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Copyright: Unfair Trade--Unfair Competition by Misappropriation of Radio Program Content

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NOTES

COPYRIGHT: UNFAIR TRADE—UNFAIR COMPETITION BY MISAPPROPRIATION OF RADIO PROGRAM CONTENT.—In a recent Texas case, *Loeb* v. *Turner*,[1] the owner of Radio Station KRIZ in Phoenix, Arizona, brought suit for damages and for a permanent injunction against Radio Station KLIF in Dallas, Texas, and one of Station KLIF's announcers. The complaint was that after the plaintiff broadcast a description of stock car races at a Phoenix, Arizona, race track, an agent of the Texas radio station listened to the broadcast in Phoenix and telephoned an abbreviated version of the event to the defendant's station in Dallas, Texas. There an announcer made a dramatic recreation of the races which was broadcast within a few minutes of the actual happening of the event. The Phoenix station had a contract with the promoter of the races providing that the Phoenix station should have the exclusive right to broadcast the races from the track. Plaintiff claims that the defendants' acts are an invasion of his property rights, and constitute unfair competition. The District Court of Dallas County rendered a judgment in favor of the defendant, the Dallas station. This judgment was affirmed by the Court of Civil Appeals, where it was held that after the plaintiff broadcast a description of the races, the facts became news available for comment, and therefore defendants' acts were neither an invasion of plaintiff's property rights nor unfair competition.

Loeb v. *Turner* presents for consideration four basic questions. (1) Does the promoter of sports events acquire a property interest in those events and in the news of them? (2) If such an interest is acquired, is it abandoned by broadcasting or allowing to be broadcast a description of the events? (3) Is the broadcasting of a recreation of the events an invasion of the promoter's property interest if such an interest is found to exist and not to have been abandoned? (4) Is the broadcasting of a recreation of the events unfair competition with the station which has expended money and effort in broadcasting the original description?

In answer to the first question, the Court of Civil Appeals of Texas implies that the promoter acquires a property right in the event itself, but not in the news of the event. It is stated first that the actual happenings of each day, including sports events, become part of the facts of history *immediately upon their happening,* and that news of these events cannot become the subject of a property right in any one person.[2] Later in the same opinion it is stated that so far as any property right of plaintiff is concerned, the facts communicated by plaintiff in his broadcast description of the event became news available for comment and use by defendant *when so communicated to the public.*[3] The implication in these two somewhat contradictory statements is that at least for the interval between the actual happening of the events and the communication of a description of the events to the public, there is a property right in the events and in the description of them. If this interpretation of the words of the opinion is incorrect, i. e., if this case holds that the promoter of the sports event, or his licensee, has no property interest in the production itself, then this case is a radical departure from previous authority.[4] However, the interpretation that there

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[1]257 S.W.2d 800 (Tex.Civ.App. 1953).
[2]*Id.* at 802.
[3]*Id.* at 803.
[4]Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F.Supp. 490 (W.D. Pa. 1938); Mutual Broadcasting System v. Muzak Corp., 177 Misc. 489, 30 N.Y.S.2d 419 (Sup. Ct. 1941), Twentieth Century Sporting Club v. Transradio Press Service, 165 Misc. 71, 300 N.Y.Supp. 159 (Sup. Ct. 1937).

is a property right in the promoter as to the event itself seems to be the better interpretation. In fact, the opinion cites an earlier decision by the Court of Civil Appeals which held that there was such a property right.[5] In its ruling that the promoter of the sports event or his licensee has no property right in the news of the event, the decision in this case is clearly against the weight of authority.[6]

That the promoter of sports events and other public exhibitions should acquire a protectible property interest in his creation and in the news of it seems readily apparent. One who expends the time, effort and money incidental to the production of a public exhibition or amusement reasonably expects to be rewarded for his expenditures. The promoter hopes to realize a profit, normally from two main sources. First is the admission fees paid by the public for the privilege of witnessing the event. Second is the considerations paid by broadcasters and advertisers for contracts granting the right to use the event for the purpose of attracting public patronage. The promoter's interest in the receipt of admission fees may be protected by enforcement of his right to control the real property on which the event is held, and to eject persons entering without license. However, to protect the promoter's second major source of revenue he must be able to guarantee to the broadcaster or advertiser some degree of exclusiveness in the granted right to use the event for advertising or goodwill purposes.[7] Without the guarantee of some degree of exclusiveness, the advertising or commercial value of the event is greatly diminished. The exclusive right to broadcast or to use the event for commercial purposes obviously cannot be guaranteed unless the promoter or his licensee, the broadcaster or advertiser, acquires some legally protectible property interest in the event and in the news of the event.

