

No. 10-1743

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

WARNER BROS. ENTERTAINMENT, WARNER BROS. CONSUMER
PRODUCTS, INC., and TURNER ENTERTAINMENT CO.,

Plaintiffs/Appellees,

v.

DAVE GROSSMAN CREATIONS, INC.,
GIFT OF SOUND LLC, X ONE X PRODUCTIONS d/b/a X ONE X MOVIE
ARCHIVES, INC., A.V.E.L.A., INC. d/b/a ART & VINTAGE
ENTERTAINMENT LICENSING AGENCY and ART-NOSTALGIA.COM,
INC.,

Defendants/Appellants.

Appeal from United States District Court for the Eastern District of
Missouri-St. Louis
Honorable Henry E. Autrey (Case No. 4:06-cv-00546)

APPELLANTS' OPENING BRIEF

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This is a civil case for copyright infringement and other intellectual property claims. The District Court granted summary judgment for plaintiff Warner Bros. on its copyright claim and issued a permanent injunction based thereon.

Defendants AVELA, Inc., et al. appeal the injunction and the predicate summary judgment order.

Warner Bros. claims copyright ownership through chain of title of the 1939 films "The Wizard of Oz," "Gone With The Wind," and cartoons featuring "Tom and Jerry." AVELA has obtained and restored publicity materials relating to the films, including movie posters, photo stills and theatre lobby cards, and has licensed images and artwork from the publicity materials to third parties for use on merchandise. The publicity materials used by AVELA are in the public domain, and are not protected by copyright.

The District Court determined that AVELA's use of the publicity material violated Warner Bros.' copyright in the films, and found that Warner Bros. had sufficiently proved ownership of the copyrights through chain of title. AVELA submits that the District Court's order is unsupported as a matter of law.

AVELA requests 20 minutes for oral argument, as the issues presented under the 1909 Copyright Act are complex and subtle. AVELA submits that oral argument would be of assistance to the Court in dealing with the issues.

CORPORATE DISCLOSURE STATEMENT

Appellants X One X Movie Archives, Inc., A.V.E.L.A., Inc. d/b/a Art & Vintage Entertainment Licensing Agency, and Art-Nostalgia.com, Inc. hereby certify pursuant to Fed. R. App. P. 26.1 that each has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

Original jurisdiction in the District Court was properly premised on 28 U.S.C. §§ 1331 and 1338 because the complaint alleges copyright infringement (17 U.S.C. § 501(a)) and infringement of both registered and unregistered trademarks (15 U.S.C. §§ 1114, 1125 (a) and 1125(c)). Jurisdiction of the state law claims arises under the District Court's supplemental jurisdiction. 28 U.S.C. § 1367.

On March 20, 2009, the District Court granted summary judgment in favor of Plaintiffs-Appellees Warner Bros. Entertainment, Inc., Warner Bros. Consumer Products, Inc. and Turner Entertainment Co. (collectively, "Warner Bros.") on the copyright infringement claim. On March 4, 2010, the District Court issued an order entering a permanent injunction against Defendants-Appellants X One X Movie Archives, Inc., A.V.E.L.A., Inc. d/b/a Art & Vintage Entertainment Licensing Agency, Art-Nostalgia.com, Inc. and Leo Valencia (collectively, "AVELA") based on the copyright order. AVELA timely appealed the permanent injunction order on April 1, 2010. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

Because the District Court's order granting summary judgment in favor of Warner Bros. on its copyright infringement claim is the predicate for the permanent injunction, this Court has jurisdiction to review the copyright order. 28 U.S.C. § 1292(a)(1); *Randolph v. Rodgers*, 170 F.3d 850, 855-56 (8th Cir. 1999).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. The District Court erred as a matter of law in determining that AVELA's use of the publicity materials constituted infringement of Warner Bros.' copyrights in "The Wizard of Oz," "Gone With The Wind" and "Tom and Jerry," because the publicity materials are all in the public domain. Even if the characters in the respective films are protectable under copyright, AVELA is entitled to copy and use images of the characters which fell into the public domain.

Twin Books v. Walt Disney, 83 F.3d 1162 (9th Cir. 1996).

Siegel v. Warner Bros. Entm't, 542 F.Supp.2d 1098 (C.D. Cal. 2008).

Milton H. Greene Archives, Inc. v. BPI Communications, Inc., 378

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1909 Copyright Act, 17 U.S.C. § 19

1909 Copyright Act, 17 U.S.C. § 24

2. The District Court erred in determining that Warner Bros. proved its ownership of copyrights in and to "The Wizard of Oz," "Gone With The Wind" and "Tom and Jerry" because Warner Bros. failed to present admissible evidence to establish a chain of title from the original copyright claimant.

Religious Technology Ctr. v. Netcom On-Line Comm. Servs, Inc., 923

F.Supp. 1231 (N.D. Cal. 1995).

17 U.S.C. § 204(a)

United States v. Shumway, 199 F.3d 1093 (9th Cir. 1999).

Fed. R. Civ. P. 56(e)(1).

Fed. R. Evid. 602

3. The District Court erred as a matter of law in issuing a permanent injunction because the injunction is premised and dependent upon the District Court's erroneous order granting summary judgment on the copyright infringement claim.

Mulcahy v. Cheetah Learning LLC, 386 F.3d 849 (8th Cir. 2004)

Randolph v. Rodgers, 170 F.3d 850 (8th Cir. 1999).

