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Books and Magazines

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III. BOOKS AND MAGAZINES

A. Copyright

1. *Agreements With Authors Regarding Idea Submissions Should Be Specific*

When the bargaining powers of one party greatly outweigh those of another, the doctrine of unjust enrichment can be applied to overcome such inequity.¹ In a recent decision by a New York district court, a free-lance journalist was permitted to amend her complaint (after she had rested her case) to provide a quasi-contractual basis upon which she could recover against the Reader's Digest Association.² The court granted her relief on a theory of unjust enrichment, describing this case as one which would result in an "injustice of the most fundamental sort" if the Reader's Digest Association were permitted to enjoy the benefits of plaintiff's idea without just compensation.³

The controversy of this case began in November of 1978, when the plaintiff, Rosella Werlin, submitted an article to the *Reader's Digest*, a monthly magazine published by the defendant Reader's Digest Association (RDA).⁴ Werlin had been a journalist for over fifty years and had published articles in various periodicals throughout the nation.⁵ In 1971, Werlin submitted an article to the RDA for the first time which was subsequently rejected.⁶ In 1972, she attended the Southwest Writers Conference in Houston and met the managing editor for RDA, Mr. John H. Allen.⁷ Allen spoke on behalf of RDA to encourage unknown writers to submit their articles for potential publication.⁸ During this speech he informed his audience, including Werlin, of the type of subjects which were classified by RDA as good areas for publication.⁹ Allen also outlined the then effective pay scale utilized by RDA in order to pay for pieces submitted from the general populace.¹⁰ Allen did not inform the audience that under certain circumstances an author might

1. *Werlin v. Reader's Digest Ass'n., Inc.*, 528 F. Supp. 451 (S.D.N.Y. 1981).

2. 528 F. Supp. at 467.

3. *Id.* at 466.

4. *Id.* at 454.

5. *Id.*

6. *Id.* at 456.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* At the time Werlin submitted her article, RDA was paying \$2,600 for "original" articles or \$3,500 for first person manuscripts. *Id.* at 455.

only receive a \$500.00 "kill fee" or a \$250.00 "spotter's fee."¹¹

Following Allen's speech, Werlin discussed with Allen her prior attempt to be published by RDA.¹² At this time he encouraged her to try again and stated that if a situation ever arose where Werlin submitted an original article which was not publishable in its present form, she could rewrite it with the help of RDA.¹³ Allen did not tell her of RDA's policy of using the topic of an already published original as a basis upon which to prepare an original article for publication, in return for the "spotter's fee."¹⁴

From 1973 through 1976, Werlin sent articles to Allen to be considered for publication, only to be rejected.¹⁵ However, RDA's notices of rejection never criticized the quality of Werlin's work.¹⁶ To the contrary, most of Allen's notes praised her improvement and encouraged her to continue to make submissions.¹⁷

In 1978, Werlin completed an article entitled "Rina: A Child Whose Problems Changed Many Lives."¹⁸ The central theme of this article focused upon the life-long goal of Rina, a Down's Syndrome child, to have a Bas Mitzvah.¹⁹ Following the article's completion, Werlin disseminated copies for publication to a variety of local papers.²⁰ The *Houston's Legal Advocate* accepted and subsequently published Werlin's story.²¹

It is in light of this background that Werlin submitted her article to RDA and unlike Werlin's previous experiences she did not receive a rejection letter from them.²² Instead, she heard nothing until she spoke with Rina's mother, who informed her that she had been contacted by RDA and that Mr. Blank would be writing the article on Rina.²³ At

11. *Id.* at 456. A "kill fee" is paid to an author if the RDA decides not to use the piece at all while a "spotter's fee" is paid if RDA decides to have the topic rewritten by one of their own staff writers. *Id.* at 455.

12. *Id.* at 456.

13. *Id.*

14. *Id.* at 456-57.

15. *Id.* at 457.

16. *Id.*

17. *Id.* Allen later stated that he had encouraged Werlin with the hope that she might someday produce a useable product even though he personally believed that she was and is incapable of doing so. *Id.*

18. *Id.* at 454.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 455, 457-58.

