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Video Software Dealers Ass'n v. Webster, 968 F.2d 684 (8th Cir. 1992)

Sarah Joyce

limitations did not begin to run until Stone knew the facts giving rise to her statutory entitlement. The fact that Stone is the daughter of Williams is the relevant fact giving rise to Stone's statutory entitlement. Stone discovered she was Williams daughter in October 17, 1979.

The defendants argued that since Stone did not seek a judicial determination that she was the owner of the copyright renewals within three years of 1979, she is barred from asserting a cause of action based on that ownership. Statutes of limitations bar remedies, not the assertion of rights.[7] This principle applies to the Act.[8] To be entitled to a share of copyright renewal royalties under the Act, the plaintiff must be a child of the author.[9] The Act does not state that a plaintiff loses the right to renewals by delaying assertion of that right.[10]

The court makes clear that there is a distinction between what must be done to give rise to an entitlement of a statutory right, and what needs to be done to vindicate that right.[11] The court concluded that Stone did not lose her status as the author's child just because she waited to ask the court to declare her status. The only consequence to Stone was to limit her claims based on the infringing acts of the defendants. Royalties which became due either subsequent to, or within three years of, the commencement of the suit were not barred by the statute of limitations. Stone could not, however, recover for royalties which became due more than three years before the commencement of the suit.

Finally, Stone argued the defendants' ongoing exploitation of her interest in the copyright renewals and their failure to account to her for her royalty share was a continuous course of wrongful conduct which precludes the statute of limitations defense. The court disagreed. Although each infringement is a separate injury which gives rise to an independent claim for relief, when infringements occur during the limitations period, that does not mean that recovery is available for past infringements.[12] Stone could only recover for the injuries occurring within three years of the commencement of the suit.

CONCLUSION

The Court of Appeals for the Second Circuit made clear that the three year statute of limitations governing causes of action in infringement under the Act apply only to the individual acts of infringement, not the enforcement of the property interest in the copyright renewal. Hence, a plaintiff's substantive right to an interest in a copyright renewal is not abrogated just because that plaintiff fails to timely file for a holding on that status. Here, the three year statute of limitations under the Act began to run once Stone was put on notice that Williams was her father in 1979. However, each act of infringement by the defendants was distinct, giving rise to an independent claim of relief. Thus, Stone's claims for royalties which became due within three years of the commencement of the suit were not time-barred.

Barbara Fox Kraut

1. Copyright Act, 17 U.S.C. §§ 101, 304(a), 24 (1988).
2. Stone v. Gulf American Fire & Casualty Co., 554 So. 2d 346 (Ala. 1989), *cert. denied*, 496 U.S. 943 (1990).
3. Stone v. Williams, 766 F. Supp. 158 (1991).
4. Copyright Act, 17 U.S.C. §507(b) (1988).
5. Stone v. Williams, 970 F.2d 1043, 1048 (2d Cir. 1992) (*citing* 118 E. 60th Owners v. Bonner Properties, Inc., 677 F.2d 200, 202 (2d Cir. 1982); Luckenbach S.S. Co. v. United States, 312 F.2d 545, 548 (2d Cir. 1963)).
6. *Id.* (*citing* Cullen v. Margiotta 811 F.2d 698, 725, cert. denied, 483 U.S. 1021 (1987); Keating v. Carey, 706 F.2d 377, 382 (2d Cir. 1983)).
7. *Id.* at 1051 (*citing* United States v. Obermeier, 186 F.2d 243, 254-55 (2d Cir. 1950)).
8. *Id.* (*citing* Prather v. Neva Paperbacks, Inc., 446 F.2d 338, 340 (5th Cir. 1971)).
9. *Id.*
10. *Id.*
11. *Id.* at 1051 (*citing* United States v. Obermeier, 186 F.2d 243, 254-55 (2d Cir. 1950)).
12. *Id.* at 1049.

Video Software Dealers Ass'n v. Webster,

968 F.2d 684 (8th Cir. 1992).

INTRODUCTION

Plaintiff, a Video Dealers Association, brought suit against defendant, the state of Missouri, challenging the constitutionality of a statute prohibiting the distribution of violent videos to minors. The Court of Appeals for the Eighth Circuit affirmed the United States District Court for the Western District of Missouri finding the statute to be unconstitutional under First Amendment principles.

FACTS

Plaintiffs are associations whose members rented or sold videos to the public, an association of film producers and distributors, and owners and operators of video retail stores. Defendants are the Missouri Attorney General, a county prosecuting attorney, and all other members empowered to enforce the statute (collectively "Missouri").

The challenged statute provides that videos covered under the statute must be displayed or maintained in a separate area and may not be rented or sold to persons under the age of seventeen. The statute applies to videos which, applying contemporary community standards, the average adult person would find" "(1)...[has] a tendency to cater to or appeal to morbid interests in violence for persons under the age of seventeen, (2) ...depicts violence in a way which is patently offensive with respect to

what is suitable for persons under the age of seventeen, and (3)...lacks serious literary, artistic, political, or scientific value for persons under the age of seventeen."[1]

The statute contains no definition of 'violence', no explanation of purpose, and no legislative history. In a July 1989 article written by the bill's sponsor, the representative wrote that the bill was designed to cover movies containing "graphic sexual torture, bondage, rape, cannibalism, human brutality, and mutilation."[2]

