

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' REPLY BRIEF

**THE BALL LAW FIRM, LLP
DOUGLAS D. WINTER
10866 Wilshire Blvd., Suite 1400
Los Angeles, CA 90024
Telephone: (310) 446-6148**

**PAULE, CAMAZINE & BLUMENTHAL
MICHAEL E. BUB
165 N. Meramec Ave., Suite 110
St. Louis, MO 63105
Telephone: (314) 727-2266**

Attorneys for Defendants-Appellants

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INTRODUCTION

Warner Bros. fails to squarely address the key legal errors made by the District Court in granting summary judgment on the copyright claim. This failure is understandable, because the District Court's ruling cannot withstand scrutiny on the most fundamental level. Not only should the copyright and injunction orders below be reversed and vacated, but summary judgment in favor of AVELA on the copyright claim should be directed by the Court.

The District Court recognized that AVELA does not use images from "The Wizard of Oz," "Gone With the Wind" or from any "Tom and Jerry" cartoons. Rather, as the District Court found, AVELA licenses and uses only images from publicity materials for the films (such as movie posters, lobby displays, and advertisements), which materials include photographs or other depictions of the characters and which were created to promote the films. The District Court also recognized, as it must, that the publicity materials themselves are not protected by copyright. Nevertheless, the District Court determined that AVELA violated "the component parts" of Warner Bros' copyrights in the films by using only *portions* of the publicity materials which depict the images of the characters. The District Court acknowledges that the publicity materials may be freely copied and licensed, but only on the condition that AVELA uses the *entirety* of the poster, lobby card,

or other publicity material. The District Court's ruling is clearly in error and is contrary to established copyright law.

AVELA's use of character images from photo stills, movie posters and other publicity materials does not infringe Warner Bros.' copyrights as a matter of law. As recognized by the author of a leading treatise on copyright law, it was not uncommon for publicity materials for motion pictures from the 1920's through the 1970's to be distributed for promotional purposes without the requisite statutory notice under the 1909 Copyright Act and to therefore enter the public domain. That is exactly what happened here. The movie posters, lobby cards and other publicity materials for "The Wizard of Oz," "Gone With the Wind" and "Tom and Jerry" featuring images of the characters were distributed to promote the film and were irretrievably injected into the public domain. Once copyright protection was lost for these materials, they became free for all (including AVELA and its licensees) to use. Copyright law does not permit subsequent protection for works which have fallen into the public domain.

The District Court's determination that the characters became copyrightable through their development in Warner Bros.' films is of no legal consequence, because the images copied and used by AVELA were not from the copyrighted films and had already fallen into the public domain.

There is absolutely no legal or rational basis for the District Court's distinction between making exact replicas of the publicity materials (no infringement) and "plucking" and copying only the images of the characters from the publicity materials (infringement). The law is that once a work enters the public domain, it may be freely copied and developed in new ways. No authority exists to support the proposition that a public domain work can only be used by making an exact, unaltered duplicate of the entirety of the work.

Finally, Warner Bros.' attempt to submit admissible evidence in the form of new documents on appeal to establish its chain of title to the subject films is improper. Contrary to Warner Bros.' assertion, the documents were not part of the record presented to the District Court on summary judgment, and cannot be considered by this Court.

The District Court's copyright order must be reversed, and the injunction based thereon must be vacated. Summary judgment in AVELA's favor on the copyright claim should be directed by the Court.

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY RECOGNIZED THAT AVELA USES ONLY IMAGES FROM THE PUBLICITY MATERIALS, NOT FROM THE MOTION PICTURES OR CARTOONS

The evidence presented at summary judgment establishes that AVELA has licensed the use of images from movie posters, movie set photographs of actors and scenes, campaign and press books and theater lobby displays and cards which were used to promote and advertise “The Wizard of Oz” and “Gone With the Wind.” Images from movie posters used to promote trailers for “Tom and Jerry” cartoons were also licensed by AVELA. AVELA’s licensees use the images from the publicity materials and affix them to products such as T-Shirts, signs, water globes and figurines.

The evidence further establishes that AVELA does not use or license any film clips, trailers, scenes or any image from the “The Wizard of Oz” or “Gone With the Wind” motion pictures or from any “Tom and Jerry” animated cartoon film. Warner Bros. does not dispute this fact.

