UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER KASEBERG,

Plaintiff,

v.

CONACO, LLC, et al.,

Defendants.

Case No.: 15-cv-01637-JLS (DHB)

ORDER REGARDING JOINT MOTION FOR DETERMINATION OF DISCOVERY DISPUTE RE MODIFYING THE SCHEDULING ORDER TO REOPEN DISCOVERY AND PERMIT THE DEPOSITION OF PLAINTIFF'S COUNSEL

(ECF No. 132)

On June 28, 2017, the parties filed a Joint Motion for Determination of Discovery Dispute Re: Modifying the Scheduling Order to Reopen Discovery and Permit the Deposition of Plaintiff's Counsel. (ECF No. 132.) In the Joint Motion, Defendants Conaco, LLC, Turner Broadcasting System, Inc., Time Warner, Inc., Conan O'Brien, Jeff Ross, and Mike Sweeney (collectively, "Defendants") seek to (1) modify the Scheduling Order and reopen discovery for a period of sixty days, and (2) take the deposition of Jayson Lorenzo, counsel for Plaintiff Robert Alexander Kaseberg ("Plaintiff").

After careful consideration of the papers submitted, the Court **ORDERS** that a telephonic, attorneys only Discovery Conference shall be held, as set forth below.

I. BACKGROUND

A. First Amended Complaint

Plaintiff commenced this copyright infringement action on July 22, 2015. (ECF No. 1.) Plaintiff filed a First Amended Complaint ("FAC") against Defendants on October 3, 2016. (ECF No. 58.) Plaintiff alleges he is a comedic writer engaged in the entertainment industry. (*Id*. at ¶ 14.) Plaintiff alleges that after he wrote and published five jokes on his personal online blog and/or Twitter account between December 2, 2014 and June 9, 2015, each joke was subsequently featured in the monologue segment of the "Conan" show. (*Id*. at ¶¶ 15-24.) These jokes, in order of date of alleged infringement, are (1) the "UAB Joke;" (2) the "Delta Joke;" (3) the "Tom Brady Joke;" (4) the "Washington Monument Joke;" and (5) the "Jenner Joke." (*See id*.)

Plaintiff alleges he filed copyright applications for each of the jokes at issue, deeming them "literary works," with the United States Copyright Office. (*Id*. at ¶ 26.) He further alleges these applications are pending. (*Id*.) Plaintiff seeks a permanent injunction, actual damages, statutory damages, increased statutory damages for willful infringement, and profits attributable to the infringement of Plaintiff's copyrights pursuant to 17 U.S.C. §§ 502(a) and 504. (*Id*. at pp. 6-8.) Plaintiff also seeks attorney's fees and costs and punitive damages. (*Id*. at p. 7.)

B. Answer

On October 17, 2016, Defendants filed an Answer to the FAC. (ECF No. 59.) Defendants assert eight affirmative defenses and reserve additional defenses. (*Id*. at pp. 5-6.) The affirmative defenses include: (1) failure to state a claim; (2) lack of copyrightable subject matter; (3) copyright non-infringement; (4) independent creation; (5) lack of originality; (6) fair use; (7) no willfulness; and (8) improper venue. (*Id*.)

C. Motion for Summary Judgment

On February 3, 2017, Defendants filed a Motion for Summary Judgment and/or Partial Summary Judgment. (ECF No. 70.) Defendants moved for summary judgment, in part, on the Tom Brady Joke and the UAB Joke on the basis that Plaintiff failed to register

these jokes. (ECF No. 70-1 at pp. 8-9.) Defendants argued that a party "cannot litigate an infringement claim until it has at least filed an application to register the allegedly infringed copyrights." (*Id*. at p. 9.) Based on Plaintiff's discovery responses, Defendants argued that Plaintiff "failed to produce any evidence proving that he registered the Tom Brady Joke and the UAB Joke, which were first published on February 3, 2015 and December 3, 2014, respectively." (*Id*.) Defendants asserted the Copyright Office's records are consistent with Plaintiff's production. (*Id*.) Thus, Defendants argued Plaintiff's claims as to the Tom Brady Joke and the UAB Joke must be dismissed for lack of standing. (*Id*.)

In his opposition, filed on February 24, 2017, Plaintiff asserted that he had submitted applications to the Copyright Office for all of the jokes at issue, including the Tom Brady and UAB Jokes, but that the applications for the Tom Brady Joke and the UAB Joke were currently pending. (ECF No. 97 at pp. 6-7.) Plaintiff represented that he sent an application for the UAB Joke on December 2, 2014, and that he sent applications for the Tom Brady Joke on September 3, 2015 and August 10, 2016, but they all remain pending. (*Id*.) Plaintiff argued that because he had submitted the applications, he has standing to proceed on these jokes. (*Id*.)

