



5-1-1954

## Case for Unfair Competition in Telecasting

Robert D. LeMense

Wilbur L. Pollard

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

### Recommended Citation

Robert D. LeMense & Wilbur L. Pollard, *Case for Unfair Competition in Telecasting*, 29 Notre Dame L. Rev. 456 (1954).

Available at: <http://scholarship.law.nd.edu/ndlr/vol29/iss3/6>

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

*Television Law*

## THE CASE FOR UNFAIR COMPETITION IN TELECASTING

The medium of television has already posed some unique legal problems.<sup>1</sup> Obviously because of its audio-visual makeup, it has invaded and overlapped the realms of both radio and motion pictures. In the sight-sound aspect, television programs resemble the motion pictures but in audience accessibility their impact is much greater.<sup>2</sup> The interstate nature of television broadcasting necessarily brings it within the scrutiny of the Federal Communications Commission. The legal ramifications of television can be either statutory, common law or a combination of the two. Common law problems will be resolved from analogous radio and motion picture case law, but the analogies will be hybrid in nature, however, and not all-conclusive.

The purpose of this note is to isolate one problem in the television field and to consider the possible answers to it. The question selected is whether the property right existing in a produced television program should be protected from misappropriation by a competitor as an act of unfair competition. While the same problem might be considered in the field of copyright<sup>3</sup> and trademark law, this article will be concerned strictly with the protection that might be or should be afforded if program misappropriation or passing-off would be recognized by the courts as the tort of unfair competition.<sup>4</sup> The problem is best presented by posing a general hypothetical situation.

*A Hypothetical Situation*

Network X is the owner of a television program. Either the program has been purchased in a "package" unit from some agency, or else Network X has created the program with its own facilities. In either event the money outlay represents the cost of actors, writers, musicians, studio help, setting, camera time, and technical help. The finished program is sent out over the network facilities either sponsored or unsponsored. Network X subscribes to the services of one or more of the independent television rating agencies. After the program has been broadcast a few

---

<sup>1</sup> SPRING, RISKS & RIGHTS IN PUBLISHING TELEVISION RADIO MOTION PICTURES ADVERTISING AND THE THEATER (1952); WARNER, RADIO AND TELEVISION RIGHTS (1953); Solinger, *Unauthorized Uses of Television Broadcasts*, 48 COL. L. REV. 848 (1948); Warner, *Unfair Competition and The Protection of Radio and Television Programs* [1950] WASH. U.L.Q. 297; Note, 28 NOTRE DAME LAW. 389 (1953); Note, 35 VA. L. REV. 246 (1949).

<sup>2</sup> Broadcasting • Telecasting, Feb. 15, 1954, p. 32, col. 1: ". . . over half (58%) of all the nation's families — 27,506,500 out of 47,191,500 — owned tv receivers as of Nov. 1, 1953, according to a survey made at that time by A. C. Nielson Co. under the sponsorship of the CBS Television Network."

<sup>3</sup> WARNER, RADIO AND TELEVISION RIGHTS, § 219 (1953).

<sup>4</sup> Callmann, *What is Unfair Competition?*, 28 GEO. L.J. 585, 598-99 (1940).

times these independent rating agencies can give Network X an audience reaction rating of the program, a "publicity value" rating.<sup>5</sup> The program with its publicity value represents the stock in trade for Network X. The television network makes money through the sale of broadcast time, and the value of broadcast time is intrinsically related to both the costs of the produced program and audience reaction.

Network Y, which is competing for the same broadcast audience as Network X, produces a program that very closely resembles the one that has already met with so much success over Network X. There are certain technical audio and visual differentials in Y's program, but the resemblance between the two is so close that the TV audience can easily accept one for the other. Independent rating agencies employed by X soon report this loss in audience reaction. X's program sponsor becomes aware of the audience drop through rating services and also because of noticeable drops in sales of advertised products. The sponsor notifies Network X that he will not renew his sponsorship of the program unless the audience is regained within a specified time.

