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Unfair Competition: Similarity of Trade-Marks on Non-Competitive Goods

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siderable evidentiary value.[15] Thus, to hold one guilty of negligence as a matter of law for failing to do what others would customarily leave undone is a rather extreme position.[16]

As a general proposition, the courts have not been very successful in laying down a particular standard of conduct in a general factual situation, the modern trend being away from judge-made rules which obviate the intervention of the jury.[17] The considerations that lend force to this proposition have special application in situations concerning accidents at railroad crossings. Variable weather conditions,[18] the presence or absence of a watchman,[19] and physical conditions peculiar to each crossing affecting vision and hearing[20] preclude the laying down of a particular standard of conduct in this type of negligence case.

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UNFAIR COMPETITION: SIMILARITY OF TRADE-MARKS ON NON-COMPETITIVE GOODS

Triangle Publications, Inc. v. Rohrlich et al.
Rosenblum et al. v. Triangle Publications, Inc.
167 F.2d 969 (C. C. A. 2nd 1948)

The plaintiff, owner of a registered trade-mark "Seventeen," used as the name of a magazine for young girls, wrote to the customers of the defendants, who manufactured girdles under the trade name "Miss Seventeen," charging that the defendants had infringed upon its trade-mark. The defendants brought suit in the state court of New York to restrain such interference with their business. The plaintiff removed the cause to the federal district court and instituted a similar suit for infringement of its registered trade-mark and for unfair competition by the use of "Seventeen" on the defendants' girdles. These suits were consolidated for trial, and the district court entered an injunction restraining further use

[15]Grammer v. Mid-Continent Petroleum Corp., 71 F.2d 38 (C. C. A. 10th 1934), *cert. denied*, 293 U. S. 571 (1934).

[16]Lawyer v. Los Angeles Pac. Co., 161 Cal. 53, 118 Pac. 237 (1911).

[17]See Note, 1 U. OF FLA. L. REV. 271, 273 (1948).

[18]Gaffka v. Grand Trunk Western R. R., 301 Mich. 383, 3 N. W.2d 314 (1942).

[19]Leuthold v. Pennsylvania R. R., 33 F.2d 758 (C. C. A. 6th 1929).

[20]Louisville & N. R. R. v. English, 78 Fla. 211, 82 So. 819 (1919).

by the defendants of the word or the numeral "Seventeen." On appeal, HELD, the use of "Seventeen" to describe any article of teen-age apparel was likely to create a belief in the minds of teen-age girls that the article was advertised or commended editorially by the magazine, thereby causing damage to the plaintiff's good-will. Decree affirmed and permanent injunction awarded, Circuit Judge Frank dissenting.

Registered trade-marks are protected by the Trade-Mark Act of 1946.[1] The law of unfair competition is no longer restricted to cases in which the goods are in competition or have the same descriptive properties; the modern trend extends to cases of "unfair trade practices."[2] The gist of the action is that the defendant is using a trade-mark that will confuse the consuming public by giving rise to the belief that the goods came from the same source.[3] It is not necessary to show actual confusion; probability of confusion suffices.[4] In order that the plaintiff obtain protection there must be sufficient connection between the products to support such a probability.[5] Sufficient connection is shown, however, not only when the consumers would normally believe the goods of the defendant to be the goods of the plaintiff but also when they would believe that the plaintiff had sponsored or approved the products of the defendant.[6] Thus the rule that equity will enjoin the unfair trade practice is based on the plaintiff's right to enjoy the exclusive benefit of the good-will established by his particular trade-mark.[7]

Many courts have enjoined the adoption of the identical or a very similar trade-mark or trade-mark symbol even though the goods are not in

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[1]60 STAT. 437-441, 15 U. S. C. § 1051 *et seq.* (1946).