The District Court expressly recognized that only publicity materials were used by AVELA:

“Defendants derive their images, which they subsequently license to others, from publicity materials they contend have fallen into the public domain.”

(Copyright Order, Addendum, Part I, p. 8.) (emphasis added) The District Court identifies the publicity materials used by AVELA as follows:

“The publicity materials include movie posters, theater lobby displays and card[s], pre-written press stories, newspaper and magazine advertisements with photographs of actors or scenes, press books, souvenirs to be sold to movie goers and news bulletins.”

(Copyright Order, Addendum, Part I, p. 8, fn. 3.)

The District Court concluded that even though AVELA used only the publicity materials and not images from the films, such actions violated Warner Bros.’ copyrights:

“Notwithstanding Defendants have copied only the publicity materials, such actions violate the component parts of Plaintiffs’ copyrights in the films.”

(Copyright Order, Addendum, Part I, p. 19.) (emphasis added)

As acknowledged by the District Court, the record establishes that AVELA copied and licensed only the publicity materials, not any scenes or images from the films themselves.

II.

THE PUBLICITY MATERIALS USED BY AVELA ARE IN THE PUBLIC DOMAIN, WHICH IS ALSO RECOGNIZED BY THE DISTRICT COURT

Warner Bros. does not dispute that the 1909 Copyright Act governs the issues in this appeal, since the works at issue were published prior to 1978. Under the 1909 Act, “a publication of a work in the United States without the statutory

notice of copyright fell into the public domain, precluding forever any subsequent copyright protection of the published work. *Twin Books v. Walt Disney*, 83 F.3d 1162, 1166 (9th Cir. 1986). A publication is “limited” and does not trigger loss of copyright only where the work was distributed (1) to a definitely selected group, and (2) for a limited purpose, and (3) without the right of reproduction, distribution or sale. *White v. Kimmel*, 193 F.2d 744, 746-47 (9th Cir. 1952); *Academy of Motion Picture Arts and Sciences v. Creative House*, 944 F. 2d 1446, 1451-52 (9th Cir. 1991). Unless all three of the limited publication elements are met, the work is published and injected into the public domain. *Milton H. Greene Archives, Inc. v. BPI Communications, Inc.*, 378 F.Supp.2d 1189, 1198 (C.D. Cal. 2005).

Further, the 1909 Act provided owners with a 28-year term of copyright protection and a 28-year renewal term, but if the initial 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 evidence in the record establishes without contradiction (and without any comment from Warner Bros. in its brief on appeal) that copyrights for hundreds of photo stills used by AVELA taken prior to, or during the filming of “The Wizard of Oz” depicting the actors in their costumes and in the same scenery that later appeared in the motion picture, were never renewed and were therefore injected into the public domain. Similarly, Warner Bros. concedes that movie

posters, lobby cards, advertisements and still photos used by AVELA publicizing “The Wizard of Oz” and “Gone With the Wind” were published without the requisite copyright notice under the 1909 Act.¹ Finally, Warner Bros. does not dispute that the animation posters relating to “Tom and Jerry” were either published without copyright notice or were not renewed.

Warner Bros. seems to take solace in the fact that the District Court did not make an express finding that “the publicity materials used by AVELA are in the public domain, and are not protected by copyright” and claims therefore that the District Court “found it unnecessary to decide that issue ...” (Warner Bros.’ Brief, Summary of the Case and Request for Oral Argument.) However, the District Court necessarily determined that the movie publicity materials were in the public domain (or at least not protected by any copyright owned by Warner Bros.), because its injunction order expressly permits AVELA to copy, license and use the publicity materials:

“IT IS FURTHER ORDERED that Defendants are not enjoined from licensing, attempting to license, or otherwise using for commercial gain reproductions of public domain movie publicity materials, in their entirety and without alteration or modification. However,

¹ It is important to keep in mind that the distribution of publicity materials without statutory notice was not by mistake. It was done intentionally as part of a promotional and advertising campaign to allow magazines and newspapers the ability to freely copy and reprint the materials and so that the materials could be readily distributed to the public. By so doing, the studios intended to attract as many moviegoers as possible to sell seats and increase revenue. (App. 301-303, 340.)

licensing, attempting to license or otherwise using for commercial gain images of movie publicity materials for use in any manner that displays less than the full movie publicity material are enjoined.”

