

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

S. VICTOR WHITMILL,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 4:11-cv-752
)	
WARNER BROS. ENTERTAINMENT INC.,)	<u>Jury Trial Demanded</u>
)	
Defendant.)	

VERIFIED COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF

Plaintiff S. Victor Whitmill alleges the following against defendant Warner Bros. Entertainment Inc.

Introduction

1. Mr. Whitmill is a visual artist living in rural Missouri. Among his creations is one of the most distinctive tattoos in the nation, an original design he created on the upper left side of former world heavyweight champion boxer Mike Tyson’s face (the “Original Tattoo”) (*see* image on page 3, below). When Mr. Whitmill created the Original Tattoo, Mr. Tyson agreed that Mr. Whitmill would own the artwork and thus, the copyright in the Original Tattoo. Warner Bros. Entertainment, Inc. — without attempting to contact Mr. Whitmill, obtain his permission, or credit his creation — has copied Mr. Whitmill’s Original Tattoo and placed it on the face of another actor in its upcoming motion picture, THE HANGOVER 2. For Mr. Whitmill, this case is not about Mike Tyson, Mike Tyson’s likeness, or Mike Tyson’s right to use or control his identity. This case is about Warner Bros. appropriation of Mr. Whitmill’s art and Warner Bros. unauthorized use of that art, separate and apart from Mr. Tyson. Not only is this infringing copy (the “Pirated Tattoo”) used throughout the movie, but Warner Bros. also uses the Pirated Tattoo extensively in advertisements and promotions

without Mr. Tyson. (*See* image on page 5, below.) This unauthorized exploitation of the Original Tattoo constitutes copyright infringement.

Jurisdiction and Venue

2. This is an action for copyright infringement arising under the Copyright Act of 1976, as amended, 17 U.S.C. § 101 *et seq.* (the “Copyright Act”). The Court has subject matter jurisdiction under 17 U.S.C. § 501 and 28 U.S.C. §§ 1331 and 1338(a).

3. Venue is proper in this District under 28 U.S.C. §§ 1391(b) and 1400 because defendant does business, may be found, and is subject to personal jurisdiction here.

Plaintiff, His Art, and the Original Tattoo

4. Plaintiff S. Victor Whitmill is an award-winning visual artist who works in various mediums, including the creation, design, and application of tattoo art to bodies. He is a citizen of the State of Missouri and lives in a small town in the south-central portion of the state.

5. On February 10, 2003, while living in Las Vegas, Nevada, Mr. Whitmill created and applied an original and distinctive tattoo to the upper left side of the face of the former, world heavyweight champion boxer Michael Gerard “Mike” Tyson (the “Original Tattoo”). True and accurate photographs of Mr. Whitmill in the process of tattooing the Original Tattoo onto Mr. Tyson and of Mr. Tyson viewing the tattoo immediately after it was completed by Mr. Whitmill are displayed below and attached to this Complaint as Exhibits 1 and 2.



6. Mr. Whitmill, doing business at the time as Paradox-Studio of Dermagraphics, is the sole creator, author, and owner of all rights, including copyright, in the Original Tattoo, which is original and fixed in a tangible medium of expression.

7. On the day Mr. Whitmill created the Original Tattoo, Mr. Tyson signed a release form acknowledging “that all artwork, sketches and drawings related to [his] tattoo and any photographs of [his] tattoo are property of Paradox-Studio of Dermagraphics.” (A true and accurate copy of the Feb. 10, 2003 Tattoo Release, redacted in accordance with the Court’s rules is attached as Exhibit 3.)

8. A true and accurate photograph of Original Tattoo is shown to the right and attached as Exhibit 4.

9. Plaintiff has registered the copyright in Original Tattoo. A true and correct copy of the Certificate of Registration for the Original Tattoo, No. VA 1-767-704, is attached as Exhibit 5.

10. Plaintiff has never copied the Original Tattoo onto anyone else and has never licensed or otherwise authorized anyone else to copy, distribute, or publicly disseminate the Original Tattoo or make derivative works based upon it.



Defendants' Infringement

11. On information and belief, Defendant Warner Bros. Entertainment Inc. ("Warner Bros.") is a Delaware corporation with its principal place of business at 4000 Warner Boulevard, Burbank, California. Warner Bros. is engaged in the production, acquisition and distribution of motion pictures for theatrical exhibition, home entertainment and other forms of distribution.

12. Mr. Whitmill recently learned that Warner Bros. is planning to release a motion picture later this Spring entitled THE HANGOVER 2 (the "Movie").