Network X seeks equitable relief via an injunction *pendente lite*, alleging unfair competition in Network Y's passing off or "quasi-copying" of X's successful program. X also alleges damages for money lost due to forced reduction of spot announcement rates before and after the program in question, and, in addition claims damages for loss of network good will. X's plea for equitable relief is based on the inadequacy of a remedy at law. An analysis of this problem is most logically initiated by a consideration of the historical development of unfair competition.

### *Historical Genesis and Development*

A precise forecast of the full social and legal impact the medium of television will ultimately have on the people of the United States cannot be given. With a desire for accuracy, the best that can be done is to take a look at the past, a glance at the present and attempt, by analogy, to present a rationale for future decisions. Future decisions will find the courts grasping for legal postulates already enounced upon which to premise their findings. Those decisions centering around "unfair competition" will find ample case and statutory authority in our legal history not foreign to the problem under discussion. It should be noted that this paper is not primarily concerned with statutory remedies but is focused upon the tort of "unfair competition" as known to the common law.

At common law the term "unfair competition" was a term of art and served primarily to supplement the law of trademarks.<sup>6</sup> In its modern

---

<sup>5</sup> C. E. Hooper, Inc., New York, N.Y., TV HOOPERATINGS; A. C. Nielson Co., Chicago, Ill., NIELSON RADIO-TELEVISION INDEX.

<sup>6</sup> CALLMANN, UNFAIR COMPETITION 1 (Practising Law Institute Series 1, No. 18 1946).

context the term does not admit of a single clear and precise definition. The common law concept has expanded and interstitially developed<sup>7</sup> until the term — in its present usage — may properly be referred to as a *nomen generalissimum*. In the early cases the doctrine was concretely and rather strictly construed as the “palming off” or “passing off” of goods on the part of a defendant as those of the plaintiff.<sup>8</sup> Nor can the concept be considered indigenous to our Anglo-American system of law, having its counterpart in French law, *concurrence deloyale*, and in the German law, *unlauterer Wettbewerb*.<sup>9</sup> The courts have, by their later decisions, freed the term “property” of its technical common law meaning in equitable injunctive proceedings, and have extended the coverage of unfair competition to any device which deceives the public into thinking that a defendant’s goods are those of the plaintiff, though it may not be a mandatory prerequisite that the goods be retailed: exclusive selling to wholesalers and the fact that purchasers are not likely to be misled is no reason for the denial of injunctive relief.<sup>10</sup>

As early as 1785 Lord Mansfield,<sup>11</sup> in a case concerned with the pirating of sea charts, stated the basic problem and clearly defined the province of the judge and limited the jury to its fundamental function of making a finding of fact. Those jurists and legal scholars who hold that the common law is an ever expanding and developing body of legal

<sup>7</sup> In *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 531-32, Chief Justice Hughes stated: “‘Unfair competition,’ as known to the common law, is a limited concept. . . . In recent years, its scope has been extended. It has been held to apply to misappropriation as well as misrepresentation, to the selling of another’s goods as one’s own, — to misappropriation of what equitably belongs to a competitor.”

<sup>8</sup> 1 NIMS, UNFAIR COMPETITION AND TRADEMARKS 52 (4th ed. 1947).

<sup>9</sup> BLACK’S LAW DICTIONARY 1699 (4th ed. 1951); 1 BASEDOW, WORTERBUCH DER RECHTSSPRACHE (1948).

<sup>10</sup> *O. & W. Thum Co. v. Dickinson*, 245 Fed. 609 (6th Cir.), cert. denied, 246 U.S. 664 (1917); *Manitowoc Malting Co. v. Milwaukee Malting Co.*, 119 Wis. 543, 97 N.W. 389 (1903).

