] or an equitable injury [2] against which an injured competitor can obtain legal or equitable relief.

TORT THEORY OF ACTION

Tort liability for unfair competition is imposed on the theory that unfair interference with a competitor's prospective business relations is an abuse of the privilege of competition.[3] This privilege, based on the public policy in favor of free competition, is an exemption from the general principle that intentional interference with the interests of another is a tort. It "rests on the economic postulate that free competition is worth more to society than it costs." [4]

The privilege of compeittion was established at common law.

58. Bell v. Bell, 181 U.S. 175 (1901).

1. Prosser, Torts §105, pp. 1013-1029 (1941).
2. McClintock, Equity §151, pp. 402-405 (2d ed. 1948).
3. Temperton v. Russell (1893) 1 Q.B. 715, 62 L.J.Q.B. 412, is the leading case. Prosser, Torts 1014 (1941).
4. Holmes, *Privilege, Malice, and Intent*, 8 Harv. L. Rev. 1, 3 (1894).

In an anonymous case [5] decided in 1410, an action was brought ty two established schoolmasters against another schoolmaster who by setting up a competing school and charging lower fees, attracted prospective pupils from the plaintiffs' school. The English court held that the action could not be maintained, one judge declaring that the defendant's conduct was "a virtuous and charitable thing, and an ease to the people"; another judge declaring that it "would be against reason for a master to be hindered from keeping school where he pleases." [6] However, in another early case, *Dunstable v. B.*,[7] a defendant was held liable for selling meat in a community where the plaintiff, the Prior of Dunstable, had a monopoly to market meat.[8]

England, at this time, was emerging from the Middle Ages, during which monopolies of this kind had frequently been granted by the Crown as a means of increasing royal power.[9] But as England was changing from a pastoral into a trading economy, there slowly developed a public policy, implicit in the Schoolmasters' case, that unrestricted competition was desirable. A few centuries of profound change both in economic practice and in economic theory culminated in the Industrial Revolution during the nineteenth century, when public policy in regard to trade could be summed up in the statement that the best way to regulate trade was to leave it alone; a policy which fostered unprecedented production of economic goods, accompanied by unprecedented creation of social evils. "The unhappy effects of that policy within less than a century resulted in the adoption of a compromise – a policy of government regulation designed to maintain a status of free and fair competition protecting alike against the dangers of monopoly and the evils of uncurbed competition." [10]

The privilege of competition has long been a matter of serious concern in democratic society, and has been limited by a standard of fairness in the laws of both England and the United States. "All laws of a democracy are but expressions of a policy drawn, correctly or otherwise, from human experience. It is therefore to be expected that the policy they express will change as new ex-

5. Y.B. 11 Hen. IV, f. 47, pl. 21 (1410).
6. Chafee, *Unfair Competition*, 53 Harv. L. Rev. 1289 (1940).
7. Y.B. 11 Hen. VI, f. 19, pl. 13 (1433).
8. Wyman, *Competition and the Law*, 15 Harv. L. Rev. 427, 428-429 (1902).
9. Jones, *Historical Development of the Law of Business Competition*, 36 Yale L.J. 351, 367 (1927).
10. *Id.* at 383; *see* 1 Callmann, Unfair Competition and Trade-Marks, 92-93 (1945). "The prevention of monopoly must be balanced with the necessity of maintaining free competition and a free market, in determining what constitutes unfair competition." California Appeal Creators v. Wieder of California, 68 F. Supp. 499, 506 (S.D.N.Y. 1946).

perience teaches that old policy is mistaken either in factual basis or functioning." [11]

Interference with the business relations of a competitor is, of course, the very essence of competition, and only where the interference is regarded as unfair is the competition unprivileged. As stated by Ames,[12] "To divert to one's self the customers of a rival tradesman by the offer of goods at lower prices is, in general, a legitimate mode of serving one's own interest and justifiable as fair competition. If, however, a man should start an opposition shop, not for the sake of profit for himself, but, regardless of loss to himself, for the sole purpose of driving the plaintiff out of business and with the intention of retiring himself immediately upon the accomplishment of his malevolent purpose, would not this wanton causing of damage to another be altogether indefensible and a tort?"

