

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

_____)
 ANNE PEARSE-HOCKER,)
 16156 Short Hill Road,)
 Purcellville, Virginia 20132-2513,)
) **Plaintiff,**)
 v.)
 THE SMITHSONIAN INSTITUTION,)
 1000 Jefferson Drive, S.W.)
 Washington, D.C. 20560,)
) **Defendant.**)
 _____)

Case No. 1:10-cv-00269

FIRST AMENDED COMPLAINT

Anne Pearse-Hocker ("Pearse"), for her First Amended Complaint against The Smithsonian Institution ("Smithsonian"), states as follows:

NATURE OF THE ACTION

1. This is an action for injunctive relief and damages against the Smithsonian for breach of contract and copyright infringement as a result of the Smithsonian's unauthorized use and distribution of several photographs for which Pearse is the lawful copyright holder in violation of the Federal Copyright Act of 1976, 17 U.S.C. § 101, *et seq.*

THE PARTIES

2. Pearse is an individual citizen of Virginia and a professional photographer. She was present and worked as a free-lance photographer during the standoff in Wounded Knee, South Dakota in 1973 between members of the American Indian Movement and the United States Marshal's Service and other law enforcement agencies. As described in greater detail below, Pearse is the copyright holder for a series of photographs taken at Wounded Knee during

the standoff that have been used and distributed by the Smithsonian Institution to third parties without her authorization.

3. The Smithsonian Institution is a trust instrumentality of the United States established by Act of Congress in 1846, 20 U.S.C. § 41, *et seq.*, that operates nineteen museums, nine research centers, and the National Zoo. Approximately two-thirds of the Smithsonian Institution's annual operating budget is derived from federal appropriations authorized by Congress.

JURISDICTION

4. This Court has original and exclusive subject matter jurisdiction over the copyright infringement claim in this matter pursuant to 28 U.S.C. § 1498(b), as the Smithsonian Institution falls within the statutory definition of "the United States" for purposes of determining the exclusive subject matter jurisdiction of the Court of Federal Claims for claims of copyright infringement against the federal government. See O'Rourke v. Smithsonian Institution Press, 399 F.3d 113, 122-23 (2d Cir. 2005). This Court has original subject matter jurisdiction over the breach of contract claim in this matter pursuant to 28 U.S.C. § 1491(a), as the claim is based upon an "express or implied contract with the United States."

FACTUAL ALLEGATIONS

5. Anne Pearse-Hocker is a professional photographer. In 1973, she was working as a freelance professional photographer for a San Diego, California newspaper called "The Voice and Viewpoint."

6. On or about February 27, 1973, a group of Native Americans, including members of a group called the American Indian Movement ("AIM"), took armed control of the town of Wounded Knee, South Dakota.

7. Over the following days, an armed standoff in which rifle and automatic weapons fire was exchanged on a frequent basis developed between the Native Americans occupying the village of Wounded Knee and agents of the United States Marshal's service, as well as other federal government law enforcement agencies.

8. In April 1973, Pearse entered the village and began taking pictures of the scenes inside the surrounded village of Wounded Knee. Pearse's activities at the time were as a freelance photojournalist.

9. During the 71-day long siege, one U.S. Marshal was shot and partially paralyzed and two Native Americans were shot and killed. Pearse was present in the village for approximately two weeks of the siege, including on the day that Frank Clearwater, one of the Native Americans occupying the village, was killed. Only one other photojournalist remained in the village during the time that Pearse was present; all other members of the press were ordered to leave the village and/or prohibited from entering the village by the United States Department of Justice approximately one month into the siege. During her time in the village, Pearse took several hundred still pictures.

10. Several months after the end of the standoff, on or about December 10, 1973, Pearse registered her copyright in the collection of photographs she had taken during her time in Wounded Knee. (A true and correct copy of the Copyright Registration is attached hereto as Exhibit A.)