<sup>11</sup> *Sayre v. Moore*, 1 East 36ln, 102 Eng. Rep. 139n, 140n (1785): “The rule of decision in this case is a matter of great consequence to the country. In deciding it we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. . . . So in the case of prints, no doubt different men may take engravings from the same picture. The same principle holds with respect to charts; whoever has it in his intention to publish a chart may take advantage of all prior publications. There is no monopoly of the subject here . . . but upon any question of this nature the jury will decide whether it be a servile imitation or not. If an erroneous chart be made, God forbid it should not be corrected even in a small degree. . . . But here you are told, that there are various and very material alterations. This chart of the plaintiffs’ is upon a wrong principle, inapplicable to navigation. The defendant therefore has been correcting errors, and not servilely copying. If you think so, you will find for the defendant; if you think it is a mere servile imitation, and pirated from the other, you will find for the plaintiffs.”

principles<sup>12</sup> would have little difficulty in finding a property right (or rights) in a modern television program. Equity has not been lackadaisical in offering its aegis in protection of other productions resulting from less mental, physical and momentary effort.<sup>13</sup>

The pivotal and controversial case in the United States in the subject under discussion is *International News Service v. Associated Press*,<sup>14</sup> wherein it was held that one gathering news at pains and expense for the purpose of publication had a quasi property right in the results of his enterprise as against a rival in the same business, and the rival appropriating those results at the expense of and to the damage of the other, amounts to unfair competition against which equity will give relief. Subsequent decisions<sup>15</sup> and articles<sup>16</sup> have expounded divergent views as to what really constitutes the import of the case.

In *Bleistein v. Donaldson Lithographing Co.*,<sup>17</sup> protection was accorded circus advertising posters by extending copyright protection to them. Mr. Justice Holmes, with his usual erudition, set down the admonishment that the general public should make the evaluation of the worth

<sup>12</sup> HOLMES, *THE COMMON LAW* 36 (1881): "The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow." See Solinger, *Unauthorized Uses of Television Broadcasts*, 48 *COL. L. REV.* 848, 875 (1948); Warren and Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193, 194-95 (1890).

<sup>13</sup> *Emerson v. Davies*, 8 *Fed. Cas.* 615, No. 4,436 (C.C.D. Mass. 1845). In *Bleistein v. Donaldson Lithographing Co.*, 188 *U.S.* 239, 251 (1903), Holmes stated: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted . . . whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end copyright would be denied to pictures which appealed to a public less educated than the judge."

<sup>14</sup> 248 *U.S.* 215 (1918). The Court stated at 238: "Not only do the acquisition and transmission of news require elaborate organization and a large expenditure of money, skill, and effort . . . but also, as is evident, the news has an exchange value to one who can misappropriate it."

<sup>15</sup> *Supreme Records, Inc. v. Decca Records, Inc.*, 90 *F. Supp.* 904, 908 (S.D. Cal. 1950), wherein Judge Yankwich expressed the view that the *Associated Press* case should be confined to its particular facts. For a like view see *Cheney Bros. v. Doris Silk Corp.*, 35 *F.2d* 279 (2d Cir. 1929), *cert. denied*, 281 *U.S.* 728 (1930); *R.C.A. Mfg. Co. v. Whiteman*, 114 *F.2d* 86 (2d Cir. 1940). *But cf.* *Waring v. WDAS Broadcasting Station, Inc.*, 327 *Pa.* 433, 194 *Atl.* 631 (1937).

<sup>16</sup> Grismore, *Are Unfair Methods of Competition Actionable at the Suit of a Competitor?*, 33 *MICH. L. REV.* 321 (1935); Solinger, *Unauthorized Uses of Television Broadcasts*, 48 *COL. L. REV.* 848, 859 (1948); Rogers, *Unfair Competition*, 17 *MICH. L. REV.* 490 (1919).

