5-1-1993

Copyright Law - Substantial Similarity Test: Denker v. Warner Brothers, Inc., No. 91 Civ. 0076 (MBM), U.S. Dist. LEXIS 18630 (S.D.N.Y. Dec. 8, 1992)

article concerning the attempted prosecution of Clay.

Held: Plaintiff's claim fails the initial threshold consideration of whether the statement complained of is defamatory. As a matter of law, the term "grifter" is not defamatory per se. Moreover, Russo failed to establish ordinary malice toward him on the part of the defendant. *Summary Judgment for Defendant.*

J.B.

LABOR LAW

THE PHILADELPHIA MUSICAL SOCIETY, LOCAL 77 v. AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, No. 92-3386, 1992 U.S. Dist. LEXIS 19263 (E.D. Pa. Dec. 2, 1992).

Local of an international union of musicians asserted that union violated federal labor laws in negotiating and ratifying a certain labor contract. Plaintiff, a musicians' local, challenged provisions of a collective bargaining agreement between its parent union and the League of American Theaters and Producers, an employer of musicians. The provisions at issue limited the number of local musicians that were required to be hired for touring productions performed in a local venue. Plaintiff alleged that pursuant to the Labor-Management Relations Act, the defendant union violated its bylaws in negotiating the provisions in question. Additionally, the plaintiff alleged that the procedures used by the union to ratify the agreement violated the Labor-Management Reporting and Disclosure Act of 1959.

Held: Both the defendant union's bylaws and its past practice authorized it to designate a maximum number of local musicians to be employed in local performances of touring theatrical productions. Therefore, the union's interpretation of its bylaws was not unreasonable. Regarding the plaintiff's claim of improper ratification, ratification of the collective bargaining agreement occurred in another jurisdiction. Pursuant to Fed. R. Civ. Pro. 12(b)(3) - improper venue - it was not necessary to reach that claim on its merits and it was dismissed without prejudice. *Summary Judgment for Defendant on negotiation claim; ratification claim Dismissed Without Prejudice.*

J.B.

COPYRIGHT LAW - SUBSTANTIAL SIMILARITY TEST

DENKER v. WARNER BROTHERS, INC., No. 91 Civ. 0076 (MBM),

1992 U.S. Dist. Lexis 18630 (S.D.N.Y. Dec. 8, 1992).

Author appeals from a summary judgment granted by the district court for the defendants on the issue of improper appropriation of plaintiff's copyrightable storyline. Plaintiff erroneously attempted to introduce expert testimony as to the substantial similarity between the plaintiff's novel and the defendant's motion picture. The district court found that the substantial similarity test, when applied to the issue of improper appropriation, must by its very nature, be "judged by the spontaneous response of the ordinary lay observer." Plaintiff's case also mistakenly relied on the defendant's past rewriting commissions to suggest that the screenplay was yet another rewriting, albeit an unauthorized one. In response, the district court restated the proposition that the law requires that an improper appropriations claim be focused solely on the works at issue.

With regard to the district court's summary judgment in favor of the defendant, plaintiff argues that the district court failed to apply the Arnstein "slightest doubt" test. This test has been repudiated by the Second Circuit, which will now grant a summary judgment for a defendant in copyright infringement cases where the alleged similarity of the material involves only non-copyrightable elements of the plaintiff's work, or if no reasonable juror could find the materials in question substantially similar.

Held: Plaintiff's attempt to overcome the major differences in theme, setting, and tone by pointing to certain discrete similarities between the works is insufficient to defeat defendant's motion for summary judgment. Simply stated, the plaintiff failed to show that the works were substantially similar from the standpoint of a lay reader. *Affirmed.*

P.J.

COPYRIGHT LAW

KAKIZAKI V. RIEDEL, 92 Civ. 3919 (JSM), 1992 U.S. Dist. LEXIS 19141 (S.D.N.Y. Dec. 15, 1992).

Action based on copyright infringement. Plaintiff argued that photo taken of defendant created a unique image which Plaintiff licensed defendant to use only on invitations to a party. The invitations mailed contained no notice of publication which destroyed plaintiff's copyright in the work. The possible exception which would prevent the divestment of plaintiff's rights in the work is if the notice had been omitted from no more than a relatively small number of copies. Plaintiff was given some 100 copies of the invita-