

FILED

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

2010 MAY -5 P 3: 34

CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

ANNE PEARSE-HOCKER,
16156 Short Hill Road,
Purcellville, Virginia 20132-2513,

Plaintiff,

v.

FIRELIGHT MEDIA, INC.
324 Convent Avenue
New York, New York 10031,

Defendant.

Case No. 1:10 cv 458 CMH/TRJ

COMPLAINT AND JURY DEMAND

Anne Pearse-Hocker ("Pearse"), for her Complaint against Firelight Media, Inc. ("Firelight"), states as follows:

NATURE OF THE ACTION

1. This is an action for injunctive relief and damages against Firelight for copyright infringement and contributory copyright infringement as a result of Firelight's unauthorized use, reproduction, display, distribution, publication, and preparation of a derivative work based upon several photographs for which Pearse is the lawful copyright holder in violation of the Federal Copyright Act of 1976, 17 U.S.C. § 101, *et seq.*

THE PARTIES

2. Pearse is an individual citizen of Virginia and a professional photographer. She was present and worked as a free-lance photographer during the standoff in Wounded Knee, South Dakota in 1973 between members of the American Indian Movement and the United

States Marshal's Service and other law enforcement agencies. As described in greater detail below, Pearse is the copyright holder for a series of photographs taken at Wounded Knee during the standoff that have been used and distributed by Firelight to third parties without her authorization.

3. Firelight Media, Inc. is a corporation organized and existing under the laws of the State of New York with its principal place of business at 324 Convent Avenue, New York, New York 10031. Firelight is an independent film production company that specializes in producing documentary films, including films that are offered for sale and sold to the general public for financial gain and profit through the internet websites of commercial retailers such as, *inter alia*, Amazon, Barnes and Noble, and Borders.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over the copyright infringement and contributory copyright infringement claims in this matter pursuant to 17 U.S.C. § 1331 because they arise under 17 U.S.C. § 101, *et seq.*

5. This Court has personal jurisdiction over Firelight pursuant to Virginia Code § 8.01-328.1, as the claims in this case arise from Firelight's transacting business in the Commonwealth of Virginia, contracting to supply things in the Commonwealth, causing tortious injury by an act or omission in this Commonwealth, and by causing tortious injury in this Commonwealth by an act or omission outside the Commonwealth while regularly doing and soliciting business, engaging in other persistent courses of conduct, and deriving substantial revenue from goods used and consumed or services rendered in this Commonwealth.

6. Venue is proper in this district pursuant to 28 U.S.C. § 1391(c) as a district in which Firelight is subject to personal jurisdiction.

FACTUAL ALLEGATIONS

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

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

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

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

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

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

13. In late 1996, Pearse was approached by representatives of the Smithsonian Institution ("Smithsonian") regarding the possibility of donating her collection of photographs from the Wounded Knee siege to the Smithsonian's Native American collection (which was then housed in the Gustav Heye museum in New York and later incorporated into the National Museum of the American Indian ("NMAI")). During the course of the negotiations, Pearse made clear that, in order for her to agree to donate the photographs, copyright would have to remain in her name, and would not be transferred to the Smithsonian. Pam Dewey, NMAI's head of photography, explicitly recognized this condition of the gift in an email to Pearse dated April 1, 1997, in which she provided Pearse with draft language regarding the copyright. Later, in a letter to Pearse dated June 3, 1997, Dewey again stated that she was providing Pearse with a "run-down of the steps we will take on our end to ensure . . . that the images are used for specific Museum-related or research purposes, and not for commercial projects."

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

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

Conditions: I do not, by this gift, transfer copyright in the photographs to the Smithsonian Institution. I retain full copyright in the photographs. I grant

to the Smithsonian Institution and the National Museum of the American Indian an irrevocable, non-exclusive, royalty-free, license to use, reproduce, display, and publish, in all media, including electronic media and on-line, the photographs for all standard educational, museum, and archival purposes. Requests by people or entities outside the Smithsonian to reproduce or publish the photographs shall be directed to the donor.

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

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

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

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

19. In or about February 2008, as part of the research Firelight was conducting for a documentary film regarding the occupation at Wounded Knee, Julianna Brannum, an associate

producer employed by Firelight, sent a request to NMAI's photo archives department to use the Distributed Photographs in the production of the film. (A copy of the original Use Request is attached hereto as Exhibit C.)

