1994

King v. Innovation Books: An Analysis of Credit Attribution with Respect to the Lanham Act

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KING v. INNOVATION BOOKS: AN ANALYSIS OF CREDIT ATTRIBUTION WITH RESPECT TO THE LANHAM ACT

I. INTRODUCTION

Filmmakers must properly credit an author when they adapt the author's work into a film. Most litigation occurs when an author is improperly credited or not credited in a film or its advertising. Authors may sue under section 43(a) of the Lanham Act when an erroneous credit is used. In *King v. Innovation Books*, the Second Circuit decided whether an author can disassociate himself from a film that is based upon his work.

In *King*, author Stephen King sued under section 43(a) to enjoin the use of his name in credits for a film based on his short story. The United States Court of Appeals for the Second Circuit affirmed the issuance of a preliminary injunction prohibiting King's name from being used in the film's possessory credits. However, the Second Circuit permitted the use of King's name in a based upon credit, even though the author wanted no connection with the film.

The Second Circuit found that the film and the short story were substantially similar, which under the terms of the licensing contract between King and the filmmakers required the filmmakers to acknowledge King in a credit. The court used the substantial

1. *William Packard, The Art of Screenwriting* 41 (1987). Adapting a film requires making significant changes to the original work, "[a screenwriter] must be allowed to rearrange, cut and add whatever he feels is necessary to make the material work in cinematic terms." *Id.*
3. 15 U.S.C. § 1125(a)(1)(A) (1988 & Supp. IV 1992) (known as § 43(a)). The Lanham Act prohibits the commercial use of "any false designation of origin, false or misleading description of fact, or false or misleading representation of fact" that is "likely to cause confusion . . . or to deceive as to [ ] affiliation, connection or association." *Id.; see* Gilliam v. ABC, 538 F.2d 14, 24-25 (2d Cir. 1976) (finding violation of § 43(a) where television network eliminated "essential and humorous" portions of original program thereby causing misleading designation of program's origin). For a further discussion of *Gilliam*, see infra notes 83-87 and accompanying text.
4. 976 F.2d 824 (2d Cir. 1992).
5. *Id.* at 829.
6. *Id.* at 826.
7. *Id.* at 829.
8. *Id.* at 831.
similarity test to compare the works and then used a provision in
the licensing agreement to justify the based upon credit. King is
significant because the court used a novel analysis to require an
author’s association with the film.

This Note will first analyze the facts in King. This Note then
examines the creative process of filmwriting: describing the process
from writing the screenplay to marketing and distributing the com-
pleted film and the creative process’ interplay with credit attribution.
The legal background relating to federal and state remedies
for misleading and false credit attribution will be explored. This
Note will then analyze the Second Circuit’s holding and reasoning
in King. The Note will conclude with a discussion of the impact of
the Second Circuit’s holding on authors who license the rights to
their literary works for adaptation into film.

II. FACTS

In 1970, best-selling author Stephen King9 wrote the short
story *The Lawnmower Man* (Short Story), which was published in
1975.10 Eight years later, King assigned the Short Story’s motion
picture and television rights to Great Fantastic Picture Corporation
(Great Fantastic), which eventually assigned the rights to Allied Vi-
sion (Allied), a film production company.11 The assignment agree-
ment gave Great Fantastic “the ‘exclusive right to deal with the
[Short Story] as [it] may think fit’”12 and it allowed King to receive
“an interest in the profits of ‘each’ film ‘based upon’ the Short
Story.”13 With respect to credit attribution, any assignee had to ac-

author of many successful horror thrillers, such as *The Shining, Carrie* and *Salem’s
10. *The Lawnmower Man* is published in a collection of short stories entitled
Short Story is about Harold Parkette, a suburban homeowner, and the man he
hires to mow his lawn. *King*, 976 F.2d at 827. The lawnmower man, an agent
of the pagan god Pan, has the ability to move the lawnmower by force of mind. Id.
Parkette witnesses the lawnmower man’s strange behavior and phones the police.
*Id*. The lawnmower man then directs the lawnmower to kill Parkette. *Id*. The
story ends as the police discover Parkette’s body in his birdbath. *Id*.
11. *King*, 976 F.2d at 826. Allied is used throughout this Note to refer to
Allied, New Line Cinema and Innovation Books. Allied is also synonymous with
filmmaker.
12. *Id*.
13. *Id*. The assignment agreement also granted the corporation the rights:
(i) to write film treatments [and] scripts and other dialogue versions of
all descriptions of the [Short Story] and at all times to add to[,] take
from[,] use[,] alter[,] adapt . . . and change the [Short Story] . . . . (ii) to
knowledge King in the credits of any film "wholly or substantially" based on the Short Story.\textsuperscript{14}

In February 1991, Allied marketed a film entitled \textit{The Lawnmower Man},\textsuperscript{15} describing it as a film "'based upon' a story by Stephen King" and as "Stephen King's \textit{The Lawnmower Man}."\textsuperscript{16} In June 1991, Allied licensed New Line Cinema Corporation (New Line) to distribute the film in the United States.\textsuperscript{17}

After learning of the forthcoming film, King's lawyer, Jay Kramer, sent New Line several letters protesting its use of King's name in connection with the film.\textsuperscript{18} The film was released in the United States on March 7, 1992, with screen credits attributing the film to King.\textsuperscript{19} Kramer continued to object to the film's credits, but New Line distributed the film as Stephen King's \textit{The Lawnmower Man}.\textsuperscript{20}

King filed suit against Allied and New Line in the United States District Court for the Southern District of New York.\textsuperscript{21} King sought

\begin{itemize}
  \item make or produce films of all kinds . . . incorporating or based upon the [Short Story] or any part or parts thereof or any adaptation thereof.
\end{itemize}

\textit{Id.}

\textsuperscript{14} \textit{King}, 807 F. Supp. at 305.

\textsuperscript{15} \textit{King}, 976 F.2d at 826. The screenplay was completed by August 1990, pre-production work began in January 1991 and filming began in May 1991. \textit{Id.} at 826-27.

The two hour movie centers around a character named Dr. Lawrence Angelo. \textit{Id.} at 827. Dr. Angelo experiments with virtual reality technology on Jobe, a young man with a childlike mentality, who mows neighborhood lawns. \textit{Id.} The technology greatly increases Jobe's intellect. \textit{Id.} Dr. Angelo eventually loses control of the experiment and Jobe becomes hostile and violent. \textit{Id.} Jobe uses his powers to employ the lawnmower to kill Dr. Angelo's neighbor, Harold Parkette. \textit{Id.} The police discover Parkette's body in his birdbath. \textit{Id.} In the climax of the movie, Dr. Angelo destroys Jobe. \textit{Id.}

\textsuperscript{16} \textit{Id.} at 826. The phrase "Stephen King's \textit{The Lawnmower Man}" is a possessory credit.

