

1 of 2 DOCUMENTS



Analysis
As of: Feb 13, 2007

Barris/Fraser Enterprises, Plaintiff, v. Goodson-Todman Enterprises, Ltd., Defendant

No. 86 Civ. 5037 (EW)

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK**

**1988 U.S. Dist. LEXIS 146; 5 U.S.P.Q.2D (BNA) 1887; Copy. L. Rep. (CCH)
P26,224**

January 4, 1988, Decided; January 8, 1988, Filed

COUNSEL: [*1]

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OPINION BY:

WEINFELD

OPINION:

OPINION

EDWARD WEINFELD, D.J.

This case raises the issue of whether a television game show format is entitled to copyright protection. In cross motions for summary judgment, the parties seek a declaration as to whether the pilot of the new game show, Bamboozle, infringes defendant's well know show To Tell the Truth. Plaintiff is a joint venture formed by Barris Industries, Inc., and Woody Fraser Production, Inc., both successful television producers. n1 Defendant is also successful television producer and owns the copyright to To Tell the Truth, which ran on CBS in prime time from 1956 to 1967, and in CBS's daytime schedule from 1962 to 1968. n2 The program was also produced

for national syndication from 1969 to 1977, and a variation of the show was broadcast in 1980-1981.

n1 Barris Industries, Inc. and Woody Fraser Productions, Inc. have collectively created and produced such shows as The Dating Game, The Newlywed Game, The Gong Show, The Mike Douglas Show, and That's Incredible.

[*2]

n2 Goodson-Todman Enterprises, Ltd. has created and produced such shows as What's My Line, I've Got a Secret, Family Feud, Concentration, The Match Game, Beat the Clock, The Price is Right, Password, Tattletales, and Card Sharks.

Plaintiff developed the concept of Bamboozle in January 1986. In February 1986 it entered into an agreement with ABC to produce a pilot program of Bamboozle. The contract granted ABC an exclusive option to order Bamboozle for broadcast as a daily series. On March 24, 1986, defendant sent a letter to ABC warning that it would take legal action if Bamboozle infringed its copyright to To Tell the Truth. Plaintiff later filed this declaratory judgment action for a decree that defendant's letter constitutes tortious interference with its relationship with ABC and that Bamboozle does not infringe To Tell the Truth. Plaintiff further seeks damages and a permanent injunction against defendant's alleged inter-

ference. Defendant counterclaims for an injunction against producing or distributing Bamboozle, or for other wise infringing defendant's copyright, for an order dismissing plaintiff's [*3] complaint, and for damages.

After a hearing, this court denied plaintiff's motion for a preliminary injunction ordering defendant to retract its letter to ABC and enjoining it from further interfering with plaintiff's promotion of Bamboozle. n3 The injunction motion was denied on the ground that plaintiff had failed to demonstrate irreparable harm. The parties then submitted cross motions for summary judgment plaintiff seeks partial summary judgment dismissing defendant's counterclaim and declaring that Bamboozle does not infringe defendant's copyright; defendant seeks summary judgment dismissing plaintiff's complaint. Essentially, these are mirror-image motions for a determination, as a matter of law, whether or not there has been an infringement.

n3 *Barris/Fraser Enter. v. Goodson-Todman Enter., Ltd*, 638 F. Supp. 292 (S.D.N.Y. 1986).

Plaintiff's program Bamboozle is played with a three-person panel, which is made up of two celebrities and one noncelebrity contestant, three "bamboozlers", and a master of ceremonies. The three "bamboozlers" each tell a different fantastic story, one of which is real, and the panel's job is to determine which of the improbable accounts [*4] is true. For example, one show has the three "bamboozlers" claiming that they own a turkey that jogs, a rabbit that surfs, and a dog that bowls. The panelists then take turns asking the "bamboozlers" questions. Following this, the noncelebrity panelist votes, based upon the advice of the two celebrity panelists, as to which story is true. Either the noncelebrity contestant, or the bamboozlers, can win money depending on the vote. At the end of the show, the truth teller is revealed and the fantastic incident or occurrence is demonstrated.