(Injunction Order, Addendum, Part II, pp 6-7.) (emphasis added)

Naturally, if the evidence established that the publicity materials were protected by any copyright owned by Warner Bros., the District Court would not have ordered, as it did, that AVELA was free to copy and license such materials. While the District Court erred in fashioning a legal distinction between copying a portion of the publicity material and copying the material in its entirety, it necessarily recognized that the publicity materials are not protected by copyright and could be copied.

Warner Bros. half-heartedly argues (as it did unsuccessfully in the District Court) that the distribution of movie posters and lobby card fits into the definition of a “limited publication” because the materials were distributed to theaters in accordance with an agreement between Loew’s and National Screen Accessories Inc. (“Accessories”) which placed restrictions on the use and return of the materials. It does not. Warner Bros. continues to ignore the fact that if the actual distribution of copies is not limited to a definitely selected group, forfeiture occurs as a matter of law, regardless of intent. *Milton H. Greene Archives, Inc.*, 378 F.Supp.2d at 1199, at n. 10.

Warner Bros.’ remaining contentions regarding publication of the publicity materials deserve only a brief response. In an effort to distance itself from the uncontradicted evidence showing copies of the publicity materials used in giant advertising campaigns for the pictures, Warner Bros. states that AVELA doesn’t license the magazine or newspaper ads – it only licenses the movie posters and lobby cards. (Warner Bros. Brief, p. 44.) The relevant point is that the advertisements contain copies of the lobby cards and posters used by AVELA. Their publication in a magazine or newspaper constitutes a general publication. *Milton H. Greene Archives, Inc.*, 378 F.Supp.2d at 1197, following *Donald Frederick Evans & Assocs., Inc. v. Cont’l Homes, Inc.*, 785 F.2d 897, 901 (11th Cir. 1986).

Finally, Warner Bros.’ reliance upon the decision in *Academy of Motion Picture Arts and Sciences* is misplaced. In that case, the court made the unremarkable finding that the Academy did not divest itself of common law copyright protection for the “Oscar” statuette, which was provided only to a definitely selected group (Academy Award winners) and which has never been sold or distributed to anyone. *Academy of Motion Picture Arts and Sciences*, 944 F.2d at 1452-54.

It was not altogether uncommon for publicity materials for pre-1978 motion pictures (governed by the 1909 Act) to be published without following the notice

requirements under the 1909 Act, thereby falling into the public domain. As the author of a leading treatise aptly notes:

“An issue of recurring application is publicity photos for motion pictures from the 1920’s through 1970’s. The films themselves from that era were routinely protected as validly noticed and registered works; but much less care was typically exercised during production and in the publicity office. Often photos were taken on the set depicting the same stars, wearing the same costumes, appearing in the same scenery, that would later appear in the photoplay, but the photographs were sent off to newspapers before the film’s release, in order to generate a buzz about its opening. *Milton H. Greene Archives, Inc. v. BPI Communications, Inc.*² serves as a cautionary tale in that regard. The photos at issue of Marilyn Monroe were used with the photographer’s permission to promote a forthcoming motion picture in newspapers, magazines and campaign books. [*Id.* at 1196] Although they claimed copyright, the notice that was affixed to the photos did not comport with the statutory strictures then in effect, thereby rendering them effectively unnoticed. [*Id.* at 1196, n. 5] Their unnoticed publication in the media with authorization from the copyright owner would forfeit copyright protection, unless the doctrine of limited publication could ride to the rescue. But making copies of the photographs available to the general public in newspapers and magazines is the antithesis of limited publication. [*Id.* at 1198] Although plaintiff could demonstrate a limited purpose [*Id.*], it failed to show limitation to a selected group and no limitation on the right of further reproduction. [*Id.* at 1199] It therefore lost its copyright in the affected shots.

2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 4.13[A][3] at 4-74.5 - 4-74.6 (2009) (“Nimmer”).

² The *Milton H. Green Archives* case, 378 F. Supp. 2d 1189 (C.D. Cal. 2005), is cited and discussed in AVELA’s opening brief at pp. 21-24 and demonstrates that the “limited publication” doctrine is clearly inapplicable to the facts of this case.