\textsuperscript{17} \textit{Id.} at 827. New Line marketed the movie, stating it was "from the mind of" and "from the imagination of Stephen King." \textit{King v. Allied Vision}, 807 F. Supp. at 303.

\textsuperscript{18} \textit{King}, 976 F.2d at 827. In a letter dated October 9, 1991, Kramer informed Allied that "King 'd[id] not want' a possessory credit to appear on the film." \textit{Id.} After Kramer received a copy of the screenplay, Kramer wrote another letter to Allied informing them that King "'emphatically object[ed]' to the possessory credit." \textit{Id.} On February 18, 1992, Kramer advised New Line's President of Production, Sara Risher, that King was "outraged" at the movie's marketing. \textit{Id.}

\textsuperscript{19} \textit{Id.}

\textsuperscript{20} \textit{Id.}

\textsuperscript{21} \textit{King v. Allied Vision}, 807 F. Supp. 300. Although Allied is a British company, the United States District Court for the Southern District of New York held that the United States had jurisdiction to enjoin Allied's actions. \textit{Id.} at 307; see, e.g., Steele v. Bulova Watch Co., 344 U.S. 280 (1952); Calvin Klein Indus. v. BFK Hong Kong, Ltd., 714 F. Supp. 78 (S.D.N.Y. 1989) (finding United States courts possess jurisdiction to enjoin misuse of name in connection with foreign distribution
an injunction to prevent Allied and New Line from using his name in either a possessory or based upon credit\textsuperscript{22} in connection with the film *The Lawnmower Man*.\textsuperscript{23} King claimed that Allied and New Line falsely designated him as the film’s creator.\textsuperscript{24} King also alleged that the use of the possessory and based upon credits violated section 43(a) of the Lanham Act and New York’s law of unfair competition.\textsuperscript{25}

The Southern District granted the injunction and concluded that: 1) the possessory credit was false because King had no part in developing the screenplay;\textsuperscript{26} 2) the based upon credit was misleading because the film and the Short Story were fundamentally dissimilar\textsuperscript{27} and 3) King suffered irreparable harm from the use of the false credits in the form of potential injury to his reputation.\textsuperscript{28} The injunction prohibited Allied and New Line from using King’s name “on or in connection with” the film.\textsuperscript{29}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{22} The marketing of the film as “from the mind of” or “from the imagination of Stephen King” constituted the based upon credits. *King v. Allied Vision*, 807 F. Supp. at 303.
\item \textsuperscript{23} Id. at 300.
\item \textsuperscript{24} King, 976 F.2d at 826. King argued that he was entitled to relief because he did not contribute to making the film and because “the movie [did not bear] likeness to the short story which he authored and published under the same name.” *King v. Allied Vision*, 807 F. Supp. at 302.
\item \textsuperscript{25} King v. Allied Vision, 807 F. Supp. at 302. New York’s common law of unfair competition seeks to prevent unauthorized use of a name or trademark. See Flexitized Inc. v. National Flexitized Corp., 335 F.2d 774 (2d Cir. 1964); Windsor, Inc. v. Intravco Travel Ctrs., Inc., 799 F. Supp. 1513 (S.D.N.Y. 1992). For a further discussion of state antidilution statutes, see infra notes 107-18 and accompanying text.
\item \textsuperscript{26} King v. Allied Vision, 807 F. Supp. at 305. The district court determined that the possessory credit was false and misleading because King neither participated in the making of the film nor approved of the film. Id.
\item \textsuperscript{27} Id. The district court held that the based upon credit “grossly exaggerated” the relationship between the film and Short Story. Id.
\item \textsuperscript{28} Id. The court concluded that such blatant misrepresentation would inevitably and irreparably harm King. Id.
\item \textsuperscript{29} Id. at 307.
\end{enumerate}
\end{footnotesize}
On appeal to the Second Circuit, Allied argued that the possessory credit was not false because "the other movie credits make clear that King was not the producer, director or writer of the film." The court held that the Southern District did not err in prohibiting the use of the possessory credit. The court determined that King had no involvement in creating the screenplay, nor did he approve of the screenplay in advance; therefore, New Line and Allied’s use of the possessory credit was a misrepresentation that violated section 43(a).

However, the Second Circuit determined that the Southern District applied the wrong standard of review for establishing whether the use of the based upon credit was misleading. The Second Circuit used a quantitative and qualitative test to compare the Short Story to the film and concluded that the works were substantially similar. The Second Circuit reversed the Southern District's prohibition on the use of the based upon credit because King's assignment agreement obligated Allied to credit King for any film "based wholly or substantially" upon the story.

III. BACKGROUND

A. Overview of the Creative Process of Filmmaking

The creative process of filmmaking depends on whether the film is based on a pre-existing work or if it is an original film. The creative process for original feature films begins when a screenwriter presents a screenplay treatment to an agent, producer or director. Once a production company purchases a treatment for development, the screenwriter develops the story into a full-length screenplay. The treatment is a compressed version of a story that emphasizes its pivotal moments. Treatments allow the writer to test the story and view potential mistakes before the treatment is turned into a full screenplay.

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30. King, 976 F.2d at 829. New Line and Allied also analogized the film project to other King projects and stated that "King has in the past received a possessory credit where he merely approved in advance of the screenplay or movie." Id.
31. Id.
32. Id.
33. Id. John Breglio, an attorney specializing in entertainment law, testified as an expert for King. Id. Breglio testified that the standard in the film industry for determining substantial similarity involves "looking at the work as a whole and how much protected material from the underlying work appears in the derivative work." Id. (emphasis in original).
34. Id. at 830.
35. Id. at 831. For a discussion of the original assignment agreement, see supra notes 15-16 and accompanying text.
36. Paul Max Rubenstein, Writing for the Media 95 (1988). A treatment is a compressed version of a story that emphasizes its pivotal moments. Id. at 93. Treatments allow the writer to test the story and view potential mistakes before the treatment is turned into a full screenplay. Id. at 99.
37. Packard, supra note 1, at 92.
Once a film is produced it is then licensed or sold to distributors and is then released in theaters. The process varies when a film is adapted from a pre-existing work because the film's producers must first purchase the right to use the work, which is generally accomplished through the use of licensing agreements. These licensing agreements permit filmmakers to adapt the work and require filmmakers to acknowledge the author of the pre-existing work. When an author licenses a filmmaker to adapt an original work, the licensee is permitted to cinematically interpret the original work. Authors must allow screenwriters to alter the original work in order to translate the piece into a successful film adaptation. Producers acknowledge an author's contributions to a film by placing the author's name in both advertising and screen credits for the film. Possessory credits and based upon credits are often used to recognize an author's role. Filmmakers should not relinquish possession of a work by selling ownership of it, they should only license others to use the work. Films are adapted from a variety of media: novels, stage plays, biographies and history. The alternative to adapting a pre-existing literary work is to produce a film from an original screenplay.
the film is adapted from an author's original work. If the film's possessory or based upon credits are misleading, an author may sue to enjoin the use of the credit.

