tion points to a need for insurance coverage against the merchants' risk. Through the insurance companies a standardization of the practises of storekeepers in such situations could be effected which would give a maximum of assistance to the federal authorities with a minimum of interference to the customer and embarrassment to the storekeeper.[15]

Torts—Privacy—Trade-Piracy—Unpermitted Broadcast of Horse Race—[Australia].—The defendant broadcasting company leased the premises adjoining the plaintiff's commercial racecourse and built an elevated platform overlooking the track. From this vantage point it proceeded to broadcast the races. The plaintiff charged admission to the track and stipulated on the tickets that the purchaser agree not to disclose any information concerning the races for the day. The plaintiff alleged that the defendant's acts resulted in a decrease in the patronage of the track and sought an injunction to restrain the broadcasting of the races. *Held*, suit dismissed. The defendants acquired the information lawfully and its subsequent broadcasting was not under the circumstances unfair to the plaintiff. *Victoria Park Racing and Recreation Grounds Co., Ltd. v. Taylor and others.*[1]

The instant case illustrates once more judicial hesitancy to grant relief in the absence of injury to a conventionally recognized property right. Too simple a notion of property has prevented courts from recognizing familiar problems under new fact situations.[2]

The legality of the defendant's viewing the race, considered apart from the subsequent use of the information so obtained, depends on the extent to which a landowner can keep his property free from interferences having a foreign source. It is clear that he has a right to have his land free from the impact of tangible substances,[3] and from the intrusion of things less tangible such as unpleasant sounds[4] and noisome odors.[5] This protection has even been extended to the interference with sunlight where maliciously caused.[6] But where the interference is merely an intrusion upon privacy no relief is given,[7] except where the loss of privacy affects the rental value of the land.[8] Therefore, in the instant case, the plaintiff could not prevent the defendant from viewing his land on the grounds of privacy, particularly since he was holding his land open to the public; and the economic loss to the plaintiff of an admission price was too trivial to warrant judicial attention.

Legal access to information, however, does not necessarily imply a right to indis-

[15] *Cf.* similar attempts in combating shoplifting.

[1] 37 N.S.W. 322 (1937). A contrary result was obtained by the New York court. Time 85 (Sept. 6, 1937).

[2] See remarks of Erle, J., in Jefferys v. Boosey, 4 H.L.C. 815, 869 ff. (1854).

[3] Harper, Law of Torts, § 204 (1933).

[4] *Id.*, at § 181.

[5] *Ibid.*

[6] *Id.*, at § 187.

[7] Chandler v. Thompson, 3 Camp. 80 (1811); Bryant v. Sholars, 104 La. 786, 29 So. 350 (1901). See also Tapling v. Jones, 11 H.L.C. 290, 305 (1865); Winfield, Privacy, 47 Law Q. Rev. 23, 24 ff. (1931).

[8] Odell v. New York El. R.R. Co., 130 N.Y. 523, 29 N.E. 997 (1892); Duke of Buccleuch v. Metropolitan Board of Works, L.R. 5 H.L. 418 (1871), reversing L.R. 5 Ex. 221 (1870).

criminate use and dissemination. Thus, an agent upon the termination of his employment may not use the trade secrets of his former employer to his own advantage.[9] Again, a spectator properly admitted to the performance of an unpublished play is not permitted subsequently to publish it;[10] nor does the recipient of a private letter acquire a right to publication.[11] It would appear therefore that the absence of a trespass by the defendant in getting the information does not necessarily foreclose the question of the legality of the subsequent use of it.

An interest similar to that in the instant case has occasionally been protected by courts who chose to state their result in terms of trespass. In *Hickman v. Maisey*,[12] the defendant timed the trials of the plaintiff's race horse from the vantage point of the adjoining highway to which the plaintiff held the fee, and subsequently published the data. The court found that so unreasonable a use of the highway was not within the terms of the easement to the public and consequently held that the defendant was a trespasser *ab initio*. It is hard to believe that the court would resort to such a technical category of liability unless it assumed that the plaintiff's interest in the information was entitled to protection against publication.[13] But even an ingenious court could hardly extend this device to the instant case where the defendant was on his own land.

In other analogous cases courts have faced directly the problem of protecting a man from the misappropriation and dissemination of something which although intangible is peculiarly his. The so-called piracy cases furnish a good example. In the celebrated *Associated Press* case,[14] defendant news service was enjoined from circulating plaintiff's dispatches until they had lost their news value. It would seem that this doctrine has been extended somewhat beyond news cases by *Uproar Co. v. Nat. Broadcasting Co.*[15] in which the publication in a cheap form of the script used in a sponsored radio program was enjoined on the ground that it might impair the good will of the sponsor, created by the program. But this approach has been rejected in cases involving the

[9] Rest., Agency §§ 395, 404 (1933).