Granted then that plaintiff, as licensee of the promoter, has a property right in the sports event, what is the nature and extent of this right? In *Pittsburgh Athletic Co.* v. *KQV Broadcasing Co.*[8] the promoter of baseball games sought an injunction against a radio station which broadcast a description of the games from information relayed to the station by observers stationed at vantage points outside the stadium. The Federal District Court for the Western District of Pennsylvania held that the Pittsburgh Athletic Company had a property right in the news of the game and the right to control the use of that news for a reasonable time following the game. This right to the news value of the game could be sold to advertisers or broadcasters.

The news or entertainment value of sports events has been treated as proper subject matter of literary property in several cases.[9]

By synthesis the property right which the promoter of a sports event acquires according to the majority view is a literary property right in the event itself and in the news and entertainment value of the sports event. It is a right which may be transferred in whole or in part, as by an exclusive license to broadcast, and may be controlled for a reasonable time after the happening of the event.[10]

In dealing with the second question, whether a radio broadcast is such a publication as is considered an abandonment or dedication to the public of literary property,

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[5]Southwestern Broadcasting Co. v. Oil Center Broadcasting Co., 210 S.W.2d 230 (Tex.Civ.App. 1947).

[6]See note 4 *supra.*

[7]The promoter may grant an exclusive right to use the event commercially, or may grant the right to several parties. In a given case, the value to the broadcaster or advertiser will vary according to the degree of exclusiveness of that right. See note, 23 A.L.R.2d 244 (1952).

[8]24 F.Supp. 490 (W.D. Pa. 1938).

[9]See note 4 *supra;* Note, 124 A.L.R. 982, 995-997 (1940).

[10]See note 8 *supra;* Warner, *Protection of the Content of Radio and Television Programs by Common Law Copyright,* 3 VAND. L. REV. 209 (1950); 35 VA. L. REV. 246 (1949).

Loeb v. *Turner* clearly establishes a new minority viewpoint. The well settled rule of the common law is that the owner of literary property (usually the creator of an intellectual or artistic production) has an absolute property right in the creation until he abandons it or dedicates it to the public by publication. Publications have been categorized as limited publications to a small group and general publications or dedications to the general public.[11] Prior to the decision in *Loeb* v. *Turner*, it had been held in many jurisdictions that a radio broadcast is not a general publication, but is only a limited publication, and as such does not cause the broadcaster to lose his common law copyright, or right of first publication of literary property.[12]

Ignoring the persuasive authority on this question, the court in *Loeb* v. *Turner* stated:

> "By sending out the news over the airways (which are publicly owned) appellant in effect published the information he had collected. Under our law, as a result of such publication the material became available to everyone, since it was uncopyrighted."[13]

At common law when the owner of literary property makes a general publication of it, he loses all exclusive right to the property unless he has come within a statutory copyright provision.[14] No statutory copyright had been acquired in this case and the court decided that plaintiff had made a general publication. The decision by the court on the third question—whether defendant's broadcasting of a recreated description of the event was an invasion of plaintiff's property rights—is, therefore, a logical conclusion from its decision on the second question.

Its approach to the third question, however, indicates that *even if the broadcast had been found to be but a limited publication,* the court still would have found defendant innocent of any invasion of plaintiff's property rights. The court made a very careful distinction between a "rebroadcast" and a "recreation." A "rebroadcast" is defined in the opinion as an exact reproduction of a program, usually accomplished by making a sound recording.[15] A "recreation" is characterized as a dramatization based on actual events.[16] To support the distinction between a "rebroadcast" and a "recreation", the court was able to see a direct analogy between the defendant's dramatic recreation of events which had happened only minutes or seconds before, and the dramatic recreation by Shakespeare of the events portrayed in "Julius Caesar"—events which occurred some 1600 years before their capture on paper by the Bard of Avon.[17] It seems not unfair to state that this analogy is somewhat strained.

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[11]International News Service v. Associated Press, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211 (1918); Board of Trade v. Christie Grain and Stock Co., 198 U.S. 236, 25 S.Ct. 637, 49 L.Ed. 1031 (1905); Wheaton v. Peters, 8 Pet. 591, 8 L.Ed. 1055 (1834); Jeweler's Mercantile Agency v. Jewelers' Weekly Publishing Co., 155 N.Y. 241, 49 N.E. 872, 63 Am.St.Rep. 666, 41 L.R.A. 849 (1898).