Four years later an affirmative answer to this question was given in the case of *Tuttle v. Buck*.[13] In that case the plaintiff, who had established a profitable business as a barber in a small town, refused to rent a building from the defendant. Angered, the defendant set up and financed a rival barber shop for the purpose of driving the plaintiff out of business, and succeeded. In a tort action the plaintiff recovered for the injury to his business relations, on the ground that the defendant did not have a privilege to interfere, by such method and with such a motive.

Clearly, then, the privilege of competition is limited by a legal standard of fairness to the method of competition and the motive of the competitor, and abuse of this privilege is the basis for imposing tort liability to the competitor whose business relations are injured as a consequence. For this reason interference with the reasonable expectancy of patronage arising from preliminary negotiations with a prospective buyer is an abuse of the privilege of competition. Thus, in *Louis Kamm, Inc. v. Flink*,[14] the plaintiff, a real estate broker, disclosed the identity of a prospective buyer to the defendant, a competing real estate broker, who assured him that the information would be held in strictest confidence. The defendant afterward induced the prospective buyer to discontinue negotiations with the plaintiff. In a tort action by the plaintiff, the court held that the defendant was liable for the commission

11. McElhone v. Geror, 207 Minn. 580, 583, 292 N.W. 414, 416 (1940).
12. Ames, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor*, 18 Harv. L. Rev. 411, 420 (1905).
13. 107 Minn. 145, 119 N.W. 946 (1909).
14. 113 N.J.L. 582, 175 Atl. 62 (1934).

which the plaintiff would have earned but for the unfair competition of the defendant. "The wrongful act charged was the malicious interference with [the plaintiff's] business. . . . Natural justice dictates that a remedy shall be provided for such unjust interposition in one's business. The luring away, by devious, improper, and unrighteous means, of the customers of another is, on principle, an actionable wrong,if damage ensues." [15] "Unjustifiable interference with one's right to pursue his lawful business or occupation, and to reap the earnings of his industry, is forbidden. The law enjoins the employment of practices that are outside of the domain of fair trade competition." [16]

In a somewhat similar case, *Johnson v. Gustafson*,[17] the Minnesota court has indicated its willingness to protect, from unprivileged interference, the prospective economic advantage of a person engaged in lawful business. In this case the owner of a residential property listed it with the plaintiff, a real estate broker, for sale at $6,000, of which the plaintiff was to receive $300 as a commission for procuring a buyer. However, the owner had the right to sell the property independently without being liable to the plaintiff for the commission. The plaintiff interested defendant Clarity in the property. But Clarity, in order to get it for less by eliminating the plaintiff's commission, induced defendant Gustafson to purchase the property directly from the owner for $5,700 with Clarity's money. The plaintiff brought action against Clarity and Gustafson for damages, and it was held that they were liable for the amount of the commission, which the plaintiff would have earned had it not been for the unfair acts of the defendants. As the court stated,[18] "No man should be permitted to reap a profitable crop from seed of the kind here used."

It has become increasingly evident in recent years that public policy, while it favors free competition, also favors higher standards of fairness in competition; and higher standards of fairness have accordingly been applied by the judicial definers of public policy.[19] A method of competition, at one time privileged, may thus be declared unlawful under a new and higher standard; and noncompliance with this standard is the basis for allowing dam-

15. *Id.* at 586, 175 Atl. at 66.
16. *Id.* at 590-591, 175 Atl. at 68.
17. 201 Minn. 629, 277 N.W. 252 (1938).
18. *Id.* at 635, 277 N.W. at 255.
19. Louis Kamm, Inc. v. Flink, 113 N.J.L. 582, 175 Atl. 62 (1934); Keviczky v. Lorber, 290 N.Y. 297, 49 N.E.2d 146 (1943); Goldman v. Feinberg, 130 Conn. 671, 37 A.2d 355 (1944); *see* Bekken v. Equitable L. Assur. Soc., 70 N.D. 122, 153, 293 N.W. 200, 217 (1940).

