
Unfair Competition and Common Law Trademarks: State or Federal Jurisdiction?

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The office of a trustee was at first deemed honorary and without compensation, but our statute changed the rule, and allowed compensation to executors, administrators, and guardians at a fixed percentage, to be computed upon all sums received and paid out. . . . To that we must therefore refer, and by that be governed in determining what allowance, if any, is to be made. Sums received and paid out are made the basis of computation.³⁷

Perhaps the last important consideration employed by courts in establishing trustee's compensation is the responsibility incurred by the trustee. In *In re Harrison's Estate*³⁸ it was decided that to fix compensation on a percentage basis was not adequate because a very small percentage which would seem reasonable might result in a large sum in gross suggesting a fee beyond what was adequate and fair to the trustee. On the other hand, a large percentage which apparently would be an excessive compensation might result in a small sum in gross which would disclose an unfair amount. Thus, the court concluded, the only safe rule to adopt and follow is to pay a trustee for the services performed and the liability incurred. In another case it was declared:

In states where there is no fixed statutory rate of compensation for trustees, it is usual to allow commissions for the ordinary service of trustees . . . and where exceptional circumstances show that the compensation reckoned in this way is too large or too small, the rate will be varied or another method of reckoning may be employed. The elements which determine proper compensation are the amount of risk and responsibility and the time and labor required of the trustee. . . .³⁹

CONCLUSION

The compensation of a trustee is not determined by any established practice of law, and unless provided for by agreement or statute, remuneration is peculiarly within the discretion of the courts. The compensation allowed, in light of the aforementioned criteria, is for the trier of the facts to decide, and his action will not be set aside unless arbitrary or capricious or, unless, unsupported by substantial evidence.⁴⁰ Since the judgment of the courts in such cases cannot be disturbed, parties contemplating a particular fee for the trustee's service should provide for a particular amount in the trust agreement.

³⁷ 101 N.Y. 451, 456, 5 N.E. 70, 71 (1886).

³⁸ 217 Pa. 207, 66 Atl. 354 (1907).

³⁹ Authority cited note 19 supra at 546, 447.

⁴⁰ Authority cited note 26 supra.

UNFAIR COMPETITION AND COMMON LAW TRADE-MARKS: STATE OR FEDERAL JURISDICTION?

Prior to the passage of the Trade-Mark Act of 1946,¹ protection afforded a person's unregistered brands was limited to an action for un-

¹ 15 U.S.C., §§ 1051-1127 (1948), referred to also as the Lanham Act.

fair competition based on his common law property rights. Jurisdiction, except in cases where there was diversity of citizenship or where the claim was appendent to a substantial and related federal claim, was in the state courts. It is probable that this is no longer so.

The proofs required in order for an individual to prevail in the action for unfair competition have changed through the years. On one end of the continuum is the restricted "passing off" theory² under which the complainant must prove that the defendant is passing off his (the defendant's) goods as those of the complainant. Many other interpretations have been made by the courts as to what is required to prove unfair competition. The following statements are illustrative:

"Palming off" is no longer a necessary requisite of unfair competition. What is required is "an unfair appropriation of the product of another's labor or talent."³

An unfair course of dealing, even without proof of an established secondary meaning, constitutes unfair competition. The New York law of unfair competition has been broadened.⁴

The grounds upon which unfair competition will be enjoined are (1) that the means used are dishonest; (2) that by false representation or imitation of a name or device there is a tendency to create confusion and thus work a fraud upon the public by inducing it to accept a spurious article.⁵

It is evident from the foregoing that there is no agreement among the various courts as to just what action on the part of a defendant must be shown in order to prevail in an action based on common law trademark "infringement" and protected on the theory of unfair competition. It would be desirable to have a more uniform applicable law.

The Trade-Mark Act of 1946 (known also as the Lanham Act),⁶ like its predecessors,⁷ provides for the registration of trademarks, and Title 28 of the United States Code, section 1338 provides that an action for the infringement of such registered mark shall be under the jurisdiction of the federal courts. There were, however, substantial changes in the 1946 Act from the previous acts and there has been speculation by the courts and others in the field as to whether the Trade-Mark Act of 1946 creates a substantive federal law of unfair competition. If it does, the federal courts would have jurisdiction over cases based on unfair competition and those seeking the protection of common law trademark rights.

² Ely Norris Safe Co. v. Mosler Safe Co., 7 F. 2d 603 (C.A. 2d 1925).