B. Theories of Recovery for False Credit Attribution

A credit is false when an author is credited for a work that has been substantially altered from the author's original work. A false film credit injures the author because the public associates the author with a film that is unsuccessful or the public associates the author with a film that is very different from the author's original work. An author who has been acknowledged in a false or misleading credit can attempt to enjoin the unauthorized use of the author's name under two legal theories. First, the author can sue under section 43(a) of the Lanham Act, alleging that the use of the author's name created a false impression as to the origin of the film. Second, the author can claim that the credit violates state commerce laws designed to protect reputation.

1. Section 43(a) of the Lanham Act

Section 43(a) of the Lanham Act creates civil liability for any person who falsely indicates the origin of goods or services or falsely

46. Id.
47. THOMAS D. SELZ ET AL., ENTERTAINMENT LAW § 17.07 (Revised ed. 1992). False credit attribution occurs when an author is credited with creating a work that the author did not create or when an author's work is edited such that the finished product no longer resembles the author's work. Id. § 17.47 n.321.
48. Id. § 17.02. The public is also injured because it is deceived into patronizing a product because of the false credit. Id.
50. Gilliam v. ABC, 538 F.2d 14, 24 (2d Cir. 1976).
(a)(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which -
(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in
describes goods or services. Thus section 43(a) prohibits misrepresentations of products or services; these misrepresentations constitute unfair competition. Section 43(a) not only protects the public from deception, but also protects "economic interests" analogous to those protected by trademark law. In the context of a false credit attribution, section 43(a) protects the property interest in an author's reputation and it protects the public from confusion as to the origin of a film.

An author is injured by false film credit attributions in two ways: the credited author is perceived to endorse a film that may be unsuccessful and the author's reputation is linked directly to the success or failure of the film. Thus section 43(a) "is primarily used to rectify credit violations."

Under section 43(a), an author who alleges false credit attribution must establish two elements to receive injunctive relief. First, the miscredited author must prove that the use of the author's name involves goods or services that affect interstate commerce. Second, the author must prove that the other party falsely described or falsely designated the origin of the goods or services.

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53. Id. In 1989, Congress amended § 43(a) to include expansive judicial interpretations of § 43(a), thereby expanding the section's reach over unfair competition. SELZ ET AL., supra note 47, § 17.37 n.234. The Trademark Law Revision Act of 1988 was described as a codification of expansive interpretations of § 43(a). Id. However, the amendment had little impact on King.

54. SELZ ET AL., supra note 47, § 17.37. Although § 43(a) is part of the Lanham Act which is the federal trademark statute, § 43(a) has little connection with trademarks, as it prohibits unfair competition in a variety of business settings. Id.; see Ames Publishing Co. v. Walker-Davis Publishing, Inc., 372 F. Supp. 1, 11 (E.D. Pa. 1974).


56. SELZ ET AL., supra note 47, § 17.08 n.19.

57. Depending on an author's popularity, credit attribution can serve as a ticket-buying incentive for the public. PACKARD, supra note 1, at 4. Thus the public may be deceived by a misleading credit.

58. SELZ ET AL., supra note 47, § 17.03 n.19.

59. Id.

60. Id.

61. Allen v. National Video, Inc., 610 F. Supp. 612, 625 (S.D.N.Y. 1985). The Dallas Cowboys Cheerleaders court added: "[Section 43(a)] is not limited to false designations of origin, but is directed also to any other false or misleading description regarding the character or nature of the goods or services." Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 467 F.Supp. 366, 374 (S.D.N.Y.), aff'd 604 F.2d 200 (2d Cir. 1979) (citing RUDOLF GALLMANN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 18.2(b), at 622-23 (3d ed. 1967)).
A plaintiff suing for injunctive relief under section 43(a) does not have to prove that consumers are actually deceived. The plaintiff must only demonstrate that the description is either literally false or has a tendency to mislead and confuse consumers. To determine whether the public is likely to be confused, the Southern District stated that "[t]he question is what is the likely ultimate impression, upon customers and potential customers of the relevant services and products which will be created by what is said and what is reasonably implied." If the defendant's description creates the impression that the plaintiff endorsed the product, then the defendant has violated section 43(a).

3. Case Law Developments in Section 43(a)

Although there are no cases directly controlling King, several cases decided by the Southern District and the Second Circuit are instructive in establishing that: 1) courts have applied section 43(a) to cover credits that are "incorrect designations" of authorship; 2) courts have consistently used a likelihood of confusion test in section 43(a) false credit attribution cases and 3) the Second Circuit has held that the use of a possessory credit in conjunction with a substantially altered work is a violation of section 43(a).

In Harlequin Enterprises Ltd. v. Warner Books, Inc., the Southern District stated that the use of a false authorship credit violates section 43(a). In Harlequin, author Don Pendleton licensed Harlequin Enterprises to use his name and the characters he created in a series of books. Pendleton then relinquished participation in...

62. Dallas Cowboys Cheerleaders, 467 F. Supp. at 374. Section 43(a) covers literal falsity and indirect intimations. Id.

63. McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co., 938 F.2d 1544, 1549 (2d Cir. 1991). A claim is literally false if a statement or description on its face causes actual public confusion. Dallas Cowboys Cheerleaders, 467 F. Supp. at 374. A claim is literally true under the statute, yet misleading, if the statement or description is ambiguous. Id.

64. Dallas Cowboys Cheerleaders, 467 F. Supp. at 374 (citing FTC v. Sterling Drug, Inc., 317 F.2d 669, 674-75 (2d Cir. 1963)) (emphasis in original).


