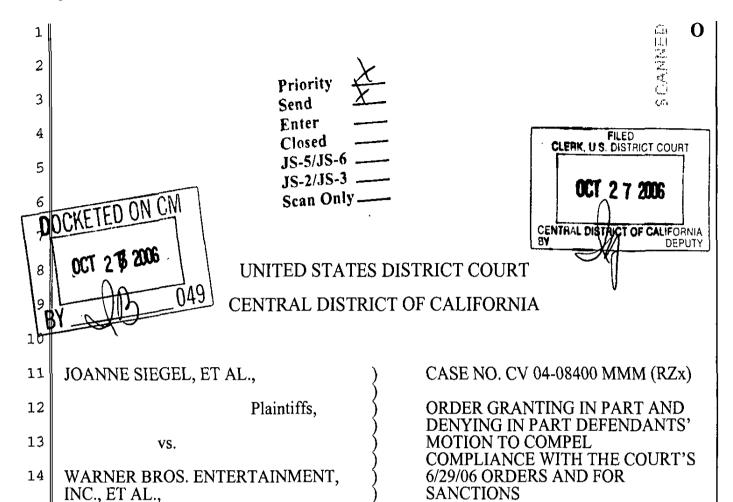
Joanne Siegel et al v. Warner Bros Entertainment Inc et al



This matter came before the Court on October 23, 2006 on the motion of Defendants to Compel Compliance With the Court's 6/29/06 Orders and for Sanctions. Defendants appeared through their counsel Michael Bergman and Anjani Mandavia. Plaintiffs appeared through their counsel Marc Toberoff. The Court heard argument of counsel and took the matter under submission.

Defendants.

In interrogatories 3(c) and 3(d), Defendants asked Plaintiffs to identify the "specific passage(s), image(s) or scene(s)" in the allegedly infringing works, (which are certain episodes of the television show *Smallville*), and the "specific passage(s), image(s) or scene(s)" in Plaintiffs' properties which have been infringed. Plaintiffs did not do this in their responses. Rather, they listed, fairly specifically in the Court's view, certain themes, settings and characters which they believe have been infringed by the themes, settings and characters in the *Smallville* episodes. They argue, in response to this motion,



Doc. 8

that it would be burdensome for them to identify particular stop-and-start points on the DVDs containing the episodes, and that the nature of the alleged infringement does not fit neatly into a scheme which identifies particular "passage(s), image(s) or scene(s).

These arguments are in the nature of objections, but it is too late for Plaintiffs to object. Plaintiffs waived that right by agreeing to respond to the interrogatories, an agreement that took the form of a stipulation presented to the Court, which the Court approved through its order. There being no right to object, the only question is whether the responses fairly answer the questions.

The identification of themes, characters and settings which may be infringed and which may cause infringement is part of the showing which might be made in a copyright action, where the plaintiff needs to show similarity of the two works because he does not have evidence of actual copying. Funky Films v. Time Warner Entertainment Co., 462 F.3d 1072, 1076 (9th Cir. 2006), citing Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000). But these are not the only elements which might show similarity; among the others are plot, mood, pace, dialogue and sequence of events. Funky Films, 462 F.3d at 1077, citing Kouf v. Walt Disney Pictures and Television, 16 F.3d 1042 1045 (9th Cir. 1994).

At trial, Plaintiffs will bear the burden of demonstrating that the episodes of *Smallville* infringe their copyright. If they wish to rest on identifying themes, characters and settings they may do so, and have the trier of fact determine if infringement has occurred. Or they may add to those identifications the elements of plot, mood, pace, dialogue and sequence of events. In either situation, however, Plaintiffs must identify, as they agreed to do, specific passage(s), image(s) or scene(s) in which the elements occur. If they assert that dialogue is infringing, they must identify the dialogue. If they assert that plot is infringing, then they must identify which plots of which episodes. As to their assertion of infringement by characters, themes and settings, they must identify the episodes in which those occur and, with as much precision as possible, the place in which they occur.

As both sides acknowledged at trial, there will be an issue as to what is protectable. It is familiar territory that ideas are not protectable, but the expression of ideas is, and that as expression becomes more and more abstract and general it becomes less and less protectable. This is all the more reason that the interrogatories should be more fully answered, so that the parties will know precisely what the trier of fact needs to consider. Defendants' motion is granted. Plaintiffs shall serve further supplemental answers within fourteen days. The Court finds that Plaintiffs had substantial justification for their opposition. Accordingly, Defendants' request for sanctions is denied. IT IS SO ORDERED. DATED: October <u>16</u>, 2006