To Tell the Truth is also played with a panel of questioners, a panel of three "liars", only one of whom is telling the truth, and a master of ceremonies. However, in this show the panel consists of four celebrities, and the liars all pretend to be the same person, rather than telling three different stories. For example, one show had three young men all claiming to be the man who had saved a four year old girl from the subway tracks. The panel questions the "liars" trying to determine who the impostors are. Each of the panelists then votes and every wrong vote adds money into the pot for the impostors to split. The show ends with the master [*5] of ceremonies saying "Will the real [contestant's name] please stand up."

In addition, in the later years of To Tell the Truth's production, the show contained a segment called "One

on One." This segment consisted of four of the "impostors" from the previous segments alleging that they possessed a different unusual credential or skill. For example, each of the impostors might claim to have invented something unusual. Only one of the four panelists would be telling the truth. The four celebrities would each question one of the impostors and vote as to whether that impostor was telling the truth. After all the votes were cast, the master of ceremonies would say, "Will the real inventor please stand up."

DISCUSSION

To sustain a claim of copyright infringement, the party asserting the claim must establish ownership of a valid copyright and copying by the infringer to such a degree as to constitute improper appropriation. n4 Copying may be proved directly or may be inferred by establishing that the alleged infringer had access to the copyrighted work and that "substantial similarities" exist in the two works. n5 If copying is established, then the party asserting the claim of infringement [*6] must establish that there was improper appropriation. A showing that substantial similarities exist as to protectible material satisfies the requirement that the copying must be to such a degree as to constitute improper appropriation. n6

n4 *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir. 1980), cert. denied, 449 U.S. 841; *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946). In this action for declaratory judgment, brought by the alleged infringer, it is the defendant that has the burden of establishing these elements.

n5 *Warner Bros. v. American Broadcasting Cos., Inc.* 654 F.2d 204, 207 (2d Cir. 1981); *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1092 (2d Cir. 1977); *Arnstein v. Porter*, 154 F.2d at 468.

n6 See *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir. 1986), cert. denied, 106 S. Ct. 2278; cf. *Arnstein v. Porter*, 154 F.2d at 468.

For purposes of its motion, plaintiff concedes that defendant has a valid copyright of To Tell the Truth and that plaintiff had access. Thus, the issues before the court are whether plaintiff's show bears a substantial similarity to defendant's show and whether the [*7] substantial similarity concerns protected work.

Whether copying and misappropriation have taken place are questions of fact, normally for the jury. n7 However, a district court may determine noninfringement as a matter of law on a motion for summary judgment either when the similarity between the works con-

cerns only noncopyrightable elements of the infringed work, or when no reasonable trier of fact, properly instructed, could find the works substantially similar. n8 The inquiry is "whether the lack of substantial similarity between the protectible aspects of the works was 'so clear as to fall outside the range of disputed fact questions.'" n9

n7 *Arnstein v. Porter*, 154 F.2d at 469.

n8 *Walker v. Time Life Films, Inc.*, 784 F.2d at 48; *Warner Bros. Inc. v. American Broadcasting Cos.*, 720 F.2d 231, 240 (2d Cir. 1983).

n9 *Walker v. Time Life Films, Inc.*, 784 F.2d at 48 (quoting *Warner v. American Broadcasting Cos.*, 720 F.2d 239).

There is little doubt that there is similarity between *Bamboozle* and *To Tell the Truth*; both require a panel containing celebrities to guess who is telling the truth. Accordingly, it cannot be said as a matter of law that no copying has taken [*8] place, because a reasonable trier of fact could find the works similar. In fact when plaintiff previewed *Bamboozle* to a test audience, some members of the audience commented that it was similar to *Tell the Truth*. The central issue on plaintiff's motion for summary judgment is whether the similarity between the shows concerns only noncopyrightable elements of the allegedly infringed work or whether there has been an improper appropriation of protected material. Summary judgment is only proper if there is no similarity between protected material.

Copyright protection extends only to the expression of an author's ideas, not to the ideas themselves. n10 Nor does protection extend to procedures, processes, systems, or methods or operation. n11 Furthermore, protection does not extend to facts, scenes a faire, or to expressions that can only take a limited number of forms. n12 All of these lie in the public domain and are not subject to copyright.

n10 *Warner v. American Broadcasting Cos., Inc.*, 654 F.2d at 208; *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960). This principle, which developed in the case law, is now codified in the Copyright Act which provides:

(a) Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicate. . . .

