

Second Circuit Affirms Summary Judgment In Copyright Infringement Case Arising From Hollywood Action Blockbuster *The Expendables*

February 5, 2014

On February 3, 2014, in *Webb v. Stallone*, No. 13-324-cv, the U.S. Court of Appeals for the Second Circuit filed its decision affirming the order of the district court granting summary judgment against plaintiff Marcus Webb's copyright infringement claim arising from Sylvester Stallone's film *The Expendables*.

The case concerns Marcus Webb, a budding screenwriter who wrote a screenplay in 2006 entitled *The Cordoba Caper*, which features an elite, highly-trained team of American mercenaries hired to defeat a Latin American dictator named General Garza. Two years later, Stallone wrote *The Expendables*, which is also about an elite, highly-trained team of American mercenaries hired to defeat a Latin America dictator named General Garza. After *The Expendables* was released in August 2010, it drew a copyright infringement suit from Webb.

In 2012, the U.S. District Court for the Southern District of New York granted Stallone's motion for summary judgment, concluding that Webb had failed to raise a triable issue of fact as to whether Stallone had access to Webb's work, a critical element of Webb's putative copyright infringement claim. *Webb v. Stallone*, 910 F. Supp. 2d 681, 686-87 (S.D.N.Y. 2012). Webb's tortured theory of access was that he had submitted *The Cordoba Caper* script to eight "well-known" screenwriting competitions, which purport to employ staff and judges with contacts in the movie industry. Stallone, in turn, testified at his deposition that he had reviewed fifteen screenplays from unknown sources before writing *The Expendables*. From this, Webb contended it was reasonably likely that Stallone had access to his script. The district court disagreed.

Webb further argued that even in the absence of affirmative evidence of access, copyright infringement could be found because *The Cordoba Caper* and *The Expendables* were "strikingly similar." *Gaste v. Kaiserman*, 863 F.2d 1061, 1071-68, n.3 (2d Cir. 1988). In the Second Circuit, where a plaintiff relies on the "striking similarity" doctrine to avoid proving access, the threshold required to establish such striking similarity is considered "stringent": the works must be so *identical* as to preclude any reasonable possibility of independent creation. The lower court concluded that Webb failed to meet this standard.

On appeal, the Second Circuit affirmed the district court not on the issues of access or striking similarity, but on the alternate ground that Webb had not proven that the works were substantially similar. In particular, the Second Circuit concluded that *The Cordoba Caper* and *The Expendables* are quite different. *The Expendables*, in the court's view, is a "gunfire-riddled 'pure action' flick," whereas *The Cordoba Caper* is a "trickery-based true caper." *The Expendables* was deemed an

exercise in machismo, while *The Cordoba Caper* was distinguished for its “sensitive and human characters, female figures who are independent and capable, and imagery that includes Mayan villages, horseback riding through the Andes mountains, and Native American ceremonial costumes, food, and music.” Accordingly, the court found that no reasonable juror could conclude that *The Cordoba Caper* and *The Expendables* are substantially similar so as to prove infringement.

The *Webb* decision shows that even in cases where two works may, at first blush, appear to share certain high level similarities, courts will go beyond surface level similarities, coincidences, and conjecture in order to determine if the more stringent requirements of access and substantial similarity have been met. Moreover, courts are increasingly willing to resolve such cases on dispositive motions well in advance of trial.

[Click here](#) to read the *Webb* decision as published on the Second Circuit website.