

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV-05-8271 CAS (Ex)	Date	November 20, 2007
Title	<i>STEPHEN HENDRICKS v. DREAMWORKS, LLC; ET AL.</i>		

Present: The Honorable	CHRISTINA A. SNYDER
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CATHERINE JEANG

Not Present

N/A

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: **(In Chambers): DEFTS' MIL NOS. 1-6 FOR ORDERS PRECL. EVID. OR ARGUMENT RE: IRRELEVANT & PREJUDICIAL MATTERS**
(filed 10/05/07)

I. INTRODUCTION

The facts and procedural history of this case are known to the parties and summarized in the Court's order of June 28, 2007, granting in part and denying in part defendants' motion for summary judgment. On November 22, 2005, plaintiff Stephen Hendricks filed suit against defendants Dream Works, LLC; Warner Bros. Entertainment, Inc.; and Caspian Tredwell-Owen ("Tredwell-Owen") for copyright infringement under the Copyright Act of 1976, as amended, 17 U.S.C. § 101, et seq., alleging that defendants' motion picture, "The Island" and the screenplay for "The Island," written by Tredwell-Owen, infringe plaintiff's registered copyright in a screenplay he wrote entitled "Double . . . Double" ("Double"). The storylines of both "Double" and "The Island" involve futuristic medical technology that allows humans to replace their deteriorating organs with the healthy organs of clones. Plaintiff alleges that "the characters, mood, plot, pace, theme, setting, dialogue and total concept and feel of ['Double'] and 'The Island' are strikingly, substantially and confusingly similar," and lists 106 "examples" of alleged "striking and substantial similarities" between the works. *Id.* ¶¶ 35-36.

On May 22, 2006, plaintiff filed a first amended complaint for (1) copyright infringement, (2) contributory copyright infringement, (3) breach of implied-in-fact contract, and (4) declaratory relief. On February 1, 2007, pursuant to stipulation, plaintiff dismissed the claims against Mandalay Pictures, LLC and Mandalay Filmed Entertainment, with prejudice.

On June 28, 2007, the Court granted in part and denied in part defendants' motion for summary judgment. The Court held that while plaintiff had demonstrated that there was a genuine issue of material fact as to whether the screenplay for "The Island" infringed plaintiff's copyright, he had not demonstrated the existence of a genuine issue of material fact as to whether the motion picture was infringing.

On October 5, 2007, defendants filed the instant six motions in limine. Plaintiff filed his oppositions thereto on October 15, 2007. A hearing was held on October 29, 2007, and the Court took

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the matter under submission. After carefully considering the arguments set forth by the parties, the Court finds and concludes as follows.

II. DISCUSSION**A. Motions in Limines Nos. 1 & 2: Evidence of “The Island” Screenplay Drafts Prepared After the January 13, 2004 Acquisition Draft and of Revenues from the Exploitation of the Motion Picture “The Island”**

During oral argument, plaintiff’s counsel stated that plaintiff’s infringement claim relates to only one draft of the screenplay for “The Island,” which defendants refer to as the January 13, 2004, Acquired Draft (“the January 13 draft”). Declaration of Vincent Cox (“Cox Decl.”) at ¶ 3; Mot. at Ex. 701. Accordingly, defendants move to exclude all evidence and argument pertaining to the content and revenues associated with subsequently written drafts of “The Island” screenplay as irrelevant and substantially more prejudicial than probative. F.R.E. 402, 403. Additionally, because the Court has determined that the motion picture “The Island” does not infringe plaintiff’s copyright, defendants argue that evidence about revenues generated by the motion picture are irrelevant and would be unduly prejudicial to defendants. Thus, defendants move to exclude all such evidence from the trial.

First, plaintiff responds that even if the other screenplay drafts and the motion picture do not infringe his copyright, evidence regarding these works is nonetheless relevant to the issue of damages because plaintiff may obtain profits from the subsequent drafts of the screenplay and from the motion picture to the extent that such profits are traceable to infringement of his copyright.

