

**FILED**

**NOT FOR PUBLICATION**

JUL 23 2012

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHERI H. GILBERT,

Plaintiff - Appellant,

v.

NEW LINE PRODUCTIONS, INC., a California corporation; NEW LINE CINEMA CORPORATION, a Delaware corporation; BENDER-SPINK, INC., a California corporation; CHRIS BENDER, individually and as an agent of Bender-Spink, Inc.; J.C. SPINK, individually and as an agent of Bender-Spink, Inc.; SPRING CREEK PRODUCTIONS, INC., a California corporation; PAULA WEINSTEIN, individually and as an agent of Spring Creek Productions, Inc.; AVERY PIX, INC., a California corporation; KUMAR MOBILIENGESELLSCHAFT MBH & CO. PROJEKT NR. 1 KG, a German Company; MICHAEL FLYNN; NUYORICAN PRODUCTIONS, INC., a California corporation; JULIO CARO; FIRECRACKER PRODUCTIONS, INC., a California corporation; ANYA KOCHOFF, individually and as an agent

No. 10-56458

D.C. No. 2:09-cv-02231-RGK-RZ

MEMORANDUM\*

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

of Firecracker Productions, Inc., AKA Anya Kochoff Landes, AKA Anya Kochoff Romano; WRITTEN IN STONE, INC., a California corporation; RICHARD LAGRAVENESE, individually and as an agent of Written in Stone, Inc.; MIGUEL A. NUNEZ, Jr.; VILLAGE ROADSHOW, LTD, an Australian Corporation; PARADISO ENTERTAINMENT, INC., a New York corporation; ENTERTAINMENT FILM DISTRIBUTORS LTD, a British corporation; METROPOLITAN FILMEXPORT, a French corporation; ALLIANCE FILMS, INC., FKA Alliance Atlantis Communications Inc., DBA Motion Picture Distribution LP; YLEISRADIO OY, a Finnish company, AKA YLE; FS FILM OY, a Finnish company; THE ENDEAVOR AGENCY, LLC, a Delaware Limited Liability Company; ADRIANA ALBERGHETTI, individually and as an agent of The Endeavor Agency, LLC; FILM INDEPENDENT, INC., a California corporation, FKA Independent Feature Project/West; TURNER BROADCASTING SYSTEM, INC., a Georgia corporation; CW MEDIA SALES INC./CW VENTES MEDIA INC., a Canadian corporation; CANWEST GLOBAL COMMUNICATIONS CORP., a Canadian corporation; PARADISO HOME ENTERTAINMENT, a Dutch company; SANTA FE PRODUCTIONS NV, a Belgian Public Limited Liability Company, DBA Paradiso Entertainment;

PARADISO ENTERTAINMENT  
NEDERLANDS BV, a Dutch Private  
Limited Company; CW MEDIA, INC., a  
Canadian Corporation, formerly known as  
Alliance Atlantis Communications Inc.,  
doing business as Motion Picture  
Distribution LP; DISTRIBUTION  
COMPANY, S.A., an Argentinian  
Company; JANE FONDA; JENNIFER  
LOPEZ, individually, and as an agent of  
Nuyorican Productions, Inc.; ROBERT  
LUKETIC; NEW LINE HOME  
ENTERTAINMENT, INC., a New York  
Corporation; NEW LINE  
INTERNATIONAL RELEASING, INC., a  
California Corporation; NEW LINE  
TELEVISION, INC., a California  
Corporation; WANDA SYKES; TIME  
WARNER INC., a Delaware Corporation;  
MICHAEL VARTAN; WARNER BROS.  
ENTERTAINMENT, INC., a Delaware  
Corporation; WARNER BROS. HOME  
ENTERTAINMENT, INC., a Delaware  
Corporation, doing business as Warner  
Home Video, Inc.; WARNER  
COMMUNICATIONS, INC., a Delaware  
Corporation; WARNER HOME VIDEO,  
INC., a Delaware Corporation,

Defendants - Appellees.

Appeal from the United States District Court  
for the Central District of California  
R. Gary Klausner, District Judge, Presiding

Submitted July 13, 2012\*\*  
Pasadena, California

Before: GILMAN,\*\* TALLMAN, and N.R. SMITH, Circuit Judges.

Sheri Gilbert appeals the district court's orders dismissing and granting summary judgment to Appellees (collectively the "movie makers"), and awarding them attorney's fees, on her claims of copyright infringement. Gilbert, the author of the screenplay *When Mom's the Other Woman* ("*The Other Woman*"), asserts that Appellees, involved in the making of the 2005 movie *Monster-in-Law*, unlawfully copied drafts of her screenplay in violation of the Copyright Act of 1976, 17 U.S.C. § 101, *et seq.* We have jurisdiction over this matter pursuant to 28 U.S.C. § 1291. The facts of this case are known to the parties. We need not repeat them here.

