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IP/ENTERTAINMENT LAW WEEKLY CASE UPDATE FOR MOTION PICTURE STUDIOS AND TELEVISION NETWORKS

April 6, 2011

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Muller v. Twentieth Century Fox Film Corp., USDC S.D. New York, March 30, 2011

 [Click here for a copy of the full decision.](#)

- In a copyright infringement case, court grants the defendants' summary judgment motion, finding no actual copying of the copyrighted work or improper appropriation of the protectable elements in the copyrighted work.

Plaintiff screenwriter James Muller sued defendants Twentieth Century Fox Film Corporation, Paul Anderson and Davis Entertainment, Inc., alleging that defendants' motion picture, *AVP: Alien vs. Predator* (the "Film"), infringed the copyright to his screenplay, entitled *The Lost Continent* (the "Screenplay"). Plaintiff also asserted a claim for breach of implied contract.

Defendants moved for summary judgment. Following a lengthy discussion of the two works at issue, and a detailed legal analysis, the court granted that motion.

To prevail on a copyright infringement claim, a plaintiff must prove: (1) ownership of a valid copyright; and (2) copying of elements of the work that are original. For purposes of their motion for summary judgment, the defendants did not contest the validity of the plaintiff's certificate of copyright registration for the Screenplay. Accordingly, the court focused its analysis on the copying prong, which is "comprised of two requirements:



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actual copying and improper appropriation.”

Plaintiff sought to prove “actual copying” by showing that defendants had access to the Screenplay, and that the Film was “probatively similar.” The court was not persuaded. With respect to access, the court found that plaintiff had, at best, alleged nothing more than “bare corporate receipt.” Noting the absence of any evidence to establish a nexus between the recipients and the alleged infringers, the court concluded that plaintiff’s “conclusory and conjectural assertions” were insufficient to raise a triable issue of access.

As to “probative similarity,” the plaintiff relied heavily on his expert’s reports. Though those reports listed several hundred alleged similarities, the court gave the reports little weight because they emphasized “random similarities scattered through the works,” rendering them “inherently subjective and unreliable.” According to the court, plaintiff’s expert “misse[d] the forest from the trees, as he ignore[d] the inescapable fact that the two works tell two very different stories.”

Turning to the defendants’ “independent creation” defense, the court noted that defendants had submitted indisputable evidence that the Film was independently created. Noting that the Film sought to capitalize on the highly successful Alien and Predator franchises, and that the Film was partly inspired by a Fox-owned 1990 comic book, the court concluded that no inference of copying could be drawn: “Where, as here, defendants’ own prior works contain the same elements, they have ‘no reason, beyond the illicit thrill of copyright infringement, to copy wrongfully from another that [they] could legally copy from [themselves].’”

Plaintiff sought to demonstrate “improper appropriation” by establishing that the “overall concept and feel,” theme, plot, characters, setting, pace, sequence of events, and dialogue of the Film were substantially similar to the protectable elements of the Screenplay.

The court found no substantial similarity in the “overall concept and feel” of the two works. The Film involved a conflict between Aliens and Predators, with the humans caught in the middle. The Screenplay featured humans



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searching for the lost city of Atlantis. Instead of extraterrestrial creatures from space, the Screenplay featured a character called "Jahbulon." Jahbulon was "Atlantis' leader from thousands of years ago, who emerge[d] from a tomb." Noting that the "overall concept and feel" of discovering Atlantis had appeared often in pop culture, the court found that neither plaintiff's concept nor the elements that flowed from it could be protected.

The court rejected plaintiff's argument that the plots of the two works were substantially similar. It held: "While both works tell the story of an expedition team that travels to Antarctica where they discover an underground ancient pyramid or city, and subsequently encounter hostile forces, 'in moving to the next level of specificity, differences in plot and structure far outweigh this general likeness.'"

With respect to characters, the court found nothing more than superficial similarities and shared general traits. After analyzing the two works' settings, pace, sequence of events and dialogue, the court concluded that summary judgment was appropriate because "the only similarities between the Screenplay and the Film are insubstantial, and pertain to non-copyrightable ideas, unprotected stock themes, or 'scenes-a-faire,' and not to protected expression."