Additionally, plaintiff’s counsel stated during oral argument that while plaintiff seeks damages in the amount of the money that defendants paid to Tredwell-Owen for the January 13 draft, he had reason to believe that defendants would argue that the sum paid to Tredwell-Owen would overcompensate plaintiff. Plaintiff’s counsel maintained that defendants are likely to argue that the sum paid to Tredwell-Owen reflects, not only the value of the January 13 draft, but also Tredwell-Owen’s fees for rewriting the script as an employee, in addition to Tredwell-Owen’s “production bonus,” (a monetary bonus paid to a screenwriter when a screenplay is produced as a motion picture), and therefore, the purchase price of the January 13 draft is an exaggerated measure of plaintiff’s infringement damages. Plaintiff’s counsel argued that in order for him to respond adequately to these anticipated arguments by defendants, plaintiff would have to draw upon evidence relating to screenplay drafts created after the January 13 draft, and therefore, this evidence is relevant.

Under the Copyright Act, a copyright owner is entitled to seek from a copyright infringer either statutory damages or actual damages and profits. 17 U.S.C. § 504(c)(1). “Actual damages represent the extent to which infringement has injured or destroyed the market value of the copyrighted work at the time of infringement.” 4 MELVILLE B. NIMMER ET AL., NIMMER ON COPYRIGHT § 14.02[A] (2007). Profits to which the copyright owner is entitled are “any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.” 17 U.S.C. § 504(b).

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The Ninth Circuit has recognized that a copyright owner is entitled to both direct profits -- those generated from the sales of an infringing product -- and, in certain circumstances, indirect profits, which is "revenue that has a more attenuated nexus to the infringement." Mackie v. Rieser, 296 F.3d 909, 914 (9th Cir. 2002). However, a court may "preclude recovery of a defendant's profits if they are only remotely or speculatively attributable to the infringement." Id. (quoting Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505, 517 (9th Cir. 1985)). "To survive summary judgment on a demand for indirect profits pursuant to § 504(b), a copyright holder must proffer sufficient non-speculative evidence to support a causal relationship between the infringement and the profits generated indirectly from such an infringement." Mackie v. Rieser, 296 F.3d at 915-16.

Plaintiff does not argue that evidence pertaining to non-infringing screenplay drafts and the non-infringing motion picture "The Island" is relevant to a showing of actual damages. Moreover, plaintiff does not explain how revenues from these non-infringing works is relevant to calculating the direct profits to which plaintiff may be entitled. The crux of plaintiff's argument appears to be that such revenues are relevant to a showing of indirect profits. However, plaintiff's argument to this effect is unavailing.

Plaintiff relies on Burns v. Imagine Films Entmt., Inc., 164 F.R.D. 589, 592 (W.D.N.Y. 1996) for the proposition that "a plaintiff may recover profits received from non-infringing ventures if those profits can be traced to infringement." In Burns, the court was presented with the plaintiff's motion to compel documents regarding the profits of an amusement park ride based on a motion picture that allegedly infringed the plaintiff's copyrighted screenplays. Id. at 591-92. The court granted the motion, ruling that, although the amusement park ride was not itself an infringing work, because interest in the motion picture elevated the public's interest in the ride, some profits from the ride may have been indirectly attributable to the infringement of the plaintiff's screenplays. Id. at 592. Thus, the court concluded that evidence regarding the amusement park ride's profits was relevant to the plaintiff's damages claim. Id.

The seminal case on indirect profits in the context of copyright infringement is Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505, 517 (9th Cir. 1985). There, the plaintiff alleged that the defendant hotel-casino owner infringed its copyright to songs from a musical by using them without authorization in a Las Vegas show. Id. at 510. After concluding that the defendant had infringed the plaintiff's copyright, the court held that the plaintiff could recover indirect damages, including casino profits, because the infringing show's promotional value increased these profits. Id.

