

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

WILLIAM D. EHRHART,
Plaintiff

v.

Civil No. 99-229-P-C

ROBERT OLMSTED individually and d/b/a
THE CONSERVATORY OF AMERICAN
LETTERS,
Defendants

Gene Carter, District Judge

**MEMORANDUM OF DECISION AND ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

Plaintiff William D. Ehrhart brought this Complaint against Defendant Robert Olmsted for copyright infringement requesting that the Court permanently enjoin Defendant from any use of Plaintiff's work or from granting others the rights to use Plaintiff's work and seeking statutory damages for willful infringement of the copyright and costs and attorney's fees. Now before the Court is Plaintiff's Motion for Summary Judgment (Docket No. 8) seeking judgment on his Complaint against Defendant, individually, and Olmsted d/b/a The Conservatory of American Letters. The Court will grant Plaintiff's motion as against Olmsted on the liability issues and deny the motion thereon as against Olmsted d/b/a/ The Conservatory of American Letters. The Court does not now address the issues of the appropriate relief to be awarded.

I. STATEMENT OF MATERIAL FACTS¹

Plaintiff William D. Ehrhart is the author of a collection of poems entitled *The Awkward Silence*, included in which is the poem “Guerilla War.” Plaintiff’s Statement of Material Facts (“PSMF”)(Docket No. 10) ¶ 1; Affidavit of William D. Ehrhart (Docket No. 12) ¶ 5; Exhibit C to Ehrhart Affidavit. Ehrhart and Northwoods Press, Inc. entered into a publishing agreement on April 5, 1979. PSMF ¶ 4; Exhibit A to Ehrhart Affidavit. *The Awkward Silence* was published by Northwoods Press, Inc., a publishing business owned and operated by Defendant Robert Olmsted. PSMF ¶ 2; Affidavit of Ehrhart ¶ 6; Exhibit A to Ehrhart Affidavit. The copyright to *The Awkward Silence* was registered to William D. Ehrhart on December 3, 1980, Registration Number TX 597-552. PSMF ¶ 3; Affidavit of Ehrhart ¶ 7; Exhibit B to Ehrhart Affidavit. The copyright to *The Awkward Silence* continues to be held by Ehrhart. PSMF ¶ 5; Affidavit of Ehrhart ¶ 9; Exhibit D to Ehrhart Affidavit.

In 1985, Ehrhart commenced a civil action against Olmsted in Maine Superior Court, Docket No. CV-85-138, seeking, among other relief, termination of the publication agreement. PSMF ¶ 6; Affidavit of Ehrhart ¶ 12. The civil action was resolved by a settlement agreement

¹Defendant did not file a separate statement of material fact as required by Local Rule 56(c). Defendant did file “Defendant’s Memorandum in Objection to Plaintiff’s Motion for Summary Judgment” in which he states that he disputes facts from “paragraphs 3 and 4 of Plaintiff’s [Memorandum] in Support of Motion for Summary Judgment.” The Court understands Defendant’s reference to Plaintiff’s paragraphs 3 and 4 to be his attempt to dispute Plaintiff’s facts. Unfortunately, paragraph numbers 3 and 4 to which Defendant refers are the assertions by Plaintiff about what the evidence will ultimately prove rather than simple assertions of fact. In any event, the Court will consider only Defendant’s assertions of *fact* in paragraphs 3 and 4 which are properly supported by record citations. *See* Local Rule 56(e). The Court will not consider the affidavit of Defendant Olmsted to the extent that the facts asserted therein are not included in a separate statement of facts.

dated July 1986, which provided in pertinent part:

Release of Publication Rights. ROBERT OLMSTED releases and conveys to WILLIAM D. EHRHART, all rights of publication to “THE AWKWARD SILENCE” which he may have had, may now have, or may claim to have, whether individually, doing business as NORTHWOODS PRESS, or as President of NORTHWOODS PRESS, INC., or in any other capacity. The parties agree that, following the date of this Agreement, all rights regarding “THE AWKWARD SILENCE” shall be held by WILLIAM D. EHRHART, to do with as he sees fit, and that neither ROBERT OLMSTED nor NORTHWOODS PRESS nor NORTHWOODS PRESS, INC., shall have any further claim of any kind to any interest in “THE AWKWARD SILENCE.”

