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CASES OF INTEREST

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IP/Entertainment Law Weekly Case Update For Motion Picture Studios And Television Networks

September 28, 2011

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DiTocco v. Riordan, USDC, S.D. New York, September 20, 2011

 [Click here for a copy of the full decision.](#)

- District court dismisses copyright suit, holding as a matter of law that no substantial similarity existed between the protectable elements of plaintiffs' book and defendants' books and film.

Plaintiffs, authors and copyright owners of two books that chronicle the adventures of Percy John Allen (PJ), a modern-day teenager descended from the mythological Greek hero Perseus, brought suit for copyright infringement against defendants, the author of a five-book series about Percy Jackson, an adolescent demigod whose father is Poseidon, as well as the distributor of the books and the companies that produced, distributed and financed the motion picture "Percy Jackson & The Olympians: The Lightning Thief." The district court granted defendants' motion to dismiss, finding as a matter of law no substantial similarity between plaintiffs' books and the Percy Jackson books and movie.

To establish a claim of copyright infringement, plaintiffs must show valid copyright ownership and also that (1) the defendant has actually copied the plaintiffs' work, and (2) the copying is illegal because a substantial similarity exists between the defendants' work and the protectable elements of plaintiffs' work. In the Second Circuit, the test for substantial similarity is the ordinary observer test, which asks whether "an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." Where works like the ones at issue contain both protectable and unprotectable elements, the court also applies a "more discerning" standard and attempts to extract the unprotectable elements from consideration and determines whether the protectable elements, standing alone, are substantially similar. In addition, because copyright law protects only the expressions of ideas, and not the ideas themselves, infringement lies not in taking general themes but particular expressions through similarities of treatment, details, scenes, events and characterization. Stock themes and characters, as well as "scenes a faire" – scenes that necessarily result from the choice of a setting or situation – do not enjoy copyright protection. Under the Second Circuit test, the court compares the works' "total concept and overall feel," focusing on whether the alleged infringer misappropriated the original way in which the authors selected, coordinated and arranged the elements of their work."

First comparing the books at issue, the district court found no substantial similarity in narrative structure, noting that plaintiffs' books are told in the third person, while the Percy Jackson works are in first person. Plaintiffs' books cover the protagonist's senior year of high school and college years, and tell the story by switching between PJ's two separate worlds, while the



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Percy Jackson books follow Percy from ages 12 to 16, and do not switch between separate worlds. The books also treat Greek mythology differently, with the plaintiffs' works relying on Hermes to teach PJ about Greek mythology, while Percy Jackson learns through conversations with various characters at Camp Half-Blood.

The court also found no substantial similarity in the characters in the two sets of works. Though there are similarities between Percy and PJ – they are both young male heroes coping with missing parents and displaying their strength in battles with otherworldly forces – these similarities are commonplace and not copyrightable, noting that characters like Harry Potter and Spiderman would both fit that mold. The two characters are portrayed differently. PJ, a remote descendant of the hero Perseus born to two human parents, is cool, athletic and popular with girls at school, while Percy, the son of Poseidon and a mortal mother, is learning disabled, accident prone, sarcastic and has few friends at school.

Beyond their unprotectable characteristics as stock characters, the sidekick and the female love interest, the other characters in the two sets of works bear no similarity to each other. PJ's sidekick Hermes, the messenger god, visits PJ at night and guides him into the mythological world of ancient Greece, while Percy's sidekick Grover, half-human, half-goat, attends school with Percy and accompanies him on their journeys across the United States. The love interests are also different beyond the fact that they are both blond females who like to watch baseball and tease the protagonist. PJ's love interest is related to the mythological figure Andromeda, though she does not display special powers or fight mythological creatures, while Percy's love interest is the daughter of Athena, and battles evil forces. The court also held that the figures from Greek mythology used in the works are stock characters and not copyrightable, and the two sets of books treat those characters differently.

With respect to the themes of the two sets of books, the court found general themes – the development of an adolescent into a man through a series of tests, bravery and independence, facing down enemies, and how mythology affects the real world – are not entitled to copyright protection. Other central themes in the books differed: PJ deals with teenage angst over dating and sports, while Percy deals with his insecurities over his learning disability and domestic strife.

The works' settings also lacked substantial similarity. Although both sets of works take place in present times and enter the realm of Greek mythology, plaintiffs' works are set in the small town of Athenia, Georgia and Los Angeles, while the Percy Jackson books are set all over the country. In plaintiffs' books, Greek mythology is a world that remains separate from the modern world, while the Percy Jackson books embed the mythological realm in modern-day America.

After examining the plot and scenes in both sets of works, the court concluded that while they shared some plot elements and scenes, many of the similarities were scenes a faire in books about adolescent males, fantasy adventure stories and stories based on Greek mythology. While both sets of books included stories that revolve around a quest to retrieve Zeus's lightning bolt, the particular expressions of this plot differed, with PJ going back in time, while Percy must travel across the modern-day United States to find the bolt that Zeus's rivals have stolen. In addition, while both protagonists battle Atlas and Kronos, two Greek mythological characters, the two sets of works feature different characters standing in for Atlas, with different consequences, actions and results, and even assuming some elements are protectable, the court found that the works as a whole were not substantially similar, and random similarities scattered throughout the works did not support a finding of substantial similarity.



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Finally, the court found that the total concept and overall feel of the works were not substantially similar. The plaintiffs' books involve dual lives of PJ as a teenager by day, mythological hero by night, while Percy Jackson does not lead dual lives. In addition, the mood of the Percy Jackson Books are much darker than the plaintiffs' books – which each concluded on a feel-good note, while the Percy Jackson Books all finish with a sense of foreboding.