68. Id. at 1091.

69. Id.
writing the books.70 Harlequin published several books and attributed authorship to Pendleton in a possessory credit.71 Pendleton sued Harlequin to enjoin its use of the possessory credit on books that Pendleton did not write.72 The Southern District held that the author acquiesced to the credit in the licensing agreement, therefore, section 43(a) was not violated.73 In applying section 43(a) to false credit attribution cases, the Southern District has consistently hewed to the likelihood of confusion test for determining whether injunctive relief is appropriate.74 In Follett v. New American Library, Inc.,75 the Southern District held that a co-author could not be attributed as a primary author because the credit misrepresented the co-author's contribution to the "finished work."76 In Follett, popular novelist Ken Follett substantially edited a translated novel originally written by several French authors.77 After a series of assignments of the book's rights, Arbor House, a United States publishing company, released the book under Ken Follett's name, displaying his name more prominently than the French authors.78 Ken Follett sued for injunctive relief and the court held that Arbor House could not equally attribute Follett and the French authors.79

The court found that Follett established a likelihood of confusion and that the credits had a tendency to mislead the public as to the authorship of the book.80 The court enjoined the use of credits which attributed him as the book's principal author.81 The court stated that section 43(a) "vindicate[s] 'the author's personal right to

70. Id. at 1082-84.
71. Id. at 1085. The credit was "Don Pendleton's 'Mack Bolan.'" Id.
72. Id.
73. Id.
74. In a case involving false celebrity endorsement, the Southern District applied the likelihood of confusion test. In Allen v. National Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985), actor Woody Allen sued to enjoin the use of a Woody Allen look-alike in a commercial for National Video. Id. at 617-18. The Southern District held that National Video's use of a Woody Allen look-alike in a commercial created a likelihood of "consumer confusion over plaintiff's endorsement or involvement" with National Video and, therefore, violated § 43(a). Id. at 628. The court stated that consumer confusion exists whether or not the public actually believes Allen appeared in the commercial. Id. Thus National Video violated § 43(a) as long as the reference to Allen implied that he was involved in or approved of the product. Id. at 628-29.
76. Id. at 313.
77. Id. at 307.
78. Id. at 308.
79. Id. at 313.
80. Id.
81. Id. at 312-13. The court determined that Follett was properly attributed as a co-author. Id.
prevent the presentation of his work to the public in a distorted form."\textsuperscript{82}

The Second Circuit has extended section 43(a) to enjoin the use of false possessory credits in connection with an author's altered work. In \textit{Gilliam v. ABC},\textsuperscript{83} Monty Python, an English comedy troupe, sought to enjoin ABC from televising versions of three programs that Monty Python wrote and performed on British television that ABC edited for American television.\textsuperscript{84} After viewing the edited programs, Gilliam, a member of Monty Python, sued ABC alleging that ABC irreparably harmed Monty Python by airing an altered work and crediting Monty Python as the creator of the altered program.\textsuperscript{85} The Second Circuit held that the edited version of the television programs falsely represented the plaintiff's work and it issued an injunction preventing rebroadcast of the programs.\textsuperscript{86} \textit{Gilliam} indicates that a court may grant injunctive relief under section 43(a) when a party misleadingly presents the altered work of an author as the author's original work.\textsuperscript{87} These three cases provide the foundation for the Second Circuit's possessory credit holding in \textit{King}.

4. Based Upon Credit Case Law Under Section 43(a)

The Southern District has on two previous occasions held that a based upon credit can be used as long as some portion of the original work is in the derivative work. In \textit{Geisel v. Poynter Products, Inc.},\textsuperscript{88} children's author and artist Theodore Geisel sought to enjoin the defendants from using his pen name, Dr. Seuss, in advertising a toy modeled after the plaintiff's characters, but which the plaintiff did not develop.\textsuperscript{89} The court stated that a manufacturer cannot use any description that is intended to deceive consumers as to the origin of the product or as to a celebrity's endorsement of

\begin{itemize}
  \item \textsuperscript{82} \textit{Id.} at 313 (quoting Gilliam v. ABC, 538 F.2d 14, 24 (2d Cir. 1976)).
  \item \textsuperscript{83} 538 F.2d 14 (2d Cir. 1976).
  \item \textsuperscript{84} \textit{Id.} at 17. Monty Python entered into an agreement with the British Broadcasting Corporation (BBC) to write and deliver scripts for use in a BBC television series. \textit{Id.} BBC subsequently licensed ABC to broadcast two Monty Python television specials in the United States. \textit{Id.} at 18.
  \item \textsuperscript{85} \textit{Id.} The alterations created a likelihood of public confusion with the original program. \textit{Id.} at 19.
  \item \textsuperscript{86} \textit{Id.} at 25. The Second Circuit found that "the truncated version [of the program] at times omitted the climax of the skits . . . and at other times deleted essential elements in the schematic development of a story line." \textit{Id.}
  \item \textsuperscript{87} \textit{Id.} at 24-25.
  \item \textsuperscript{88} 283 F. Supp. 261 (S.D.N.Y. 1968).
  \item \textsuperscript{89} \textit{Id.} at 263. The court initially held the defendants liable because the descriptions used by the defendants created a "false impression" that Geisel created the toys. \textit{Id.} at 267.
\end{itemize}
the product.\textsuperscript{90} The Southern District enjoined the toymaker's use of possessory credits.\textsuperscript{91} However, in subsequent proceedings, the court held that the toymaker did not violate section 43(a) because the defendant changed the descriptions of the dolls to make it clear that the toys were only based on the characters of Dr. Seuss, but were not specifically produced or endorsed by him.\textsuperscript{92}

In \textit{Geisel II}, the Southern District found that the toymaker's use of the based upon credit was literally true.\textsuperscript{93} The court determined that the based upon credit was necessary to inform the public of the dolls' origin.\textsuperscript{94}

In \textit{Landon v. Twentieth Century-Fox Film Corp.},\textsuperscript{95} a case factually similar to \textit{King}, author Margaret Landon licensed Fox to adapt her novel to film.\textsuperscript{96} Landon protested when Fox released the television films, which differed substantially from her novel, with a credit stating the films were based upon Landon's novel.\textsuperscript{97} The Southern District upheld the filmmaker's use of the based upon credit, finding the credit to be literally true despite the substantial alterations to Landon's original work.\textsuperscript{98} The court stated that "[e]ven without permission from an author or the existence of a written agreement with him, any person may truthfully state that a work is 'based on' or 'suggested by' the work of that author."\textsuperscript{99} Thus the interest in

\textsuperscript{90.} Id. at 268.
\textsuperscript{91.} Id.
\textsuperscript{93.} Id. at 353. The court found that the credit adequately described the origin of the dolls. \textit{Id.}
\textsuperscript{94.} Id.
\textsuperscript{95.} 384 F. Supp. 450 (S.D.N.Y. 1974).
\textsuperscript{96.} Id. at 452. Part of the dispute centered on whether Landon licensed Fox to produce only a motion picture or if the license included the right to produce television films. \textit{Id.} The court held that the license was broadly drafted and included the implicit right to adapt the novel for television. \textit{Id.} at 454.
\textsuperscript{97.} Id. at 459.
\textsuperscript{98.} Id. at 459-60. The licensing agreement contemplated credit attribution no matter how substantial the alterations to the novel were. \textit{Id.} at 459.