³ Hogan v. A. S. Barnes & Company, Inc., 114 U.S.P.Q. 314, 319 (Pa. Ct. Common Pleas, Phila. Cty. 1957).

⁴ Upjohn Company v. Schwartz, 246 F. 2d 254, 261, 114 U.S.P.Q. 53, 59 (C.A. 2d, 1957).

⁵ Hill's Supermarkets, Inc. v. Stony Brook Dairies, Inc., 6 Misc. 2d 165, 113 U.S.P.Q. 299, 300 (N.Y. Sup. Ct., 1957).

⁶ 15 U.S.C., §§ 1051-1127 (1948).

⁷ The trademark acts of 1881, 1905 and 1920.

There are several facets to the Trade-Mark Act which bear upon the jurisdictional question. However, while it will be necessary to discuss several variations which are involved in a determination of this question, the writer will confine the discussion to the early, present, and possible future interpretation of Section 43(a) of the Act.⁸

ANALYSIS

Prior to 1938 when the *Erie Railroad Co. v. Tompkins*⁹ decision was handed down, the federal courts had authority to hear claims of unfair competition if federal jurisdiction was based on diversity of citizenship or if the claim was appendent to a substantial and related federal claim.¹⁰ An aggregate of federal law regarding unfair competition was thereby amassed. All other common law unfair competition claims were governed by state law. Under the prevailing interpretation, the *Erie* decision narrowed application of federal law by making state law controlling as to all questions of common law unfair competition based on diversity.¹¹ The passage of the Lanham Act in 1946¹² broadened the jurisdiction of the federal courts. Section 39¹³ thereof gives the district courts of the United States original jurisdiction "of all actions arising under this chapter, without regard to the amount in controversy or to diversity or lack of diversity of the citizenship of the parties." If an action could be brought under this section, the district courts would not apply the state law but a substantive federal law. The problem then becomes one of interpreting the sections of the Act to determine whether *common law* unfair competition claims (as distinguished from the statutory trademark infringement action) are such actions arising under this chapter.

Section 45¹⁴ of the Act expressly states the intent of Congress in enacting the law. Among the items enumerated it seeks "to protect persons engaged in such commerce [commerce within the control of Congress] against unfair competition. . . ." In the "Commentary on The Lanham Trade-Mark Act" the following quotation is found with respect to the entire "intent" paragraph of Section 45:

⁸ 15 U.S.C. § 1125(a) (1948).

⁹ 304 U.S. 64 (1938). Under the doctrine of this case a federal district court sitting in a diversity case is required to apply the substantive law of the state in which the court sits inasmuch as the Court determined that there was no federal common law.

¹⁰ *Hurn v. Oursler*, 289 U.S. 238 (1933). 28 U.S.C., § 1338(b) (1948) is a codification of the holding in the *Hurn* case.

¹¹ *Radio Shack Corp. v. Radio Shack, Inc.*, 180 F. 2d 200 (C.A. 7th, 1950). *Food Fair Stores v. Food Fair*, 117 F. 2d 177 (C.A. 1st, 1949). *Time, Inc. v. Life Television Corp.*, 123 F. Supp. 470 (D.C. Minn., 1954).

¹² The effective date of the Act was July 5, 1947.

¹³ 15 U.S.C., § 1121 (1948).

¹⁴ 15 U.S.C., § 1127 (1948).

It will be noted from this statement of intent that Congress intended to occupy the entire field with respect to marks used in commerce, as well as to provide remedies against unfair competition, *irrespective of whether a registered mark is involved or not*. Deceptive and misleading uses of marks in commerce are actionable, and *persons engaged in commerce are protected under the Act from unfair competition; and the remedies provided for infringement are made available to obtain such protection*. This, perhaps, is the most far-reaching change in remedial advantages which are available under the new Act.¹⁵

Can a section of the Act be found which will carry out the intent of Congress as stated above? Section 43(a) reads as follows:

Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.¹⁶

In his concurring opinion in *Maternally Yours v. Your Maternity Shop*, Judge Clark made the following comment with respect to Section 43(a):

[T]here is indication here and elsewhere that the bar has not yet realized the potential impact of this statutory provision.¹⁷

Judge Clark's comment is borne out by the paucity of cases in which a party or the court has relied on Section 43(a) as a basis for federal jurisdiction in common law trademark actions for unfair competition, or even commented upon its availability as a foundation for federal jurisdiction.