[2]Wisconsin Electric Co. v. Dumore Co., 35 F.2d 555 (C. C. A. 6th 1929); Vogue Co. v. Thompson-Hudson Co., 300 Fed. 509 (C. C. A. 6th 1924); Brooks Bros. v. Brooks Clothing, 60 F. Supp. 442 (S. D. Cal. 1945); Louisville Taxicab & Transfer Co. v. Yellow Cab Transit Co., 53 F. Supp. 272 (W. D. Ky. 1943); Time, Inc. v. Viobin Corp., 40 F. Supp. 249 (E. D. Ill. 1941); Armour & Co. v. Master Tire & Rubber Co., 34 F.2d 201 (S. D. Ohio 1925).

[3]Wall v. Rolls-Royce, 4 F.2d 333 (C. C. A. 3rd 1925).

[4]Esso, Inc. v. Standard Oil Co., 98 F.2d 1 (C. C. A. 8th 1938); Time, Inc. v. Viobin Corp., 40 F. Supp. 249 (E. D. Ill. 1941).

[5]Time, Inc. v. Viobin Corp., 40 F. Supp. 249 (E. D. Ill. 1941); Time, Inc. v. Barshay, 27 F. Supp. 870 (S. D. N. Y. 1939); Affiliated Enterprises, Inc. v. Rock-ola Mfg. Corp. 23 F. Supp. 3 (N. D. Ill. 1937).

[6]Vogue Co. v. Thompson-Hudson Co., 300 Fed. 509 (C. C. A. 6th 1924); Time, Inc. v. Viobin Corp., 40 F. Supp. 249 (E. D. Ill. 1941); Esquire, Inc. v. Esquire Bar, 37 F. Supp. 875 (S. D. Fla. 1941).

[7]Hanover Star Milling Co. v. Metcalf, 240 U. S. 403 (1916).

competition.[8] Few courts, however, have done so in cases in which the goods are not in competition and do not bear the same or a very similar trade-mark, trade name, or symbol.[9] Without a close similarity, in the case of goods that are non-competitive and foreign to each other, there is no ground for injunctive relief because there is very little basis for confusion.[10]

In most cases in which the defendant has been enjoined there has been a substantial similarity in some specific feature of the mark, such as style, shape, or format, whereas in the principal case not one of these factors exists.[11] Until the *Seventeen* cases[12] the courts refused to grant an injunction in such instances; for example, the publishers of *Life* magazine were refused an injunction against packers of food with a trade-mark "Life of Wheat" on a red background with white letters.[13] In the present case the lower court[14] frankly admitted that the doctrine had not heretofore been pushed this far. As the dissent points out,[15] this constant expansion of the trade-mark and trade name protection may well result in monopolies not only undeserved but also of definite harm in that the consumer is induced to pay for a name when equal quality of product is available for less.

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[8]Waterman Co. v. Gordon, 72 F.2d 272 (C. C. A. 2nd 1934); Vogue Co. v. Thompson-Hudson Co., 300 Fed. 509 (C. C. A. 6th 1924); Standard Brands, Inc. v. Smidler, 56 F. Supp. 665 (E. D. N. Y. 1944); Esquire, Inc. v. Esquire Bar, 37 F. Supp. 875 (S. D. Fla. 1941); Great A. & P. Tea Co. v. A. & P. Radio Stores, Inc., 20 F. Supp. 703 (E. D. Pa. 1937); Armour & Co. v. Master Tire & Rubber Co., 34 F.2d 201 (S. D. Ohio 1925).

[9]Time, Inc. v. Viobin Corp., 40 F. Supp. 249 (E. D. Ill. 1941).

[10]Horlick's Malted Milk Corp. v. Horlick, 143 F.2d 32 (C. C. A. 7th 1944).

[11]Time, Inc. v. Viobin Corp., 40 F. Supp. 249 (E. D. Ill. 1941).

[12]Triangle Publications, Inc. v. Rohrlich, 167 F.2d 969 (C. C. A. 2nd 1948); Hanson v. Triangle Publications, Inc. 163 F.2d 74 (C. C. A. 8th 1947).

[13]Time, Inc. v. Viobin Corp., 40 F. Supp. 249 (E. D. Ill. 1941).

[14]Triangle Publications, Inc. v. Rohrlich, 73 F. Supp. 74 (S. D. N. Y. 1947).

[15]See opinion p. 982.