PSMF ¶ 7; Affidavit of Ehrhart ¶ 13; Exhibit F to Ehrhart Affidavit.

Defendant Olmsted has also engaged in the business of publication of literature and poetry as President of “The Conservatory of American Letters,” which was incorporated in the State of Maine as a nonprofit corporation on September 14, 1982. PSMF ¶ 8; Affidavit of Ehrhart ¶ 11; Exhibit E to Ehrhart Affidavit. The Conservatory of American Letters maintains its own funds and bank accounts. Defendant’s Memorandum in Objection to Plaintiff’s Motion for Summary Judgment (Docket No. 16) at 2; Exhibit B to Olmsted Affidavit (Docket No. 17). On July 14, 1995, the Secretary of State of the State of Maine suspended The Conservatory of American Letters. PSMF ¶ 9; Exhibit E to Ehrhart Affidavit. The Secretary of State reinstated the corporate status of The Conservatory of American Letters on September 13, 1999. Defendant’s Memorandum in Objection to Plaintiff’s Motion for Summary Judgment at 2; Exhibit C to Olmsted Affidavit.

By agreement dated January 6, 1997, Defendant Olmsted, as President of the Conservatory of American Letters, granted Holt, Rinehart & Winston, Inc., of Austin, Texas, permission to reprint the poem “Guerilla War” from *The Awkward Silence* in a textbook

published by that company entitled *Boyer's The American Nation* (Revised Edition), Grades 9-11, Pupil's Edition and Annotated Teacher's Edition, for distribution throughout the United States. PSMF ¶ 10; Affidavit of Ehrhart ¶¶ 15, 16; Exhibit H to Ehrhart Affidavit. The Conservatory of American Letters was paid one hundred dollars for the use it granted to Holt, Rinehart & Winston, Inc. on January 6, 1997. PSMF ¶ 11; Exhibit H to Ehrhart Affidavit.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F. 3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U. S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F. 3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.”

National Amusements, Inc. v. Town of Dedham, 43 F. 3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U. S. at 324); Fed. R. Civ. P. 56(e).

B. Copyright Infringement Claim

To prevail on a claim of copyright infringement, a plaintiff must show (1) ownership of a valid copyright, and (2) copying of the protected work by the alleged infringer. *See Segrets, Inc. v. Gillman Knitwear Co., Inc.*, ___ F.3d ___, 2000 WL 298567 (1st Cir.); *Concrete Machinery Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 605 (1st Cir. 1988). It is undisputed that Ehrhart is the owner of the valid copyright to *The Awkward Silence*. The copyright to *The Awkward Silence* was registered to William D. Ehrhart on December 3, 1980, Registration Number TX 597-552. PSMF ¶ 3; Affidavit of Ehrhart ¶ 7; Exhibit B to Ehrhart Affidavit. The record shows, however, that it was The Conservatory of American Letters that authorized publication of the poem without Ehrhart’s permission. Although the agreement enabling Holt, Rinehart & Winston to reprint the poem “Guerilla War” from *The Awkward Silence* was signed by Olmsted, he did not sign in his individual capacity; instead, he signed as President of The Conservatory of American Letters. Exhibit H to Ehrhart Affidavit.

Defendant Olmsted contends that The Conservatory of American Letters, Inc., the corporation, is the proper party to be sued and that he is not personally liable as the President of The Conservatory of American Letters unless a claim is brought to pierce the corporate veil. To support his position, Defendant relies on two breach of contract cases. *Sturtevant v. Town of Winthrop*, 1999 ME 84, 732 A.2d 264; *Johnson v. Exclusive Properties Unlimited*, 1998 ME 244, 720 A.2d 568. The Court disagrees.

