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Static and Dynamic Concepts of the Law of Unfair Competition

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I.

A fundamental difference in basic concept will, of course, result in substantial difference in ultimate conclusion. Nowhere is this more strikingly evident than in the law of unfair competition. Some authorities tell us that this branch of the law is but "a single narrow concept—that of passing off goods as the goods of another."¹ Others tell us, however, that it is an embodiment of "fundamental principles, applicable here as elsewhere, [that] when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other."²

The divergence in conclusion resulting from this fundamental difference in basic concept is markedly exemplified in decisions dealing with false advertising. Thus we find the narrow concept applied in a case decided by one of the United States Circuit Courts of Appeal composed of as illustrious a group of justices as ever sat upon any such Court, namely, Justices Taft, Lurton, and Day, all of whom were later appointed to the Supreme Court. In a unanimous decision by those Justices it was held in *American Washboard Co. v. Saginaw Mfg. Co.*,³ that the manufacturer of an aluminum-faced washboard was without remedy against another manufacturer who falsely represented that his own washboards were of aluminum. The defendant was not "*palming off its goods on the public as and for the goods of complainant*" [italics the writer's] and relief was, accordingly, denied.

Another Circuit Court of Appeals, however, in the case of *Ely-Norris Safe Co. v. Mosler Safe Co.*,⁴ applied the broad concept and sustained a bill of complaint by a manufacturer of safes who alleged that his safes had ex-

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1. McLaughlin, *Legal Control of Competitive Methods* (1936) 21 IOWA L. REV. 274; see *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 531 (1935).

2. *International News Service v. Associated Press*, 248 U. S. 215, 235 (1918).

3. 103 Fed. 281 (C. C. A. 6th, 1900).

4. 7 F. (2d) 603 (C. C. A. 2d, 1925).

plosion chambers therein as a protection against burglars and that the defendant falsely advertised that its safes had such devices therein. Judge Learned Hand, in delivering the opinion for the Court, said:

“ . . . 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. We find it impossible to deny the strength of the plaintiff’s case on the allegations of its bill. . . . It is as unlawful to lie about the *quality* of one’s wares as about their *maker*; . . . [Italics the writer’s.]

In view of this divergence in conclusion among Circuit Courts of Appeal, the Supreme Court granted certiorari in the latter case and upon consideration thereof, reversed the decision of the Second Circuit.⁵

This result may appear to reflect an avowal of the narrow concept—and some have so regarded it.⁶ Nevertheless, in the *Associated Press* case, cited above,⁷ the Supreme Court expressly repudiated the narrow concept and adopted the broad concept as the basis of the decision. There is no equivocation in the following pronouncements:

“It is said that the elements of unfair competition are lacking because there is no attempt by the defendant to palm off its goods as those of the complainant, characteristic of the most familiar, if not the most typical, cases of unfair competition. *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118, 140. But we cannot concede that the right to equitable relief is confined to that class of cases.”⁸

“The parties are competitors in this field; and on fundamental principles, applicable here as elsewhere, when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 254. Obviously, the question of what is unfair competition in business must be determined with particular reference to the character and circumstances of the business.”⁹

While that decision has been regarded as definitely establishing the broad concept,¹⁰ that conclusion is beclouded by the result in the later decision, the *Mosler Safe* case, referred to above. Furthermore, in its most recent discussion of the subject, the Court appears again to avow the narrow concept as the basic fundamental, with the decision in the *Associated Press* case as an unexplained extension.¹¹

5. *Mosler Safe Co. v. Ely-Norris Safe Co.*, 273 U. S. 132 (1927).

6. McLaughlin, *loc. cit. supra* note 1. But see Handler, *False and Misleading Advertising* (1929) 39 YALE L. J. 22.

7. *International News Service v. Associated Press*, 248 U. S. 215, 235 (1918).

8. *Id.* at 241.

9. *Id.* at 235.

10. Rogers, *Unfair Competition* (1919) 17 MICH. L. REV. 490; Comment (1919) 32 HARV. L. REV. 566; Nims, UNFAIR COMPETITION AND TRADEMARKS (3d ed. 1929) 6.

