5-1-1993

Copyright Law: Kakizaki v. Riedel, 92 Civ. 3919 (JSM), 1992 U.S. Dist. LEXIS 19141 (S.D.N.Y. Dec. 15, 1992)

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-

tions to use and defendant invited at least 100 guests. Thus, because 50 percent of the total copies mailed with the plaintiff's permission did not contain proper copyright notice, more than a relative few were distributed without proper notice.

Held: Plaintiff's copyright was divested by the photo's general publication without notice of copyright to the audience of invitation recipients. There are no exceptions that save plaintiff's copyright interest under these facts. *Judgment for Defendant.*

H.C.

TRADEMARK LAW

YANKEE PUBLISHING, INC. AND INTERNATIONAL LICENSING MANAGEMENT, INC. v. NEWS AMERICA PUBLISHING, INC., No. 90 Civ. 8120 (PNL), 1992 U.S. Dist. LEXIS 19385 (S.D.N.Y. Dec. 18, 1992).

Plaintiff, publisher of The Old Farmer's Almanac, brought a suit for trademark infringement and false designation of origin, unfair competition, unjust enrichment, and trademark dilution against the publisher of New York Magazine. The plaintiff claims that *New York's* takeoff on the *Almanac's* cover design violates its trademark rights under federal and state law. Plaintiff argues that the defendant's use of this design caused confusion in the market and dilution of the value of the *Almanac* trademark. The main issue in trademark infringement and unfair competition is whether or not the use is likely to cause public confusion. The defendant contends that its cover reference to the *Almanac* did not cause confusion, and if it did, the interest in free expression protected by the First Amendment outweighs the possible confusion.

Held: The court held that *New York Magazine* made it clear that the reference to the *Almanac* was a joke, and its identity was made clear so that there was little possibility of confusion. If there was any confusion as to the origin, the confusion was minor and outweighed by the First Amendment considerations of free expression and commentary. The court also held that there was no significant dilution of the value of the plaintiff's trademark resulting from the defendant's reference. *Judgment for Defendant.*

J.H.

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MAKEWIDE PUBLISHING CO., ET AL v. ALVIN LEE JOHNSON, SR., ET AL, No. 91-0879 sect. B, 1993 U.S. Dist. LEXIS 652 (E.D. La.