Here, the undisputed evidence is that the publicity materials used by AVELA, including movie posters, campaign and press books, and lobby cards depicting photographs of the actors in costume, sometimes taken on set, were widely sold and distributed to promote and advertise the releases of “The Wizard of Oz” and “Gone With the Wind.” (App. 153-155, 252-303; 309-517.) Just as in the *Milton H. Greene Archives* case, the doctrine of “limited publication” cannot “ride to the rescue” in this matter. Copies of the materials were distributed so that they could be sent to newspapers, magazines and other publications to promote the films. As Nimmer states, this is the antithesis of limited publication because “the very essence of the publicity campaign was to actively encourage such dissemination [of the publicity materials].” Nimmer, § 4.13[A][3] at 4-74.6, n. 17.35.

III.

AVELA’S USE OF THE PUBLICITY MATERIALS DOES NOT CONSTITUTE INFRINGEMENT OF COPYRIGHTS IN THE MOTION PICTURES

It is undisputed that AVELA has not copied, licensed or otherwise used any images of characters from “The Wizard of Oz,” “Gone With the Wind” or the “Tom and Jerry” cartoons. Instead, AVELA has copied and licensed the images of the characters as they appeared in public domain, publicity materials distributed prior to the registration of the films. Nevertheless, the District Court ruled that

because it was through the Warner Bros.' films that the characters developed the unique characteristics that make them copyrightable as a component part of the films, AVELA's use of public domain images of the characters violates Warner Bros' copyrights in the characters. The District Court also ruled that had AVELA copied and licensed the publicity materials in their entirety (e.g., the entire poster, not just the character images from the poster), there would be no copyright infringement. Respectfully, the District Court's ruling is plainly in error and finds no support in the law of copyright.

A. The Development of the Characters in the Films Is Irrelevant Because AVELA Does Not Use Any Images of Characters from the Films

The issue of whether the characters are protectable component parts of the films is irrelevant in this matter, because AVELA does not copy images of the characters from the films. The character images in the publicity materials which AVELA uses went into the public domain, precluding forever any subsequent protection for such characters. *Twin Books*, 83 F.3d at 1166 . Even if the District Court is correct that the characters became sufficiently developed in the films to be separately protectable, that does not mean that the characters from the publicity materials which already fell into the public domain are somehow "retrieved" and are newly protected upon registration of the film. There is no authority for such a proposition, because it is fundamentally inconsistent with the law of copyright that

anyone may copy works which are in the public domain. Instead, the law is well-settled that if, as here, the basic pictorial representation of the character has entered the public domain, any infringement claim based on such character fails as a matter of law.

In *Harvey Cartoons v. Columbia Pictures Industries, Inc.*, 645 F.Supp. 1564, 1569-70 (S.D. N.Y. 1986), the court held that Harvey had no copyright protection for the pictorial representation of its “Fatso” character because the comics in which the character first appeared were not renewed and went into the public domain. Even though Harvey’s later publications which included the “Fatso” character were validly protected by copyright, the defendant was free to directly copy the character, and “Harvey’s copyright infringement claim must fail as a matter of law.” *Id.*

In its copyright order, the District Court cited and discussed cases on the issue of whether a character can be a protectable component of a film copyright. The District Court concluded that the cartoon characters from “Tom and Jerry” were entitled to copyright protection, and also concluded that characters from “The Wizard of OZ” and “Gone With the Wind” were entitled to separate protection because of their distinctive and widely identifiable traits developed through the

films.³ This analysis, however, is relevant only if the characters have not already been injected into the public domain.⁴

Here, the District Court expressly found, as it must, that the characters depicted in the pre-film publicity artwork are the *same* as the characters in the subject films:

“There is no dispute that the characters contained within publicity artwork and the characters in the subject films are the same. ... the actors and cartoon characters from the films are indeed the very same actors and cartoon characters as those featured in the publicity materials.”

(Copyright Order, Addendum, Part I, p. 14.)⁵

Therefore, once the characters featured in the publicity materials went into the public domain, there could be no copyright protection for these “same”

³ As noted in AVELA’s opening brief, “Wizard of Oz” and “Gone With the Wind” are concededly based on and derivative of the public domain books by L. Frank Baum and Margaret Mitchell. Therefore, setting aside the fact that AVELA does not make use of any character images from the films, protection for the characters in the films could only extend to those non-book elements or “increments of expression” added in the films. *See, Silverman v. CBS, Inc.*, 870 F.2d 40, 50 (2d Cir. 1989); *Harvey Cartoons, supra*, 645 F.Supp. at 1570.

⁴ This is not a case, like those analyzed by the District Court, in which the character in the protected work is copied, and the defendant claims there is no infringement because the character is not a separately protectable part of the work in which it appears.