Here, the situation is different, and Burns and Frank Music are inapposite. In those cases, where the promotional value of an allegedly infringing work was found to have contributed to the profitability of a non-infringing work, the revenue produced by the non-infringing work was found to be relevant to a determination of the profits of the allegedly infringing party. In the present case, however, it does not appear that the January 13 draft had any promotional value that could have boosted the profitability of the later drafts of the screenplay of "The Island" or of the motion picture "The Island." Accordingly, the later drafts of the screenplay and revenues pertaining to the motion picture are not relevant to a showing

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of indirect damages.

Additionally, it is not apparent that plaintiff would need to rely upon evidence of subsequently written screenplay drafts in the event that defendants raise the aforementioned arguments regarding the purchase of the January 13 draft. Based on the statements of counsel for defendants during oral argument, it is not clear that defendants will ultimately raise these arguments. Moreover, it does not seem that the contents of subsequently written drafts of the screenplay would be relevant to a determination of the monetary value of the January 13 draft, to the extent that this question arises at trial. The Court may be willing to revisit the question of whether evidence pertaining to screenplay drafts other than the January 13 draft is admissible, depending on the arguments raised by the parties at trial.

Because plaintiff has presented no other theories as to the relevance of these works, the Court concludes that they are not relevant. Therefore, under Federal Rule of Evidence 402, they are inadmissible. The Court GRANTS motions in limine Nos. 1 and 2.

B. Motion in Limine No. 3: Interlocutory Rulings in the Clonus Case

Defendants assert that some of the defendants to this action were previously parties to a different copyright infringement action in the United States District Court for the Southern District of New York that also related to "The Island." This case, captioned Clonus Assocs. v. DreamWorks, LLC, et al., 05 Civ. 7043 (SAS), was settled. Defendants argue that evidence regarding the settlement is inadmissible under Federal Rule of Evidence 408. Additionally, defendants argue that the interlocutory rulings by the district court in this case are inadmissible because they are irrelevant, because they are substantially more prejudicial than probative, and because they have no binding effect under the doctrines of collateral estoppel and res judicata.

Defendants are correct that evidence concerning settlement negotiations is generally inadmissible under Rule 408, subject to the exceptions described in Rule 408(b). However, defendants do not specify which interlocutory rulings of the Clonus court they find objectionable, much less have they submitted said rulings to the Court. Therefore, the Court is unable, at this time, to consider the merits of defendants' request. The Court will entertain a further request to exclude this evidence at such time that defendants identify and provide the Court and plaintiff with the specific rulings to which they object.

Accordingly, the Court GRANTS motion in limine No. 3 insofar as it seeks exclusion of the settlement and DENIES motion in limine No. 3 without prejudice insofar as it seeks exclusion of interlocutory orders.

C. Motion in Limine No. 4: Evidence of the Mandalay Settlement

Defendants contend that all evidence and argument concerning the settlement between plaintiff

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and Mandalay Filmed Entertainment should be deemed inadmissible under Federal Rule of Evidence 408. Plaintiff responds that he should be entitled to introduce evidence concerning this settlement to the extent that such evidence is for a permitted use, under Rule 408(b).

Under Rule 408(b), evidence concerning settlement negotiations, offers to settle, and acceptances of offers to settle need not be excluded if the evidence is offered for purposes not prohibited by subdivision (a). Permitted uses of such evidence include to prove a witness' bias or prejudice and to negate a contention of undue delay. F.R.E. 408(b). Contrary to plaintiff's assertion, however, evidence of settlement negotiations is not admissible to "impeach through a prior inconsistent statement or contradiction." F.R.E. 408(a).

Because defendants' request for a blanket exclusion of all evidence concerning the Mandalay settlement does not take into account the permitted uses for such evidence under Rule 408(b), the Court DENIES motion in limine No. 4 without prejudice.

D. Motion in Limine No. 5: Evidence of the Health Condition of Plaintiff's Associates

Defendants maintain that they have reason to believe that plaintiff intends to testify that he was inspired to write "Double" when he realized that cloning technology would benefit a friend of plaintiff's who had a medical condition. Defendants argue that there is a possibility that plaintiff will give this testimony while said friend is in the courtroom or will otherwise present this testimony so as to unduly obtain the sympathy of the jury. Thus, defendants contend that the medical condition of plaintiff's friend is both irrelevant and highly prejudicial.