(b) In no case does copyright protection for an original work of authorship extend to any idea 17 U.S.C. § 102.

[*9]

n11 17 U.S.C. § 102(b).

n12 See *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972; *Reyher v. Children's Television Workshop*, 533 F.2d 87, 91 (2d Cir. 1976), cert. denied, 429 U.S. 980.

To distill unprotected ideas from protected expression, is not easy. n13 As Judge Learned Hand said,

Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more . . . is left out. The last may perhaps be no more than the most general statement . . . but there is a point in this series of abstractions where they are no longer protected, since otherwise the [copyright owner] could prevent the use of his "ideas," to which, apart from their expression, his property never extended. n14

The idea of a game in which people lie and contestants guess who is telling the truth is not protectible, any more than the idea of a story based upon the adventures of police officers in the South Bronx, or the idea that a man has superhuman powers and uses them to fight evil in the world is protectible. n15 In these cases, the similarity is "too common and general a characteristic or theme to even approach the degree of concreteness and particularity [*10] deserving of copyright protection." n16 Indeed, the idea of a game show where contestants must decide who is lying is fairly common; *The Liar's Club* and a British production entitled *Call My Bluff* are also television shows based upon the idea that contestants must choose who is lying and who is telling the truth. Nor is protection extended to a system of asking questions, the concept of a master of ceremonies and celebrity guests, or the true stories told on the show. It is only in original expression that defendant can claim copyright protection.

n13 *Reyher v. Children's Television Workshop*, 533 F.2d at 91.

n14 *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (citations omitted), cert. denied, 282 U.S. 902 (1931).

n15 See *Walker v. Time Life Films, Inc.*, 784 F.2d 44 (book *Fort Apache* not infringed by movie *Fort Apache: The Bronx* where both were based on events in particular police precinct but were otherwise dissimilar); *Warner Bros. Inc. v.*

American Broadcasting Cos., 654 F.2d 204 (Superman not infringed by television show The Greatest American Hero which was based upon character with superhuman powers but otherwise dissimilar to Superman character).

[*11]

n16 Warner Bros. Inc. v. American Broadcasting Cos., 654 F.2d at 209.

The final inquiry, then, is whether Bamboozle is substantially similar to the protected elements of defendant's To Tell the Truth so as to support a claim of improper appropriation. Defendant emphasizes that such differences as exist between To Tell the Truth and Bamboozle were purposely created so as to avoid infringement. Although such evidence may have an impact on whether defendant tortiously interfered with plaintiff's business dealings to the extent that it shows that defendant reasonably believed there was an infringement, it has no bearing on whether plaintiff's show, as finally filmed, infringes plaintiff's show. As the Second Circuit has often quoted with approval, "a [potential infringer] may legitimately avoid infringement by intentionally making sufficient changes in a work which would otherwise be regarded as substantially similar to [another work]." n17

n17 Warner Bros. v. American Broadcasting Cos., 720 F.2d at 241 (quoting Nimmer on Copyright); Warner Bros. v. American Broadcasting Cos., 654 F.2d at 211 (quoting same); Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 913 n. 11 (2d Cir. 1980) (quoting same).

[*12]

To determine at what point similarity becomes "substantial" is difficult. The test for infringement is of necessity vague and decisions must therefore be ad hoc. n18 To Tell the Truth begins with a long shot of three impostors standing together, then moves to an individual shot of the first impostor as the announcer asks, "Number One, what is your name?" When asked Number One answers, "My name is Dave Evans" or "My name is Grace Jones." After all three impostors have been asked and responded with the same name, the announcer then states "Only one of these is the real Dave Evans and has sworn to tell the truth." It is only after the celebrity panel is introduced that the announcer reads an account of the truth teller's unusual story. Bamboozle starts off with individual shots of the three "bamboozlers" as they state their real names and then describe different unusual events or occurrences. After they have told their stories, the announcer states, "Only one of these is for real.