[12]Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 51 S.Ct. 410, 75 L.Ed. 971 (1931); Uproar Co. v. National Broadcasting Co., 8 F.Supp. 358 (D. Mass. 1934), *aff'd* 81 F.2d 373 (1st Cir. 1936); Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F.Supp. 490 (W.D. Pa. 1938); Stanley v. Columbia Broadcasting System, 85 A.C.A. 76, 192 P.2d 495 (Cal.App., 1948), *aff'd* 34 A.C. 111, 208 P.2d 9 (Cal., 1949), *aff'd* 35 Cal.2d 653, 221 P.2d 73 (1950), 23 A.L.R.2d 216 (1952); Metropolitan Opera Association v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd* 279 App.Div. 632, 107 N.Y.S.2d 795 (1st Dept., 1951); Mutual Broadcasting System v. Muzak Corp., 177 Misc. 489, 30 N.Y.S.2d 419 (Sup. Ct. 1941); Twentieth Century Sporting Club v. Transradio Press Service, 165 Misc. 71, 300 N.Y.Supp. 159 (Sup. Ct. 1937); Waring v. WDAS Broadcasting Station, 327 Pa. 433, 194 Atl. 631 (1937); SOCOLOW, THE LAW OF RADIO BROADCASTING, § 446 (1939); WARNER, RADIO AND TELEVISION RIGHTS, § 211 (1953).

[13]257 S.W.2d 800, 801 (Tex.Civ.App. 1953).

[14]See note 10 *supra.*

[15]See note 12 *supra.*

[16]*Ibid.*

[17]*Ibid.*

The Supreme Court of New York County dealt with the same question in *Twentieth Century Sporting Club* v. *Transradio Press Service*,[18] where it held that a plan by parties supplying news to radio broadcasting stations to obtain tips as to the progress of a stadium prize fight from a ringside broadcast of the fight could not be utilized without unlawfully appropriating the substance of the broadcast. It was further held that ". . . any rebroadcasting of plaintiff's account of the exhibition whether by paraphrasing or by adoption of its text . . ."[19] would be an invasion of plaintiff's common law literary property rights. The New York court held also that such a plan would be within the prohibition of the Federal Communications Act of 1934, section 325(a),[20] dealing with unauthorized rebroadcasts.

In the fact situation as presented by *Loeb* v. *Turner*, the better rule is that even a paraphrasing constitutes a rebroadcast. Station KLIF's broadcast was a virtually simultaneous paraphrase of Station KRIZ's broadcast. Would it not be more correct to designate KLIF's act as a rebroadcast rather than as a dramatic recreation? The harm done to the commercial value of the broadcast made by the originating station is virtually the same whether the repeating station paraphrases the broadcast, repeats it verbatim, or reproduces it exactly. As previously indicated, the distinction was unnecessarily made in the principal case. The finding that KRIZ had dedicated the material to the public and had no right to control the news precluded any finding of an invasion of KRIZ's property rights by KLIF's act.

The question of unfair competition was settled by the court by taking judicial notice of the fact that Dallas, Texas, is more than 1000 miles from Phoenix, Arizona, and by finding that defendant and plaintiff broadcast only in Dallas and Phoenix, respectively. The lack of direct market competition was held to render inapplicable an action for unfair competition.[21]

Recent cases[22] would indicate that the Texas Court of Civil Appeals is not in accord with other jurisdictions on the question of unfair competition, especially as it is applied to radio broadcasting. In *Metropolitan Opera Association* v. *Wagner-Nichols Recorder Corporation*[23] it was stated that the law of unfair competition has been extended to the point that relief has been granted where there is ". . . only a misappropriation for the commercial advantage of one person of a benefit or 'property right' belonging to another."[24] This New York court summed up the recent developments in this field and stated:

> "The modern view as to the law of unfair competition does not rest solely on the ground of direct competitive injury, but on the broader principle that rights of commercial value are to be and will be protected from any form of unfair invasion or infringement and from any form of commercial immorality, and a court of equity will penetrate and restrain every guise resorted to by the wrongdoer."[25]

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[18]165 Misc. 71, 300 N.Y.Supp. 159 (Sup. Ct. 1941).

[19]*Id.* at 73, 300 N.Y.Supp. at 161.

[20]48 STAT. 1064 (1934), as amended, 47 U.S.C. § 325(a) (1946).

[21]257 S.W.2d 800, 803.