In their Reply, dated March 10, 2017, Defendants argued that they did not receive Plaintiff's copyright applications for the Tom Brady Joke and the UAB Joke until February 8, 2017. (ECF No. 106 at pp. 1-2.) Defendants argued the late disclosure were not harmless because the UAB Joke application appeared to be invalid, and Plaintiff failed to explain why he produced two different applications for the Tom Brady Joke. (*Id*. at p. 2.)

In supplemental briefing following oral argument, the parties addressed whether Plaintiff's failure to produce the applications was substantially justified or harmless, or whether such evidence should be excluded, under Federal Rule of Civil Procedure 37. (ECF Nos. 124, 126, 127.)

In the Honorable Janis L. Sammartino's Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment, dated May 12, 2017, she addressed the issue in detail. (ECF No. 131.) Judge Sammartino held "there is no question that Plaintiff failed

to timely produce the required disclosures," but ultimately found the failure "harmless" within the meaning of Federal Rule of Civil Procedure 37(c). (*Id.* at pp. 8-9.) Although Defendants could have conducted discovery that invalidates the applications if the applications were produced in a timely manner, Judge Sammartino found the fact remains that "Plaintiff did, in fact, submit applications which in turn confer Plaintiff with standing for the relevant jokes." (*Id*. at p. 9.) Because she found the failure to disclose harmless insofar as it relates to standing to bring suit, Judge Sammartino denied Defendants' summary judgment motion on this ground. (*Id.* at p. 10.)

However, Judge Sammartino added that "Defendants are correct that they should be permitted to reopen discovery regarding the relevant applications, associated documents, and communications from the Copyright Office. Further, if Defendants discover fatal deficiencies in Plaintiff's applications then Defendants should also again be permitted to move for Summary Judgment on those discrete grounds." (*Id*. at pp. 9-10.) Judge Sammartino instructed the parties to meet and confer regarding these issues, and "if possible," submit a joint motion to reopen discovery and modify the operative pre-trial schedule. (*Id*. at p. 10.)

Ultimately, Judge Sammartino granted summary judgment in favor of Defendants on the UAB Joke and the Delta Joke. (*Id*. at p. 28.) Summary judgment was granted as to the UAB Joke on grounds unrelated to registration with the Copyright Office. (*Id*. at pp. 22-23.) Judge Sammartino did not, however, grant summary judgment as to the Tom Brady Joke.

D. Scheduling Order

On July 7, 2017, Defendants filed an Ex Parte Motion to Continue Pretrial Deadlines Pending Resolution of the Parties' Joint Motion. (ECF No. 134.) On July 10, 2017, Judge Sammartino granted the Ex Parte Motion and vacated all current pretrial deadlines. (ECF No. 136; *see also* ECF No. 138.) Judge Sammartino will reset the pretrial deadlines after the present motion is resolved. (*Id.* at p. 2.)

///

E. Meet and Confer Efforts

The parties met and conferred extensively on the present issue before the Court. (*See* ECF No. 132-1, Declaration of Nicholas Huskins ("Huskins Decl."); ECF No. 132-2, Declaration of Jayson M. Lorenzo ("Lorenzo Decl.").) After reviewing the submissions by the parties, the Court notes the following key dates in the history of this issue:

- **March 10, 2015**: Plaintiff submitted a Standard application to the Copyright Office for the Delta Joke, but included screenshots from Plaintiff's blog of the Delta Joke, the Tom Brady Joke, and the Washington Monument Joke. (Huskins Decl. at ¶¶ 12-13, Exhs. 7-8.)
- **March 11, 2015**: Plaintiff submitted a Single application for the Delta Joke, and again included screenshots from Plaintiff's blog of the Delta Joke, the Tom Brady Joke, and the Washington Monument Joke. (Huskins Decl. at ¶¶ 12-13, Exhs. 7-8.)
- **July 22, 2015**: Complaint filed alleging copyright infringement of the Delta Joke, the Tom Brady Joke, the Washington Monument Joke, and the Jenner Joke. (ECF No. 1.) The Complaint alleges Plaintiff filed copyright applications for each of these jokes on March 10, 2015, March 11, 2015, June 26, 2015, and July 8, 2015, and that these applications remain pending with the Copyright Office. (*Id.* at ¶ 23.)
- **August 11, 2015**: The Copyright Office sent a letter to Plaintiff's counsel advising him that it was refusing to register Plaintiff's March 2015 applications "because they are duplicate claims, or because they contain multiple works that require multiple applications, filing fees, and deposit copies." (Huskins Decl. at ¶ 13, Exh. 8.)
- **September 3, 2015**: Plaintiff filed a Single Application to register the Tom Brady Joke by itself. (Huskins Decl. at ¶¶ 9, 14, Exh. 4, 9.)
- **March 24, 2016**: Conaco, LLC's served its First Set of Requests for Production of Documents and Things to Plaintiff. (Huskins Decl. at ¶ 6, Exh. 1.) Request for Production No. 8 stated: "Please produce all DOCUMENTS related to the application and/or registration of the JOKES AT ISSUE with the United States Copyright Office." (*Id.* at Exh. 1.)
- **April 25, 2016**: Plaintiff responded to Conaco, LLC's Request for Production by stating: "Documents in Respondent's possession that do not violate the attorney-client privilege or attorney work product privileges will be produced." (Huskins Decl. at ¶ 7, Exh. 2.) In

