

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 09-7249 DSF (Ex) Date 10/8/09

Title Regina Kimbell v. Chris Rock, et al.

Present: The Honorable DALE S. FISCHER, United States District Judge

Debra Plato

Not Present

Deputy Clerk

Court Reporter

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (In Chambers) Order DENYING Plaintiff's Application for a Temporary Restraining Order, GRANTING Plaintiff's Request for Expedited Discovery, and SETTING Schedule for a Preliminary Injunction Hearing

Plaintiff, the producer of an award-winning documentary entitled *My Nappy Roots*, applies for a temporary restraining order ("TRO") against Defendants and their agents that would enjoin them from:

exhibiting, distributing, exploiting, publicly performing, marketing, advertising, selling, promoting, licensing, or causing or authorizing the sale, distribution, exhibition, public performance, exploitation, licensing, marketing, advertising or promotion of the [allegedly infringing] motion picture entitled *Good Hair* or any version thereof, in any form.

(Pl.'s Application ("Appl.") at 1.) *Good Hair* has been in the public domain since its January 2009 showing at the Sundance Film Festival. Plaintiff admits knowing about its planned public release since at least August 2009. (Appl. at 4, 7.) Nevertheless, Plaintiff makes this request a mere four days before *Good Hair* is set to be released in theaters. Plaintiff's eleventh hour request is untimely, and in any event lacks merit. For both of these reasons, the request is DENIED.

I. FACTUAL BACKGROUND

A. The Creation of *Good Hair*

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Chris Rock attended the Bronner Bros. International Hair Show and Convention approximately 17 years ago. (Rock Decl. at ¶ 6.) This show is a competition held in Atlanta, Georgia where contestants demonstrate their hair-styling skills on African American women. (Weiman Decl. at ¶¶ 4-6.) At the time, Rock believed the convention could be funny and considered a motion picture project as a possibility. (Rock Decl. at ¶¶ 6-7.) Sometime between 2000 and 2003, Rock informed HBO Senior Vice President Nancy Geller that he was interested in doing a project about African American hair, and over the course of the following years he routinely mentioned and pitched this idea to HBO. (Geller Decl. at ¶ 4.) He also specifically mentioned including the Bronner Bros. show as part of the project. (*Id.*)

On April 30, 2007, the creators sent HBO a treatment for *Good Hair*, a “docu-comedy” with the following elements: (1) the title *Good Hair*; (2) the importance of the Bronner Bros. International Hair Show and Convention; (3) Black hair as socially and politically conscious; (4) the history of Black hair; (5) his daughters as Rock’s stated inspiration for the movie; (6) the business of Black hair care; (7) interviews with people in the Black hair care business; (8) interviews with individuals discussing their hair stories; (9) a visit to Asia to explore the journey of hair from the head of a woman in Asia to the head of an African American woman in America; and (10) a hoped-for discussion on the Jheri Curl with its creator Jheri Redding. (Miller Decl. at ¶ 7, Ex. B.)

B. The Creation of *My Nappy Roots*

Plaintiff was first inspired to make *My Nappy Roots* in 2002 because of a film project she had worked on with her daughter. (Kimbell Decl. at ¶ 2.) Plaintiff completed the movie in 2006, and in it she covered the following subjects: (1) the history of Black hair care from the time before slavery up to the present; (2) the chemistry and manufacturing process of hair relaxers; (3) the Black hair care business; (4) Black hair care pioneers; (5) the Bronner Bros. show; (6) India as a source for human hair for weaves; (7) celebrity hair stories; (8) natural hair versus chemically treated or pressed straight hair; (9) the perception of Black hair in the workplace; and (10) Black hair care education. (*Id.* at ¶¶ 8-9.)

In June 2007, Miller and Rock watched *My Nappy Roots* with Plaintiff and others. (*Id.* at ¶ 10.)

