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Equity--Unfair Competition--Injunction Granted Against Community Antenna

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right to engage in interstate commerce can only be regulated by Congress and a state tax which attempts to withdraw that right is invalid.

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Equity—Unfair Competition—Injunction Granted Against Community Antenna

P, community antenna service, brought this anti-trust suit against *D,* local television station. *D* counterclaimed seeking an injunction to prevent the community antenna service from picking up certain programs sent to the local station under a contract agreement with three network stations in Salt Lake City, Utah. *Held,* the injunction was granted to the local station on the counterclaim. The court found that the local station had acquired a contractually exclusive right to the first run of network and film programs in the community of Twin Falls, Idaho. The community antenna service was held to be tortiously interfering with and unfairly competing with the local station, and the local station had no adequate remedy at law. *Cable Vision, Inc. v. KUTV, Inc., K.L.I.X. Corp.,* (D.C. Idaho, 1962).

The principal case presents a new and unique application of the law dealing with unfair competition. The problem stems from the rapid growth of the television industry in this country.

This case was brought in the District Court of Idaho attempting to curtail the activities of the community antenna service in Twin Falls, Idaho. An earlier litigation was instituted by the Salt Lake City stations against the community antenna service. *Intermountain Broadcasting and Television Corp. v. Idaho Microwave, Inc.,* 196 F. Supp. 315 (D.C. Idaho 1961). These stations were attempting to enjoin the community antenna service from picking up and retransmitting their signals in Twin Falls without their permission. In refusing to grant the injunction the court pointed out that the community antenna service was guilty of no "unfair competition" or "unjust enrichment" as against the Salt Lake City stations and could operate without their consent.

The court, in deciding the principal case, was concerned with whether it would be invading any preempted field of national jurisdiction or conflicting with any phase of national policy in granting the injunction against the community antenna service basing its

decision on the common law remedies of unfair competition and tortious interference. The court observed in *Intermountain Broadcasting and Television Corp. v. Idaho Microwave, Inc., supra,* that the Federal Communications Commission had disclaimed any power under the existing statute, 47 U.S.C. sec. 153 (1959), to control community antenna systems with respect to this type of activity. The commission has, however, asked Congress to give it the authority to regulate community cables. Federal Communication Commission Public Notice, Feb. 23, 1962. In *Dumont Laboratories v. Carroll,* 86 F. Supp. 813 (E.D.Pa. 1949), the court explained that there are many instances of congressional regulation of interstate commerce which Congress, in the exercise of its discretion, intended to be less than complete and in situations where this power is partially exercised, the state is entitled to act. Further, civil actions for anti-trust violations involving radio and television are cognizable and entitled to decision on their merits in the federal courts. *Packaged Programs v. Westinghouse Broadcasting Co.,* 255 F.2d 708 (3d Cir. 1958).

In the present case the local station had contracts with the three network organizations in Salt Lake City. Under these contracts the local station was granted the exclusive right to rebroadcast the network programs in the Twin Falls area. In order to rebroadcast another station's programs, the Federal Communications Commission requires contracts of this nature to be made. 47 U.S.C. sec. 325(a) (1959). The telecasting made by the community antenna service, however, is not considered "rebroadcasting." 47 U.S.C. 153(a) (1959). The basis for the local stations' objection to the duplication by the community antenna service was that when the viewers in Twin Falls watched the programs on the cable the commercials seen were those from Salt Lake City and not those inserted by the local station for its local sponsors.

The court in the earlier case of *Intermountain Broadcasting and Television Corp. v. Idaho Microwave, Inc., supra,* relied a great deal on the decision in *International News Service v. Associated Press,* 248 U.S. 215 (1918), in making its decision based on the common-law remedy of unfair competition. Prior to this decision the majority of the cases decided on the question of unfair competition were restricted to "passing off" situations. That situation occurs when one party attempts to confuse the public and pass goods off as that of another party. The *International News* case

introduced a new aspect of unfair competition which would enjoin the guilty party not only from "passing off" but also in certain instances where one party attempts to reap the fruits of another's effort and expenditure. 48 COLUM. L.REV. 848 (1948).

