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EQUITY—UNFAIR COMPETITION—UNAUTHORIZED USE BY RETAILER
OF CHARGE PLATES DISTRIBUTED BY RETAIL ASSOCIATION

Hartford Charge-Plate Associates, Inc. v. Youth Centre - Cinderella Stores, Inc., 215 F.2d 668 (2d Cir. 1954)

Plaintiff, Hartford Charge-Plate Associates, was incorporated by certain retail stores to conduct for its members a customer identification and credit system using metal "charge plates,"¹ the use of which saves the time of sales clerks and simplifies billing procedure. The Associates sought to enjoin the defendant, a retailer not a member of the association, from using charge plates distributed by the Associates to stamp its own sales slips, alleging that this use constituted unfair competition. A dismissal of the action by a federal district court² was affirmed by the Second Circuit Court of Appeals, which held that the plaintiff did not retain sufficient property interest in the plates after their distribution to enable it to enjoin the acts of the defendant.³

Before the courts will enjoin competition as being "unfair," they must find, first, that the defendant has interfered with a property interest of the plaintiff—the traditional ground for equity jurisdiction—and second, that the interference is causing actual or potential economic loss to the plaintiff.⁴ Of course, all competition exhibits these characteristics to some degree,⁵ and it appears that some courts have been induced by the highly unethical nature of a defendant's conduct to find the requisite property interest and harm on rather tenuous grounds.⁶ Courts have found unfair competition in three

1. Each charge plate bears, in raised letters, the name and address of the customer to whom it is distributed. When a credit purchase is made the plate is given to the sales clerk, who inserts it into an addressing machine which stamps the customer's name and address upon the sales slip.

2. *Hartford Charge-Plate Associates, Inc. v. Youth Centre-Cinderella Stores, Inc.*, 116 F. Supp. 148 (D. Conn. 1953). Federal jurisdiction was based upon diversity of citizenship, the defendant being a Massachusetts corporation and the Associates being incorporated under the laws of Connecticut.

3. *Hartford Charge-Plate Associates, Inc. v. Youth Centre-Cinderella Stores, Inc.*, 215 F.2d 668 (2d Cir. 1954). It has been generally recognized since *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), that state law applies in unfair competition cases not involving a copyright or trade-mark aspect. See *Pecheur Lozenge Co. v. National Candy Co.*, 315 U.S. 666 (1942); *Anheuser-Busch, Inc. v. Du Bois Brewing Co.*, 175 F.2d 370 (3d Cir. 1949). No Connecticut decisions on the point involved in the principal case were found, however, and the federal court consequently applied general law.

4. CALLMAN, *THE LAW OF UNFAIR COMPETITION AND TRADE-MARKS* § 88.1 (2d ed. 1950); 1 NIMS, *UNFAIR COMPETITION AND TRADE-MARKS* §§ 6, 9 (4th ed. 1947); 4 POMEROY, *EQUITY JURISPRUDENCE* §§ 1337, 1338, 1346, 1347 (5th ed. 1941).

5. 1 CALLMAN, *op. cit. supra* note 4, § 6; *RESTATEMENT, TORTS* § 708 (1938).

6. 1 CALLMAN, *op. cit. supra* note 4, § 7; *RESTATEMENT, TORTS* c. 35, Introductory Note (1938). In applying this test, if the court feels relief to be appropriate, it will go to great lengths to find that an injured plaintiff does have the property interest requisite to the granting of relief. The outstanding example is *International News Service v. Associated Press*, 248 U.S. 215 (1918), where the court found a "quasi property" interest in news releases in order to ground

situations, *viz.*, (1) where the defendant commits a separate wrongful act such as interference with contractual relations, or infringement of trade-mark, patent or copyright,⁷ (2) where the defendant is "palming off" its goods as those of the plaintiff in order to take advantage of the plaintiff's advertising and good will,⁸ and (3) where the defendant appropriates for reproduction and sale⁹ a product, performance or idea of the plaintiff such as news items,¹⁰ recorded¹¹ or broadcast¹² music, and fashion designs.¹³

The principal case clearly does not fall within the recognized categories of unfair competition. The case involves a situation in which the defendant is reducing its operating costs by utilizing a service of the plaintiff's existing business system.¹⁴ The plaintiff did not show that the defendant's activity impaired the efficiency of the association's system or that the defendant "palmed" itself off as a member of the association. The plaintiff based its claim for relief on the alle-

injunctive relief. On the other hand, if the plaintiff clearly has a property interest, the court may go far to find prospective injury. See *Lone Ranger, Inc. v. Cox*, 124 F.2d 650 (4th Cir. 1942); *CALLMAN, op. cit. supra* note 4, § 88.1.

7. *NIMS, UNFAIR COMPETITION AND TRADE-MARKS* § 1 (4th ed. 1947).