There are several possible explanations for this lack of interpretation of this section of the Trade-Mark Act:

1. If diversity of citizenship and the jurisdictional amount were present, the federal district court had jurisdiction. In such a case it was bound under the *Erie* doctrine to apply state law, but inasmuch as the results under either the state or federal law were often the same, the court did not have to search for any other basis of jurisdiction in order to reach a

¹⁵ "Commentary on The Lanham Trade-Mark Act," Robert Leeds (Ass't. Commissioner), reported immediately preceding § 1051 of 15 U.S.C.A. (1948) (emphasis added).

¹⁶ Note that this section broadens the concept of unfair competition from that generally applied by the states. Under this section, unfair competition is not limited to the restricted "passing off" theory that had developed in the several states. *Ely Norris Safe Co. v. Mosler Safe Co.*, 7 F. 2d 603 (C.A. 2d, 1925) defines "palming off" (or "passing off"). The court in *American Washboard Co. v. Saginaw Mfg. Co.*, 103 F. 281 (C.A. 6th, 1900) held that a private right to an injunction is based on "passing off."

¹⁷ 234 F. 2d 538, 546 (C.A. 2d, 1956).

decision. If the court wished to reach a decision contrary to the prevailing state ruling on the question, perhaps it would look further for a basis of federal-question jurisdiction.

2. If the claim for unfair competition were appendent to a substantial and related federal claim relating to a federally registered trademark, the district court could find jurisdiction under Title 28 of the United States Code, section 1338(b) and again would not have to look further.

3. Where the claim of unfair competition arises between those engaged in interstate commerce, even if the infringing acts themselves are not in interstate commerce, the Ninth Circuit has held that Section 44 of the Lanham Act¹⁸ creates substantive federal law of unfair competition and federal district courts have federal-question jurisdiction over all such claims.¹⁹ Therefore it has not been necessary to look to a possible interpretation of Section 43(a).²⁰

¹⁸ 15 U.S.C., § 1126 (1948). The language of this section gives U.S. citizens and residents the same protection respecting unfair competition that has been given foreign nationals by way of conventions and treaties. The Ninth Circuit holding is based specifically on an interpretation of subsections (b), (h), and (i) of Section 44.

¹⁹ *Stauffer v. Exley*, 184 F. 2d 962, 87 U.S.P.Q. 40 (C.A. 9th, 1950). Accord: *Pagliero v. Wallace China Co.*, 198 F. 2d 339, 95 U.S.P.Q. 45 (C.A. 9th, 1952). But cf. *City Messenger of Hollywood, Inc. v. City Bonded Messenger Service, Inc.*, 116 U.S.P.Q. 75 (C.A. 7th, 1958), where it was held that a count for unfair competition relating to common law service mark does not constitute a federal cause of action governed by the Lanham Act. The court states at page 76, "We do not think that the Lanham Act changed this rule [that a claim for damages caused by unfair competition is governed by state law]." The decision does not mention Section 43(a), but cites *American Automobile Association v. Spiegel*, 205 F. 2d 771, 98 U.S.P.Q. 1 (C.A. 2d, 1953) and *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*, 214 F. 2d 649, 102 U.S.P.Q. 94 (C.A. 3d, 1954), as authority for their holding. Those cases are based on nonacceptance of the Ninth Circuit rule.

²⁰ However, with the exception of the Ninth Circuit, the cases interpreting jurisdiction based on Section 44 have for the most part limited its application to cases where foreign nationals are unfairly competing with United States citizens. (*American Automobile Association v. Spiegel*, 205 F. 2d 771, 98 U.S.P.Q. 1 (C.A. 2d, 1953). Accord: *Old Reading Brewery, Inc. v. Lebanon Valley Brewing Co.*, 102 F. Supp. 434, 92 U.S.P.Q. 38 (D. C. M. Pa. 1952). For a thorough criticism of the AAA case, see 39 *Cornell L. Q.* 351 et seq.) They (again excepting the Ninth Circuit) do not interpret Section 44 as creating a federal law of unfair competition available in claims arising *between United States citizens* nor do they interpret it as granting the federal courts any new jurisdictional authority to hear such controversies between United States citizens in the absence of diversity of citizenship. (*AAA case*, *infra*. *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*, 214 F. 2d 649, 102 U.S.P.Q. 94 (C.A. 3d, 1954). Where diversity is the basis of jurisdiction the governing law has been held to be state law (*Artype, Inc. v. Zappulla*, 228 F. 2d 695 (C.A. 2d, 1956); *Esquire, Inc. v. Esquire Slipper Manufacturing Co., Inc.*, 243 F. 2d 540, 113 U.S.P.Q. 237 (C.A. 1st, 1957). See also *City Messenger of Hollywood, Inc. v. City Bonded Messenger Service, Inc.*, 116 U.S.P.Q. 75 (C.A. 7th, 1958), where the Seventh Circuit held that a count for unfair competition relating to a common law service mark does not constitute a federal cause of action (see Footnote 19 *supra*). Therefore, it is certainly not a uniform interpretation that any and all cases involving infringement of a common law trademark (based on a claim of unfair competition) are governed by federal law under Section 44 of the Lanham Act.