11. *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 531 (1935).

Until this basic conflict or doubt as to the fundamental concept of the law of unfair competition is settled, we shall continue to find substantial divergence in results. An inquiry toward the determination of that question is, therefore, in order.

II.

Here, as elsewhere, historical perspective does much to clarify our view. Mr. Nims has truly said that, "The development of these rules now defined as 'Unfair Competition,' is one of the romances of legal history. . . ." ¹² In an earlier article, the writer has sought to determine the origin of this branch of the law and to thread our way down to the present time. ¹³ The citations there detailed demonstrate one thing, at least, and that is the amazing recentness of all this. The early common law digests and writers, even as late as Blackstone, tell us nothing about any "law of unfair competition"—not even about a "law of trade-marks." While we find recorded a case at the end of the sixteenth century where the common law action of deceit was allowed for counterfeiting a trade-mark, nevertheless, as late as the middle of the eighteenth century, the courts of equity were unwilling to "restrain one trader from using the same mark with another." ¹⁴ Indeed, as late as 1847 the law courts were still unsettled as to whether there was a legal right, as such, in a trade-mark so that the mere adverse use thereof, in the absence of actual proof of damages, would entitle the plaintiff to judgment for nominal damages. ¹⁵ Judge Duer tells us in 1849, that while trade-mark proprietors had a remedy in the law courts in earlier times, "it is certain that the jurisdiction, in relation to such marks, that courts of equity now exercise, is of recent origin." ¹⁶ And as late as 1885, the leading contemporary authority in this field, said:

"It is probable that no other branch of legal science has had a more rapid growth during the twelve years since the first edition appeared. For that reason, this book had, for the greater part, to be rewritten." ¹⁷

When once the courts of equity were granting relief against trade-mark infringement, as such, it was an easy step to grant relief also where the defendant sought to "palm off" his goods as those of the plaintiff *by any other means*. This step in the development is beautifully illustrated in a case decided in 1883 by the Kentucky Court of Appeals. ¹⁸ There the defendant had been most careful not to use or imitate the plaintiff's *trade-marks*, but had endeavored to *simulate the appearance of the plaintiff's product*. The lower court denied relief—*there was no infringement of a trade-mark*. The Court of Appeals, however, reversed that decision and granted relief.

12. NIMS, UNFAIR COMPETITION AND TRADEMARKS (3d ed. 1929) 2.

13. Fathchild, *Statutory Unfair Competition* (1936) 1 Mo. L. REV. 20, 21, reprinted with supplemental annotations in (1936) 31 BULL. U. S. TRADE-MARK ASSN., 83, 84.

14. Lord Hardwicke in *Blanchard v. Hill*, 2 Atk. 484 (1742).

15. Fathchild, *loc. cit. supra* note 13.

16. *Amoskeag Mfg. Co. v. Spear*, 4 N. Y. Sup. Ct. Rep. 599, 604 (1849).

17. BROWNE, TRADE-MARKS (2d ed. 1885) Preface.

18. *Avery & Sons v. Meikle & Co.*, 4 Ky. L. Rep. 759, 81 Ky. 73 (1883).

That decision is noteworthy not alone for its actual result, but also because of the broad fundamental concept recognized by the Court as underlying this entire subject matter. Chief Justice Hargis, in delivering the opinion of the Court, said:

“The object of trade-mark law is to prevent one person from selling his goods as those of another, to the injury of the latter and of the public. It grew out of the philosophy of the general rule that every man should so use his own property and rights as not to injure the property or rights of another, unless some priority of right or emergency exist to justify a necessarily different manner of use.”¹⁹

And further in the opinion the Court held that it was unlawful by *any* deceptive means, whether by way of trade-mark infringement or otherwise,

“. . . to cause the goods or articles to which they are attached to be purchased by the public as the make or manufacture of another; thus violating that great generic rule which lies at the foundation of all law, that a man must so use his own property as not to injure the property of another.”²⁰