Under 17 U.S.C. § 501(a), “[a]nyone who violates any of the exclusive rights of the

copyright owner . . . is an infringer of the copyright.” Although federal statutory copyright law does not expressly establish any form of third-party liability, copyright is analogous to a species of tort and, thus, “common law concepts of tort liability are relevant in fixing the scope of the statutory copyright remedy.” *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403 (S.D.N.Y. 1966); *see also Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 439-42, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984). Since infringement is akin to tort, Defendant’s breach of contract cases pertaining to piercing the corporate veil are necessarily distinguishable. Moreover, all participants in copyright infringement are jointly and severally liable as tortfeasors, *Columbia Pictures Industries v. Redd Horne*, 749 F.2d 154, 160 (3rd Cir. 1984); *Screen Gems-Columbia Music, Inc. v. Metlis & Lebow Corp.*, 453 F.2d 552, 554 (2nd Cir. 1972); *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2nd Cir. 1971); *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2nd Cir. 1963); *Warner Bros., Inc. v. Lobster Pot, Inc.*, 582 F. Supp. 478, 482 (N.D. Ohio 1984); *Famous Music Corp. v. Bay State Harness Horse Racing and Breeding Ass’n*, 423 F. Supp. 341 (D. Mass. 1976), *aff’d*, 554 F.2d 1213 (1st Cir. 1977), and the aggrieved party may select the joint tortfeasor he wishes to sue. It is not essential, then, for Ehrhart to bring suit against The Conservatory of American Letters or to assert a claim for piercing the corporate veil in order to recover against Olmsted.

Following well established principles of tort liability, courts have developed two types of third-party liability in copyright: vicarious and contributory. Vicarious liability is established by showing control and benefit, whereas contributory liability is established by showing knowledge and participation. A corporate officer may be held personally liable under the Copyright Act

when:

(1) the officer personally participated in the actual infringement; or (2) the officer derived financial benefit from the infringing activities as either a major shareholder in the corporation, or through some other means such as receiving a percentage of the revenues from the activity giving rise to the infringement; or (3) the officer used the corporation as an instrument to carry out a deliberate infringement of copyright; or (4) the officer was the dominant influence in the corporation, and determined the policies which resulted in the infringement; or (5) on the basis of some combination of the above criteria.

Marvin Music Co. v. BHC Limited Partnership, 830 F. Supp. 651, 654-55 (D.Mass. 1993)

(general manager of club, and president of corporation which was general partner of limited partnership that owned and operated club, was jointly liable for copyright infringements); *see also Famous Music Corp.*, 423 F. Supp. at 344.

The evidence demonstrates that Olmsted personally engaged in the conduct that caused the infringement to occur. In addition, Olmsted had knowledge that his conduct was infringing. Specifically, the record shows that although Olmsted once possessed the right to publish *The Awkward Silence*, he formally relinquished that right when he settled the state court lawsuit instituted by Ehrhart in July of 1986. The settlement agreement entered into by Ehrhart and Olmsted provides that:

ROBERT OLMSTED releases and conveys to WILLIAM D. EHRHART all rights of publication to "THE AWKWARD SILENCE" which he may have had, may now have, or may claim to have, whether individually, doing business as NORTHWOODS PRESS, or as President of NORTHWOODS PRESS, INC., or in any other capacity. The parties agree that, following the date of this Agreement, all rights regarding "THE AWKWARD SILENCE" shall be held by WILLIAM D. EHRHART, . . . and that neither ROBERT OLMSTED nor NORTHWOODS PRESS nor NORTHWOODS PRESS, INC shall have any further claim of any kind to any interest in "THE AWKWARD SILENCE."

PSMF ¶ 7; Affidavit of Ehrhart ¶ 13; Exhibit F to Ehrhart Affidavit. In addition, the agreement

states that “OLMSTED agrees not to advertise or represent himself, in any capacity, as being the publisher of “THE AWKWARD SILENCE.” *Id.* The agreement by which rights of publication to *The Awkward Silence* and the poem “Guerilla War” were given to Northwoods Press, Inc. and Olmsted was unquestionably terminated by the settlement agreement reached in the state court lawsuit more than a decade before the instant act of infringement. Nevertheless, Olmsted represented to Holt, Rinehart & Winston that he possessed the authority to allow others to reprint “Guerilla War” when he was not so authorized. Because the record demonstrates that Olmsted has been engaged in the publishing business for more than twenty years and that he has negotiated, and entered into, publishing agreements, the Court reasonably presumes that he possesses a basic understanding of copyright law. Hence, the Court concludes that in January 1997, Olmsted had knowledge when he, as President of the Conservatory of American Letters, granted Holt, Rinehart & Winston permission to reprint “Guerilla War” that he was infringing Ehrhart’s copyright. The Court finds, therefore, that Olmsted was a contributory infringer of Ehrhart’s copyright and that liability for the infringement may be imposed on Olmsted individually.²