The Trade-Mark Act of 1946 went into effect on July 5, 1947. The decisions that have touched upon an interpretation of Section 43(a) may be summarized chronologically as follows:

*California Apparel Creators v. Wieder of California, Inc.*²¹

On July 30, 1947, the Court of Appeals for the Second Circuit handed down its decision in the above case. The litigation was concerned with the problem of whether a group of merchants and dealers in wearing apparel located in California could prevent manufacturers and dealers in wearing apparel located in New York from using the names "California" or "Californian" in connection with their businesses. The court awarded the defendants a summary judgment. They stated that injury to plaintiffs was insufficiently shown where there was no proof of specific diversion of customers.²² In its decision the court commented (dictum) on Section 43(a), stating first that it was not applicable in the present case since the Act did not become effective until July 5, 1947²³ (which was after the appeal argument in this case) and does not apply to pending cases. The decision does not state that Section 43(a) extends federal jurisdiction to common law unfair competition claims generally, but accepts Professor Derenberg's statement²⁴ that Section 43(a) codifies the doctrine of *Grand Rapids Furniture Co. v. Grand Rapids Furniture Co.*²⁵

*Chamberlain v. Columbia Pictures Corp.*²⁶

This case concerns a controversy wherein plaintiff made a claim of unfair competition under Section 43(a), alleging that defendants, by producing a moving picture purported to be a portrayal of a story by Mark Twain, was deceiving the public inasmuch as the story was not the same as that written by Mark Twain. Plaintiffs were trustees under the will of Samuel L. Clemens. They did not have an exclusive right to use the story

²¹ 162 F. 2d 893 (C.A. 2d, 1947).

²² This is an application of the decision in *American Washboard Co. v. Saginaw Mfg. Co.*, 103 F. 281 (C.A. 6th, 1900), which held that the private right to an injunction must be based on the restricted and technical "passing off" of one's product as that of another. Fraud on the public through misleading advertising was not per se grounds for a claim of unfair competition. See also Footnote 16, supra.

²³ *Carpenter v. Rohm & Haas Co.*, 109 F. Supp. 739 (D. Del., 1953), aff'd, 201 F. 2d 671 (C.A. 3d, 1952), also held that Section 43(a) was not applicable to actions for injuries sustained prior to the effective date of the section.

²⁴ Derenberg, *Preparing for the New Trade-Mark Law*, Analysis 50, *Research Institute of America* 6 (1947).

²⁵ 127 F. 2d 245 (C.A. 7th, 1942), cert. den. 321 U.S. 771 (1944). This case is one of a number illustrating the concept that representative or class suits can be brought to restrain misuse of geographical names.

²⁶ 186 F. 2d 923 (C.A. 9th, 1951).

in question. The court made a statement to the effect that certain provisions of the Lanham Act give protection under federal law regardless of registration, provided the unfair competition takes place in interstate commerce.²⁷ With respect to Section 43(a), the court states:

However, we do not think said section changes the fundamental requirements necessary to sustain a suit for unfair competition, one such requirement being a direct injury to the property rights of a complainant by passing off the particular goods or services misrepresented as those of complainant. Deceiving the public by fraudulent means, while an important factor in such a suit, does not give the right of action unless it results in the sale of the goods as those of the complainant²⁸

This indicates a feeling on the part of the Ninth Circuit that the old restricted definition of unfair competition must still be shown; that is, diversion of trade and a monopoly position by the plaintiff.²⁹

*L' Aiglon Apparel Inc. v. Lana Lobell, Inc.*³⁰

In this case the defendant advertised a dress by means of a picture which was substantially an actual photographic reproduction of plaintiff's dress. The dress which defendant sold was, however, a dress substantially different from the one pictured. As a result of defendant's advertising, plaintiff abandoned marketing of its dress and sustained substantial damage.

