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Law Applied: Right of Publicity, First Amendment, Fair Use, Copyright, Lanham Act

Summary: Apple Corps Limited, sued Steven Leber, David Krebs, Beatlemania Ltd., Ely Landau, Ely Landau, Inc., and The This Is The Week That Beatlemania Was Company, Inc., for misappropriation of right of publicity. Judgment for plaintiff.

Apple Corps Limited
v.
Leber, et al.

COMMENTS:

California Superior Court Los Angeles County

No. C 299149

Decided June 3, 1986

***1015** Action by Apple Corps Limited, against Steven Leber, David Krebs, Beatlemania Ltd., Ely Landau, Ely Landau, Inc., and The This Is The Week That Beatlemania Was Company, Inc., for misappropriation of right of publicity. Judgment for plaintiff.

Bertram Fields, Robert F. Marshall, and Greenberg, Glusker, Fields, Claman & Machtinger, all of Los Angeles, for plaintiff.

Joel M. Smith, Gary L. Swingle, and Leopold, Petrich & Smith, all of Los Angeles, Calif., for defendants.

***1016** Breckenridge, Jr., Judge.

In this matter heretofore taken under submission, the Court announces its intended decision as follows:

Judgment for plaintiff and against defendants Leber, Krebs, and Beatlemania, Ltd. in the amount of \$5,625,000, with interest at the rate of seven percent from and after September 25, 1979, until Judgment is entered and thereafter at ten percent, and against defendants Ely Landau, Ely Landau, Inc., and The This Is The Week That Beatlemania Was Company, Inc., in the amount of \$2,000,000, plus interest at a rate of seven percent from and after January 1, 1981, until entry of Judgment, and thereafter at a rate of ten percent, plus costs of suit. In addition, plaintiffs are entitled to injunctive relief against further unconsented presentations of Beatlemania or exploitations of the Beatles persona in whatever form. Counsel for plaintiffs is ordered to prepare, file and serve a Statement of Decision, if timely requested, and Judgment in accordance with the Court's intended decision.

The facts of this lawsuit are basically without contradiction, and, as found by the Court are as set forth in that section of plaintiff's trial brief labelled "The Facts," except for the argumentative material.

Plaintiffs' claims have as their core the right of publicity which the Beatles acquired as a consequence of their joint professional career. Since this case is to be decided by New York law, that right is set forth in the New York Civil Rights Law, sections 50 and 51. These statutes have been held, inter alia, to proscribe the unconsented use by others of a plaintiff's name, portrait, or picture for purposes of trade or advertising.

Beatlemania consisted of Beatles look-alike, sound-alike, imitators performing live on stage twenty-nine of the more popular Lennon-McCartney songs, to a mixed media background, and foreground of slides, and movies which depicted a whole variety of subjects, many of which related to events occurring during the 1960's. The imitators were onstage performing approximately 95% of the 90-100 minute performance.

Defendants' basic defense arises out of the First Amendment to the U.S. Constitution. As a general proposition, a theatrical, orchestral, or cinematic performance is a form of expression, protected as free speech. On the other hand, entertainment that merely imitates, does not have a creative component of its own and is not protected by the First Amendment. Estate of Presley v. Russen, 513 Fed.Supp. 1339, 211 USPQ 1339. Defendants have, therefore, contended that Beatlemania was not simply imitation, but rather an historical overview of the 1960's, and that the mixed media material contained significant political and social comment upon that era, all of which shields defendants with the protection of the First Amendment.

In order to accommodate the right of privacy/publicity and the First Amendment, the New York courts have concluded that an unconsented "use" does not violate the civil rights law if it occurs as the result of publication of newsworthy events or matters of public interest. Thus defendants contend that the use of the mixed media presentation brings Beatlemania within the "newsworthy or public interest" exception, or in the alternative, causes it to be absolutely protected by the First Amendment

guarantee of freedom of expression.

Other contentions have been presented by way of defense, which the Court has previously rejected in the rulings that were made on "in limine" motions. To the extent that they have been again raised at trial, they are rejected.