<sup>17</sup> 188 *U.S.* 239 (1903).

of the illustrations.<sup>18</sup> An eminent authority in the field today has commented that the illustrations concerned in the *Bleistein* case should not require the intervention of copyright in order to be secure against competitive imitation.<sup>19</sup> An author at common law had an exclusive property right in his original intellectual production, and the right was not a privilege conferred by statute; a recent decision substantiating this view has in addition stated that the right would still be recognized wherever the common law system prevailed.<sup>20</sup> In the field of unfair competition it has also been held that the use of radio skits, alleged to be of inferior quality and carrying the title of a well known novel, but not based on the novel, might amount to unfair competition.<sup>21</sup>

In the famous case of *Chaplin v. Amador*,<sup>22</sup> the court found a property right in the characteristics, mannerisms, role and garb of a theatrical performer. A perpetual injunction issued restraining defendants from disposing of, advertising, or dealing in a motion picture called "The Race Track"; from using the name "Charles Aplin" or "Charlie Aplin," or any other name similar to that of the plaintiff in connection with that motion picture, or any other motion picture, in imitation of the motion pictures of the plaintiff, which would be likely to deceive the public in believing that plaintiff was acting the role. The injunction issued over the objection that it was too broad. No question of monopoly or ownership of a trade-name was in issue.

In an equitable action (by a theatrical manager) to enjoin imitation of two of his noted performers, then appearing in the famous opera "Die Lustige Wittwe," being produced under the title "The Merry Widow," complainant alleged that he owned the exclusive right of producing in all languages in the United States and Canada the opera composed by Franz Lehar. Defendant had been giving a series of imitations in a vaudeville performance, one of which, occupying from eight to ten minutes, was as follows: A male assistant, dressed exactly as Brian did in the role of "Prince Danilo," sang a song called "Maxim's" from the first act of "The Merry Widow"; the orchestra playing the chorus as in the opera. The defendant then appeared costumed exactly like Barbanell as "Sonia," while the orchestra played the waltz which was the finale of the first act. The orchestra played the popular "Merry Widow Waltz,"

---

<sup>18</sup> *Id.* at 251.

<sup>19</sup> Callmann, *Copyright and Unfair Competition*, 2 LA. L. REV. 648, 663 (1940).

<sup>20</sup> *Johnston v. Twentieth Century-Fox Film Corp.*, 82 Cal. App.2d 796, 187 P.2d 474, 483 (1947); *But see Carter v. Bailey*, 64 Me. 458, 460-64, 18 Am. Rep. 273, 274-78 (1874).

<sup>21</sup> *Prouty v. National Broadcasting Co.*, 26 F. Supp. 265 (D. Mass. 1939).

<sup>22</sup> 93 Cal. App. 358, 269 Pac. 544 (1928). The court stated at 546: "The case of plaintiff does not depend on his right to the exclusive use of the role, garb, and mannerisms . . . it is based upon *fraud and deception* . . . and *it* [right of action] *exists independently of the law regulating trade-marks, or of the ownership of such trade-marks or trade-names by plaintiff.*" (Emphasis added). *See Jones v. Republic*

which the defendant and her assistant danced separately. This was followed by a burlesque of the waltz to ragtime. Complainant asked that the defendant be restrained, but he was accorded no remedy.<sup>23</sup> However, plagiarism has been enjoined in the instance of excerpting a scene from a play for the purpose of making a dramatic representation of it.<sup>24</sup>

On the note of originality Justice Story has given us the classic statement in the case of *Emerson v. Davies*:<sup>25</sup>

In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book . . . borrows, and must necessarily borrow, and use much which was well known and used before. No man creates a new language for himself, at least if he be a wise man, in writing a book. . . . No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of several men are . . . a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection. If no book could be the subject of copy-right which was not new and original in the elements of which it is composed, there could be no ground for any copy-right in modern times, and we should be obliged to ascend very high, even in antiquity, to find a work entitled to such eminence. Virgil borrowed from Homer; Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakespeare and Milton, so justly and proudly our boast as the brightest originals would be found to have gathered much from . . . current knowledge and classical studies. . . . What is La Place's great work, but the combination of the processes . . . of the great mathematicians before his day, with his own extraordinary genius? What are all modern law books, but new combinations and arrangements of old materials . . . ? Blackstone's Commentaries and Kent's Commentaries are but splendid examples of the merit and value of such achievements.

