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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

No. 1:07-cv-11673-MLW

WILLIAM V. AGUIAR, III,
Plaintiff

vs.

FLOYD WEBB, et al,
Defendants

For Hearing Before:
Chief Judge Mark L. Wolf

Motion Session

United States District Court
District of Massachusetts (Boston)
One Courthouse Way
Boston, Massachusetts 02210
February 15, 2008

REPORTER: RICHARD H. ROMANOW, RPR
Official Court Reporter
United States District Court
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1 P R O C E E D I N G S

2 (Begins, 2:00 p.m.)

3 THE CLERK: Civil Action, 07-11673, William
4 Aguiar versus Floyd Webb, et al. The Court is in
5 session. You may be seated.

6 THE COURT: Good afternoon. Would those
7 present to participate please identify themselves for
8 the Court and for the record.

9 MR. AGUIAR: Your Honor, I'm William Aguiar,
10 I'm the plaintiff.

11 MR. FALZONE: Good afternoon, your Honor.
12 Anthony Falzone for defendant, Floyd Webb. With me here
13 is Julie Ahrens and David Kluft.

14 MS. BROSIUS: Your Honor, Amy Brosius for the
15 defendant, Radford Davis.

16 MR. SILVERSTEIN: Your Honor, Aaron
17 Silverstein and Matthew Saunders for the defendants,
18 Barron and Wendy Shepherd.

19 THE COURT: Okay. I want to review the
20 pending motions which I'm prepared to address and, I
21 expect, decide today.

22 First, is the motion to dismiss for lack of
23 personal jurisdiction and for other reasons filed by
24 Barron Shepherd, Wendy Shepherd and Radford Davis, also
25 known as Ashida Kim. I want to confirm, however, that

1 while Floyd Webb has asserted a lack of personal
2 jurisdiction as an affirmative defense, he's not moved
3 for dismissal now for lack of personal jurisdiction or
4 for any other reason, is that correct?

5 MR. FALZONE: That's correct, your Honor.

6 THE COURT: Now, Mr. Aguiar, I ordered
7 Mr. Davis to file a consolidated motion to dismiss and
8 ordered you to respond to that by last Monday, February
9 11th. No response was filed, however. I know you're
10 representing yourself, but you're obligated to obey
11 court orders and if you don't, I have the authority,
12 which I may be compelled to exercise in the future, to
13 dismiss your case. Do you understand that?

14 MR. AGUIAR: Your Honor, I understand. I was
15 hoping to get that out actually in the next couple of
16 days and --

17 THE COURT: You were hoping to do what?

18 MR. AGUIAR: I was hoping to send it out in
19 the next day or two, unfortunately, I just couldn't get
20 to finish it up. I also would like to ask for a
21 continuance at this time for 90 days. I've been
22 interviewing some counsel and the attorney asked me to
23 ask for a 90-day extension and that way he can review
24 the case. His name is Attorney Richard Goren.

25 THE COURT: Okay. Well, that request is

1 denied. As you can see, there's been a proliferation of
2 filings, I've set this hearing, everybody's come.
3 Although -- and my goal is to decide these matters
4 today. If you or Mr. Goren had filed a motion before we
5 got here, I could have decided what to do. But if this
6 all comes out in accordance with my present views, it
7 may be that Mr. Goren can look at this, if he files an
8 appearance, and rehabilitate the case somewhat. But
9 it's just not the way it works.

10 MR. AGUIAR: Okay, your Honor. I only really
11 attained him within the last couple of days and he said
12 he couldn't be here, that if he could, he would of, and
13 so he asked me to do this.

14 THE COURT: Well, that's okay. But, you know,
15 you filed this case a long time ago, a lot of filings
16 have been made, I understand a lot of e-mails have been
17 exchanged, and now I'm going to decide as much as I can
18 properly decide today and we'll see what's left and
19 where we go from here.

20 MR. AGUIAR: Okay, your Honor.

21 THE COURT: And just in case, you know, you
22 continue to represent yourself, but this is also true
23 for any attorney who represents you, as I said, you have
24 to obey the court orders and you should get a copy of
25 the Federal civil rules and the court's local rules.

1 For example, the local rules require that you file a
2 memorandum in support of any motion you file, like your
3 motion for a preliminary injunction, but you didn't do
4 that.

5 All right. Let me ask you this. You didn't file
6 any opposition to the consolidated motion to dismiss
7 that Mr. Davis, through his counsel, filed. Do you
8 oppose that motion?

9 MR. AGUIAR: To consolidate?

10 THE COURT: No, do you oppose Mr. Davis'
11 motion to dismiss even though you didn't file an
12 opposition?

13 MR. AGUIAR: Yes.

14 THE COURT: All right. So I've got the
15 motions to dismiss based primarily, but not exclusively,
16 on lack of personal jurisdiction. If those defendants
17 are dismissed, I still have Mr. Aguiar's motion for a
18 preliminary injunction with regard to Mr. Webb, I have
19 Mr. Aguiar's motion to amend to add 3-1 Studios in which
20 Webb is allegedly a partner, and I have some other
21 motions. I think those are the substantive motions
22 other than the schedule and the protective order, is
23 that right? There are a few other motions that I'll
24 deal with as a housekeeping matter.

25 (Pause.)

1 THE COURT: I have the Shepherds' motion for
2 leave to file a reply brief, which is allowed, and
3 Mr. Aguiar's motion to amend the Copyright Office
4 document, which I think doesn't require any action by
5 me. But to the extent he's amending anything that was
6 filed in court, that's allowed.

7 Mr. Aguiar's discovery motions are premature and
8 they're denied as premature. Mr. Davis' motion for
9 inclusion in the proposed hearing, where he wanted to
10 participate by telephone, is now moot. Mr. Collins
11 filed a motion seeking leave to act as an amicus
12 curiae. The arguments he presents seem to be factual,
13 rather than legal, and I don't perceive that anybody
14 needs any help in this case, or at least the defendants
15 don't. So that's denied.

16 Mr. Aguiar moved to strike one of Mr. Davis'
17 previous motions, but that motion has been -- well,
18 Mr. Davis' motion has been withdrawn, so the motion to
19 strike is moot. And scheduling, as I said, and the
20 protective order, we'll decide -- we'll discuss later.

21 Now I've got the three motions to dismiss for lack
22 of personal jurisdiction. The usual prima facie
23 standard is a standard I intend to apply. That means:
24 "The personal jurisdiction must be based on evidence of
25 specific facts set forth in the record. The plaintiff

1 must go beyond the pleadings and make affirmative
2 proof. The plaintiff may not rely on unsupported
3 allegations to make a prima facie showing of personal
4 jurisdiction." I read that from **Boit**, 967 F. 2nd 671 to
5 675.

6 It seems to me that all of the moving defendants
7 have meritorious motions to dismiss, but that if I allow
8 the motions to dismiss, it may be without prejudice.
9 You know, conceivably if a new lawyer comes in and
10 proper allegations of personal jurisdiction can be made,
11 I would consider it. On the other hand, if there's
12 another motion to amend and there's not a proper factual
13 basis, sanctions can be imposed, like money, sanctions,
14 under Federal Rule of Civil Procedure 11 for making
15 baseless claims. But in any event, I'm interested in
16 hearing the argument, of course, before finally deciding
17 this issue, which I have studied.

18 So which of the defendants -- and we'll go
19 defendant by defendant, would like to go first? As far
20 as I can see -- and when I say "see," usually I look at
21 the complaint and I look at affidavits. Since
22 Mr. Aguiar is Pro Se and representing himself, I've
23 looked at all the filings. But I can't find any
24 allegations relating to Wendy Shepherd in those
25 filings. There are some regarding Barron Shepherd and

1 there are some regarding Mr. Davis.

2 Do the defendants have a preference as to who goes
3 first?

4 MS. BROSIUS: Your Honor, good afternoon. I'm
5 Amy Brosius here for defendant, Radford Davis. As your
6 Honor noted, plaintiff's complaint does leave, um, many
7 question marks over what exactly he is alleging our
8 client, Radford Davis, has done and given that, it's a
9 little difficult to address the elements for personal
10 jurisdiction, but to the best we can infer, it doesn't
11 appear that any of the actions the plaintiff is alleging
12 were committed by our client could be considered to
13 arise here in the District of Massachusetts.

14 You know, to the extent our client operates a
15 website, that is true, and it operates two websites,
16 that is a fact, but there's nothing in our complaint
17 that indicates that any of the activity that has been
18 done by our client currently is in any way impacting or
19 coveting work that Mr. Aguiar does own or is alleged to
20 own. So for that reason we would submit that personal
21 jurisdiction on our client, Mr. Davis, is simply not in
22 the evidence.

23 THE COURT: Well, I think, liberally
24 construed, the complaint and other documents allege that
25 Mr. Davis infringes the copyright by selling books and

1 videos containing copyrighted material through his
2 website, but I think you provided a declaration, an
3 affidavit saying that everything sold in
4 Massachusetts -- well, your client sold \$267 worth of
5 goods in Massachusetts or --

6 MS. BROSIUS: Sales, in the last two years.

7 THE COURT: And that's sales generally?

8 MS. BROSIUS: Exactly.

9 THE COURT: Or is it sales of the matters
10 relating to Count Dante?

11 MS. BROSIUS: No, and actually none of the --
12 there has been no sales of anything that could colorably
13 be considered a copyrighted work owned by plaintiff
14 since as far as we can tell. And obviously our client
15 contests the right of plaintiff over these materials,
16 namely the original Count Dante Fighting Secrets Book,
17 by which we believe was published back in the 1960s.
18 That is the only material that our clients have ever
19 handled. So as far as the personal jurisdiction
20 question as far as what our claims are doing today in
21 his website? None of the materials that's been sold in
22 Massachusetts is anything but our client's own authored
23 material.

24 THE COURT: And, Mr. Aguiar, would you like to
25 speak to the evidence that's in the record with regard

1 to personal jurisdiction over Mr. Davis?

2 MR. AGUIAR: Yes, your Honor. Your Honor,
3 regarding the copyrighted works, Radford Davis, Ashida
4 Kim, he basically cuts off my "World's Deadliest
5 Fighting Secrets," the original text and the '91 copy,
6 and uses it -- and also books called "Ninja Hands of
7 Death," and uses pieces of this throughout other books.
8 He also has videos where he does what's copyrighted by a
9 book, "The World of Dance of Death," which is comprised
10 of 27 moves all executed within 5 seconds or so.

11 THE COURT: Is this in the papers you've
12 submitted to me?

13 MR. AGUIAR: Yes, I believe it is. I also
14 have the original copyright.

15 Your Honor, regarding the copyright, what
16 essentially happened is my father had everything turned
17 over to him through the original copyright owner, John
18 Creeden, and later on, with a few letters of transfer of
19 copyright, to his wife. From there he recopyrighted it
20 in 1986, okay, "The World's Deadliest Fighting Secrets,
21 II."

