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15
16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA**
18

19 TWENTIETH CENTURY FOX FILM CORPORATION,

20 Plaintiff,

21 v.

22 WARNER BROS. ENTERTAINMENT, INC.; WB STUDIO ENTERPRISES, INC.;
23 WARNER BROS. PICTURES and DOES 1
24 - 10,

25 Defendants.

Case No. CV 08-0889 GAF (AJWx)

[Honorable Gary A. Feess]

PLAINTIFF TWENTIETH CENTURY FOX FILM CORPORATION'S OPPOSITION TO DEFENDANTS' MOTION *IN LIMINE* TO PRECLUDE REFERENCE TO THE MOONRUNNERS CASE OR ANY OTHER PURPORTED PAST COPYRIGHT INFRINGEMENT (MOTION *IN LIMINE* NO. 3)

Date: January 7, 2009

Time: 3:30 p.m.

Courtroom: 740

1 **I. INTRODUCTION**

2 Warner Bros. seeks to exclude evidence or argument relating to prior
3 lawsuits for copyright infringement brought against Warner Bros. Evidence of these
4 prior lawsuits are relevant and Fox is entitled to refer to them during phase one of
5 trial. The evidence of Warner Bros.' involvement in prior copyright infringement
6 actions demonstrates a practice of substituting business calculation to achieve its ends
7 rather than respecting the intellectual property rights of others by "vetting" chain of
8 title efforts in good faith -- a studio practice of leaving it to the Courts to sort out the
9 consequences of copyrights infringement claims.¹ Evidence of other litigation also
10 demonstrates Fox's entitlement to injunctive relief because it establishes that Warner
11 Bros. is unlikely to be deterred from its apparent business model of infringing activity
12 thereby causing Fox irreparable harm and rendering legal remedies inappropriate.

13 **II. ARGUMENT**

14 **A. Evidence Of Warner Bros.' Prior Acts Of Copyright Infringement**
15 **Are Relevant And Admissible To Prove Fox's Entitlement to**
16 **Permanent Injunctive Relief**

17 This Court already has decided that Fox continues to hold, at the very
18 least, distribution rights in the *Watchmen*.² Warner Bros. has infringed Fox's
19 distribution rights in *Watchmen* because it has engaged in pre-distribution activity,
20 including releasing a theatrical trailer of the film and screening the film to various
21 audiences. Warner Bros. is not a first-time copyright infringer. In fact, on June 17,
22 2005, in the case entitled *Moonrunners Ltd. Partnership v. Time Warner, Inc. et al.*,
23 CV05 1362 GAF ("*Moonrunners*"), this Court issued a preliminary injunction
24 enjoining Warner Bros. from preparing, producing, editing, distributing, advertising,
25

26 ¹ In *this* litigation, Warner Bros. witnesses have offered that "we were gonna make the movie [and]
27 whatever claim Fox may have had would have been simply that, a claim" and similar metaphors
28 about "trains leaving the station," without recourse, after such decisions were made.

² Fox also continues to assert a claim to development and production rights in *Watchmen* pursuant to
the terms of the 1994 Turnaround Agreement between Fox and Gordon.

1 exploiting, copying, publishing, or licensing, for theatrical release the feature motion
2 picture entitled “The Dukes of Hazzard.” Neither the *Moonrunners* lawsuit nor
3 previous copyright infringement actions filed against Warner Bros. has deterred
4 Warner Bros. from further infringing activity, including its infringement of Fox’s
5 copyrights at issue here.

6 The *Moonrunners* lawsuit and prior copyright infringement actions are
7 relevant and should be admissible because the evidence helps establish Fox’s
8 entitlement to permanent injunctive relief.³ Specifically, the evidence supports the
9 fact that Fox does not have an adequate remedy at law and that it will suffer
10 irreparable harm because Warner Bros. will continue to infringe Fox’s copyright
11 interests in *Watchmen*. The evidence tends to show Warner Bros. has a history of
12 infringing copyrights and therefore there is a serious threat of continuing violations
13 which justifies issuance of injunctive relief. *See e.g., United Features Syndicate, Inc.*
14 *v. Spree, Inc.*, 600 F.Supp. 1242 (E.D. Mich. 1984) (Court enjoined defendants from
15 committing any further infringement of plaintiffs’ copyright, stating that prior lawsuits
16 for infringement of copyrights not at issue in the present case establish a history and
17 therefore a threat of continuing violations by defendants).