11. In late 1996, Pearse was approached by representatives of the Smithsonian Institution regarding the possibility of donating her collection of photographs from the Wounded Knee siege to the Smithsonian's Native American collection (which was then housed in the Gustav Heye museum in New York and later incorporated into the National Museum of the

American Indian ("NMAI")). During the course of the negotiations, Pearse made clear that, in order for her to agree to donate the photographs, copyright would have to remain in her name, and would not be transferred to the Smithsonian. Pam Dewey, NMAI's head of photography, explicitly recognized this condition of the gift in an email to Pearse dated April 1, 1997, in which she provided Pearse with draft language regarding the copyright. Later, in a letter to Pearse dated June 3, 1997, Dewey again stated that she was providing Pearse with a "run-down of the steps we will take on our end to ensure . . . that the images are used for specific Museum-related or research purposes, and not for commercial projects."

12. On or about December 31, 1997, after extensive discussions with representatives from the Smithsonian, Pearse executed a Deed of Gift donating her collection of photographs from the Wounded Knee siege to the Smithsonian. (A true and correct copy of the Deed of Gift is attached hereto as Exhibit B.)

13. With respect to the copyright in the photograph collection, the Deed of Gift provides as follows:

Conditions: I do not, by this gift, transfer copyright in the photographs to the Smithsonian Institution. I retain full copyright in the photographs. I grant to the Smithsonian Institution and the National Museum of the American Indian an irrevocable, non-exclusive, royalty-free, license to use, reproduce, display, and publish, in all media, including electronic media and on-line, the photographs for all standard educational, museum, and archival purposes. Requests by people or entities outside the Smithsonian to reproduce or publish the photographs shall be directed to the donor.

The "conditions" language in the Deed of Gift with respect to the copyright was drafted by the Smithsonian's Office of General Counsel and is identical to the draft language provided in the April 1, 1997 email from Pam Dewey to Pearse.

14. The Deed of Gift specifically provides, immediately above the signature line for the Smithsonian's representative, that the "National Museum of the American Indian, Smithsonian Institution, hereby accepts the above property under the conditions specified."

15. The hundreds of photographs of the Wounded Knee occupation that Pearse donated to the Smithsonian included images numbered by NMAI's photo archives department as images N4462, N44926, and N45215 (hereinafter the "Distributed Photographs"). Image N44926 shows the scene immediately after Frank Clearwater, one of the two Native Americans who was shot and killed during the stand-off, was struck in the head by a bullet. Image N45215 shows other Native Americans transporting Mr. Clearwater from the church where he was struck to seek medical aid before he died from his injuries. Both images N44926 and N45215 were captured by Pearse under direct automatic weapons and rifle fire at considerable risk to her own life and safety.

16. Upon information and belief, since Pearse donated the photographs to NMAI and the Smithsonian in 1997, NMAI has maintained the entire collection within its photo archives department.

17. In or about February 2008, NMAI's photo archives department received a request from Julianna Brannum, an associate producer employed by Firelight Media, Inc., an independent film production company based in New York City, to use the Distributed Photographs in the production of a documentary film regarding the occupation of Wounded Knee. The film, entitled "We Shall Remain: Wounded Knee," was to be broadcast by the WGBH Educational Foundation and the Public Broadcasting Service (PBS) in January 2009. (A copy of the original Use Request is attached hereto as Exhibit C.)

18. On or about February 28, 2009, Firelight Media's application for use of the Distributed Photographs was approved by NMAI's photo archives department. (A copy of the approved Use Request is attached hereto as Exhibit D.) In the approved Use Request, NMAI agreed to Firelight's proposed redaction of the credit line to accompany the photographs in the film from "Courtesy, National Museum of the American Indian, Smithsonian Institution (negative, slide, or catalog number). Photo by Anne Pearse Hocker." to "~~Courtesy, National Museum of the American Indian, Smithsonian Institution (negative, slide, or catalog number).~~ Photo by Anne Pearse Hocker."

19. Following its receipt of approval from the Smithsonian, Firelight Media proceeded to incorporate the Distributed Photographs in its final documentary film, "We Shall Remain: Wounded Knee." At no time did anyone from NMAI, the Smithsonian Institution, Firelight Media, WGBH, or PBS contact Pearse regarding Firelight Media's request to use her copyrighted photographs in the film, the Smithsonian's approval of the request, or the inclusion of the photographs in the documentary film.