STATEMENT OF THE CASE

Warner Bros. initiated this action on March 31, 2006, contending that AVELA infringed its copyright in the motion pictures "The Wizard of Oz" and "Gone With The Wind" and its copyrights in and to various "Tom and Jerry" cartoon films. Warner Bros. also brought claims for trademark infringement and state law claims for violation of rights of publicity and unfair competition. (Appendix ("App.") 64-98.) AVELA filed counterclaims for libel, declaratory

relief, interference with economic and contractual relations and for unlawful restraint of trade. (App. 16, 61.)

In March, 2008, Warner Bros. and AVELA filed cross-motions for summary judgment on Warner Bros.' claims and Warner Bros. also sought summary judgment as to AVELA's counterclaims. (App. 99-106; 115-118.) On March 20, 2009, the District Court, the Honorable Henry E. Autrey, issued an order granting Warner Bros.' motion for summary judgment as to its copyright claim only, denying the remainder of Warner Bros.' motion and denying AVELA's motion ("Copyright Order"). (Part 1 of Addendum.)

On March 4, 2010, the District Court granted Warner Bros.' motion for permanent injunction based on the copyright order ("Injunction Order"). (Part 2 of Addendum.)

AVELA appealed the permanent injunction order on April 1, 2010. (App. 1092.)

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Relevant Facts

1. Copyrights in the Motion Pictures and Cartoons and Warner Bros' Chain of Title

Warner Bros. is not the creator or author of the relevant motion pictures or animated films, and therefore alleges legal and/or beneficial copyright ownership of copyright in the works through chain of title. (App. 65, 107-109, 111-112.)

The motion picture "The Wizard of Oz," which premiered on August 12, 1939, was released by Metro Goldwyn-Mayer ("MGM") and was based upon L. Frank Baum's 1900 book "The Wonderful Wizard of Oz" and the characters therein. (App. 652-653, 662-674, 194-215.)

Copyright for "The Wizard of Oz" was registered on August 7, 1939 by Loew's Incorporated ("Loew's") with the U.S. Copyright Office ("Copyright Office") as Original Registration No. L9039. (App. 107.) A renewal registration for "The Wizard of Oz" was filed in the Copyright Office on August 8, 1966 by Metro Goldwyn-Mayer ("MGM") as Renewal Certificate No. R390474. (App. 108.)

The motion picture "Gone With the Wind" was released in 1939 by MGM, and was based upon Margaret Mitchell's 1936 best selling novel of the same title, which also won a Pulitzer Prize. (App. 636, 125.)

Copyright for the motion picture was registered on December 31, 1939 by Selznick International Pictures, Inc. (“Selznick”) with the Copyright Office as Original Registration No. L9390. (App. 109.) A renewal registration for “Gone With The Wind” was filed in the Copyright Office on January 3, 1967 by MGM as Renewal Certificate No. R399224. (App. 109.)

As to the “Tom and Jerry” film cartoons, Warner Bros. claims that Loew’s registered copyrights in more than 100 of the cartoons prior to 1960, and that Warner Bros. is the copyright holder for each of the approximate 255 animated shorts and pictures in which Tom and Jerry have appeared. (App. 110-111.)

According to statements of Warner Bros.’ Senior Litigation Counsel, the chain of title leading to Warner Bros. is as follows: Loew’s changed its name to MGM in 1960. In 1980, MGM assigned all of its interest in the subject motion picture copyrights to MGM Film Co. (“Filmco”). In 1982, Filmco changed its name to MGM/UA Entertainment Co. (“MGM/UA”). In 1986, MGM/UA changed its name to MGM Entertainment Co., which merged into TBS Entertainment Co. (“TBS Entertainment”). TBS Entertainment changed its name to Turner Entertainment Co. (Plaintiff-Appellee herein) (“TEC”), and as of August 5, 1986, TEC was the owner of all intellectual property rights in and to the subject motion pictures. In 1994, Turner Entertainment Group (“TEG”) became a subsidiary of Turner Broadcasting System, Inc. (“TBS”), and all shares of TEC were transferred

from TBS to TEG. In 1996, Time Warner, Inc. (“Time Warner”) acquired TBS and, therefore, TEG and TEC, and all copyrights associated with the subject motion pictures. (App. 111-112.)

TEC is wholly-owned by WTTA Incorporated, which is wholly-owned by Plaintiff-Appellee Warner Bros. Entertainment, Inc. (App. 66-67.)

2. AVELA’s Business and Use of Publicity Materials

AVELA is in the business of finding, buying, restoring, licensing and selling publicity works. (App. 136.) Specifically, AVELA identifies public domain publicity materials, such as vintage movie and theater posters, lobby display card and other publicity works used in the past to advertise plays, theatrical productions and motion pictures, and hires artists to carefully restore them, add new colors, pigments and creative expressions, and also to incorporate the old images into new and original works. (App. 136-137.) AVELA also acquires others’ original restorations of old public domain materials. *Id.*

AVELA takes careful steps to ensure that it does not infringe other copyright holder’s rights by conducting extensive copyright searches to verify that the printed works, posters, photographs and other materials have in fact fallen into the public domain. (App. 137-138.) Before restoring the vintage works and before acquiring and using the restored works, AVELA confirms that the materials are in the public domain. (App. 138.) A number of AVELA restorations have been

registered as derivative works, for which copyrights have been claimed by X One X. (App. 138, 760-789, 679-719.)

AVELA enters into licensing agreements for the use of its works with third parties. The restored images taken from the publicity materials are licensed to third parties who affix them to consumer products, such as T-shirts, tin signs, water globes and figurines. (App. 142, 144-145.)

