

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

JAN 13 2004

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

MICHAEL GALSTER

PLAINTIFF

VS.

NO. 4-03-CV-01013 GTE

KELLY DUDA

DEFENDANT

**PLAINTIFF'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION AND RESPONSE TO DEFENDANT'S MOTION TO
DISMISS**

Comes now the Plaintiff, by and through his attorney, Joseph W. Woodson, Jr., and states the following:

1. The defendant in his response to plaintiff's motion for preliminary injunction correctly states that 17 U.S.C. §106A(a) excludes a film as "a work of visual art." This is of no consequence; because, 17 U.S.C. § 106(2) provides in relevant part that the owner of copyright has the exclusive rights to prepare derivative works based upon the copyrighted work.

2. The copyright act defines a "derivative work" to mean a work based upon one or more preexisting works such as...fictionalization... or any other form in which a work may be recast, transformed, or adapted. 17 U.S.C. §101. For a derivative work to infringe a copyright, "the infringing work must incorporate in some form a portion of the copyrighted work."

Litchfield v. Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984), cert. denied, 470 U.S. 1052 (1985).

Copyright infringement may be established by showing ownership of a valid copyright, access to the copyrighted work by the defendant, and substantial similarity between the two works.

Hartman v. Hallmark Cards, Inc., 833 f.2d 117, 120 (8th Cir. 1987).

3. Here, the plaintiff holds a registered copyright on his book "Blood Trail" which was published in 1998 by Jameson Publishers. The subject film is entirely derived from this

preexisting work and incorporates most, if not all, of the copyrighted book. The reason that the subject film is substantially similar to the copyrighted book is because the plaintiff personally produced, directed, and financed the film based upon the book he wrote. The plaintiff will show that the defendant had access to the copyrighted material as an employee of the plaintiff. In short, the film claimed by the defendant is a violation of the plaintiff's copyright in his book "Blood Trail."

4. Particularly relevant to this case is 17 U.S.C. § 103(a) which states that the subject matter of copyright as specified by section 102 includes derivative works and that copyright does not extend to any part of the work in which such material has been used unlawfully. Thus, even if the defendant had produced an original work, which he has not, he would have no copyright to it because he used the plaintiff's material unlawfully.

5. In addition to the book copyright, the plaintiff holds a copyright of the subject film because he is the author and owner. The defendant was an "employee for hire" as defined by 17 U.S.C. §201(b) and does not have any copyright in the subject film. This was pled in the original complaint, ¶11.

6. "The Copyright Act provides that an employer is the author when an item is considered a work made for hire." Kirk v. Harter, 188 F.3d. 1005, 1007 (8th Cir. 1999). "To determine the status of an individual under the copyright statutes when there is no written employment agreement, we look to the common law rules of agency." *Id.*

7. In applying the common law test, the court should examine the following factors: the hiring party's right to control the manner and means by which the product is accomplished; the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign

additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. *Id.*

8. Here, this Court should look to these factors at the preliminary injunction hearing as well as trial to determine whether the plaintiff was the defendant's common law employer and consequently the author of the disputed film. If the plaintiff was the author of the film, then he owns all of the rights comprised in the copyright. 17 U.S.C. §201(b). Regardless of registration, the author and owner of a work gains "immediate copyright protection" from the moment a work is first fixed in tangible form. Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991). The evidence at the hearing will establish that the plaintiff had produced a "fixed" form of the film prior to the defendant illegally taking possession of said film.

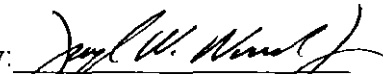
9. The defendant's claim to the subject film is an infringement of the plaintiff's copyright in his book and an infringement of plaintiff's copyright in the film itself because the plaintiff is the author and owner of the film.

10. The plaintiff prays this Court grant leave to amend the original complaint to more fully allege violation of the plaintiff's copyright in his book "Blood Trail." This Court has jurisdiction over this case pursuant to 28 U.S.C. §1338 because this case arises under an Act of Congress relating to copyright. Additionally, plaintiff prays this court hold an expedited hearing to determine the plaintiff's motion for preliminary injunction and for all other relief to which the plaintiff may show himself justly entitled, under law and in equity.

Respectfully Submitted,

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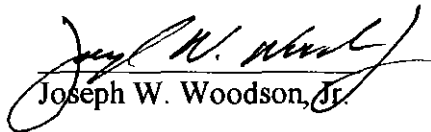
By:



Joseph W. Woodson, Jr.
ABA 94019

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing were served this 13th day of January, 2004 on Defendant's counsel via regular mail at P.O. Box 193101, Little Rock, Arkansas 72219-3101 and via facsimile at 501-907-5160.



Joseph W. Woodson, Jr.