Which one is it? You'll find out on the ultimate game of deception."

n18 Ideal Toy Corp. V. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966); Peter Pan Fabrics, Inc. v. Martin Weiner, Corp., 274 F.2d at 489.

[*13]

In To Tell the Truth, each of the celebrity panelists has a set period of time in which to ask any of the impostors questions. When a celebrity's time is up, the next celebrity begins questioning the impostors. During this questioning, a certain amount of comic bantering goes on, with the celebrities asking some "funny" questions and ribbing each other about the questions and answers. In Bamboozle, the method of questioning is different -- the panelists take turns asking one question at a time -- but the comic bantering is the same.

After the celebrities in To Tell the Truth have had an opportunity to question the impostors, each casts a vote for the impostor he or she believes is telling the truth. As the master of ceremonies asks, "Will the real [contestant's name] please stand up," the impostors all make motions toward standing up. Finally, one stands and is revealed as the truth teller. The master of ceremonies and celebrities then encourage the truth teller to elaborate on the heroic or unusual event. In Bamboozle, only the non-celebrity contestant casts a final vote, but casts it upon the advisory votes of the celebrity panelists. A series of lights then flash [*14] behind the "bamboozlers," ultimately staying on the truth teller. The truth teller's wacky talent is then demonstrated.

Turning now to defendant's specific claims of infringement, defendant does not allege that plaintiff has misappropriated particular words or statements from its show. Were this the case, it would be much easier to distinguish the idea from the protected expression to determine whether an infringement had taken place. For example, in Goodson-Todman Enterprises, Ltd. v. Kellogg Co., n19 the defendant cereal manufacturer had created an advertisement entitled "Know Your Tiger" in which panelists tried to pick out the "real Tony the Tiger." After questioning, the announcer said, "Will the real tony the Tiger please sit down." The Ninth Circuit found that summary judgment was inappropriate because it could not be said as a matter of law that no protectible elements of To Tell the Truth were copied.

n19 513 F.2d 913 (9th Cir. 1975).

The case at bar does not allege the copying of anything so concrete and recognizable as the line, "Will the real [contestant's name] please stand up." n20 Rather, the

claim is that plaintiff has appropriated the format of To Tell [*15] the Truth. the difference is between literally copying some portion of a work and copying the appearance, structure, or essence of a work without literally copying any part of it. n21 In the latter case, it is often more difficult to distinguish the idea from the protected expression.

n20 Bamboozle comes the closest to a literal copying of To Tell the Truth in the opening sequence when the announcer says, "Only one of these is for real. Which one is it?" In comparison, To Tell the Truth says in the opening sequence, "Only one of these three people is the real [contestant's name] and he has sworn to tell the truth." Because there are a limited number of ways to state that "only one" is genuine in a game where the object is to pick out one from many, the statement that "only one . . . is . . . real" is not entitled to protection.

n21 The difference can be described as "fragmented literal similarity" versus "comprehensive nonliteral similarity" as the terms, coined by Professor Nimmer, have made their way into the case law. See Warner Bros. v. American Broadcasting Cos., 720 F.2d at 242.

Many of the similarities between Bamboozle and To Tell the Truth [*16] flow from the logic and necessities of television game shows and as such are not protectible. Just as the fact that two shows are broadcast for one half hour five days each week cannot be an infringement because such formatting flows from the requirements of the broadcast companies, similarities dictated by the genre of the program cannot be prohibited. n22 Celebrities are featured in both shows because they increase the viewer's interest in the program. Questioning the liars is a vehicle for the celebrities to engage in the comic bantering which is a staple of game shows. Hesitating before revealing the truth is a device to create suspense. None of these devices can be protected. For an infringement to be found, the copied material must be more than stock element of television game shows. n23

n22 It would appear that the more unusual or arbitrary an element of a show is, the less likely it is to flow from the logic or necessity of the idea and the more likely it is to be protectible.

n23 See Warner v. American Broadcasting Companies. The fact that two superheroes wear tights and a cape does not amount to an infringement. Such outfits are stock items among super-

heroes: Superman, Batman, Robin, Mighty Mouse, Captain America, Underdog. [*17]