This case holds that an unfair competition action is stated under Section 43(a) of the Lanham Act. The court declared that the section was not merely a declaration of existing concepts of unfair competition, but that Congress defined a civil wrong of false representation of goods in commerce, set out the class of people who could bring suit and the relief to which they were entitled, and gave them the right to relief in the federal courts. The court stated:

[H]owever similar to or different from preexisting law, here is a provision of a federal statute which, with clarity and precision adequate for judicial administration, creates and defines rights and duties and provides for their vindication in the federal courts.³¹

*Bechik Products v. Federal Silk Mills*³²

In this case defendant sold tapes with identifying numbers on them, which numbers were identical to the ones which plaintiff used when

²⁷ This Ninth Circuit case cites *Stauffer v. Exley*, 184 F. 2d 962, 87 U.S.P.Q. 40 (C.A. 9th, 1950), thereby reaffirming the Ninth Circuit's interpretation of Section 44. See note 20 supra.

²⁸ 186 F. 2d 923, 925 (C.A. 9th, 1951).

²⁹ Authorities cited notes 6 and 12 supra.

³⁰ 214 F. 2d 649, 102 U.S.P.Q. 94 (C.A. 3d, 1954).

³¹ *Ibid.* at 651.

³² 135 F. Supp. 570 (D.C. Md., 1955).

selling defendant's tapes. The court held that in the absence of conduct tending to pass off the goods of the defendant as the goods of plaintiff (which element was lacking here), there was no unfair competition. The court stated that the element of falsity required by Section 43(a) was lacking.

*Gold Seal Co. v. Weeks*³³

This case agrees with the *L'Aiglon* case, that Section 43(a) does not confine an action to the narrow common law property right limitation of unfair competition to the effect that "apart from trademark infringement and proof of 'palming off' misrepresentation by a tradesman concerning his product works no actionable injury upon his competitors."³⁴ This case holds that Section 43(a) creates a federal statutory tort *sui generis* and a person seeking relief under Section 43(a) need not prove diversion of trade nor show that he himself holds a monopoly position in the industry.³⁵

*Maternally Yours v. Your Maternity Shop*³⁶

The majority of the court based jurisdiction in this case on Section 1338(b) of Title 28 of the United States Code, and did not search further for jurisdiction. In a dictum the majority decision stated that they believed the *source* of the right sued upon and not the ground upon which federal jurisdiction is founded should be determinative as to whether or not state or federal law would be applied. They felt that this theory would require the application of state law to common law unfair competition claims whether or not combined with a trademark infringement claim under federal law.

This case is one of several in which Judge Clark has written a separate opinion,³⁷ concurring or dissenting. In order to bring out his views as to the breadth of Section 43(a) of the Lanham Act regarding jurisdiction, he states:

I do not see how we can avoid the clear federal jurisdiction arising under the new and quite extensive provision covering the false description or representa-

³³ 129 F. Supp. 928 (D.D.C., 1955).

³⁴ *Ibid.* at 939.

³⁵ In this case it was held that a large wax products manufacturer had adequate standing to institute, under Section 43(a), an action against a manufacturer who marked a glass cleaner and polish (which contained no wax) under the trademark "Glass Wax." However, it was held that the evidence was insufficient to entitle plaintiff to relief.

³⁶ 234 F. 2d 538 (C.A. 2d, 1956).

³⁷ In *Hyde Park Clothes, Inc. v. Hyde Park Fashions, Inc.*, 204 F. 2d 223, 227 (C.A. 2d, 1953), Judge Clark made the statement: "We have already given effect to the announced purpose of Congress to establish a national law in the Lanham Act so far as concerns the issue of infringement, 15 U.S.C. § 1114(1). . . . I think we should do the same on the issue of unfair competition, 15 U.S.C. § 1125(a)." In *Dad's Root Beer Co. v. Doc's Beverages, Inc.*, 193 F. 2d 77, 80 (C.A. 2d, 1951), he contends that the law of unfair competition with respect to trademarks was expanded by Section 43(a). See also Judge Clark's comments in *Admiral Corp. v. Penco, Inc.*, 203 F. 2d 517 (C.A. 2d, 1953).

tion of goods introduced into commerce. . . . By the broad and general construction properly given this remedial legislation, as in *L'Aiglon Apparel Inc. v. Lana Lobell, Inc.* . . . the major and more important portions of the relief here granted would be supported under federal law. I think we must consider the applicability of this statute, and cannot avoid it. . . .³⁸

Judge Clark is of the opinion that even if the Ninth Circuit view³⁹ be turned down, i.e. that Section 44 confers jurisdiction upon the federal courts in all claims of unfair competition arising in interstate commerce, it does not follow that state law governs—there is yet Section 43(a) to be reckoned with. At another point in the concurring decision he states, “[we] necessarily have now at least a partial federal law of unfair competition.”⁴⁰