Thus here in the very beginnings of the “palming off” rule, we find declared *as the underlying principle of this entire subject matter* that broad fundamental concept which, thirty-five years later, was avowed by the Supreme Court in the *Associated Press* case.²¹

These analogous rights thus established were for a time, for want of a name, referred to merely as “rights analogous to those of trademarks.” They were so referred to, and classified by Browne, the leading authority in the early development of this branch of the law.²² But things soon acquire names; and the history of the name is as engaging as the history of the subject. The name “unfair competition” was not the result of analytical selection. It arose in the course of the consideration of these cases first as a natural characterization of the conduct in question, and then, by increasing concurrence of use, became the accepted designation of this branch of the law.

Thus as early as 1803, Lord Eldon, in granting relief against the simulation of the plaintiff’s magazine, said:

“If there is a *fair competition* by another original work, really new, be the loss what it may, there is no damage or injury.”²³
[Italics the writer’s.]

In 1849, Judge Duer, in the case already referred to, in answering Lord Hardwicke’s objection²⁴ that granting relief against the adverse use of a trade-mark “would be of mischievous consequence,” said:

19. *Id.* at 762, 81 Ky. 84.

20. *Id.* at 776, 81 Ky. 102.

21. See *supra*, p. 299.

22. BROWNE, TRADE-MARKS (1st ed. 1873) c. XII; *id.* (2d ed. 1898) c. XII.

23. Hogg v. Kirby, 8 Ves. 215, 225 (1803).

24. In *Blanchard v. Hill*, 2 Atk. 484 (1742).

"It is a mistake to suppose that this necessary protection can operate as an injurious restraint upon the freedom of trade. Its direct tendency is to produce and encourage a *competition* by which the interests of the public are sure to be promoted; a *competition* that stimulates effort and leads to excellence from the certainty of an adequate reward."²⁵ [Italics the writer's.]

In Browne's first edition of his *Trade-Marks* published in 1873, while we do not find any chapter or section heading or even an index reference on "unfair competition," we do find the following:

"Sec. 42. *Wherein consists the wrong in using the Trade-Mark of Another.*—It is not in imitation a symbol, device, or fancy name, for in such act may not be involved the slightest turpitude. The wrong consists in *unfair means* to obtain from a person the fruits of his own ingenuity or industry. . . ."²⁶ (Italics the writer's).

We there find also such expressions as: "honest competition,"²⁷ "illicit competition,"²⁸ "competition in business by unfair means,"²⁹ and "unfair competition."³⁰

Twelve years later, however, in Browne's second edition, we find not only such usages as above quoted, but also an index reference heading "unfair competition" and the following significant section in the text:

"Sec. 43. *Unfair Competition in Business.*—In examining cases classified in digests and books of reports as those of trade-marks, the reader is sometimes puzzled. In the absence of the slightest evidence that technical trade-marks have been infringed, courts of equity have granted full and complete redress for an improper use of labels, wrappers, bill-heads, signs, or other things that are essentially *publici juris* . . . French-speaking nations have a standard name for this kind of wrong. The term used is *concurrency déloyale*. This term may fairly be Anglicized as a dishonest, treacherous, perfidious rivalry in trade. In the German Imperial Court of Colmar, in 1873, the court said that current jurisprudence understands by *concurrency déloyale* all manoeuvres that cause prejudice to the name of a property, to the renown of a merchandise, or in lessening the custom due to rivals in business. The euphemism employed as a head to this section will answer the present purpose."³¹

This outgrowth of the term "unfair competition" from the law of trade-marks is reflected also in our digests and encyclopedias of law. As late as thirty years ago the title heading was still "Trade-marks and Trade Names;" later, "Trade-marks, Trade Names, Etc.;" and more recently "Trade-Marks, Trade-Names and Unfair Competition."³²

25. *Amoskeag Mfg. Co. v. Spear*, 4 N. Y. Sup. Ct. Rep., 599, 605 (1849).

26. BROWNE, *TRADE-MARKS* (1st ed. 1873) 30.

27. *Id.* at 43.