response to Conaco, LLC's First Set of Interrogatories, Plaintiff responded: "Respondent objects to this Interrogatory on the basis that the question is vague and ambiguous as to the term 'ownership'. Without waiving said objections, Respondent has registered copyrights for the jokes created." (Huskins Decl. at ¶ 8, Exh. 3.)

- **July 20, 2016**: The Copyright Office sent a letter to Plaintiff's counsel advising him that it could not register the Brady Joke "because the material deposited represents less than the required minimum amount of original authorship." (Huskins Decl. at ¶ 15; Exh. 10.)
- **August 10, 2016**: Plaintiff filed a Standard Application to register the Tom Brady Joke and two others posted to Plaintiff's blog on February 3, 2015. (Huskins Decl. at ¶ 9, Exh. 4.)
- **October 3, 2016**: Plaintiff filed the FAC. (ECF No. 58.) The FAC added the UAB Joke. (*Id*. at ¶¶ 15-16.) The FAC alleges that Plaintiff filed copyright applications for each of the five jokes on March 10, 2015, March 11, 2015, June 26, 2015, July 8, 2015, and August 10, 2016, and that these applications remain pending with the Copyright Office. (*Id.* at ¶ 26.)
- **October 7, 2016**: Discovery closed. (ECF No. 57.) At the time discovery closed, Plaintiff had only produced registration certificates for the Delta Joke, the Bruce Jenner Joke, and the Washington Monument Joke. (Huskins Decl. at ¶ 2.) Plaintiff did not produce any applications, deposits, or correspondence with the United States Copyright Office related to any of the jokes at issue, and did not produce registration certificates for the Tom Brady Joke or the UAB Joke. (*Id*.)
- **October 19, 2016**: Plaintiff's counsel sent a letter to the Copyright Office asking it to reconsider its refusal to register the Tom Brady Joke. (Huskins Decl. at ¶ 16, Exh. 11.)
- **February 3, 2017**: Defendants filed a Motion for Summary Judgment and/or Partial Summary Judgment. (ECF No. 70.)
- **February 8, 2017**: Plaintiff produced two copyright registration applications for the Tom Brady Joke: the September 3, 2015 application and the August 10, 2016 application. (Huskins Decl. at ¶ 9, Exh. 4.)
- **March 23, 2017**: The Copyright Office sent a letter to Plaintiff's counsel denying his request for reconsideration, stating that the Tom Brady Joke "does not contain a sufficient amount of original and

creative literary authorship to support a copyright registration." (Huskins Decl. at ¶ 17, Exh. 12.)

- **April 21, 2017**: Plaintiff's counsel sent a letter to the Copyright Office advising them of the pending lawsuit, the application history of the Tom Brady Joke, as well as the collective work application filed on August 10, 2016. (Lorenzo Decl. at ¶ 19, Exh. O.)
- **May 12, 2017**: Judge Sammartino issued her Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment, ordering the parties to meet and confer. (ECF No. 131.) Judge Sammartino granted Defendants' Motion for Summary Judgment for failure to establish a genuine issue of material fact regarding the UAB Joke and the Delta Joke. (*Id.*)
- **May 19, 2017**: Upon request, Plaintiff produced seventy-one (71) pages of documents, which included the registration applications, deposits, and letters with the Copyright Office related to the Washington Monument Joke, the Tom Brady Joke, and the Bruce Jenner Joke. (Lorenzo Decl. at ¶ 5, Exh. C; Huskins Decl. at ¶¶ 3, 12.)
- **May 30, 2017**: Plaintiff's counsel sent a letter to the Copyright Office seeking reconsideration of its decision on the Brady Joke based on Judge Sammartino's ruling on Defendants' Motion for Summary Judgment and/or Partial Summary Judgment. (Huskins Decl. at ¶ 18, Exh. 13.)
- **June 2, 2017**: Plaintiff's counsel sent an email to the Copyright Office advising them "of the procedural history related to the Tom Brady Joke, which included the filing of a collective work application." (Lorenzo Decl. at ¶ 11, Exh. H.)
- **June 5, 2017**: Plaintiff produced fifty-one (51) additional pages of application-related documents pertaining to the jokes at issue. (Huskins Decl. at ¶ 4.)
- **June 13, 2017**: Plaintiff's counsel sent a letter to the Copyright Office withdrawing the August 10, 2016 application for the Tom Brady Joke, prior to registration being received. (Lorenzo Decl. at ¶ 15, Exh. K; Huskins Decl. at ¶ 19, Exh. 14.)
- **June 19, 2017**: Plaintiff's counsel received a registration for the collective work application on the Tom Brady Joke. (Lorenzo Decl. at ¶ 20, Exh. P.) Plaintiff forwarded the registration to Defendants. (*Id.*)