22 THE COURT: I'm sorry. I couldn't hear you.

23 MR. AGUIAR: From there he recopyrighted in
24 1986.

25 THE COURT: What did he copyright?

1 MR. AGUIAR: "The World's Deadliest Fighting
2 Secrets," your Honor.

3 THE COURT: "The World's Deadliest Fighting
4 Secrets."

5 MR. AGUIAR: Yes, sir. In fact, there was an
6 attachment to an amendment -- I believe it was an
7 attachment. Do you mind if I --

8 THE COURT: Okay.

9 (Pause.)

10 MR. AGUIAR: I have my DVDs and things, also,
11 in that case. I have the original copyright --

12 THE COURT: Well, is that something you
13 submitted to me previously?

14 MR. AGUIAR: Yes, your Honor. I also have the
15 attachment in here. And basically it states that we
16 have full use of the books and in the back it's actually
17 -- we attached original copyrighted works.

18 THE COURT: All right. Let me ask you this,
19 because it's probably a link that would have to be
20 filled in later. I don't think it's in what you
21 submitted to me. And my understanding is that your
22 father had the copyright until he passed away a couple
23 of years ago?

24 MR. AGUIAR: But I received it through
25 probate, your Honor.

1 THE COURT: You did?

2 MR. AGUIAR: Yes, sir.

3 THE COURT: Because at some point there'll
4 have to be some evidence.

5 MR. AGUIAR: That was also submitted in the
6 paperwork.

7 THE COURT: I don't think so.

8 MR. AGUIAR: Sorry?

9 THE COURT: I don't think so.

10 MR. AGUIAR: With that being said, I inherited
11 it through will in probate. Since the '80s -- although
12 this, I believe, this goes back to '05, he's been
13 selling these books.

14 In 2005, your Honor, and shortly after my father
15 passed away, Ashida Kim put on his website and a few
16 other affiliate websites that somebody put him in charge
17 essentially of selling the book that I own.

18 THE COURT: Where is that in the materials
19 that have been submitted to me?

20 MR. AGUIAR: Well, offhand, I'm not sure
21 exactly where --

22 THE COURT: I don't think it's in there. I
23 mean, these are -- and I can't decide this case based on
24 what, you know, you just start telling me now, which
25 your adversaries haven't had notice of, although, as I

1 said, if I dismiss this case, I may dismiss it without
2 prejudice. So if there's a proper basis for the case to
3 go forward here in Massachusetts, um, and some lawyer
4 can lay it out in a way that meets the legal standards,
5 then maybe you can get them back in the case. But go
6 ahead.

7 MR. AGUIAR: Your Honor, essentially I put --
8 filed a DMCA takedown and had his website removed, okay,
9 and that's in the paperwork. From there I --

10 THE COURT: Who had his website removed?

11 MR. AGUIAR: I did, your Honor, through using
12 his web server and things. From there I --

13 THE COURT: What do you mean you had it
14 removed?

15 MR. AGUIAR: I filed a DMCA takedown and got a
16 complaint for copyrights and I removed it.

17 THE COURT: With YouTube?

18 MR. AGUIAR: No, with this actual website.
19 The YouTube issues come later on.

20 THE COURT: Okay.

21 MR. AGUIAR: This goes back to the website.
22 From there he sent -- after sending some paperwork and
23 remodifying his website to get his website back, he
24 removed -- I'm sorry, "The World's Deadliest Fighting
25 Secrets Book" and "Ninja Hands of Death, essentially to

1 --

2 THE COURT: I think you're talking a little
3 too fast and the transcript is probably not going to
4 reflect the names of the books. They're very familiar
5 to you, but they're not as familiar to the court
6 reporter.

7 MR. AGUIAR: Okay. Essentially what happened
8 is I filed the DMCA. They took it down. In order for
9 Radford Davis to put his website back up, he had to
10 remove all the copyright infringement issues, anything
11 that I complained about, pretty much. I think there
12 were about two or three that I wasn't sure about and
13 they let it happen. But there was paperwork submitted,
14 how he had said he'd never ever use that book again or
15 sell any parts of these books.

16 A few years afterwards he started to sell the book
17 again. I got in touch -- or shall I say Mr. Webb got in
18 touch with me about the same time, okay, um, and he
19 started selling his books over the website. His books
20 are also in every major bookstore in Massachusetts.

21 THE COURT: Whose books?

22 MR. AGUIAR: Ashida Kim.

23 THE COURT: Where's that in the papers in
24 front of me?

25 MR. AGUIAR: I believe they're in there.

1 THE COURT: Well, show me.

2 MR. AGUIAR: To tell you the truth, your
3 Honor, I'm not too sure.

4 THE COURT: Yeah, I'm not too sure either. I
5 have no evidence of this that I'm aware of. Go ahead.

6 MR. AGUIAR: Okay. I apologize. That is
7 true.

8 Essentially these are major bookstores in
9 Massachusetts. Um, he continues to sell the books or at
10 least did for a while and over the last year or so --
11 and this is where the YouTube thing comes in, your
12 Honor, he started using video footage from my disks in
13 some black belt memberships in black belt magazines --
14 not magazines, but black belt memberships to the
15 organization. I also have submitted diplomas that he's
16 issued out to people utilizing my copyrighted logos.

17 THE COURT: Diplomas? Do you have copies of
18 what you gave me?

19 MR. AGUIAR: Yes.

20 THE COURT: No, not copies. Do you have
21 copies of the papers that you filed with the court?

22 MR. AGUIAR: Some of them, your Honor.

23 THE COURT: You're going to have to point me
24 -- if I've overlooked something that you gave me
25 previously, then I want to see it.

1 MR. AGUIAR: Okay.

2 THE COURT: If it's not in what you gave me
3 previously, I'm not going to rely on --

4 MR. AGUIAR: I believe that these are within
5 some of the amended things.

6 THE COURT: What you do you mean by the
7 amended things?

8 MR. AGUIAR: One the amended filings that I
9 amended with all the other paperwork that I might have
10 missed.

11 Right here is a copy of a diploma. You'll notice
12 my logo there, also.

13 THE COURT: Well, I can't see it. What
14 document do you say you gave me this with?

15 MR. AGUIAR: Off the top of my head, I'm not
16 sure, your Honor. I have the document right here.

17 THE COURT: Do defense counsel -- is this
18 diploma in the record? Why don't you show it to
19 Mr. Davis' lawyer.

20 (Shows.)

21 MS. BROSIUS: I don't recall seeing this
22 particular piece. I can certainly help to maybe fill in
23 a little bit about the dealings between my client and
24 Mr. Aguiar back in --

25 THE COURT: Well, not yet.

1 MS. BROSIUS: All right.

2 (Pause.)

3 THE COURT: Okay. Go ahead. Is the logo
4 registered as a trademark in copyright?

5 MR. AGUIAR: It was registered. I wasn't able
6 to file my affidavit of continuous use. I was going
7 through some family matters. My father had gotten sick
8 and passed away and I was dealing with the repercussions
9 to that. I had a separation from my ex. A lot of the
10 paperwork I wasn't able to actually obtain and see the
11 dates and so it slipped out of use, but I had refiled
12 for it and it's pending right now. I have an office
13 action on it.

14 THE COURT: See, this is part of the reason it
15 has to be in the papers, so then the other side knows
16 what you're arguing and they can say, "Yes, that's true"
17 or "Here, this shows it's not true."

18 MR. AGUIAR: I understand, your Honor. To the
19 best of my ability, I thought it was in there.

20 THE COURT: Go ahead.

21 MR. AGUIAR: So essentially, your Honor, in
22 2005, he did that, I took down his website, these other
23 things transpired. They started selling memberships
24 through YouTube or at least advertising for Black Dragon
25 Fighting Society memberships using my video footage and

1 things along those lines pretty much. They -- we -- I
2 used a DMCA takedown again with YouTube. It turns out
3 that at the time the accounts that were registered to
4 the YouTube videos were actually under "Bad Ass
5 Fightware" and Barron Shepherd. When we further found
6 and looked up who the company belonged to and who it was
7 associated with, your Honor -- and I know this is going
8 off a little bit to the side, it was registered all
9 under Wendy Shepherd and that's how I included her,
10 because really she's the business owner of that whole
11 operation with the website and all of that.

12 THE COURT: These are the type of things that
13 have to be spelled out in a complaint.

14 MR. AGUIAR: I think they are, your Honor.

15 THE COURT: No, they're not. They're not.
16 They're not. They have to be spelled out -- hold on
17 just a second.

18 (Pause.)

19 THE COURT: Okay. This is jumping around a
20 little bit, but it may make it more understandable to
21 me.

22 MR. AGUIAR: Yeah, I apologize, your Honor,
23 but it kind of all connects.

24 THE COURT: I mean, this says: "Wendy
25 Shepherd is an owner of Shepherd's Consulting, Bad Ass

1 Fightware.com, Sky Systems, Dojo Press, Dojo Press I, is
2 a resident of Florida." It doesn't tell me anything
3 about her having registrations or whatever you just
4 talked about. And I'm explaining this to you because if
5 you get a lawyer, your lawyer should know this, but will
6 have to comply, and if you don't get a lawyer and you
7 try to bring any of these people back in, you're going
8 to have to comply by alleging specific facts that are
9 sufficient, if you can support them, to show that any
10 claim you have against them can properly proceed in the
11 District of Massachusetts as opposed to someplace else.
12 Go ahead.

13 MR. AGUIAR: So we got him videos, that's how
14 he -- how Mr. Shepherd got involved with all of this
15 stuff. We sent these out to YouTube, they removed it,
16 they said the next step to keep the videos off is
17 essentially -- we got them the Ashida Kim videos, were
18 to file in Federal court in 10 days, but I couldn't do
19 that because I didn't have the means. So the videos
20 went back up, I came to court, and I believe I filed on
21 July 7th, and, um, regarding the videos, there were a
22 few videos that were actually recorded, but they used
23 bits and pieces of advertisement, but essentially that's
24 how Mr. Shepherd got involved.

25 The -- like I said before, a lot of the books that

1 he still sells have remnants of this -- I think there's
2 a book out there called "Book of the Ninja." There's a
3 few that have -- we issued some of the "Dance of Death"
4 moves -- actually, it's the whole "Dance of Death" and
5 he just -- he just keeps putting it in. So if I don't
6 get this book down, it pops up over here. It's all over
7 the place now with his books.

8 Essentially he says there's seven sales in
9 Massachusetts. I'm not sure if I --

10 THE COURT: Are you talking about Mr. Shepherd
11 or Mr. Davis?

12 MR. AGUIAR: Mr. Davis. I'm not sure if
13 that's to be true or not. I do know whether or not I
14 put it in the record or not of the book -- of the book
15 stores, but I could have sworn I did. Um, I don't think
16 there's -- basically he's been doing this a while. And
17 even after, in some of the letters, when I took down his
18 '05 website, website '05, saying he would never use the
19 books again, never use these things again, and they were
20 all back up again after a year and a half.

21 Essentially I feel that if it goes on, he's just
22 going to continue to stand on my rights and stuff.

23 THE COURT: Okay. So that's Mr. Davis. Why
24 don't I hear from counsel for the Shepherds and then
25 you'll get a chance to respond to that.

