

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ANNE PEARSE-HOCKER	)	
	)	
Plaintiff,	)	
	)	No. 10-269C
v.	)	Judge Lynn J. Bush
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

**DEFENDANT'S ANSWER**

Defendant, the United States (the government), hereby answers plaintiff's First Amended Complaint against the Smithsonian Institution (Smithsonian) as follows, using the same headings and paragraph numbers used by plaintiff:

**NATURE OF THE ACTION**

1. Defendant admits that this purports to be an action for injunctive relief and damages against the government based on activities of the Smithsonian. The government denies that plaintiff is entitled to any injunctive relief. The other allegations in paragraph 1 are conclusions of law to which no response is required. To the extent that they are deemed to be allegations of fact, defendant denies the remaining allegations in paragraph 1.

**THE PARTIES**

2. Based on information and belief, defendant admits that plaintiff has worked as a photographer and that plaintiff registered a copyright in a collection of photographs, for which some were taken in Wounded Knee in 1973. Defendant is without information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 2 and, therefore, denies them.

3. Defendant admits the allegations contained in paragraph 3.

### **JURISDICTION**

4. The allegations in paragraph 4 are conclusions of law to which no response is required. To the extent that a response is deemed to be required, defendant admits that this court has subject matter jurisdiction over claims of copyright infringement under 28 U.S.C. § 1498(b) and over claims for breach of contract under 28 U.S.C. § 1491(a).

### **FACTUAL ALLEGATIONS**

5. Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 5 and, therefore, denies them.

6. Defendant admits the allegations in paragraph 6.

7. Defendant admits that gunfire was exchanged between 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. Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 7 and, therefore, denies them.

8. Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 8 and, therefore, denies them.

9. Defendant admits that during the siege, one U.S. Marshal was shot and partially paralyzed, and two Native Americans were shot and killed. Defendant is without information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 9 and, therefore, denies them.

10. Defendant admits that plaintiff registered a copyright in a collection of

photographs described as being taken at Wounded Knee in 1973. Defendant is without information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 10 and, therefore, denies them.

11. Defendant admits that, in 1996, plaintiff discussed the possibility of donating her collection of photographs from the Wounded Knee siege and related American Indian Movement (AIM) events to the National Museum of the American Indian (NMAI). Defendant further admits that, during these discussions, plaintiff eventually requested that her copyright in the collection of photographs would remain in her name and would not be transferred to the Smithsonian. Defendant further admits that this issue related to plaintiff's gift was discussed in an email dated April 1, 1997, and a letter dated June 3, 1997, both addressed to plaintiff from Pam Dewey, who was the Head of Photography for the NMAI. Defendant further admits that the June 3<sup>rd</sup> letter states, in part, that the earlier email provides "a run-down of the steps we will take on our end to ensure that your photographs are made available to the Pine Ridge and Rosebud communities, as well as to ensure that the images are used for specific Museum-related or research purposes, and not for commercial projects." Defendant denies the remaining allegations in paragraph 11.

12. Defendant admits that on (or about) December 31, 1997, plaintiff executed a Deed of Gift (Exhibit B to the original Complaint) that donated a collection of over 2,200 photographs, prints, and negatives from the Wounded Knee siege and related AIM events to the Smithsonian. Defendant further admits that the parties discussed the terms of the Deed prior to its execution. To the extent that there are any other factual allegations in paragraph 12, they are denied.

13. Defendant admits that paragraph 13 accurately quotes the last paragraph of language in the Deed of Gift. Defendant further admits that a portion of the language in that paragraph (specifically, the portion beginning "I retain full copyright . . .") is identical to language provided in a April 1, 1997, email from Pam Dewey to the plaintiff. This email indicates that the language was "drafted by the General Counsel [of the Smithsonian]." To the extent that there are any other factual allegations in paragraph 13, they are denied.

14. Defendant admits the allegations in paragraph 14.

15. Defendant admits that three photographs included in the collection of photographs donated to the Smithsonian have been numbered as images N44622, N44926, and N45215 (photographs-at-issue) and are at issue in this litigation. Defendant is without information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 15 and, therefore, denies them.