- **June 28, 2017**: Plaintiff's counsel sent a letter to the Copyright Office requesting the copyright registration for the Tom Brady Joke be voluntarily cancelled. (Lorenzo Decl. at ¶ 21, Exh. Q.)

II. LEGAL STANDARD

A. Modifying the Scheduling Order

Pursuant to Federal Rule of Civil Procedure 16(b)(3)(A), district courts must enter a scheduling order to establish deadlines to, among other things, "complete discovery." Fed. R. Civ. P. 16(b)(3)(A). Once issued, a Rule 16 scheduling order "may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). The decision to modify a scheduling order is within the broad discretion of the district court. *Johnson,* 975 F.2d at 607 (citation omitted). Under Rule 16(b)(4)'s good cause standard, the court's primary focus is on the movant's diligence in seeking the amendment. *Johnson,* 975 F.2d at 609. "Good cause" exists if a party can demonstrate that the scheduling order could not or "cannot reasonably be met despite the diligence of the party seeking the extension." *Id.* (citations omitted). "[C]arelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Id.* "Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the [Rule 16] inquiry is upon the moving party's reasons for seeking modification." *Id.* (citations omitted). The party seeking to continue or extend the deadlines bears the burden of proving good cause. *See Zivkovic v. S. Cal. Edison Co.,* 302 F.3d 1080, 1087 (9th Cir. 2002); *Johnson,* 975 F.2d at 608–09.

In addressing the diligence requirement, one district court in this Circuit noted:

> [T]o demonstrate diligence under Rule 16's "good cause" standard, the movant may be required to show the following: (1) that [it] was diligent in assisting the Court in creating a workable Rule 16 order..; (2) that [its] noncompliance with a Rule 16 deadline occurred or will occur, notwithstanding [its] diligent efforts to comply, because of the development of matters which could not have been reasonably foreseen or anticipated at the time of the Rule 16 scheduling conference ...; and (3) that [it] was diligent in seeking amendment of the Rule 16 order, once it became apparent that [it] could not comply with the order . . . .

Jackson v. Laureate, Inc., 186 F.R.D. 605, 608 (E.D. Cal.1999) (internal citations omitted); *see also Sharp v. Covenant Care LLC*, 288 F.R.D. 465, 466 (S.D. Cal. 2012) (McCurine Jr., J.). If the district court finds a lack of diligence, "the inquiry should end." *Johnson*, 975 F.2d at 609; *see also Zivkovic v. So. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002).

B. Reopening Discovery

District courts have broad discretion to manage discovery and to control the course of litigation under Rule 16. *Hunt v. Cnty. of Orange*, 672 F.3d 606, 616 (9th Cir. 2012). In determining whether to reopen discovery, courts consider such factors as:

> 1) whether trial is imminent, 2) whether the request is opposed, 3) whether the non-moving party would be prejudiced, 4) whether the moving party was diligent in obtaining discovery within the guidelines established by the court, 5) the foreseeability of the need for additional discovery in light of the time allowed for discovery by the district court, and 6) the likelihood that the discovery will lead to relevant evidence.

United States ex rel. Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1526 (9th Cir. 1995), rev'd on other grounds, 520 U.S. 939 (1997) (quoting *Smith v. United States*, 834 F.2d 166, 169 (10th Cir. 1987)); *see also Mikell v. Baxter Healthcare Corp.*, No. CV 13-07611 MMM (PJWx), 2014 WL 12588640, at *7 (C.D. Cal. Sept. 16, 2014).

III. DISCUSSION

The parties do not dispute that Defendants were diligent in seeking to modify the Scheduling Order, and that the need for modification could not have reasonably been foreseen or anticipated at an earlier date. Despite requesting the documents in discovery, Defendants first received the copyright applications for the UAB Joke and the Tom Brady Joke on February 8, 2017, after they filed their Motion for Summary Judgment and/or Partial Summary Judgment. During subsequent meet and confer efforts ordered by Judge Sammartino, Plaintiff produced seventy-one (71) pages of new documents, which included the registration applications, deposits, and letters with the Copyright Office related to the Washington Monument Joke, the Tom Brady Joke, and the Bruce Jenner Joke on May 19,

2017, and an additional fifty-one (51) pages of new application-related documents pertaining to the jokes at issue on June 5, 2017. (Lorenzo Decl. at ¶ 5, Exh. C; Huskins Decl. at ¶¶ 3-4, 12.) Plaintiff subsequently sent Defendants the registration for the Tom Brady Joke on June 19, 2017. (Lorenzo Decl. at ¶ 20, Exh. P.) After failing to resolve their issues as part of their meet and confer, this motion was filed shortly thereafter, on June 28, 2017. As the Court finds Defendants were diligent in seeking to modify the Scheduling Order, the Court now turns to address whether reopening discovery is appropriate.

