



**JOEL BEININ, Plaintiff, v. THE CENTER FOR THE STUDY OF POPULAR  
CULTURE, Defendant.**

**NO. C 06-2298 JW (RS)**

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
CALIFORNIA, SAN JOSE DIVISION**

**2006 U.S. Dist. LEXIS 96088; 35 Media L. Rep. 1527**

**October 31, 2006, Decided**

**October 31, 2006, Filed**

**SUBSEQUENT HISTORY:** Motion denied by Beinin v. Ctr. for the Study of Popular Culture, 2007 U.S. Dist. LEXIS 22518 (N.D. Cal., Mar. 16, 2007)

**COUNSEL:** [\*1] For Ph.D. Joel Beinin, Plaintiff: Albert L. Sieber, LEAD ATTORNEY, Fenwick & West LLP, San Francisco, CA.; Mitchell Harris Zimmerman, Patrick E. Premo, LEAD ATTORNEYS, Mary Elizabeth Milionis, Fenwick & West LLP, Mountain View, CA, US.

For The Center for the Study of Popular Culture, a California corporation, Defendant: Roger R. Myers, LEAD ATTORNEY, Rachel E. Matteo-Boehm, Holme Roberts & Owen LLP, San Francisco, CA.

**JUDGES:** RICHARD SEEBORG, United States Magistrate Judge.

**OPINION BY:** Richard G. Seeborg

**OPINION**

**ORDER GRANTING IN PART AND DENYING IN PART MOTION TO COMPEL AND MOTION FOR PROTECTIVE ORDER**

**I. INTRODUCTION**

Before the Court is defendant's motion for a protective order, plaintiff's corresponding motion to compel, and post-hearing requests from both sides that they be permitted to submit additional materials. Based on the parties' briefing, the arguments of counsel, and the record herein, each motion will be denied in part and granted in part, and the requests to file additional materials will be denied.

**II. BACKGROUND**

Plaintiff Joel Beinen is a professor of Middle Eastern studies at Stanford University who has been involved with the Middle East Studies Association ("MESA"). [\*2] Defendant The Center for the Study of Popular Culture ("the Center") is self-described as a "non-profit organization founded by author and advocate David Horowitz to promote conservative positions on matters of domestic and foreign policy." The Center publishes political commentary online and in printed books and pamphlets. In February of 2005, the Center published a pamphlet entitled "Campus Support for Terrorism." The pamphlet collected several articles criticizing various academic organizations and individuals for advocating views that the authors assert are not in the interests of the United States. One of the articles in the pamphlet, entitled "Terror's Faculty Sympathizers," expressly criticized MESA and Beinen.

The cover of the pamphlet featured photographs of

four individuals mentioned in the articles, including one of Beinen. The center obtained the photo of Beinen from the Stanford University website. Beinen subsequently obtained an assignment of rights from the photographer who had taken the picture, and then filed this action for copyright infringement.

### III. DISCUSSION

Under the Federal Rules of Civil Procedure, Rule 26(b)(1), [\*3]

[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Federal Rules of Evidence, Rule 401. Discovery may be limited by the court for good cause shown "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26 (c)

#### A. Discovery Requests Related to Liability

Beinen has propounded a number of interrogatories and document requests that the Center contends are wholly inappropriate given that Beinen is suing only for copyright infringement and not for libel. The Center notes that it would be entitled [\*4] to various protections in any libel suit, including the provisions of California's "anti-SLAPP" statute, Cal. Code Civ. P. § 425.16 and rights under the First Amendment. The Center argues that Beinen is now attempting to evade those limitations by seeking discovery that would only be relevant had he brought a defamation claim.

Beinen concedes that, as drafted, the discovery requests seek factual support for the *content* of the pamphlet, among other things. Beinen argues, however, that in the meet and confer process he narrowed his

requests to seek only information related to the *cover* of the pamphlet, and its use in advertising and promoting the pamphlet or other publications, fund raising, or other activities of the Center. Beinen contends that, as limited, the requests properly seek information that is relevant to a copyright claim because the Center's intent and motive is germane to its various equitable defenses and to the doctrine of "fair use."

As noted at the hearing, the precise contours of the limitations Beinen proposes are somewhat unclear. It appears, however, that even though Beinen has disavowed any intent to obtain factual support for the contents of the pamphlet, [\*5] he is still expecting the Center to provide any factual support it may have for what Beinen sees as the "message" of the cover. Even assuming that the Center's good faith or lack thereof may have some bearing on claims or defenses in this copyright action, Beinen has not shown how the truth or falsity of the "message" of the cover has any relevance to this action for copyright infringement of the photograph. The issue in this case is not whether Beinen "supports terrorism" or not, nor whether it was defamatory to imply that he does. With that limitation in mind, the Court will address the specific requests remaining in dispute.