28. *Id.* at 50.

29. *Id.* at 51.

30. *Id.* at 410.

31. *Id.* (2d ed. 1885) § 43.

32. 26 *THIRD DEC. DIG.* 282 (1929).

While the name has been criticized—Mr. McLaughlin of the Harvard Law School objecting that the word “unfair” is fraught with emotional instability,³³ and Mr. Nims that the word “competition” has misled the Courts into unnecessarily restrictive applications³⁴—it appears to have become established not only in the jurisprudence of our own country, but also in that of other nations and in international covenants.³⁵

Furthermore, in our view—while not disagreeing with the criticism that the word “unfair” is of variable content depending upon the economic and social philosophy of the person using it—that word has been a significant factor in the subsequent development of this branch of the law. The romance did not end with the establishment of the name. In 1918 the Supreme Court announced the following paradox:

“The law of *trade-marks* is but a part of the broader law of *unfair competition*.”³⁶ [Italics the writer’s.]

Nor is this statement at all inaccurate. When once the name had become a part of the law, its breadth readily enabled it to draw upon substantive sources other than the law of trade-marks in the establishment of a comprehensive code of “fair dealing” governing all competitive or other economic enterprise. Thus, the law of libel and slander and other fields of *tort liability* were drawn upon.³⁷ “In every *contract*,” it is said, “there exists an implied covenant of good faith and fair dealing.”³⁸ [Italics the writer’s.] Indeed, even the *criminal law* has been drawn upon so that its violations adversely affecting a competitor have been held enjoined as “unfair competition.”³⁹ The process has not been merely a physical transposition, but a fusion of legal and equitable considerations into new corollaries in the law of unfair competition. Thus while the rule of *respondeat superior* may be sufficient to render the employer legally liable for the slanderous statements of the employee, it is not necessarily sufficient to establish unfair competition.⁴⁰

Mr. Nims caught the trend of this development when he said:

“The law of Unfair Competition might well be called the book of rules of the business game. It gives far greater protection against unfair practices used in competition than is realized by the average business man. It is still in its infancy. Its possibilities of growth and effectiveness are almost unlimited.”⁴¹

33. McLaughlin, *Legal Control of Competitive Methods* (1936) 21 IOWA L. REV. 274.

34. NIMS, UNFAIR COMPETITION AND TRADE-MARKS (3d ed. 1929) 1; cf. Federal Trade Comm. v. Raladam, 283 U. S. 643 (1931).

35. DAVIES, TRUST LAWS AND UNFAIR COMPETITION (1915) 529 *et seq.*; Fathchild, *supra* note 13, at 20.

36. United Drug Co. v. Rectanus Co., 248 U. S. 90, 97 (1918).

37. See Handler, *Unfair Competition* (1936) 21 IOWA L. REV. 175, 196 *et seq.*

38. Uproar Co. v. National Broadcasting Co., 81 F. (2d) 373, 377 (C. C. A. 1st, 1936), *cert. denied*, 56 Sup. Ct. Rep. 835 (1936), applying quotation from Kirke LaShelle Co. v. Paul Armstrong Co., 263 N. Y. 79, 188 N. E. 163, 167 (1937).

39. Comment (1929) 42 HARV. L. REV. 693; Comment (1925) 25 COL. L. REV. 1088 (1934) 13 TEX. L. REV. 136.

40. Bourjois, Inc. v. Park Drug Co., 82 F. (2d) 468 (C. C. A. 8th, 1936).

41. NIMS, UNFAIR COMPETITION AND TRADE-MARKS (2d ed. 1917) VIII.

In light of this perspective we cannot concur in the view that the "palm-ing off" rule is the sum and substance of the law of unfair competition, or even that that was so "at common law."⁴² At common law, as that phrase is usually understood, there was no law of unfair competition. Wholly aside from the fact that most of this development was in the courts of equity,⁴³ this whole subject matter is relatively recent and is only in the early stages of its growth. The narrow concept mistakes *application* for *principle*—corollary for proposition—and makes static that which is a dynamic fundamental in the law. We subscribe unreservedly to the view expressed by Mr. Nims, that,

"The legal wrong called Unfair Competition exists wherever unfair means are used in trade."⁴⁴

III.