1 MR. SILVERSTEIN: Good afternoon, your Honor.

2 THE COURT: Could you please say your name for
3 the record, there's so many attorneys here.

4 MR. SILVERSTEIN: Aaron Silverstein for Barron
5 and Wendy Shepherd.

6 THE COURT: Go ahead.

7 MR. SILVERSTEIN: Your Honor, the plaintiffs
8 failed to allege any facts that would confer to this
9 court personal jurisdiction over Barron and Wendy
10 Shepherd. Neither Barron nor Wendy Shepherd have ever
11 been to Massachusetts, they do not do business in
12 Massachusetts, they have no bank accounts in
13 Massachusetts, nor do they own any real property or
14 other assets in the Commonwealth.

15 Mr. Shepherd's sole contact with Massachusetts was
16 in the Spring of 2007 when he purchased certain film
17 footage known as "The Dance of Death" film from a
18 Mr. John Creeden, Jr., through his son, John Creeden,
19 III. Mr. Shepherd did not transact any business with
20 the plaintiff. In fact, the plaintiff has not put forth
21 any evidence that he has any claim whatsoever to the
22 ownership of the "Dance of Death" film or the copyright
23 of it. By all accounts, the film was created solely by
24 Mr. Creeden, Jr. and the rights in the film were never
25 licensed, assigned or otherwise transferred to the

1 plaintiff.

2 Mr. Aguiar has failed to allege that the Shepherds
3 have performed any specific acts with respect to the
4 "Dance of Death" film or had any contact with the
5 Commonwealth, beyond this single transaction with
6 Mr. Creeden, that would establish specific jurisdiction
7 in the Commonwealth. Moreover, Mr. Shepherd's single
8 transaction with Mr. Creeden does not constitute
9 continuous and systematic business contacts required to
10 establish general jurisdiction. Your Honor,
11 jurisdiction is also improper in this case under the
12 Massachusetts long-arm statute. Jurisdiction generally
13 cannot be premised on a single transaction with the
14 Commonwealth.

15 THE COURT: What case do you rely on primarily
16 for that?

17 MR. SILVERSTEIN: For the long-arm statute?

18 THE COURT: Well, the long-arm statute has
19 four sections, so it's Section 3(a) provides long-arm
20 jurisdiction for the -- for actions arising from a
21 person transacting any business in the Commonwealth.

22 MR. SILVERSTEIN: Your Honor, for the long-arm
23 statute, we rely on *Whittaker Corp. v. United Aircraft*
24 and *Automatic Sprinkler Corp. v. Seneca*. For the
25 general jurisdiction, I would rely on *Sandstrom v. Law*

1 **Corp.**

2 Your Honor, Wendy Shepherd has not conducted any
3 business in Massachusetts. In fact, Mrs. Shepherd has
4 had absolutely no contacts within the Commonwealth.
5 Barron Shepherd was involved in a single transaction
6 with Mr. Creeden and sent payment to Mr. Creeden for the
7 "Dance of Death" footage.

8 THE COURT: Doesn't the -- what about the --
9 doesn't the information before me show that Mr. Shepherd
10 had some telephone calls or e-mails with Mr. Aguiar?

11 MR. SILVERSTEIN: I believe so, your Honor,
12 very early on in the process of trying to acquire some
13 of -- some information about Count Dante, they did have
14 communications.

15 THE COURT: Well, so those are contacts that
16 could contribute to a finding of personal jurisdiction.

17 MR. SILVERSTEIN: Your Honor, I believe those
18 contacts amounted to a series of e-mails and maybe a
19 phone call. But the vast majority of communication
20 between -- regarding the single transaction was with
21 Mr. Creeden and Mr. Shepherd.

22 THE COURT: Okay.

23 MR. SILVERSTEIN: In the plaintiff's
24 opposition to our client's motion to dismiss, the
25 plaintiff claimed that Mr. Shepherd waived personal

1 jurisdiction by filing a counternotification pursuant to
2 the notice and takedown provisions of the Digital
3 Millennium Copyright Act. Your Honor, neither Mr. nor
4 Mrs. Shepherd has ever filed a DMCA counternotification
5 because neither of them has ever received notice under
6 the Digital Millennium Copyright Act.

7 THE COURT: Neither of them filed the
8 notification?

9 MR. SILVERSTEIN: No, neither of them filed a
10 counternotification, your Honor, because they never
11 received notice of any takedown in the first place and
12 that is because the plaintiff has continually, and
13 without any basis in fact, attributed to Mr. and
14 Mrs. Shepherd actions that were undertaken by others.
15 Even if Barron or Wendy Shepherd had filed a DMCA
16 counternotification, such counternotification would not
17 have established personal jurisdiction in the
18 Commonwealth. The Digital Millennium Copyright Act
19 provides that the party filing a counternotification
20 consents to the personal jurisdiction of the Federal
21 District Court in his district, not in --

22 THE COURT: Where his address is?

23 MR. SILVERSTEIN: Correct. Alternatively,
24 your Honor, as we noted in our motion, the action should
25 also be dismissed for failure to state a claim. The

1 plaintiff has only made bald assertions and legal
2 conclusions that do not warrant any relief on any theory
3 of law. Specifically the plaintiff has failed to
4 properly plead a claim for copyright infringement.

5 A properly pleaded claim must allege four things.
6 Number 1, which specific or original works are the
7 subject of the claim. Number 2, that the plaintiff owns
8 the copyright in the works. 3, that the copyrights have
9 been registered in accordance with the Copyright Act.
10 And, 4, by which acts and during what time the defendant
11 infringed on copyrights.

12 THE COURT: And what do you rely on as
13 authority for that?

14 MR. SILVERSTEIN: We rely on **ABC vs. Flying**
15 **Jay**, it's a Southern District of New York case from
16 2007.

17 THE COURT: Because I think the cases are
18 mixed on how specific a pleading has to be to properly
19 allege a copyright violation. But if I do dismiss
20 without prejudice, I'm going to direct the plaintiff, if
21 he wants to try this again, to allege with specificity
22 the facts that are necessary to establish personal
23 jurisdiction and to provide fair notice of what
24 copyrighted works are allegedly infringed, by whom, and
25 how.

1 MR. SILVERSTEIN: I understand.

2 THE COURT: Go ahead.

3 MR. SILVERSTEIN: Your Honor, the plaintiff
4 hasn't alleged any of those four elements, let alone all
5 of them, in his complaint. In his complaint, the
6 plaintiff sets forth just a broad allegation that
7 Ms. Shepherd has infringed upon plaintiff's copyrighted
8 materials without describing which materials had been
9 infringed, without establishing ownership of the
10 copyrights, without providing evidence of a valid
11 registration, and without explaining by which acts and
12 during what time such infringement allegedly took place,
13 and as such none of his claims can stand. I would also
14 like to point out that in his opposition to
15 Ms. Shepherd's motion, the plaintiff did not contest
16 Ms. Shepherd's motion based on failure to state a
17 claim.

18 Your Honor, for all of these reasons, Barron and
19 Wendy Shepherd ask the Court to grant their motion and
20 to dismiss with prejudice all claims against them.
21 Thank you.

22 THE COURT: Mr. Aguiar, is there more you'd
23 like to say about the Shepherds --

24 MR. AGUIAR: Yes, your honor.

25 THE COURT: -- based on what's in the record?

1 MR. AGUIAR: I hope so.

2 Your Honor, I know that they have a website, "Bad
3 Ass Fightware," and it's a lot like other websites, it's
4 open in commerce to the world. So therefore they do
5 have some jurisdiction up here in Massachusetts.

6 THE COURT: No, they might as a result of
7 that, but --

8 MR. AGUIAR: Also, regarding the e-mails, your
9 Honor --

10 THE COURT: Well, let me put it this way. The
11 -- well, go ahead. Go ahead.

12 MR. AGUIAR: If you'd like to speak, it's
13 okay.

14 THE COURT: No. Thank you.

15 (Laughter.)

16 THE COURT: Go ahead.

17 MR. AGUIAR: Your Honor, the website is
18 therefore registered to Wendy Shepherd. That's the most
19 how she's involved with this situation.

20 When it comes to the e-mails, there was a slew of
21 about, I'd say, 10 e-mails or so, okay, including about
22 three phone calls where Mr. Shepherd asked to buy my
23 stuff -- actually, harassed me a little bit to a point
24 where I just stopped answering his e-mails. He wants to
25 buy my stuff. He can do things better. He can use the

1 stuff and give it back to me. Every excuse under the
2 sun.

3 I asked him, "Hey, are you related to the Ashida
4 Kim, because anybody that usually comes to me with a
5 deal" -- and, believe me, I get about five deals a
6 month, okay, to buy my stuff, to use my stuff, and I
7 usually tell them "No." Um, after that I started seeing
8 things poke up with the video and things along those
9 lines. He politely said "No." He told me he wasn't, in
10 fact, associated with the Ashida Kim, although their
11 addresses are within two blocks from each other. And
12 that's definitely in some of my motions.

13 Um, let me see. Regarding the video, your Honor.
14 The video that the Shepherds obtained is a raw footage
15 video of my copyrighted works. I own the original 8
16 millimeters of that work. Sometime before my father
17 died, and I estimate in the late '80s, my father made
18 two copies of this video, aside from the original 8
19 millimeter. Okay, one is in beta form, one is in VHS,
20 just in case something ever happened, to preserve this
21 video. This video is the only existing video of Count
22 Dante doing what he's doing.

23 THE COURT: What's he doing?

24 MR. AGUIAR: He's executing poison hand
25 techniques and he follows into the Dance of Death and

1 some of the techniques that go along with that. They
2 basically go, hand for hand, with the books that are
3 copyrighted.

4 With that I guess Mr. Shepherd bought a rough
5 footage of the video with no user agreement whatsoever.

6 THE COURT: User agreement with who?

7 MR. AGUIAR: From what I understand, with the
8 Shepherds, Mr. Creeden and the Shepherds. With no user
9 agreement.

10 THE COURT: But you haven't sued Mr. Creeden
11 for infringing?

12 MR. AGUIAR: I haven't. Your Honor, I haven't
13 yet. With that being said, your Honor, I don't feel he
14 has the right to actually use the video because it's
15 copyrighted under my copyright and he had no user
16 agreement. That would essentially be like selling
17 somebody a regular movie that was in -- among the 5 cent
18 shelf and, you know, somebody trying to make a video out
19 of that.

20 Um, between the different jurisdictions, I feel
21 like we have enough to hold him here. With the DMCA
22 takedown, you know, as I said, I have to file in
23 Massachusetts. When they filed a counternotification,
24 the one I received, their names were, in fact, on it.
25 The last signature on the bottom, I believe, was Ashida

1 Kim, which is a pen name. It's not even a real name.
2 So, therefore, somebody received something.

3 They sent it back, because I got a copy of it in
4 my e-mail. The videos went back door underneath the
5 Shepherd's YouTube account and then I had to file in
6 Federal court regarding the YouTube videos and the
7 original footage and all those kinds of things. And
8 those videos, again, were selling memberships, were
9 selling everything with my logos including -- I would
10 even say franchises, if you will, and things along those
11 lines. So I feel that between all of these things, I
12 definitely have jurisdiction and I feel we should keep
13 him in Massachusetts.