But even though a television game show is made up entirely of stock devices, an original selection, organization, and presentation of such devices can nevertheless be protected, just as it is the original combination of words or notes that leads to a protectible book or song. Copying of a television producer's selection, organization, and presentation of stock devices would therefore be a misappropriation. n24 It is on this point that summary judgment must be denied because it cannot be said, as a matter of law, that there is no similarity of protectible material in the overall composition of the shows. "Whether only 'idea' or the 'expression of that idea' has been copied is at least a close enough question that it should be decided by way of an evidentiary hearing on the merits and not by way of summary judgment." n25

n24 See Davis v. United Artists, Inc., 547 F. Supp. 722, 726 (S.D.N.Y. 1982) (in dramatic movie it is treatment of details, scenes, events, and characters that is protectible).

n25 Goodson-Todman Enterprises, Inc. v. Kellogg Co., 513 F.2d 913, 914 (9th Cir. 1975) (citations omitted).

The similarities between the shows are numerous: in both shows a panel [*18] of celebrities questions non-celebrity contestants who are lying; the liars state their names -- whether real or fictitious -- in the opening sequence; the subject of the deception is the person's occupation, hobby, or accomplishment; the deception is exposed by asking open-ended questions; the panelists vote on which one person is telling the truth; the truth is not immediately revealed but rather the audience is held in suspense; two such segments are aired in each half-hour show; and so on. Though each of these elements alone would not be afforded protection, the television producer's choice to combine them in this way may be protected. Whether the similarity between the protected. Whether the similarity between the protected expression is substantial is a question of fact, which cannot be decided on this motion for summary judgment.

CONCLUSION

After a close and detailed study of this extensive record, and a viewing of the Bamboozle pilot and a number of episodes of To Tell the Truth, the court is persuaded that the case is not one for summary judgment. the respective motions made by the parties to foreclose a trial should be, and the same hereby are, denied at this juncture [*19] of the case. The issue of whether the shows are so substantially similar as to constitute a misappro-

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priation should be resolved by way of a trial, either to the court or to a jury. n26 In so holding, this court is fully sensitive to use of the summary judgment rule to avoid long, protracted, and expensive litigation. n27 However, it may not be employed where substantial issues of genuine fact exist, as they do here.

n26 Cf. Twentieth Century Fox v. MCA, 715 F.2d 1327 (9th Cir. 1983).

n27 Davis v. United Artists, Inc., 547 F. Supp. at 724; Samuels v. Beheer, 500 F. Supp. 1357 (S.D.N.Y. 1980), aff'd, 661 F.2d 907 (2d Cir. 1981); Schwartz v. Broadcast Music, Inc., 180 F. Supp. 322 (S.D.N.Y. 1959)

So ordered.

Date: January 4, 1988, New York, New York.

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Analysis

As of: Feb 13, 2007

Barris/Fraser Enterprises, Plaintiff, v. Goodson-Todman Enterprises, Ltd, Defendants

No. 86 Civ. 5037 (EW)

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK**

638 F. Supp. 292; 1986 U.S. Dist. LEXIS 23091; Copy. L. Rep. (CCH) P25,988

July 8, 1986, Decided

July 8, 1986, Filed

COUNSEL: [**1]

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Pryor, Cashman, Sherman & Flynn, Stephen F. Huff, Esq., Phillip R. Hoffman, Esq., Tom J. Ferber, Esq., of counsel, New York, New York, for Defendant.

JUDGES:

Edward Weinfeld, D.J.

OPINION BY:

WEINFELD

OPINION:

[*292] EDWARD WEINFELD, D.J.

Plaintiff Barris/Fraser Enterprises (Barris/Fraser) is the producer of a pilot n1 of a television game show entitled "Bamboozle," which it is attempting to market as a series to the American Broadcasting Company (ABC). Defendant Goodson-Todman Enterprises, Ltd. (Goodson-Todman) is also a producer of television game shows and owns the copyright on the show "To Tell the Truth," which was shown on television for many years. Goodson-Todman, contending that Barris/Fraser's "Bamboozle" pilot bears some similarity to "To Tell the

Truth," wrote a letter to ABC on March 24, [*293] 1986, stating that if "Bamboozle" infringed upon its copyright on "To Tell the Truth," Goodson-Todman would "take all steps necessary to restrain [**2] and/or recover damages for any infringement of its rights." n2

n1 A pilot is a television program taped as a sample of a proposed series and used by television production companies to interest broadcasters in the series.

n2 Letter from Royal E. Blakeman to John Sias, President of ABC (Mar. 24, 1986).