Finding no substantial similarity as to the protectable elements, and the total look and overall feel of the two sets of works, the court turned to a comparison of the plaintiffs' books and the Percy Jackson Film and found no substantial similarity there either. Specifically, the court found that the Percy in the film not only differed from PJ in the same ways as the Percy from the books, but displayed even more of a distinctive edgy side that the conventional PJ lacked. The plots also developed in two very different ways, despite having both protagonists navigate the world of Greek mythology to solve the mystery of Zeus's missing lightning bolt, and the villains in both works were different. Moreover, the film takes place in the United States in the present day, a marked departure from plaintiffs' book, which alternates between the fictional rural town in Georgia and a far-off mythological world.

As with the books, the court found that similarities between the film and the plaintiffs' book were scenes a faire from Greek mythology and teen fiction, and therefore not protectable. Likewise, the general themes shared by the plaintiffs' book and the film existed in countless other works and were not protectable.

Warner Bros. Entertainment, Inc. v. WTV Systems, Inc., USDC C.D. California, August 1, 2011

 [Click here for a copy of the full decision.](#)

- District court grants plaintiff motion picture studios' motion for preliminary injunction against operators of online video service, finding that plaintiffs had established likelihood of success on claims that service violated their exclusive rights to publicly perform their copyrighted works and caused irreparable harm, including loss of revenue and interference with licensing agreements.

Plaintiffs, motion picture studios, brought a copyright action against defendants, operators of Zediva, an online service that enables its customers to watch movies, including those in which plaintiffs own the copyrights. The court granted plaintiffs a preliminary injunction, finding that the plaintiffs had established likelihood of success on the merits of their copyright claims and that they would suffer irreparable harm absent a preliminary injunction.

Defendants, who were not licensed or authorized to distribute the plaintiffs' copyrighted movies, purchased copies of plaintiffs' copyrighted movies on DVD and played those DVDs using players that they owned, located in a data center they lease. When a customer requested to view a particular movie, defendants, through their Zediva service, initiated the play process on a particular DVD player holding the requested movie, converted the analog video signal from the DVD player into a digital signal using a video adapter, fed the digital signal into a DVD control server that converted the digital signal to a form suitable for streaming across the internet and that could be viewed in the player created by defendants and used on their website, and transmitted the performance to the customer over the internet, to be viewed by the customer with a custom viewer provided by the defendants.



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Noting that defendants did not dispute the validity of plaintiffs' copyrights in the movies at issue, the court found that defendants were violating plaintiffs' exclusive right under Section 106 of the Copyright Act to publicly perform their copyrighted works by transmitting those works to the public through their Zediva service over the internet, without either a license or plaintiffs' permission. The court rejected defendants' argument that their service offered "DVD rentals" rather than transmissions of performances, an argument that had been likewise unsuccessful in *On Command Video Corporation v. Columbia Pictures Industries*, 777 F.Supp. 787 (N.D. Cal. 1991), a case involving transmission of videotaped movies to hotel rooms. As with the transmission of videotaped movies in *On Command Video*, the court concluded that the transmission through the Zediva service fell directly within the language of Section 106. The service "communicates" the "images and sounds" of plaintiffs' copyrighted movies through the use of a "device or process" — defendants' equipment, including various servers, and the internet — from a central bank of DVD players to the individual customer's computers, where the images and sounds are received "beyond the place from which they are sent."

The court also found that defendants' transmissions fit within the meaning of "to the public" under Section 101(2), the "transmit" clause of the Act, because the relationship between defendants, as the transmitter of the performance, and the audience, their customers, is a commercial, "public" relationship. The fact that customers view the movies on their computers, in a non-public place, has no bearing on whether they constitute "the public" under the transmit clause. Likewise, that the customers view the transmissions at different times and in different places is also immaterial, since Section 101 of the Copyright Act explicitly states that a performance can still be public "whether the members of the public ... receive it in the same place or in separate places and at the same time or at different times."

Plaintiffs also demonstrated that they would suffer irreparable harm in the absence of the preliminary injunction. Defendants' continued operation of Zediva would jeopardize plaintiffs' right to decide when, where, to whom, and for how much they will authorize transmission of their copyrighted works, not only interfering with negotiated grants of exclusivity to licensees, but also impacting plaintiffs' ability to negotiate similar agreements in the future, as well as plaintiffs' business relationships, including the goodwill developed with their licensees. The court also noted that since defendants transmitted the works without a licensing agreement, plaintiffs would lose the control they otherwise would have through those agreements to require licensees to provide a high-quality movie-watching experience for their customers, and to have in place necessary security measures to protect the works from piracy and other forms of illegal copying. Defendants' transmission of the plaintiffs' works without paying the normal licensing fees deprived plaintiffs of revenue and also jeopardized the continued existence of the licensees' businesses, significantly decreasing the amount of revenue received by plaintiffs and their licensees. In addition, because defendants admitted that the technology they use to provide their service would support millions of customers, the already significant loss of revenue to plaintiffs and their licensees would continue to increase. Defendants' service also threatened the development of a successful and lawful video-on-demand market, in particular, the growing internet-based market, by damaging the public's perception of the quality, service and price associated with the lawful, licensed transmission of plaintiffs' works.

The court concluded its analysis by finding that the balance of the hardships tipped sharply in favor of plaintiffs — rejecting defendants' claim, unsupported by any evidence, that an injunction would significantly harm or destroy their business — and



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that public interest would be served by upholding copyright protections and preventing the misappropriation of skills, creative energies, and resources invested in copyrighted works.

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