Turning to plaintiff's claim for breach of implied contract claim, the court noted that it was equivalent to his copyright claim, and thus preempted by Section 301 of the Copyright Act.

Canal+ Image UK Ltd. v. Lutvak, USDC S.D. New York, March 29, 2011

 [Click here for a copy of the full decision.](#)

- In copyright infringement action, court grants defendants' motion to dismiss, concluding that no reasonable jury could find that defendants' musical is substantially similar to plaintiff's film, and that plaintiff's contract claim is preempted.

Plaintiff Canal+ Image UK Ltd. ("Canal+") owns the copyright to the film *Kind Hearts and Coronets* (the "Film"), a comic adaptation of Roy Horniman's 1907 novel *Israel Rank*. Defendants Steven Lutvak and Robert



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Friedman entered into an agreement with Canal+ to adapt the Film into a musical play (the “Musical”). After Canal+ decided not to produce the Musical, the writers learned that *Kind Hearts* was based on *Israel Rank*, and that *Israel Rank* had passed into the public domain. Defendants revised their play to maintain the plot of the novel (written in the form of the prison memoirs of a man condemned to death), and eliminate elements unique to the Film. They did, however, retain the Film’s dramatic device of using a single actor – Sir Alec Guinness in the Film – to portray each of the novel’s eight murder victims. Canal+ sued, claiming that the Musical infringed its copyright in *Kind Hearts* and violated the parties’ contract. Among other things, Canal+ argued that the Musical “retained the central and most memorable expressive part of *Kind Hearts and Coronets*: the comedy inherent in having all eight of the aristocratic murder victims played by a single actor”

Defendants moved to dismiss the complaint on the ground that Canal+ failed to state a claim for copyright infringement and the further ground that the Copyright Act preempts Canal+’s claim for breach of contract.

The court began by identifying the protectible elements of the Film. It noted that in the case of a derivative work based on an underlying work in the public domain, only the material added to the underlying work is protected by copyright.

The court analyzed the Film’s characters, plot, theme and setting, and found that very little of those elements were protectible. It then turned to the dramatic device of using one actor to play multiple roles in the same production. It characterized this device as a “standard convention.” Finding it no more original than using a character who talks directly to an audience, the court found that it was not protectible.

The court then applied the “more discerning observer test” (which compares the protectible *elements* in the plaintiff’s work to defendant’s work) and the “total concept and feel test” (which compares the two works more broadly) to the Film and the Musical.

After noting that the Film contained very few original elements, the court



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held that there was no substantial similarity between the protectible aspects of the characters in or plot of the Film and the characters in or plot of the Musical. Indeed, the court emphasized that the plot of the Musical differs from the plot of the Film in several ways. For instance, in the Film the protagonist learns from his mother at a very young age that he has been disinherited and grows up with resentment. In the Musical, by contrast, the protagonist only learns of his disinheritance after his mother's death. In sum, the court found that "most of the plot of the Musical that was similar to the plot of the Film is not original to the Film and nearly all of the plot that is similar to the film is not similar to the plot of the Musical."

In addition to the comparison of the individual elements of the film, the court also considered whether there is a substantial similarity between the "total concept and feel" of the two works. Canal+ contended that the composite victim is "bound together in an inseparable unity with all of the Film's other elements" and "is interwoven throughout the elaborate plot, moving the audience to laughter each time another foppish victim falls." Canal+ argued that, as a result, the composite victim is responsible for creating the total concept and feel of the film. The court disagreed, observing that the total concept and feel of the film is a dark comedy/drama about a distinguished heir who murders his relatives in order to advance in rank. In comparison to the Film, the court noted that the Musical is a bawdy, over-the-top send-up of the same unprotectible plot. Although the court acknowledged that both works employ the convention of using a single actor to play all the victims, it concluded that that device was hardly the "heart and soul" of each work. Accordingly, the court dismissed Canal+'s copyright claim on the grounds that no reasonable jury would find that the film and musical are substantially similar in total concept and feel.

The court also held that Canal+'s breach of contract claim was preempted by the Copyright Act.

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