23. *Id.* at 458.

this point Werlin called Blank to discuss the use of her article.²⁴ Blank informed her that RDA had decided to use the topic for an original piece which Blank would write for RDA.²⁵ Werlin offered to cooperate with Blank on the article and demanded that she receive a by-line for any article he put out on the topic.²⁶ Blank refused her offer, but offered her \$250.00 for "spotting" the idea for his new article.²⁷ Werlin declined and wrote letters of complaint to Blank's editor at RDA.²⁸ Subsequently, RDA published Blank's article, for which he received \$3,500.00 in addition to his regular salary, while Werlin was sent a check for \$250.00 as a "spotter's fee."²⁹

Werlin filed suit against Blank and RDA for copyright infringement and misappropriation.³⁰ During trial and at the close of her case, Werlin moved to leave to further amend her complaint pursuant to Rule 15(b) of the Federal Rules of Civil Procedure.³¹ The court granted this motion after defendants' counsel stated that such amendment would not be prejudicial as long as the court confined its decision to the existing record.³² This allowed Werlin to assert a quasi-contract claim on the theory that defendants were unjustly enriched through their use of the story idea in Werlin's article.³³

The first claim addressed by the court was Werlin's claim against RDA for copyright infringement.³⁴ In order to succeed on a claim for copyright infringement, the plaintiff must show two things: ownership of a valid copyright and that the defendant has copied the plaintiff's property.³⁵

Here, the court determined that Werlin's article sufficiently met the ownership requirement.³⁶ Although Werlin did not place notice of copyright upon all of her publicly distributed copies, as required by law, her article was automatically protected upon the date of its com-

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 459.

30. *Id.*

31. *Id.* at 460.

32. *Id.*

33. *Id.*

34. *Id.* (citing 17 U.S.C. § 501(a) (1976)).

35. *Id.* at 460 (citing *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1092 (2d Cir. 1977); *Kamakazi Music Corp. v. Robbins Music Corp.*, 522 F. Supp. 125, 134 (S.D.N.Y. 1981)).

36. 528 F. Supp. at 460.

pletion.³⁷ Ordinarily, the omission of this notice will invalidate the copyright.³⁸ However, when the registration of an article has been or is made within five years from the date of its publication the copyright is preserved as long as a reasonable effort is made to add notice of copyright once its omission is discovered.³⁹ Werlin registered her article in 1980 (well within the five-year requirement), and prevented the public dissemination of other copies without notice after her discovery of the omitted copyright.⁴⁰

Since Werlin's article met the requirements for ownership of a copyright, the court held that this right was not lost by publication in the *Houston's Legal Advocate* without the affixed copyright notice.⁴¹

Next, the court looked to whether the defendant "copied" the plaintiff.⁴² Copying will be inferred when the plaintiff proves that the defendant had access to the copyrighted work and that the two works are substantially similar.⁴³ Since it was obvious that the defendant had access to the article, the court focused upon the question of whether the articles by Werlin and by Blank were substantially similar.⁴⁴

The court stated that the general test to determine substantial similarity is "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."⁴⁵ Copyright laws protect only the author's expression of an idea and not the idea itself.⁴⁶ Where a literary work is based upon historical events, copyright protection extends only to the author's expression of those events and not the event itself.⁴⁷

In order to apply these rules, the court must separate the non-protected event from the protected manner of expression⁴⁸ and then compare the manner of expression used by each author to determine

37. *Id.* at 460-61 (citing 17 U.S.C. §§ 301(a), 302(a) (1976)).

38. 17 U.S.C. § 405(a)(2) (1976).

39. 528 F. Supp. at 461.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* (citing *Warner Bros. v. American Broadcasting Cos.*, 654 F.2d 204, 207 (2d Cir. 1981)).

44. *Id.* at 461. RDA stipulated that it received Werlin's article in November of 1978, and Blank testified that he received a copy in December of 1978. *Id.*

45. *Id.* (citing *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir. 1966)).

46. 17 U.S.C. § 102(b) (1976).

47. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 978-79 (2d Cir. 1980), *cert. denied*, 449 U.S. 841 (1980).