⁵ Indeed, as discussed *supra*, Nimmer states that with respect to publicity materials for early motion pictures, “[o]ften photos were taken on the set depicting the same stars, wearing the same costumes, appearing in the same scenery, that would later appear in the photoplay...”

characters which later appear in the films. *Harvey Comics*, 645 F.Supp. at 1569-70; *Silverman*, 870 F.2d at 50.

Notwithstanding the express recognition that the characters in the publicity materials and in the films are really the same, the District Court later attempts to make a distinction between “pictures of the actors in costume” and the “idiosyncracies” of the characters in the films. Any such distinction is irrelevant under copyright law, because Warner Bros. had no copyright protection for the pictorial representation of any of the characters once the publicity materials went into the public domain. Warner Bros.’ copyright infringement claim fails as a matter of law.

In a new theory first raised on appeal, Warner Bros. argues that the inclusion by AVELA licensee, Trau & Loevner, of phrases (such as “There’s No Place Like Home” along with a publicity image of Dorothy) means that AVELA is actually copying the characters as they are depicted in the films.⁶ Even though this new theory cannot be considered for the first time on appeal, this argument fails for at least three reasons. First, Warner Bros. does not and cannot dispute that the images used are from the public domain, so there can be no infringement based on such use. Next, there is no evidence that Trau & Loevner ever produced the

⁶ Since this theory was not presented below on summary judgment (See Docket ## 210, 231 and 238) this Court cannot consider it for the first time on appeal. *Kriegesmann v. Barry-Wehmiller Co.*, 739 F.2d 357, 358 (8th Cir. 1984).

subject shirts with the phrases – the exhibits referenced by Warner Bros. are merely designs that were created by Trau & Loevner, and Trau & Loevner’s designee specifically testified that he doesn’t know if the shirts were ever made or sold to retailers. (Sep. App. 289-290.) Finally, even if the phrases had been actually licensed and used, Warner Bros. does not own the copyrights therein. The phrases referenced, including “There’s no place like home” by Dorothy, and “If [I] only had [a] brain[.]” referring to the Scarecrow, are in the L. Frank Baum public domain book, “The Wonderful Wizard of Oz.” (App. 669.)⁷

B. The Publicity Materials Are Not Derivative Works of the Films

As anticipated, Warner Bros. tries to confuse the issues by suggesting that the publicity materials are derivative of the films, and that the public domain status of the publicity materials therefore cannot affect the underlying copyright of the films. (Warner Bros. Brief, pp. 36-39.) A derivative work is, by definition, “a work based upon one or more pre-existing works...” Section 103(a) of the Copyright Act. The publicity materials are *not* derivative works – they were separately created and were published and entered the public domain *before* the films were registered and released.

⁷ Warner Bros. concedes that it “has no claims to versions or elements of these characters that have been developed in novels, or even on stage or radio plays, in the case of L. Frank Baum’s creations.” (Docket # 238, p. 15.)

Warner Bros.’ continued reliance on *Stewart v. Abend*, 495 U.S. 207 (1990) and *Russell v. Price*, 612 F.2d 1123 (9th Cir. 1979) is misplaced. These cases simply stand for the proposition that if a derivative work enters the public domain, the matter therein which derives from a work still protected by copyright does not go into the public domain. Further, this doctrine prevents unauthorized copying of the pre-existing work so long as the pre-existing work itself remains copyrighted. *Russell*, 612 F.2d at 1128; *Stewart*, 495 U.S. at 223.

Here, the publicity materials were created and published before the films were released and were not derivative of the films. Upon their publication without statutory notice under the 1909 Act, the materials were injected into the public domain. The doctrine discussed in *Russell* and *Stewart* is inapplicable.

C. There is No Restriction as to the Manner in Which Public Domain Materials May Be Copied

The District Court has ruled that AVELA may license, exploit, copy or otherwise use the public domain movie publicity materials as long as they make reproductions “in their entirety and without alteration or modification.” AVELA cannot, according to the District Court, license, exploit, copy or otherwise use the public domain movie publicity materials “in any manner that displays less than the full movie publicity material.” (Injunction Order, Addendum, Part II, pp 6-7.)