14 THE COURT: Okay. Thank you. Well, I studied
15 the submissions before we came in. The arguments have
16 been helpful. As I said, the law that I'll describe in
17 more detail requires that I rely on information that's
18 properly been submitted to the Court and to Mr. Aguiar's
19 adversaries in deciding this matter. A number of things
20 that Mr. Aguiar said are not in the record before me,
21 they may or may not be true, and I neither -- the
22 defendants nor I, have had a chance to consider the
23 implications of them.

24 So I'm going to rule on the -- based on the
25 information liberally construed, because Mr. Aguiar's

1 representing himself, but the information properly
2 before me, the inferences that could be drawn, and for
3 the reasons I'll describe in some detail, the motions to
4 dismiss for lack of personal jurisdiction of Wendy
5 Shepherd, Barron Shepherd, and Radford Davis, also known
6 as Ashida Kim, are hereby allowed. But I'm dismissing
7 without prejudice. And that means that Mr. Aguiar,
8 through counsel or on his own, can, if he wishes, try
9 one more time to establish personal jurisdiction against
10 these defendants, and before we leave today, I'm going
11 to give you a deadline for doing that. I doubt it will
12 be as long as 90 days.

13 But, Mr. Aguiar, it's very important that you
14 understand this because if you, or any attorney on your
15 behalf, makes factual allegations with regard to the
16 defendants who have been dismissed, or indeed Mr. Webb
17 as well, that don't have a likely evidentiary basis --
18 in other words, there's not likely to be evidence to
19 prove those allegations or there's no legal basis for
20 them, you can be sanctioned under Federal Rule 11 and
21 the sanction can include having to pay for all of these
22 lawyers, which is expensive, and there could be other
23 sanctions as well.

24 However, as I said, the motions to dismiss of the
25 three defendants, other than Mr. Webb, are hereby

1 allowed, the personal jurisdiction cases against them
2 are dismissed without prejudice.

3 The most commonly-used method for determining a
4 motion to dismiss for want of personal jurisdiction is
5 for the District Court to consider only whether the
6 plaintiff has proffered evidence that, if credited, is
7 enough to support findings of all facts essential for
8 personal jurisdiction. This is the so-called prima
9 facie standard as described in *Boit*, 967 F. 2nd 671 at
10 674 to 75. It's the standard that I've used here.

11 As the First Circuit said, a prima facie showing
12 of personal jurisdiction must be based on evidence of
13 specific facts set forth in the record. The plaintiff
14 must go beyond the pleadings and make affirmative
15 proof. The plaintiff may not rely on unsupported
16 allegations in his pleadings to make a prima facie
17 showing of personal jurisdiction.

18 Personal jurisdiction also needs to exist under
19 the Massachusetts long-arm statute, Mass. General Law
20 Chapter 223(a), Section 3, and satisfy the requirements
21 of due process. As I understand it, essentially the
22 long-arm statute is co-extensive with the limits of due
23 process.

24 Mass. General Law, Chapter 223(a), Section 3
25 states: "A court may exercise personal jurisdiction

1 over a person who acts directly or by an agent as to a
2 cause of action in law or in equity arising from the
3 person's (A) transacting any business in this
4 Commonwealth, (B) contracting to supply services or
5 things in this Commonwealth, (C) causing tortious injury
6 by an act or omission in this Commonwealth, (D) causing
7 tortious injury in this Commonwealth by an act or
8 omission outside this Commonwealth, if he regularly does
9 or solicits business or engages in any other persistent
10 course of conduct or derives substantial revenue from
11 goods used or consumed for services rendered in this
12 Commonwealth."

13 First, with regard to all three defendants, I find
14 that personal jurisdiction does not exist under the
15 Digital Millennium Copyright Act, 17 United States Code,
16 Section 512(c).

17 Looking at the record generously to Mr. Aguiar, it
18 appears that he sent notifications to YouTube of a video
19 hosting website pursuant to 17 United States Code,
20 Section 512(c), a provision of the Digital Millennium
21 Copyright Act. His notification asserted that the
22 videos hosted by some of the defendants infringed his
23 copyrights. YouTube responded by disabling access to
24 the videos.

25 I thought that, in response, Barron Shepherd,

1 Davis and Webb separately allegedly issued
2 counternotifications to YouTube that their videos were
3 not infringing pursuant to 17 United States Code,
4 Section 512(g). I'm told today that the Shepherds did
5 not file such a counternotification because they never
6 received the notification. That dispute is not
7 material.

8 As part of the counter -- any counternotification
9 a defendant would have received, he or she would have --
10 under the Act, have been required to provide her name,
11 address and telephone number in a statement that he or
12 she consents to the jurisdiction of the Federal District
13 Court for the judicial district in which the address is
14 located. That's 17 United States Code, Section
15 512(g)(3)(d). In his papers, Mr. Aguiar argued that by
16 submitting these counternotifications, the defendants
17 consented to be sued in the district where he's located,
18 the District of Massachusetts. This reflects a
19 misunderstanding of the statute.

20 The statute requires consent to personal
21 jurisdiction in the Federal District Court in the
22 judicial district in which the user's address is
23 located. Therefore, Webb consented to be sued in
24 Illinois and if they received notifications, the
25 Shepherds would have consented to being sued in Indiana

1 and Davis in Florida. None of them consented to being
2 sued in Massachusetts pursuant to the
3 counternotification provisions of the so-called DMCA.

4 No prima facie case of personal jurisdiction over
5 any of the three defendants other than Webb has been
6 made. The plaintiff, in his complaint, makes really the
7 barest of general allegations. In Paragraph 7, he
8 alleges that the defendants infringed plaintiff's
9 copyrighted materials and caused severe financial
10 damages. This may not satisfy even the notice pleading
11 requirements of Federal Rule of Civil Procedure 8, but
12 the plaintiff has failed to provide the kind of support
13 for allegations that might support a finding of personal
14 jurisdiction with regard to the three defendants who can
15 test personal jurisdiction.

16 With regard to Wendy Shepherd, essentially no
17 facts are alleged and none are supported by an affidavit
18 or other information that goes beyond the minimal
19 allegations in the complaint. In response, however, in
20 her motion to dismiss and supporting declaration, Miss
21 Shepherd asserts that she's never conducted any
22 transactions in Massachusetts, has not offered or
23 contracted to offer services in Massachusetts, and does
24 not regularly conduct transactions with residents of
25 Massachusetts. There is, therefore, no basis under any

1 provision of the long-arm statute for jurisdiction over
2 her. Indeed, in his opposition to her motion to
3 dismiss, Aguiar did not argue that personal jurisdiction
4 was appropriate as to her, although he has today.

5 With regard to Barron Shepherd, looking at all the
6 pleadings, including those provided by the defendants,
7 the most that can be discerned under the prima facie
8 standard is the following. Barron Shepherd communicated
9 with Mr. Aguiar with a view to getting licensing --
10 well, with a view to licensing the copyrighted
11 trademarks Mr. Aguiar has. Those communications did not
12 result in a deal or a transaction. Barron Shepherd did
13 buy video footage from Mr. Creeden in Massachusetts for,
14 I believe, \$1,000. These represent far fewer contacts
15 than were found to be insufficient to meet the
16 transaction of business test in Section 3(a) in
17 Massachusetts Supreme Judicial Court decisions such as
18 ***Droukas, D-R-O-U-K-A-S, vs. Divers Training Academy,***
19 ***Inc.***, 375 Mass. 149, and ***Roberts vs. Legendary Marine***
20 ***Sales***, 447 Mass. 86.

21 Therefore, as it hasn't been established even
22 under the low prima facie standard, the personal
23 jurisdiction over Barron Shepherd exists under Section
24 3(a). Section 3(b) does not apply because, at least
25 according to the information in the record, Barron

1 Shepherd was not supplying goods or services in
2 Massachusetts. Section 3(c) does not apply because
3 there are no alleged misrepresentations that he made.
4 And Section 3(d) does not apply because there's no basis
5 for finding that the purchase of video from Mr. Creeden
6 was tortious and, moreover, no evidence that Barron
7 Shepherd regularly does or solicits business in
8 Massachusetts.

9 With regard to Radford Davis, the pleadings
10 indicate that Mr. Davis allegedly infringed copyrights
11 held by Mr. Aguiar by selling books or videos containing
12 copyrighted materials through his website. Mr. Davis
13 responds in his declaration that he's never been to
14 Massachusetts, has never offered or contracted to offer
15 services of any kind in Massachusetts, and disseminates
16 no advertising in Massachusetts. He adds that he does
17 not own or lease property in Massachusetts, does not
18 have any bank accounts in Massachusetts, and does not
19 file tax returns in Massachusetts. Davis does own two
20 websites on which he sells martial arts paraphernalia.
21 He asserts that from that website he sold seven books
22 and DVDs to people in Massachusetts totaling in revenues
23 \$267. He also represents that this constitutes less
24 than 1 percent of his sales and therefore he has not
25 done continuous and systematic business in

1 Massachusetts.

2 Again, the contacts established by evidence that's
3 properly before me are far less than found to be
4 inadequate in *Droukas* and related cases to invoke
5 personal jurisdiction under the long-arm statute.

6 Although this isn't very well developed in the
7 papers, as to the videos Mr. Davis allegedly placed on
8 YouTube, which are not specifically identified in the
9 record, even if they infringed some copyright owned by
10 Aguiar, they do not confer personal jurisdiction here.
11 YouTube is, undoubtedly, an active website as that term
12 "active website" is defined in *Zippo*, a case that may
13 apply here conceptually, but Davis does not operate that
14 site. Barring any allegation that Davis specifically
15 targeted infringing videos at Massachusetts, it did not
16 constitute minimum contacts with Massachusetts. That,
17 however, is an issue I'll get into more deeply if it's
18 properly presented and briefed in the future.

19 So as I said, the motions to dismiss of Davis and
20 the Shepherds are allowed, they're allowed without
21 prejudice, and before we leave I'll set a schedule for
22 the filing of any proposed amended complaint, which can
23 be examined to see if it's adequate with regard to
24 personal jurisdiction, among other things.

25 All right. Now we should move to the motion for

1 preliminary injunction, which at this point applies only
2 to Mr. Webb since the other defendants have been
3 dismissed.

4 To obtain a preliminary injunction, the burden of
5 proof is on the plaintiff. The Court's required to
6 weigh four factors. The first is whether the plaintiff
7 has shown a likelihood of success on the merits. The
8 second is whether the plaintiff has established an
9 imminent threat of irreparable harm in the absence of a
10 preliminary injunction. The Court is also required to
11 balance the hardships of the plaintiff, if no injunction
12 is issued, against the hardships of the defendant, if
13 the requested injunction is ordered. In addition, the
14 Court must consider the effect of the proposed
15 injunction on the public interest.

16 The Court of Appeals for the First Circuit has
17 said, on a number of occasions, the likelihood of
18 success on the merits is of primary importance. In a
19 copyright case, usually irreparable harm is presumed if
20 a likelihood of success on the merits is shown, as the
21 First Circuit said in *Concrete Machinery*, 443 F. 2nd at
22 611, and a preliminary injunction is an equitable
23 remedy. So I'm going to take the equities into
24 account.