3. AVELA's Use of Publicity Materials Relating to "The Wizard of Oz," "Gone With The Wind" and "Tom and Jerry"

The artwork and images at issue are derived from publicity materials, including movie posters, photographs of actors or scenes, campaign or press books, and theater lobby displays and cards that were widely distributed to promote and advertise the upcoming 1939 releases of "The Wizard of Oz" and "Gone With The Wind." (App. 141-146, 154-160, 163, 181, 188, 301-303, 340, 996-999, 1004-1005, 1007, 790-799, 833-873, 251-299, 874-886, 629-632, 722.) In addition, movie posters used to promote trailers for "Tom and Jerry" cartoons as early as 1940 are also the subject of this matter. (App. 146-148, 955-972, 170-171.)

AVELA has not published, copied or displayed any film clips, trailers or images appearing in the motion picture, "The Wizard of Oz." (App.146, 152.) Instead, AVELA has used images from pre-production or publicity photographs or stills that were produced prior to completion of post-production of the release of

the motion picture and before the deposit date of copyright in the film was affixed. (App. 153.) These photo stills are each numbered with the prefix “1060,” which is the number assigned via the studio’s internal identification system reflecting that they were publicity stills relating to “The Wizard of Oz.” (App. 834-873, 143, 1002-1003.) Although Loew’s received 287 copyright registrations in 1939 for still photographs taken on the set of “The Wizard of Oz,” none of the registrations was renewed with the Copyright Office. (App. 800-820, 143, 153.)

AVELA has also used images from movie posters related to “The Wizard of Oz,” which were published, issued and sold without any copyright notice being affixed or included. (App. 875-879, 153.)

AVELA has also used images from movie lobby cards which were created from “Wizard of Oz” production stills produced prior to completion of post-production of the motion picture. (App. 880-886, 153, 144.) The lobby cards were issued and sold without any copyright notice being affixed or included. (App. 153, 144.)

AVELA has licensed the restored images taken from the publicity materials described above relating to the “Wizard of Oz” to third parties who affix them to consumer products such as T-Shirts, tin signs, water globes and figurines. (App. 144-145.) Examples of the products are found at App. 1035-1063, 144-145, and charts depicting each product and the corresponding “Wizard of Oz” publicity

material on which it is based is at App. 887-918, 1070. (See also App. 194-215, 629-632.)

AVELA has similarly not used or copied any portion of the motion picture “Gone With The Wind.” (App. 143, 154.) AVELA has instead used still photographs taken on the movie set during the production of “Gone With The Wind” and photo stills taken of the actors in costume that were used by MGM in publicity works. (App. 790-799, 154, 163, 181, 188, 996-999, 1004-1007.) These stills were not deposited with the Copyright Office, and in fact were issued and distributed without any copyright notice being affixed or included. (App. 800-820, 141, 154.)

AVELA has used images from promotional movie posters for “Gone With The Wind.” (App. 141-142, 1111-1117.) The movie posters were issued and sold without any copyright notice being affixed or included. (App. 141, 154, 800-820.)

AVELA has licensed to third parties the restored images taken from the publicity materials described above relating to “Gone With The Wind,” and the images and artwork are affixed to products such as T-Shirts, tin signs, water globes and figurines. (App. 142.) Examples of the products are found at App. 1022-1033, and a chart depicting each product and the corresponding “Gone With The Wind” publicity material on which it is based is at App. 821-832, 633-646, 142-143.

AVELA has not used or copied any scene or portion of any “Tom and Jerry” animated cartoon film. (App. 147, 154, 170-171.) Instead, AVELA has used images from MGM animation posters which were distributed by MGM to promote its “Tom and Jerry” trailers and which were either published and distributed without copyright notice being affixed or included or were published and distributed with a written copyright notice but with no deposit or renewal (the “Tom and Jerry Posters”). (App. 146-147, 301-339, 340-358, 955-972, 919-935.)

AVELA restored the Tom and Jerry Posters, and has licensed a number of them to third parties. (App. 936-954, 146.) AVELA’s licensees have created products using some of the images from the Tom and Jerry Posters, including T-Shirts and figurines, examples of which are depicted at App. 973-984. A chart illustrating how the licensed images are used to create these products is found at App. 985-991, 148.

B. Relevant Procedural History

1. Warner Bros.’ Complaint

Warner Bros. alleges ownership of copyright registrations for the “Wizard of OZ” and “Gone With The Wind” motion pictures and for 255 “Tom and Jerry” cartoon films and that AVELA has infringed such copyrights. (App. 69, 78.) Warner Bros. does not allege ownership of any copyrights in and to any of the publicity materials relating to the above works. (*Id.*)

2. Summary Judgment Motions and District Court Orders

On March 24, 2008, Warner Bros. and AVELA filed cross-motions for summary judgment. Each requested oral argument pursuant to Eastern District Local Rule 4.02(B). On March 20, 2009, the District Court issued its Opinion, Memorandum and Order on the parties' respective motions without any oral argument, a copy of which is attached hereto pursuant to Eighth Cir. R. 28A(b). The District Court granted Warner Bros.' motion for summary judgment on the copyright infringement claim, and otherwise denied all other motions by the parties.

On June 22, 2009, Warner Bros. filed a motion for permanent injunction based on the order granting summary judgment on the copyright claim. AVELA filed its opposition to the motion on July 6, 2009. On March 4, 2010, the District Court issued its Opinion, Memorandum and Order granting the motion, a copy of which is attached hereto pursuant to Eighth Cir. R. 28A(b) (the "Injunction Order"). The injunction was issued by the District Court based upon its entry of summary judgment in favor of Warner Bros. on the copyright infringement claim. (*See* Injunction Order attached as part of Addendum , pp. 1-5). The Injunction Order restrains AVELA from licensing or using images from the motion pictures and images of the characters therein and also from using the publicity materials in

any manner that displays less than the full publicity material. (Injunction Order, pp. 6-7.)

