10-1-1992

Braun v. Soldier Of Fortune Magazine, Inc., 968 F.2d 1110 (11th Cir. 1992)

short story and the movie were held to be sufficient so that the "based upon" credit could not have been seen as misleading to the public. Therefore, the circuit court reversed the district court's grant of a preliminary injunction regarding the "based upon" credit and affirmed the injunction with respect to the possessory credit.

-J.B.K.

ACUFF-ROSE MUSIC, INC. V. CAMPBELL, 972 F.2D 1429 (6TH CIR. 1992).

The holders of a song's copyright brought an action against a rap music group for copyright infringement. The District Court for the Middle District of Tennessee granted summary judgment under section 107 of the Copyright Act for the rap group and the copyright holders appealed. The rap group, 2 Live Crew, released for commercial distribution a version of Acuff-Rose Music's copyrighted song, "Oh, Pretty Woman." The rap group claimed that their version of the song was a parody. The credits on the album recognized Roy Orbison and William Dees as the writers of "Pretty Woman," and Acuff-Rose Music as the publisher of the song.

The United States Court of Appeals for the Sixth Circuit concluded that 2 Live Crew's use of Acuff-Rose's copyrighted song was not a fair use based on the four factors set forth in section 107 of the Copyright Act. The court concluded that the first factor weighs against a finding of fair use because of the admittedly commercial nature of the derivative work. The court found that the copyrighted work represented a substantial investment of time and labor made in anticipation of financial return and that the rap group copied a substantial portion of the recognizable bass and guitar riffs verbatim. The court concluded that taking the heart of the original and making it the heart of a new work was purloining a substantial portion of the essence of the original and that the likelihood of future harm existed. The court, in reversing and remanding, stated that it was the blatantly commercial purpose of the derivative work that prevented this parody from being a fair use.

-J.F.B.

BRAUN V. SOLDIER OF FORTUNE MAGAZINE, INC., 968 F.2D 1110 (11TH CIR. 1992).

The sons of a murder victim brought an action against a magazine and its parent company for negligently publishing an advertisement which created an unreasonable risk of solicitation of vio-

lent criminal activity. Soldier of Fortune Magazine, Inc., and its parent, Omega Group, Ltd., appealed the $4,375,000 jury verdict. In January of 1985, Michael Savage submitted the following personal service advertisement to Soldier of Fortune: "GUN FOR HIRE: 37 year old professional mercenary desires jobs. Vietnam Veteran. Discrete [sic] and very private. Body guard, courier, and other special skills. All jobs considered." Savage testified that he only intended to obtain legitimate jobs, but the majority of the 30 to 40 phone calls a week he received sought his participation in criminal activity. In response to the Soldier of Fortune ad, Savage was enlisted to murder an individual and accompanied John Moore and Sean Doutre to the victim's home on August 26, 1985. As the victim and his son were driving down the driveway, Doutre killed Braun and wounded his son.

The Court of Appeals for the Eleventh Circuit concluded that the district court in Alabama correctly applied Georgia law. The court held that the lower court properly applied the risk-utility balance by instructing the jury that it could hold the magazine publisher liable only if the advertisement on its face would alert a reasonably prudent publisher to the clearly identifiable unreasonable risk of harm to the public that the advertisement posed. The court rejected Soldier of Fortune's argument that the instructions placed an intolerable burden upon the press and chilled protected speech. The First Amendment does not protect commercial speech related to illegal activity. The court also held that the district court's modified negligence standard satisfied the First Amendment's interests in protecting the commercial and core speech at issue in this case. The district court stressed that the jury could find Soldier of Fortune negligent only if Savage's advertisement "on its face" would have alerted a reasonably prudent publisher that the ad contained a clearly identifiable unreasonable risk that the offer is one to commit a serious violent crime. The court of appeals also held that sufficient evidence existed to sustain the jury determination that publication of the ad was the proximate cause of injuries to the plaintiff and that the chain of causation was not broken.

-J.F.B.

SEGA ENTERPRISES, LTD. V. ACCOLADE, INC., NO. 92-15655, 1992 U.S. APP. LEXIS 26645 (9TH CIR. OCT. 20, 1992).

A computer manufacturer brought suit against a software cartridge manufacturer for trademark and copyright infringement in