The taking of the plan, arrangement, and illustrations of the arithmetic book in the *Emerson* case was enjoined even though the material and the several particulars of the plan had existed before in separate forms and in separate works. Inasmuch as the materials and plan had never been united in one combination in the same manner there was found to be an infringement.

Two recent cases<sup>26</sup> have reflected anew the principle stated before in this paper, *viz.*, that the common law must develop and expand with the

Pictures, 112 F.2d 672, 673 (9th Cir. 1940). *But cf.* Keene v. Kimball, 82 Mass. 545 (1860), later overruled in *Tompkins v. Halleck*, 133 Mass. 32, 46 (1882).

<sup>23</sup> *Savage v. Hoffman*, 159 Fed. 584 (C.C.S.D.N.Y. 1908). The court stated at 585: "Obviously the complainant has no literary property in the manner in which Barbanell and Brian dance or posture. They, if anyone, have the right to complain."

<sup>24</sup> *Daly v. Palmer*, 6 Fed. Cas. 1132, No. 3,552 (C.C.S.D.N.Y. 1868); See Yankwich, *Law of Intellectual Property*, 11 F.R.D. 457, 471 (1951).

<sup>25</sup> 8 Fed. Cas. 615, No. 4,436, at 619 (C.C.D. Mass. 1845).

<sup>26</sup> *Uproar Co. v. National Broadcasting Co.*, 8 F. Supp. 358 (D. Mass. 1934); *Advance Music Corp. v. American Tobacco Co.*, 296 N.Y. 79, 70 N.E.2d 401 (1946); Notes, 13 GEO. WASH. L. REV. 468 (1945), 41 ILL. L. REV. 661 (1947). *Cf.* *Ely-Norris Safe Co. v. Mosler Safe Co.*, 7 F.2d 603 (2d Cir. 1925), *rev'd*, 273 U.S.

changing conditions of society, and that the plaintiff having merits in his position should not be denied relief merely because it was not available in the exact terms of some prior decision.

### *Recognition of the Right*

The property right in a produced television program is evidenced by both tangible and intangible things. Whether the show is set up and produced by the network itself or is purchased from another agency, the resultant monetary expenditure includes many tangible items.<sup>27</sup> The result is not merely the exposition of a single idea, but a unique combination of ideas.<sup>28</sup> The format, then, is original. The cost figure would vary to fit a particular set of facts, but normally a program of network proportion (or for that matter, down to the smallest station level) could be expected to represent a considerable outlay.<sup>29</sup>

The program does not obtain its full value until it has been broadcast to the network television audience. The network (or station) subscribes to one or more of the independent rating systems and thereby gains some knowledge of the public response to the program.<sup>30</sup> After the program has been televised a number of times the independent rating agencies reveal its comparative listening audience.<sup>31</sup> The network approaches various sponsors and endeavors to sell the program time on the basis of the appeal it has achieved, unless, of course, the program has been sponsored from the outset. In any event, the net worth of the program will be

132 (1927), L. Hand stating 7 F.2d at 604: ". . . there is no part of the law which is more plastic than unfair competition, and what was not reckoned an actionable wrong 25 years ago may have become such today." See Solinger, *Unauthorized Uses of Television Broadcasts*, 48 *Col. L. Rev.* 848, 875 (1948).

<sup>27</sup> See Heading, "A Hypothetical Situation," *supra*.

<sup>28</sup> "Such a right exists only in the arrangement and combination of the ideas — in the form, sequence and manner in which the composition expresses the idea.

Although there is no property right in an idea there may be property in a particular combination of ideas." Stanley v. Columbia Broadcasting System, Inc., 192 P.2d 495, 501 (Cal. App. 1948), *aff'd*, 208 P.2d 9 (1949), *aff'd on rearg.*, 35 Cal.2d 653, 221 P.2d 73 (1950).

