

1-1954

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Recommended Citation

Ollie M. Marie-Victoire, *Trade-Marks: Unfair Competition--Use of Identical Names on Non-Competitive Activities as Constituting Unfair Competition*, 6 HASTINGS L.J. 115 (1954).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol6/iss1/14

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become an essential factor in earning a livelihood, for the minor as well as for the adult.

With this in mind it is submitted that the courts in the future will probably recognize the fact that a car has become a necessity. The reader need only look at the Help Wanted sections in which many of the available jobs are qualified by the words "car necessary."

Thomas B. McGuire

TRADE-MARKS: UNFAIR COMPETITION—USE OF IDENTICAL NAMES ON NON-COMPETITIVE ACTIVITIES AS CONSTITUTING UNFAIR COMPETITION.

In June, 1954, the Supreme Court of California held, in a four to three decision,¹ that use of the trade-name "Slenderella" in connection with a chain of reducing salons was not confusingly similar with a use of the identical² name by a business specializing in supplying dresses to stout women. Justice Edmonds, in writing the majority opinion, followed the holding of the trial court and denied an injunction to plaintiff Schwartz, the dress business owner.

The facts of the case showed that Schwartz was engaged in the business of retailing women's apparel, catering primarily to women "who do not enjoy the benefits of a standard figure."³ He opened his first shop in Hollywood in 1938 and adopted the name "Slenderella of Hollywood." In 1947 he opened a second shop also using the name "Slenderella." Prior to Schwartz's use of the name, two other California parties had adopted and used the same name, but had abandoned such use before Schwartz commenced his business. In 1944, Schwartz obtained from the Secretary of State a California registration of the names "Slenderella" and "Slenderella of Hollywood" for use in connection with the sale of women's apparel.⁴ Since then Schwartz has acquired a good reputation and extensively advertised his merchandise in the Los Angeles area, using the name "Slenderella."

In December, 1951, defendant also adopted the name "Slenderella" to identify its weight-reducing salons. Prior to that time it used the trade-name of "Siloote," but by assignment acquired the alleged right to use the name "Slenderella" from one Erika Schneider who had registered the name in the United States Patent Office in 1941, intending to use it in the merchandising of sugarless candy for reducing purposes. Defendant made an extensive trade-mark search and discovered several other instances of the use of the mark "Slenderella," including Schwartz's, but upon advice of its counsel, adopted the mark believing in *good faith* that no confusion would result. Defendant and the court laid much stress upon this showing of good faith.

Schwartz, in his opening brief, showed that by reason of the use of the iden-

¹ Schwartz v. Slenderella Systems of California, 43 A.C. 107, 271 P.2d 857 (1954).

² "This case is stronger than most unfair competition cases because respondent did not merely adopt a name similar to that already in use by appellant, but appropriated the *identical* name." Appellant's Petition for Rehearing, p. 5.

³ Appellant's Opening Brief, p. 9.

⁴ "The registration of a trademark, like the recording of any other instrument, is merely prima facie evidence of its validity and ownership." Sun-Maid Raisin Growers v. Mosesian, 84 Cal.App. 485, 258 Pac. 630 (1927).

tical trade names, there were eight instances of actual confusion⁵ among his customers who believed that he had gone into the weight-reducing business in conjunction with his dress business. Some of his patrons told him that since he was in the weight-reducing business, they would prefer to reduce *before* they bought his dresses. In addition to these instances of confusion, and the possibility of confusion, Schwartz claimed that he and his business were the subject of ridicule because of the apparent inconsistency of selling apparel to large women while at the same time conducting a business to reduce their weight. Defendant, in turn used this claim of Schwartz to "prove" the dissimilarity of the parties' services and products and to show that they were mutually repugnant. Thus no possibility of confusion. That the services are mutually repugnant is obvious, but in this instance such a fact seems more likely to cause confusion. Assume that one of Mr. Schwartz's stout patrons learns of the Slenderella Reducing System. She may well reason that Mr. Schwartz had extended his business to include actual weight reduction as well as just giving the appearance of a slender figure by specially designed dresses. This is actually not a supposition. As pointed out above, Plaintiff Schwartz introduced evidence that many of his customers were so confused, or "mistaken."

