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Zhao Jikang v. Qujing Cigarette Plant

Citation: The Yunnan Province Higher People's Court's Civil Judgment No. Yungaominsanzhongzi 16/2003

Date of judgment: September 26, 2003

Procedural history

Zhao Jikang (Zhao) sued, in the Kunming City Intermediate People's Court, the Qujing Cigarette Plant (Qujing) for copyright infringement and unfair competition by filing application for registration of the title of his movie play Five Golden Flowers (the work) as a mark to be used in respect of cigarettes. Qujing's act was not established, in the first-instance judgment, as an act of copyright infringement and unfair competition. Dissatisfied, Zhao appealed to the Yunnan Province Higher People's Court.

Issue

Whether use of the title of another party's work as a trademark constituted copyright infringement or unfair competition

Facts

In 1958, Zhao et. al. created the movie play Five Golden Flowers depicting the life of a local ethnic community in Yunnan Province. A movie of the same title was produced out of the work and publicly shown in 1959. In 1983, Qujing filed an application with the Trademark Office for registration of the title Five Golden Flowers as a mark to be used in respect of cigarette, and from then on made and marketed the "Five Golden Flowers" brand cigarette.

The first-instance court wrote to the National Copyright Administration (NCA) regarding the issue

of whether the title of a literary work was protected under the Copyright Law. The Copyright Administration Department of the NCA issued the Reply (No. Quanshi 65/2001) That the Title of a Literary Work Was Not Due to Be Protected under the Copyright Law, noting that whether the title of a work was protected under the Copyright Law depended on the originality of the title. If it was original, it should, but it was more appropriate to apply the Unfair Competition Law to matters concerning titles of works.

It was decided in the first-instance judgment that the title of the movie play in suit was not protected under the Copyright Law, nor was the dispute subject to the regulation under the Unfair Competition Law. Zhao's litigant claims were rejected.

Zhao argued in his appeal that the Copyright Law protected a literary work without taking the number of words composing the work as the element. Originality was the sole condition to accord the protection. The title "Five Golden Flowers" of the play was original, and a substantial, integral part of the play. Use of it without authorization from the copyright proprietor was an infringement of the copyright in the work. Meanwhile, he requested applying the Copyright Law and Unfair Competition Law to the case.

Rule of law

Rule 2 of the Implementing Regulations of the Copyright Law *The term "works" used in the Copyright Law shall mean original intellectual creations in the literary, artistic and scientific domain, insofar as they are capable of being reproduced in a certain tangible form.*

Article 2, paragraphs two and three, of the Unfair Competition Law *"Unfair competition" mentioned in this Law refers to a business operator's acts violating the provisions of this Law, infringing the lawful rights and interests of another business operator and disrupting the socio-economic order. "A business operator" mentioned in this Law refers to a legal person or any other economic organization or individual engaged in commodities marketing or profit-making services ("commodities" referred to hereinafter include such services).*

Reasoning

1. Whether use of the title of a work as a trademark constituted copyright infringement.

The subject matter protected under the Copyright Law was works. According to the definition of Rule 2 of the Implementing Regulations of the Copyright Law, besides originality, a work eligible for the protection under the Copyright Law should also independently convey views, information, idea and feeling, so as to provide the public with some information. It should not be a simple combination of lexical items.

The play Five Golden Flowers was a literary work of integrity, with Five Golden Flowers its title and integral part thereof. Only upon reading the whole work could a reader understand the idea, feeling, personality the writer intended to convey and his style of creation. Isolated from the specific content of the work, the title “Five Golden Flowers” alone, with a limited number of words could not embrace the originally created part of the work, so it did not have the element of a work in the sense of law, and it lacked the attributes of a work.

2. Whether use of the title of a work as a trademark constituted unfair competition.

The Unfair Competition Law regulates the legal relations of market players on equal footing in market competition with a view to ensuring the healthy development of socialist market economy, encouraging and protecting fair competition, ceasing acts of unfair competition and safeguarding the legitimate rights and interests of business operators and consumers. Zhao was not a market business operator competing with Qujing, so his dispute with Qujing was not subject to the regulation under the Unfair Competition Law.

Holding

1. The title “Five Golden Flowers” of the work was not protected under the Copyright Law.
2. Qujing’s use of “Five Golden Flowers” as a mark was not an act of unfair competition.