<sup>29</sup> *Broadcasting • Telecasting*, Jan. 4, 1954, p. 37, col. 2: "Expenses in tv totaled \$268.7 million in 1952. . . ."

<sup>30</sup> *Broadcasting • Telecasting*, Feb. 15, 1954, p. 14-15, Advertisement by NBC Television for the Pinky Lee Show. A four week Trendex Rating as to audience gain was featured. At p. 15: "Here's what THE PINKY LEE SHOW offers you as an advertiser: An estimated 3¼ million viewing homes with an audience breakdown of over 2¼ million adults and over 5 million children. In other words, a big audience."

<sup>31</sup> THE NIELSON RADIO-TELEVISION INDEX (pamphlet), p. 2, col. 2: "The result is a rating and analysis service meeting all the essential requirements of valid audience measurement. . . ." TV Hooperatings, (inside front cover), col. 1: "It is the function of this Report to establish: the comparative size of the television audience at different times (TV Sets-in-Use) . . . the proportion of the TV Sets-in-Use attracted to each station (Share of Audience) . . . ."



based not only on the initial outlay (tangible) but also on its publicity value (intangible).<sup>32</sup> This publicity value as related to a particular produced program is almost akin to secondary meaning. It is not unreasonable to conceive that a successful program will become intimately identified in the public mind with the network and the sponsor. Independent rating evaluations should be admissible as evidence (rebuttable) of a program's publicity value. Inasmuch as this publicity value is the crux in successful network operation, surely it should be accorded legal recognition.

The case for the plaintiff must focus on the premise that a produced television program with its evidenced audience appeal represents a property right in the plaintiff-owner that can be measured by the contract sale value of the program to a sponsor. By analogy the produced program is as much a property right in the network (or station) as is any product to its owner. Public acceptance in either case represents a protectible property right in the producer. The actual release or broadcast of the program over the air is not an abandonment of ownership or a dedication to the public.<sup>33</sup> "At common law, the public performance of a play is not an abandonment of it to public use."<sup>34</sup>

If we assume that the court as a preliminary question of law decides that the plaintiff's program format is a concrete thing and not an abstract idea, then the claimed appropriation or passing-off by the defendant becomes a question of fact. But even if the question of fact is answered in favor of the plaintiff, should it then be entitled to relief on the basis of unfair competition?

Why should a program be a property right in the plaintiff? The argument has been advanced that the plaintiff "spends its money for that which is too fugitive or evanescent to be the subject of property."<sup>35</sup> The answer is given by the same court:<sup>36</sup>

. . . where the question is one of unfair competition, if that which the complainant has acquired fairly at substantial cost may be sold fairly at substantial profit, a competitor who is misappropriating it for the purpose of disposing of it to his own profit and to the disadvantage of complainant cannot be heard to say that it is too fugitive or evanescent to be regarded as property.

It has been said that the protection given to trade names, trade marks and against unfair competition is in reality a protection of the good will

---

<sup>32</sup> Broadcasting • Telecasting, Feb. 8, 1954, p. 32, col. 1: "THERE ARE three principal uses of television audience measurements. . . . (1) a programming tool, (2) a balance sheet to show changes over the years, and (3) a tool in time selling and time buying."

<sup>33</sup> Uproar Co. v. National Broadcasting Co., 8 F. Supp. 358, 362 (D. Mass. 1934), *modified*, 81 F.2d 373 (1st Cir.) *cert. denied*, 298 U.S. 670 (1936).

<sup>34</sup> Ferris v. Frohman, 223 U.S. 424, 435 (1912).

<sup>35</sup> International News Service v. Associated Press, 248 U.S. 215, 240 (1918).

<sup>36</sup> *Ibid.*

of the plaintiff.<sup>37</sup> Surely the audience good will of a television network or station deserves the protection of the courts. Actually a television network sells good will and is constantly competing with other networks for it.