AVELA filed its Notice of Appeal of the Injunction Order on April 1, 2010. (App. 1092.)

STANDARD OF REVIEW

This Court's jurisdiction under 28 U.S.C. § 1292 (a)(1) to review the Injunction Order also extends to the copyright summary judgment order because the validity of the injunction is dependent upon the copyright ruling. *Randolph v. Rodgers*, supra, at 855-56. Although summary judgment that determines only liability or that disposes of less than all claims is not a final appealable order, jurisdiction under 28 U.S.C. § 1292 (a)(1) extends to all matters inextricably bound up with the injunctive order from which the appeal is taken. In *Mulcahy v. Cheetah Learning LLC*, 386 F.3d 849, 850 (8th Cir. 2004), the district court granted partial summary judgment and issued a permanent injunction on plaintiff's copyright infringement claim. The court reviewed the propriety of the copyright summary judgment ruling, expressly recognizing that "[i]f summary judgment was improvidently granted on Mulcahy's claim of copyright infringement, the permanent injunction must be vacated." *Mulcahy*, 386 F.3d at 852. See, also, *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 824 (9th Cir. 2002) (court has

jurisdiction to review partial summary judgment where ruling is necessary predicate for later grant of injunctive relief).

Therefore, if the District Court erred in granting summary judgment on the copyright claim, both the copyright order and the injunction must be vacated.

The District Court's summary judgment decision is reviewed *de novo*. *Randolph, supra*, 170 F.3d at 856 (8th Cir. 1997). Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Rifkin v. McDonnell Douglas Corp.*, 78 F.3d 1277, 1280 (8th Cir. 1996). Using the same standards that apply to the district court's consideration of a motion for summary judgment, the reviewing court must decide whether the record, when viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Sierra Club v. Robertson*, 28 F.3d 753, 760 (8th Cir. 1994).

The District Court's order granting a permanent injunction is reviewed for abuse of discretion. *F.D.I.C. v. Bell*, 106 F.3d 258, 262-63 (8th Cir. 1997). "Abuse of discretion occurs if the district court reaches its conclusion by applying erroneous legal principles or relying on clearly erroneous factual findings." *Fogie v. THORN Americas, Inc.*, 95 F.3d 645, 649 (8th Cir. 1996), *cert. denied*, 520 U.S. 1166 (1997).

SUMMARY OF ARGUMENT

The District Court erred in granting summary judgment and injunctive relief in favor of Warner Bros. on its copyright infringement claim. The evidence establishes that (1) AVELA uses only publicity materials which were published in advance of the subject motion pictures “The Wizard of Oz,” “Gone With The Wind” and “Tom and Jerry;” and (2) such publicity materials were injected into the public domain when they lost copyright protection under the 1909 Copyright Act. The law recognizes, and in fact encourages, free copying of such material because it belongs to the public.

The District Court correctly recognized that AVELA copies and otherwise uses only such public domain materials. However, the District Court’s analysis then went seriously off-track. Focusing on the copyright protection of the film characters, which the District Court found became copyrightable through the development of character “idiosyncracies” in the subject films, the District Court concluded that AVELA’s use of images of the characters constituted infringement. However, the evidence is that AVELA uses only the photos and images of the characters from the public domain materials, which it is freely entitled to do. The images used by AVELA do not embody any character traits or “idiosyncracies” which are developed in the films which are not already part of the public domain images. The District Court erred as a matter of law in concluding that AVELA’s

use of the public domain material constituted infringement of any copyrights owned by Warner Bros.

The District Court further erred in finding that Warner Bros. proved ownership of the copyrights in the subject films. Since Warner Bros. did not create the films and was not the original copyright registrant, it has the burden to establish, through the introduction of admissible evidence, its chain of title of ownership of the copyright beginning with the original claimant. Warner Bros. failed to do so. Warner Bros. failed to present a single document establishing transfer(s) of copyright interests (even though copyright transfers are invalid unless in writing), and instead relied solely on the statements of its in-house counsel attesting to copyright assignments and corporate restructuring covering a period of approximately 60 years. The “evidence” relied upon by Warner Bros. to prove its chain of title was clearly inadmissible under Fed. R. Evid. 602, and Warner Bros.’ failure of proof is fatal to its infringement claim.

Finally, the Injunction Order must be vacated because it is entirely dependent upon the erroneous finding of copyright infringement. Once the copyright order is reversed, there is no basis for injunctive relief.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DETERMINING THAT AVELA'S COPYING OF THE PUBLICITY MATERIALS CONSTITUTES INFRINGEMENT OF COPYRIGHTS IN THE MOTION PICTURES AND ERRED IN DETERMINING THAT WARNER BROS. PROVED COPYRIGHT OWNERSHIP

A. Copyright Protection and the 1909 Copyright Act

A copyright holder has certain exclusive rights to the copyrighted work, including the right to reproduce all or any part of the copyrighted work. 17 U.S.C. § 106. It is well-settled, however, that a work may be copied unless it is covered by a valid patent or copyright. *Mayview Corp. v. Rodstein*, 480 F.2d 714, 719 (9th Cir. 1973).

The determination of when a copyright in a work is secured is when the material was protected by statute, meaning when the copyright in such a work secured protection under the copyright laws. *Siegel v. Warner Bros. Entm't*, 542 F.Supp.2d 1098, 1119 (C.D. Cal. 2008). The validity of a copyright in a work distributed before 1978 is determined by the 1909 Copyright Act. *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 206 F.3d 1322, 1325 (9th Cir. 2000). Here, the relevant works were all distributed well before 1978, and the 1909 Copyright Act, 17 U.S.C. §§ 1, *et seq.* (superseded 1976) ("1909 Act") therefore applies.