Barris/Fraser has since commenced this declaratory judgment action for a decree that Goodson-Todman's letter constitutes tortious interference with its relationship with ABC and that "Bamboozle" does not infringe upon defendant's copyright. Barris/Fraser further seeks damages and a permanent injunction against defendant's alleged interference. Pending trial on the merits, Barris/Fraser moved for a temporary restraining order, which was denied, and now moves for a preliminary injunction requiring that defendant 1) refrain from communicating to any of the three major networks any claim that "Bamboozle" violates any of defendant's rights in "To Tell the Truth," and 2) withdraw in writing the threat of suit contained [**3] in its March 24 letter to ABC.

Barris/Fraser developed the concept of "Bamboozle" in January 1986, and in February 1986 it entered into a

contract with ABC to produce the pilot for the show. n3 The contract obliges ABC to reimburse Barris/Fraser for the cost of producing the pilot, and grants ABC an exclusive option to order "Bamboozle" as a series within nine months following delivery of the completed pilot to ABC. All payment for the pilot and the series, however, is contingent upon plaintiff's obtaining "errors and omissions" insurance for each, naming ABC as an insured. Although plaintiff's counsel has stated that plaintiff has not yet obtained such insurance, ABC has to date reimbursed plaintiff for \$150,000, or approximately half the cost of producing the pilot. Barris/Fraser completed the pilot and delivered it to ABC on March 26, 1986, and as of June 16, 1986, ABC was using the pilot in test marketing to determine the program's appeal to television audiences.

n3 The following description of the contract is based upon the redacted version supplied by the plaintiff.

[**4]

At about the time Barris/Fraser completed the pilot, the correspondence at the heart of this litigation ensued. On March 24, 1986, Goodson-Todman addressed to ABC the above-mentioned letter stating that if "Bamboozle" infringed upon the copyright on "To Tell the Truth," defendant would take legal action. ABC did not respond to the letter. Instead, plaintiff replied on April 1, 1986, stating that it did not intend to infringe upon defendant's copyright and did not believe that its pilot did so. Plaintiff wrote defendant again on May 12, 1986, this time sending a video cassette of the "Bamboozle" pilot and stating that if defendant did not withdraw its warning letter to ABC within a week, plaintiff would bring suit. Defendant did not reply, and plaintiff instituted this action on June 25, 1986.

The Second Circuit's standard for granting preliminary injunctions is well-established. A preliminary injunction should be granted "where the moving party demonstrates (1) irreparable harm and (2) either (a) a probability of success on the merits or (b) sufficiently serious questions going to the merits to make them fair grounds for litigation and a balance of hardships tipping decidedly in [**5] the moving party's favor." n4 Thus, before any consideration of the merits, the plaintiff has the burden of proving irreparable harm. To sustain this burden, plaintiff must show that it is "likely to suffer irreparable injury" if such relief is denied n5 and that "the alleged threats of irreparable harm are not remote or speculative, [*294] but are actual and imminent." n6 Plaintiff fails to meet this burden.

n4 *Church of Scientology Int'l v. The Elmira Mission of the Church of Scientology*, 794 F.2d 38, slip. op at 4253-54 (2d Cir. 1986); *Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, 780 F.2d 189, 192 (2d Cir. 1985).

n5 *In re Feit & Drexler, Inc.*, 760 F.2d 406, 415-16 (2d Cir. 1985); see *Proctor & Gamble Co. v. Chesebrough-Pond's, Inc.*, 747 F.2d 114, 118 (2d Cir. 1984); *Jackson Dairy, Inc. v. H.P. Hood & Sons*, 596 F.2d 70, 72 (1979).

n6 *State of New York v. Nuclear Regulatory Comm'n*, 550 F.2d 745, 755 (2d Cir. 1977).

