Maryland Law Review

Volume 23 | Issue 4 Article 7

Community Antenna Service-Unfair Competition? - Intermountain Broad. & T.V. Corp. v. Idaho Microwave,Inc.

John T. Joseph

Community Antenna Service—Unfair Competition?

Intermountain Broad. & T.V. Corp. v. Idaho Microwave, Inc.[1]

Plaintiffs, Intermountain Broadcasting and Television Corporation, KUTV, Inc., and Radio Service Corporation of Utah, own and operate television stations KTVT, KUTV, and KSL-TV, broadcasting out of Salt Lake City, Utah. Defendant, Cable Vision, Inc., maintains two high-gain receiving antennas just outside of Twin Falls, Idaho by which it receives and electronically treats selected signals which are not otherwise receivable in Twin Falls and sends them out by means of cables to the homes of individual subscribers in that city. Subscribers pay a "hook-up" fee of about $100, plus a monthly service rate of approximately $4 to $5. Defendant, Cable Vision, designed its antennas to handle broadcasts other than those of the plaintiffs. However, it announced plans to add new facilities to pick up and relay plaintiffs' signals otherwise undependable to residents of Twin Falls, and had begun soliciting subscribers for this new community antenna service. Each of the plaintiffs brought a separate suit against Cable Vision, Inc., and a co-defendant Idaho Microwave, Inc., which had contracted to construct the necessary equipment, seeking declaratory and injunctive relief. Plaintiffs contended that defendants' intended action of beaming their broadcasts to individuals who lived in Twin Falls would be a misappropriation of the fruits of plaintiffs' money, skill, and labor, and would be "unfair competition" and "unjust enrichment" within the meaning of *International News Service v. Associated Press*.[2] The Court denied plaintiffs' motions for summary judgments and in refusing to grant declaratory relief, held that "the relationship between the public, defendants' microwave relay and plaintiffs' broadcasts are not similar to or fairly comparable with the relationships in the International News case."[3]

---

[1] 196 F. Supp. 315 (S.D. Idaho 1961).

[2] 248 U.S. 215 (1918). In INS v. AP, the plaintiff and defendant were competitors in the business of gathering and distributing news to their member newspapers. INS had engaged in copying news from bulletin boards and early editions of AP's member newspapers and then providing it to its own members. The Court's order restrained INS from this practice.

[3] *Supra*, n. 1, 328. The Court noted, however, that plaintiffs, "upon further presentation may make a case for protection under copyright law, statutory or common law, with respect to any programs which they themselves produce or for protection under the doctrine of unfair competition with respect to any exclusive license arrangements which have heretofore been recognized as ground for invoking that doctrine." *Ibid.*

Before the *INS* case, unfair competition was categorically defined as (1) infringing upon another's trademark, or (2) deceiving the public by palming off one's goods under the representation that they were the merchandise of a competitor.[4] The Supreme Court in the *International News* case held that the misappropriation of another's product for one's own use is an adequate basis for equitable relief and the element of "palming off" is not essential to the doctrine of unfair competition. The basic conception of the doctrine of unfair competition was radically altered in that "[u]nfair competition by the interpretation given it actually means what its name indicates, and infringement of trademarks has been relegated to its proper position as merely one of the forms which this wrong may assume."[5] The case seemed to introduce the idea of unjust enrichment into the law of unfair competition.[6]

Justice Brandeis wrote a strong dissenting opinion in which he viewed the majority as establishing a heretofore unrecognized property right in "news." He stated, in essence, that where the public interest may be affected, courts should forebear from recognizing property rights which have not been previously protected. He reasoned that courts "are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news . . . [and they] would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulation. * * *"[7]

---

[4] Note, *Unfair Competition: Application to News Service*, 4 Cornell L.Q. 223, 225 (1919).

[5] *Ibid.* See Hanover Milling Co. v. Metcalf, 240 U.S. 403, 413 (1916); 2 CALLMANN, UNFAIR COMPETITION AND TRADEMARKS (2d ed. 1950), 877, where it is said that "[INS v. AP] represents a new development, for it recognized the availability of an equitable remedy against unjust enrichment in the field of competition, and thus broke the monopoly of the doctrine of 'passing off'."

[6] "The basis of the decision is to be found in the relation between the parties, rather than in a general property right of the complainant. . . ." Callmann, *He Who Reaps Where He Has Not Sown: Unjust Enrichment In The Law Of Unfair Competition*, 55 Harv. L. Rev. 595, 597 (1942).

[7] *Supra*, n. 2, 267. Justice Holmes wrote in a concurring opinion that "the only ground of complaint that can be recognized without legislation is the implied misstatement. . . ." *Id.*, 248. The majority opinion stated, "Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as quasi property, irrespective of the rights of either as against the public.

In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property

Many courts have refused to extend the doctrine of the *International News* case beyond the precise factual situation there presented,[8] and "it has been repeatedly held, almost *ad nauseatum*, that the Associated Press Case 'is authority only for the situation there at bar'."[9] It seems reasonable to attribute much of this phenomenon to Justice Brandeis' compelling dissent.[10]

The Court in the instant case seemingly aligned itself squarely with those previously decided cases resting on Justice Brandeis' dissent. However, Judge Sweigert went a step beyond the Brandeis thesis in applying it to the facts of the instant case. He noted that "there has been a plenary exercise by Congress of the power to occupy and regulate the field of television."[11] This is demonstrated by the fact

---

right." *Id.*, 236. But see Callmann, *supra*, n. 6, 608-09, where it is stated that, "For various reasons, I believe that the courts are the most desirable agency to develop as well as to administer the law of unfair competition * * * [and] a statute is too inflexible to furnish a satisfactory solution for the innumerable and varied situations which will come up."