In \textit{Playboy Enterprises, Inc. v. Dumas}, 831 F. Supp. 295 (S.D.N.Y. 1993), the estate of artist Patrick Nagel sued Playboy to enjoin its use of the credits "by Patrick Nagel" and "from the Playboy Collection" on altered works by the late artist. \textit{Id.} The Southern District stated that the descriptions did not violate § 43(a) because they were "literally true." \textit{Id.} at 316. The court found no injury to the public because the descriptions created no confusion regarding the origin of the illustrations nor did the descriptions impugn endorsement of the altered illustrations by the estate. \textit{Id.}

\textsuperscript{99.} Landon, 384 F. Supp. at 459. The Southern District does require that some part of the original work appear in the derivative work. Curwood v. Affiliated Distribs., 283 F. 219 (S.D.N.Y. 1922). In \textit{Curwood}, a based upon credit was used, even though the film only borrowed a title from the original work. \textit{Id.} \textit{Curwood} is
preventing the public from being misled as to the origin of a work outweighed the author's artistic objections.100

In *Granz v. Harris,*101 a case analogous to *Landon*, the Second Circuit granted an injunction preventing the seller of musical records from selling altered compositions under the credit "[p]resented by Norman Granz."102 Granz had a contract requiring the defendant to attribute him as musical composer of any records it released.103 However, the defendant released a record that was substantially altered from Granz's original composition, but which acknowledged the work as Granz's.104 The Second Circuit found that the defendant breached its contract with Granz and engaged in unfair competition.105 In *Granz*, the bulk of Granz's composition was on the record, but the court found that the deletion of eight minutes of the composition substantially altered Granz's work and justified the court's conclusion that the use of the credit was incorrect.106 However, *Granz* can be distinguished from *King* because the court did not base the *Granz* decision on section 43(a) and because the credit discussed in *Granz* is a possessory credit, not a based on credit.

These cases establish that section 43(a) is a flexible statute that authors can use to enjoin false credit attributions. However, section 43(a) is not the sole form of relief for miscredited authors; authors may also seek relief under state antidilution laws.

3. State Antidilution Laws

State antidilution laws prevent injury to a person's or a business' reputation and prevent the erosion of the distinctive quality of their names.107 Antidilution statutes focus on preventing unauthorized use of a name, rather than focusing on consumer confusion.108 Thus miscredited authors may seek injunctive relief under state an-
tidilution statutes to prevent the unauthorized use of their names.\textsuperscript{109}

To obtain an injunction under New York’s Antidilution Law, a miscredited author must establish that the author’s name is distinctive and that a likelihood of dilution of the name exists if the unapproved use of the name continues.\textsuperscript{110} Similar to section 43(a), the antidilution law’s standard of proof does not require that dilution actually exist.\textsuperscript{111} Both statutes require only a mere likelihood that the asserted harm, dilution or confusion, will occur.

In \textit{Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.},\textsuperscript{112} the Dallas Cowboys Cheerleaders sought to enjoin Pussycat Cinema from distributing the erotic film \textit{Debbie Does Dallas} under section 43(a) and New York’s Antidilution Law.\textsuperscript{113} The film contained scenes that implied the Cheerleaders either participated in the making of the film or endorsed it.\textsuperscript{114} The Southern District held that the defendant’s unauthorized use of the Cheerleaders’ trademark established a cause of action under New York’s Antidilution Law.\textsuperscript{115}

The Southern District found for the Cheerleaders on both the section 43(a) and New York Antidilution Law claims.\textsuperscript{116} The court concluded that Pussycat Cinema’s continued use of the trademark would inevitably dilute the Cheerleaders’ business reputation.\textsuperscript{117} The Second Circuit affirmed the Southern District, stating: “The public’s belief that the mark’s owner sponsored or otherwise approved the use of the trademark satisfies the confusion require-

\textsuperscript{109} SELZ ET AL, \textit{supra} note 47, § 17.06. Many courts, however, endeavor to resolve the case on § 43(a) grounds. Therefore, the statutes are not fully interpreted by case law. \textit{Id.}

\textsuperscript{110} N.Y. GEN. BUS. LAW § 368-d (McKinney 1984).


\begin{quote}
Dilution is an injury that differs materially from that arising out of the orthodox confusion. Even in the absence of confusion, the potency of a mark may be debilitated by another’s use. This is the essence of dilution. Confusion leads to immediate injury, while dilution is an infection which, if allowed to spread, will inevitably destroy the advertising value of the mark.
\end{quote}

\textit{Id.}

\textsuperscript{112} 467 F. Supp. 366 (S.D.N.Y.), \textit{aff’d} 604 F.2d 200 (2d Cir. 1979).

\textsuperscript{113} \textit{Id.} at 369.

\textsuperscript{114} \textit{Id.} at 377.

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{Id.}
ment." Although *Dallas Cowboys Cheerleaders* involved the unauthorized use of a trademark, the holding illustrates that New York's Antidilution Law can be used where there is a likelihood of dilution from the unauthorized use of the plaintiff's name.

### IV. ANALYSIS

#### A. Narrative Analysis

In *King*, the Second Circuit reviewed the Southern District's decision to grant injunctive relief prohibiting the use of the possessory and based upon credits. The court stated that King had to prove two elements: 1) either (a) he had a likelihood of success on the merits or (b) he established serious questions about the merits and showed hardship resulting from the use of the credit and 2) he would suffer irreparable harm if the injunction were not granted.

1. **Likelihood of Success**

The Second Circuit first discussed King's likelihood of success on the merits of his section 43(a) claim. After recognizing that a false or misleading reference to the origin of a work can be analyzed under the Lanham Act, the court addressed the difference between possessory and based upon credits. The Second Circuit held that the Southern District correctly concluded that "King [was] likely to succeed on the merits of his objection to the possessory credit," because King had no involvement in creating the screenplay or film. The film distributors contended that without evidence of public confusion King could not succeed on the merits. The court rejected this argument for two reasons. First, the court found that King's evidence of irrepara-


119. *King*, 976 F.2d at 828. The Second Circuit used an abuse of discretion standard. *Id.* A reviewing court finds abuse of discretion when it determines that the trial court either applied an incorrect legal standard or reached a clearly erroneous finding of fact. *Proctor & Gamble Co. v. Cheesebrough-Pond's Inc.*, 747 F.2d 114, 118 (2d Cir. 1984).

120. *King*, 976 F.2d at 828 (quoting *Resolution Trust Corp. v. Elman*, 949 F.2d 624, 626 (2d Cir. 1991)).

121. *Id.*

122. *Id.; see Gilliam v. ABC*, 538 F.2d 14, 25 (2d Cir. 1976).

123. *King*, 976 F.2d at 829. For a further discussion of the difference between possessory and based upon credits, see *supra* notes 44-46 and accompanying text.