C. Alleged Similarities between *Good Hair* and *My Nappy Roots*

Plaintiff alleges the following similarities between *Good Hair* and *My Nappy Roots*:

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<i>My Nappy Roots</i>	<i>Good Hair</i>
Title connotes the perceived negative end of the spectrum of Black hair.	Title connotes the perceived positive end of the spectrum of Black hair.
Is socially and politically conscious.	Is socially and politically conscious.
Kimbell was inspired to make the film because of her daughter's hair angst.	Rock claims he was inspired to make the film because of his daughter's questions about her hair.
Includes an interview with a doctor.	Includes an interview with a dermatologist and a chemist.
Includes an interview with hair care [sic] George Johnson.	Includes an interview with hair care pioneer Joe Dudley.
Tells story of the weave with film clips of India, focusing on Tonsure ceremony at Temple Tirumala Tirupati.	Visits India to explore a principal source of human hair, focusing on Tonsure ceremony at Temple Tirumala Tirupati.
Has comedian Tommy Chunn for comic relief.	In addition to Rock, has comedian Paul Mooney for comic relief.
Covers the business of Black hair care.	Covers the business of Black hair care.
Celebrities tell their own hair stories.	Celebrities tell their own hair stories.
Tour of manufacturing plant where hair relaxers are made.	Tour of manufacturing plant where hair relaxers are made.
Interviews Aleila Bundles.	Interviews Aleila Bundles.
Photos of Madam C.J. Walker graduation ceremony.	Film footage of J. Dudley graduation ceremony.
Discusses controversy over inventor of the Jheri Curl.	Interviews inventor of Jheri Curl.
Interviews Sam Enos, founder of BOBSA.	Interviews Sam Enos, founder of BOBSA.

(Appl. at 12-14.) Plaintiff states that one difference between these movies is that *Good Hair* does not cover the issue of the history of Black hair. (*Id.* at 6.) The Court notes, however, that the treatment refers to this topic. (Miller Decl. Ex. B.)

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II. LEGAL STANDARD

The standard for granting a TRO is essentially the same as that used for granting a preliminary injunction. See City of Tenakee Springs v. Block, 778 F.2d 1402, 1407 (9th Cir. 1985). “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” Winter v. Natural Res. Def. Council, 129 S. Ct. 365, 374 (2008).

Even if jurisdiction has not yet been established, the Court may issue injunctive relief if Plaintiff establishes a “reasonable probability of ultimate success upon the question of jurisdiction when the action is tried on the merits.”¹ Enter. Int’l, Inc. v. Corp. Estatal Petrolera Ecuatoriana, 762 F.2d 464, 471 (5th Cir. 1985) (internal quotation marks omitted).

III. DISCUSSION

A. Plaintiff Has Failed to Demonstrate a Likelihood of Success on the Merits

“To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 361 (1991).

1. Ownership of a Valid Copyright

When a plaintiff does not possess a copyright certificate, she must provide evidence of copyrightability and originality, and compliance with statutory formalities. Montgomery v. Noga, 168 F.3d 1282, 1289 (11th Cir. 1999). A movie can be copyrighted, see LGS Architects, Inc. v. Concordia Homes of Nev., 434 F.3d 1150 (9th Cir. 2006), and Defendants do not contend that *My Nappy Roots* is not copyrightable.

2. Infringement

“Copying can be proved by evidence indicating that the infringer had access to the

¹ Plaintiff’s copyright registration is currently pending. Courts disagree about whether a pending registration is sufficient to confer jurisdiction, and the Ninth Circuit has not yet determined this issue. See Rosenfeld v. Twentieth Century Fox Film, No. CV 07-07040 AHM (FFMx), 2008 WL 4381575, at *5 (C.D. Cal. Sept. 25, 2008).