ages at law.[20] But since periodic recovery of damages in repeated actions at law would be an inadequate remedy to protect continuing business relations, the remedy in equity is manifestly better, providing in one suit both damages for past unfair competition and an injunction against continuance of such competition.[21]

Equity Theory of Action

In equity, unprivileged interference with business relations is enjoinable at the suit of an injured competitor, in order to protect the property right to conduct business without unlawful interference,[22] or to prevent unjust enrichment.[23]

1. Theory of Property Right

Injunctive relief is usually granted on the theory that the right to conduct a business is a property right which equity will protect from interference by unfair compeition.[24] For example, in *Madison Square Garden Corp. v. Universal P. Co.*,[25] the plaintiff was the owner of Madison Square Garden. The defendant, a motion picture producer, was authorized by the plaintiff to photograph ice hockey events for use in newsreels only. It produced without the plaintiff's permission a feature picture using many authentic scenes of hockey games held in the auditorium, as well as fictitious scenes designed to appear genuine. In advertising the picture, the defendant made frequent references to Madison Square Garden. The plaintiff, part of whose business was the licensing of genuine photographs for use in feature pictures, brought suit to enjoin the defendant from showing the picture. The court held that the plaintiff was entitled to equitable relief, on the ground that the plaintiff's right to conduct the valuable business of licensing the use of genuine photographs was a property right protectible in equity from unfair competition.[26]

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20. Newark Hardware & Plumbing Supp. Co. v. Stove Mfrs. Corp., 136 N.J.L. 401, 56 A.2d 605 (1948), *aff'd.* 137 N.J.L. 612, 61 A.2d 240 (1948).
21. Walsh, Equity 214 (1930).
22. 1 Callmann, Unfair Competition and Trade-Marks §2.1, pp. 16-18 (1945).
23. 1 *id.* §60.3, pp. 728-730.
24. McClintock, Equity 402-403 (2d ed. 1948). This right is not property in the sense of being a thing; for, as stated by Justice Holmes in Truax v. Corrigan, 257 U.S. 312, 342 (1921) (dissenting opinion), "An established business no doubt may have pecuniary value and commonly is protected by law against various unjustified injuries. But you cannot give it definiteness of contour by calling it a thing. It is a course of conduct . . ."
25. 255 App. Div. 459, 7 N.Y.S.2d 845 (1st dep't. 1938).
26. *Accord:* Paramount Pictures v. Leader Press, 106 F.2d 229 (10th Cir. 1939); Federal Waste Paper Corp. v. Garment Cent. Capitol, 268 App.Div. 230, 51 N.Y.S.2d 26 (1st Dep't. 1944).

2. Theory of Unjust Enrichment

The United States Supreme Court has advanced the theory that one whose business values are misappropriated by a competitor is entitled to injunctive relief in order to prevent unjust enrichment.[27] The misappropriation by a competitor of the business values of another person is equivalent to taking the competive equipment of that person and using it to his injury.[28] Recognizing this fact, the United States Supreme Court, in the leading case of *International News Service v. Associated Press,*[29] declared that such misappropriation, by which one competitor unjustly enriches himself at the expense of another, constitutes unfair competition entitling the injured competitor to injunctive relief. In this case the plaintiff and the defendant were both engaged in the business of gathering news and distributing it to member newspapers. The defendant, by copying from bulletin boards the news gathered by the plaintiff, and publishing the pirated news in distant cities before the plaintiff's member newspapers could get the same news published, was seriously interfering with and damaging the plaintiff's business. In a suit to restrain the defendant from continuing this practice, it was held that the plaintiff was entitled to relief. The court stated[30] that the defendant "is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money . . . 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 . . . 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.[31] The transaction speaks for itself and a court of equity ought not to hesitate long in characterizing it as unfair competition in business."[32]

The statement that a person cannot reap where he has not sown and cannot appropriate to himself the harvest of those who have

