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Art Buchwald v. Paramount Pictures Corp. 13 U.S.P.Q.2d 1497 (Cal. Super. 1990)

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exercising state police powers in this manner. The state has a substantial interest in preserving societal order and morality. Consequently, Indiana's statute satisfied the first two prongs of the *O'Brien* test.

Notably, Justice Souter's concurrence emphasized a substantial governmental interest in preventing the secondary effects of adult entertainment establishments. Indiana contended that nude dancing "encourages prostitution, increases sexual assaults, and attracts other criminal activity."[11] Accordingly, Justice Souter asserted that these secondary effects of nude barroom dancing created an important governmental interest worthy of state enforcement through public indecency statutes.

The third prong of the *O'Brien* test requires that the government interest be unrelated to the suppression of free expression. Respondents claimed that the state's prohibition of nude dancing was related to expression because it "[sought] to prevent its erotic message."[12] However, the Supreme Court rebutted respondents' contention that Indiana sought to silence the erotic message of nude dancing. The Court rejected any "expansive notion of 'expressive conduct'" which would allow "an apparently limitless variety of conduct to be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[13] The state's purpose was to prevent public nudity regardless of whether it involved expressive activity. The Supreme Court further determined that by allowing performances in which dancers wore pasties and G-strings, Indiana did not proscribe the communication of an erotic message. The statutory requirement of a "fully opaque covering" merely "made the [erotic] message slightly less graphic" without depriving the dancer of his or her right of expression.[14]

Finally, the Supreme Court addressed the fourth prong of the *O'Brien* test which requires that "the incidental restriction on first amendment freedom be no greater than is essential to the furtherance of the governmental interest."[15] The Indiana statute provided that a person who appears knowingly and intentionally in a state of nudity in a public place commits public indecency, and that 'nudity' is the showing of human genitals, pubic area, buttocks, or the nipple of a female breast with less than a fully opaque covering.[16] The Supreme Court contended that to require pasties and G-strings was "modest, and the bare minimum necessary to achieve the state's purpose."[17] Accordingly, the government regulation only incidentally restricted first amendment freedom and was narrowly tailored to serve the state's interest. Therefore, Indiana's public indecency statute satisfied the fourth and final prong of the *O'Brien* test and was held constitutionally valid by the United States Supreme Court.

Conclusion

The Seventh Circuit perceived the Indiana legislation as a total ban on expressive conduct based on its expressive content. While it recognized the state's authority to establish reasonable time, place, and manner restrictions (regulations unrelated to the suppression of speech), the Seventh Circuit found that the statute at issue did not limit itself by these constitutional guidelines. Consequently, the Seventh Circuit found the Indiana statute violative of the third and fourth prongs of the *O'Brien* test and unconstitutional as applied.[18] However, the Supreme Court denied the content-based and total ban arguments of the Seventh Circuit and ultimately justified its ruling by asserting that the Indiana restriction on nude dancing was incidental to the expressive nature of this recognized first amendment conduct. Ω

Tracey L. Kaufman

1. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991); Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1991).
2. United States v. O'Brien, 391 U.S. 367 (1968).
3. *Barnes*, 111 S. Ct. at 2460.
4. IND. CODE § 35-45-4-1 (1988).
5. *Miller*, 904 F.2d at 1082.
6. *Miller*, 904 F.2d at 1086, quoting Cohen v. California, 403 U.S. 15, 25 (1970).
7. *Miller*, 904 F.2d at 1086-1087, citing Texas v. Johnson, 109 S.Ct. 2533, 2539 (1989).
8. *Miller*, 904 F.2d 1086-87.
9. *Barnes*, 111 S. Ct. at 2460.
10. *O'Brien*, 391 U.S. at 377.
11. *Id.* at 2469 (Souter, J., concurring). Brief for Petitioners at 37.
12. *Barnes*, 111 S. Ct. at 2462.
13. *Id.*, quoting *O'Brien*, 391 U.S. at 376.
14. *Id.* at 2463; IND. CODE § 35-45-4-1 (1988).
15. *Barnes*, 111 S.Ct. at 2463.
16. IND. CODE § 35-45-4-1 (1988).
17. *Barnes*, 111 S. Ct. at 2463.
18. *Miller*, 904 F.2d at 1088-89.