16. Defendant admits the allegations in paragraph 16.

17. Defendant admits that Firelight Media, Inc. (Firelight) requested use of the photographs-at-issue on or about February 2008 and that defendant gave Firelight permission to use them (subject to certain conditions), as set forth in Exhibit D to plaintiff's original Complaint. To the extent that there are any other factual allegations in paragraph 17, they are denied.

18. Defendant admits only that on or about February 28, 2008, the NMAI granted Firelight permission to use images N44622, N44926, and N45215, all at issue in this litigation, subject to certain conditions. Defendant denies that this occurred on or about February 28, 2009, as alleged in paragraph 18. Defendant further denies the remaining allegations in paragraph 18.

19. Defendant admits only that Firelight used images N44622, N44926, and N45215, the photographs-at-issue, in "Episode 5: Wounded Knee" (Wounded Knee documentary), the final part of the five-part documentary series "We Shall Remain." Defendant is without information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 19 and, therefore, denies them.

20. Defendant admits only that Firelight's Wounded Knee documentary aired on public broadcasting stations around the country as part of the series "American Experience." Defendant is without information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 20 and, therefore, denies them.

21. Defendant admits that image N44622 is shown at approximately minute 63 of the Wounded Knee documentary for roughly fifteen seconds, that image N44926 is shown at approximately minute 64 of the documentary for roughly seven seconds, and that image N45215 is shown at approximately minute 65 of the documentary for roughly seven seconds. Defendant denies the remaining allegations in paragraph 21.

22. Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 22 and, therefore, denies them.

23. Based on information and belief, defendant admits the allegations in paragraph 23.

24. Defendant admits that the Wounded Knee documentary is available for purchase on PBS's website and through the websites of third-party commercial vendors. Defendant is without information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 24 and, therefore, denies them.

25. Defendant admits that plaintiff initially contacted the Smithsonian to find out why she had not been credited for use of the photographs-at-issue in the Wounded Knee documentary. Defendant further admits that she later asked for an explanation for why she had not been contacted regarding the release of the photographs. Defendant is without information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 25 and, therefore denies them.

26. Defendant admits that Kevin Gover, the Director of the NMAI, wrote a letter to the plaintiff, which was dated May 27, 2009. Defendant further admits that plaintiff has accurately quoted brief portions of that letter. To the extent that there are any other factual allegations in paragraph 26, they are denied.

27. The allegation contained in paragraph 27 that the photographs-at-issue continue to be rebroadcast in "violation of her [plaintiff's] copyright" is a conclusion of law to which no answer is required. To the extent that it is deemed an allegation of fact, it is denied. Defendant is without information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 27 and, therefore, denies them.

28. The allegations contained in paragraph 28 constitute conclusions of law to which no answer is required. To the extent they may be deemed allegations of fact, they are denied.

29. The allegations contained in paragraph 29 constitute conclusions of law to which no answer is required. To the extent they may be deemed allegations of fact, they are denied.

**COUNT 1**  
**(Copyright Infringement)**

30. Defendant incorporates by reference its responses to paragraphs 1-29, above, as if fully set forth herein.

31. The allegations contained in paragraph 31 constitute conclusions of law to which no answer is required. To the extent they may be deemed allegations of fact, they are denied.

32. The allegations contained in paragraph 32 constitute conclusions of law to which no answer is required. To the extent they may be deemed allegations of fact, they are denied.

33. The allegation contained in paragraph 33 that "[t]he Smithsonian also infringed Pearse's copyright in violation of 17 U.S.C. § 501 by copying the photographs and distributing them to Firelight Media" constitutes a conclusion of law to which no answer is required.

Defendant admits that it provided Firelight with copies of the photographs-at-issue and permission to use them (subject to certain conditions), as set forth in Exhibit D to plaintiff's original Complaint. Defendant further admits that the Deed of Gift contains conditions, which are set forth in the Deed of Gift itself. To the extent that paragraph 33 is deemed to contain additional allegations of fact, they are denied.

34. Defendant denies the allegations in paragraph 34.

35. Defendant denies the allegations in paragraph 35.

36. Defendant denies the allegations in paragraph 36.

**COUNT II**  
**(Breach of Contract)**

37. Defendant incorporates by reference its responses to paragraphs 1 through 36, above, as if fully set forth herein.

38. The allegation contained in paragraph 38 that plaintiff demanded the referenced conditions "as consideration" constitutes a conclusion of law to which no answer is required. To the extent it may be deemed an allegation of fact, it is denied. Defendant admits that the Deed of

Gift contains conditions, which are set forth in the Deed of Gift itself. To the extent that there are any other factual allegations in paragraph 38, they are denied.