In *International News Service v. Associated Press, supra,* the problem stemmed from the unauthorized use of news items gathered by the Associated Press and used by International News for its benefit. The Court felt that the method used by International News amounted to an unauthorized interference with the normal operations of the Associated Press's legitimate business, precisely at the point where the profit was to be reaped in order to divert a material portion of the profits from those who were entitled to it to those who were not. The International News also had an advantage in the competition because of the fact that they were not burdened with any part of the expense of gathering the news. The Court, therefore, felt that equity should not hesitate in characterizing this practice as unfair competition in business. The view expressed in this case might be compared to the equitable theory of consideration in the law of trusts, that he who has fairly paid the price should have the beneficial use of the property. 3 POMEROY'S EQUITY JURISPRUDENCE § 981 (5th ed. 1941).

The question of the adequate property right to sustain the injunction was also considered by the court in the present case. The court determined that the local station had acquired a sufficient property right arising from their contracts with the network affiliates in Salt Lake City. As early as 1939, it was recognized that radio broadcasts, motion pictures, and television were as much the subject of property rights and deserving of the protection of equitable relief as the most concrete and definite easements in land. *Waring v. Dunlea,* 26 F. Supp. 338 (E.D.N.C. 1939).

On the question of unfair competition, the court in the present case decided that the new doctrine presented in *International News Service v. Associated Press, supra,* would fall clearly in point with the situation presented in the pending litigation. The local station and the community antenna service were in intense competition in the Twin Falls area. This lack of competition was a distinguishing feature in the failure of the court to grant the injunction sought by the Salt Lake City stations. *Intermountain Broadcasting and Television Corp. v. Idaho Microwave, Inc., supra.* The court con-

cluded that the competition between the parties was centered around and greatly effected "the point where the profit was reaped."

It is uncertain how many of the states would agree with the doctrine of unfair competition presented in the present case. Some courts have refused to extend the doctrine of *International News Service v. Associated Press, supra,* beyond its precise facts. *R.C.A. v. Whiteman,* 114 F.2d 86 (2d Cir. 1940), *Raenore Novelties Inc. v. Superb Stitching Co.,* 47 N.Y.S.2d 831 (1944). Other courts in determining what constitutes unfair competition still rely on the "passing off" aspect. *Crump Co. v. Lindsay,* 130 Va. 144, 107 S.E. 679 (1921).

In determining unfair competition in West Virginia the court held in *Household Finance Corp. v. Household Finance Corp.,* 11 F. Supp. 3 (N.D. W. Va. 1935), that the general purpose of the law of unfair competition was to prevent one person from passing off his goods or his business as goods or business of another. In another West Virginia case, *General Shoe Corp. v. Rosen,* 29 F. Supp. 102 (S.D. W. Va. 1939), it was determined that the test of unfair competition was whether the acts of the defendant were such as were calculated to deceive the ordinary buyer making his purchases under the ordinary conditions which prevailed in the particular trade and if the acts of the defendant were such as would probably deceive the public with whom he dealt, these acts would constitute unfair competition.

On the basis of these decisions it would seem that West Virginia would not follow the doctrine of the *International News* case and would still rely on the "passing off" element for establishing unfair competition. However, the view of the court of any particular jurisdiction on this problem could well be an academic point, as federal regulatory action appears imminent.

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Evidence—Identity of Driver in Absence of Direct Evidence

Two wrongful death actions arising out of a one car collision in which all three occupants were killed were consolidated for trial. The facts were stipulated: *D's* decedent was the owner of the car; all three occupants were licensed operators; the accident occurred when the vehicle failed to make a curve, ran off the road, and struck a tree; there were no eyewitnesses. The description of the physical