27. Internat'l News Serv. v. Asso. Press, 248 U.S. 215 (1918).
28. 1 Callmann, Unfair Competition and Trade-Marks 722 (1945).
29. 248 U.S. 215 (1918).
30. *Id.* at 239-240.
31. Compare the following statement from a similar news-copying case, Walter v. Steinkopff [1892] 3 Ch. 489, 495: "For the purpose of their own profit they [the defendants] desire to reap where they have not sown, and to take advantage of the labour and expenditures of the Plaintiffs in procuring news for the purpose of saving labour and expense to themselves."
32. 1 Callmann, Unfair Competition and Trade-Marks §60.1, pp. 724-725 (1945).

sown, seems to make enjoinable almost every kind of unfair competition at the suit of the injured competitor. It forms the basis for a very comprehensive theory of liability, equating "unfair competition" with "unjust enrichment by competition."

This theory has permitted equitable protection to business interests not otherwise protectible. For example, in *Waring v. WDAS Broadcasting Station,*[33] the plaintiff's orchestra had made for sale to the public phonograph recordings under a contract with a recording company which provided that the records be labelled "Not licensed for radio broadcast." The defendant radio station purchased one of the records so labelled, and used it for broadcast purposes. The plaintiff brought suit to restrain such broadcasting, and the court held that the plaintiff was entitled to relief. The court stated that, although copyright law did not recognize the right of a performer in artistic interpretations of musical works, the plaintiff had property rights in its musical renditions, and that there was no reason why the restriction placed on the use of the records should not be enforced in equity. After discussing and relying on the theory advanced in the *Associated Press* case, the court stated:[34] "On the facts in the present case . . . we are of opinion that on the ground of unfair competition, apart from any other theory of equitable relief, plaintiff is entitled to the injunction. . ."

Hence, misappropriation of the business values of a competitor is unfair competition enjoinable at the suit of the injured competitor on the theory that the unfair competitor should not be permitted to enrich himself unjustly at the expense of the injured competitor. This theory, however, although frequently relied upon as the basis of decision in unfair competition cases,[35] on the leading authority of the *Associated Press* case, has not been widely followed.[36] But it is manifestly a reasonable and fair theory, and could well have been applied to give the plaintiff injunctive relief in the recent case of *Walt Disney Productions v. Souvaine Selec-*

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33. 327 Pa. 433, 194 Atl. 631 (1937); *Contra:* RCA Mfg. Co. v. Whiteman, 114 F.2d 86 (2d Cir. 1940).

34. *Id.* at 455-456, 194 Atl. at 641-642.

35. See *e.g.*, Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F. Supp. 490 (W.D. Pa. 1938); Metropolitan Opera Ass'n v. Wagner-Nichols R. Corp., 101 N.Y.S.2d 483 (1950); Twentieth Century S. Club v. Transradio P. Service, 165 Misc. 71, 300 N.Y. Supp. 159 (1937).

36. Callman, *He Who Reaps Where He Has Not Sown: Unjust Enrichment in the Law of Unfair Competition,* 55 Harv. L. Rev. 595, 958 (1942); 1 Callmann, Unfair Competition and Trade-Marks §60.2, pp. 725-727 (1945); 1 Nims, Unfair Competition and Trade-Marks 54-65 (4th ed. 1947).

tive Pictures.[37] In this case the plaintiff, an American company, and the defendant, a French company, each produced a motion picture entitled *Alice in Wonderland* based on the Lewis Carroll book, which was no longer subject to copyright. Work on both pictures was begun in 1945. The defendant presented a first showing at Paris of its Anscocolor actor-and-puppet version in 1949.[38] Sometime later the plaintiff completed its Technicolor animated-drawing version, and several months prior to the first scheduled showing in New York financed an expensive advertising campaign to creat public interest in the picture. The defendant then scheduled the simultaneous release in New York of its French-made production. The plaintiff brought suit to enjoin the showing of the defendant's picture. But the court held, denying a preliminary injunction, that the simultaeous showing of the defendant's *Alice in Wonderland* under the same name as the plaintiff's much-advertised version was not unfair competition.[39]

This decision seems wrong. It is true that there was no attempt by the defendant to pass off an inferior picture. It is also true that the plaintiff should not be permitted to secure a virtual monopoly simply by advertising, because injunctive relief against unfair competition will be denied where its practical effect is to create a monopoly.[40] But the issue was not whether the plaintiff would acquire a monopoly by its advertising if an injunction were granted. The precise issue was whether interference by the defendant with the prospective business relations of the plaintiff, by taking advantage of the plaintiff's advertising was fair competition.[41] According to existing theories and prevailing standards of fairness, such interference is not privileged. Since good will created by advertising is a business value protectible in equity from inter-

37. 98 F. Supp. 774 (S.D.N.Y. 1951).