There is significant case law both in New York and elsewhere holding that the First Amendment protection is not absolute. The U.S. Supreme Court, of course, so held in the case of *Zacchini v. Scripps-Howard*, 433 U.S. 562, 205 USPQ 741, specifically dealing with the right of publicity. Consequently, the Court rejects such a contention here. The Court is faced with the dilemma and conflict posed by the interaction of the First Amendment and plaintiffs' publicity rights. No New York case submitted is exactly on all fours with the instant case. Many cases deal with newspapers, or newspaper articles, and the unconsented use of a photograph. While these cases are of interest, and provide some guidelines for print media uses, they are not entirely helpful in the context of this case as to providing a definitive test for the phrase, "purposes of trade." As one commentator has stated, "Due to first amendment concerns regarding freedom of speech and of the press, New York courts have not construed the second prohibited application of an appropriate name or likeness literally. To prove "trade purposes," a plaintiff must provide evidence of a 'commercial exploitation,' although the exploitation need not be for the purpose of promoting the sale of a particular commodity. The term 'trade' implies an ongoing set of events. Thus an appropriation must be continuous to be 'for the purposes of trade' and in violation of this part of the statute. Some proof of benefit or gain to the defendant is apparently required, *1017 although the mere fact that the medium is published for profit does not, ipso facto, make the use one 'for the purposes of trade.'

The value of freedom of speech and press has prompted the courts to remove from the category of 'use for the purposes of trade' publications of newsworthy matters or matters of legitimate public interest, even if the works sold for a profit. The precise scope of the public interest/newsworthy category is unclear." [FN1] What seems clear is that the New York and other courts which have dealt with these issues, in this new and gradually evolving area of law, have engaged in a balancing process, weighing facts and circumstances surrounding the manner, extent, degree and character of the case, in an effort to determine whether a violation has

occurred.

Plaintiff has urged the Court to adopt the copyright fair-use series of factors as a framework within which the defendants' conduct should be judged. The Court has some reluctance to adopt as New York law, that which New York has neither expressly nor implicitly incorporated within its body of law dealing with sections 50 and 51. On the other hand, in the absence of any clear cut New York or California standards, this Court as the forum, believes it appropriate, as a matter of California public policy to adopt for this case what appears to be a logical and reasonable approach in light of the similarity of the interests involved in copyright and right of publicity law, and the common rationale for the legal protection of such interests. [FN2] Indeed, the U.S. Supreme Court has inferentially recognized the similarity by referring to the *Zacchini* case while discussing the concept of fair use in *Harper and Row Publishers, Inc. v. Nation Enterprises*, (a copyright-fair-use case) 53 L.W. 4562, 225 USPQ 1073, 1079 (1985). Finally, fair use can provide a reasonable, systematic, and consistent frame of reference for evaluating right of publicity matters. Adoption of such standards would provide all persons with a predictable test by which they could determine what conduct would be deemed tortious or constitutionally protected. For all these reasons, the Court has measured the defendants conduct by the fair-use standards, more specifically described in plaintiff's trial brief, and finds and concludes, that defendants' appropriation greatly exceeded any fair use. Without going into unnecessary detail in this memorandum, it appears that by all tests, the scale tips in favor of plaintiff.

[1] Notwithstanding a fair use analysis, the Court is also satisfied that as in *Zacchini*, the defendants' taking or use amounted to virtually a complete appropriation of the Beatles "persona" at least in a qualitative sense. The primary purpose of Beatlemania, live on stage, was the commercial exploitation of the Beatles persona, goodwill and popularity. It's true that the mixed-media presentation was a top quality performance, organized, put together, and presented by some very highly talented and capable persons, but such only provided the setting for what was a fantasy concern by persons who so accurately imitated the Beatles in concert that the audience, according to contemporary viewers, in great part suspended their disbelief and fell prey to the illusion that they were actually viewing the Beatles in performance. This conclusion is amply supported by the evidence, and in particular by the admissions of

Mr. Leber, and his employees.

Beatlemania and the appropriation involved in this case was not just one photograph among many in a newspaper or magazine. The New York company performed eight concerts a week for over three years. In addition, two national touring companies as well as a bus and truck group performed for substantial periods of time. It is fair to conclude that several million people witnessed Beatlemania in several thousand different performances, all of which grossed defendants forty-five million dollars. This was a massive appropriation of the Beatles persona, and the court is satisfied that any New York Court would find a violation of the statute and the rights of plaintiff. By all standards, plaintiffs are entitled to recovery on their right of publicity claim.

