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Dryer v. Nat'l Football League

814 F.3d 938 (8th Cir. 2016)

JEFFREY T. HUGHES*

BACKGROUND

Appellants in this case are three retired National Football League (NFL) players, John Frederick Dryer, Elvin Lamont Bethea, and Edward Alvin White. Defendant is the National Football League.

The NFL has created hundreds of films about football since 1965 and continues in this tradition today. The films are generally compilations of game footage and interviews with persons involved in the game, including players and coaches. The NFL sells these films to individual consumers and broadcasts them on its television network and website. The NFL also licenses the films to companies like ESPN and Hulu.

Dryer, Bethea, and White have all appeared in game footage in these films and all three have given post-retirement interviews with the understanding that their interviews would appear in these NFL films.

PROCEDURAL HISTORY

Initially, appellants were part of a class action of twenty-three former NFL players. The class asserted that the game footage used in the NFL films violated various states' common law and statutory right-of-publicity and sought injunctive relief and damages. The class also asserted that the NFL's use of images of the appellants playing football violated section 43 of the Lanham Act.¹

Twenty members of the class action settled with the NFL, but appellants Dryer, Bethea, and White opted out of the settlement to pursue their right-of-publicity and Lanham Act claims against the NFL. Appellants assert that the use of the images of them playing football in the video clips violated their publicity rights since they served as advertisements imparting commercial advantage to the NFL.

Appellants brought suit in the United States District Court for the District of Minnesota. Both parties moved for summary judgment, and the district court granted summary judgment for the NFL.

The district court found that the right-of-publicity claims were preempted by the Copyright Act because the work at issue was

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1. 15 U.S.C. § 1125.

copyrightable subject matter and because the rights asserted under copyright and right-of-publicity were equivalent. The district court further found that the NFL films did not confuse consumers as to the appellants' affiliation with, or endorsement of, the NFL, and thus that the Lanham Act claims lacked merit.

ISSUE

The issue before the Eighth Circuit was whether the district court's grant of summary judgment to the NFL was proper. Because summary judgment is generally reviewed *de novo*, the Eighth Circuit had to re-evaluate the district court's holdings.

DECISION

The Eighth Circuit agreed with the district court's grant of summary judgment on the right-of-publicity and Lanham Act issues, although it did not address all of the holdings of the district court. The court agreed that the Copyright Act preempted the appellants' right-of-publicity claims and that the Lanham Act was not applicable to the use of the appellants' images in relation to the NFL because they were "not objectively misleading."²

REASONING

I. RIGHT-OF-PUBLICITY CLAIMS

To determine whether the Copyright Act preempted the right-of-publicity claims, the court considered whether the work at issue was copyrightable subject matter under §§ 102 and 103 of the Copyright Act³ and whether state right-of-publicity laws were equivalent to the rights created by the Copyright Act.

The court made it clear that the game footage was considered copyrightable under the Copyright Act of 1976, and that the Act was specifically modified to ensure that such footage would be given copyright protection. Thus, appellants' argument that their performances in football games were not copyrightable works was easily rebutted. Because appellants were only challenging the publication of the films, the court determined that the work at issue was copyrightable subject matter.

Next, the court considered whether the state right-of-publicity laws created rights that were equivalent to those created by the Copyright Act. Both right-of-publicity laws and copyright laws seek to incentivize creativity by protecting that creativity and allowing authors to gain from it financially. According to the Eighth Circuit, the rights

2. *Dryer v. Nat'l Football League*, 814 F.3d 938, 944 (8th Cir. 2016).

3. 17 U.S.C. §§ 102-103 (2012).

were equivalent. However, the court did note that when a right-of-publicity claim is brought in relation to a copyrighted work that is considered commercial speech, the right-of-publicity claim could have the purpose of protecting consumers from misleading advertising, which would be outside the scope of copyright law. But, when expressive speech, rather than commercial speech, in a copyrighted work is the relevant subject matter of a right-of-publicity claim, the Copyright Act governs the claim.

Appellants alleged that the NFL's films constituted commercial speech, meaning that the state right-of-publicity laws would govern the suit. The court had to determine whether or not the films were considered commercial speech. To do this, the court turned to a three-part test: "(i) whether the communication is an advertisement, (ii) whether it refers to a specific product or service, and (iii) whether the speaker has an economic motivation for the speech."⁴

The Eighth Circuit agreed with the district court's finding that the NFL films were not commercial speech. The films were not advertisements because they did not ask the viewer to participate in any sort of commercial transaction. The films discussed games or events related to the NFL, but they did not refer to the NFL as a product or service. The films were, in and of themselves, a specific product. There is no question that the NFL had an economic motivation for creating the films, but this factor alone could convert the films into commercial speech.

The court concluded that the NFL films were copyrightable subject matter, not commercial speech; and therefore, that the right-of-publicity rights were equivalent to the rights within the scope of the Copyright Act. The court agreed with the district court's finding that the Copyright Act preempted the right-of-publicity claims.

II. LANHAM ACT CLAIMS

The purpose of section 43 of the Lanham Act is to protect consumers from being confused about the origin of the goods or services that they are purchasing. More specifically, the Act is meant to protect consumers from being misled by false endorsements of goods or services. The court said that to prevent summary judgment under this section, appellants had to show that the statements in question were "'literally false as a factual matter' or 'literally true or ambiguous but which implicitly convey a false impression, are misleading in context, or [are] likely to deceive consumers.'"⁵

Appellants presented survey evidence that a significant number of those surveyed thought that the players appearing in the films endorsed the NFL. However, survey evidence is not convincing unless

4. *Dryer*, 814 F.3d at 943.

5. *Dryer*, 814 F.3d at 944.

objectively misleading statements are made. A defendant cannot be punished because consumers misunderstand a statement. As applied here, appellants did not assert that the films were factually false or that they made misleading statements or were misleading in context. The films as a whole tended to positively represent the NFL, but nothing in the films indicated that appellants endorsed the NFL. In particular, because appellants were interviewed for the films, they had the chance to share their views on the NFL. Even though the survey evidence demonstrated that some viewers thought that appellants were endorsing the NFL, this was a misunderstanding based on statements that were not objectively misleading. Although the district court had alternative reasons for granting summary judgment, the Eighth Circuit did not rule on them because this finding was sufficient to grant summary judgment.