25 Based on the evidence in the record, Mr. Aguiar,

1 would you like to speak to your motion for a preliminary
2 injunction against Mr. Webb?

3 MR. AGUIAR: Your Honor, Mr. Webb first
4 contacted me around 2005. He said that he was referred
5 to me through Ashida Kim. He and I had a couple of
6 phone conferences with him with my attorney, at the
7 time, John Francure. Okay? He wanted to use my
8 archives, he wanted to use my copyrighted videos, I
9 said, "Well, you need to have some kind of a user
10 agreement for releasing my stuff." He refused. I
11 politely told him, around 2005, "Well, you can't use my
12 stuff."

13 Shortly after those phone conversations, videos
14 started being aired on YouTube and throughout a bunch of
15 different websites. Also, his website also had a lot of
16 infringing-types of pictures in his blog that are also
17 from my books. From there I sent cease and desist
18 orders. For the most part, I followed the letter of the
19 law, using Mr. Francure. I filed a DMCA also with
20 Mr. Webb. I filed a counternotification basically
21 saying he's misrepresenting my copyrights.

22 His website went back up. I filed. Um, for the
23 most part, your Honor, the copyrighted materials have
24 been -- are owned by me through probate. He was asked
25 to cease and desist --

1 THE COURT: I looked at this morning, and I
2 want to make sure we're talking about the same thing,
3 you're talking about the so-called trailers that were on
4 YouTube that are advertising the movie that Mr. Webb
5 hopes to make?

6 MR. AGUIAR: Yes.

7 THE COURT: And what are the -- you say he's
8 using your books, too?

9 MR. AGUIAR: There are numerous pictures in
10 both books -- from both books, I should say, on his
11 blog, on his website, in different places.

12 THE COURT: Okay. So it's -- you're
13 complaining -- I just want to understand what the
14 allegations are against Mr. Webb. Am I correct that
15 you're complaining that he's using some photographs from
16 the copyrighted book or books on his trailers, video
17 trailers that you can get on the Internet, right?

18 MR. AGUIAR: Essentially, your Honor --

19 THE COURT: No, just listen. I'm just trying
20 to figure out, you know, what I need to focus on. So
21 one of your claims -- am I correct that one of your
22 claims is he's taken some full photographs which are in
23 copyrighted books and put them on those trailers?

24 MR. AGUIAR: Yes.

25 THE COURT: And then there's another one of

1 your claims that he took clips from your copyrighted
2 videos and put those on the trailer, too?

3 MR. AGUIAR: Yes. Right.

4 THE COURT: Is there anything else?

5 MR. AGUIAR: Essentially it's the heart and
6 soul of the copyrighted works. Everyone buys my
7 production to see Count Dante doing what he does. It's
8 the only footage of it in existence. It's the meat and
9 potatoes of my production. You know, he was asked to
10 take it down until we get a user agreement, something
11 tangible, and he refused, and that's why I pushed
12 forward with this cease and desist orders and things
13 along those lines. When Mr. Webb was noncompliant with
14 all of that, I pushed forward to have his website
15 knocked down. He filed, I believe it was, copyright
16 misrepresentation that I did that and he got his website
17 back up. This is one of the reasons why we're here
18 today.

19 Your Honor, essentially I'd like to see -- if I
20 lose my video now, if I lose my footage now, I'll never
21 get it back. I'm hoping to keep it under --

22 THE COURT: Keep it under what?

23 MR. AGUIAR: I'm hoping to keep it within my
24 reigns. He doesn't have any permission to use my
25 footage. He's using the whole "Dance of Death." Not

1 only the video footage, but in the back of the book --
2 and this is the original book, and there's other
3 pictures, too, from both, he uses basically the entire
4 27 parts, which also is pretty much what Ashida Kim has
5 used, also. My book's the slightly older one, but it's
6 also in the back of that. There's very few pictures
7 that have changed and because of our '86 Amendment,
8 that's why we've changed and modified a few books.

9 Essentially he's had every chance in the world to
10 work with me, your Honor. I'm not the bad guy I'm made
11 out to be on the Internet. I actually don't mind some
12 of this stuff, but --

13 THE COURT: You don't mind?

14 MR. AGUIAR: I don't mind somebody coming to
15 me and working with me fairly, but he wanted everything
16 for nothing. He didn't even want to sign a contract.
17 He talks about \$10,000 I mentioned. On his website,
18 that story changed three times. Okay? What I really
19 essentially wanted was something to hold our agreement
20 between us and he refused and he did what he wanted to
21 do, regardless of me following the law and using
22 Attorney Francure.

23 Essentially he's been noncompliant with all the
24 law. He told the websites that I misrepresented my
25 copyright. Nevertheless, I have the original works,

1 some of the original pictures, some of the original -- I
2 believe the original -- the original, um, negatives,
3 probate, you know, I have it all. How is it not mine?

4 The fact of the matter is, your Honor, is he just
5 wanted to do what he wanted to do. I contacted him over
6 a year and a half between once a week and four times a
7 month, okay, from my lawyer's office. At least I have
8 an official witness. And I'd either get a call back or
9 there would be no calls again --

10 THE COURT: Let me ask you this. Is this in
11 the materials you gave me?

12 MR. AGUIAR: I believe it is.

13 THE COURT: Where?

14 MR. AGUIAR: I'm not sure, your Honor.

15 THE COURT: Because this is not ringing a bell
16 with me. Go ahead.

17 MR. AGUIAR: Essentially I followed the letter
18 of the law, I spoke to him a few times, and he basically
19 and publicly and here and there, on the phone with
20 Mr. Francure, said that if I don't like it, I can sue
21 him, and so I sued him. I own it. I can show the
22 timeline all the way back, almost to the first time that
23 we signed the original copyright. I didn't mind working
24 with him at first. I would like to see it all down to
25 the end of this -- or me and Mr. Webb's case.

1 THE COURT: I'm sorry. You would like to see
2 what?

3 MR. AGUIAR: I would like to see it all down,
4 you know, everything, start with my infringing videos
5 until the end of --

6 THE COURT: This case. Okay. Thank you.
7 Would you say your name, please, for the record.

8 MR. FALZONE: Anthony Falzone for the
9 defendant, Floyd Webb, your Honor.

10 Your Honor, the discussions, whatever they were
11 between Mr. Aguiar and Mr. Webb, are beside the point.
12 Likewise, the takedown notices and the cease and desist
13 letter is beside the point on the issue before your
14 Honor and that is whether there's a basis to issue a
15 preliminary injunction. Here there simply isn't any.

16 I think the reasons are laid out clearly in our
17 papers. I won't belabor them all here. But I do want
18 to speak directly to the ownership issue that has come
19 up time and time again that Mr. Aguiar raises here now.
20 The ownerships of the copyrights asserted here are very
21 much in doubt, your Honor.

22 As a threshold matter, the vast bulk of materials
23 Mr. Webb used in both the trailer and the website were
24 drawn from sources completely independent of any other
25 copyrighted works Mr. Aguiar asserts here and that's

1 laid out, item by item, in Mr. Webb's declaration
2 submitted to the Court.

3 Now, he does acknowledge that he used four
4 photographs from the original 1968 "World's Deadliest
5 Fighting Secrets" book and so the ownership of that book
6 is very much important here, your Honor, and although
7 it's a little difficult to trace, step by step, how
8 exactly it is that Mr. Aguiar came to own those
9 copyrights, I have a demonstrative I'd like to share, if
10 the Court would find that helpful?

11 THE COURT: Well, (A) I have to -- I think
12 this, again, is something you didn't give me before, but
13 I understood from the submissions that one issue
14 relating to whether Mr. Aguiar is likely to prevail on
15 the merits is that you're challenging whether he
16 actually has a copyright?

17 MR. FALZONE: Absolutely. The 1968 copyright
18 was issued to The Count Dante Chicago Black Dragon
19 Fighting Society. Although Mr. Aguiar asserts that he
20 inherited it from his father, there are several gaps
21 that have to be bridged on the road from the original
22 register of the copyrights to Mr. Aguiar. He simply has
23 not bridged those gaps, your Honor, and presents no
24 proper basis for your Honor to conclude he owns the
25 copyrights in the original --

1 THE COURT: Is it your claim that his father
2 didn't own them?

3 MR. FALZONE: We don't believe he did. And
4 even if he asserts he did, he has not presented the
5 proof necessary for the Court to so conclude.

6 THE COURT: What's your next argument?

7 MR. FALZONE: Your Honor, as to the ownership
8 of the video, that's actually not in dispute. In both
9 his declaration to the Court and his reply memorandum,
10 Mr. Aguiar acknowledges that video was shot by John
11 Creeden, Jr. He would be the presumptive author of that
12 video and owner of the copyrights. And, indeed,
13 Mr. Aguiar acknowledges that John Creeden, III,
14 I believe, as, quote, "owns the video." So there is,
15 again, no basis for the Court to conclude that
16 Mr. Aguiar has any valid copyrights to that video.

17 Now, ownership aside, even if he overcomes these
18 barriers to showing ownership, the fair use question
19 here is, I submit to your Honor, open and shut. I'm
20 happy to address that now, although I think it's laid
21 out clearly in the papers.

22 THE COURT: Okay. Well, you've been waiting
23 to make your argument, so I want to give you a chance.

24 MR. FALZONE: If it's reiterating what your
25 Honor has already studied, I'm happy to forego it.

1 THE COURT: No, go ahead.

2 MR. FALZONE: Thank you.

3 As a threshold matter, the Court has to be careful
4 in issuing a preliminary injunction here because this is
5 Mr. Webb's free speech rights that are at issue. The
6 **Campbell vs. Acuff-Rose** case submits that and so does
7 the **Suntrose** case out in the Eleventh Circuit.

8 If you turn to the four factors that were
9 statutory factors and how they apply here, I think they
10 line up solidly and clearly in Mr. Webb's favor.
11 There's a significant line of cases that teach the use
12 of copyrighted materials as artifacts to tell a
13 biographical story, which is a transformative use, that
14 **Bill Graham** case from the Second Circuit.

15 THE COURT: But, actually, I thought in **Bill**
16 **Graham**, the Second Circuit noted that: "DK has not used
17 any of BGA's images in its commercial advertising or in
18 any other way to promote the sale of a book," but I
19 thought here that Mr. Webb was using the disputed
20 materials in these trailers to advertise the film he
21 hopes to make and actually ask people to donate money to
22 the making of the film. Doesn't that distinguish the
23 two cases?

24 MR. FALZONE: I don't think it does, your
25 Honor. I think the trailers are audio/visual works that

1 stand on their own. They are, in and of themselves,
2 miniature biographies of Count Dante. And I think that,
3 just standing in and of themselves, regardless of
4 whether there's a film on the way, they serve exactly
5 the same purpose as the posters in **Bill Graham** and that
6 is to illustrate the story of this man's life.

7 Now, the critical thing to focus on here, your
8 Honor, is, yes, the trailer is, in some measure, to
9 generate interest in the film. The film is about Count
10 Dante and so, consequently, there must be some latitude
11 to use, in the trailer, materials concerning Count Dante
12 to serve that biographical purpose.