48. 528 F. Supp. at 462; *see Reyher v. Children's Television Workshop*, 533 F.2d 87, 91 (2d Cir. 1976), *cert. denied*, 429 U.S. 980 (1976).

whether the latter work is substantially similar to the first.⁴⁹

In this case, the court ruled that neither RDA's determination that the subject of Werlin's article was a "viable" topic nor Blank's use of facts substantially similar to those used by Werlin constituted infringement of Werlin's copyright.⁵⁰ The former was held to be merely a duplication of Werlin's non-protectible idea, and as such could not form the basis of a finding of infringement;⁵¹ the latter, as factual information, was found to fall within the public domain.⁵²

Thus, the court turned its attention to whether Blank's manner of expression was substantially similar to that used in Werlin's article.⁵³ There are two types of substantial similarity, neither of which require any literal word-for-word duplication.⁵⁴ The first type, referred to as "comprehensive non-literal similarity," permits a finding of substantial similarity where the fundamental essence or structure of a substantial part of one work is duplicated in another even though there is no literal duplication.⁵⁵ The second type of substantial similarity, "fragmented literal similarity," is found in spite of a lack of duplication of either the essence or the structure if there are a number of instances of literal similarity between the two works.⁵⁶

First, the court addressed the question of whether there existed any non-literal similarity between Werlin's and Blank's articles.⁵⁷ To do this the court used the "patterns" test "to determine whether Blank's article 'tracked' in any material way, Werlin's treatment of events."⁵⁸

49. 528 F. Supp. at 462.

50. *Id.*

51. *Id.*

52. *Id.* (citing *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 309 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Alexander v. Haley*, 460 F. Supp. 40, 44-45 (S.D.N.Y. 1978)).

53. *Id.* at 462.

54. *Id.*

55. This distinction between the two types of substantial similarity is described by Professor Nimmer in his treatise. See 3 M. Nimmer, *Nimmer on Copyright*, § 13.03(MB)[a][1], [2] (rev. ed. 1981).

56. As to the comprehensive, nonliteral similarity test, the court explained that the willingness of the courts to use this test is based upon the principle that if protection was extended exclusively to the literal duplication, the "plagiarist would escape by immaterial variations." 528 F. Supp. at 462 (citing *Nichols v. Universal Pictures Co.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931)).

56. 528 F. Supp. at 463. The court's use of the "fragmented literal similarity" test is based on the principle that "a work may be substantially diminished even when only part of it is copied; if the part that is copied is of great qualitative importance to the work as a whole." *Id.*

57. *Id.*

58. *Id.* The "patterns" test refers to the duplication of a pattern of the first author's

Applying these principles, the court found that there were no significant comprehensive non-literal similarities between the two articles.⁵⁹

Next, the court considered the question of literal similarity.⁶⁰ In order to find substantial similarity by way of literal similarity, the court must determine whether the literal duplication comprises a material part of the first work.⁶¹ This requires the court to look first to the quantitative amount of literal duplication in comparison to the total size of the first article.⁶² If the quantity copied is insignificant, the court will look to whether "the language duplicated is material to the copied work."⁶³

Applying the aforementioned principles to this case, the court found that, although Blank had duplicated two lines out of Werlin's article, these lines were not material to Werlin's work (as is required when the quantity of duplication is very small).⁶⁴

After completing its analysis of substantial similarity between Werlin's and Blank's articles, the court concluded that the two articles were not substantially similar, and dismissed this part of Werlin's claim.⁶⁵

The court turned next to consider plaintiff's claim against RDA for the misappropriation of her idea.⁶⁶ In order to successfully maintain a claim for misappropriation, the plaintiff must prove two things: first, that the defendant obtained access to the plaintiff's idea either through an abuse of his fiduciary or confidential relationship with the plaintiff or through fraud or deception,⁶⁷ second, "that the defendant's use of the idea deprived the plaintiff of the opportunity to reap its due profits

description of events. See *McGraw Hill, Inc. v. Worth Publishes, Inc.*, 335 F. Supp. 415, 420 (S.D.N.Y. 1971).

59. 528 F. Supp. at 463. For example, Blank's article focused primarily upon the human interest story of Rina Cahana, and only slightly addressed Down's Syndrome in any context, while Werlin's article utilized Rina's Bas Mitzvah as an introduction into her discussion of Down's Syndrome children. *Id.*

60. 528 F. Supp. at 463-64.