On July 10, 2017, Judge Sammartino vacated the trial pending the outcome of this Joint Motion. (ECF Nos. 136, 138.) Accordingly, although trial would be the next step in this case absent additional discovery, there is no trial imminent. Furthermore, while Defendants' request is opposed, given Plaintiff's failure to timely comply with discovery, it would be difficult for Plaintiff to argue that he would be prejudiced by reopening discovery. These factors weigh in favor of reopening discovery. However, in light of Judge Sammartino granting summary judgment in favor of Defendants on the UAB Joke, and Plaintiff's voluntary cancellation of the Tom Brady Joke registration, the key question is whether there is any likelihood additional discovery will lead to relevant evidence.

Plaintiff argues the requested discovery is not relevant to any of Defendants' claims or defenses. (ECF No. 132 at 18-23.) In response, Defendants argue "the intended discovery is highly relevant, as it bears directly on [Plaintiff's] ability to assert an infringement claim as to the Tom Brady Joke, and any potential relief he may be afforded." (*Id*. at 9.) In particular, Defendants argue the intended discovery – written discovery and depositions of Plaintiff and his counsel – is crucial to determine whether Defendants can assert the affirmative defenses of fraud and unclean hands to the Tom Brady Joke. (*Id*.) These defenses, Defendants argue, "may invalidate the Tom Brady registration." (*Id*.)

Unfortunately, because Plaintiff's counsel did not send the letter to the Copyright Office requesting voluntary cancellation of the Tom Brady Joke registration until the day the present Joint Motion was filed, Defendants did not have an opportunity to address in

detail the relevance of their intended discovery, if such registration was cancelled. Instead, Defendants were left to argue:

> While [Plaintiff] may offer that he will abandon the Tom Brady registration, rendering Defendants' proposed affirmative defenses and discovery moot – this misses the point. Defendants are entitled to the discovery they were prejudicially denied so they can explore and develop potential claims, affirmative defenses, and evidentiary issues for trial. Until Defendants take discovery, they cannot know the extent of what it will bear, and what other issues may present themselves.

(*Id.* at 5-6.) As they were dealing with a hypothetical and were constrained by page limits, Defendants did not further explain what types of potential claims, affirmative defenses, and evidentiary issues they expect to find. Without further explanation, the Court is not inclined to grant the Joint Motion.

However, in light of Plaintiff's late decision to seek cancellation of the Tom Brady Joke claim, the uncertain status of the claim,[1] and the prejudice that may result to Defendants if they are not given an opportunity to present further argument, the Court finds it appropriate to set a Discovery Conference. At the Discovery Conference, Plaintiff shall be prepared to discuss how he intends to proceed on the Tom Brady Joke, and Defendants shall be prepared to discuss how their intended discovery is relevant and necessary, given Plaintiff's request to cancel the registration on the Tom Brady Joke. The parties should also be prepared to discuss whether the intended discovery is relevant to Plaintiff's

---

[1] Plaintiff argues that Defendants' potential affirmative defenses to the Tom Brady Joke must fail because the request for a cancellation was made. (ECF No. 132 at 23.) However, Plaintiff does not discuss the status of his Tom Brady Joke claim after the request was sent, other than stating "[i]n the event that the request for cancellation is not granted prior to this Court making a ruling on this dispute, Plaintiff will and continues to agree not to use the August 10, 2016 registration at trial." (*Id.*) Thus, it is unclear whether Plaintiff intends to pursue a copyright infringement claim as to this "unregistered" joke, and whether he is entitled to all the damages he seeks in the FAC. *See*, *e.g.*, 17 U.S.C. § 412.

remedies under 17 U.S.C. §§ 411(b)(1), 412. Defendants shall also address whether they intend to amend their Answer to the FAC.

IV. CONCLUSION

Based on the foregoing, the Court hereby **ORDERS** as follows:

1. A telephonic, attorneys only Discovery Conference shall be held on **July 28, 2017** at **10:00 a.m.** before Magistrate Judge Louisa S Porter.

2. The parties shall use the Court's conferencing system:

Conference number:	(888) 684-8852
Access code:	2236596
Participant security code:	1637

IT IS SO ORDERED.