Under the 1909 Act, an unpublished work was protected by state common law copyright from the moment of creation until it was either published or until it received protection under the federal copyright scheme. *Twin Books v. Walt Disney*, 83 F.3d 1162, 1165 (9th Cir. 1996). When a work was published for the first time, it lost state common law protection, but the owner could obtain federal protection by complying with the 1909 Act requirements. *Id.* “If the owner failed to satisfy the 1909 Act requirements, the published work was interjected irrevocably into the public domain precluding any subsequent protection of the work under the 1909 Act.” *Id.* “Section 10 of the 1909 Act provided that ‘[a]ny person ... may secure copyright for his work by publication thereof with the notice of copyright required by this title.’” *Id.*

“Section 19 of the 1909 Act delineated what constituted proper notice: ‘The notice of copyright required by section 10 of this title shall consist of either the word ‘Copyright’, the abbreviation ‘Copr.’, or the symbol ©, accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication.’” *Siegel*, 542 F.Supp.2d at 1119. A publication without this required statutory notice of copyright caused the work to fall into the public domain, precluding forever any subsequent copyright protection of the work. *Twin Books*, 83 F.3d at 1166; *Stewart v. Abend*, 495 U.S. 207, 233 (1990).

Section 24 of the 1909 Act provided authors an initial 28-year term of copyright protection and a 28-year renewal term. If the initial copyright term expired without renewal, the work entered the public domain. *Maljack Productions, Inc. v. Goodtimes Home Video Corp.* 964 F.Supp. 1416, 1420 (C.D. Cal. 1997).

The law permits and encourages imitation and copying of works that are in the public domain. *See Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237-38 (1964). “In *Compco*, the court emphasized that the federal policy found in Art. I, § 8, cl. 8 of the Constitution and in implementing federal statutes is to allow ‘*** free access to copy whatever the federal patent and copyright laws leave in the public domain.’” *Cable Vision, Inc v. KUTV, Inc.*, 335 F.2d, 350 (9th Cir. 1964) (quoting *Compco Corp.*, 376 U.S. at 237).

B. Infringement

Copyright infringement occurs when one of the exclusive rights to a work held by a copyright owner is violated, giving the owner the right to sue for infringement. 17 U.S. C. § 501. To establish copyright infringement, a plaintiff must prove ownership of a valid copyright and that the defendant copied original elements of plaintiff’s copyrighted work. *Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958, 962-63 (8th Cir. 2005).

Here, Warner Bros. cannot establish copyright protection for the publicity materials used by AVELA, because all of the materials are in the public domain. As such, Warner Bros. copyright claim fails as a matter of law. Warner Bros.' alleged ownership of copyrights to the motion pictures is irrelevant, because AVELA has not copied them or any portions from them. In any event, Warner Bros. has not established through admissible evidence its ownership of the motion pictures, as discussed *infra* in section G. For this separate and additional reason, Warner Bros.' copyright claim is without merit.

C. All of the Publicity Materials Used by AVELA are in the Public Domain

AVELA has licensed certain images derived from photo stills that were taken prior to, or during the filming of "The Wizard of Oz," some of which, as referenced above, are numbered with the prefix "1060." (App. 834-873.)

Although copyrights were registered for 287 of these images in 1939 (prior to the release and registration of the film), none was renewed. (App. 800-820, 143, 153.) Under the 1909 Act, the initial copyright term for each expired in 1967, and all of the photos fell into the public domain.

AVELA has also used and licensed images derived from movie posters, lobby cards, advertisements and still photos which were published before the release of "The Wizard of Oz" and "Gone With The Wind" and without the requisite copyright notice under the 1909 Act. (App. 152-156, 141,143, 875-879,

800-820.) Images from “Tom and Jerry” animation posters have also been licensed by AVELA, and these posters were either published without copyright notice or were not renewed. (App. 919-935, 170-171, 146-147.)

Warner Bros. argued at summary judgment that these publicity materials may still be protected under the 1909 Act because their distribution without the requisite copyright notice only constituted a “limited publication.” Warner Bros. is wrong. A limited publication occurs when a particular work is distributed to a select group of individuals, such as a restricted showing of a film to a limited number of critics, or shopping a manuscript to a limited number of potential publishers. In sharp contrast, the publicity materials in this case were used to publicize the upcoming films to the general public, and there were no limits placed on their distribution. Hence, upon their publication without the required notice under Section 19 of the 1909 Act, the materials were injected irretrievably into the public domain.

This precise issue was considered in *Milton H. Greene Archives, Inc. v. BPI Communications, Inc.*, 378 F.Supp.2d 1189, 1197-1200 (C.D. Cal. 2005), where the court addressed whether the distribution of publicity materials used to promote a film constituted a limited or general publication. The court set forth the applicable standard, mandating that all three of the following elements must be met before a court may consider a publication to be limited: “A publication is limited

only where the work was distributed (1) to a definitely selected group, and (2) for a limited purpose, (3) without the right of further reproduction, distribution or sale. (citations) All three of the enumerated elements [must] exist or else the distribution may not be deemed limited and the copyright will not be valid.” *Id.* at 1198. (internal quotes and citations omitted.)

In *Milton H. Greene Archives*, the distribution of the publicity materials were found to constitute a general, and not limited publication because, as here, the materials were used to promote the films and were included in campaign books, which were sent to the theaters, newspapers and magazines. *Milton H. Greene Archives*, 378 F.Supp.2d at 1198-99. (See App. 154-160, 251-299, 301-302, 303-339, 340-508, 554-632.) As an example, “The Wizard of Oz” publicity materials reflect that distribution reached audiences as high as 91 million people – “91,912, 853 – ACTUAL PUBLICATION CIRCULATION.” (App. 1079.) Copies of the materials used by AVELA were distributed to the general public in the form of lobby cards, and other materials were freely posted in other public areas. (App. 153-158, 163, 181, 188, 996-999, 1004-1007, 301-303, 340.) Warner Bros. cannot meet the first required element to establish a limited publication.