13. On information and belief, the Movie features a virtually exact reproduction of the Original Tattoo, which appears on the upper left side of the Stu Price character's face, played by actor Ed Helms. As used in this Complaint, the term "Pirated Tattoo" shall refer to any version of the Original Tattoo that appears anywhere but where Mr. Whitmill originally created it, namely, on the upper left side of Mr. Tyson's face.

14. A close-up of the Pirated Tattoo from the advertising poster (attached as Exhibit 6), and the Original Tattoo from a photograph of Mr. Tyson are displayed side-by-side below.



15. On information and belief, the Pirated Tattoo is a recurring device and plays an important role in the plot of the Movie.

16. The Pirated Tattoo is prominently featured in the marketing and promotional materials for the Movie as demonstrated by a current movie poster (the "Movie Poster") that defendants are using to advertise the Movie. A true and correct copy of the Movie Poster is attached as Exhibit 6 and reproduced below.



15 At all relevant times, Warner Bros. has had access to the Original Tattoo.

16 There is substantial similarity between the copyrightable expression in the Original
Tattoo and the Pirated Tattoo.

17 Mr. Whitmill has never been asked for permission for, and has never consented to,
the use, reproduction, or creation of a derivative work based on his Original Tattoo, including the
Pirated Tattoo. Nor has he ever been asked or agreed to the public display and distribution of a

motion picture containing the Pirated Tattoo, or to the use of any of his other exclusive rights in the Original Tattoo under the Copyright Act.

18 Warner Bros. has already infringed Mr. Whitmill's copyright through its unauthorized copying, distribution and public display of the Pirated Tattoo in advertising and promotion for the Movie and by making an unauthorized derivative work—namely, the Pirated Tattoo—that is based upon and copies virtually all of the copyrightable subject matter of the Original Tattoo.

19 If not enjoined, Warner Bros. will continue to infringe Mr. Whitmill's copyright by using the Pirated Tattoo to advertise, market, and promote the Movie; by releasing the Movie and otherwise distributing or licensing others to distribute the Movie in various formats and distribution channels; and, by distributing or licensing derivative works that include the Pirated Tattoo.

20 Defendant's conduct constitutes, at the very least, reckless copyright infringement in disregard of the rights of Mr. Whitmill.

21 These wrongful acts of defendant have caused irreparable injury to Mr. Whitmill, and unless this Court restrains defendant from further use of the Pirated Tattoo, Mr. Whitmill will continue to suffer irreparable injury for which he has no adequate remedy at law.

22 As a direct and proximate result of defendant's wrongful acts, defendant has been and will continue to be unjustly enriched, and Mr. Whitmill has suffered and will continue to suffer damages in an amount not yet fully determined.

WHEREFORE, Plaintiff prays that this Court enter judgment in its favor and against defendant as follows:

A. A preliminary injunction during the pendency of this action and a permanent injunction thereafter enjoining and restraining defendant, its agents, servants, employees, attorneys, partners, licensees, divisions, affiliates, parent corporation(s), and all others in active concert or participation with any of them from copying, distributing, publicly

displaying, or otherwise making any use of the Pirated Tattoo, both in the Movie and otherwise.

B. An award of monetary damages sufficient to compensate Plaintiff for the injuries suffered as a result of Defendant's wrongful conduct;

C. An award of Defendant's profits and unjust enrichment realized from its infringement;

D. An award to Plaintiff of his costs and reasonable attorney's fees expended in this action; and

E. An award of such other and further relief as the Court deems just and proper.

Jury Demand

Plaintiff demands trial by jury of all issues so triable.

Respectfully submitted,

/s/ Geoffrey G. Gerber

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Attorneys for Plaintiff

VERIFICATION

STATE OF MISSOURI)
)
COUNTY OF PULASKI)

Before me, the undersigned authorized authority, in and for said State and County, personally appeared Victor Whitmill, who, being by me first duly sworn, deposes and states as follows: that the factual averments contained in the foregoing Verified Complaint for Injunctive and Other Relief are true and correct to the best of his knowledge information and belief.


STEVEN VICTOR WHITMILL

Subscribed and sworn to before me this 25th day of April, 2011.


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Notary Public

My Commission Expires:
September 21, 2013

[SEAL]

JEANETTE LUDWIG
Notary Public - Notary Seal
State of Missouri
Commissioned for Pulaski County
My Commission Expires: September 21, 2013
Commission Number: 09752285