61. *Id.* at 463 (citing *Nikanov v. Simon & Schuster, Inc.*, 246 F.2d 501, 504 (2d Cir. 1957)).

62. *Id.* at 463-64 (citing 3 M. Nimmer, *Nimmer on Copyright*, § 13.03[a][2] at 13-32 (1981)).

63. 528 F. Supp. at 464 (citing *Miller Brewing Co. v. Carling O'Keefe Breweries Co.*, 452 F. Supp. 429, 439 (1978)).

64. 528 F. Supp. at 464.

65. *Id.*

66. *Id.* The court analyzed this claim under New York tort law. *Id.*

67. *Id.* (citing *Warner Bros. v. Gay Toys, Inc.*, 513 F. Supp. 1066, 1069 (S.D.N.Y. 1981), *rev'd on other grounds*, 658 F.2d 76 (2d Cir. 1981)).

on the idea."⁶⁸

In the present case, the court found that there was no fiduciary or confidential relationship between RDA and Werlin and that RDA did not act in a fraudulent manner.⁶⁹ Additionally, the court ruled that Werlin presented no evidence to show that she was deprived of her opportunity to reap the profits of her idea and therefore failed to meet the second portion of the test.⁷⁰ Since RDA did nothing to diminish the value of Werlin's article to Werlin, the fact that it was of some value to RDA was irrelevant to her unfair competition claim.⁷¹

Finally, the court considered Werlin's claim in quasi-contract on a theory of unjust enrichment.⁷² Under New York law, "a contract will be implied in fact when the evidence shows that the parties clearly intended payment to the extent of use of the plaintiff's idea though they did not set forth that intention in express language."⁷³ The court found that there clearly was no express contract between RDA and Werlin concerning the article she submitted to him in 1978.⁷⁴ The court did find an implied-in-fact contract between the parties regarding articles previously submitted to RDA by Werlin, since both parties clearly contemplated potential publication and compensation.⁷⁵ However, because Werlin was unaware of RDA's policy of utilizing its own authors to write on ideas brought to RDA and paying out only a "spotter's fee" to the original author, there was no implied-in fact contract as to Werlin's 1978 article: neither party expected nor intended payment.⁷⁶

Nonetheless, the court stated that a defendant may still be liable to a plaintiff under a theory of unjust enrichment even if no express or implied-in-fact contract for the sale or use of plaintiff's idea has been established.⁷⁷ This allows a plaintiff to recover in equity when the defendant has unfairly benefited from its use of plaintiff's idea.

New York law requires that a plaintiff first show that the defendant was enriched by the plaintiff.⁷⁸ This is accomplished by demonstrating that plaintiff's idea was novel, concrete, and actually

68. 528 F. Supp. at 464 (citation omitted).

69. *Id.*

70. *Id.* at 464-65.

71. *Id.* at 465. It is relevant, however to Werlin's quasi-contract claim. *Id.*

72. *Id.*

73. *Id.* (citations omitted).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* See *Matarese v. Moore-McCormack Lines, Inc.*, 158 F.2d 631, 634 (2d Cir. 1946).

78. *Id.* (citations omitted).

appropriated by defendant.⁷⁹ Here, the court found that Werlin established all three. Even though Werlin's article had previously been published by the *Houston's Legal Advocate*, RDA in all likelihood would have never come across Werlin's article had she not mailed it in. Thus, to RDA, Werlin's idea was novel. The idea was concrete, since it had already been developed into an article, and RDA essentially conceded the fact that it had appropriated Werlin's idea by its development of the idea into an article published in its periodical.⁸⁰

Under the second prong of New York's test for unjust enrichment, the plaintiff must show that the circumstances underlying the defendant's enrichment were such that it would be unjust, both in equity and good conscience, to allow the defendant to refuse to make any restriction to the plaintiff.⁸¹ Here, the court found what it termed "a classic case of unjust enrichment."⁸² RDA had encouraged Werlin, for nearly a decade, to submit articles and ideas to RDA for possible publication.⁸³ Werlin was never told that any of her ideas might ultimately be prepared by one of RDA's author's, nor was she told that RDA had serious doubts about her writing ability.⁸⁴ Instead, RDA continued to encourage her in its good-faith belief that she might produce a useable article.⁸⁵ When Werlin finally did submit a topic which proved to benefit RDA, RDA denied any legal obligation toward her.⁸⁶ The court stated that "[t]o permit RDA to refuse to pay any compensation to Werlin would be, notwithstanding the fact that RDA did not act in bad faith, to permit an injustice of the most fundamental sort."⁸⁷