8. *Best & Co. v. Miller*, 167 F.2d 374 (2d Cir. 1948); *Airolite Co. v. Fiedler*, 147 F.2d 496 (2d Cir. 1945). Many courts have stated that "palming off" is an essential element of unfair competition. *E.g.*, *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U.S. 598 (1888); *Addressograph-Multi-graph Corp. v. American Expansion Bolt & Mfg. Co.*, 124 F.2d 706 (7th Cir. 1941), *cert. denied*, 316 U.S. 682 (1942); *Stroehmann Bros. Co. v. Manbeck Baking Co.*, 331 Pa. 96, 200 Atl. 97 (1938).

9. It is only within comparatively recent years that courts have recognized unfair competition in instances of appropriation for reproduction and sale, and the law in that area is very unsettled. See 2 *CALLMAN, op. cit. supra* note 4, §§ 60-62.

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

11. *Fonotopia, Ltd. v. Bradley*, 171 Fed. 951 (E.D.N.Y. 1909); see *Beecham v. London Gramophone Corp.*, 104 N.Y.S.2d 473 (Sup. Ct. 1951).

12. *Metropolitan Opera Ass'n, Inc. v. Wagner-Nichols Recorder Corp.*, 199 N.Y. Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd*, 279 App. Div. 632, 107 N.Y.S.2d 795 (1st Dep't 1951).

13. See *Wm. Filene's Sons Co. v. Fashion Originators' Guild*, 90 F.2d 556, 557 (1st Cir. 1937); *contra*, *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279 (2d Cir. 1929).

14. In other cases involving the invasion of an established business system, relief has been granted only where some recognized wrongful element other than the invasion itself has been present. *Meyer v. Hurwitz*, 5 F.2d 370 (E.D. Pa. 1925), *aff'd*, 10 F.2d 1019 (3d Cir. 1926) (interference with contract); *Prest-O-Lite Co. v. Davis*, 209 Fed. 917 (S.D. Ohio 1913), *aff'd*, 215 Fed. 349 (6th Cir. 1914) ("palming off").

The situation in the principal case is similar in principle to that found in the operation of many discount houses which direct potential customers to department stores to take advantage of the department stores' personnel and displays of goods in making a selection of the goods desired. Obtaining the model and number of certain merchandise, the customer returns to the discount house, which uses the information to obtain the desired goods. By this means the discount house utilizes the department stores' existing business system in order to avoid the necessity of keeping on hand a sizeable inventory. However harmful this practice might be to legitimate dealers, it would indeed be a startling proposition of law to declare that the discount houses were guilty of unfair competition. See *Alexander and Hill, What to Do About the Discount House*, *Harv. Bus. Rev.*, Jan.-Feb. 1955, pp. 53, 55.

gation that the defendant was gaining a "free ride" by wrongfully appropriating for its own benefit something of value rightfully belonging to the plaintiff.¹⁵ The issue, therefore, is whether the defendant, by enriching itself through use of the plaintiff's system, unreasonably threatened or caused harm to a property interest of the plaintiff, and therefore should have been enjoined.

However unethical the defendant's conduct might seem, it was not held illegal.¹⁶ There are two grounds adequate to support this result. The court said the reason the plaintiff could not maintain the suit was that it did not retain sufficient property in the plates, after distributing them without restriction, to provide the basis for an equity action.¹⁷ This rationale is entirely adequate under the conventional understanding of a property interest. An equally basic reason for the result of the case is the plaintiff's failure to prove present or potential harm to itself or to show that the defendant's use of the plates impaired the efficiency of the plaintiff's system. Hence, there was no reason for equity to act even if plaintiff could have proved that it retained a property interest in the plates.

It remains to be seen whether a charge plate association could strengthen its position by contracting with the individual charge plate holders that the plates cannot be used in non-member stores. The use of the plates by a non-member store might then constitute a separate wrongful act—interference with contractual relations.¹⁸ Certainly the contract would provide a strong argument that the association retained a property interest in the plates.¹⁹ In either situation, the necessity of showing injury still exists, but the principal case does not foreclose that issue, since the plaintiff, in relying on the wrongful appropriation theory, did not exhaust all the possibilities of proving harm. With an unethical act, a recognized property interest, and a demonstrable loss brought before it, a court would undoubtedly look more favorably upon granting relief.

15. *Hartford Charge-Plate Associates, Inc. v. Youth Centre-Cinderella Stores, Inc.*, 215 F.2d 668, 670 (2d Cir. 1954).

16. The court, moreover, did not seem to think the conduct was unethical. *Ibid.* On the necessity for a distinction between unethical and illegal conduct see *Perlberg v. Smith*, 70 N.J. Eq. 638, 642, 62 Atl. 442, 444 (1905). Also see 1 CALLMAN, *op. cit. supra* note 4, § 7.

17. *Hartford Charge-Plate Associates, Inc. v. Youth Centre-Cinderella Stores, Inc.*, 215 F.2d 668, 671 (2d Cir. 1954).

18. A contract restricting the use of the charge plates might be objectionable as a servitude upon a chattel, unless it could be shown that the continuing contractual relations between plaintiff's member stores and the plate holders justified such a restriction. See *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940).

19. The plaintiff might seek to establish a recognized property interest through a bailment theory, *i.e.*, that customers received charge plates only as bailees in order to use them in plaintiff's member stores.