20. Firelight Media's film eventually became part of a five-part miniseries that, starting on May 11, 2009, aired on public broadcasting stations around the country as part of the series "American Experience."

21. The Distributed Photographs themselves are highlighted in the fifth part of the miniseries. Specifically, the copyrighted photograph labeled by the Smithsonian as N44622 is shown from minutes 63:22 to 63:29 of the film, the photograph labeled by the Smithsonian as N44926 is shown from minutes 64:08 to 64:24, and the photograph labeled by the Smithsonian as N45215 is shown from minutes 64:57 to 65:04.

22. Pearse first became aware that her photographs were used in the documentary when she saw the documentary on television in May 2009. Prior to that time, no one had advised her that the Smithsonian had released her photographs for use in the documentary. Further, to add insult to injury, Pearse's name was not included in the credits roll at the end of the film.

23. Since the film first began airing on public television stations, WGBH has also made the film available for viewing online at <http://www.pbs.org/wgbh/amex/weshallremain/>. Further, a DVD version of the film is available for purchase from PBS at <http://www.shoppbs.org/product/index.jsp?productId=3511812>. The film was also screened at the Sundance Film Festival in Utah in January 2009.

24. In addition to purchase through PBS's website, the film is also available for purchase to the general public through the websites of multiple third party commercial vendors, including, but not limited to, Amazon.com, the website of Barnes & Noble, and the website of Borders. Upon information and belief, as a result of PBS's multiple infringements of Pearse's copyrights in the photos, thousands of copies of her photographs have been sold for commercial gain and profit through sales of the film.

25. Upon seeing the film, Pearse contacted the Smithsonian and asked for an explanation for why she had not been contacted regarding the release of the Distributed Photographs.

26. In a letter dated May 27, 2009, Kevin Gover, the Director of the National Museum of the American Indian, admitted that NMAI "did not properly adhere to the terms and conditions stated in your gift agreement," and that Pearse's photos were "used and not properly credited in the episode 'We Shall Remain: Wounded Knee.'" In the same letter, Gover also

admitted that "[Pearse's] permission was not obtained for this third party use [of the photographs]."

27. Upon information and belief, WGBH and PBS have licensed the film to local PBS affiliates throughout the United States for rebroadcast up to four times during a period of three years. In each of these rebroadcasts, Pearse's copyrighted photographs continue to be republished without her consent and in violation of her copyright.

28. Upon information and belief, in the absence of injunctive relief, the Smithsonian will continue to breach the Agreement, including by continuing to license the Distributed Photographs for use by Firelight Media in violation of both Pearse's copyright and the terms of her Deed of Gift.

29. The Smithsonian's actions have caused and, in the absence of an injunction, will continue to cause, Pearse to suffer irreparable harm.

COUNT I
(Copyright Infringement)

30. Pearse incorporates by reference Paragraph 1-29, above, as if fully set forth herein.

31. Pearse's copyright in the Wounded Knee photograph collection, including the Distributed Photographs, is valid and enforceable.

32. The Smithsonian infringed Pearse's copyright in the Distributed Photographs in violation of 17 U.S.C. § 501 by granting Firelight Media an unauthorized license to use, display, reproduce, and publish the Distributed Photographs in the film "We Shall Remain: Wounded Knee" without Pearse's consent and by publishing the Distributed Photographs to Firelight Media for a commercial purpose in violation of the terms of the Smithsonian's license as established by the terms and conditions of the Deed of Gift.

33. The Smithsonian also infringed Pearse's copyright in the Distributed Photographs in violation of 17 U.S.C. § 501 by copying the photographs and distributing them to Firelight Media, as the conditions of the Deed of Gift only provide the Smithsonian a license to reproduce and publish the phototgraphs "for all standard educational, museum, and archival purposes" and provides that "[r]equests by people or entities outside the Smithsonian . . . shall be directed to the donor."