Missouri's position is that the statute targets "slasher videos," which it describes as "blood and gore" displaying "the most bestial and graphic acts of violence imaginable" such as "excessive scenes of murder, rape, sado-masochistic sex, autopsies, mutilations, satanism and assorted perversions."[3] Missouri also broadly asserts that the statute is aimed at "graphically violent videos."[4]

LEGAL ANALYSIS

The court found that the statute was unconstitutional for three reasons: (1) it is not narrowly tailored to promote a compelling state interest, (2) the statute is impermissibly vague, and (3) the statute imposes strict liability.[5] Because the statute regulates videos based on their content, the court applied strict scrutiny. In deciding whether a statute which is a content-based regulation of speech should be upheld under strict scrutiny, the court uses a two step analysis. First, the court determines whether the regulation can be justified with a compelling state interest and second, the court determines whether the regulating statute is narrowly tailored to achieve its asserted purpose.[6] In applying these factors, the court held that the statute was not narrowly tailored to promote an articulated, compelling state interest.[7]

Under the strict scrutiny analysis, Missouri attempted to justify its statute's content-based regulation of speech by citing two compelling state interests—prohibiting obscenity and protecting children from slasher videos. First, the court held that the statute could not be justified as legally prohibiting obscene material under the First Amendment, because obscene material encompasses only expression that depicts or describes sexual conduct.[8] Although agreeing with Missouri that some expression which is not obscene for adults may be obscene from the viewpoint of a minor, the court still found the statute constitutionally infirm because of its inclusion of violent videos. Videos included under the statute depicting only violence do not fall within the legal definition of obscenity.

Second, the court found that although states have broader authority to regulate communicative materials available to children, minors are nevertheless entitled to a significant measure of First Amendment freedoms.[9] Only in narrow and defined circumstances may government bar public dissemination of protected materials to them.[10] Because much of the speech covered by the statute was neither obscene nor subject to some other legitimate proscription, it could not be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In refusing to decide whether the state's interest in protecting children was legitimate, the court concluded its application of strict scrutiny by holding that even assuming the state's interest is valid, the statute was not narrowly drawn to achieve its end without unnecessarily infringing on freedom of expression.[11] As drawn, the statute covered all types of violence.

To survive a vagueness challenge, the test is whether the statute gives a person of "ordinary intelligence a reasonable opportunity to know what is prohibited," and whether it provides "explicit standards for those who apply the statute."[12] Courts apply a stringent vagueness test when the statute involved allegedly infringes on the right of free speech.

Missouri asserted that the statute was merely an adoption of the *Miller* test for obscenity, substituting the word "violence" for the words "sexual conduct."[13] The court, however, reasoned that if the statute was similar to the Miller test, a definition of "violence" was required. The statute's phrase, "...tendency to cater or appeal to morbid interests in violence for persons under the age of seventeen" was held by the court to be elusive and prohibitive of merely offensive videos also.[14] Furthermore, the court found that given the absence of legislative history and purpose, there was no way for Missouri's courts to decisively narrow the statute. Therefore, the court concluded that because "people of common intelligence, whether prosecutors or video dealers, must guess at the meaning of the statute...the statute is impermissibly vague."[15]

Last, the court condemned the statute for imposing strict liability on video dealers. Statutes which impose criminal responsibility for dissemination of unprotected speech or chill the exercise of First Amendment rights must contain a knowledge requirement.[16] Moreover, the court felt that regardless of a knowledge requirement, penalizing video dealers for a video's content presented a hazard of self-censorship. The court felt that dealers would in essence be forced to view all videos to make a determination of their content; they would be reluctant to exercise their freedom of speech which would ultimately restrict the market. The court held that because the statute's strict liability requirement would make dealers reluctant to place videos on the market, thereby restricting the public's access to constitutionally protected videos, the statute violated the First Amendment.[17]

CONCLUSION

Courts have repeatedly held that legislation aimed at protecting children must be clearly drawn and the

standards adopted must be reasonably precise. This is necessary so that those who govern and those who administer the laws will understand the statute's meaning and application. In this case, the court refused to narrowly construe the statute to cure it of its constitutional defects. The court explained there was no readily apparent means of rehabilitating the statute. Nothing less than rewriting the statute to at least include a definition of violence would begin to remedy its vagueness. Nevertheless, the court added, it was not belittling the State's interest in protecting the well-being of minors, and stressed that its holding narrowly applied to the statute at issue.

Sarah Joyce

1. Video Software Dealers Ass'n. v. Webster, 968 F.2d 684, 687 (8th Cir. 1992) (*citing* Mo. Rev. Stat. § 573.090 (Supp. 1991)).
2. *Id.* at 687-88 (8th Cir. 1992) (*quoting* Kenneth D. Rozell, *Missouri Statute Attacks "Violent" Videos: Are First Amendment Rights in Danger?*, 10 Loy. Ent. L.J. 655, 666 (1990) (*quoting Slasher Video Law Draws Contrasting Reviews*, The Statesman, July 1989, at 6)).
3. *Id.* at 688.
4. *Id.*
5. *Id.*
6. *Id.* at 689.
7. *Id.* at 688.
8. *Id.*
9. *Id.*
10. *Id.* (*citing* Erznoznik v. City of Jacksonville, 422 U.S. 205, 212-14 (1975)).
11. *Id.* at 689.
12. *Id.* (*citing* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)).
13. *Id.* at 690 (*citing* Miller v. California, 413 U.S. 15, 24 (1973)).
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*