20. As part of the Use Request, Firelight redacted the proposed credit line to accompany the photographs in the film from "Courtesy, National Museum of the American Indian, Smithsonian Institution (negative, slide, or catalog number). Photo by Anne Pearse Hocker." to "~~Courtesy, National Museum of the American Indian, Smithsonian Institution (negative, slide, or catalog number). Photo by Anne Pearse Hocker.~~"

21. The NMAI agreed to Firelight's proposed redaction of the credit line to accompany the photographs.

22. On or about February 28, 2008, NMAI's photo archives department approved Firelight's application for use of the Distributed Photographs. (A copy of the approved Use Request is attached hereto as Exhibit D.)

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

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

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

26. Pearse first became aware that her photographs were used in the documentary when she saw the documentary on television in May 2009. Prior to that time, no one had advised her that Firelight had requested, much less obtained, permission from the Smithsonian to use her photographs in the documentary, or that Firelight had utilized the photographs in the film. Further, to add insult to injury, Pearse's name was not included in the credits roll at the end of the film.

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

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

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

30. In a letter dated May 27, 2009, Kevin Gover, the Director of the National Museum of the American Indian, admitted that NMAI "did not properly adhere to the terms and conditions stated in your gift agreement," and that Pearse's photos were "used and not properly credited in the episode 'We Shall Remain: Wounded Knee.'" In the same letter, Gover also admitted that "[Pearse's] permission was not obtained for this third party use [of the photographs]."

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

32. Upon information and belief, in the absence of injunctive relief, Firelight will continue to publish the Distributed Photographs in violation of Pearse's copyright.

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

34. Pursuant to 28 U.S.C. § 1498(b), Pearse is unable to join the Smithsonian as a defendant in this case, as the Court of Federal Claims has exclusive subject matter jurisdiction over the Smithsonian for claims of copyright infringement. Thus, Pearse has separately commenced a similar action against the Smithsonian in the United States Court of Federal Claims as case number 1:10-cv-00269.

COUNT I
(Copyright Infringement)

35. Pearse incorporates by reference Paragraphs 1-34, above, as if fully set forth herein.

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

37. Firelight infringed Pearse's copyright in the Distributed Photographs in violation of 17 U.S.C. § 501 by using the Distributed Photographs in the film "We Shall Remain: Wounded Knee."

38. Firelight infringed Pearse's copyright in the Distributed Photographs in violation of 17 U.S.C. § 501 by displaying the Distributed Photographs in the film "We Shall Remain: Wounded Knee."

39. Firelight infringed Pearse's copyright in the Distributed Photographs in violation of 17 U.S.C. § 501 by reproducing the Distributed Photographs in the film "We Shall Remain: Wounded Knee."

40. Firelight infringed Pearse's copyright by creating a derivative work based on the Distributed Photographs in violation of 17 U.S.C. § 501 by using the photographs in the film "We Shall Remain: Wounded Knee."

41. Firelight infringed Pearse's copyright in all of the above methods by providing the photographs to PBS and other downstream users as part of the film.

42. Firelight willfully infringed Pearse's copyright in the Distributed Photographs, as illustrated, in part, by its intentional deletion of the credit in its Use Request submitted to the Smithsonian.

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

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

COUNT II
(Contributory Copyright Infringement)

45. Pearse incorporates by reference Paragraphs 1-44, above, as if fully set forth herein.

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

47. The Smithsonian has infringed Pearse's copyrights in the Distributed Photographs in violation of 17 U.S.C. § 501 by reproducing, distributing, displaying, and publishing the Distributed Photographs to Firelight.

48. Firelight assisted the Smithsonian knowing that the Smithsonian would infringe Pearse's copyright in the Distributed Photographs.

49. The Smithsonian willfully infringed Pearse's copyright in the Distributed Photographs, as it ignored the express conditions in her Deed of Gift and failed to even attempt to contact Pearse regarding Firelight's request to use the photographs in its film.

50. Pearse is entitled to recover all damages sustained as a result of Firelight's infringing conduct, including, but not limited to: (i) profits from the sale of the film "We Shall Remain: Wounded Knee" and Pearse's damages; or (ii) statutory damages, in an amount to be more fully determined at trial.

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

WHEREFORE, Plaintiff, Anne Pearse-Hocker, demands that a judgment be entered in her favor and against Firelight Media, Inc.:

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

B. Compelling Firelight Media to permanently delete all electronic copies and to return all hard copies of Pearse's photographs in Firelight's possession, custody, or control;

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

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

E. Awarding post-judgment interest; and

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

JURY DEMAND

Plaintiff demands a trial by jury for all claims so triable.

THOMPSON HINE LLP

Dated: May 5, 2010

By: _____

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