13 THE COURT: So basically your argument is, I
14 think, and I want to see if I understand it, is that
15 what Mr. Aguiar says he's got a copyright in, including
16 this book, "The World's Deadliest Fighting Secrets,"
17 teaches people Count Dante's moves, but Mr. Webb's work
18 is aimed at teaching people about Count Dante's
19 biography and that's different. It's, in the words of
20 the Supreme Court, transformative.

21 MR. FALZONE: I think that's it absolutely,
22 your Honor, but there's even more to it than that. And
23 I think this is where the **Nunez** case comes in and is
24 instructive here. You have to look at the constituent
25 elements, the photographs that were used, and insofar as

1 Mr. Webb uses publicity photos, the **Nunez** case discusses
2 those, and it found that using a photograph for a news
3 purpose is different than using a publicity photograph
4 for a publicity purpose, and I think that provides
5 further support for the transformation.

6 THE COURT: How does it do that?

7 MR. FALZONE: How does it do what?

8 THE COURT: How does it do that? Are you
9 saying that this is like news?

10 MR. FALZONE: Well, it highlights the
11 transformativeness of the purpose. The idea here is to
12 educate the public about Count Dante's life and
13 certainly not to teach karate, as I understand the
14 purpose of "The World's Deadliest Fighting Secrets" book
15 and video to be.

16 THE COURT: Okay. What about the other fair
17 use factors?

18 MR. FALZONE: Sure. The second factor, your
19 Honor, the nature of the copyrighted work winds up, if
20 on anyone's side, on Mr. Webb's side. The material used
21 here is used in its factual capacity, that is, as an
22 artifact from the life of Count Dante. And so it's not
23 something that is presented like a Richard Avedon
24 photograph that is there for its aesthetic merit, it was
25 taken presumably to further the purpose of teaching

1 karate, not a creative artistic purpose that might
2 generate maximum protection.

3 THE COURT: Well, why isn't a book to teach
4 karate creative?

5 MR. FALZONE: Well, it may very well be, but
6 the manner in which it's used, it's used to teach a
7 skill, to teach a skill, that is a -- although there may
8 be some creative element, it's very much utilitarian.
9 In fact, as I examine the website for Mr. Aguiar and
10 other folks, it's very clear that the thrust of all of
11 this is that this is deadly stuff, you learn this to
12 protect yourself and to use against somebody else. This
13 is not artistic expression and the like that --

14 THE COURT: Does "creative" mean artistic
15 expression? Does "creative" mean that you didn't just
16 take the elements and throw them there, but you put them
17 there in a way that creates something where the value is
18 more than the sum of the parts. If you just looked at
19 one of these pictures, it probably wouldn't teach you
20 much about a martial arts movie, but if you look at the
21 pictures in the context of the book, it has some
22 instructive value that it wouldn't have independently.
23 I thought that was "creative"?

24 MR. FALZONE: Well, even if it were, your
25 Honor, one of the things the **Bill Graham** case does teach

1 is that when even a creative work is used in a very
2 transformative fashion, the second factor weighs in
3 favor of its factual capacity. So on the spectrum of
4 creative versus factual works, I think this falls
5 clearly on the factual side, but maybe there's some
6 small creative component. I don't think that changes
7 the way the factor ultimately weighs.

8 Turning to the third factor, it is true that yet
9 the full photograph was used in each case, but that's
10 not the same thing as saying the whole copyrighted work
11 was used because, of course, here the copyrighted work
12 is the whole book. Any time you focus just on the
13 photographs themselves, your Honor, the **Nunez** case,
14 among others, instructs the Court that, for certain
15 purposes, using the whole photograph was just fine.

16 Finally, market effect, your Honor. There's just
17 been no showing whatsoever that there's any effect here
18 on the sales of the video and nor could there be any
19 cognizable showing. Again, the **Bill Graham** case is
20 instructive when you have a very transformative use. If
21 anything, the defendant's work occupies what the Second
22 Circuit calls a "transformative market." And even
23 effect on that market, and that's shown here, would not
24 be cognizable under the fourth factor or the second.

25 THE COURT: Okay.

1 MR. FALZONE: I do want to speak very briefly
2 about trademark issues, your Honor. First and foremost,
3 I don't understand there to be any trademark claims in
4 this case now against my client. I think Mr. Aguiar
5 made that crystal clear in his reply papers. He said it
6 no less than four times.

7 THE COURT: That's my present understanding
8 that right now this is a copyright case exclusively.
9 Right, Mr. Aguiar?

10 MR. AGUIAR: Yes, your Honor.

11 MR. FALZONE: In that case, your Honor, I
12 won't go into the representations about the validity of
13 the Black Dragon Fighting Society trademark, but as we
14 set out in the papers, it is, in fact, not a registered
15 mark. And there wouldn't be a trademark claim to assert
16 anyway, contrary to what Mr. Aguiar has told you today.

17 THE COURT: Okay.

18 MR. FALZONE: Thank you, your Honor.

19 THE COURT: Mr. Aguiar, would you like to
20 respond briefly?

21 MR. AGUIAR: Yes, your Honor.

22 Your Honor, regarding the trademarks, for the most
23 part, the logos are on my copyrighted works. So even if
24 they're not officially trademarked, they're still under
25 a copyright. And besides that, the validity of my

1 copyrights, okay, and I know I submitted these, your
2 Honor, there is a transition of the original form.

3 After the death of Count Dante, in several public
4 magazines, and I do believe I submitted them, the majors
5 anyway that mention about Count Dante's wishes for my
6 father to take on the thrown and everything else, after
7 the death of Count Dante, there's essentially two or
8 three letters written out from Christa Dante, his
9 past -- the beneficiary. Okay? So it was a thing where
10 if someone contests my father's ownership, we have these
11 letters, okay, directly saying "user copyright,"
12 "copyrighted works," and I have the letters here, if you
13 can't find them there. And from there my father took
14 the copyrights and filed the 86. And the Library of
15 Congress won't copyright something if you don't own it
16 or have it transferred properly. From then on I did
17 receive -- I received it through probate, therefore I do
18 own copyrights.

19 Regarding the video, the video was never actually
20 ever released until 2000 and 2001, okay? My father is
21 in the video. It's a personal family video aside from
22 copyrighted.

23 Um, the four factors of fair use, your Honor, I
24 don't believe that Mr. Webb meets any of them. He did
25 not get permission from the owner. If he uses my

1 material, it will definitely be out of my hands. It
2 will damage my works.

3 THE COURT: It might actually enhance the
4 value of your works. I had a case, 22 years ago,
5 **Haberman vs. Hustler**, where I had to apply fair use as
6 it was then interpreted and one of the critical factors
7 in a finding of fair use was that a parodying of these
8 fine art photographs in "Hustler Magazine" was followed
9 by an increase in sales.

10 MR. AGUIAR: Yes, your Honor, but once again I
11 would like to keep it within my restraints.

12 THE COURT: Yeah, but that's -- it's a
13 somewhat different point. But if a movie is made about
14 Count Dante and lots of people learn about him and are
15 interested, why shouldn't I think -- that's likely to
16 increase the demand for your books rather than diminish
17 it.

18 MR. AGUIAR: But within the trailers, your
19 Honor, not only is the video there, but in the back of
20 the book he uses not just one picture, but pretty much
21 the entire "Dance of Death" in sequence. We're not
22 taking one picture out and throwing it on a page or a,
23 "Hey, look at this," it's 1, 2, 3, 4, 5, 6, 7, 8, 9, 10,
24 11, 12, right up to 27. Okay?

25 Aside from that, your Honor, they're not following

1 the letter of the law. I asked him to stop. He didn't
2 have that permission. He continued on. I don't feel --
3 I feel like I'll never get this back. It's going to
4 damage my works. Maybe it might promote it a little
5 bit, but as far as I see it, I don't want it used. I'm
6 hoping to keep this under all restraints, okay, it will
7 financially damage my works. This is the only video of
8 Count Dante in existence doing this stuff, unless it's
9 in my file cabinet, your Honor, where I have more.

10 THE COURT: Okay.

11 MR. AGUIAR: I also own the original 8
12 millimeter film. Okay? Regardless of who claimed to
13 have shot it, I do believe that my Godfather, John
14 Creeden, Sr. -- my father and his father were -- and
15 John Creeden, III's father, my Godfather, were good
16 buddies. They both knew Count Dante. They both
17 experienced these thing together. Okay?

18 As it works, though, the original guy who
19 supposedly was behind the camera says "You can't use
20 it." I have the original 8 millimeters. I own it.

21 THE COURT: Who was behind the camera? I
22 thought Mr. Creeden was behind the camera?

23 MR. AGUIAR: The original Mr. Creeden, the
24 senior.

25 THE COURT: I know, but --

1 MR. AGUIAR: How do I even know that for a
2 fact? I mean, that's what he told me. I believe him
3 because, you know, they were very tight, they were
4 business compadres back in those days.

5 All in all, your Honor, I don't see where they
6 have any -- okay, one individual picture, you want to
7 use an ad, and he uses the ads, and he uses those
8 things. This is fair use to cover something like this,
9 not the video footage with my father in it, not
10 consecutively 27 pictures that comprises the Dance of
11 Death, not video footage that he never actually got
12 permission for.

13 I believe one of the factors are that you should
14 get permission from the copyright holder or at least
15 attempt to. I wanted to work with Mr. Webb. He didn't
16 want to put anything on paper for me. He wanted to do
17 what he wanted to do and he made his comments on the
18 phone or even on his blog, on his blog somewhere, maybe,
19 "If you don't like it, then sue me." He doesn't follow
20 the four factors, whatsoever.

21 Since these videos went on YouTube and his
22 website, my sales went down a little bit. I don't
23 really sell much of these anymore. Why? Because
24 they're seeing the only existing video.

25 THE COURT: Where in the record am I told that

1 your sales have gone down?

2 MR. AGUIAR: I don't believe I put that in
3 there.

4 THE COURT: Yeah, I don't believe you did
5 either. I have to decide this based on the evidence
6 that's properly before me.

7 MR. AGUIAR: Okay. I apologize. But for the
8 most part, your Honor, with all of this happening, it
9 doesn't meet the four factors. It will grossly ruin my
10 sales. I'll lose control of my video with my father in
11 it.

12 THE COURT: Yeah, I think you've said that and
13 I think I understand.

14 MR. AGUIAR: There's other -- he uses several
15 pictures within "The World's Deadliest Fighting
16 Secrets," okay, not just one or two like his claims.
17 Um, and for the most part, the copyright always said
18 "No."

19 THE COURT: Okay. All right. Thank you.

20 MR. FALZONE: Your Honor, may I respond
21 briefly to that?

22 THE COURT: Okay.

23 MR. FALZONE: Very briefly. I just want to
24 speak to ownership. He's talking about relying on
25 magazine articles --

1 MR. AGUIAR: No, I'm not actually.

2 MR. FALZONE: -- as evidence of some kind of
3 transfer. What he had provided to your Honor is a
4 purported 1977 sale of copyrights from some entity
5 called Cherry Productions to House of Dante, a Rhode
6 Island corporation. He gives your Honor no proof that
7 the original copyrights registered to the Count Dante
8 Chicago Black Dragon Fighting Society were ever
9 transferred to Cherry productions. Nor when he gives --
10 in addition, he submits what he purports as evidence of
11 transfer from the Fall River Black Dragon Fighting
12 Society to his father, but he doesn't provide the Court
13 with any evidence whatsoever that House of Dante, the
14 Rhode Island corporation, ever transferred to the Fall
15 River Black Dragons. That is the problem with the
16 ownership here.

