

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
GROUP TEN PRESS, INC.,	)	CASE NO. BK79-1361
a Nebraska corporation,	)	
	)	A79-11
DEBTOR	)	
	)	
JOHN P. EMARINE,	)	
	)	
Plaintiff	)	
	)	
vs.	)	
	)	
GROUP TEN PRESS, INC.;	)	
a Nebraska corporation; and	)	
JOHN E. O'DONNELL, an Individual	)	
	)	
Defendants	)	

MEMORANDUM OPINION

Plaintiff filed a complaint in federal district court alleging in the first count that defendant infringed his common law and federal copyrights in a drawing of a skunk and in the second count that defendant improperly registered plaintiff's copyrighted drawing as a trademark. Defendant filed a motion to dismiss the first count for failure to state a claim upon which relief could be granted and the second count for lack of jurisdiction. Subsequently, defendant filed Chapter 11 proceedings in this Court and removed the adversary proceedings to Bankruptcy Court pursuant to 28 U.S.C. §1478(a). The motion to dismiss is now before me.

Plaintiff alleges as follows:

"On or about December, 1977, Plaintiff created an original work of art in pen and ink entitled 'Drawing of a Skunk'. Plaintiff submitted this drawing in a contest sponsored by Defendant, said contest being brought to Plaintiff's attention by the art school which he attended. Plaintiff's drawing won first place in said contest, and he was paid the sum of Eighteen and 75/100 Dollars (\$18.75) as the winning entry. Plaintiff was informed by Defendants that his drawing would be used for letterheads, order forms, inter-office memos, and other such uses. At no time did Defendants inform Plaintiff or any other contestant who submitted drawings that the entry was to become the sole property of the contest sponsor. . . .

"On or about January, 1978, the Defendant, Group Ten Press, Inc., without the knowledge, authority or consent of the Plaintiff, began to use Plaintiff's drawing. . . as a logo on 'insult'-type greeting cards distributed in intrastate and interstate commerce; on advertisements for said cards and for Defendant's business; as a logo for a weekly column in 'Fever Magazine'; and in various other manners and uses all without Plaintiff's knowledge, authority, permission and consent. . . ."

Plaintiff alleges that defendant obtained a Certificate of Copyright Registration on November 6, 1978. This action was filed July 30, 1979.

Motions to dismiss are not granted in federal courts unless it appears on the face of the pleadings that plaintiff can prove no set of facts entitling him to relief. For the purposes of the motion, the allegations of the pleadings are construed in favor of the pleader. Scheur v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed. 2d 90 (1974). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Id. Defendant's motion fails to meet this burden and must be denied.

The basis for defendant's claim that the first count of plaintiff's complaint fails to state a cause of action is that the uses which plaintiff admittedly authorized constitute abandonment or forfeiture of plaintiff's copyright as a matter of law. However, under pre-1978 law, the courts drew sharp distinctions between general and limited publication. General publication would destroy a copyright while limited publication would not. Compare American Visuals Corp. v. Holland, 239 F.2d 740, 742-44 (2d Cir. 1956) with Patterson v. Century Productions, 93 F.2d 489, 491-93 (2d Cir. 1937). Generally, the courts have treated the concept of publication so as to avoid forfeiture and prevent piracy. American Visuals Corp. v. Holland, supra, at 743-44. Fairly large publications could, under some circumstances, be considered limited and would not lead to forfeiture of the copyright. Patterson v. Century Productions, supra. Moreover, general publication did not lead to forfeiture of the copyright if the publication was without the consent of the owner of the work. Ferris v. Frohman, 223 U.S. 424, 437, 32 S.Ct. 263, 56 L.Ed. 492 (1912).

A new Copyright Act took effect January 1, 1978. The act apparently is applicable to this case. 17 U.S.C. §301(a). However, the act's definition of "publication" is essentially a loosely worded restatement of prior case law on the subject, and the prior law therefore remains relevant. See 17 U.S.C. §101. Moreover, the provisions of the act dealing with omission of copyright notice from published items provide that the copyright is invalidated only if the distribution was "by authority of the copyright owner. . . ." 17 U.S.C. §405(a). Thus, under either the old or the new law, the fact that plaintiff authorized some use of his work does not bar him from relief as a matter of law.

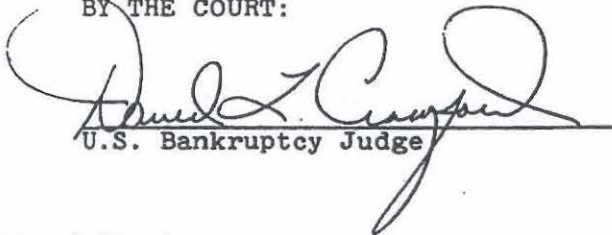
Defendant's motion to dismiss the second count for lack of jurisdiction could be valid in a federal district court if the first count were dismissed and the second count stated a

cause of action not triable in federal court. See United Mine Workers v. Gibbs, 388 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966). Plaintiff does not state in his complaint whether defendant has registered the trademark under state or federal law. However, plaintiff claims jurisdiction under 17 U.S.C. §1121 of the federal trademark statutes, which leads to the inference that plaintiff is alleging a federally registered trademark. Furthermore, as the first count has not been dismissed, a federal district court would have jurisdiction in this case under the doctrine of pendent jurisdiction even if the claim arose under state law. United Mine Workers v. Gibbs, supra, at 725.

A separate order is entered in accordance with the foregoing.

DATED: March 13, 1980.

BY THE COURT:

  
U.S. Bankruptcy Judge

Copies mailed to each of the following:

Robert W. Green, Attorney, Suite 40 Swanson Building, 8401 West Dodge Road, Omaha, Ne. 68114

E. R. Newman, Attorney, 990 Woodmen Tower, Omaha, Ne. 68102

Charles I. Scudder, Attorney, 209 Farm Credit Building, Omaha, Ne. 68101