39. Defendant admits the allegations contained in paragraph 39 to the extent they are supported by the document cited, the Deed of Gift. To the extent that there are any other factual allegations in paragraph 39, they are denied.

40. The allegations contained in paragraph 40 constitute conclusions of law to which no answer is required. To the extent they are deemed allegations of fact, they are denied.

41. The allegation contained in paragraph 41 that, by providing the referenced photographs, plaintiff "fulfilled all her obligations under the Deed of Gift" constitutes a conclusion of law to which no answer is required. To the extent that the allegations in paragraph 41 may be deemed allegations of fact, Defendant is without information or knowledge sufficient to form a belief as to the truth of the allegations and, therefore, denies them.

42. The allegation contained in paragraph 42 that the Smithsonian breached the terms of the Deed of Gift constitutes a conclusion of law to which no answer is required. To the extent it may be deemed an allegation of fact, it is denied. Defendant admits the allegation in paragraph 42 that the Smithsonian did not "direct to Pearse for her approval the request by Firelight Media to use and reproduce the Distributed Photographs." Defendant denies the allegation in paragraph 42 that Smithsonian "unilaterally authoriz[ed] 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," but admits that defendant provided Firelight with copies of the photographs-at-



issue and permission to use them (subject to certain conditions), as set forth in Exhibit D to plaintiff's original Complaint.

43. The allegations contained in paragraph 43 constitute conclusions of law to which no answer is required. To the extent they are deemed allegations of fact, they are denied.

44. Defendant denies the allegations in paragraph 44.

45. Defendant denies the allegations in paragraph 45.

46. Defendant denies each and every allegation not previously admitted or otherwise qualified in this Answer.

#### **ANSWER TO PRAYER FOR RELIEF**

Defendant denies that plaintiff is entitled to the relief set forth in the prayer for relief immediately following paragraph 45 of the First Amended Complaint. To the extent that statements in the prayer for relief are deemed to be allegations of fact, they are denied.

Defendant further answers that:

A. Defendant denies that plaintiff is entitled to the equitable relief sought in paragraph A because the United States Court of Federal Claims lacks subject matter jurisdiction to award such relief under 17 U.S.C. § 502.

B. Defendant denies that plaintiff is entitled to the equitable relief sought in paragraph B because the United States Court of Federal Claims lacks subject matter jurisdiction to award such relief under the facts plead by plaintiff.

C. Defendant denies that plaintiff is entitled to compensatory or statutory damages "between \$750 and \$150,000 for infringement of each of Pearse's copyrights." Defendant further

denies that plaintiff holds separate copyrights for the photographs-at-issue, which are part of the same copyrighted collection.

D. Defendant denies that plaintiff is entitled to compensatory damages for breach of contract.

E. Defendant denies that plaintiff is entitled to the award of costs and attorneys' fees under 17 U.S.C. § 505.

F. Defendant denies that plaintiff is entitled to the award of post-judgment interest.

G. Defendant denies that plaintiff is entitled to "such other and further relief as is necessary and appropriate."

**DEFENDANT'S FURTHER ANSWER AS TO DEFENSES**

Further answering, defendant alleges upon current information and belief that:

A. Defendant has not infringed plaintiff's copyright.

B. Firelight's use of plaintiff's copyrighted photographs was a fair use.

C. Plaintiff's breach-of-contract claim (Count II) fails for lack of consideration.

D. Plaintiff granted a license to defendant.

E. Defendant further asserts any other defenses that are presently unknown to the defendant but which, when ascertained, defendant prays leave to add to this answer or otherwise give notice to plaintiff.

WHEREFORE, Defendant respectfully requests the following relief:

A. That the Court dismiss the First Amended Complaint with prejudice, and that the Court deny each prayer for relief sought by plaintiff;

B. That the Court adjudge plaintiff's copyright has not been infringed by or for

defendant;

C. That the Court adjudge that the Deed of Gift is not a contract that has been breached by defendant;

D. That the Court grant defendant judgment for all its expenses, including costs and such other and further relief as the Court may deem proper.

August 25, 2010

Respectfully submitted,

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