[22]Jerome v. Twentieth Century Fox Film Corp., 58 F.Supp. 13 (S.D. N.Y. 1944); Reconstruction Finance Corporation v. J. G. Monihan Corp., 22 F.Supp. 180 (W.D. N.Y. 1938); Henry Glass & Co. v. Art-Mor Togs, Inc., 101 N.Y.S.2d 538 (Sup. Ct. 1950); Metropolitan Opera Association v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd* 279 App. Div. 632, 107 N.Y.S.2d 795 (1st Dept., 1951); Philadelphia Storage Battery Co. v. Mindlin, 163 Misc. 52, 296 N.Y.Supp. 176 (Sup. Ct. 1937); see note, 23 A.L.R.2d 244; *cf.* Advance Music Co. v. American Tobacco Co., 183 Misc. 855, 51 N.Y.S.2d 692 (Sup. Ct. 1944), *rev'd* 268 App.Div. 707, 53 N.Y.S.2d 390 (1st Dept., 1945), *rev'd* 296 N.Y. 79, 70 N.E.2d 401 (1946).

[23]See note 11 *supra.*

[24]199 Misc. 786, 792, 101 N.Y.S.2d 483, 489 (Sup. Ct. 1950).

[25]*Id.* at 796, 101 N.Y.S.2d at 493.

A federal district court in New York held in *Jerome* v. *Twentieth Century Fox Film Corp.*[26] that the element of competition is no longer a requirement in actions for unfair competition, that misappropriation is the key element. Other cases speak of unjust enrichment as the basis for unfair competition actions.[27] In defining unfair competition the emphasis is on the unfairness and it is immaterial whether that unfairness occur in competition or otherwise.[28] One commentator[29] suggests that in cases of alleged unfair competition in radio broadcasting, the decision will rest on whether an injunction restraining defendant's allegedly unfair practice will result in giving plaintiff a monopoly to the detriment of the public.[30]

The fact situation in *Loeb* v. *Turner* is a proper one for application of an injunction for unfair competition. Station KRIZ, having produced an item of commercial value, is entitled to profit by its efforts. Station KLIF, when it recreated or rebroadcast KRIZ's program, was trying to "reap where it had not sown."[31] Station KLIF was appropriating for its own commercial advantage the product of KRIZ's labor.

In summary, four points should be noted in this decision. First, it holds that under Texas law the promoter of sports events acquires no property right in the news value of the event. The weight of authority supports the modern and better view that the promoter does acquire a property interest in the news value of his production. Second, it establishes that under Texas law a radio broadcast constitutes a general publication in respect to literary property rights, although the weight of authority is opposed to this view. Third, by dictum *Loeb* v. *Turner* has introduced a new and possibly unnecessary refinement on the question of whether a rebroadcast is an invasion of common law literary property rights. Fourth, this court has taken an unnecessarily restricted view on the law of unfair competition which is in conflict with the better view obtaining in other jurisdictions.[32]

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[26]58 F.Supp. 13 (S.D. N.Y. 1944).

[27]International News Service v. Associated Press, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211 (1918); Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F.Supp. 490 (W.D. Pa., 1938); Uproar Co. v. National Broadcasting Co., 8 F.Supp. 358 (Mass. 1934), *aff'd* 81 F.2d 373 (1st Cir. 1936).

[28]Reconstruction Finance Corporation v. J. G. Monihan Corp., 22 F.Supp. 180 (W.D. N.Y. 1938); Advance Music Co. v. American Tobacco Co., 183 Misc. 855, 51 N.Y.S.2d 692 (Sup. Ct., 1944), *rev'd* 268 App.Div. 707, 53 N.Y.S.2d 390 (1st Dept., 1945), *rev'd* 296 N.Y. 79, 70 N.E.2d 401 (1946); Philadelphia Storage Battery Co. v. Mindlin, 163 Misc. 52, 296 N.Y.Supp. 176 (Sup. Ct., 1937).

[29]WARNER, *op. cit., supra* note 11, § 211.

[30]Triangle Publications v. New England Newspaper Publishing Co., 46 F.Supp. 198 (D. Mass., 1942); see dissenting opinion by Brandeis, J., International News Service v. Associated Press, 248 U.S. 215, 248, 39 S.Ct. 68, 75, 63 L.Ed. 211, 224; also Loeb v. Turner, 257 S.W.2d 800, 803.

[31]International News Service v. Associated Press, 248 U.S. 215, 239, 39 S.Ct. 68, 71, 63 L.Ed. 211, 221 (1918).

[32]See Burge v. Dallas Retail Merchants Assn., 257 S.W.2d 733 (Tex.Civ.App. 1953); Gilmore v. Sammons, 269 S.W. 861 (Tex.Civ.App. 1926); A.B.C. Stores v. T. S. Richey & Co., 266 S.W. 551 (Tex.Civ.App. 1924), *rev'd on other grounds,* 280 S.W. 177 (Tex.Com.App. 1926); RESTATEMENT, TORTS, § 708 (1938).