38. Time, Jul. 16, 1951, p. 90, col. 2.

39. *Cf.* Snowden v. Noah, Hopk. 347, 2 N.Y. Ch. 446 (1825), where the plaintiff purchased an established New York daily newspaper, called the *National Advocate,* which until then had been edited by the defendant at 48 Wall Street. The defendant thereafter continued to publish a newspaper at the same address, calling his paper the *New York National Advocate* and soliciting the patronage of subscribers to the plaintiff's *National Advocate.* The plaintiff brought suit against the defendant, but the court held that he was not entitled to injunctive relief against the publication of the defendant's paper or the solicitation of the plaintiff's customers, on the ground that these were fair methods of competition which deceived no one.

40. Pocket Books v. Meyers, 178 Misc. 59, 33 N.Y.S.2d 39 (1942), *aff'd.* 292 N.Y. 58, 54 N.E.2d 6 (1944).

41. "Perhaps there never was a time when good-will . . . has played a more important part in the theatre of commerce than it plays today . . . when the means of advertising designed to create good-will were so various and highly developed as today . . . when there were so many temptations to motivate the trade pirate to endeavor to purloin the good-will of others for his own profit." American Shops v. American Fashion Shops, 13 N.J.Super. 416, ____, 80 A.2d 575, 579 (1951).

ference by unfair competition,[42] the plaintiff in the *Disney* case would be entitled to injunctive relief under the unjust enrichment theory, in order to prevent misappropriation of this business value by the defendant.[43] Furthermore, since good will created by advertising is a business property right protectible in equity,[44] the plaintiff would be entitled to injunctive relief under the property right theory, in order to prevent unfair interference with that right by the defendant.[45] But the court did not consider these theories in the Disney case.

Conclusion

Interests in prospective business relations are sufficiently valuable civil rights to merit judicial protection at law and in equity. Intentional interference with these rights by competition is lawful so long as it is fair according to judicial standards. These standards change as public policy in regard to business competition is modified by social and economic conditions. Under present conditions public policy favors higher standards of fairness, with consequent greater protection to prospective business relations. The tort theory of action is that the competitor who fails to comply with these standards of fairness has abused the privilege of competition, and is therefore subject to liability by way of damages to an injured competitor. The equity theory is that continuing abuse of the privilege of competition by an unfair competitor is an unlawful interference with the property right to conduct a lawful business, or is an unlawful misappropriation of the prospective economic advantage of that business, against which an injunction is the only adequate remedy. Under both the equity theory and the tort theory the judicial aim is to make the sower also a reaper.

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42. Chas. H. Elliott Co. v. Skillkrafters, Inc., 271 Pa. 185, 114 Atl. 488 (1921).
43. Lone Ranger, Inc. v. Cox, 124 F.2d 650 (4th Cir. 1942); Beecham v. London Gramophone Corp., 104 N.Y.S.2d 473 (1951).
44. Paramount Pictures v. Leader Press, 106 F.2d 229 (10th Cir. 1939); "The money invested in advertising is as much a part of the business as if invested in buildings, or machinery, and a rival in business has no more right to use the one than the other—no more right to use the machinery by which the goods are placed on the market than the machinery which originally created them." Hilson Co. v. Foster, 80 Fed. 896, 897 (C.C.S.D.N.Y. 1897).
45. Goldwyn Pictures Corporation v. Goldwyn, 296 Fed. 391 (2d Cir. 1924); J. B. Liebman & Co. v. Liebman, 135 N.J.Eq. 288, 38 A.2d 187 (1944).