But settling the basic concept does not necessarily settle all of our problems. Indeed, the adoption of the broad concept makes our problems of application all the more numerous. What are "unfair means?" And by what process or formula shall we proceed to determine that question?

This problem is doubly complex. The word "unfair" not only presents an objective indefiniteness but also, as stated by Mr. McLaughlin in the criticism already referred to, "has emotional and ethical implications peculiarly subject to the economic bias of the person using the term."⁴⁵

This situation, however, is not without precedent. The Courts of Chancery were instituted some centuries ago to do "equity" but without an investiture of ritual or creed to guide them. And with like criticism, John Selden, one of the great English lawyers of the seventeenth century, said:⁴⁶

"Equity in law is the same that the spirit is in religion, what every one pleases to make it. . . . For law we have a measure, know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity."

But the dynamic charge "to do equity" did much, we believe, to carry the law forward in necessary adjustment to changed and changing conditions. And so here, the general charge to require "fair dealing" in all competitive or other economic activity has done, and is doing, much to carry the law forward in closer synchronism with the onrush of change in economic conditions. In both cases the general reluctance of the judiciary to step beyond established precedent—even the Chancery courts soon adopted the maxim that "equity follows the law"—and the inherent conservatism of judicial temperament should be sufficient protection against emotional divergencies from the course of sound progress.

42. McLaughlin, *Legal Control of Competitive Methods* (1936) 21 IOWA L. REV. 274; see *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 531 (1935).

43. *Amoskeag Mfg. Co. v. Spear*, 4 N. Y. Sup. Ct. Rep. 599, 604 (1849); see also *Associated Press Case*, 248 U. S. 215, 240, 262 (1918).

44. NIMS, *UNFAIR COMPETITION AND TRADE-MARKS* (3d ed. 1929) 2.

45. McLaughlin, *Legal Control of Competitive Methods* (1936) 21 IOWA L. REV. 274.

46. SELDEN'S TABLE TALK (Reynold's ed. 1892) 60.

The question still remains, however, how shall we proceed to determine what constitutes "unfair means." To decide the successive cases, as they arise, merely upon the persuasions of the moment is likely to result in haphazard conclusions with high probability of error. Some antecedent formulation of principles to govern the application of this broad concept is highly desirable. Even the early Chancery courts soon formulated a group of maxims to guide their decision.

In a previous article appearing in this Review, this writer said:

" . . . even if the courts were willing to go forward in exact synchronism with the 'march of time,' still there may be fields of alleged unfairness into which the courts may properly refuse to enter until the legislative branch of the government has delineated the substantive rights in the matter. We suggest the following:

- (1) The alleged unfairness may be in a subject-matter which is inherently, or has become, a domain exclusively for legislative action, and should, accordingly, be left for such action.
- (2) Also, the courts may properly be unwilling to give effect to a proffered trade standard, the soundness of which may well be open to debate. Proffered standards, the soundness of which, in an organized community, may properly be debated should be given effect, if at all, only by legislative action, not by judicial decision.
- (3) And again, as emphasized by Mr. Justice Brandeis in his dissent in the *Associated Press* case, above-considered, the alleged unfairness may present a complexity of interests which can more readily be adjusted and supervised by legislative action rather than by judicial process."⁴⁷

These suggestions find support in the citations considered in the previous article and are illustrated also in a number of more recent cases. Thus in *Gruelle v. Mollye's Doll Outfitters, Inc.*,⁴⁸ the successor to the alleged rights of the "Raggedy Ann" doll sought to enjoin the defendants from manufacturing and selling dolls of the same design and appearance and under the same name. In denying relief, the court said:

"In view of the ample protection of the copyright laws to meet a situation of this kind there seems to be no reason to advance into new territory and I shall not do so."