[8] Many differences between the circumstances of the instant case and those in the International News case were pointed out by the District Court Judge in the final portion of his decision: (1) in the INS case the plaintiff and defendant were identical businesses, here the plaintiffs and defendants are not engaged in the same kind of enterprise; (2) in the instant case the defendants' threatened practice does not interfere with the primary purpose of plaintiffs—the dissemination of TV programs, the practice of INS did so interfere with AP; (3) in the instant case defendants' threatened practice does not interfere with plaintiffs at the point where their profit is to be made (in fact, defendants' intended course of action may further plaintiffs' possibilities of profit); (4) in INS an element of deception was involved (Justice Holmes' implied misstatement), there is no fraud on the public here; (5) the defendants in the Intermountain Broadcasting case intend to relay plaintiffs' broadcasts at the same time and in the same manner as was intended by plaintiffs. Finally, the Court explained that plaintiffs conceded that the individual owners of TV sets in Twin Falls could band together and do for themselves what defendants plan to do for them, and because defendants plan to perform this service for a profit, it does not follow that their actions constitute unfair competition.

[9] Supreme Records v. Decca Records, 90 F. Supp. 904 (S.D. Cal. 1950). See Speedry Products, Inc. v. Dri Mark Products, Inc., 271 F.2d 646, 649 (2d Cir. 1959) where, in discussing INS v. AP, the Court said that "Because of the complexity of the facts the case is *sui generis*"; National Comics Publications v. Fawcett Publications, 191 F.2d 594, 603 (2d Cir. 1951) which states that INS v. AP "is authority only for the situation there at bar, as has been over and over decided."

[10] See Cheney Bros. v. Doris Silk Corporation, 35 F.2d 279 (2d Cir. 1929). In United States v. Associated Press, 52 F. Supp. 362, 377 (S.D.N.Y. 1943), it was said that "In the case of a business which was not recognized as a public calling at common law, I believe it is sound policy to leave to the legislature to determine whether the public welfare requires that all applicants be served without discrimination"; and in Triangle Publications v. New England Newspaper Pub. Co., 46 F. Supp. 198, 204 (D. Mass. 1942), it was stated that, "I could hardly be unmindful of the probability that a majority of the present justices of the Supreme Court of the United States would follow the dissenting opinion of Mr. Justice Brandeis in the International News case. . . ."

[11] *Supra*, n. 1, 323.

that Congress has gone so far as to specifically consider amending the Federal Communications Act[12] to require community antenna services to obtain the consent of originating stations to relay their programs.[13] Therefore, Judge Sweigert reasoned,

> "A cautious approach to recognition of novel rights protectible upon the theory of unfair competition is especially wise when the unjust practice complained of occurs in a field over which the Congress has already assumed a control sufficient to enable it, if it so chooses, to regulate the practice one way or another in the public interest."[14]

Maryland does not appear to have moved beyond the concept of unfair competition which prevailed before the *International News* case. The Maryland case which best analyzes the law of unfair competition is *Edmondson Vil. Theatre v. Einbinder*[15] in which the complainant, Edmondson Village Theatre, Inc., brought a bill in equity to enjoin the defendant from using the name Edmondson Drive-In Theatre. Complainant alleged that use of the name constituted unfair competition. The Court found that there was no evidence that defendant had been *misleading any patrons* of complainant, and in the course of the opinion stated: "The essential element of unfair competition is deception, by means of which the goods of one dealer are passed off as the goods of another. . . ."[16] The law in Maryland, therefore, is that the mere misuse of another's product does not give rise to a cause of action—"palming off" on the public is an indispensable factor.

---

[12] 47 U.S.C.A. § 151.

[13] Senate Committee on Interstate and Foreign Commerce, Senate Rpt. No. 923, p. 11, 86th Congr., 1st Sess. (1959).

[14] *Supra*, n. 1, 323. See also Cheney Bros. v. Doris Silk Corp., *supra*, n. 10, 281, where it is said that "Judges have only a limited power to amend the law; when the subject has been confided to a Legislature, they must stand aside, even though there be an hiatus in completed justice."

[15] 208 Md. 38, 44, 116 A. 2d 337 (1955). See also Avalon Hill Co. v. Gebhardt, 224 Md. 52, 56, 166 A. 2d 740 (1960), where it was said that "The appellant's case must stand or fall upon proof of a likelihood that the ordinary purchaser would be confused . . ."; A. & H. Trans. v. Save Way, 214 Md. 325, 135 A. 2d 289 (1957); Nat. Shoe v. Nat. Shoes of N.Y., 213 Md. 328, 131 A. 2d 909 (1956); Bedding Corporation v. Moses, 182 Md. 229, 34 A. 2d 338 (1943); Hecht Co. v. Rosenberg, 165 Md. 116, 166 A. 440 (1933); Braiterman-Fedder Company v. Mauro V. Cardill, 156 Md. 699, 145 A. 338, 340 (1929).

[16] *Id.*, 44. The United States District Court in Maryland has on two occasions quoted this statement. Car-Freshner Corporation v. Marlenn Products Company, 183 F. Supp. 20, 42 (D. Md. 1960) and Bechik Products v. Federal Silk Mills, 135 F. Supp. 570, 577 (D. Md. 1955).

Twenty-four years after the *International News* decision, it still seems, in general, that the noted case, though it found no unfairness present, took the best approach to the problem of unfair competition by laying emphasis on "unfairness". The element of "palming off" should be unessential, and the courts should be free to provide relief where it is equitable to do so, unfettered by the notion that the element of deception of the public is a prerequisite to recovery. This policy, of course, does not necessarily preclude a court from adhereing to Justice Brandeis' position where appropriate.

JOHN T. JOSEPH