

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-11003

LYONS PARTNERSHIP,

Plaintiff-Appellant,

versus

TED GIANNOULAS, doing business
as Famous Chicken; TFC, INC.,

Defendants-Appellees.

Appeals from the United States District Court for the
Northern District of Texas

July 7, 1999

Before REAVLEY, JOLLY, and EMILIO M. GARZA, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Lyons Partnership LP ("Lyons"), the owners of the rights to the children's caricature Barney, sued Ted Giannoulas, the creator of a sports mascot--The Famous Chicken ("the Chicken")--because the Chicken had incorporated a Barney look-alike in its act. The district court granted summary judgment to Giannoulas and awarded attorneys' fees.

On appeal, Lyons raises six issues, the most important of which is whether the district court erred when it determined that there was insufficient evidence that Giannoulas's use of the Barney

trademark caused consumer confusion under the Lanham Act.¹ Because we agree with the approach taken by the district court, we affirm.

I

This case involves a dispute over the use of the likeness of "Barney," a children's character who appears in a number of products marketed to children.² Barney, a six-foot tall purple "tyrannosaurus rex," entertains and educates young children. His awkward and lovable behavior, good-natured disposition, and renditions of songs like "I love you, you love me," have warmed the hearts and captured the imaginations of children across the United States. According to Lyons, the owner of the intellectual property rights for Barney and the plaintiff in the suit below, the defendants--Giannoulas d/b/a The Famous Chicken and TFC, Inc. ("TFC"), the owner of the intellectual property rights to the Chicken--sought to manipulate Barney's wholesome image to accomplish their own nefarious ends.

The Chicken, a sports mascot conceived of and played by Giannoulas, targets a more grown-up audience. While the Chicken

¹We have reviewed the other issues raised by Lyons and, after a consideration of the arguments made on appeal and a review of the briefs and the record, find no reversible error.

²These items include television shows, videotapes, books, magazines, music albums, and plush dolls. In addition, a person dressed in a Barney costume has made public appearances at numerous events, including inaugural balls at both of President Clinton's inaugurations, a Red Sox game (where Barney threw the first pitch), and a public appearance with Nelson Mandela.

does sell marketing merchandise, it is always sold either by direct order or in conjunction with one of the Chicken's appearances. Thus, the Chicken's principal means of income could, perhaps loosely, be referred to as "performance art." Catering to the tastes of adults attending sporting events, most notably baseball games, the Chicken is renowned for his hard hitting satire. Fictional characters, celebrities, ball players, and, yes, even umpires, are all targets for the Chicken's levity. Hardly anything is sacred.

And so, perhaps inevitably, the Chicken's beady glare came to rest on that lovable and carefree icon of childhood, Barney. Lyons argues that the Chicken's motivation was purely mercenary. Seeing the opportunity to hitch his wagon to a star, the Chicken incorporated a Barney look-alike into his acts. The character, a person dressed in a costume (sold with the title "Duffy the Dragon") that had a remarkable likeness to Barney's appearance, would appear next to the Chicken in an extended performance during which the Chicken would flip, slap, tackle, trample, and generally assault the Barney look-alike.

The results, according to Lyons, were profound. Lyons regales us with tales of children observing the performance who honestly believed that the real Barney was being assaulted. In one poignant account related by Lyons, a parent describes how the spectacle brought his two-year-old child to tears. In fact, we are told,

only after several days of solace was the child able to relate the horror of what she had observed in her own words--"Chicken step on Barney"--without crying. After receiving such complaints from irate parents who attended the Chicken's performances with their children, Lyons sought to defend this assault on their bastion of child-like goodness and naiveté.

Giannoulas offers a slightly different perspective on what happened. True, he argues, Barney, depicted with his large, rounded body, never changing grin, giddy chuckles, and exclamations like "Super-dee-Dooper!," may represent a simplistic ideal of goodness. Giannoulas, however, also considers Barney to be a symbol of what is wrong with our society--an homage, if you will, to all the inane, banal platitudes that we readily accept and thrust unthinkingly upon our children. Apparently, he is not alone in criticizing society's acceptance of a children's icon with such insipid and corny qualities. Quoting from an article in The New Yorker, he argues that at least some perceive Barney as a "pot-bellied," "sloppily fat" dinosaur who "giggle[s] compulsively in a tone of unequalled feeble-mindedness" and "jiggles his lumpish body like an overripe eggplant." The Talk Of The Town: Pacifier, The New Yorker, May 3, 1993 at 37. The Internet also contains numerous web sites devoted to delivering an anti-Barney message.³

³One Internet search service provides a list of links to anti-Barney web sites, many of which contain warnings like the

Giannoulas further notes that he is not the only satirist to take shots at Barney. Saturday Night Live, Jay Leno, and a movie starring Tom Arnold have all engaged in parodies at the ungainly dinosaur's expense.

Perhaps the most insightful criticism regarding Barney is that his shows do not assist children in learning to deal with negative feelings and emotions. As one commentator puts it, the real danger from Barney is "denial: the refusal to recognize the existence of unpleasant realities. For along with his steady diet of giggles and unconditional love, Barney offers our children a one-dimensional world where everyone must be happy and everything must be resolved right away." Chala Willig Levy, The Bad News About Barney, Parents, Feb. 1994, at 191-92 (136-39).

Giannoulas claims that, through careful use of parody, he sought to highlight the differences between Barney and the Chicken. Giannoulas was not merely profiting from the spectacle of a Barney look-alike making an appearance in his show. Instead, he was engaged in a sophisticated critique of society's acceptance of this ubiquitous and insipid creature. Furthermore, Giannoulas argues that he performed the sketch only at evening sporting events.

The sketch would begin with the Chicken disco dancing. The Barney character would join the Chicken on the field and dance too,

following: "If you're offended by material that suggests the killing of Barney, or like him in any way, please don't come here."

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