Here was a legislative subject-matter—copyright protection. Congress, pursuant to the Constitution, has provided for monopolistic privileges upon the performance of certain conditions precedent. Those prerequisites having been specified, it is hardly within the province of the courts to nullify or change them. Change, if any is to be made in this branch of the law, should be by legislative action—not by judicial decision.

47. FATHCHILD, *supra* note 13, at 27.

48. 26 TRADE-MARK REP. 532 (U. S. D. C. E. D. Pa., July 23, 1936).

This decision is in line with the ultimate conclusion of the Court of Customs and Patent Appeals, considered in the previous article mentioned, that under the "unfair competition" jurisdiction, the courts should not undertake to modify the substantive patent law—that being a legislative subject-matter.⁴⁹

In *Hoeltke v. Kemp Mfg. Co.*,⁵⁰ one of the Circuit Court of Appeals awarded recovery for the defendant's manufacture and sale of the invented device *prior to the grant of the patent* where the invention had been exhibited to the defendant prior to such manufacture and sale for purposes of negotiating sale or license of the invention. While patents are a legislative subject-matter, the patent statutes do not profess to deal with the inventor's substantive status prior to the grant of the patent—it being recognized by Congress and the courts that the inventor's rights in his invention prior to the grant of the patent are to be determined by the non-statutory law. The standard of conduct enunciated in this decision is, of course, hardly subject to debate and, therefore, is properly within the realm of judicial recognition and enforcement.

This result may be compared with a recent decision of one of the New York courts where the plaintiff had written a play for motion picture production, entitled "Inflation," and had exhibited the play to the defendants for purposes of sale or license. The defendants did not accept plaintiff's production, but shortly thereafter produced one of their own origination but under the same title. In denying an injunction, the court said:

" . . . Inflation was a common subject on almost every tongue and pen . . . It is not at all inconceivable that the defendants, after learning that the plaintiffs had produced a picture on inflation decided to do likewise. They had a perfect right to do so, just as a writer who, after seeing an article or a book on a given timely subject, is licensed to write on the identical topic. . . . It is unfortunate for the plaintiffs that their picture could not remain the sole picture on the subject of inflation; but more than that is necessary to make out a case. Competition alone is not enough; unfairness must attend the rivalry."⁵¹

The difference between the *Hoeltke* case and the *Whitman* case is rather clear, but the precise dividing line between their respective fields of application is not so clear. As said by Mr. Handler of the Columbia University Law School:

"To brand every taking a misappropriation or piracy is to beg the issue.

49. FATHCHILD, *supra* Note 13, at 31-33.

50. 80 F. (2d) 916 (C. C. A. 4th, 1936); similarly see *Booth v. Stutz Motor Car Co.*, 56 F. (2d) 962 (C. C. A. 7th, 1932); *Shellmar Products Co. v. Allen-Qualley Co.*, 36 F. (2d) 623 (C. C. A. 7th, 1930).

51. *Whitman v. Metro-Goldwyn-Mayer Corp.*, 289 N. Y. Supp. 961 (1936); similarly see *Moore v. Ford Motor Co.*, 43 F. (2d) 685 (C. C. A. 2d, 1930).

"The right to compete means the right to imitate. Otherwise, the first tradesman who wrapped wax paper about a loaf of bread or who bottled milk would enjoy the exclusive rights to these methods of distribution. How long would these exclusive rights endure? A court cannot restrain a tradesman from copying a style, design, or the shape and appearance of an article without according a monopoly to the first user. For one to reap with impunity the fruits of another's labor may be reprehensible, but the creation of new species of property interests and new series of monopolies by the courts may be disastrous to free enterprise.