RDA argued in its defense that Werlin's quasi-contract claim, being based on New York law, should have been preempted by federal copyright law.⁸⁸ However, the court found that to the extent that Werlin's submission to RDA was a completed article, it was protected under the Copyright Act; to the extent that it was merely an idea, it was not protected under the Act, but rather enjoyed limited protection

79. *Id.* (citing *Seymore v. Reader's Digest Association, Inc.*, 493 F. Supp. 257, 265 (S.D.N.Y. 1980), *aff'd mem.*, 657 F.2d 264 (2d Cir. 1981); *Galanis v. Procter & Gamble Corp.*, 153 F. Supp. 34, 38 (S.D.N.Y. 1957).

80. 528 F. Supp. at 466.

81. *Id.* at 465.

82. *Id.* at 466.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 467.

under New York State law.⁸⁹

After finding for Werlin on her quasi-contract claim, the court next addressed the issue of compensation.⁹⁰ Generally, such compensation would be calculated by reference to the actual value of the benefit received by the defendant, as opposed to the market value of plaintiff's services rendered.⁹¹ However, since Werlin's quasi-contract claim was not raised until after she had rested her case, and Werlin had stipulated that she would be bound to her original record, there had not been any evidence introduced concerning profits earned by RDA resulting from its use of Werlin's article.⁹² Therefore, the court limited damages to five hundred dollars (plus interest), the amount being paid by RDA in 1978 as a "kill fee."⁹³

The effects of this decision are two-fold. On the one hand, the district court utilized its discretionary powers to create an equitable remedy where needed to avoid an unfair result. Although this result was reached ultimately through the use of New York state law, this decision suggests that this district court may look to the state law to obtain relief where the federal law does not provide it under like circumstances. On the other hand, this decision may serve as a warning to publications to tread more carefully when discussing pay scales with aspiring writers. RDA suggested that this decision might put them at risk whenever it encouraged writers or accepted their unsolicited articles, but the court pointed out that this decision and its holding was confined only to the facts of this particular case.⁹⁴ Although the effects

89. *Id.* The court noted that:

the elements of a quasi-contract claim are significantly different from those of a federal copyright claim; moreover, the rights that the doctrine of quasi-contract seeks to protect are qualitatively different from those that federal copyright law endeavors to preserve. Under such circumstances, the courts of this Circuit have consistently declined to find that state law has been preempted by the Copyrights Act.

Id. (citations omitted).

90. *Id.*

91. *Id.* (citations omitted).

92. *Id.*

93. *Id.*

94. *Id.* at 466. The key facts leading to this holding were:

- (1) RDA encouraged an author to submit her published pieces to be considered for reprinting;
- (2) RDA failed to tell the author that it might use one of the author's published pieces as an idea for one of its own articles;
- (3) RDA also failed to tell the author that it had a very low opinion of her ability to write an article suitable for republication in *Reader's Digest*;
- (4) the author ultimately submitted an article on a topic that RDA found to be an excellent idea for an article and that RDA would otherwise not have found; and

of this decision are unclear at this time, the potential for its use as a precedent in similar federal copyright cases exists and could present problems to publishers while creating relief for naive writers.

Kimberly Sloan

B. Constitutional Law

1. *Child Pornography Not Protected Speech in New York*

When the United States Supreme Court began regulating expression, it categorized different kinds of speech as either protected or unprotected.¹ However, it became increasingly wary of any such blanket prohibitions on expression, and began to create exceptions to these rigid classifications.² The Court recently found reason to reverse that trend by placing child pornography in the category of speech completely without constitutional protection. In *New York v. Ferber*,³ the Court upheld a New York criminal statute⁴ banning the distribution of material depicting sexual conduct by children, without a requirement that the material meet traditional obscenity standards.

