UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CHARLES BARTON BOLLFRASS

Plaintiff,

- against -

WARNER MUSIC GROUP CORP.,

Defendant.

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12 Civ. 6648 (LLS)

MEMORANDUM AND ORDER

Plaintiff Charles Bollfrass alleges that a song published by defendant Warner Music Group Corp. ("Warner") infringes his copyright on his screenplay, in violation of the Copyright Act of 1976, 17 U.S.C. §§ 101 et seq, and that Warner has competed unfairly by distributing the infringing song. Defendant moves to dismiss Bollfrass' complaint, and for costs and attorney's fees.

On a motion to dismiss, the court "must accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally," Rescuecom Corp. v. Google Inc., 562 F.3d 123, 127 (2d Cir. 2009), and should dismiss the complaint if it does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

Copyright

The complaint alleges that "Panspermia/ExoGenesis," Bollfrass' screenplay, and "Exogenesis: Symphony," the song published by Warner, [1] are both stories of "(i) humanity's impending demise as a result of planetary breakdown, (ii) the use of astronauts and space travel to stave off humanity's demise by spreading human life to unpopulated planets, and (iii) the astronauts'/protagonists' realization that their actions are merely part of a larger cycle they have been predestined to undertake." Compl. ¶¶ 6, 12.

"Panspermia/ExoGenesis" is a screenplay for a "cinematic science fiction rock opera," see Compl. ¶ 5, that includes characters, dialog, plot development, and stage and camera instruction. The screenplay does not contain any music. See Reiner Decl. Ex. A.

"Exogenesis: Symphony" is a three-movement song. Although the online liner notes of "Exogenesis: Symphony" describe a story told by the song, the song lyrics are sparse and contain no discernible narrative. "Exogenesis: Symphony" has no dialog or characters. See Id. Ex. C.

[1] Panspermia and exogenesis are related theories, not unique to these works, that life originated elsewhere in the universe and was spread to Earth, see Wikipedia, Panspermia, http://en.wikipedia.org/wiki/Panspermia (March 11, 2013, 16:35 EST).

To succeed in his copyright infringement claim, Bollfrass must show copying by Warner, see Reyher v. Children's Television Workshop, 533 F.2d 87, 90 (2d Cir. 1976), cert. denied, 429 U.S. 980 (1976), which can be "proved by circumstantial evidence of access to the copyrighted work and substantial similarities as to protectible material in the two works." Reyher, 533 F.2d at 90.

Whether any similarities between two works are protectible is a question of law that can be resolved on a motion to dismiss. Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 63-64 (2d Cir. 2010). "It is an axiom of copyright law that the protection granted to a copyrightable work extends only to the particular expression of an idea and never to the idea itself." Reyher, 533 F.2d at 90, citing Mazer v. Stein, 347 U.S. 201, 217 (1954) and Baker v. Selden, 101 U.S. 99, 102-103 (1880). This axiom has been codified in section 102(b) of the Copyright Act, which provides that "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work." 17 U.S.C. § 102(b).

Bollfrass argues that "Exogenesis: Symphony" is substantially similar to "Panspermia/ExoGensis" because the two

works have similar plots of planetary breakdown and the use of astronauts and space travel in the attempt to spread human life to other planets.

A plot may be afforded copyright protection without running afoul of the maxim that ideas are not copyrightable. See Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), cert. denied, 282 U.S. 902 (1931). But the infringement occurs only when the telling of the story - that is, the expression of the idea - is substantially similar to the expression of that idea in a protected work. Cf. Dymow v. Bolton, 11F.2d 690, 691 (2d Cir. 1926) ("[C]opyright law protects the means of expressing an idea; and it is as near the whole truth as generalization can usually reach that, if the same idea can be expressed in a plurality of totally different manners, a plurality of copyrights may result, and no infringement will exist."). A similar plot does not infringe if the similarity is only at general levels of abstraction, because then it is the ideas that are similar, and not the way they are expressed:

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer

> protected, since otherwise the playwright could prevent the use of his 'ideas' to which, apart from their expression, his

Aping my soul
You stole my overture
Trapped in God's program
Oh I can't escape
Who are we?
Where are we?
When are we?
Why are we?
Who are we?
Where are we?
Why, why, why?
I can't forgive you
And I can't forget you
Who are we?
Where are we?
When are we?
Why are we in here?
Who are we?
Where are we?
When are we?
Why are we in here?