"It is not to be wondered, therefore, that the courts have found the problems arising out of the appropriation of competitors' intangible trade values the most perplexing of those encountered in the law of unfair competition."⁵²

In the previous article by this writer already referred to,⁵³ reference was made to a decision of one of the trial courts in Illinois,⁵⁴ where under the jurisdiction to prevent "unfair competition," the court fixed certain *minimum* prices in the barbers' trade in Chicago. In a similar case, the court fixed minimum prices for the dry-cleaning industry in the Chicago area and enjoined the parties from charging *less* than the prices so fixed. The propriety of this decision has since been considered by the Illinois Appellate Court, and the decree reversed, in *Cleaning . . . Ass'n v. Sterling Cleaners & Dyers*.⁵⁵ The Court said:

"The court by its mandatory injunction compels all the parties, both plaintiffs and defendants, to this suit, constituting nearly all of the cleaning and dyeing plant owners in Chicago and vicinity, to observe the prices fixed for the industry by the decree, ostensibly for the purpose of eliminating so-called 'unfair competition' . . .

"Competition is not of itself a violation of any right of one engaged in a like business. . . .

"Fair competition as applied to business covers a wide range. The fact that there are sales for less than those of a like business is not of itself unfair. In order to determine the purpose it is necessary to consider the facts and circumstances concerning such competition, and the court will consider such facts and the reason for cutting the price, and if the court finds that such price cutting is for the primary purpose of destroying the competing business, then such purpose is not fair competition. . . .

"The case simmers itself down to whether the facts justify such competition as is evident from the record, and in a general way the plaintiffs do not deny that competition is necessary. . .

52. Handler, *Unfair Competition* (1936) 21 IOWA L. REV. 175, 189.

53. FATHCHILD, *supra* note 13, at 25.

54. *Master Barbers' Ass'n v. Jos Baiata*, Sup. Ct. Cook Co., Ill., Docket No. 34 S-18528.

55. 285 Ill. App. 336 (1936).

"The plaintiffs do contend, however, that—'Freedom of contract is no longer a dogma but a problem. The question is not whether freedom of contract should be abolished; nor how much freedom must be allowed the individual on principle, because of his natural inalienable etc. rights; but how must and should the sphere of freedom of the individual be formulated in view of the factual conditions and the changing needs of social economic life.'

"In the case of *John D. Parks & Sons Co. v. Hartman*, 153 Fed. 24, what was said by the court is a fitting reply to the plaintiff's contention in the instant case, and we cite it with approval.

"'It has been suggested that we should have regard to new commercial conditions and a tendency toward a relaxation of old common-law principles which tend to prevent development on modern lines. This is an argument better addressed to legislative bodies than to the courts. Neither is it wise for the courts to countenance the introduction of artificial distinctions dependent upon the variant economic views of individual judges. . . .'"⁵⁶

This decision is eminently sound. Standards of economic, social or moral policy on which there may properly be differences of opinion in the community should be determined by legislative action, not by judicial decision. Furthermore, in view of the complexity of the problem including the need for continuing administration in any such regulatory program, the subject-matter should be left for comprehensive legislative action.

The recent decision in *Motor Improvements, Inc., v. A. C. Spark Plug Co.*,⁵⁷ in which the Supreme Court has denied certiorari,⁵⁸ goes far to correct the results of the *American Washboard* and *Ely-Norris Safe* cases. In the *Spark Plug* case, the defendant had manufactured and sold an oil filter for automobiles, which, prior to the instant litigation, had been held to infringe the patents relied upon by the plaintiff. Thereafter, the defendant changed the internal construction of its filters so as to avoid the charge of patent infringement, but represented to the public that the device was the same as the earlier infringing device. The lower court held that "such representation, in the absence of a showing that the appellee's filter was palmed off on the public as the appellant's, did not constitute unfair competition . . ."⁵⁹ The Court of Appeals reversed the judgment and directed an injunction and accounting. The court definitely rejected the position "that the palming off by one competitor of his goods as those of another is the sole test of unfair competition," and significantly cited with approval Judge Hand's decision in the Court of Appeals in the *Ely-Norris Safe* case—rejecting the *American Washboard* case as not applicable.⁶⁰

56. *Id.* at 349-358.

57. 80 F. (2d) 385 (C. C. A. 6th, 1935).

58. *A. C. Spark Plug Co. v. Motor Improvements, Inc.*, 56 Sup. Ct. Rep. 939 (1936).

59. 80 F. (2d) 385-386 (C. C. A. 6th, 1935).