*L'Aiglon Apparel Inc. v. Lana Lobell, Inc.*⁴¹

This case is squarely on point and finds jurisdiction in the federal court based on Section 43(a). The court stated:

This conduct on the part of the defendant is clearly the type of misrepresentation referred to in Section 43 (a) of the Lanham Act, and it is clear that the plaintiff is a person injured by the defendant's conduct and has a right of action.⁴²

In addition to the foregoing cases, it would be well to comment on cases where it has been attempted to extend Section 43(a) to alleged acts of unfair competition not involving trademarks. In *Samson Crane Co. v. Union National Sales, Inc.*,⁴³ plaintiff alleged that defendant used unfair trade practices consisting of alleged misrepresentation that defendant's store was being operated by a union or for its benefit. Plaintiffs alleged this was done in order to induce sales to union members. The plaintiff attempted to base the case either under the Federal Trade Commission Act or on Section 43(a) of the Lanham Act. The court interpreted Section 45 of the Lanham Act in conjunction with Section 43(a) and stated that the intent mentioned in the final paragraph of Section 45 must be:

[C]onstrued to refer not to any competitive practice which in the broad meaning of the words might be called unfair, but to that “unfair competition” which has been closely associated with the misuse of trademarks, i.e., the passing off of one's own goods as those of a competitor.⁴⁴

The court states that Section 43(a) is broad enough, however, to include other forms of misrepresentation which are of the same general character, even though not involving any use of a technical trademark, but that it should not be interpreted as to bring within its scope any kind of undesirable business practice involving deception, when such is outside the trade-

³⁸ 234 F. 2d 538, 546 (C.A. 2d, 1956).

³⁹ See Footnotes 9 and 10, supra.

⁴⁰ 234 F. 2d 538, 547 (C.A. 2d, 1956).

⁴¹ 115 U.S.P.Q. 235 (E.D. Pa., 1957).

⁴² Ibid.

⁴³ 87 F. Supp. 218 (D.C. Mass., 1949).

⁴⁴ Ibid. at 222.

mark field. The case of *Carpenter v. Erie R. Co.*⁴⁵ was an action by an employee against an employer to recover damages for personal injury on the theory of the employer's misrepresentation concerning medical care requirements. The court held Section 43(a) to be inapplicable to such an action.

CONCLUSION

The foregoing are the pertinent decisions to date interpreting or commenting upon Section 43(a) of the Lanham Act. What will the future decisions hold? Perhaps the section was drawn with an intention that it be only a codification of the *Grand Rapids* case;⁴⁶ nevertheless, there is no doubt but that the language of Section 43(a) is broad enough to allow a court to regard it as a direct source of federal law with respect to false designations of origin (an indication of origin being the basic function of a trademark) or false advertising.

Will judicial decision lag behind highly developed and quickly changing business practices so that it might be possible for an individual to trade with impunity upon the goodwill that another has created (even though that practice would be considered to be a form of unfair competition in the present-day connotation of the word), since such a practice is not of a nature that is remedied by state law? The possibilities are many. Perhaps more courts will base federal jurisdiction on Section 44 of the Lanham Act and find an indirect source of federal common law regarding unfair competition based on the international treaties and conventions. It would seem that the better way would be to use the direct and concise wording found in Section 43(a). It seems that the only conclusion that can be drawn is that from a legislative viewpoint there ought to be a federal law of unfair competition in order to arrive at some degree of uniformity.

From a judicial standpoint there is a variety of thinking, with the trend perhaps slightly more toward the view that the federal district court does have jurisdiction over matters of common law unfair competition. Certainly in any common law trademark litigation one might attempt to base jurisdiction on Section 43(a). Outside the trademark field it is doubtful if such an attempt would be availing.

⁴⁵ 178 F. 2d 921 (C.A. 2d, 1949), cert. den., 339 U.S. 912 (1949).

⁴⁶ 127 F. 2d 245 (C.A. 7th, 1942), cert. den., 321 U.S. 771 (1943). See discussion in footnote 25 supra.

WHEN MAY AN ARBITRATOR'S AWARD BE VACATED?

Arbitration, the submission of some disputed matter to selected persons and the substitution of their decision for the judgments of the courts,¹ has proved to be both an economical and efficient means for the settlement of

¹ In re Curtis, 64 Conn. 501, 30 Atl. 769 (1894).