In 1978, adult bookstore proprietor Paul Ferber sold two films to an undercover police officer that depicted young boys masterbating.⁵ He was indicted under section 263.10⁶ and section 263.15⁷ of the New York Penal Code. Both laws prohibited the promotion of sexual performances by a child, but section 263.15 did not require a showing of obscenity. Ferber was convicted under section 263.15, and the Appellate Division affirmed.⁸

(5) RDA never asked the author to rewrite her article, but proceeded to use the topic as the basis for one of its own pieces, which piece became the lead article in an issue of *Reader's Digest*.

Id.

1. *Chaplinsky v. New Hampshire*, 313 U.S. 568 (1942) included "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . ." in a class of speech clearly prohibitable without constitutional violation. *Id.* at 571-72.

2. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) found protection for some libelous statements.

3. 458 U.S. 747, 102 S. Ct. 3348 (1982).

4. N.Y. Penal Law § 263.15 (McKinney 1980). Under § 263.15, "[a] person is guilty of promoting a sexual performance by a child when knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age."

5. 102 S. Ct. at 3352.

6. N.Y. Penal Law § 263.15 (McKinney 1980). See *supra* note 4.

7. N.Y. Penal Law § 263.10 (McKinney 1980). § 263.10 is nearly identical to § 263.15, adding only the word obscene.

8. *People v. Ferber*, 74 A.D.2d 558, 424 N.Y.S.2d 967 (1980).

The New York Court of Appeals reversed, finding the statute underinclusive⁹ and overbroad,¹⁰ in violation of the First Amendment.¹¹ The court reasoned that section 263.15 was intended to prohibit the distribution of protected materials because it did not explicitly include an obscenity standard, as did section 263.10.¹² Implicit in the reasoning was the assumption that the traditional standard of obscenity used in section 263.10¹³ was appropriate, and that non-obscene sexual conduct by children could not be treated specially.¹⁴

The United States Supreme Court then unanimously upheld the statute, and effectively created a new class of unprotected speech. The majority¹⁵ stressed that the clear and convincing threat to the welfare of children in this case outweighed any possible invasions of First Amendment rights.

The Court cited five reasons to justify its distinction between child pornography and other pornography. First, it deferred to the judgment of the New York legislature that the use of children as subjects of pornographic materials was harmful to the physiological, emotional and mental health of the child.¹⁶ The Court then recognized that it had previously acted to protect children from exposure to non-obscene literature¹⁷ and had justified special treatment of indecent but not obscene broadcasting received by children.¹⁸ Second, it found that the standard of obscenity set forth in *Miller v. California*¹⁹ was not a satisfactory solution to the problem of child pornography. Materials exploiting children may not be patently offensive or appeal to the average prurient interest, and they may contain some value. Such characteris-

9. The court noted that § 263.15 did *not* prohibit the distribution of materials depicting non-sexual activities equally dangerous to children. *Id.*

10. The court stressed that § 263.15 also prohibited non-obscene materials depicting sexual conduct by children, such as medical or educational treatments. *Id.*

11. *People v. Ferber*, 52 N.Y.2d 674, 422 N.E.2d 523, 439 N.Y.S.2d 863 (1981).

12. *Id.* at 678.

13. The court in *Miller v. California*, 413 U.S. 15 (1973) held that "a state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 24. Since *Miller*, the U.S. Supreme Court and most state statutes have adhered to its guidelines.

14. 102 S. Ct. at 3352.

15. Justice White spoke for the 5-member majority. Justice O'Connor filed a concurring opinion. Justice Blackmun concurred without an opinion. Justice Stevens, and Justice Brennan (joined by Justice Marshall) both filed opinions concurring in the judgment only.

16. 102 S. Ct. at 3355.

17. *Ginsberg v. N.Y.*, 390 U.S. 629 (1968).

18. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

19. *Miller v. California*, 413 U.S. at 24. See *supra* note 13.

tics, however, would not diminish the harm to a child portrayed therein.²⁰

Third, the distribution of such materials was an integral part of their production, which was illegal in all fifty states. Current production laws have, however, been difficult, if not impossible to enforce against the low-profile industry. The Court saw that enforcement of distribution laws could greatly enhance the efficient curtailment of the industry, with no greater threat to Fifth Amendment freedom than that caused by the production laws.²¹ Fourth, the value of allowing children to appear in such films was exceeding modest, if not *de minimus*,²² compared to a relatively slight cost to free speech.²³ Fifth, it was allowable to classify speech on the basis of its content²⁴ where the "evil to be restricted overwhelmingly outweighs" the First Amendment interests in free expression.²⁵

After the Court concluded that section 263.15 explicitly singled out this type of material for prohibition, and was thus not underinclusive,²⁶ it addressed Ferber's claim that the statute was overbroad. The Court began by stating that "the traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court."²⁷ However, an exception to this principle is known as the First Amendment overbreadth doctrine, which reflects the concern that "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression."²⁸ Use of the doctrine has been limited with respect to regulation of conduct, and the court has insisted that the overbreadth be substantial before a facial invalidation can occur.²⁹

20. 102 S. Ct. at 3356-57. The court also pointed out that if the distribution of these materials was heavily sanctioned, then the market would dry up for the producers, effectively curtailing the exploitation of children.

21. *Id.* at 3357.

22. *Id.*

23. *Id.* The trial court had suggested that a person over the statutory age who looked younger could be used if necessary for a literary, artistic, scientific, or educational work.

24. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 742-48 (1978). *See supra* note 18. *See also N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (libelous publications generally without first amendment protection).

25. 102 S. Ct. at 3358.

26. *Id.* at 3359.

27. *Id.* at 3360.

28. *Id.* 3361 (citing *Village of Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 634 (1980)).

29. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

The New York Court of Appeals failed to apply this analysis, as it found the statute to be directed at pure speech. The court then found the statute to be fatally overbroad, as it would include medical and educational materials as well as hardcore pornography.³⁰ The Supreme Court, however, saw it as conduct plus speech, and found the above analysis applicable. It then held that section 263.15 was a classic case of a "statute whose legitimate reach dwarfs its arguably impermissible applications,"³¹ and thus was not substantially overbroad.

The *Ferber* majority left open the question of First Amendment protection for the materials if they had any serious literary, artistic or educational value, which prompted comment in the concurring opinions. Justice O'Connor was alone in stating that such material should also be prohibited, as the audience's appreciation of the depiction is simply irrelevant to New York's asserted purpose of protecting children from physiological, emotional and mental harm.³² That may be true, but that was not the only interest the *Ferber* court considered. The concurrences of Justice Brennan (joined by Justice Marshall) and Justice Stevens suggested that a ban on materials with any serious value would violate the First Amendment. Justice Brennan justified increased First Amendment protection by explaining that such depictions would not threaten the same harms to a child, and the production of those materials is not by the low-profile industry that produces purely pornographic materials.³³

Further, there is direct evidence in the majority's opinion that even the majority would not go so far as to prohibit distribution of materials with some value. It relief heavily on the unique relationship between the production and distribution branches of pure pornography,³⁴ and on the evidence of harm to children used to produce it.³⁵ However, the use of children in works of socially redeeming value would not prompt the same reaction, and the delicate balance would most likely need to be restruck. Finally, the term "child pornography" was consistently used by the Court. This could have meant that a depiction of a sexual act by a child in a non-pornographic work with socially redeeming value should remain protected.

The foregoing arguments probably explain the Court's decision to

30. 52 N.Y.2d at 678.

31. 102 S. Ct. at 3363.

32. *Id.* at 3364.

33. *Id.* at 3365-67.

34. *Id.* at 3356.

35. *Id.* at 3355 n.8-10.

afford this material *no* protection, rather than place any restrictions on it. In *Young v. American Mini Theatres, Inc.*, the Court subjected non-obscene, but sexually graphic films to time, place and manner restrictions.³⁶ But there, the need to protect the interests of America's young was not really at issue, nor was the uniquely dependent relationship between the production and distribution of child pornography. Therefore, the holding in *Ferber* could logically be seen as being limited to its unique facts, and not interpreted as a signal that the Court intends to further erode previously protected First Amendment freedoms.

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36. 427 U.S. 50 (1976) (upholding zoning ordinance restricting location of theatres exhibiting sexually explicit but not legally obscene films).