

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

JAN 14 2004

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**By: JAMES GORMACK, CLERK
DEP CLERK**MICHAEL GALSTER****PLAINTIFF****VS.****NO. 4-03-CV-01013 GTE****KELLY DUDA****DEFENDANT****PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF THE
ORIGINAL COMPLAINT AND SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION
TO AMEND ORIGINAL COMPLAINT**

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

PROCEDURAL HISTORY

The plaintiff filed his original complaint on December 24, 2003 alleging copyright infringement against the defendant based on 17 U.S.C. §106A(a)(3)(A). Service of process was perfected on the defendant that same day. In addition, the plaintiff moved for a preliminary injunction against the defendant to prevent the showing of the documentary film "Factor Eight" at the Slamdance Film Festival in Park City, Utah on or about January 14, 2004. The film currently is scheduled to be shown for the first time on Saturday, January 17, 2004.

The defendant filed an answer to the original complaint along with a response to the motion for preliminary injunction, a motion to dismiss the original complaint, and a brief in support. At the telephone hearing yesterday, plaintiff's counsel conceded that this Court does not have jurisdiction over this case under 17 U.S.C. §106A(a)(3)(A). However, in light of Olin Mills, Infra., the plaintiff request this Court reconsider the original complaint for the sole purpose of obtaining injunctive relief.

On January 13, 2004, Plaintiff filed his motion for leave to amend the original complaint to add the allegation that the subject film is a "derivative work" of the plaintiff's copyrighted book "Blood Trail" and protected by 17 U.S.C. §106(2). Plaintiff contemporaneously attached the First Amended Complaint and filed his brief in support.

The defendant responded with his motion to deny leave to amend and brief in support. This Court has not ruled on the proposed first amended complaint. Additionally, plaintiff's counsel informed the Court that the plaintiff filed a copyright of the disputed film yesterday at the Library of Congress, Copyright Office in Washington, D.C. (Exhibit A) consisting of 18 digital video discs, one digital videotape, and a transcription of the film. As a result of this registration, the plaintiff should be allowed to assert his infringement claim against the defendant under Title 17.

INTRODUCTION

The plaintiff, Mike Galster, has already testified under oath (Exhibit A to Plaintiff's brief in support of motion for preliminary injunction) to the following:

As Board Certified Prosthetist/Orthotist I ran an orthopedic clinic once every two weeks for the inmate population of the Arkansas prison system from 1978 to 1999; during the late 1980's I became aware of a prison scheme, which culminated in the largest medical disaster in North American history; in 1995 I wrote the first chapter of a book, which later became known as "Blood Trail;" it was shortly after this, while I was outlining the rest of the book, that I conceived the idea of carrying out personal interviews with people who had been involved in the tainted blood disaster; since these interviews would be critical in the actual telling of the story, I thought it would be a perfect scenario for developing a documentary film by filming the interviews.

The defendant has produced no contesting affidavit, nor can he. Mr. Galster testified further stating:

in the fall of 1997 I employed Mr. Duda to help me gather information, interview informants and begin gathering video equipment for the interviews; on May 5, 1998, I bought Mr. Duda a computer to use as we began compiling data; on

October 19, 1998 I bought a Canon XL 1 digital video camera and other equipment solely for the purpose of creating my documentary; we began conducting interviews almost immediately.

In summary, the plaintiff will call six witnesses who will all testify under oath that the plaintiff conceived the idea of making a documentary film regarding the prison blood scheme (the basis for his fictional book "Blood Trail"); the plaintiff hired the defendant and others to film interviews (over 100 individual interviews were taped, lasting 1 to 2 hours each); the defendant and others were paid by the plaintiff to film, copy, and edit the film; the defendant and others worked at the plaintiff's sole discretion and direction; and, the plaintiff supplied all of the tools necessary to create the documentary film.

The plaintiff and witnesses will also testify that the film this Court viewed was comprised completely of film and source video tapes that were taken for the plaintiff, paid for by the plaintiff, and made for the plaintiff's benefit (i.e. a documentary film called "Factor Eight"). The plaintiff and witnesses will testify that the film this court viewed was a "re-arrangement" of the film the plaintiff produced, directed and compiled in 2001. That film, which was in "fixed form" in 2001, is what has been stolen and "re-arranged" by the defendant. Even if the defendant had produced an original work, which he has not, he would have no copyright because he used the plaintiff's material unlawfully. 17 U.S.C. §103(a).