Neither can Warner Bros. establish the third required element, because the publicity materials were concededly distributed so that they could be sent to

newspapers, magazines and other publications to promote the films. (App. 301-303, 996-997, 252-299, 157-158.) As reported by the Library of Congress:

As part of its \$250,000 promotional campaign, MGM ran full-page, color advertisements in the Sunday comic section of newspapers to generate excitement in advance of the opening of *The Wizard of Oz* ... By placing the ads in an estimated twenty-nine newspapers in twenty-one large cities in August 1939, publicists reached an audience in the millions. In addition to the newspaper campaign, MGM placed advertisements in large-circulation national magazines. (App. 722.)

No copyright protection was placed on these materials because the studios wanted them to be readily distributed to the public. (App. 301-303, 340.) Further, the studios did not use actual images from the films, because such distribution without notice would effect the loss of copyright protection for those portions of the films.

Warner Bros. has further argued that under certain language in an NSS agreement (National Screen Agreement), the publication is rendered limited because some of the materials were to be distributed to the theaters for lease only and then returned. This exact argument was rejected by the court in *Milton H. Greene Archives*, in which the following language appeared on the distributed materials: "Licensed for display only in connection with the exhibition of this picture at your theatre. Must be returned immediately thereafter." *Milton H. Greene Archives*, 378 F.Supp.2d at 1199. The court determined that a general publication occurred "even if restrictions are placed upon the use of the work." *Id.*

at n.10. (emphasis in original). The forfeiture resulting from publication occurs as a matter of law regardless of the author's intent in distributing the work. *Id.*

The case of *Siegel v. Warner Bros. Entm't, supra*, 542 F.Supp.2d 1098, which was decided during the parties' respective summary judgment briefing, is directly on point. In *Siegel*, the court noted that a publicity poster for a Superman comic book that was distributed prior to the release of the actual comic book would have fallen into the public domain if it was released without the requisite copyright notice: If published without copyright notice "then any of the copyrightable material in the works (including the promotional announcements) was never secured ... but instead was injected into the public domain." *Id.* at 1119.

D. Substantial Similarity Between the Licensed Products and the Films Is Irrelevant. The Publicity Materials are not Derivative Works.

Warner Bros. has argued that there is copyright infringement because the works created by AVELA and its licensees are substantially similar to the motion pictures and scenes therein. This argument misses the point. The publicity materials were created and published prior to the respective films. AVELA, and the rest of the public, are free to copy the publicity materials because they are in the public domain. Because the products were created from public domain publicity materials, the similarities with the films are irrelevant. *Milton H. Greene Archives*, 378 F.Supp.2d at 1197.

In a futile effort to avoid the public domain status of the publicity materials used by AVELA, Warner Bros. argued to the District Court that the publicity materials are somehow derivative works of the films, and that therefore only the new matter contained in the publicity material would have fallen into the public domain. It is true that if a derivative work enters the public domain, the matter contained therein which derives from a work still covered by statutory copyright is not dedicated to the public. *Russell v. Price*, 612 F.2d 1123, 1128 (9th Cir. 1979). Here, of course, the publicity materials were published months before the completion and release of the films, and were separately published by the studios for the express purpose of promoting the films. They are not derivative of the films.

The case of *Lamb v. Starks*, 949 F.Supp. 753, 755 (N.D. Cal. 1996), cited by Warner Bros. in support of its contention that the publicity materials are derivative works, actually further demonstrates that the materials are not derivative works. In *Lamb*, the court determined that a movie trailer was a derivative work of the underlying film because the trailer contained actual scenes from the film and the film was published before the trailer. *Lamb v. Starks*, 949 F.Supp. at 755-56. Here, not a single scene from the film was ever used in the publicity materials, and the publicity materials were published months before the completion and release of the films.

E. Copyright Protection in the Characters In the Films Is Inconsequential, Because AVELA Uses Only the Public Domain Materials.

Characters in a particular work may be entitled to copyright protection.

“Characters that have received copyright protection have displayed consistent, widely identifiable traits.” *See, e.g. Rice v. Fox Broadcasting Co.*, 330 F. 3d 1170, 1175-76 (9th Cir. 2003). (citing *Toho Co. , Ltd. v. William Morrow & Co., Inc.*, 33 F.Supp.2d 1206-1215-16 (C.D. Cal. 1998) (recognizing copyright protection for the character “Godzilla”)); *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Corp.*, 900 F.Supp 1287, 1296-97 (C.D. Cal. 1995) (recognizing protection for James Bond).

The District Court concluded that the Tom and Jerry cartoon characters are protectable and further determined that each of the characters in “The Wizard of Oz” and in “Gone With The Wind,” is entitled to copyright protection:

The remaining characters, Judy Garland as Dorothy Gale, ... Clark Gable as Rhett Butler ...can be seen as more akin to a comic book character than a literary character based on their distinct characteristics and idiosyncracies in their portrayal of the character. Each character has widely identifiable traits and is especially distinctive. Each has been extensively developed through the films.

(Copyright Order, p. 17.)

