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 MOTION TO DISMISS COUNT II OF THE COMPLAINT

Pursuant to Rule 12(b)(6) of the Rules of Court of Federal Claims (RCFC), defendant, the United States (the government), moves this Court to dismiss Count II of this action for failure to state a claim upon which relief can be granted. Under the governing law, the government cannot be sued under 28 U.S.C. § 1498 for contributory infringement of a copyright, which is the substance of plaintiff's claims in Count II. Because there has been no waiver of sovereign immunity for such claims, plaintiff has failed to state a claim upon which relief can be granted under RCFC 12(b)(6). On the same basis, defendant alternatively moves to dismiss Count II pursuant to RCFC 12(b)(1) for this Court's lack of subject matter jurisdiction over such claims.

The government is filing this motion in lieu of an answer, in accordance with RCFC 12(a)(4). *See Illinois v. United States*, 15 Cl. Ct. 399, 413 (Cl. Ct. 1988). While the present motion is a partial motion to dismiss, such motions toll the time for filing an answer to plaintiff's complaint. *See United Constructors v. United States*, 2009 LEXIS 407, *22 (Fed. Cl. Mar. 27, 2009) (ordering plaintiff to answer complaint 10 days after order granting partial motion to dismiss in accordance with RCFC 12(a)(4)(A)(i)).

Statement of Facts

In the present action, plaintiff has filed suit against the government for breach of contract and copyright infringement under 28 U.S.C. § 1498(b) based on an alleged unauthorized use and distribution of three photographs, which are part of a copyrighted collection of plaintiff's photographs taken during the siege of Wounded Knee, South Dakota in 1973 and subsequently donated to the Smithsonian Institution in 1997.[1] *See* Docket No. 1 at ¶1, ¶10, ¶21, Exhibit (Ex.) A. Specifically, plaintiff alleges that the photographs were used in an infringing manner during short segments of one episode of the five-part documentary mini-series "We Shall Remain," which was first broadcast on public broadcasting stations in 2009 as part of the "American Experience" series. Docket No. 7 at 2. Specifically, in "Episode 5: Wounded Knee" (Wounded Knee documentary), plaintiff alleges the three photographs-at-issue were shown for a collective total of 30 seconds. Docket No. 1 at ¶21.

The Wounded Knee documentary was produced by Firelight Media, Inc. (Firelight), an independent production company that specializes in documentary films. Docket No. 7 at 2. During production, plaintiff alleges that Firelight received permission to use the three photographs-at-issue from the National Museum of the American Indian (NMAI), Smithsonian Institution. Docket No. 1 at Ex. C, Ex. D. This transaction, in turn, forms the basis of Count II of the complaint.

Count II is entitled "Contributory Copyright Infringement." Docket No. 1 at 9. Count II first asserts that Firelight infringed plaintiff's copyrights, in violation of 17 U.S.C. § 501, by

[1]The government believes that the entire copyrighted collection consists of over 2,000 photographs.

"reproducing, distributing, displaying, and publishing" the three photographs-at-issue in the Wounded Knee documentary without plaintiff's consent. *Id.* at ¶39. Plaintiff further alleges that the Smithsonian Institution "assisted" Firelight in infringing plaintiff's copyright by providing an "unauthorized license" to the photographs and publishing the photographs to Firelight for a commercial purpose. *Id.* at ¶41. Plaintiff additionally alleges that the Smithsonian Institution aided Firelight while "knowing that Firelight Media would infringe Pearse's copyright in the Distributed Photographs." *Id.* at ¶42.

Argument

I. Standard of Review

When considering a motion to dismiss for failure to state a claim upon which relief may be granted, a court "must accept as true all the factual allegations in the complaint . . . and [the Court] must indulge all reasonable inferences in favor of the non-movant . . . ." *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001) (citations omitted). But a complaint must contain allegations that are "enough to raise a right of relief above the speculative level . . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). Otherwise, when the asserted facts do not support particular claims, the Court should dismiss such claims under RCFC 12(b)(6). *See Mark S. Zaid, P.C. v. United States*, 85 Fed. Cl. 404, 406 (2009) (citation omitted).

Similarly, when considering a motion to dismiss based upon a lack of subject matter jurisdiction, the court must assume that the alleged facts in the complaint are true and must draw all reasonable inferences in the plaintiff's favor. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Davis v. Scherer*, 486 U.S. 183 (1984). Nevertheless,

insofar as the jurisdiction of the Court is challenged, the plaintiff cannot rely on allegations in the complaint, but instead must bring forth relevant, competent proof to establish jurisdiction. *See McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936). Specifically, the plaintiff must establish jurisdiction by a preponderance of the evidence. *See Reynolds v. Army & Air Force Exch. Serv.*, 846 F.3d 746, 748 (Fed. Cir. 1988).

II. No Waiver of Sovereign Immunity For Contributory Copyright Infringement

Count II of the complaint asserts a cause of action for which the government has not waived sovereign immunity. Section 1498 provides for a cause of action whenever a copyrighted work is "infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the Government . . . ." 28 U.S.C. § 1498(b). Thus, as the Federal Circuit has acknowledged, sovereign immunity has been waived under this statute for three circumstances:

> (1) when the United States itself infringes a copyright, (2) when a corporation owned or controlled by the United States infringes and, (3) when a contractor, subcontractor, or any person, firm or corporation, acting for the Government and with its authorization or consent, infringes.

Boyle v. United States, 200 F.3d 1369, 1373 (Fed. Cir. 2000). In other words, "the United States can only be held liable for direct appropriation, not for inducing or allowing others to infringe a copyright." *Siler v. United States*, No. 2009-5130, 2010 U.S. App. LEXIS 2167, at *1 (Fed. Cir. February 2, 2010) (nonprecedential) (citing *Boyle*, 200 F.3d at 1373).

As a result, the government can only be liable for copyright infringement through the actions of a third party where there is authorization or consent for such activities by the

government. Count II of the complaint does not allege that the government provided authorization or consent for Firelight's action, but instead asserts that the government merely assisted Firelight in infringing plaintiff's copyrighted work, through an alleged license and publication of the photographs-at-issue. Accordingly, plaintiff has failed to allege a claim upon which relief could be granted. *See Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009).

III. No Subject Matter Jurisdiction For Contributory Copyright Infringement Claims

Alternatively, Count II of the complaint should be dismissed for a lack of subject matter jurisdiction. The United States Court of Federal Claims is a court of limited jurisdiction. *See Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d 1357, 1365-66 (Fed. Cir. 2002). Absent congressional consent to entertain a claim against the United States, the court lacks authority to grant relief. *See, e.g., United States v. Testan*, 424 U.S. 392, 399 (1976). As discussed above, there has been no congressional waiver of sovereign immunity for claims of contributory copyright infringement against the government. Accordingly, this court does not have subject matter jurisdiction over Count II.

Conclusion

For the reasons stated above, defendant respectfully requests that Count II be dismissed as failing to state a claim upon which relief can be granted under RCFC 12(b)(6) or, alternatively, for lack of subject matter jurisdiction under RCFC 12(b)(1).

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Respectfully submitted,

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