**COPYRIGHT REGISTRATION IS UNNECESSARY FOR INJUNCTIVE RELIEF
ON THE PLAINTIFF'S ORIGINAL COMPLAINT**

It is unnecessary for the plaintiff to amend the original complaint to receive injunctive relief from this Court. "Section 502(a) gives the district court the power to issue an injunction to prevent infringement of "a copyright." The power to grant injunctive relief is not limited to registered copyrights, or even to those copyrights which

give rise to an infringement action.” Olin Mills, Inc. v. Linn Photo Co., 23 F.3d 1345, (8th Cir. 1994) citing Pacific and Southern Co. v. Duncan, 744 F.2d 1490, 1499 n.17 (11th Cir. 1984), cert. denied, 471 U.S. 1004, 105 S.Ct. 1867, 85 L.Ed.2d 161 (1985).

“While registration is required under section 411 of the Copyright Act in order to bring suit for infringement, infringement itself is not conditioned upon registration of the copyright. See 17 U.S.C. §408(a) (registration is not a condition of copyright protection). Thus, a copyright holder can register a copyright and file suit after infringement occurs. The timing of registration only determines whether the copyright holder can recover statutory as opposed to actual damages.” *Id.*

“Courts have traditionally crafted broad injunctions to protect copyright holders, regardless of the registration status of the copyright.” *Id.* citing Pacific and Southern, 744 F.2d at 1499. “Injunctions have even prohibited infringement of works not yet in existence.” *Id.* at 1499, n. 17. “When a copyright owner has established a threat of continuing infringement, the owner is entitled to an injunction regardless of registration.” *Id.* at 567 citing Universal City Studios v. Sony Corp. of America, 659 F.2d 963, 976 (9th Cir. 1981), rev’d on other grounds, 464 U.S. 417, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984).

Here, the plaintiff has pled violation of his copyright in the film “Factor Eight” and has asked for injunctive relief. See *Original Complaint* ¶¶9,12 and Prayer for relief, and, Plaintiff’s Motion for Preliminary Injunction. Assuming the plaintiff presents enough evidence to convince this Court of his authorship and ownership of the disputed film, amendment of the complaint is unnecessary to receive injunctive relief.

REGISTRATION OF THE FILM FACTOR EIGHT

“Initial Ownership-Copyright in a work protected under this title vests initially in the author or authors of the work.” 17 U.S.C. § 201(a). In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title. 17 U.S.C. §201(b). The owner of copyright under this title has the exclusive rights to: reproduce the work, prepare derivative works, distribute copies, perform the work publicly, and display the work. 17 U.S.C. §106.

Registration is a prerequisite to bringing an action for infringement. 17 U.S.C. §411(a). “Registration” means ...a registration of a claim in the original. 17 U.S.C. §101. “**At any time** during the subsistence of the first term of copyright in any published or unpublished work...the owner of copyright or any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by this sections 409 and 708. Such registration is not a condition of copyright protection.” 17 U.S.C. §408. “Thus, a copyright holder can register a copyright and file suit after infringement occurs.” Olan Mills, Supra.

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 stealing the plaintiff’s video source tapes. Furthermore, the plaintiff has registered his copyright in the film “Factor Eight.”

Exhibit A identifies and the plaintiff will testify that the following copyright was registered in compliance with 17 U.S.C. §109: 1) A complete 500 page word-for-word transcription of 107 individual video source tapes. Obviously, the plaintiff’s copyright does not

attach to the words themselves; rather, the copyright is of the "fixed" form (i.e. the compilation or collection of the transcription of these source tapes taken as a single whole). Additionally, the plaintiff has a copyright in the video source tapes themselves; however, registration is impossible because of the defendant's theft of the tapes. 2) 18 DVDs (digital video discs) which contain a complete copy of all still images that were rendered for the film "Factor Eight." The rendering process takes a still image and converts it into a moving image on-screen. For example, moving from left to right over a newspaper clipping. 3) 1 digital videotape which consists of the remaining video images without sound.