18
19 **B. Evidence of Warner Bros.’ Prior Acts Of Infringement Is Relevant**
20 **And Admissible To Prove Its Willful Infringement Of Fox’s**
21 **Copyright Interests**

22 Courts often consider past acts of infringement in making a determination
23 as to whether a defendant’s conduct was willful. For example, in *Lauratex Textile*
24 *Corp. v. Allton Knitting Mills Inc.*, 517 F.Supp. 900 (S.D.N.Y. 1981), the Court
25

26 ³ In determining whether or not to grant permanent injunctive relief Courts typically weigh four
27 factors: (1) whether the plaintiff has suffered irreparable injury, (2) whether remedies at law provide
28 inadequate compensation for the injury, (3) whether the balance of hardships warrants an equitable
remedy, and (4) whether the public interest would be disserved by a permanent injunction. *eBay,*
Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006 (citations omitted)).

1 considered the fact that defendant had been sued for copyright infringement ten times
2 in the last five years. “Five of those actions were settled, two [were] still pending and
3 two resulted in judgments in favor of the plaintiffs.” *Id.* at 903. The Court stated that
4 the “inference is inescapable that [defendant] has made a practice of copying the
5 designs of other converters, and that an award of statutory damages is appropriate as a
6 deterrent to further activity of this kind.” *Id.* at 903-904; *see also Pret-A-Printee, Ltd.*
7 *v. Allton Knitting Mills, Inc.*, 218 U.S.P.Q. 150, 153 (S.D.N.Y. 1982) (finding
8 defendant willfully infringed plaintiff’s design and stating that the fact that defendant
9 has been repeatedly sued in court for the very kind of violation at issue in the case,
10 “the almost unavoidable inference is that [defendant] has built a business based on
11 deliberate infringement of the copyrights of other converters.”)

12 Here, Warner Bros. has been sued in the past for copyright infringement,
13 due in part, because of its defective chain-of-title analysis. Evidence of other
14 copyright lawsuits will support the notion that Warner Bros. has a business strategy of
15 ignoring the copyrights of third parties and instead pursuing projects and later taking
16 its chances in court. Warner Bros. clearly implemented that very same business plan
17 with respect to *Watchmen*, when it proceeded with production of the project at a time
18 when it was fully aware of all the relevant agreements reflecting Fox’s rights. Warner
19 Bros. chose to ignore Fox’s rights, make the movie and then take its chances before
20 this Court.

21 **C. Evidence of Warner Bros.’ Past Copyright Infringement Should Not**
22 **Be Excluded Under Rule 403.**

23 The Court should not preclude the evidence based on Rule 403 grounds.
24 Warner Bros.’ past acts of copyright infringement are relevant and probative to Fox’s
25 request for injunctive relief and its claim for willful copyright infringement. The fact
26 that such evidence would no doubt hurt Warner Bros.’ case does not make it subject to
27 exclusion based on Rule 403 or any other grounds. Accordingly, the Court should
28 deny Warner Bros.’ Motion *in Limine* No. 3.

1 **III. CONCLUSION**

2 Evidence of previous copyright infringement actions filed against Warner
3 Bros. is relevant and probative to Fox’s claim for willful copyright infringement and
4 its request for permanent injunctive relief. The prejudicial effect of such evidence – if
5 any – does not come close to substantially outweighing its probative value under Rule
6 403. The Court should deny Warner Bros.’ attempt to exclude such evidence.

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8 DATED: December 29, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2008, I caused a copy of PLAINTIFF TWENTIETH CENTURY FOX FILM CORPORATION’S OPPOSITION TO DEFENDANTS’ MOTION *IN LIMINE* TO PRECLUDE REFERENCE TO THE MOONRUNNERS CASE OR ANY OTHER PURPORTED PAST COPYRIGHT INFRINGEMENT (MOTION *IN LIMINE* NO. 3) to be served the following counsel in the manner described below:

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