17 And as to the video, he acknowledges it's simply
18 not his. He's clearly not the author. And the fact
19 that his father and Mr. Creeden were good buddies,
20 doesn't make him the copyright owner.

21 MR. AGUIAR: Your Honor, may I?

22 THE COURT: No.

23 At the outset of the argument on the motion for
24 preliminary injunction, I recited the applicable
25 standards as I summarized them in *Cablevision vs. Public*

1 **Improvement Commission**, 38 F. Supp. 2d 46 at 53, and
2 noted that in a copyright case, usually a likelihood of
3 success on the merits is shown, irreparable harm is
4 presumed, as the First Circuit said in **Concrete**
5 **Machinery**. This is necessarily a preliminary
6 assessment, but for the reasons I'll describe, the
7 plaintiff's motion for a preliminary injunction is
8 hereby denied.

9 First, I find that the required likelihood of
10 success on the merits, which the First Circuit has
11 characterized as the sine qua non for obtaining a
12 preliminary injunction, is not met. There seems to be a
13 meaningful issue as to whether the plaintiff owns the
14 copyright and the photographs at issue. For present
15 purposes, I assume he does. It appears that Mr. Creeden
16 owns the copyright to the video, however.

17 More importantly, on this necessarily incomplete
18 record, it appears that Mr. Webb is likely to prevail in
19 showing fair use. As has been noted, there are four
20 primary, but not exclusive elements of fair use under 17
21 United States Code, Section 107. The fair use inquiry
22 is primarily framed by four nonexclusive statutory
23 factors: (1) The purpose and character of the use,
24 including whether such use is of a commercial nature or
25 is for nonprofit educational purposes. (2) The nature

1 of the copyrighted work. (3) The amount and
2 substantiality of the portion used in relation to the
3 copyrighted work as a whole. And (4) The effect of the
4 use upon the potential market for a value of the
5 copyrighted work.

6 The courts give significant weight in the fair use
7 analysis to whether the use of the copyrighted
8 materials, here the video -- as to which Mr. Aguiar may
9 not own the copyright, but I've analyzed it as if he
10 does, and the photographs is transformative. This
11 concept was described by the Supreme Court in **Campbell**,
12 510 U.S. 569 at 579, and elaborated upon by the First
13 Circuit in **Nunez**, 235 F. 3rd 18 at 21 to 22. I find
14 that within those definitions, these trailers, prepared
15 by Mr. Webb, that incorporate the video and some
16 photographs from the copyrighted book is
17 transformative.

18 The plaintiff's book and the related video are
19 used to teach martial arts skills. The defendant's
20 video is intended to educate people regarding Count
21 Dante's life -- Count Dante being the person depicted in
22 the book and on the video doing and teaching these
23 martial arts skills. But the difference between
24 essentially teaching materials and biographical
25 materials makes Mr. Webb's trailer, his proposed film,

1 transformative. As something transformative -- and
2 because it's something transformative, that weighs
3 rather heavily on the side of a finding of fair use.

4 I haven't delved deeply into the definitions, but
5 I've actually assumed that the copyrighted book itself
6 is creative and that weighs in the plaintiff's favor.
7 In addition, the entire video clip is used and the
8 photographs are fully used, but they're only part of the
9 copyrighted book. Again, I've assumed that this weighs
10 slightly toward the plaintiff.

11 While it's been argued by Mr. Aguiar today that
12 his sales have been going down, I have no affidavit, the
13 defendants have had no discovery, and as a practical
14 matter I have no evidence, which could have been
15 presented in the form of an affidavit, of harm to a
16 potential market for the copyrighted book, "The World's
17 Deadliest Fighting Secrets." Rather, it seems to me, at
18 the moment, that it's more likely that a film on Count
19 Dante or this trailer will increase interest in him in
20 the market for books that display his ability.

21 In this sense, this case has the potential to be,
22 but I can't make a decision now, like *Haberman vs.*
23 *Hustler*, 626 F. Supp. 201 at 211 to 213, with the effect
24 on the potential market of a parodying of Mr. Haberman's
25 fine art photographs in "Hustler" magazine that actually

1 led to increased sales rather than decreased sales of
2 those fine art postcards. Since there's no showing of a
3 reasonable likelihood of success on the merits, there's
4 no basis to presume irreparable harm without a
5 preliminary injunction, nor is there any evidence of
6 irreparable harm before me.

7 I recognize that there's some potential hardship
8 to the plaintiff if, during the pendency of this case,
9 he loses exclusive control of the photographs that are
10 part of his book and the video, if he has the copyright,
11 but there's also -- would be a very significant hardship
12 to Mr. Webb if a preliminary injunction issued. The
13 injunction would prevent the trailer from being
14 broadcast and he would lose the opportunity to express
15 himself in this period.

16 In addition, the trailer both advertises and
17 solicits funds for a full movie that Mr. Webb would like
18 to make. The trailer, which I viewed this morning, and
19 it was put in evidence, said that the movie was going to
20 be made, I think, by May 2007. So evidently money
21 hasn't been raised or there's some other impediment to
22 finishing the movie.

23 But if Mr. Webb wants to make this movie, and at
24 the moment it appears it would be fair use to
25 incorporate some of the disputed materials in it, and

1 he's not allowed to be on the Worldwide Web trying to
2 raise money for the movie, that would be a hardship to
3 him. And in the circumstances as they now exist where
4 it appears the use is fair use, delaying the film work,
5 killing the project, would harm the public interest.

6 The film is intended to educate the public about
7 Count Dante and would be creative. I'm getting educated
8 to understand that there's interest in Count Dante. In
9 general, courts don't decide whether some piece of art
10 or expression is valuable or not valuable, but we do
11 protect the creative process as a manifestation of
12 people's First Amendment rights. The law generally
13 seeks to foster legitimate creativity and a preliminary
14 injunction in the circumstances of this case, as they've
15 been presented to me, would injure that interest.

16 All right. Now, there's a motion to amend the
17 complaint to add "31 Studios" and motions to amend are
18 generally freely given, but the proposed amendment would
19 just add one line about 31.

20 MR. AGUIAR: 321.

21 THE COURT: 321? Oh, then I misunderstood.
22 321. I mean, I -- you know, as I said earlier,
23 Mr. Aguiar, what I'm inclined to do is to require that
24 you, alone or through a lawyer, file a new complaint.
25 If you look at Federal Rule of Civil Procedure 8, even

1 if you're Pro Se, still representing yourself, cases
2 like -- well, **Ahmed vs. Rosenblatt**, 118 F. 3rd 886,
3 require that you allege specific facts that if they're
4 true would give me jurisdiction or power to hear a case
5 against a particular person and give the defendants, you
6 know, a fair notice of exactly what you're -- not
7 exactly, but, you know, generally what you're charging.
8 And you've been able to articulate this today. It's not
9 like you don't know. You just didn't put it down on
10 what you filed. You know, if you put the facts down,
11 the alleged facts down, even if you don't have a lawyer,
12 then I can and will do a lot of work to figure out
13 whether you've got a claim in there. But if you don't
14 put the alleged facts in there, you know, my law clerk
15 can't help you, I can't help you, and the defendants
16 can't figure out what they have to answer.

17 So, you know, I've dismissed three of the
18 defendants without prejudice and I know you've been
19 listening to this carefully, but they really have to
20 have done enough in Massachusetts to make it fair under
21 the legal standards to require that they defend a suit
22 here and, you know, if you don't meet those standards, I
23 don't have the power to hear your case against them.

24 So my inclination, rather than to decide this
25 motion with regard to 321, which just says, I think,

1 that Mr. Webb owns 321 or something to that effect and
2 that 321 is going to produce this film, is, you know, to
3 give you a reasonable period of time, with a lawyer or
4 alone, to elaborate your allegations against Webb, to
5 specify in greater detail than you did in the motion to
6 amend any allegations you want to make against 321, and
7 to think very carefully about whether there's a proper
8 legal and factual basis to try to get any of the
9 dismissed defendants back in this case. And if you're
10 wrong about them, you could end up paying for all of
11 their lawyers, as I've told you.

12 But, I guess, I'm interested in hearing from
13 counsel for Mr. Webb, who I assume would also represent
14 321, and Mr. Aguiar on that approach at this point, so
15 you get clearer notice of what you're charged with.

16 MR. FALZONE: Well, first of all, your Honor,
17 I'm not at all sure we'd be representing 321. As
18 Mr. Webb set forth in his declaration, 321 Studies had
19 nothing to do with this film whatsoever. Given that
20 statement, it's hard to imagine how there could be any
21 proper basis to amend the complaint to bring 321 in as a
22 defendant. So for that reason, again, although
23 amendments should be granted liberally --

24 THE COURT: Well, on that, you see, I don't
25 grant a motion to amend if it's futile, but usually, you

1 know, that's like 12(b)(6), it fails to state a claim.
2 That if Mr. Aguiar alleges and then is prepared to offer
3 evidence that it would meet at least the prima facie
4 standard, that 321 is involved in this, you know, the
5 fact that Mr. Webb says, "No, they're not," probably
6 wouldn't get 321 out of the case, if he supported it the
7 way you have to under a prima facie standard. But
8 anyway.

9 MR. FALZONE: I understand, your Honor.

10 THE COURT: But I'm just -- I mean, I could
11 also -- I mean, maybe you want to go ahead on the
12 present record. You didn't move to dismiss.

13 MR. FALZONE: So I think your Honor's
14 suggestion about greater specificity is a very good
15 idea. In fact, that's what we asked for in terms of a
16 condition of an amendment. Here we think it would be
17 very beneficial.

18 But I do want to speak to one thing that I think
19 is even more important from Mr. Webb's point of view and
20 that is moving this along quickly, and we'll probably
21 discuss that in respect to the CMC. But although we
22 think this claim is meritless, it's casting a long
23 shadow, as your Honor identified, over his ability to
24 get funds for the film, to finish the film. The BBC was
25 interested in the film, but said they didn't want to

1 touch it until this lawsuit is over. So it's very
2 important for us to --

3 THE COURT: So how do you think those two
4 interests get reconciled? Part of my concern is that if
5 I -- well, maybe they're separate. Are the claims
6 against Mr. Webb, can they proceed without knowing
7 whether these other defendants are in or out of the
8 case, Mr. Aguiar, from your perspective?

9 MR. AGUIAR: Your Honor, from what I
10 understand, at least Barron Shepherd, Wendy being
11 attached to Barron with the website, your Honor, and
12 Ashida Kim, from what I understand, at least in the
13 beginning, they all got together and conspired with all
14 of this stuff to get this documentary up and going at
15 one point and in some manner.

16 But what I was hoping, and maybe this is a little
17 premature, but I believe that there's a conspiracy for
18 my copyright, a conspiracy to defraud. When it comes
19 down to 321 Studies, they are essentially the studio
20 that's producing the film. So do I send them a cease
21 and desist? What are my rights on that? I added them
22 because they have a part to it. They are part of the
23 overall issue. So are the other defendants that were
24 dismissed, they all have a little piece in this, your
25 Honor.