However, the District Court failed to consider the fact that that the films

themselves are admittedly derivative of L. Frank Baum's 1900 book "The Wonderful Wizard of Oz" and Margaret Mitchell's 1936 Pulitzer Prize winning novel, "Gone With The Wind." The protections afforded to a derivative work are limited solely to the new elements contained in the derivative work that are distinguished from the original works. *Stewart v. Abend*, 495 U.S. at 233. All of "The Wizard of Oz" characters, such as Dorothy, Scarecrow, the Cowardly Lion, etc. were first created by L. Frank Baum in his 1900 book, and have long-since fallen into the public domain. *Pannonia Farms, Inc. v. USA Cable*, 2004 WL 1276842, at *7 (S.D.N.Y. 2004) ("copyright in a particular work in a series will not protect the character as contained in such series if the work in the series in which the character first appeared has entered the public domain"). Likewise, the characters in "Gone With The Wind," including Rhett Butler and Scarlett O'Hara, were all part of Margaret Mitchell's original book, and none is original to Warner Bros. The District Court's focus solely on the 1939 motion pictures neglects to take into account the development, characteristics and traits of the characters which existed in the original underlying works from which each character was derived. Even if the characters were separately protectable, Warner Bros. would only be entitled to ownership of the "increments of expression added by" the 1939 films to the characters. *Silverman v. CBS, Inc.*, 870 F.2d 40, 50 (2d Cir. 1989). For this reason, the District Court's analysis is fatally flawed.

In any event, the extent to which the characters are entitled to copyright protection is irrelevant because AVELA did nothing more than copy the public domain materials. Even though the District Court reaches an erroneous conclusion, the District Court illustrates the distinction between copying the publicity materials and using the “idiosyncracies” of protectable character traits:

[AVELA’s] argument that, *even if* the characters would be entitled to copyright protection, the characters are no longer protected because of the publication of the characters in the public domain materials caused them to become public domain material as well, is unavailing. The publicity materials with pictures of the actors in costume are just that – pictures of actors. It is necessarily through the films that the characters become copyrightable. But for the films, these characters would remain literary figures without the particular idiosyncracies that have established each character as a unique icon in American culture ... ¶ ... Notwithstanding [AVELA] ha[s] copied only the publicity materials, such actions violate the component parts of [Warner Bros.’] copyrights in the films.

(Copyright Order, pp. 18-19) (emphasis in original)

As expressly recognized by the District Court, the evidence is that AVELA copied only the publicity materials, not from the films. As discussed at length above, copying public domain material is perfectly lawful. The images used by AVELA do not embody the “idiosyncracies in the portrayal of the characters” or any other traits which according to the District Court constitute the copyrightable features of the film characters which do not exist in the publicity materials themselves. AVELA’s works are, to use the District Court’s language, “just ...

pictures of actors” as they appear in the publicity materials. That is, AVELA copied precisely the aspects of the characters that are in the public domain. This cannot constitute copyright infringement, because the publicity materials are not protected by copyright.

F. The Copyright Act Does Not Limit Use of Public Domain Materials

Warner Bros.’ made the assertion below that even if the movie posters and other publicity materials have irretrievably been injected into the public domain, AVELA’s use is somehow limited to only making new posters. This self-created limitation has no support in law, because once a work falls into the public domain, the public is free to copy that work and create whatever derivative works it wishes, and the new creative elements added to the derivative work are protectable.

Silverman, 870 F.2d at 50. The public may make an exact replica of the work, or may freely copy a portion of the work. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33 (2003) (“The right to copy, and to copy without attribution, once a copyright has expired ... passes to the public.”); *See Compco*, *supra*, 236 U.S. at 237.

In *Pannonia Farms*, the court described as “plainly baseless” the contention made here by Warner Bros. - that one can use the public domain materials only in the manner in which they appear in the public domain: “[W]here a work has gone into the public domain, it *does* in fact follow that any individual is entitled to

develop this work in new ways. This is because anyone may use material found in the public domain.” *Pannonia Farms*, 2004 WL 1276842, at *9 (citing *Silverman*, 870 F.2d at 50) (emphasis in original).

AVELA is not limited to making posters from the publicity materials. The law recognizes that AVELA is free to develop the public domain materials in new ways, and AVELA has done exactly that.

G. Warner Bros. Has Failed to Establish Copyright Ownership of the Films

As set forth above, Warner Bros. must prove ownership of copyright to prevail on its infringement claim. *Taylor Corp.* 403 F.3d at 962-63.

Warner Bros. claims ownership of the relevant copyrights in and to the films by “chain of title.” Since it is neither the author nor creator of the films, it is Warner Bros.’ burden to prove its chain of title through the original copyright claimant. *Religious Technology Ctr. v. Netcom On-Line Comm. Servs, Inc.*, 923 F.Supp. 1231, 1241 (N.D. Cal. 1995).

Copyright transfers are invalid unless they are in writing. 17 U.S.C. § 204(a) (“A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner’s duly authorized agent.”) It is well-settled, of course, that the evidence presented on summary judgment must be admissible. Fed. R. Civ. P. 56(e)(1).

Warner Bros.' "evidence" in support of its chain of title theory is entirely based on the statements of its legal counsel, Katherine Chilton ("Ms. Chilton"). Warner Bros. presented no written copyright assignments or any other documentary evidence on summary judgment to support its chain of title theory. Warner Bros. failed to present admissible evidence establishing its ownership of the copyrights.

Ms. Chilton states that Loew's registered "The Wizard of Oz" copyright in 1939, and that MGM renewed the copyright in 1966. (App. 107.) For "Gone With The Wind," Ms. Chilton avers that Selznick purchased the rights from Margaret Mitchell, that Selznick recognized in a 1938 agreement that it and Loew's were jointly granted the copyright to the film, and that Selznick registered the copyright in 1939. According to Ms. Chilton, Selznick thereafter assigned its copyright to Loew's and itself. In 1961, Mitchell's beneficiaries and MGM entered into an agreement recognizing MGM's copyright ownership in the film, and in 1967 MGM renewed the copyright. Yet another agreement referenced by Ms. Chilton from 1990 purportedly confirms TEC's ownership of certain rights to Mitchell's novel. (App. 108-109.)