One argument against the protection of "ideas" has been that it is against public policy to allow monopolization of them.<sup>38</sup> But this argument has two sides and the validity of its refutation seems especially applicable in the problem at hand. Protection of the owner of a combination of ideas as in a unique television program format is in the public interest. A competitor who realizes that he may be liable if he attempts to cash in on the origination and good will of another will be forced to develop new and different program formats. Certainly the public interest as regards this powerful public-affected means of communication and entertainment will be better served by the competitive development of new and better programs. It is a fair generalization that large numbers of the television audience would welcome greater diversity in programming.

One author has carried the torch for protection of television programs via copyright law rather than unfair competition.<sup>39</sup> It would seem that he does not think that television program content should be protected to the extent envisaged by the hypothetical problem. As Callmann has pointed out,<sup>40</sup> the copyright protection extends to the right of copying and dissemination, modification or transformation, and performance or representation. This protection, however, ignores the essence of the problem, namely, the audience competition factor. The competitor's infringement would not, in many cases, involve the copyright law. Rather it would be a quasi-copying from which it is doubtful that the copyright law furnishes protection. Nonetheless, the competitor, without contributing to any artistic development or progress within the television medium, can profit by the efforts of another.

Here again an interesting refutation of the "monopoly" argument can be considered.<sup>41</sup> The gist of the monopoly argument is that the public will either lose or be forced to pay more for their enjoyment of whatever is legally monopolized under the unfair competition theory.<sup>42</sup> But a television program is disseminated to all the public within range, and it is

<sup>37</sup> McCLINTOCK, HANDBOOK OF EQUITY 405 (2d ed. 1948).

<sup>38</sup> *International News Service v. Associated Press*, 248 U.S. 215, 262-3 (1918). See comment on this case in *Triangle Publication v. New England Newspaper Pub. Co.*, 46 F. Supp. 198, 204 (D. Mass. 1942), as to "monopoly" aspect. Also WARNER, *op. cit. supra* note 3, § 212.

<sup>39</sup> WARNER, *op. cit. supra* note 3, § 219.

<sup>40</sup> Callmann, *Copyright and Unfair Competition*, 2 LA. L. REV. 648, 656 (1940).

<sup>41</sup> WARNER, *op. cit. supra* note 3, at 986: "The objection to unfair competition is that it establishes perpetual monopolies in words, phrases and ideas and thus removes them from public circulation."

<sup>42</sup> See note 38 *supra*.

hard to conceive how program protection could "cost" the public. The protection is afforded against those who would attempt to capitalize on the creative efforts of another without giving the public something new and original in return. Again it goes back to the property right.<sup>43</sup> Television networks are in competition with each other for advertising sponsors, and advertising sponsors are acquired on the basis of network popularity.<sup>44</sup> But network popularity is predicated on audience acceptance of produced programs. Thus competition is evident as between program owners vying for the audience and sponsorship for their programs. This situation can exist from network down to individual station level. Courts will have to recognize this aspect of competition in relation to the television industry. Actually it is market competition. As was said in a recent case:<sup>45</sup> "The wrong, in unfair competition, is the sale of goods of one manufacturer or vendor for those of another." Further words of the same court are quite appropriate and applicable to our hypothetical problem:<sup>46</sup>

And in view of its engaging in a business similar to that of the plaintiff, with near identical methods of advertising, salesmanship and operation, the defendant's use of the name . . . renders practically inevitable the likelihood of confusion of origin in the minds of the purchasing public, and is therefore unfairly competitive.

The question of damages enters the picture. In our hypothetical case, what damages could the plaintiff claim and prove? First, if the produced program and its publicity value are recognized as a property right in the plaintiff then certainly he has suffered a loss when that value is depreciated on the open market, because a competitor is selling a nearly-identical product as his own. The measureability of damages will vary with the individual cases, but certainly a threatened loss of a present lucrative contract presents no problem insofar as equitable relief via an

---

<sup>43</sup> Broadcasting • Telecasting, Feb. 15, 1954, pp. 38-39: Advertisement, "what's up?" for CBS Television; p. 39: "CBS TELEVISION IS UP. PIB figures, just released, confirm that advertisers invested more of their 1953 budgets on CBS Television than on any network for any year of broadcasting history."

