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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

JOANNE SIEGEL, ET AL.,  
Plaintiffs,  
vs.  
WARNER BROS. ENTERTAINMENT,  
INC., ET AL.,  
Defendants.

CASE NO. CV 04-08400 MMM (RZx)  
ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION TO COMPEL  
COMPLIANCE WITH THE COURT'S  
6/29/06 ORDERS AND FOR  
SANCTIONS

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.

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,

*[Handwritten mark]*

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

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

9           The identification of themes, characters and settings which may be infringed  
10 and which may cause infringement is part of the showing which might be made in a  
11 copyright action, where the plaintiff needs to show similarity of the two works because he  
12 does not have evidence of actual copying. *Funky Films v. Time Warner Entertainment*  
13 *Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006), citing *Three Boys Music Corp. v. Bolton*, 212  
14 F.3d 477, 481 (9th Cir. 2000). But these are not the only elements which might show  
15 similarity; among the others are plot, mood, pace, dialogue and sequence of events. *Funky*  
16 *Films*, 462 F.3d at 1077, citing *Kouf v. Walt Disney Pictures and Television*, 16 F.3d 1042  
17 1045 (9th Cir. 1994).

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

1 As both sides acknowledged at trial, there will be an issue as to what is  
2 protectable. It is familiar territory that ideas are not protectable, but the expression of  
3 ideas is, and that as expression becomes more and more abstract and general it becomes  
4 less and less protectable. This is all the more reason that the interrogatories should be  
5 more fully answered, so that the parties will know precisely what the trier of fact needs to  
6 consider.

7 Defendants' motion is granted. Plaintiffs shall serve further supplemental  
8 answers within fourteen days.

9 The Court finds that Plaintiffs had substantial justification for their  
10 opposition. Accordingly, Defendants' request for sanctions is denied.

11 IT IS SO ORDERED.

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13 DATED: October 26, 2006

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17 RALPH ZAREFSKY  
18 UNITED STATES MAGISTRATE JUDGE  
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