Barris/Fraser alleges that Goodson-Todman's notice letter [**6] threatening copyright litigation has caused it three types of irreparable injury. These are 1) interference in the sale of "Bamboozle" as a series to ABC; 2) loss of profits from sales of "Bamboozle" in syndication and from exploitation of ancillary rights; and 3) injury to Barris/Fraser's reputation, credibility, and goodwill. Each of these claimed injuries will be discussed in turn.

Barris/Fraser's main claim of irreparable injury is the defendant's alleged interference in the sale of "Bamboozle" as a series to ABC. An affidavit from Budd Granoff, President of Barris Industries, states that the defendant's letter is "likely to have an adverse effect on ABC's consideration of BAMBOOZLE" and "casts a serious cloud" on the program. n7 ABC Vice President Wallace Weltman affirms in his affidavit that "the threat of a lawsuit is . . . a factor which ABC must consider when evaluating and making its decision with respect to BAMBOOZLE. . . . Thus, unless and until this threat is withdrawn, ABC cannot judge BAMBOOZLE solely on its merits." n8 As additional support for its claim of irreparable injury, plaintiff notes that ABC has not yet exercised its series option on "Bamboozle."

n7 Affidavit of Budd Granoff, June 16, 1986 at paras. 13, 15-16.

[**7]

n8 Affidavit of Wallace Weltman, June 30, 1986 at para. 5.

Upon a motion for a preliminary injunction, "the likelihood of injury and causation will not be presumed, but must be demonstrated in some manner." n9 Yet plaintiff has not presented any evidence that links defendant's letter with any action that may be taken or has

been taken by ABC. Barris/Fraser only asserts that the letter might be responsible for ABC's failure thus far to exercise its series option. In the face of plaintiff's lack of proof, however, defendant offers the plausible alternative explanation that ABC has not adopted the series yet because its market testing is not yet complete and because ABC would not, in any case, begin the series in the summer, when the size of the television viewing audience is at its ebb. Moreover, the statements of the ABC and Barris/Fraser officials are vague with respect to whether ABC might actually reject the offered series solely on account of the defendant's notice letter alleging infringement of its copyright on "To Tell the Truth." While it may be acknowledged that the threat of a lawsuit [**8] may be a factor influencing ABC's judgment with respect to exercising its rights under the contract, ABC officials have not indicated that the defendant's letter would cause their decision to differ from what it would be if the market testing proves favorable.

n9 *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 316 (1982). The cases cited by plaintiff in its reply brief to support its claim of loss of sales all had some concrete evidence of such loss. In the two Lanham Act cases cited, market research indicated that the alleged false advertising did mislead consumers. See *Coca Cola, supra*, at 317; *Vidal Sassoon, Inc. v. Bristol-Meyers Co.*, 661 F.2d 272, 278-79 (2d Cir. 1981). In two cases involving the circulation of claims of copyright infringement, there was evidence that some sales had already been lost because of the claims. See *Beacon Looms, Inc. v. S. Lichtenberg & Co., Inc.*, 552 F. Supp. 1305, 1314 (S.D.N.Y. 1982); *Solex Laboratories, Inc. v. Butterfield*, 202 F. Supp. 461, 462 (D. Ore. 1961) (relying upon facts in *Solex Laboratories, Inc. v. Plastic Contact Lens Co.*, 268 F.2d 637, 640 (7th Cir. 1959)).

[**9]

Plaintiff has attempted to bolster its argument that defendant's letter may prevent the sale of "Bamboozle" to ABC by asserting that the letter has made it difficult to obtain the "errors and omissions" insurance for the series that is required under the contract with ABC. Such insurance, although it is not clear from the moving papers, apparently covers claims of copyright infringement. Plaintiff's counsel asserts that because of defendant's letter, Barris/Fraser "may not be able to obtain insurance for 'Bamboozle,'" except upon payment of what he terms an "exorbitant" [*295] sum. n10 And in a letter sent to the Court after decision had been reserved at oral argument, plaintiff's counsel further suggests that the reason

why ABC has only reimbursed Barris/Fraser for half the cost of producing the pilot is that plaintiff has not yet obtained the required errors and omissions insurance for the pilot. n11

n10 Affidavit of Roger Sherman, June 30, 1986, at paras. 6-7.

n11 An alternative explanation for the half payment may simply be that the full payment is not yet due. Plaintiff's contract states that ABC will pay the production costs for the pilot according to a schedule that was not supplied to the Court.