34. The Smithsonian willfully infringed Pearse's copyright in the Distributed Photographs because it had constructive knowledge that it was infringing Pearse's copyright or acted in reckless disregard of the high probability that it was infringing Pearse's copyright.

35. Pearse is entitled to recover all damages sustained as a result of the Smithsonian's infringing conduct, including, but not limited to: (i) Pearse's actual damages, or, alternatively, (ii) statutory damages, in an amount to be more fully determined at trial.

36. Pearse is entitled to an award of her costs and reasonable attorneys' fees pursuant to 17 U.S.C. § 505.

COUNT II
(Breach of Contract)

37. Pearse incorporates by reference Paragraphs 1-36, above, as if fully set forth herein.

38. As consideration for her donation of her collection of photographs taken at Wounded Knee to the Smithsonian, Pearse demanded the "conditions" set forth in the Deed of Gift, including the condition that she retain full copyright in the photographs and the condition that requests by third parties other than the Smithsonian to reproduce or publish the photographs be directed to her.

39. By executing the Deed of Gift, the Smithsonian agreed that it would comply with the conditions listed therein, including the two conditions described above regarding copyright in the photographs and the requirement of Pearse's consent for reproduction or publication by third parties.

40. The Deed of Gift is a reasonable, valid, and enforceable contract, and is supported by more than adequate consideration.

41. Pearse has fulfilled all of her obligations under the Deed of Gift, as she provided her entire collection of Wounded Knee photographs to the Smithsonian in or about 1998.

42. The Smithsonian has breached the terms of the Deed of Gift by: (i) failing to direct to Pearse for her approval the request by Firelight Media to use and reproduce the Distributed Photographs; and (ii) unilaterally authorizing the use, reproduction, displaying, and publishing of the Distributed Photographs by Firelight Media, WGBH, PBS, and all other downstream third parties that have reproduced or benefitted financially from the reproduction of the Distributed Photographs as if the Smithsonian were the owner of the copyright in the Distributed Photographs.

43. Through the May 27, 2009 letter from NMAI Director Kevin Gover, the Smithsonian Institution has acknowledged its liability for violations of the terms and conditions of the Deed of Gift.

44. In the absence of injunctive relief, the Smithsonian will continue to breach the terms and conditions of the Deed of Gift, including by continuing the unauthorized license granted by the Smithsonian to Firelight Media for the reproduction and publication over the airwaves, on the internet, and through online sales of DVDs of the Distributed Photographs in the documentary film "We Shall Remain: Wounded Knee."

45. Pearse has suffered monetary damages as a direct and proximate result of the Smithsonian's breaches of the Deed of Gift and has also been irreparably harmed in that the Smithsonian has continued its unauthorized license to Firelight Media for the use of the pictures in the documentary film.

WHEREFORE, Plaintiff, Anne Pearse-Hocker, demands that a judgment be entered in her favor and against the Smithsonian Institution:

A. Permanently enjoining the Smithsonian from continuing in effect its unauthorized license of the Distributed Photographs to Firelight Media, Inc. and any other downstream, third-party users pursuant to 17 U.S.C. § 502;

B. Compelling the Smithsonian to immediately return Pearse's entire collection of photographs taken at Wounded Knee to Pearse and to permanently delete all electronic copies of Pearse's photographs in the Smithsonian's possession, custody, or control;

C. Awarding compensatory damages or, alternatively, awarding statutory damages between \$750 and \$150,000 for infringement of each of Pearse's copyrights;

D. Awarding compensatory damages for breach of contract;

E. Awarding costs and attorneys' fees pursuant to 17 U.S.C. § 505;

F. Awarding post-judgment interest; and

G. Granting such other and further relief as is necessary and appropriate.

THOMPSON HINE LLP

Dated: July 28, 2010

By: _____

Christopher "Kip" Schwartz*

kip.schwartz@thompsonhine.com

Eric N. Heyer*

eric.heyer@thompsonhine.com

1920 N Street, N.W., Suite 800

Washington, D.C. 20036

Telephone: (202) 331-8800

Fax: (202) 331-8330

Counsel for Plaintiff Anne Pearse-Hocker