1 THE COURT: Well, my point is if -- you know,
2 you might find something out while you're doing
3 discovery with Webb that would give you a stronger case
4 against the others or it might persuade you they had
5 nothing to do with it. But the issue is can the case go
6 ahead with regard to Mr. Webb before it's finally
7 determined whether the rest of them are in there?

8 MR. FALZONE: Can I speak to that briefly,
9 your Honor? Conspiracy or no conspiracy allegations,
10 the fact is that the alleged acts of infringement here
11 are completely separate. So I think your Honor is right
12 to suggest that maybe these cases don't need to be
13 hitched together. And I would submit to your Honor that
14 it might be prudent to simply sever the claims against
15 Mr. Webb and have them continue as a separate case.

16 THE COURT: Well, the problem is -- well,
17 right now Mr. Webb is the only defendant. The problem
18 is -- what are you proposing for discovery?

19 MR. FALZONE: We want to finish discovery by
20 September of this year and we want to get before your
21 Honor for a trial, if there's going to be a trial, by
22 January of next year. And in the meantime we think this
23 case would benefit by an early briefing schedule for a
24 summary adjudication motion --

25 THE COURT: Well, I don't see -- I would

1 rarely take up a motion for summary judgment before the
2 end of discovery.

3 MR. FALZONE: I understand.

4 THE COURT: Rule 56(f) or something. I'd have
5 to know what the evidence is before I can decide if
6 there are material facts in dispute.

7 MR. FALZONE: Well, we're probably jumping
8 down into the case management conference, and I hope
9 that's okay with your Honor, but the suggestion is, for
10 instance, to bring an early summary adjudication motion
11 on the fair use issue. The facts that would be in
12 dispute, if there are any in dispute, are fairly
13 limited. The works are what they are and so
14 transformation doesn't turn on the facts that need to be
15 discovered, nor does the second factor, nor does the
16 third factor. As to the fourth factor, it would seem
17 that most of the facts would be uniquely within the
18 plaintiff's control. So I think that's a good candidate
19 for an early summary adjudication motion.

20 THE COURT: I'm not sure. Now, what are your
21 conversations with Attorney Goren -- who's Attorney
22 Goren? Does he have background in copyrights?

23 MR. AGUIAR: Yes, he does, your Honor. Yes,
24 essentially regarding the three parties.

25 When the video was purchased from Mr. Creeden --

1 THE COURT: No, I want to know about Mr. --

2 MR. AGUIAR: Oh, I'm sorry.

3 THE COURT: No. Here's -- if you're going to
4 have a lawyer soon --

5 (Pause.)

6 THE COURT: Mr. Goren said to go in and ask
7 for 90 days and that's not happening.

8 MR. AGUIAR: I understand, your Honor.

9 THE COURT: But what I may do, today being the
10 15th, is, say, to give Mr. Goren two weeks to decide
11 whether he's going to appear in the case and have
12 another conference shortly after that. And if there's
13 some counsel who are out of town and want to, you can
14 participate by telephone. Because, you know, if
15 Mr. Aguiar is going to get counsel, the case will
16 proceed one way, but if he's not going to get counsel,
17 it's going to proceed in another way.

18 So what I'm inclined to do is to give you two
19 weeks to, you know, either have counsel appear and, you
20 know, then counsel will participate in talking about
21 what he wants to do and how much time is necessary to do
22 it. And I'm not saying they're going to have to file
23 anything in two weeks other than an appearance in the
24 case. But, you know, if you're going to have to do this
25 by yourself, you know, the next time I see you, you're

1 going to have to tell me, you know, whether you're
2 asking for another chance right now to get the
3 defendants in or you can go and do discovery with regard
4 to Mr. Webb and then if you find something out that
5 gives you reason to believe you have a proper basis to
6 bring the other defendants in, you can make a motion and
7 I'll see what to do. It doesn't mean I'd let him, but
8 --

9 MR. AGUIAR: All right. But can I speak about
10 that right now?

11 THE COURT: Well, here, let me just tell you
12 what I'm proposing. That I would order that by February
13 29 you either cause new counsel to appear, counsel to
14 appear on your behalf, or you tell me that you haven't
15 been able to get a lawyer and you're going to continue
16 to do this yourself.

17 MR. AGUIAR: Okay.

18 THE COURT: And then I would have a
19 conference, let's see, I have an opening on March 6th.
20 So I would see you on March 6th and we'll see where we
21 go.

22 MR. AGUIAR: Okay.

23 THE COURT: Do you want to try to talk me out
24 of that?

25 MR. AGUIAR: No, I would just like to comment

1 on -- I know you were asking me earlier about how you
2 can separate the three defendants? Essentially, your
3 Honor, when --

4 THE COURT: Well, hold on just a second. What
5 about from Webb's perspective?

6 MR. FALZONE: Your Honor, I think all of that
7 is a very good start in moving the case forward. I
8 would also suggest to your Honor that in the meantime
9 there's no reason we can't set a deadline for any
10 amended complaint, too, so we make sure too much time
11 isn't --

12 THE COURT: Well, the problem with that is I
13 don't know if Mr. Aguiar -- I mean, I can set a
14 deadline, but I might change it if he gets a lawyer.

15 MR. FALZONE: Well, that's perfectly
16 understandable. What I was going to suggest, your
17 Honor, is it would seem that one or two things is going
18 to happen, he'll either have a lawyer on the 29th or
19 not. If he does, it would seem like two weeks is enough
20 time for his new lawyer to draft an amended complaint.
21 And if it turns out he doesn't have a lawyer, he should
22 be working on it in the meantime. I see no reason why
23 we can't have an amended complaint in 30 days.

24 THE COURT: There might or might not be, the
25 lawyer might say that he wants more. And usually that I

1 wouldn't have the conference before I had the amended
2 complaint. I wouldn't know who had to come to the
3 conference. (Pause.) But then I could push the
4 conference back.

5 I'm ordering Mr. Aguiar to either cause a lawyer
6 to appear by February 29th or tell me that he's going to
7 continue to represent himself. I am going to conduct a
8 conference at 2:30 on March the 6th. Anybody who's out
9 of town and wishes to participate by telephone, I may
10 permit that. And if Mr. Aguiar is going to continue to
11 represent -- and I'm going to set a tentative date of
12 March 14th for an amended complaint to be filed. And
13 I'll send you a written order on this, Mr. Aguiar, even
14 though it does make sense to write down the dates. So
15 that's the date.

16 If you're representing yourself, you're going to
17 have to file an amended complaint by that date. If a
18 new lawyer is going to represent you, that's the date
19 for present purposes. But if he has a good reason, a
20 persuasive reason to get more time, then I'm going to
21 give him another week or so. But I do think that it's
22 in your interest, because you're concerned that the
23 value of your property is being injured, that this
24 progress reasonably fast and it's in the defendant's
25 interest, too, because just the threat of being held

1 liable here apparently is having some injurious effect.

2 I think there's one other issue, the protective
3 order. You all agree on the protective order, which is
4 okay, but while the copy I have isn't -- it's signed by
5 Mr. Aguiar, the copy I have isn't signed by anybody
6 else. Oh, yes it is.

7 There's only one adjustment. You've got Paragraph
8 11 here that talks about use at trial and the rules at
9 trial are different. Things in discovery are not
10 generally publicly available. The First Circuit case is
11 **Anderson vs. Cryovac**. But trials are presumptively open
12 proceedings. Rather than try to deal with that now,
13 what I typically add to these orders when they're not in
14 there is that the Court reserves the right to modify
15 this order after giving counsel notice and an
16 opportunity to be heard. That happens to be the law in
17 the First Circuit anyway. But I'll put you on notice.
18 I'll adopt this order, but particularly if and when we
19 get to a trial, we'll have to have some careful
20 discussions about what's going to happen at trial,
21 because we don't conduct secret trials.

22 (Pause.)

23 THE COURT: All right. I'm going to want to
24 see counsel in the lobby for a few moments, but is there
25 anything else before we do that? Anything else?

1 MR. FALZONE: Well, we have the case
2 management conference statement and the dates we
3 proposed.

4 THE COURT: Well, that's what we're going to
5 take up on March 6th. I'm not going to set a schedule
6 for the case until I know whether Mr. Aguiar has a
7 lawyer or not and whether -- and you'll need to think
8 about all of this, Mr. Aguiar, and discuss it with
9 Mr. Goren or any other lawyer whether you think you're
10 going to try to bring these other folks in. Right now
11 they're not required to come on March 6th because
12 they're not in the case. But if they want to come, they
13 can.

14 MR. AGUIAR: There is a connection between the
15 three of them, your Honor.

16 THE COURT: Yeah, I know, but they're not in
17 the case now. I've dismissed them. And you're going to
18 have to think carefully about not just whether you think
19 you have a claim against them, but whether under the
20 standards I tried to explain, so you can understand them
21 today, it's permissible to bring the case against them
22 here. You might have a case against them that you could
23 bring in Federal court in Florida. I know you don't
24 want to go to Florida. But I only have power to decide
25 cases against people as to whom there's personal

1 jurisdiction in Massachusetts. And whether there's a
2 meritorious case and whether there's jurisdiction in
3 Massachusetts are two different questions. Okay?

4 MR. FALZONE: I would like to ask your Honor
5 if there's any need to file a case management conference
6 prior to the March 6th conference?

7 THE COURT: No, I don't think so. Well, let's
8 see. Sure. I mean if -- yeah, if Mr. Aguiar has a
9 lawyer, let's say -- no, there's not much time. You'll
10 find out on the 29th. Let's say, you know, by March 5th
11 at 12:00 noon, jointly if possible, individually if
12 necessary, you'll file a proposed scheduling order.
13 But, you know, talk to each other. Maybe you can reach
14 an agreement as to how it should proceed. Okay?

15 If Mr. Aguiar doesn't have a lawyer, can you talk
16 civilly to each other and see if you can agree or
17 disagree on how the case should proceed? You're not
18 going to send any nasty e-mails that might come to the
19 attention of the judge? Okay? What's that?

20 MR. AGUIAR: There's that on both sides.

21 THE COURT: I know. But nobody looks good
22 when I read those things.

23 MR. FALZONE: Your Honor, for what it's worth,
24 the conversations we've had with Mr. Aguiar have been
25 quite productive and he's been quite respectful, so I

1 don't think that --

2 THE COURT: Okay. Good. Okay. All right. I
3 just want to try to make sure you don't try any of these
4 moves out on each other. They look deadly.

5 (Laughter.)

6 MR. AGUIAR: Your Honor, if it was one of
7 those things, they'd still need more people.

8 THE COURT: All right. The Court is in
9 recess, but I'll see you.

10 (Ends, 4:00 p.m.)

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C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,
do hereby certify that the foregoing record is a true
and accurate transcription of my stenographic notes,
before Chief Judge Mark L. Wolf, on February 15, 2008,
to the best of my skill and ability.

/s/ Richard H. Romanow

RICHARD H. ROMANOW