There was also great likelihood of continued confusion and damage because the parties catered to the same class of trade, although their services were opposed. In spite of this state of affairs, the Supreme Court did not believe that an injunction was warranted.

For the following reasons, it is submitted that the opinion of the majority of the court seems to be in error, and the dissenting opinion of Justice Carter appears to be the more realistic interpretation of the law.

The court seemed to overemphasize the fact that the defendant adopted the mark in good faith. Prior to 1933, it was necessary in California to establish fraud on the part of the junior appropriator before injunctive relief would be granted. The leading case for this proposition was *American Automobile Assn. v. American Automobile O Assn.*⁶ However, in 1933, Section 3369 of the Civil Code was amended and now provides that merely an unfair business practice is sufficient to warrant granting an injunction. In 1927, when the *Sun-Maid* case⁷ was decided, the court cited several federal cases holding that fraud was not necessary, but there does not seem to be any California authority holding this until the Code was amended. In line with the amendment to the Code, the recent case of *Mac-Sweeney Enterprises Inc. v. Tarantino*,⁸ stated:

"It is not essential to prove fraudulent intent. An injunction is proper if the natural consequences of defendant's conduct are such as to cause deception."

Thus it appears that the court spent too much time discussing good faith in view of its diminished importance since 1933. Of course, if there is a showing of

⁵ Defendant states on page 17 of its brief that the customers and potential customers of Schwartz's shop were not actually deceived or confused they were merely "mistaken." Such an argument certainly does not mitigate the damage to Schwartz, and no trade-mark authority was found that made such a distinction.

⁶ 216 Cal. 125, 13 P.2d 707 (1932).

⁷ See note 4 *supra*.

⁸ 106 Cal.App.2d 504, 235 P.2d 266 (1951).

bad faith, the court will grant an injunction without a showing of as much confusion.

Aside from the fraud issue, the *MacSweeney*⁹ case is somewhat analogous to the present case. There, the plaintiff operated a well-known restaurant called "Tarantino's" on Fisherman's Wharf in San Francisco. Defendant engaged in the fish packing business and commenced putting up a cocktail sauce bearing the name "Tarantino's." Allegedly, the reason for defendant's use of the name was because several members of a Tarantino family were officers of the defendant corporation, and they apparently thought they could use the name even if such use would be in conflict with plaintiff's use of it. Plaintiff did not make cocktail sauce, but pleaded successfully that purchasers of the sauce would buy believing that plaintiff was the originator. Plaintiff's business reputation would therefore be in the hands of defendant. An injunction was promptly granted to plaintiff, although, of course, the services and products were only remotely related. The court in the *Schwartz* case thus appears to have erred in holding that confusion was unlikely because the parties were not in the same type of businesses.

That direct competition is not necessary for the granting of an injunction is brought out in the case of *Academy of Motion Picture Arts and Sciences v. Benson*.¹⁰ There the plaintiff was in the business of advancing the motion picture industry. One of its important functions was the awarding of "Oscars" for outstanding performances by motion picture actors and actresses. Defendant opened a dramatic school for the training of hopeful motion picture actors and actresses, adopting the name "The Hollywood Motion Picture Academy." The parties were, of course, not directly competitive, although both were connected with the motion picture industry. Defendant did not take any business away from plaintiff or get business plaintiff could otherwise receive, yet the court granted an injunction to restrain defendant from further use of the name. One of the reasons for granting the injunction was that defendant's use of the name would be a *deceit* upon the public.

The right of the public to protection from being misled is enunciated in the case of *American Philatelic Society v. Claibourne*.¹¹ If this so-called right exists in California, it would seem that the court has a duty to protect Schwartz's patrons and the over-weight female public in general, from the deceit, unintentional though it may be, of the defendant in the present case. In an old federal case,¹² the court recognized the problem and said:

"We may say, generally, that a similarity which would be likely to deceive or mislead an *ordinary unsuspecting* customer is obnoxious to the law." (Emphasis added.)

Thus misleading an *ordinary, unsuspecting* customer is sufficient, yet the trial court in the *Schwartz* case said:

" . . . such confusion arises from the similarity of names and is the result principally of *inattention* and *carelessness* on the part of patrons so confused."