Plaintiff responds that testimony about his friend is relevant because it would explain plaintiff's motivation for exploring the themes involved in "Double," including the "moral implications of cloning." Plaintiff argues that the evidence of his friend's illness establishes an overall context for his writing of "Double" and helps to show that plaintiff was uniquely situated to write a screenplay about cloning and the medical applications thereof.

On the present record, the Court declines to find that testimony regarding said friend of plaintiff is irrelevant. Such evidence regarding plaintiff's inspirations for writing "Double" and his motivations for the creative decisions reflected in "Double" may have narrative relevance and may also be relevant to establish originality. *NIMMER ET AL.*, supra, at § 2.01[A] ("a work is original and may command copyright protection, even if it is completely identical with a prior work, provided it was not copied from such prior work but is rather a product of the independent efforts of its author.").

However, while the aforementioned friend of plaintiff may attend the trial as a member of the public, the Court finds that his or her presence in the courtroom is not relevant to this action. Plaintiff, therefore, may not give testimony regarding whether this person is or is not in the courtroom.

Accordingly, the Court DENIES motion in limine No. 5 without prejudice.

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E. Motion in Limine No. 6: Expert Witness' Opinion That "The Island" is "Strikingly Similar" to "Double"

Defendants assert that the declaration of an expert witness expected to testify on behalf of plaintiff, Dr. Jade R. McCutcheon ("McCutcheon"), uses the phrase "striking similarity" in comparing "Double" with the screenplays for "The Island." Cox Decl., Ex. 702 at 15. Defendants argue that McCutcheon lacks foundation for this opinion because she is unfamiliar with "critical prior art," *viz.*, the 1978 motion picture "Clonus." Additionally, defendants observe that "striking similarity" is a legal term of art that describes a standard which, if met, gives rise to the inference that the "copying" element of a copyright infringement claim has been satisfied. See Baxter v. MCA, Inc., 812 F.2d 421, 423-24 (9th Cir. 1987) ("Absent evidence of access, a 'striking similarity' between the works may give rise to a permissible inference of copying."). Defendants argue that in McCutcheon's declaration, she uses the phrase "strikingly similarly" colloquially, rather than as a legal term of art. Defendants seem to contend that McCutcheon's allegedly colloquial use of the phrase "strikingly similar" in her declaration suffices to exclude her use of this phrase at trial.

While defendants' objections to the use of this phrase are less than clear, the Court is mindful that "[e]xpert witnesses are . . . prohibited from drawing legal conclusions, because they are the province of the trier of fact," and that "[t]his proscription precludes an expert witness from testifying in the language of . . . legal standards that are at the heart of the case if that language has a separate, distinct, and specialized meaning in the law different from its meaning in the vernacular." 4 WEINSTEIN'S FEDERAL EVIDENCE at § 702.03[3] (2d ed. 2007); see also Mukhtar v. Cal. State Univ., 299 F.3d 1053, 1065 n.10 (9th Cir. 2002) ("an expert witness cannot give an opinion as to her *legal conclusion*, *i.e.*, an opinion on an ultimate issue of law.") (emphasis in original). Permitting McCutcheon to use the exact phrase "striking similarity," a legal standard that is virtually dispositive of the "copying" element of the copyright claim, may amount to McCutcheon's improperly telling the jury how to rule on a question of fact. Dr. Seuss Enters., L.P. v. Penguin Book USA, Inc., 924 F. Supp. 1559, 1564 (1996) ("Copying is a question of fact that call for any evidence that would the [sic] trier of fact to conclude that discovered similarities in protected expression arose not from independent creation but from copying.").

Accordingly, the Court GRANTS motion in limine No. 6.

III. CONCLUSION

In accordance with the foregoing, the Court GRANTS motions in limine Nos. 1, 2, and 6, and GRANTS in part motion in limine No. 3. Additionally, the Court DENIES motions in limine Nos. 4 and 5, and denies motion in limine No. 3 in part.

IT IS SO ORDERED.