Dated: July 25, 2017

LOUISA S PORTER
United States Magistrate Judge

Jayson M. Lorenzo, Esq. SBN 216973
jmlorenzo.esq@gmail.com
Attorney at Law
2794 Gateway Road, Suite 116
Carlsbad, CA 92009
Tel. (760) 517-6646
Fax (760) 520-7900

Attorney for Plaintiff
ROBERT ALEXANDER KASEBERG

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER KASEBERG,

Plaintiff,

vs.

CONACO, LLC; TURNER BROADCASTING SYSTEM; TIME WARNER, INC.; CONAN O'BRIEN; JEFF ROSS; MIKE SWEENEY; DOES 1 – 10, inclusive,

Defendants.

Case No. 15-CV-01637-JLS-DHB

SUPPLEMENTAL EXHIBIT TO JOINT MOTION FOR DETERMINATION OF DISCOVERY DISPUTE (ECF NO. 132); DECLARATION OF JAYSON M. LORENZO

Judge: Hon. David H. Bartick

I, JAYSON M. LORENZO declare and state as follows:

1. I am an attorney at law duly licensed to practice before all courts of the and am the attorneys of record herein for Plaintiff ROBERT ALEXANDER KASEBERG. I make this declaration in support of Plaintiffs' position in the Joint Motion for Determination of Discovery Dispute. The facts set forth herein are true of my own personal knowledge, and if called upon to testify thereto, I could and would competently do so under oath.

2. On July 21, 2017, I received a letter from the Copyright Office. The letter, dated July 17, 2017, is attached hereto as **Exhibit A**.

3. On July 21, 2017, I sent an email to counsel for Defendants, Nick Huskins, attaching a copy of the letter received.

I declare under penalty of perjury that the foregoing is true and correct.

Date: July 27, 2017

By:/s/ *Jayson M. Lorenzo*
JAYSON M. LORENZO
Attorney for Plaintiff

Exhibit A

United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

Re: Second Request for Reconsideration for Refusal to Register A LITTLE BIT BAD, Blog Content, Brady Joke February 3, 2015; Correspondence ID: 1-25KMZ9Z; SR #: 1-2752094070

The attached decision of the United States Copyright Office Review Board is approved for release.

By:
Sarang V. Damle
General Counsel and
Associate Register of Copyrights

Date: July 18, 2017

United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

July 17, 2017

Jayson M. Lorenzo, Esq.
2794 Gateway Road, Suite 116
Carlsbad, CA 92009

Re: Second Request for Reconsideration for Refusal to Register A LITTLE BIT BAD, Blog Content, Brady Joke February 3, 2015; Correspondence ID: 1-25KMZ9Z; SR #: 1-2752094070

Dear Mr. Lorenzo:

The Review Board of the United States Copyright Office ("Board") has considered Robert Alexander Kaseberg's second request for reconsideration of the Registration Program's refusal to register a text claim in the work titled "A LITTLE BIT BAD, Blog Content, Brady Joke February 3, 2015" ("Work"). The Work consists of the following two-sentence textual work, containing twenty seven words, posted on Mr. Kaseberg's blog on February 3, 2015: "Tom Brady said he wants to give his MVP truck to the man who won the game for the Patriots. So enjoy that truck, Pete Carroll." After reviewing the application, deposit copy, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board finds that the Work exhibits copyrightable authorship and thus may be registered.

The Board bases its finding on the "minimal degree of creativity" required by the U.S. Supreme Court in *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). As a textual work, the Work meets the threshold for copyright protection as articulated in *Feist*. Courts and the Copyright Office both have found copyright protection for jokes when the jokes are sufficiently creative. *See, e.g.*, *Foxworthy v. Custom Tees, Inc.*, 879 F. Supp. 1200, 1219 (N.D. Ga. 1995) (finding that a series of "You might be a redneck if . . ." jokes "evidenced a 'modicum of intellectual labor'") (citation omitted). But the Board also cautions that, while it is copyrightable, the copyright in the Work is "thin." Works with a thin copyright "reflect only scant creativity." 4 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 13.03 (2017). As one court noted, "[s]cantiness may exist because the work is composed of elements in the public domain, and it is only the organization of those elements that is protectable." *Well-Made Toy Mfg. Corp. v. Goffa Int'l Corp.*, 210 F. Supp. 2d 147, 163 (E.D.N.Y. 2002). The Board notes its decision is consistent with a decision in the Southern District of California, finding that this Work merits thin copyright protection. Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment, *Kaseberg v. Conaco, LLC*, No. 15-cv-1637 at 21 (C.D. Cal. May 9, 2017), ECF No. 70 (noting that "there is little doubt that the jokes at issue merit copyright protection" but "the jokes here are similarly constrained by their subject matter and the conventions of the two-line, setup-and-delivery paradigm").

For the reasons stated herein, the Board reverses the refusal to register the copyright claim in the Work. Pursuant to 37 C.F.R. § 202.5(g), this letter constitutes final agency regarding the Work. The Office will register the Work and no response regarding this Work is necessary.