Plaintiffs are also entitled to judgment on their unfair competition causes of action. Common sense and reasonable inference from established facts support the conclusion that there was a reasonable likelihood that many viewers of Beatlemania were confused as to whether the Beatles had authorized, consented, or approved the Beatlemania production. The advertising and other promotional material did nothing to dispel the inference that the Beatles had in fact licensed or approved the production. The specific disclaimer at the conclusion of the movie "crawl" was of such size and duration that it is doubtful that any viewers actually saw or read it, and hence must be disregarded. Without doubt, the stage and movie presentations, as presented, unfairly competed with the right of Apple.

The defendants have also raised the "no harm, no foul" defense, by suggesting that plaintiffs have sustained no damages, that the Beatles and Apple received substantial music royalties, and that, therefore plaintiff cannot prevail. It is true in any tort claim where ***1018** compensatory damages are sought, damage is an essential element of the cause of action. But in the claims before this Court, it is not necessary that plaintiff prove an out of pocket loss. Harm consists in the taking of a right and the measure of damages is the reasonable value of what defendant has taken. As was eloquently stated in *Grant v. Esquire, Inc.*, 367 Fed.Supp. 876, 881, 883 the plaintiff would "be able to recover the fair market value of the use for purposes of trade of his face, name, and reputation," . . . If the publisher feels impelled to trade upon the name and reputation of a celebrity, it must pay the going rate

for such benefit."

Various affirmative defenses have been asserted by the defense, including, but not limited to laches, acquiescence, consent, and the Statute of Limitations. The Court has rejected the Statute of Limitations defense heretofore by way of its ruling on "in limine" motion. None of the other asserted defenses are supported by the evidence. Defendants were on notice from the very beginning that the Beatles and Apple objected to Beatlemania. The fact that the lawsuit was not promptly filed, or that a preliminary injunction was not sought did not prejudice defendants, and did not, under the circumstances constitute an express or implied consent to the defendants' conduct.

Based upon the uncontradicted evidence in the record, the public demand for and popularity of the Beatles was so great during the mid-70's that plaintiff could have named its own price for the exercise of the right to license a production such as Beatlemania. Consequently the Court accepts the figure of a royalty rate of 12 1/2 % of gross as the fair market value of the right taken by the stage performance, and \$2,000,000 for the right taken by the movie. Plaintiffs are to be awarded prejudgment interest against Leber, Krebs, and Beatlemania, Ltd., at a rate of seven percent, commencing at the date the complaint was filed, September 25, 1979. While some of the gross was actually received after that date, most accrued before, and hence defendants in equity should pay such interest from the date mentioned.

As to the movie, defendants prejudgment interest shall run from January 1, 1981. The rights agreement between Leber and the Landaus was apparently executed on or about December 20, 1980, and presumably rights payments were made shortly thereafter.

The Court is not awarding punitive damages. While Mr. Leber appears to have acted without much regard for the rights of the Beatles, he did reply, to some extent, upon some questionable advice from reputable law firms in New York. In balance, the Court is not satisfied by a preponderance of the evidence that he acted maliciously.

Plaintiff has also sought attorney fees pursuant to the federal Lanham act. However, a reading of section 1117 of such act appears to limit such relief to situations where the plaintiff is at the time of the

violation a registrant of a mark at the Patent and Trademark Office. Thus, the Court is not including in its intended decision such an award. However, the Court will reserve jurisdiction to reconsider same in the cost bill should plaintiff have further case authority on the subject.

There are other contentions of the parties which have been implicitly decided by the Court, but which have not been discussed in this Memorandum. Suffice it to say that those which deal with any principal controverted issue should be incorporated by plaintiff into the Statement of Decision.

FN1 "Right of Privacy. . .", by Lawrence Sonell, 48 Albany Law Review 1, 23-25 (1983).

FN2 Gagnon Co. Inc. v. Nevada Desert Inn, 45 Cal.2d 448, 454.

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