124. *King*, 976 F.2d at 829. For a discussion of King's involvement, see *supra* notes 17-19 and accompanying text.

125. *King*, 976 F.2d at 829.
ble harm negated the requirement of public confusion.\textsuperscript{126} Second, the court determined that the attribution was false on its face because King did not participate in production of the film.\textsuperscript{127} Therefore, the Second Circuit rejected the possessory credit argument and affirmed the Southern District's order prohibiting the use of possessory credits.\textsuperscript{128}

The Second Circuit next discussed the injunction with respect to the based upon credit.\textsuperscript{129} The court held that the Southern District applied an incorrect standard to determine if the based upon credit was misleading.\textsuperscript{130} According to the Second Circuit, the Southern District erred in focusing on the portion of the film that was attributable to the Short Story.\textsuperscript{131} The Second Circuit determined that the use of the likelihood of confusion test was inappropriate; instead it used the substantial similarity test. The court apparently adopted the testimony of King's witness, John Breglio, that substantial similarity was the industry standard used to determine when credit should be awarded.\textsuperscript{132} The court cited \textit{Harper & Row Publishers, Inc. v. Nation Enterprises}\textsuperscript{133} to support its determina-
tion that the appropriate standard of review is a quantitative and qualitative analysis emphasizing the portions of the Short Story that appeared in the film.\textsuperscript{134}

Applying the substantial similarity test, the Second Circuit quoted another of King’s expert witnesses, Professor George Stade, who stated that “substantial portions of the Short Story appear in the film,” leading the court to conclude that the Short Story was, therefore, substantially similar to the film.\textsuperscript{135} The court then applied the contract language which it stated obligated Allied to award King credit in any film based “wholly or substantially” on the Short Story.\textsuperscript{136} The court found such language in two provisions of the agreement: one provision contemplated alterations to the Short Story while another allowed King to receive credit for any film that was “substantially similar” to the Short Story.\textsuperscript{137} Furthermore, the court stated that if Allied did not give King a based upon credit, then King would have had a basis for relief against Allied.\textsuperscript{138} Thus the court found that King had not demonstrated a likelihood of success on the merits of his based upon credit claim.

The Second Circuit concluded its section 43(a) analysis by distinguishing King from Gilliam.\textsuperscript{139} The court agreed with its analysis in Gilliam, which prevented granting a possessory credit when an individual is falsely labelled as the creator of the work.\textsuperscript{140} However, the court refused to apply Gilliam to the issue of based upon credit because Gilliam did not address that issue.\textsuperscript{141}


\textsuperscript{135} Id. at 830. In both the movie and Short Story, there is a climactic scene where the lawnmower man uses psychic powers to chase another character through his house. In both, the murdered man is found in his birdbath and the murder weapon is a red lawnmower. Id. at 826. Furthermore, King stated that “the core of my story, such as it is, is in the movie.” Id. at 828.

\textsuperscript{136} Id. at 831. The court was satisfied that the agreement addressed substantial alterations to the Short Story and “obligate[d] Allied to give King credit in the case of a film ‘based wholly or substantially upon’ the Short Story.” Id.

\textsuperscript{137} Id. at 826.

\textsuperscript{138} Id. at 831. The court’s reasoning on this point is confusing because King was not seeking credit, he was declining it. It is doubtful that King would ever sue Allied to receive credit.

\textsuperscript{139} Id. The King court stated that in Gilliam, Monty Python’s programs were edited and then rebroadcast as Monty Python’s work, therefore, the case only involved a dispute over use of possessory credits. Id.

\textsuperscript{140} King, 976 F.2d at 831.

\textsuperscript{141} Id.
2. Irreparable Harm

After determining that King established a likelihood of success on the merits with respect to the possessory credit claim, the court discussed whether King would suffer irreparable harm if the injunction were not granted. After reviewing the evidence, the Second Circuit found that an injunction was necessary to prevent irreparable harm to King. The court disagreed with the argument that King suffered no irreparable harm solely because he waited eight months before seeking relief.

The film distributors also argued that King suffered no irreparable harm because King stated that he would not bring legal action. The court did not accept this argument, as King’s letter was silent on his feelings about the credits. The Second Circuit found that the delay between discovering the distributors’ use of the possessory credit and filing suit did not negate the evidence of irreparable harm.

Allied’s final argument suggested that King failed to prove irreparable harm because he could provide no evidence of damage to his public popularity. To rebut this argument, King provided evidence of public harm by citing reviews of the film which found it to be his personal failure. The court held that King’s ability to prove that the wrongful attribution potentially injured his reputation established irreparable harm.

142. Id.
143. Id. at 831-32.
144. Id. at 831. King learned of the movie in October 1991, yet did not bring suit until June 1992. Id. However, during that period King made continuous objections to use of the possessory credit. Id. For a further discussion of King’s objections, see supra notes 17-19 and accompanying text.
145. King, 976 F.2d at 831-32. King wrote to the agent handling King’s film rights, stating that “he was impressed by the movie and that he was ‘shelving’ legal action.” Id. at 831.
146. Id. at 832.
147. Id.
148. Id. The appellant’s argument was that “King himself enjoyed the movie, continues to be a popular literary figure, and was unable to specify particular financial injury.” Id.
149. Id. One reviewer stated: “Steven [sic] King’s latest film, The Lawnmower Man, continues to reinforce the impression that he and Hollywood just don’t work well together.” Id.
150. Id. Instead of reviewing King’s evidence of harm, the Southern District held that misattribution alone causes irreparable harm. King v. Allied Vision, Ltd., 807 F. Supp. 297, 304 (S.D.N.Y. 1992). Thus the Southern District relied on settled law which stated that any misrepresentation created a presumption of irreparable harm. Id. The Second Circuit agreed with the Southern District.

The Second Circuit also discussed the film distributors’ assertion of the equitable doctrine of laches. King, 976 F.2d at 833. The doctrine of laches is defined
3. **State Claims and Jurisdictional Issues in King**

The Second Circuit stated that the outcome would be the same under both section 43(a) and New York's Antidilution Law; therefore, King would win under both laws regarding the use of possessory credits but would not win with regard to the based upon credit.\(^{151}\) The court then rejected the film distributors' jurisdictional arguments.\(^ {152}\) The court also found Allied's motion to reassign the case meritless.\(^ {153}\)

**B. Critical Analysis**

First, this Section will discuss the Second Circuit's analysis of possessory credits. Second, it will examine the court's use of the substantial similarity standard and its finding that the Short Story and the film were substantially similar. Third, it will present an alternative basis for upholding the use of the based upon credits. Finally, it will address the equities weighing against requiring King to be associated with the film.

1. **Possessory Credit Analysis**

The Second Circuit correctly concluded that Allied could not use a possessory credit because Allied presented no evidence of King's involvement with the film. King had no involvement in creating the screenplay; in fact, the screenplay was completed over a year before King learned of its existence.\(^ {154}\) As the Second Circuit stated in *Gilliam*: "To deform [a writer's] work is to present him to the public as the creator of a work not his own, and thus makes him subject to criticism for work he has not done."\(^ {155}\)

as a party's neglect to assert a right or claim, which considered with lapse of time and other circumstances, causes prejudice to the adverse party. **BLACK'S LAW DICTIONARY** 875 (6th ed. 1990). The film distributors contended that October 1991, not March 1992, was the proper date from which to consider the laches question. *King*, 976 F.2d at 833.

Recognizing that laches questions are discretionary for the district court, the Second Circuit held that the Southern District had not abused its discretion in rejecting the equitable defense of laches. *Id.* Furthermore, the court stated that even if October 1991 were the applicable tolling date, King did not unreasonably delay initiation of the suit. *Id.* The court concluded that King's continuous objections to the film distributors' credits sufficiently evidenced that the suit had been brought in a timely fashion. *Id.*

151. *King*, 976 F.2d at 833.
152. *Id.*
153. *Id.* The court did not explain why appellant's argument was meritless.
154. *Id.* at 826-27.
In addition, the Second Circuit properly analyzed the issue of irreparable harm to King. An author's livelihood is based on the public's perception of the author's last work. If the public does not find an author's work worthy of its patronage, the author may find great difficulty in maintaining an audience and receiving offers for new projects. Therefore, misleading credit attribution can damage a celebrity's reputation by linking the celebrity, in this case King, with an unsuccessful work.

Neither the Second Circuit nor the Southern District required King to prove actual injury to his reputation. Both presumed King suffered irreparable harm because they found that the possessory credits misrepresented King's participation in the making of the film. King produced evidence that the film received poor reviews from critics; therefore, he was able to demonstrate actual harm to his professional reputation. While the Second Circuit's analysis of the possessory credit issue was routine, its analysis of the based upon credit was novel.

2. Based Upon Credit Analysis and the Substantial Similarity Test

After comparing aspects of the Short Story to the film, the Second Circuit determined that "substantial similarity" existed between the two works. Thus, due to the language in the assignment agreement, Allied could acknowledge King in a based upon credit. The court replaced the section 43(a) likelihood of confusion test with the standard of substantial similarity found in the licensing agreement. The court erred in using the substantial similarity test.

156. The Southern District stated:
Plaintiff need not demonstrate lost profits or tangible damage to his reputation to show irreparable harm. Plaintiff's fans who have read his story and go to see the film because of its association with plaintiff are likely to be annoyed and confused when they discover that the film is not actually based upon plaintiff's work. The public may well blame plaintiff for their disappointment and refrain from viewing future films claiming to be associated with him. Moreover, even if plaintiff sustains no measurable loss in profits, plaintiff's name and reputation are inevitably diluted by the misattribution to him of works which he did not create. King v. Allied Vision, 807 F. Supp. at 304.

157. King, 976 F.2d at 832.
158. Id. at 826-27.
159. Id.
160. Id. at 826.
161. Robert J. Shaughnessy, Note, Trademark Parody: A Fair Use and First Amendment Analysis, 72 Va. L. Rev. 1079, 1084-85 (1986). In trademark cases, the proper test requires determining whether there is the possibility of consumer confusion as to the product's true origin. Id. The likelihood of confusion test is a flexible test. Id.
similarity test\textsuperscript{162} for two reasons: 1) the substantial similarity test is used to determine infringement between the same types of work, which was not the case in \textit{King}\textsuperscript{163} and 2) there are logical flaws in the Second Circuit's argument that by incorporating the core of King's Short Story into the film, no amount of extraneous material in the film would render the two works dissimilar.\textsuperscript{164} Additionally, the Second Circuit's finding that the two works are substantially similar is questionable.

The Second Circuit erred when it used the substantial similarity test, a test designed to measure copying between projects and to prevent infringement of one work by a competing work of the same type.\textsuperscript{165} Substantial similarity is primarily used to determine whether one publication has infringed on a copyrighted publication of the same type by substantially imitating or copying the copyrighted publication.\textsuperscript{166} The test does not address whether a film adaptation is substantially similar to a story because copyright infringement is not the alleged injury. In \textit{King}, unauthorized copying of the Short Story was not the basis of the suit; it was King's desire

\begin{itemize}
  \item \textsuperscript{162} The substantial similarity test is primarily used in copyright infringement cases. One author notes that the convergence of different intellectual property tests is harmful because the different branches of intellectual property law serve different purposes. Michael Todd Helfand, \textit{When Mickey Mouse Is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters}, 44 STAN. L. REV. 623, 652-53 (1992) (stating copyright similarity test is replacing trademark consumer confusion test). As the Second Circuit stated in \textit{dicta} in \textit{Dallas Cowboys Cheerleaders}, "it is unlikely that [copyright law] is applicable to trademark infringements" because the purposes behind copyright and trademark law are different. \textit{Dallas Cowboys Cheerleaders}, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 207 (2d Cir. 1979).
  \item \textsuperscript{164} \textit{King}, 976 F.2d at 830. The court stated: "Our concern is . . . that under the district court's apparent approach, substantially all of a literary work could be taken for use in a film and, if unrelated ideas, themes and scenes are tacked on or around the extracted work, a 'based upon' credit would be deemed misleading." \textit{Id.} The Second Circuit glossed over the Southern District's finding of "fundamental differences" between the two works. \textit{Id.} (citing \textit{King} v. Allied Vision, Ltd., 807 F. Supp. 300, 302 (S.D.N.Y. 1992)). The Southern District did not state that the film "tacked on" unrelated ideas.
  \item \textsuperscript{166} See \textit{id.} Cunningham stated substantial similarity is used when artist A paints and exhibits a landscape, there appears on the market a suspiciously similar landscape painted by artist B and not authorized by A, the . . . question is, given B's access to A's painting, whether B's work is so similar that it can be regarded as an infringing copy of A's work. \textit{Id.} Thus the works must be of the same type.
\end{itemize}
to disassociate himself from the film regardless of any similarities between the two works.

Second, the Second Circuit erred in stating that substantial similarities exist between works when the core of one work is found in the other.\textsuperscript{167} The court stated that irrelevant material can be added to the core of the other work without rendering the works dissimilar.\textsuperscript{168} According to the Second Circuit, the works would be "substantially similar," even if the core of King's Short Story were incorporated into a film where the Short Story is not integral to the film.\textsuperscript{169}

The Second Circuit also erred in relying on the testimony of King's expert witness, Professor Stade, who testified not that the works were similar, but that "substantial" portions of King's Short Story are in the film.\textsuperscript{170} From this, the court concluded that the works are substantially similar. It is illogical to conclude that the mere inclusion of the whole of one work into another renders the two works substantially similar. The derivative work may include so much dissimilar material that the original work becomes irrelevant and undiscoverable.