Finally, there is an additional administrative matter regarding a related application. In addition to the application to register the Work alone, the Work also was incorporated into another application, "A LITTLE BIT BAD. Blog Jokes posted on February 3, 2015" ("Three Jokes Work"), which the Office registered on June 6, 2017 (SR# 1-3896431421). Because previously registered material, including material that has been submitted for registration but has not been registered yet, is unclaimable in subsequent registrations, the registration for Three Jokes Work must be corrected to exclude the content covered in the registration for this Work. COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 503.5 (3d ed. 2014). An Attorney-Advisor with the Office informed your attorney of this issue and he agreed that, if the Board granted registration of this Work, the registration record for Three Jokes Work would need to be corrected to exclude the text comprising the single joke in the Work. Telephone call from John R. Riley, Attorney-Advisor, to Jayson M. Lorenzo (July 5, 2017). As the Board is ordering this Work to be registered, the Copyright Office's Office of Registration Policy and Practice will be in contact regarding the copyright claim in the Three Jokes Work.

BY: Catherine Rowland
Catherine Rowland
Copyright Office Review Board

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER KASEBERG,

Plaintiff,

v.

CONACO, LLC, et al.,

Defendants.

Case No.: 15-cv-01637-JLS (DHB)

ORDER REGARDING JOINT MOTION FOR DETERMINATION OF DISCOVERY DISPUTE RE MODIFYING THE SCHEDULING ORDER TO REOPEN DISCOVERY AND PERMIT THE DEPOSITION OF PLAINTIFF'S COUNSEL

(ECF No. 132)

On June 28, 2017, the parties filed a Joint Motion for Determination of Discovery Dispute Re: Modifying the Scheduling Order to Reopen Discovery and Permit the Deposition of Plaintiff's Counsel ("Joint Motion"). (ECF No. 132.) In the Joint Motion, Defendants Conaco, LLC, Turner Broadcasting System, Inc., Time Warner, Inc., Conan O'Brien, Jeff Ross, and Mike Sweeney (collectively, "Defendants") seek to (1) modify the Scheduling Order and reopen discovery for a period of sixty days, and (2) take the deposition of Jayson Lorenzo, counsel for Plaintiff Robert Alexander Kaseberg ("Plaintiff"), as well as Plaintiff. (*Id.*)

On July 28, 2017, the Court held a telephonic, attorneys only Discovery Conference. (ECF No. 141.) Jayson Lorenzo and Ryan Altomare, counsel for Plaintiff, and Erica Van Loon and Nicholas Huskins, counsel for Defendants, made an appearance. (*Id.*) During the Discovery Conference, counsel clarified their respective client's positions as to the Tom Brady Joke, as requested in the Court's July 25, 2017 Order Regarding Joint Motion for Determination of Discovery Dispute Re: Modifying the Scheduling Order to Reopen Discovery and Permit the Deposition of Plaintiff's Counsel ("July 25 Order"). (ECF No. 139.)

The Court hereby incorporates the background of the dispute as set forth in its July 25 Order. (*See id.*) The Court adds the following facts:

One day prior to the Discovery Conference, Plaintiff filed a July 17, 2017 letter from the Copyright Office related to the September 3, 2015 single application ("September 2015 single application") (ECF No. 132-1, Exh. 9). (ECF No. 140, Exh. A.) The letter relates to Plaintiff's Second Request for Reconsideration for Refusal to Register the Tom Brady Joke. (*Id.*) In the letter, the Board finds that the Tom Brady Joke "exhibits copyrightable authorship and thus may be registered," based primarily on the same reasoning set forth in Judge Sammartino's Order Granting in Part and Denying Part Defendants' Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment ("MSJ Order"). (*Id.*)[1]

///

///

///

///

///

[1] The letter cites to the MSJ Order, stating: "The Board notes its decision is consistent with a decision in the Southern District of California, finding that this Work merits thin copyright protection." (ECF No. 140, Exh. A.)

The Copyright Office acknowledges in the letter that it had previously registered the Tom Brady Joke as part of the August 10, 2016 standard application ("August 2016 collective application") covering three jokes, including the Tom Brady Joke. (ECF No. 140, Exh. A at p. 2.) The Copyright Office stated:

> Because previously registered material, including material that has been submitted for registration but has not been registered yet, is unclaimable in subsequent registrations, the registration for Three Jokes Work must be corrected to exclude the content covered in the registration for this Work.

(*Id.*) As stated in the letter, Plaintiff's counsel, Jayson Lorenzo, discussed this issue with the Copyright Office on July 5, 2017, and agreed that the registration based on the August 2016 collective application needs to be corrected. (*Id.*) As of the date of this Order, the Court does not know whether this correction has been made, or whether Plaintiff's request to cancel the registration based on the August 2016 collective application has been granted. (*See* ECF No. 132-2 at Exh. Q.) Regardless, it is apparent one of these outcomes must occur if Plaintiff intends to proceed on the September 2015 single application.