²The Court will not extend liability to “Olmsted d/b/a/ The Conservatory of American Letters” because the record now shows that “The Conservatory of American Letters” is a valid Maine corporation. The “doing business as” designation is not a substitute for suing the appropriate party when the alleged wrongdoer is a corporation. Although, The Conservatory of American Letters had been suspended when the act of infringement was committed and also when this lawsuit was instituted, it would need to be a party to the extent it is claimed to be an infringer. *See John W. Goodwin, Inc. v. Fox*, 1999 ME 33, 725 A.2d 541, 543 (“a suspended corporation may be sued”); *see also* 13-A M.R.S.A. §§ 1101, 1122 (1981)(corporation’s capacity to be sued ends two years after formal dissolution). The Court notes that before it could determine whether the corporation had infringed Plaintiff’s copyright, it would need to resolve a question neither party has briefed: That is, whether a corporation, once reinstated, is responsible for an act of infringement it committed while under suspension. *See generally*, John P. Ludington, Annotation, *Reinstatement of Repealed, Forfeited, Expired, or Suspended Corporate*

C. Willful Infringement

The copyright statute allows the aggrieved party to elect either actual or statutory damages. 17 U.S.C. § 504(a) (1996). Under the statute at the time of this action, the statutory damages to be awarded per copyright infringement violation is not less than \$500 or more than \$20,000, "as the court considers just." 17 U.S.C. § 504(c)(1)(1996). Generally, statutory damages are awarded when no actual damages are proven, or actual damages and profits are difficult or impossible to calculate. *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 231-33, 73 S.Ct. 222, 224-25, 97 L.Ed.2d 276 (1952); *Warner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1126 (2nd Cir. 1989). The Copyright Act provides that "where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$100,000." 17 U.S.C. § 504(c)(2)(1996). "Willfully," in the context of section 504(c)(2), means that the defendant "knows his actions constitute an infringement; the actions need not have been malicious." *Broadcast Music, Inc. v. Xanthas, Inc.*, 855 F.2d 233, 236 (5th Cir. 1988); *see also RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 779 (8th Cir. 1988); *Fitzgerald Publishing Co. v. Baylor Publishing Co.*, 807 F.2d 1110, 1117 (2nd Cir. 1986) ("The statute does not distinguish between those who maliciously infringe another's copyright or those who simply act knowing that they are infringing upon the copyright."). As the Court concluded in determining contributory liability, the evidence clearly demonstrates that when selling the right to reprint "Guerilla War," Olmsted knew that he was infringing Ehrhart's copyright. Olmsted has thus acted willfully within the meaning of the copyright statute.

Charter as Validating Interim Acts of Corporation, 42 A.L.R. 4th 392 (1985).

III. CONCLUSION

It is **ORDERED** that Plaintiff's Motion for Summary Judgment be, and it is hereby, **GRANTED** as against Defendant Olmsted and **DENIED** as against Olmsted d/b/a/ The Conservatory of American Letters. It is further **ORDERED** that the Clerk schedule this matter for a hearing to determine the appropriate amount of damages and other relief.

GENE CARTER
District Judge

Dated at Portland, Maine this 17th day of April, 2000.

CIVIL DOCKET FOR CASE #: 99-CV-229

EHRHART v. OLMSTED
Assigned to: JUDGE GENE CARTER
Demand: \$0,000
Lead Docket: None
Dkt# in other court: None
Cause: 17:501 Copyright Infringement

Filed: 07/19/99

Nature of Suit: 820
Jurisdiction: Federal Question

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