According to Ms. Chilton, Loew's changed its name to MGM in 1960, and in 1980, MGM assigned its copyrights in the film to Filmco. Thereafter, according to Ms. Chilton, several more name changes and/or mergers involving corporate

restructuring occurred, culminating with TEC's purported ownership of the films. (App. 111-112.)

Warner Bros. failed to attach or submit any of the documents referenced by Ms. Chilton, including any of the purported assignments of copyright interests. Instead, Ms. Chilton simply stated in her declaration that she was the Vice President and Senior Litigation Counsel for Warner Bros., and that the information forming the basis of her statements "is derived from corporate documents, and other materials that I have reviewed ..." (App. 107.)

Naturally, AVELA objected to this "evidence" as purportedly establishing the requisite chain of title. In this regard, AVELA stated:

"[Warner Bros.] relies on the Declaration of its present day in house lawyer Ms. Chilton who does not attach any documents or authenticate any documents to support her factual allegations. Ms. Chilton does not have personal knowledge of the facts to which she purports to attest. Local Rule 7-4.01 (E) requires citation to the record for each asserted uncontested fact. [Warner Bros] has the burden of proving it has holds (sic) rights to these properties and these bald accusations are insufficient to meet this standard. The chain of title has not been established by [Warner Bros]."

(App. 1106, 1107-1109.)

The District Court dispensed with the chain of title issues in a footnote in its Copyright Order, concluding that, *inter alia*, since Ms. Chilton stated she had personal knowledge of the facts, they are true and accurate:

[AVELA] argue[s] that [Warner Bros.] ha[s] failed to sufficiently delineate through admissible evidence the chain of title to the subject films. [Warner Bros.] ha[s] submitted the affidavit of Katherine Chilton, Vice President and Senior Litigation Counsel for Warner Bros. Entertainment, Inc., in which Ms. Chilton avers that she has personal knowledge of the facts set forth in her affidavit. This personal knowledge was obtained through corporate documents and other materials which she reviewed, and which have been produced to [AVELA] through discovery. [AVELA] ha[s] failed to present any evidence to controvert the averments contained in the affidavit. The Court, therefore concludes that the facts set forth above are true and accurate.

(Copyright Order, p. 3, n. 2)

The District Court's handling of this evidentiary issue was clearly in error. First, the fact that Ms. Chilton swears to personal knowledge does not establish personal knowledge. Rather, the declaration itself must contain facts showing the declarant's connection with the matters stated therein. See Fed. R. Evid. 602; *United States v. Shumway*, 199 F.3d 1093, 1104 (9th Cir. 1999). Ms. Chilton was not Warner Bros.' legal counsel during the time that the relevant transfers of copyright ownership occurred, and was not even alive for some of them. As such, Ms. Chilton's "knowledge" of these matters could only be derived from the documents themselves. Ms. Chilton, however, failed to identify or produce the written documents evidencing the purported transfers and chain of title, and therefore she did not set forth any facts which demonstrate her personal knowledge of the chain of title and transfers of ownership. Warner Bros.' chain of title theory

relies upon several assignments of copyright interests, which are invalid unless in writing. Nevertheless, Warner Bros. failed present a single written assignment on summary judgment.

The District Court's statement that AVELA failed to present evidence controverting Ms. Chilton's statements reflects an improper shifting of the burden of proof. Warner Bros., as the party claiming ownership of copyright, has the burden to establish ownership through chain of title. *Religious Technology Ctr.*, 923 F. Supp at 1241. AVELA has no burden to disprove Warner Bros.' ownership. AVELA may controvert Warner Bros.' proof if and when Warner Bros. presents admissible evidence purporting to establish ownership. Warner Bros. failed to meet its burden.

Warner Bros. failed to submit admissible evidence demonstrating its ownership in and to the relevant film copyrights. This failure independently warrants dismissal of the copyright infringement claim in this case.

II. THE DISTRICT COURT ERRED IN ISSUING A PERMANENT INJUNCTION BECAUSE IT WAS BASED ON THE ERRONEOUS COPYRIGHT ORDER

The District Court's Injunction Order was based entirely on the Copyright Order – that is, because the District Court determined that AVELA had infringed Warner Bros.' copyrights in the films, Warner Bros. was entitled to an injunction restraining AVELA from future infringement.

The District Court recited its Copyright Order granting summary judgment on the copyright claim, cited statutory and case law recognizing that injunctions regularly and/or presumptively issue pursuant to the Copyright Act, and determined that Warner Bros. was entitled to injunctive relief. (Injunction Order, pp. 1-5.)

As demonstrated above, the District Court plainly erred in granting summary judgment on the copyright claim. AVELA's use of the publicity materials does not constitute infringement as a matter of law. Further, Warner Bros. has not established ownership of copyrights in the subject films. Since summary judgment on the copyright claim was improperly granted, the injunction based thereon must be vacated. *Mulcahy*, 386 F.3d at 850 (8th Cir. 2004).

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CONCLUSION

For all the foregoing reasons, the District Court's order granting summary judgment on Warner Bros.' copyright infringement claim must be reversed, and the Court should direct summary judgment for AVELA. The District Court's order granting a permanent injunction based on the copyright order should be vacated.

Respectfully submitted,

Dated: July 21, 2010

THE BALL LAW FIRM, LLP

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