60. *Id.* at 386.

The Supreme Court's denial of certiorari, while technically not an affirmance, may fairly be taken as an indication that the Court does not regard its reversal of Judge Hand's decision on the *Ely-Norris Safe* case as a disavowal of the broad concept announced in the *Associated Press* decision, but solely as a ruling that the plaintiff in these cases must show that he, individually, rather than possibly as one of a group, is being damaged. But, as so interpreted, the decision is in conflict with other rulings where group damage has been recognized as a basis for representative action by individuals in the group.⁶¹

We come finally to the recent decision by the Court of Appeals, Ninth Circuit, in the case of the *Associated Press v. KVOS Inc.*⁶² In this case, the Court of Appeals in purported application of the *Associated Press* decision, already considered, held that a radio broadcasting station which as one of its features conducted a "Newspaper of the Air" could be restrained by the Associated Press from broadcasting news reports *published by member newspapers in the locality of the station.*

The facts in this later case are clearly different from those in the earlier case, but whether those differences are of consequence is another question. In the first place, the defendant in the earlier case was a competing news-gathering agency. In the later case the defendant was not a news-gathering agency, as such, but a radio broadcasting station at a local point of news distribution. Also, the practice involved in the earlier case was the picking up of published news items in distant eastern points and transmitting them to western points, where the papers served by the defendant organization could publish them at about the same time as the items were published in the papers there served by the plaintiff.⁶³

These differences call for reflection. If a radio station *at a point of news distribution* is to be prevented from broadcasting news items *published by newspapers in the locality of that point of distribution*, how far will this extra-statutory judge-made monopoly be carried? Is everyone to be precluded from using news reports *for purposes of profit*? What of the news commentators, such as Mr. Boake Carter? And what of the late Will Rogers who frankly confessed that all he knew was what he read in the papers—and made a fortune out of it?

Even if we agree with the result in the earlier case, the decision in the later case is not a necessary deduction therefrom. But if we may be permitted to approach this particular subject-matter from the point of view of our suggestions hereinabove set forth, we submit the following:

Newspapers are accorded the privileges of copyright protection;⁶⁴ and such protection is quite generally utilized. It was undoubtedly utilized by the publications here involved. The situation considered and ruled upon

61. *Harvey v. American Coal Co.*, 50 F. (2d) 832 (C. C. A. 7th, 1931), *cert. denied*, 284 U. S. 669 (1931).

62. 80 F. (2d) 575 (C. C. A. 9th, 1935).

63. See 245 Fed. 244, 246 (C. C. A. 2d, 1917).

64. 17 U. S. C. A. § 5 (b).

in the earlier case may indeed be adequately covered by the copyright law.⁶⁵ If not, the subject-matter being legislative in character,⁶⁶ change, if any, in the substantive scope of that law should be made by legislative action and not by judicial decision. Furthermore, as a standard of trade practice, the position taken in the earlier case is perhaps debatable, but clearly so in the later case. And, finally, the complex questions of public and private interests involved, questions also of the scope of adjustment in related or other industries and problems of administration perhaps makes the situation one where change, if any, should be by a comprehensive legislative plan, not by intermittent judicial action.

The Supreme Court having granted certiorari in the later case,⁶⁷ an opportunity is afforded for further consideration of this subject-matter and the underlying fundamentals. While our point of view in making these suggestions is, of course, strictly professional, not partisan (being in no wise interested in this Associated Press litigation or in the particular issues therein presented), we frankly recognize that that very fact may completely disqualify us—we may not have been pushed far enough into those records to form an intelligent conclusion thereon. We, therefore, respectfully leave the subject-matter where, in any event, it must always finally repose, in the hands of the Supreme Court.

65. See 6 R. C. L. 1143, par. 62.

66. *Banks v. Manchester*, 128 U. S. 244 (1888); *Globe Newspaper Co. v. Walker*, 210 U. S. 356 (1908).

67. *KVOS, Inc. v. Associated Press*, 56 Sup. Ct. Rep. 938 (1935).