The district court properly ruled that neither the *Monster-in-Law* film nor any of its preliminary drafts infringes any of the second, third, or fourth drafts of

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\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

\*\*\* The Honorable Ronald Lee Gilman, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

*The Other Woman*.<sup>1</sup> Even assuming that the movie makers had access to Gilbert's drafts, there is not sufficient similarity between the protectible expression in the various works to maintain a claim.<sup>2</sup> See *Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620, 624–25 (9th Cir. 2010). *Monster-in-Law* and *The Other Woman* both tell the story of a mother who meddles in her son's life and tries to break up his engagement. But basic plots are not protectible, *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985), nor are elements that naturally flow from such premises, so-called scènes à faire. *Id.* All of the decidedly few similarities between *Monster-in-Law* and *The Other Woman* are unprotectible scènes à faire.

There was no abuse of discretion in awarding attorney's fees and costs to the movie makers. The district court properly considered the appropriate factors and emphasized that the movie makers achieved complete success on the merits and that Gilbert's legal claims were objectively unreasonable. See *Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 889 (9th Cir. 1996).

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<sup>1</sup>Because Gilbert failed to file her first draft for registration with the Copyright Office prior to instituting suit, she may not pursue an infringement action on that claim. *Cosmetic Ideas, Inc. v. IAC/InterActiveCorp.*, 606 F.3d 612, 621 (9th Cir. 2010); see also 17 U.S.C. § 411(a).

<sup>2</sup>Gilbert also argues that substantial similarity need not be proven here where there is direct evidence of exact copying. See *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987). However, Gilbert fails to provide any facts or helpful references to the record that indicate exact copying has occurred.

We must vacate the fees award in part, however, for the district court to reconsider the amount awarded for the movie makers' North Carolina counsel, who defended the action first filed there before the case was transferred to the Central District of California. The district court is required to make specific findings as to what rate and amount of time is reasonable in each case. *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545, 1557 (9th Cir. 1989). It is error to "accept uncritically . . . counsel's representations concerning the time expended." *Id.*

The district court made appropriate and specific findings as to the rate and time expended by California counsel and ruled that the movie makers were entitled to \$801,130 in attorney's fees. But the court made no mention of North Carolina counsel. After adding full costs of \$14,571, the district court somehow entered a final award of \$894,983. This \$79,282 discrepancy is likely attributable to the services performed by North Carolina counsel. The declaration of one of the movie makers' attorneys requests \$801,100 for the California firm's fees, \$79,282 for North Carolina counsel's fees, and \$14,571 for costs. It is not clear whether the court's final award is the result of an administrative error or the uncritical acceptance of counsel's representations. We must therefore vacate the award amount and remand for reconsideration because we cannot tell which it is.

We have carefully considered all the other arguments presented by Gilbert and have determined that they lack merit.

**AFFIRMED in part; REVERSED AND REMANDED in part.** Each party shall bear its own costs on appeal.

**United States Court of Appeals for the Ninth Circuit**

**Office of the Clerk**  
95 Seventh Street  
San Francisco, CA 94103

**Information Regarding Judgment and Post-Judgment Proceedings**

**Judgment**

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

**Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)**

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

**Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)**

**Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)**

**(1) A. Purpose (Panel Rehearing):**

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

**B. Purpose (Rehearing En Banc)**

- A party should seek en banc rehearing only if one or more of the following grounds exist:



- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-7806.

### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.gov)

### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ▶ West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**United States Court of Appeals for the Ninth Circuit**

**BILL OF COSTS**

**Note:** If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v.  9th Cir. No.

The Clerk is requested to tax the following costs against:

| Cost Taxable<br>under FRAP 39,<br>28 U.S.C. § 1920,<br>9th Cir. R. 39-1 | REQUESTED<br>Each Column Must Be Completed |                      |                         |                         | ALLOWED<br>To Be Completed by the Clerk |                      |                         |                         |
|---|--|----------------------|-------------------------|-------------------------|---|----------------------|-------------------------|-------------------------|
|   | No. of<br>Docs.                            | Pages per<br>Doc.    | Cost per<br>Page*       | TOTAL<br>COST           | No. of<br>Docs.                         | Pages per<br>Doc.    | Cost per<br>Page*       | TOTAL<br>COST           |
| Excerpt of Record   | <input type="text"/>                       | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/>                    | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> |
| Opening Brief   | <input type="text"/>                       | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/>                    | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> |
| Answering Brief   | <input type="text"/>                       | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/>                    | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> |
| Reply Brief   | <input type="text"/>                       | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/>                    | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> |
| Other**   | <input type="text"/>                       | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/>                    | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> |
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\* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

\*\* Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

*Continue to next page.*

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

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(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk