

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JAN 09 2004
By: JAMES W. MCCORMICK, CLERK
DEP CLERK

MICHAEL GALSTER

PLAINTIFF

V.

NO. 4:03-CV-01013 JMM

KELLY DUDA

DEFENDANT

DEFENDANT'S BRIEF IN SUPPORT OF RESPONSE TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION
AND COUNTERMOTION TO DISMISS COMPLAINT
FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Comes now the Defendant, and in support of his response and counter motion, states:

1. Plaintiff's complaint should be dismissed as it is facially deficient. Plaintiff states plainly that he has not registered a copy right. Defendant would assert that the work alleged by Plaintiff to exist is in no "fixed" form and is, therefore, incapable of copyright.
2. The only "fixed" form that the information upon which Plaintiff relies has existed is in his rather crude and poorly written novel, "Blood Trail" which, Plaintiff freely admits, is the product of a fertile imagination—rather like the complaint in this matter.
3. In any event, Plaintiff seeks an injunction to "prevent any intentional distortion, mutilation, or modification of " his work that would be prejudicial to his honor or reputation.
4. If Plaintiff is alleging damage to reputation, his forum is state court, and *after* publication of the work. He has no right to prior restraint of a work nor can this Court legitimately

enjoin on that basis, given the requirements that all governmental entities act in conformance with the First Amendment of the Constitution of the United States.

5. Moreover, the relief sought is found under 17 USC §106A which, by its terms, applies to “works of visual art”. This is a copyright term of art which applies to paintings and still photographs, but specifically does not apply to “works of audiovisual art” as those terms are defined in 17 USC §101 et seq, the definitions section of the copyright law.
6. As there is no cause of action stated in tort, and as there is no remedy available to Plaintiff under 17 USC §106A for his alleged potential for damage, the complaint should be dismissed for failure to state a cause of action.
7. Even if 17 USC §106A or some similar provision applied, the congressional intent seems to have been the prevention of the mutilation or misrepresentation of *existing works* of art. Plaintiff has neither pled nor proven that he has a currently existing film in any fixed form.
8. Alternatively even if this film turned out to be a work for hire, then the proper remedy is damages, if applicable, not injunction. Plaintiff has an adequate remedy at law and preliminary injunction is an extreme remedy.
9. Plaintiff appears to be asserting also the tort of conversion. This is not an issue for the Federal courts to decide if there is no underlying Federal cause of action and the relief originally sought is one of injunction, not damages.
10. Under *Taylor Corp v. Four Seasons Greetings*, 315 F3d. 1039 (8th Cir 2003) an individual seeking a preliminary injunction must meet a four factor test, to wit:
 - a. That they are likely to prevail on the merits;


- b. That there is the threat of irreparable harm to the movant;
 - c. That the harm the movant will suffer is greater than the harm the other party will suffer if the injunction is issued.
 - d. The public interest in the issuance of the injunction.
11. There is little likelihood that Plaintiff can prevail on the merits. "Blood Trail" is totally dissimilar to the factual account of "Factor 8, the Arkansas Prison Blood Scandal". To date, Plaintiff has provided the Court with no evidence in fixed form of the existence of such a film while Defendant has provided a copy of the same with this pleading. Moreover, Plaintiff has cited an inapplicable provision of the copyright law and should not be granted relief on such provision.
12. Plaintiff will suffer no irreparable harm. Plaintiff makes prostheses for a living. He is not a film maker. He has never made a film. He does not have the first idea of how to go about making and distributing a film. Therefore, it is inconceivable that his career will be affected adversely. Moreover, one need look at the plethora of documentaries and works of fiction based upon the assassinations of the 1960's, the sinking of HMS Titanic, Pearl Harbor, and more recently 9/11/2001, to see that the assertion that Plaintiff's opportunity to make a documentary of the historic events at issue in "Factor 8, the Arkansas Prison Blood Scandal" would somehow compromise his ability to tell the story in his own way and to compete in the marketplace of ideas with Mr. Duda's telling of it.
13. In contrast, Kelly Duda has worked long and hard to put together this documentary. He has applied to major film festivals all over the country only to be told that his subject matter is too controversial. The documentary, if shown at Slamdance, has a pretty fair

chance of significantly advancing his career.

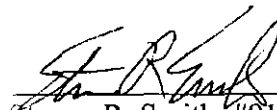
14. Moreover, the power of documentaries is such that this work may very well cause the apathetic powers that should investigate the death sentence passed by the Arkansas Department of Corrections on unsuspecting Canadians, Europeans and Japanese, to be fully investigated, making the present showing of this matter of potential inestimable worth to the public good.
15. Based on this balance of factors, it is clear that a preliminary injunction should not issue. Plaintiff has shown no fact or set of facts that indicate that he will lose anything in an irreparable manner. He has never even taken the trouble to register his copyright that he alleges on this film -which is at least some indication that it exists in no fixed form.

WHEREFORE, Defendant prays the Court that the complaint in this matter be dismissed for failure to state facts upon which relief can be granted, or, alternatively, that the preliminary injunction not issue, and that he receive costs, attorney fees and all other just and proper relief, premises considered.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon the individual(s) indicated herein below by placing a copy of same in the United States Mail, postage prepaid, or by such other service as may be indicated herein.

Dated this 8th day of Jan, 2004

Joseph W. Woodson, Jr., 400 W. Capitol Ave, Suite 2990, Little Rock, AR. 72201

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11. Slamdance Film Festival is a major event in the film community. Kelly Duda has a degree in film from San Jose State University and wishes to work in this field.
- 12.