#### Interrogatory No. 4

This interrogatory requests the Center to state all facts relating to why it "believes Prof. Beinen supports or collaborates with terrorists." Having sued only in copyright, Beinen cannot now call on the Center to defend or support any opinions it may hold about Beinen and his activities. No further response to this interrogatory will be required.

#### Interrogatory No. 5

As drafted, this interrogatory seeks "all facts relating to the Pamphlet's discussion of Prof. Beinen," including all facts underlying the statements made in the pamphlets. [\*6] Beinen has now recast this interrogatory to request "all facts relating to the cover of the Booklet and use of the cover of the booklet in [the Center's] advertising, promotion, solicitation and or fund-raising activities." With the understanding that the Center is not required to state facts supporting the "message" of the cover, the revised interrogatory is appropriate, and a further response shall be provided within 20 days of the date of this order.

## Document Request No. 1

This request seeks all documents in any way related to Beinen. The Center has agreed to produce any documents related to its use of Beinen's photograph, but contends that the request is otherwise overbroad. Assuming the Center possesses other documents relating to Beinen, those documents may well pertain to his public activities and political views. Indeed, the divergent political opinions of the parties is no secret. The details of what the Center has collected about Beinen, or what it has said to others about Beinen, simply have no bearing on the copyright issues in this action. No further response to this request will be required.

## Document Request No. 3

This request originally sought "all documents [\*7] relating to the Pamphlet" including communication with third parties. As limited, it now seeks only documents relating to the cover of the pamphlet and its use by the Center. As limited, the request does not require the Center to support the "message" of the cover, and is not otherwise overbroad. The Center has already agreed to produce responsive documents "relating to its use of the photograph." To the extent that the Center possesses additional responsive non-privileged documents relating to its use of the cover in its advertising, promotion, solicitation, and/or fund raising activities, it shall produce them within 20 days of the date of this order.

## Document Request Nos. 5 and 6

As drafted, these requests seek communications between Horowitz or Ben Johnson and third parties regarding Beinen, MESA, the photograph and/or the pamphlet. Beinen is now limiting the request to communications regarding Beinen, the photograph, the cover of the pamphlet and its use in advertising, promotion, solicitation, and/or fund raising activities.

To the extent the narrowed requests still seek any communications relating to Beinen, they remain overbroad, for the same reason as discussed in connection [\*8] with request no. 1. The remainder of the requests as narrowed, however, are appropriate, for the same reason as discussed in connection with request no. 3. To the extent that the Center possesses additional responsive non-privileged documents relating to its use of the cover in its advertising, promotion, solicitation, and/or fund raising activities, it shall produce them within 20 days of

the date of this order.

## Document Request Nos 28 and 29

These requests seek documents supporting the purported connection between terrorists and Beinen and other academics. As with interrogatory no. 4, there is no basis in this copyright action to require the Center to defend the message conveyed by the pamphlet or its cover. No further response to these requests will be required.

## B. Discovery Requests Related to Damages

As narrowed in the parties' meet and confer discussions, the discovery requests relating to damages that remain in dispute are interrogatory 12, subcategories (3) (sales of books and pamphlets) and (4) (revenue received from direct solicitations) and document request 14 (documents supporting the interrogatory response).

The Center contends that it should not have to disclose [\*9] any revenue information *except* what it derived from sales of the pamphlet itself. Beinen points out, however, that the pamphlet--and therefore his photograph--was depicted prominently on the Center's website. Beinen's theory is that his photograph was in effect used as a marketing tool for *all* of the Center's sales and fund-raising efforts. The Center argues that Beinen will not be able to prove a sufficient nexus between the use of the photograph and other revenues so as to permit recovery of such "indirect profits." The Center may well ultimately be able to persuade the trial judge or a trier of fact that issues of causation and speculation preclude recovery for some or all of the "indirect profits," but that is a question that must be decided on a complete factual record. As limited, these requests are reasonably calculated to lead to the discovery of admissible evidence. The Center shall serve a further response to interrogatory 12, subcategories (3) and (4), and any non-privileged responsive supporting documents within 20 days of the date of this order.

## C. Post-hearing submissions

The Court has received and considered the post hearing letter briefs that it requested. [\*10] The Center's subsequent request to submit copies of certain materials produced by Beinen in discovery is denied. The Center has not demonstrated that consideration of such materials is critical to disposition of these motions. Beinen's request to

file a transcript counsel produced of the hearing in this matter is denied. The audio record of the hearing is already part of the record herein.

IV. CONCLUSION

The parties' respective motions are denied in part and granted in part, as set forth above.

IT IS SO ORDERED.

Dated: October 31, 2006

RICHARD SEEBORG

United States Magistrate Judge