Exogenesis: Symphony Part 2 (Cross-Pollination)

Rise above the crowds
And wade through toxic clouds
Breach the outer sphere
The edge of all our fears
Rest with you
We are counting on you
It's up to you
Spread, our codes to the stars
You must rescue us all
Tell us, tell us your final wish?
Now we know you can never return
Tell us, tell us your final wish?
We will tell it to the world

Exogenesis: Symphony Part 3 (Redemption)

Let's start over again
Why can't we start it over again
Just let us start it over again
And we'll be good
This time we'll get it, get it right

It's our last chance to forgive ourselves

Reiner Decl. Ex. C.

Music, apart from its lyrics, cannot infringe on the copyright of a written work. Because the lyrics of "Exogenesis: Symphony" do not express a plot, they do not infringe on "Panspermia: ExoGenesis." The online liner notes describe a plot, but one that is far too abstract and general to infringe on Bollfrass' copyright.

Thus, Bollfrass fails to state a claim for copyright infringement, and dismissal of count one of the complaint is granted.

Unfair Competition

Bollfrass alleges that Warner is liable for unfair trade practices and unfair competition for "publishing, selling, and otherwise marketing" "Exogenesis: Symphony." Compl. ¶ 23.

The Copyright Act provides that:

> [A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title.

17 U.S.C. § 301(a). Section 106 affords a copyright owner the exclusive right "to distribute copies or phonorecords of the

copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."

The subject matter of Bollfrass' unfair competition claim "falls squarely within the subject matter of the copyright laws," Muller v. Twentieth Century Fox Film Corp., 794 F.Supp.2d 429, 448 (S.D.N.Y. 2001) (citations omitted). Bollfrass' claim for unfair competition based only on Warner's distribution of the allegedly infringing song is therefore preempted by the Copyright Act.

Count two of the complaint is dismissed.

Costs and Attorney's Fees

Section 505 of the Copyright Act provides:

> In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 505.

The Supreme Court has made clear that defendants may be prevailing parties for the purposes of § 505. See Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 (1994)("Prevailing plaintiffs and prevailing defendants are to be treated alike . . . ."). Costs and attorney's fees are awarded to prevailing parties under § 505 as a matter of the court's equitable discretion.

See Medforms, Inc. v. Healthcare Mgmt. Solutions, Inc., 290 F.3d 98, 117 (2d Cir. 2002). "When determining whether to award attorneys fees, district courts may consider such factors as (1) the frivolousness of the non-prevailing party's claims or defenses; (2) the party's motivation; (3) whether the claims or defenses were objectively unreasonable; and (4) compensation and deterrence." Bryant v. Media Right Productions, Inc., 603 F.3d 135, 144 (2d Cir. 2010), cert. denied, 131 S.Ct. 656 (2010), citing Fogerty, 510 U.S. 534 n.19.

Warner argues that it is entitled to its fees because Bollfrass' claim is objectively unreasonable and to deter potential plaintiffs from bringing such meritless cases. Warner also speculates that, because Bollfrass waited until nearly three years after "Exogenesis: Symphony" was published to file this claim, he was motivated by a desire to piggyback on the publicity for a recent follow-up album published by Warner.

The objective unreasonableness of a claim or defense is given "substantial weight" in this Circuit. Matthew Bender & Co., Inc. v. West Publ'g Co., 240 F.3d 116, 122 (2d Cir. 2001). "The grant of a motion to dismiss does not in itself render a claim unreasonable." Jovani Fashion, Ltd. v. Cinderlla Divine, Inc., 820 F.Supp.2d 569, 573 (S.D.N.Y. 2011). A claim is objectively unreasonable if it is "clearly without merit or

otherwise patently devoid of legal or factual basis." Id. (quotations and citations omitted).

Bollfrass' claims are insufficient, and have practically no legal or factual basis. Nevertheless, methods of expression of plots have received copyright protection, and it would be unduly critical to characterize the complaint as frivolous. Although an inference of improper motivation could be drawn from the timing of the complaint, there is no evidence that Bollfrass brought this action with any such motivation.

As a matter of discretion, on a close call, Warner's application for attorney's fees is denied.

Conclusion

Defendant's motion to dismiss is granted and its application for the award of attorney's fees and costs is denied.

The Clerk shall enter judgment accordingly.

So ordered.

Dated: New York, NY
April 1, 2013

Louis L. Stanton
LOUIS L. STANTON
U.S.D.J.