

King v. Innovation Books, 976 F.2d 824 (2d Cir. 1992)

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of recycling newspaper paper required the exemption for newspapers. Nevertheless, because the Department looked at the contents of a publication in determining whether it was considered a newspaper for taxation purposes, the statute was not narrowly drawn for this interest either.¹³ Stressing that the means must be narrowly tailored to achieve the end goal of recycling, the court implied in dicta that recycling would be a valid interest only if the Department Of Revenue looked solely at the type of paper used in determining whether a publication would be taxed.¹⁴ The Florida Supreme Court held that the tax could not pass muster under strict scrutiny.¹⁵

In determining the appropriate remedy for this violation, the court applied state law.¹⁶ The Florida statute made it clear that between the imposition of a tax or the granting of an exemption, the imposition of a tax should prevail. Accordingly the Florida Supreme Court reversed the trial court's invalidation of the tax and ordered it to strike the newspaper exemption so that the Florida Department of Revenue would now impose the tax on magazines and newspapers equally.

CONCLUSION

The Florida Supreme Court found the Florida tax scheme differentiated between newspapers and magazines based on their content and therefore applied strict scrutiny. Ultimately the court found the taxation scheme violated the First Amendment because it was not narrowly tailored to achieve a compelling government interest. Although the state had a compelling interest in both literacy and recycling, the statute was not narrowly drawn toward either end.

Sarah Joyce

1. *Leathers v. Medlock*, -U.S.-, 111 S. Ct. 1438 (1991).
2. *Department of Revenue v. Magazine Publishers*, 604 So.2d 459, 461 (Fla. 1992).
3. *Id.* (citing *Leathers v. Medlock*, -U.S.-, 111 S. Ct. at 1443-44).
4. *Id.*
5. *Department of Revenue v. Magazine Publishers*, 604 So.2d at 462.
6. *Leathers v. Medlock*, -U.S.-, 111 S. Ct. 1438; *Arkansas Writers' Project v. Raglund*, 481 U.S. 221 (1987).
7. *Id.* at 1447.
8. *Arkansas Writers' Project v. Raglund*, 481 U.S. 221 n. 4.
9. *Department of Revenue v. Magazine Publishers*, 604 So.2d 459 at 461.
10. FLA. ADMIN. CODE ANN. 12A-1.008(1)(b) provides: (b) In order to constitute a newspaper, the principal purpose of the publication must be to disseminate news and contain at least the following elements.... 5. It must routinely contain reports of current events and matters of general interest which appeal to a wide spectrum of the general public. If the publication is intended for general circulation to the public and is devoted primarily to matters of specialized interests such as legal, mercantile, political, religious, or sporting matters, and it contains in addition thereto general

new of the day, information of current events, and news of importance and of current interest to the general public, it is entitled to be classed as a newspaper.

11. *Id.* at 462.

12. *Id.* at 463.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 463-4 (citing *Texas Monthly v. Bullock*, 489 U.S. 1 (1989) (Supreme Court held "it is not for us to decide whether the correct response as a matter of state law to a finding that a state tax exemption is unconstitutional is to eliminate the exemption, to curtail it, to broaden it or to invalidate the tax altogether").

King v. Innovation Books,

976 F.2d 824 (2d Cir. 1992).

INTRODUCTION

Stephen King ("King") sought to enjoin the producer and distributor of the motion picture "THE LAWNMOWER MAN" from using a possessory credit or a "based upon" credit which associated King's name with the motion picture. King claimed that the use of his name in conjunction with the motion picture falsely designated him as the originator of the movie in violation of section 43(a) of the Lanham Act. The Court of Appeals for the Second Circuit held that King was entitled to a preliminary injunction against the use of King's name "on or in connection with" the motion picture; however, King was not entitled to an injunction against the use of a "based upon" credit.¹

FACTS

King is a famous horror writer. The defendants are Allied, a British motion picture production company and New Line, an American motion picture distribution company.

In 1970, King wrote a short story called "*The Lawnmower Man*" (the "Short Story"). King assigned the motion picture and television rights for the Short Story to Great Fantastic Picture Corporation, which later transferred its rights to Allied. After the screenplay for the feature-length motion picture was completed, Allied licensed the distribution rights to the motion picture in North America to New Line. King was not involved in the creation of the screenplay or in the production of the motion picture. In February 1991, the defendants began to market the motion picture as "Stephen King's THE LAWNMOWER MAN," and as "based upon" a short story by King.

After King first learned about the motion picture in October 1991, King ordered his attorney to inform the defendants that he objected to the use of both the possessory credit and "based upon" credit and that he wished to see a copy of the film. On March 3, 1992, just days before the release of the motion picture in theaters, the defendants allowed King to view the

motion picture. In the meantime, the defendants were still advertising "THE LAWNMOWER MAN" with both possessory and "based upon" credits.

In May, 1992, King filed suit against the defendants in the United States District Court for the Southern District of New York, seeking damages and an injunction for the use of the possessory and "based upon" credits. King claimed that the credits violated section 43(a) of the Lanham Act because the credits were false and misleading.² The district court granted a preliminary injunction against the defendants' use of the credits. The injunction prohibited the defendants from using King's name "on or in connection with" the motion picture.³ The defendants appealed.

LEGAL ANALYSIS

King argued that he was entitled to a preliminary injunction against the use of possessory and "based upon" credits since he was likely to succeed on the merits of his claim that the possessory and "based upon" credits were false and misleading in violation of section 43(a) of the Lanham Act. On appeal, the Court of Appeals for the Second Circuit analyzed the possessory credit separately from the "based upon" credit.

First, the Court of Appeals held that the possessory credit was false and therefore the district court was correct to enjoin its use. The general rule is that a false or misleading reference to the origin of a work is a violation of section 43(a) of the Lanham Act.⁴ A possessory credit is usually given to the director, producer or writer of a motion picture. At a minimum, a possessory credit acknowledges a person who had some involvement in or gave approval to a motion picture or screenplay.⁵ The words "Stephen King's THE LAWNMOWER MAN" implies that King had some involvement in the screenplay or motion picture. The court reasoned that King was neither involved in "THE LAWNMOWER MAN" screenplay or motion picture nor did King give his approval to the motion picture. Furthermore, the court stated, when attribution is false on its face, as it is here, no evidence of public confusion is required in order to grant an injunction.⁶ Thus, the court held, the possessory credit is false and an injunction against its use was proper.

Second, the Court of Appeals held that since King was not likely to succeed on the merits in his claim against the "based upon" credit, the district court was incorrect to enjoin use of the "based upon" credit. Unlike the possessory credit, the "based upon" credit is proper when a work is derivative of an underlying work. Therefore, the "based upon" credit is given more "leeway" than the possessory credit.⁷

The district court applied the incorrect standard in its determination of the "based upon" credit. The district court compared the motion picture as a whole to how much protected material from the Short Story

appeared in the motion picture. Focusing on the proportion of the motion picture attributable to the Short Story, the district court held that the "based upon" credit was misleading. However, the proper emphasis should have been on the "proportion, in quantitative and qualitative terms," of the Short Story appearing in the motion picture.⁸ Generally, absent countervailing facts and circumstances, a "based upon" credit is not misleading when a motion picture takes material respects, both quantitatively and qualitatively, from a literary work.⁹

In applying this standard, the court found that the core of the Short Story was used in the motion picture. Although there were facets of the Short Story which did not appear in the motion picture and, likewise, elements of the motion picture which were independent of the Short Story, the court believed that the motion picture resembled in "sufficiently material respects" the Short Story's qualitative and quantitative elements.

Moreover, King did not offer any countervailing facts or circumstances to prove that the "based upon" credit was misleading. There was no evidence that the "based upon" credit caused any industry or consumer confusion. Thus, since the "based upon" credit was not misleading and, therefore, did not violate section 43(a) of the Lanham Act, an injunction against its use was not proper.

CONCLUSION

The Court of Appeals for the Second Circuit affirmed the injunction against the use of King's name in a possessory credit in conjunction with the motion picture "THE LAWNMOWER MAN". However, the prohibition against the use of King's name in a "based upon" credit was reversed since a significant portion, both qualitative and quantitative, of King's Short Story appeared in the motion picture. Thus, a "based upon credit" was not misleading or confusing to the public.

Barbara Fox Kraut

1. King v. Innovation Books, 976 F.2d at 826 (2d Cir. 1992).

2. Lanham Act, 15 U.S.C. § 1125(a) (1988).

3. King v. Innovation Books, 807 F. Supp. 300, 307 (S.D.N.Y. 1992).

4. King, 976 F.2d at 828-29 (citing Gilliam v. American Broadcasting Cos., 538 F.2d 14, 24-25 (2d Cir. 1976)).

5. *Id.* at 829.

6. *Id.*

7. *Id.* at 830.

8. *Id.* at 829.

9. *Id.* at 830.