[10] Macklin v. Richardson, Ambler 694 (1770); Palmer v. De Witt, 47 N.Y. 532 (1872); Aronson v. Baker, 43 N.J. Eq. 365, 12 Atl. 177 (1888). Same as to lectures, Copinger, Law of Copyright 36 ff. (7th ed. 1936).

[11] Gee v. Pritchard, 2 Swanst. 402 (1818); Denis v. Leclerc, 1 Mart. (La.) 297 (1811).

[12] [1900] 1 Q.B. 752. *Accord:* Harrison v. Duke of Rutland, [1893] 1 Q.B. 142 (scaring away game); Adams v. Rivers, 11 Barb. (N.Y.) 390 (1851) (uttering abusive language).

[13] Thus in Sports & General Press Agency, Ltd., v. "Our Dogs" Pub. Co., Ltd., [1916] 2 K.B. 880, aff'd [1917] 2 K.B. 125, the court, in contrast to the Hickman case, refused to enjoin the defendant from publishing photographs taken at a dog show, even though he had been aware of the sale of the exclusive rights and warned against taking pictures. By analogy, the court could have easily under the circumstances found an implied obligation not to publish.

[14] International News Service v. Associated Press, 248 U.S. 215 (1918). For earlier cases implying similar doctrine, see: Nat. Tel. News Co. v. Western Union Tel. Co., 119 Fed. 294 (C.C.A. 7th 1902); Fonotipia, Ltd. v. Bradley, 171 Fed. 951 (C.C. N.Y. 1909).

[15] 81 F. (2d) 373 (C.C.A. 1st 1936), *cert. den.* 298 U.S. 670 (1936). See also Associated Press v. KVOS, 80 F. (2d) 575 (C.C.A. 9th 1935) (broadcasting company pirating plaintiff's news enjoined), rev'd and remanded with instructions to dismiss for want of jurisdiction, 299 U.S. 269 (1936).

copying of designs[16] or the appropriating of advertising schemes.[17] The potentialities of the analogy to the piracy of a trade-name, however, has not yet been realized in this group of cases. Perhaps the analogy has been obscured because the element of public deception has loomed unnecessarily large in the rationale of the trade-name cases.[18] The primary reason for protecting this means of identifying merchandise is to protect the owner of the trade-name from the misappropriation by his competitor; deception of the public being merely a test of private loss.[19] The plaintiff establishes a case by showing the loss or threat of loss of a trade expectancy which he can be said to have created.[20] At first, courts recognized the possibility of diversion of sales only where the name was used on a competing product.[21] Protection was gradually given in cases of similar but not directly competing goods, *e.g.*, self-playing pianos and phonographs on the theory that in the normal expansion of the plaintiff's enterprise, it might ultimately take in the defendant's product.[22] Finally, protection was cautiously extended to cases of completely dissimilar goods, where no element of unfair competition entered, on the theory that the use by others of the plaintiff's name might weaken its rhetoric value and ultimately result in the loss of sales.[23]

Even though in the instant case the plaintiff and the defendant are hardly in direct competition, each is appealing to the interests of the sport-loving members of the community, and in any event the possibility of loss to the plaintiff is none the less

[16] Cheyney Bros. v. Doris Silk Corp., 35 F. (2d) 279 (C.C.A. 2d 1929), *cert. den.* 281 U.S. 728 (1930).

[17] Westminster Laundry Co. v. Hesse Envelope Co., 174 Mo. App. 238, 156 S.W. 767 (1913); Gotham Music Service v. D. & H. Music Pub. Co., 259 N.Y. 86, 181 N.E. 57 (1932) (two judges dissenting on authority of Associated Press case); *cf.* Coca-Cola Co. v. Old Dominion Beverage Corp., 271 Fed. 600 (C.C.A. 4th 1921), *cert. den.* 256 U.S. 703 (1921).

[18] Nims, Unfair Competition § 8 (3d ed. 1929).

[19] Nims, *id.*, at § 9; McLean v. Fleming, 96 U.S. 245 (1877); Nu-Enamel Corp. v. Armstrong Paint & Varnish Works, 81 F. (2d) 1 (C.C.A. 7th 1936); National Biscuit Co., v. Kellogg Co., 91 F. (2d) 150 (C.C.A. 3d 1937), *cert. den.* 58 S. Ct. 120 (1937); Riggs Optical Co. v. Riggs, 132 Neb. 26, 270 N.W. 667 (1937); see also Fed. Trade Comm. v. Klesner, 280 U.S. 19, 27 (1929).

[20] Wall v. Rolls-Royce of America, 4 F. (2d) 333 (C.C.A. 3d 1925); Standard Oil Co. of New Mexico v. Standard Oil Co. of Cal., 56 F. (2d) 973 (C.C.A. 10th 1933); Colorado Nat. Co. v. Colorado Nat. Bank of Denver, 95 Colo. 386, 36 P. (2d) 454 (1934).