⁹ *Ibid.*

¹⁰ 15 Cal.2d 685, 104 P.2d 650 (1940).

¹¹ 3 Cal.2d 689, 46 P.2d 135 (1935).

¹² *Heaven v. Pender*, 11 Q.B.D. 503 (1883). Lord Brett's Rule as restated by Lawrence Vold, Professor of Law, Hastings College of Law, San Francisco: "The actor whose conduct does not conform to the standard of reasonable care with regard to foreseeable danger to the legally protected interests of others is prima facie subject to liability for damages proximately caused thereby."

which tends to show that the court is imposing a standard of care on patrons that trade-mark law does not require. It is a well-known principle of tort law that an ordinary reasonable man is required to conform to a fairly rigid standard of care,¹³ but trade-mark law is far more lenient and even indulgent toward the reasonable man when he comes in contact with products or services bearing trade-marks (or a trade name, as the case may be).¹⁴ It would seem from a reading of the authorities that a potential purchaser can be as unwary and inattentive as he wishes. No case could be found that requires that he be reasonable, except the *Schwartz* case which is being discussed here. In short, when a question of unfair competition or trade-mark infringement is involved, the law takes the customer as it finds him; thus it appears that the court in the *Schwartz* case was wrong in holding that Mr. Schwartz's customers should be more careful; and if the court's reasoning were carried to its logical conclusion the result would be that women desiring to improve their appearance by wearing dresses which deemphasize their stoutness, are to be held to a higher standard of care than the "ordinary, unsuspecting customer" so often discussed and described in trade-mark cases. It is interesting to note some of the descriptions of this "ordinary purchaser." He is "unwary";¹⁵ he does not analyze, but merely looks hastily;¹⁶ he is notoriously careless as to details;¹⁷ discrimination is neither required nor expected from him;¹⁸ and "As a rule, he is not specially familiar with the trade-mark or with all the characteristic features of the articles which he desires to buy, and often he does not even know that there is or may be a similar article or similar brand or another make, nor has he any reason to expect to find another."¹⁹ One case even held that he has a right to be careless.²⁰ Judge Coxe, in *Florence v. Dowd*,²¹ even included the ignorant, the unthinking and the credulous. Indeed, it would seem that it is the tendency to carelessness on the part of buyers that makes unfair competition profitable.²²

A quotation from *defendant's* brief in the *Schwartz* case lends itself to our discussion of the typical purchaser:

"and it is a large class when one considers that half the population are women and of that half probably the majority do not enjoy the benefits of a figure which could not bear some improvement."

From this, it would be safe to conclude that if such a large proportion of the population is made up of so many corpulent ladies, it is probable that there are unwary, careless, indiscriminate, and ignorant ones among them.

¹³ Celluloid Mfg. Co. v. Cellonite Mfg. Co., 32 Fed. 94 at page 97 (1887).

¹⁴ A "trade-mark" is affixed to a manufacturer's goods to identify their origin, while a trade-name generally designates the business or occupation of a person. Thus "Slenderella" as used here is a trade-name when used to designate Mr. Schwartz's dress shop or Defendant's reducing salon business; but when Mr. Schwartz attaches a label bearing the name "Slenderella" onto a dress, it becomes a trade-mark.

¹⁵ De Voe Snuff Co. v. Wolff, 206 Fed. 420, 423 (CCA 6, 1913).

¹⁶ Ward Baking Co. v. Potter-Wrightington, 298 Fed. 398, 401 (CCA 1, 1924).

¹⁷ Little v. Kellam, 100 Fed. 353 (N.D.N.Y. 1900).

¹⁸ Smyth Sales Corp. v. Kaveny, 109 N.J.Eq. 138, 156 Atl. 322 (1931).

¹⁹ Hostetter v. Adams, 10 Fed. 838, 842 (S.D.N.Y. 1882).

²⁰ Pillsbury v. Pillsbury-Washburn Flour Mills, 64 Fed. 841, 847 (C.C.A. 7, 1894).

²¹ 178 Fed. 73, 75 (CCA 2, 1910).

²² 2 NIMS, UNFAIR COMPETITION AND TRADE-MARKS § 324, p. 1024.