

Morrissey
v.
Procter & Gamble Co.

379 F.2d 675

United States Court of Appeals,
First Circuit

June 28, 1967

ALDRICH, C.J.: This is an appeal from a summary judgment for the defendant. The plaintiff, Morrissey, is the copyright owner of a set of rules for a sales promotional contest of the "sweepstakes" type involving the social security numbers of the participants. Plaintiff alleges that the defendant, Procter & Gamble Company, infringed, by copying, almost precisely, Rule 1. In its motion for summary judgment, based upon affidavits and depositions, defendant denies that plaintiffs Rule 1 is copyrightable material, and denies access. The district court held for the defendant on both grounds.

Taking the second ground first, the [court found that there was enough of a factual issue as to access to preclude summary judgment for defendant.]

The second aspect of the case raises a more difficult question. Before discussing it we recite plaintiffs Rule 1, and defendant's Rule 1, the italicizing in the latter being ours to note the defendant's variations or changes.

"1. Entrants should print name, address and social security number on a boxtop, or a plain paper. Entries must be accompanied by . . . boxtop or by plain paper on which the name . . . is copied from any source. Official rules are explained on . . . packages or leaflets obtained from dealer. If you do not have a social security number you may use the name and number of any member of your immediate family living with you. Only the person named on the entry will be deemed an entrant and may qualify for prize.

"Use the correct social security number belonging to the person named on entry . . . wrong number will be disqualified."

(Plaintiffs Rule)

"1. Entrants should print name, address and Social Security number on a Tide boxtop, or *on* [a] plain paper. Entries must be accompanied by Tide boxtop (*any size*) or by plain paper on which the name 'Tide' is copied from any source. Official rules are *available* on Tide Sweepstakes packages, or *on* leaflets *at* Tide dealers, *or you can send a stamped, self-addressed envelope to:* Tide 'Shopping Fling' Sweepstakes, P.O. Box 4459, Chicago 77, Illinois.

"If you do not have a Social Security number, you may use the name and number of any member of your immediate family living with you. Only the person named on the entry will be deemed an entrant and may qualify for a prize.

"Use the correct Social Security number, belonging to the person named on *the* entry--wrong numbers will be disqualified."

(Defendant's Rule)

The district court, following an earlier decision, . . . took the position that since the substance of the contest was not copyrightable, which is unquestionably correct, *Baker v. Selden*, . . . and the substance was relatively simple, it must follow that plaintiffs rule sprung directly from the substance and "contains no original creative authorship." . . . This does not follow. Copyright attaches to form of expression, and defendant's own proof, introduced to deluge the court on the issue of access, itself established that there was more than one way of expressing even this simple substance. Nor, in view of the almost precise similarity of the two rules, could defendant successfully invoke the principle of a stringent standard for showing infringement which some courts apply when the subject matter involved admits of little variation in form of expression. . . .

Nonetheless, we must hold for the defendant. When the uncopyrightable subject matter is very narrow, so that "the topic necessarily requires," . . . if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance. In such circumstances it does not seem accurate to say that any particular form of expression comes from the subject matter. However, it is necessary to say that the subject matter would be appropriated by permitting the copyrighting of its expression. We cannot recognize copyright as a game of chess in which the public can be checkmated. . . .

Upon examination the matters embraced in Rule 1 are so straightforward and simple that we find this limiting principle to be applicable. Furthermore, its operation need not await an attempt to copyright all possible forms. It cannot be only the last form of expression which is to be condemned, as completing defendant's exclusion from the substance. Rather, in these circumstances, we hold that copyright does not extend to the subject matter at all, and plaintiff cannot complain even if his particular expression was deliberately adopted.

Affirmed.