During the Discovery Conference, Plaintiff's counsel represented that Plaintiff intends to pursue a copyright infringement claim on the Tom Brady Joke. Plaintiff's counsel further represented that Plaintiff intends to rely on the Copyright Office's registration of the Tom Brady Joke based on the September 2015 single application.

Defendants' counsel represented during the Discovery Conference that Defendants want to reopen discovery to (1) take the deposition of Plaintiff's counsel, Mr. Lorenzo, (2) re-depose Plaintiff, and (3) serve written discovery. The intended scope of discovery is the registration process for the Tom Brady Joke. Defendants argue they are entitled to explore any and all relevant defenses and claims related to the registration process for the Tom Brady Joke. As discussed in the July 25 Order and the MSJ Order, due to Plaintiff's failure to make timely disclosures, Defendants have thus far been deprived of the opportunity. After they take discovery, Defendants intend to amend their answer. Defendants argue that any allegations of fraud must be stated with particularity, and therefore it would be most efficient to amend after discovery is conducted, so that they can meet this burden.

The primary question raised in the July 25 Order is the relevance of the requested discovery in light of recent events. In their proposed amended answer circulated to Plaintiff, Defendants added the following defenses: (1) fraud on the Copyright Office; (2) unclean hands; and (3) invalidity of copyright registration and/or application. (ECF No. 132-2 at Exh. I.) All of these defenses, as currently drafted, relate exclusively to the August 2016 collective application. (*Id*.)

Defendants allege that a finding of fraud on the Copyright Office would render the Tom Brady Joke registration based on the August 2016 collective application invalid and/or unenforceable, and preclude Plaintiff from obtaining any of the remedies afforded by the Copyright Act, including statutory damages or attorneys' fees.[2] (*Id*. at pp. 7-12.) Defendants further allege that a finding of unclean hands based on Plaintiff's conduct in filing the August 2016 collective application would estop Plaintiff from asserting his copyright claim as to the Tom Brady Joke. (*Id*. at pp. 12-13.) Lastly, Defendants allege that due to Plaintiff's prior publication of the Tom Brady Joke on his Twitter account, any registration of the Tom Brady Joke based on the August 2016 collective application is invalid and/or unenforceable, and Plaintiff is precluded from obtaining any of the remedies afforded by the Copyright Act, including statutory damages or attorneys' fees. (*Id*. at pp. 13-14.) Plaintiff argues all of these defenses are irrelevant because he has requested to voluntarily cancel the August 2016 collective application, and he intends to go forward solely on the September 2015 single application, which contains none of the errors alleged by Defendants in their proposed amended answer.

Based on the proposed amended answer before the Court and the parties' arguments presented in the Joint Motion, the Court does not find the proposed affirmative defenses,

---

[2] The Court notes that if Plaintiff intends to rely on the September 2015 single application, he may already be precluded from obtaining statutory damages and attorneys' fees on the Tom Brady Joke pursuant to 17 U.S.C. § 412(2). *See* 17 U.S.C. §§ 412(2), 410(d).

as currently drafted, to be relevant, due to the pending cancellation (or correction) of the August 2016 collective application. During the Discovery Conference, Defendants' counsel stated that Defendants intend to bring the same or similar defenses as to the September 2015 single application. Based on all of the information presently before the Court, however, the Court is not persuaded that the same or similar defenses are relevant to the September 2015 single application.

Nonetheless, Defendants emailed Plaintiff a copy of their proposed amended answer on June 9, 2017, which was before the request for cancellation of the August 2016 collective application was sent, and before the Copyright Office registered the Tom Brady Joke based on the September 2015 single application. The Court therefore finds it appropriate to order supplemental briefing from the parties, as follows:

1. No later than **August 11, 2017**, Defendants shall file:
   a. A proposed amended answer based on all of the information presently in Defendants' possession. The proposed amended answer shall be filed as an exhibit to the supplemental brief discussed below.
   b. A supplemental brief to the Joint Motion, clearly defining the scope of any proposed discovery of Plaintiff's counsel, written and/or oral, and demonstrating how (1) no other means exist to obtain this information, (2) the information is relevant and non-privileged, and (3) the information is crucial to the preparation of the case. The brief should further explain the basis for re-deposing Plaintiff. Defendants' brief shall be no longer than **five pages**.
2. No later than **August 18, 2017**, Plaintiff shall file a response to Defendants' brief. Plaintiff's response shall be no longer than **five pages**.

IT IS SO ORDERED.

Dated: August 4, 2017

LOUISA S PORTER
United States Magistrate Judge