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Introduction

Plaintiff, Art Buchwald, brought an action against Paramount Pictures Corporation for breach of contract in the development of an idea for a motion picture.[1] Buchwald claims that after his negotiations with Paramount ended, Paramount released

a film similar to his idea, without recognition or payment, in breach of their agreement. To recieve punitive damages, Buchwald also asserted tort claims based on bad faith, tortious breach of contract, and fraudulent concealment against Paramount.[2] The court concluded that the works were similar enough in content and in the parties involved. The court found a breach of contract by Paramount and decided for Art Buchwald on the contract claim.[3] However, the court decided for Paramount on the tort claims.[4]

Facts

In early 1982, Art Buchwald prepared a screen treatment entitled *"It's a Crude, Crude World"* and registered it with the Writers Guild of America. Late in 1982, the story was pitched to Paramount Pictures for development into a movie starring Eddie Murphy. In January 1983, Paramount registered the title *"King For A Day,"* the new title, and sought a writer for the story. Buchwald and Paramount entered into an agreement on March 22, 1983 for the movie as a possible project for Eddie Murphy.

A few months later the first draft of *"King For A Day"* was completed and described in a memorandum as the "Art Buchwald idea" that Paramount was "now developing for Murphy." Paramount also attempted to employ John Landis as director of the film. After exercising several options with Buchwald, Paramount confirmed that *"King For A Day"* had been abandoned early in 1985 because Paramount could not procure a writer for the script. Therefore, Buchwald optioned his treatment for *"King For A Day"* to Warner Brothers in May 1986. In the summer of 1987, Paramount began developing a story called *"The Quest,"* based on a story by Eddie Murphy, to be directed by John Landis. The shooting script for *"Coming To America,"* the subsequent title, was dated October 21, 1987. In the meantime, Warner Brothers was still developing Buchwald's treatment.

In January 1988, Warner Brothers canceled *"King For A Day"* partly because of the discovery that Paramount was shooting *"Coming To America"* starring Eddie Murphy. When *"Coming To America"* was released, the story credit was given to Eddie Murphy.

Legal Analysis

The court determined that this was a case based primarily on breach of contract which must be analyzed in reference to the agreement and the rules of contract construction.[5] Pursuant to the agreement, Buchwald transferred to Paramount all motion picture and other rights to his original story and concept. The first issue was the meaning of the term "based upon," because the agreement provided that Buchwald was entitled to payment only if Paramount produced a "feature length theatrical motion picture based upon Author's Work."[6] There was little agreement among the experts as to the meaning of the term "based upon" in the entertainment industry. The court therefore looked to the appellate decisions of the state for guidance. It found that an inference of copying may arise when there is proof of access to the material with a showing of similarity and that, where there is strong evidence of access, less proof of similarity may suffice.[7]

The court decided that there was no question Eddie Murphy had access to Buchwald's concept. In addition, the evidence established that Murphy knew of the concept.[8] Paramount's creative executives had met at least four times with Murphy and his manager to discuss Buchwald's idea and Murphy had a positive reaction to the concept.

The court then considered the question of similarity; a factual inquiry for the trier of fact to determine.[9] The court rejected Paramount's contention that the similarity must be substantial and stated that if there is a contractual obligation to pay for an idea, the defendant cannot avoid such liability because he only copied the abstract or the basic idea.[10] Rather, the court determined that Paramount's obligation arose to pay Buchwald if *"Coming To America"* was based upon a material element of or was inspired by Buchwald's treatment.[11] The court compared the two works and concluded that the similarities between the two stories were sufficient to impose contract liability on Paramount.

Additionally, the plaintiff asserted tort claims to recover punitive damages. However, the court found no tortious conduct. Paramount's conduct was not in bad faith, fraudulent, oppressive, or malicious. Therefore, the plaintiffs were denied recovery on their tort claims.[12] The court concluded that, bearing in mind the unlimited access in this case and the rule that the stronger the access the less striking and numerous the similarities need be, Paramount had appropriated and used a qualitatively important part of Buchwald's treatment in such a way that the works were substantially similar.[13]

Conclusion

The court concluded that Paramount breached its contract with Art Buchwald by producing a film based upon Buchwald's idea, in violation of the express language of the contract. The court held