[21] Borden Ice Cream Co. v. Borden Condensed Milk Co., 201 Fed. 510 (C.C.A. 7th 1912).

[22] Wilcox & White Co. v. Leiser, 276 Fed. 445 (S.D. N.Y. 1918); Florence Mfg. Co. v. J. C. Dowd & Co., 178 Fed. 73 (C.C.A. 2d 1910); Standard Oil Co. of New Mexico v. Standard Oil Co. of Cal., 56 F. (2d) 973 (C.C.A. 10th 1933). For cases advocating theory of confusion upon consumer see Wolff, Non-Competing Goods in Trade-mark Law, 37 Col. L. Rev. 582, 592 ff. (1937).

[23] This theory is advocated by Schechter, Rational Basis of Trademark Protection, 40 Harv. L. Rev. 813, 824 ff. (1927); Schechter, Fog and Fiction in Trademark Protection, 36 Col. L. Rev. 60, 81 ff. (1936); Tiffany & Co. v. Tiffany Productions, Inc., 147 Misc. 241, 264 N.Y. Supp. 459 (1932), aff'd 262 N.Y. 482, 188 N.E. 30 (1933); Yale Electric Corp. v. Robertson, 26 F. (2d) 973, 974 (C.C.A. 2d 1928); *cf.* L. E. Waterman & Co. v. Gordon, 72 F. (2d) 272 (C.C.A. 2d 1934); see also Alfred Dunhill of London, Inc. v. Dunhill Shirt Shop, 3 F. Supp. 487 (N.Y. 1929); Churchill Downs Distilling Co. v. Churchill Downs, Inc., 262 Ky. 567, 90 S.W. (2d) 1041 (1936).

real. Conceivably, the plaintiff might go into the "business" of selling his broadcasting privileges and consequently come into direct conflict with the defendant.[24] Or, as was alleged in the case, the effect of the broadcasting of the races might be to decrease the attendance at the track.[25] This result should warrant relief on the analogy of the trade-name cases involving completely dissimilar goods.

There remains the question of how much of his own the defendant must add to what he has taken from the plaintiff to make the product or result legally his. In the instant case, it may be argued that the defendant transformed the mere observation of the horse race into an exciting broadcast, embroidered with entertaining sidelights and instructive interpretation. But this argument by analogy seems a most far-fetched and hopeless justification for the defendant's appropriation and dissemination of the plaintiff's show.

One final consideration remains. The result of protecting the plaintiff is to promote his acquisition of future income by strengthening his monopoly of the means of acquiring it. Since the ultimate purpose of protecting such monopoly is to encourage the enterprise, the final decision may well turn on the social desirability of the plaintiff's activity. In any event, a matter of such fundamental social importance might well be left for the legislature.[26]

Trusts—Liability of Corporate Trustee—Court Order as a Defense to Trustee's Liability—[Texas].—A corporation deposited securities with the defendant, trustee, and issued participation certificates. The trust indenture contained an exculpatory clause exempting the trustee from liability except for "gross negligence or wilful default." Thereafter, a receiver was appointed for the settlor corporation and he on behalf of 90% of the trust beneficiaries, requested the receivership court to order the defendant to deliver the securities to him. Accordingly, the decree was granted in which it was also provided that the receiver should perform the duties of the original trustee. The defendant, evidently knowing that not all the beneficiaries were represented, *complied* with the court order. Subsequently, the plaintiff, who was a certificate holder, but not one of the 90% represented by the receiver, filed suit for breach of trust against the trustee. *Held*, the beneficiaries are necessary parties to a proceeding that destroys the trust or materially alters its terms. Since the plaintiff was not a party in the receivership court, the decree was no justification for the trustee's action. *Nat'l Bk. & Tr. Co. v. Bruce.*[1]

The standards measuring the liabilities of a trustee under an indenture have not been clearly defined by the decisions. Writers disagree on whether the standards applicable to the family trustee can be properly applied to the corporate trustee since the

[24] In the United States, broadcasting and motion picture rights have become commercial assets in both amateur and professional sports. Lit. Dig. 33 (Oct. 5, 1935); Lit. Dig. 41 (Sept. 19, 1936); Phillips, Hold 'Em Mike, Sat. Eve. Post 25 (Oct. 17, 1936); Time 85 (Sept. 6, 1937).

[25] Many colleges in the United States do not permit broadcasting of football games on the theory that it cuts into the gate-receipts. Lit. Dig. 41 (Sept. 19, 1936).

[26] See Brandeis, J., dissenting in International News Service v. Associated Press, 248 U.S. 215, 248 (1918); Handler, Unfair Competition, 21 Iowa L. Rev. 175, 191 (1936).

[1] 105 S.W. (2d) 882 (1937).