<sup>44</sup> Broadcasting • Telecasting, *supra* note 43: "They expressed this confidence in CBS Television because its program schedule won the greatest network popularity . . . (citing Trendex: Jan.-Dec., 1953). Also Broadcasting • Telecasting, Feb. 22, 1954, back cover; "Yes TIME BUYERS who know their markets and stations select KOTV in Tulsa and KFMB-TV in San Diego. They know that popular local programs . . . top network shows . . . audience rating . . . coverage and cost per thousand add up to the greatest possible sales return for every advertising dollar invested."

<sup>45</sup> Book-of-the-Month Club, Inc. v. Children's Book & Record of the Month Club, Inc., 112 F. Supp. 151, 153 (S.D.N.Y. 1953).

<sup>46</sup> *Ibid.* The concurring opinion of Justice Holmes in the Associated Press case also expresses the "protection" idea, 248 U.S. at 246-7: "This means that words are repeated by a competitor in business in such a way as to convey a misrepresentation that materially injures the person who first used them, by appropriating credit of some kind which the first user has earned."

injunction to prevent these anticipated damages is concerned.<sup>47</sup> Naturally if the contract has already been lost then specific damages can be claimed. So also losses on the sale of time for spot announcements before and after the program in question might be alleged. The plaintiff should be entitled to ask for damages on the basis of overall good will or listening audience loss.<sup>48</sup>

The truth of the matter is that mere money relief in damages that would be afforded in an action at law would be inadequate. The plaintiff's loss of audience rating and sponsor contracts should be protected in equity via injunctive relief.<sup>49</sup> Equitable relief on those grounds would give the court jurisdiction to settle the entire matter and assess damages insofar as they are ascertainable.<sup>50</sup>

### Conclusion

What the courts will do with the anticipated problem is, in a real sense, conjectural. An attempt to predict with precision future legal decisions is not a novel approach in the law. Holmes was speaking with perspicacity when he enounced his predictive theory.<sup>51</sup>

Sooner or later the courts will face the many ramifications of the television challenge. There is legal authority for protecting a produced television program and certainly there is equity and justice in affording such protection.<sup>52</sup> This article has not been concerned with the factual aspects of misappropriation or passing-off, but rather with the broader picture; that is, the legal recognition of such action as unfair competition.

---

<sup>47</sup> CALLMANN, UNFAIR COMPETITION 77 (Practicing Law Institute Series 1, No. 18 1946): "Because a businessman usually adopts the most effective tactics when he seeks to injure another, the preliminary injunction is essential to the plaintiff's protection. In unfair competition cases, moreover, the defendant aims to hurt the plaintiff by prejudicing him in the public eye; the public is the audience before whom the competitive performance is staged. The greater the publicity accorded to the injurious act, the more aggravated the injury to the plaintiff. Furthermore, the damage to an intangible value will be, in most cases, unascertainable."

<sup>48</sup> RESTATEMENT, TORTS § 944, comment *d* (1939): "A different sort of difficulty is encountered in a case of unfair competition. If the plaintiff could show exactly what business had been diverted, what sales lost, the harm could be measured with fair accuracy — at least this would be so in some cases — but in the nature of things he can not make this exact showing. The difficulty lies not so much in the unmeasurable character of proven harms as in the unprovability of measurable harms. Any estimate of the amount of business diverted necessarily contains a high degree of conjecture."

<sup>49</sup> CALLMANN, *op. cit.* *supra* note 47.

<sup>50</sup> 1 POMEROY, EQUITY JURISPRUDENCE § 236a (5th ed. 1941).

<sup>51</sup> Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460-461 (1897): ". . . if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the . . . courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."

<sup>52</sup> International News Service v. Associated Press, 248 U.S. 215, 240.