The film "Factor Eight" is a registered copyright of the plaintiff. Anyone who violates the exclusive rights of the copyright owner as provided by sections 106 through 122 is an infringer of the copyright. 17 U.S.C. §501(a). "The legal or beneficial owner of an exclusive right under a copyright is entitled ...to institute an action for any infringement of that particular right committed while he or she is the owner of it." 17 U.S.C. §501(b).

Here, the plaintiff has alleged that he is the author and owner of the film "Factor Eight," Original Complaint ¶9; that the defendant unlawfully took possession of the production and source material, Original Complaint ¶7; and, that the defendant intended to infringe upon the plaintiff's copyright in the film by publicly displaying the film as defendant's own, Original Complaint ¶8, in contravention of §106. Therefore, the plaintiff is entitled to all available remedies under the Title 17 upon establishing that the plaintiff is the author and owner of the copyright.

DERIVATIVE WORK

On the one hand, if this Court interprets a derivative work to mean one that must incorporate verbatim something from the original work, then plaintiff concedes that the subject

film is not a derivative work. The plaintiff has never contended that the film somehow takes verbatim some character or language of the book, "Blood Trail."

On the other hand, if the Court interprets a derivative work to mean one that is substantially similar to the original, then a derivative work does exist. 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).

The copyright act defines a "derivative work" to mean a work based upon one or more preexisting works such as... **fictionalization** ("Blood Trail")... 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). "Thus to constitute a violation of section 106(2), the infringing work must **incorporate a portion of the copyrighted work in some form.**" *Defendant's Brief citing Historical and Revision Notes: House Report No. 94-1476.*

Here, the subject film takes the underlying storytelling of the book, which is unique to the plaintiff, and portrays them in a documentary film. While it is true that the underlying facts of book and film are the same, the plaintiff has a copyright on his book and derivative works that are unique to him (i.e. how he tells the story). Therefore, the film is "derivative" of the book because it "incorporates in some form" a portion of the copyrighted book.

CONCLUSION

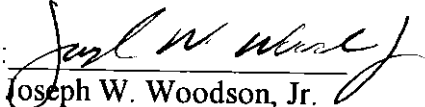
Even without registration of his copyright, the plaintiff's original complaint is sufficient for this Court to grant injunctive relief, should it find a violation of the plaintiff's copyright in the

film "Factor Eight." In addition, the plaintiff has a registered copyright in the film "Factor Eight" and entitled to bring an infringement action against the defendant for remedies available under Title 17. Alternatively, this Court may find that the film claimed by the defendant is in violation of the plaintiff's registered copyright in the book "Blood Trail."

Respectfully Submitted,

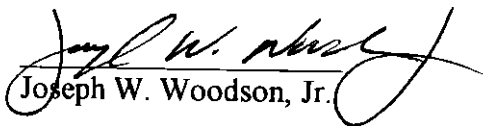
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By:


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing were served this 14th 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.



Receipt

Library of Congress
Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000

No. 160166

Date 15 Jan 2004

Received

☐ Not examined in information section

Form(s) LPA

Number of copies one set

Type of deposit copies of 18 DVDs + 1 digital videotape +

Document(s) transcript (writ. desc)

Cover letter

Other enclosures

Refer to

Services

☐ Search

☐ Photocopies

☐ Additional certificates

☐ Certifications

☐ Secure text exam

☐ Transfer to photoduplication

☐ Other (specify)

Method of Payment

☐ Cash

☒ Check \$ 30⁰⁰

☐ Money order

☐ Deposit acct #:

Amount:

☐ Credit card Type: Auth #:

Amount:

☐ No Fee

☐ Fee to be determined

☐ For connection

ETN:

Total Payment: \$ 30⁰⁰

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Labuena Vida, Inc.

Phone

Address

P.O. Box 7402

Pine Bluff, AR 71611

Representing

Michael Robert Halster

Phone

Received for the Register of Copyrights by

RAA

Title

Factor Eight

... and no others

Notes



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