There is no authority cited by Warner Bros. or the District Court which supports the proposition that AVELA, or any member of the public, can only copy the

entirety of a public domain work and is prohibited from copying a portion thereof. Works in the public domain are dedicated to the public and are free for all to use. The characters in the publicity materials are injected, along with whatever other elements are in the publicity materials, into the public domain. AVELA, its licensees and the public are free to copy everything that is dedicated to the public, including the characters. Lifting or “plucking” the characters from the background and other elements of the public domain material does not make the characters any less part of the public domain.

Not surprisingly, Warner Bros. offers no defense of the District Court’s determination that one may only make an exact replica of the public domain work. In *Pannonia Farms, Inc. v. USA Cable*, 2004 WL 1276842, at *9 (S.D.N.Y. 2004), the court described as “plainly baseless” the contention that one can use public domain materials only in the manner in which they appear in the public domain, and that “where 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.” (emphasis in original).

IV.

WARNER BROS. CANNOT RELY ON NEW DOCUMENTS FIRST SUBMITTED ON APPEAL TO PROVE ITS CHAIN OF TITLE

As the foregoing discussion demonstrates, even if it is assumed that Warner Bros. is the owner by chain of title of the subject films, its copyright infringement

claim fails as a matter of law. However, Warner Bros. has failed to establish through admissible evidence that it is the owner of the films.

Review of a grant of summary judgment is limited to the record presented to the District Court at the time of summary judgment. *Marion County Coop. Ass'n v. Carnation Co.*, 214 F.2d 557, 562 (8th Cir. 1954); *Gilson v. Republic of Ireland*, 787 F.2d 655, 659 (D.C. Cir. 1986) (“Materials not presented to the district court for consideration of a motion for summary judgment are never properly before the reviewing court on appeal from the judgment granting the motion.”); See, also, 10A. C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2716 (3d ed. 2009) (“[The appellate court] can consider only those papers that were before the trial court. The parties cannot add exhibits, depositions or affidavits to support their position.”)

In response to AVELA’s opening brief, in which it was demonstrated that Warner Bros. could not establish its chain of title based solely on the inadmissible statements of its current legal counsel as to events which occurred more than 70 years ago, Warner Bros. has submitted approximately 60 pages of documentation which it claims establishes the chain of title. (Sep. App. 26-87.) Warner Bros. states that the documents were attached to its original complaint and that AVELA has had them since the beginning of the case. (Warner Bros. Brief, p. 47.) However, the issue is not whether the documents were previously filed or produced

in the action. Instead, as the above authorities mandate, in order for the Court to consider such evidence on appeal, it had to be made part of the record presented to the District Court at the time of summary judgment. The operative pleading before the District Court at the time of summary judgment was Warner Bros.' Second Amended Complaint, filed nearly two years after the original complaint, which did *not* include any documents purporting to establish the chain of title. (App. 64-98.) The documents presently included by Warner Bros. in the Separate Appendix were *not* presented to the District Court at the time of summary judgment as an exhibit, attachment or otherwise.

The reason for the rule prohibiting consideration of such documents is clear. This Court's function is to review the District Court's determination based on the record before the District Court. Further, AVELA did not have a chance to address or consider the documents at time of summary judgment.

AVELA will not repeat the points made in its opening brief which establish that Warner Bros. failed to submit admissible evidence to prove its chain of title.

V.

THE INJUNCTION MUST BE VACATED

AVELA has demonstrated that the District Court's copyright order must be reversed. Since summary judgment on the copyright claim was improperly

granted, the injunction based thereon must be vacated. *Mulcahy v. Cheetah Learning LLC*, 386 F.3d 849, 850 (8th Cir. 2004).

CONCLUSION

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: November 19, 2010

THE BALL LAW FIRM, LLP

By: /s/ Douglas D. Winter
DOUGLAS D. WINTER

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

The undersigned attorney for Appellants certifies as required by Rule 32(a)(7)(C) that Appellants' Reply Brief complies with the word limitations contained in Rule 32 (a)(7)(B)(i). The number of words used in the Reply Brief attached hereto is shown to be 4,838 by the word count of the word processing system used in preparing the Reply Brief. In accordance with Eighth Cir. Rule 28A(c), the Reply Brief was prepared using Microsoft Word, version 2007, with a Times New Roman font in 14 point size.

Dated: November 19, 2010

THE BALL LAW FIRM, LLP

By: /s/ Douglas D. Winter
DOUGLAS D. WINTER

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on November 19th, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/ Michael E. Bub

Michael E. Bub

Attorney for the Appellants