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

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nance was constitutional and reversed the judgment of the district court, remanding the case for further proceedings as appropriate.

-J.B.K.

KING V. INNOVATION BOOKS, 976 F.2D 824 (2D CIR. 1992).

Allied Vision, Ltd. and New Line Cinema Corporation appealed from an order of the United States District Court for the Southern District of New York, which, under a claim based on section 43(a) of the Lanham Act (prohibiting use in commerce of "any false designation of origin, false or misleading description of fact, or false or misleading representation of fact" which is "likely to cause confusion . . . or to deceive as to [] affiliation, connection, or association"), granted a preliminary injunction in favor of Stephen King. A substantial part of a King short story entitled "The Lawnmower Man" was incorporated into a movie with the title "Stephen King's The Lawnmower Man." The injunction prohibited the use of a possessory credit, describing the motion picture "The Lawnmower Man" as "Stephen King's The Lawnmower Man," and prohibited the use of a "based upon" credit, representing that the movie was "based upon" a short story by King.

In affirming the preliminary injunction against the use of the possessory credit, the circuit court found both a likelihood of success on the merits of King's claim and irreparable harm should the injunction not be granted. The court stated that a possessory credit ordinarily is given to an individual who had some involvement in, and/or gave approval to, the screenplay or movie itself. King had no involvement in, and gave no approval of, "The Lawnmower Man" screenplay or movie, so the possessory credit was false on its face as it wrongfully attributed the movie to King in the eyes of the general public. The court held that the district court's granting of a preliminary injunction was proper because a presumption of irreparable harm arises in Lanham Act cases once the plaintiff establishes a likelihood of success on a claim of literal falseness.

In reviewing the grant of an injunction against the use of the "based upon" credit, the circuit court held that the district court did not have sufficient support in the testimony and applicable law to find the credit to be misleading and confusing to the public. The court stated that "where a movie draws in material respects from a literary work, both quantitatively and qualitatively, a 'based upon' credit should not be viewed as misleading absent persuasive countervailing facts and circumstances." The similarities between the

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-