The Second Circuit's finding that the works are substantially similar sharply contrasts with the Southern District's finding that the works were dissimilar.\textsuperscript{171} Overall, the Short Story and the film are not similar as they have very different premises.\textsuperscript{172} The Short Story focuses on the relationship between a suburban homeowner and the lawnmower man.\textsuperscript{173} The Short Story's horrific aspects exist because the lawnmower man serves as an agent of the pagan god Pan.\textsuperscript{174} Unlike the Short Story, the climax of the film revolves around the scientific developments of virtual reality technology.\textsuperscript{175}

The climactic scene of the Short Story is inserted into the film; its

\textsuperscript{167} The Landon court suggests that the inclusion of some material, no matter how minute, in a derivative work justifies the use of a based upon credit. Landon v. Twentieth Century-Fox Film Corp., 384 F. Supp. 450, 459 (S.D.N.Y. 1974).

\textsuperscript{168} King, 976 F.2d at 831.

\textsuperscript{169} See id.

\textsuperscript{170} Id. at 830.

\textsuperscript{171} Compare King, 976 F.2d at 830 with King v. Allied Vision, 807 F. Supp. at 305.

\textsuperscript{172} Compare supra note 10 and accompanying text with supra note 15 and accompanying text. King stated that his "short story is all about a guy who's too lazy to mow his own lawn, so he hires somebody who cuts the grass by chomping away at it and any living creatures in his path." Corliss, supra note 9, at 62. Meanwhile, the movie is about "mad scientists and virtual-reality video games." Id.

\textsuperscript{173} King, 976 F.2d at 826.

\textsuperscript{174} Id.

\textsuperscript{175} THE LAWNMOWER MAN (New Line Cinema Corp. 1992).
presence, however, is unrelated to the film's plot. Therefore, irrespective of the substantial portions of the Short Story that appear in the film, the derivative work is not substantially similar to the original work.

Although the contract provision appears at first glance to have been inserted in the contract as a means of ensuring acknowledgment for King's efforts in creating the original work, the credit provision actually requires King to surrender the right to use a credit to the filmmaker's discretion. The provision in the agreement required Allied to give him credit for any film based "wholly or substantially" on his work, but it was Allied's discretion, not King's, to decide both whether to give King credit and whether the works were substantially similar.

2. What the Court Should Have Done

Without focusing on the language of the assignment agreement, the court could have permitted the based upon credit by focusing on the possibility of public confusion. The court could have stated that Allied needed to use the based upon credit to alert the public that the premise of the film derived from King's Short Story. Use of King's name in the based upon credit did not imply that King endorsed the film, it merely signified to the public that although the film and King's work had differences, many of the ideas in the resultant film came from the Short Story. According to the Second Circuit's definition of based upon credit, if Allied had not acknowledged King's Short Story, it likely would have violated the Lanham Act by misleading the public into believing that Allied and New Line created an original screenplay which had no other sources.

The Second Circuit also ignored the Southern District's persuasive decisions in Landon and Geisel II. Both decisions established that a based upon credit can be used as long as it is literally true. The Southern District implied that a based upon credit is always literally true as long as some part of the original work is included in

176. Compare supra note 10 and accompanying text with supra note 15 and accompanying text.
177. SELZ ET AL, supra note 47, § 17.08.
178. Id.
179. See King, 976 F.2d at 831 (stating that King would have "cause to complain" if not given based upon credit). King would not have contested this violation.
the derivative work. According to this line of reasoning, the original work does not have to be an integral or significant part of the derivative work. Both cases relied heavily on preventing consumer confusion, not on assessing the degree of similarities between the two works—a test more appropriate in infringement cases.

Thus the Second Circuit appears to state that based upon credits can be justified only by showing substantial similarity between the original and the derivative work. This outcome is erroneous because Landon and Geisel II demonstrate that even minimal similarities justify the use of based upon credits.

Additionally, the Second Circuit ignored the principles of equity in requiring the based upon credit. King should have the right to disassociate himself from a product that is different from his original work. By permitting Allied to use the based upon credit, the court allows Allied to trade on King's name and to profit from its association with King. Allied can now use King's name to promote the film even though King does not want to be associated with the film. The Second Circuit stated that it "thinks that King would have cause to complain if he were not afforded the 'based upon' credit." However, King clearly stated that he did not want credit.

V. IMPACT

The Second Circuit's decision in King provides authors and attorneys with a pointed reminder that great care must accompany the drafting of assignment agreements. When discussing credit attribution in assignment agreements, both parties must recognize that they are addressing the freedom of expression interests of both parties as well as control over licensing. By requiring a based upon credit to appear in the film, the court required King to implicitly endorse the film and aid in its marketing. The court required a based upon credit by analogizing King's right to demand credit if Allied had failed to give him credit and King had sought credit, to Allied's right to use King's name even if he did not want his name used, an event the contract did not contemplate.

King attempted to assert his freedom of expression by attempting to disassociate himself from the film. The court refused to allow King to do this because it decided that the assignment agreement provision allowing him to demand credit allowed Allied to use the based upon credit over his objections. By forcing King to

182. King, 976 F.2d at 831 (emphasis in original).
honor the contract with Allied and New Line, the court also forced him to be associated with a film that he did not find satisfactory. The *King* decision has serious ramifications because it forces an author to associate with a derivative work that has only some similarity to the author’s original work.

The most important aspect of the *King* decision involved its use of an erroneous test for determining when the use of a based upon credit is appropriate. By using a standard that favors the filmmaker, the Second Circuit has opened the doors to forced associations and endorsements by authors to works they did not create. Under the Second Circuit’s analysis, a licensee can use a based upon credit as long as the core of the licensor’s work is present, even though the core of the licensed work is surrounded by irrelevant material.

Therefore, *King* is problematic for authors whose works are substantially similar to films but translate poorly to the screen. The Second Circuit’s decision in *King* exemplifies that an author’s dissatisfaction with cinematic interpretation is not a basis for relief if a substantial amount of the original work is contained in the film and if non-use of an author’s name in a credit will create public confusion.

To allay an author’s concerns regarding the cinematic interpretation of the author’s work, an author should be very careful in limiting the use of the author’s name. An author may wish to have final approval of the film before credit is attributed. However, all authors will not be in a position to make such a demand. When authors not in position to make this demand agree to contracts involving the assignation of their rights, they should find some way to retain more control over the use of their names. The Second Circuit should reconsider its analysis in *King* in order to protect author dissatisfaction with respect to cinematic presentation.

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