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copyrighted work and that the protected portions of the works are substantially similar.” Jada Toys, Inc. v. Mattel, Inc., 518 F.3d 628, 636-37 (9th Cir. 2008).

a. Access

To demonstrate access, a plaintiff need only show that the defendant had “an opportunity to view or to copy plaintiff’s work.” Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482 (9th Cir. 2000) (internal quotation marks omitted). Here, Defendants admit they had access to Plaintiff’s movie in June 2007, and Plaintiff does not contend they had access any earlier.

b. Substantial Similarity

“The substantial-similarity test contains an extrinsic and intrinsic component.” Funky Films, Inc. v. Time Warner Entm’t Co., L.P., 462 F.3d 1072, 1077 (9th Cir. 2006).² “Extrinsic analysis is objective in nature.” Id. “The extrinsic test focuses on articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events in the two works.” Id. (internal quotation marks omitted). “In applying the extrinsic test, [the Court] compares, not the basic plot ideas for stories, but the actual concrete elements that make up the total sequence of events and the relationships between the major characters.” Id. (internal quotation marks omitted).

Courts “must take care to inquire only whether the protectable elements, standing alone, are substantially similar.” Id. (internal quotation marks and italics omitted). To determine whether the identified elements are protectable, a court must apply relevant limiting doctrines such as merger, *scenes à faire*, and originality. Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435, 1443-45 (9th Cir. 1994). In addition, “elements . . . that were created prior to access to plaintiff’s work are to be filtered out at the first stage of the substantial similarity analysis, just as non-protectible elements are.” Murray Hill Publ’ns, Inc. v. Twentieth Century Fox Film Corp., 361 F.3d 312, 326 (6th Cir. 2004).³

Once the Court filters out the elements of *Good Hair* that existed before access,

² Because the Court finds Plaintiff failed to establish the requisite likelihood of success on the extrinsic component, it need not address the intrinsic component, which ultimately must be decided by a jury. Funky Films, 462 F.3d at 1077.

³ Even though the Sixth and Ninth Circuits diverge on some particulars of the extrinsic component, they both require courts to determine initially what parts of the allegedly infringed work could be given copyright protection. Murray Hill, 361 F.3d at 318. Obviously, elements of the allegedly infringing work that already existed before the alleged access were not copied.

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there is not enough evidence of substantial similarity to establish the requisite likelihood of success on the merits, even if the remaining allegedly similar elements could be considered protectable. To establish substantial similarity, Plaintiff relies on a chart that, with the elements that existed at the time of the treatment removed, shows the movies have only two of the same elements, and at most six other allegedly similar elements.⁴ Plaintiff does not explain the context in which these allegedly similar elements arise in the movies, but based on the evidence submitted by the parties, it is clear the movies are not substantively similar in terms of their “theme, plot, sequence of events, characters, dialogue, setting, mood, and pace.” *Good Hair* is a comedic documentary that follows the Bronner Bros. contest, and along the way focuses on other facets of Black hair care. (Weiman Decl. at ¶¶ 4-8.) It focuses on contemporary issues of Black hair care, and relies on Chris Rock’s shtick of combining comic incredulity with a respect for the underlying subject matter. (*Id.*) *My Nappy Roots*, in contrast, takes a serious and holistic view of Black hair care throughout its history. (See Kimbell Decl. at ¶ 8.) It has won multiple awards, and its creator is now treated as “an authority on the history and social dynamics of Black hair issues” in the world of academia. (*Id.* at ¶¶ 9-10.) There is nothing in the record to suggest the world of academia has accorded Rock similar status.

IV. CONCLUSION

Plaintiff’s application is DENIED. The Court, however, grants Plaintiff’s request for expedited discovery, even though her own allegations in this application strongly suggest she will be unable to establish that she is entitled to a preliminary injunction. Defendants must make *Good Hair* available to Plaintiff and Plaintiff’s expert for inspection and review for a reasonable period of time at the law offices of Defendants’ counsel. Plaintiff and Defendants must each provide a copy of their work to the Court no later than October 15, 2009 (or make other suitable arrangements for the Court to view the movies). Supplemental briefing will be limited to 15-pages each and will be due on October 15, 2009. A hearing on the request for a preliminary injunction will be held on October 19, 2009 at 1:30 p.m.

IT IS SO ORDERED.

⁴ These remaining elements are likely not protectable due to the *scenes à faire* doctrine, see Funky Films, 462 F.3d at 1077 (elements that “flow naturally from generic plot-lines [] are not protectable”), or for other reasons.