[**10]

Yet plaintiff has made no showing at all that it cannot obtain the needed insurance. Plaintiff has presented no evidential matter concerning what ABC expects the errors and omissions insurance to cover, what a normal premium is, what increase in the premium is due to the defendant's letter, n12 and what increase plaintiff can afford. Moreover, plaintiff makes no mention of seeking such insurance from any source other than its current insurer. The fact that plaintiff may have to pay an increased premium is irrelevant to the rights asserted by the parties and does not establish irreparable harm. Indeed, if plaintiff purchases the insurance it will not only prevent irreparable harm to its relationship with ABC, but it will also render the alleged cost of defendant's notice letter more readily quantifiable in the event that plaintiff ultimately succeeds in its copyright litigation.

n12 Plaintiff has supplied copies of its errors and omissions policies for the television series "We Love the Dating Game" (a program previously insured under the name "The Dating Game") and "The New Newlywed Game," also previously insured. Plaintiff, however, has made no representation to the Court that the premiums charged for these policies are comparable to what would be charged for a policy on the new program, "Bamboozle," if defendant had not sent its letter.

[**11]

Barris/Fraser's additional claims of irreparable injury -- loss of profits from syndication and exploitation of ancillary rights, and loss of goodwill and injury to reputation -- are no more convincing. Plaintiff's proof that these harms will come about depends in the first place on its proof that defendant's letter will cause ABC to reject the series. This dependence is evident from plaintiff's

explanation that profits from syndication and exploitation of ancillary rights are threatened if a network does not first broadcast the series n13 and from plaintiff's argument that goodwill would be injured if ABC "fails to maintain its dealings" with plaintiff. n14 Because plaintiff has not proven that defendant's letter will lead to rejection of the series by ABC, it has not proven these further injuries. Moreover, if Barris/Fraser is concerned that litigation over "Bamboozle" will tarnish its reputation and destroy its goodwill more generally, it has introduced no evidence that this is likely to occur. Indeed, the fact that ABC -- the only party known to have received defendant's letter -- is continuing to deal with plaintiff suggests that plaintiff's reputation is not endangered. Such [**12] damage cannot be presumed simply from the fact that defendant sent its letter.

n13 Affidavit of Roger Sherman, June 30, 1986, at para. 4.

n14 Plaintiff quotes *Beacon Looms, Inc. v. S. Lichtenberg & Co., Inc.*, 552 F. Supp. 1305, 1314 (S.D.N.Y. 1982).

Given the lack of proof needed to sustain its burden to establish an immediate threat of irreparable injury, plaintiff's motion for a preliminary injunction seems actually to be an effort to obtain an advisory opinion from this Court that "Bamboozle" does not infringe upon "To Tell the Truth." Such an opinion would no doubt be useful to plaintiff in negotiating for lower insurance premiums. Yet to grant plaintiff its requested relief on the basis of its assertions during (and after) its motion argument would be virtually tantamount to giving plaintiff the declaratory judgment it would be entitled to receive only if it prevailed upon a full trial on the merits.

Facts potentially critical to a determination of the contested issues have not been fully probed. [**13] The defendant contends that [*296] one of its former employees who played a significant role in the production of "To Tell the Truth" has also played a significant role in the production of "Bamboozle," with the implication that his familiarity with "To Tell the Truth" led to the use of alleged infringing material in "Bamboozle." Yet defendant has to date conducted no discovery of plaintiff and its agents, including the former Goodson-Todman employee. Such discovery might well disclose facts that bear on the plaintiff's likelihood of success on the merits of the basic controversy.

The first essential for the grant of a preliminary injunction is proof of irreparable harm. As the Second Circuit has repeatedly held, a preliminary injunction is an "extraordinary" remedy, to be granted only on a "clear showing" of such harm. n15 Because plaintiff has failed to offer persuasive evidence linking defendant's threat of litigation to any irreparable injury, plaintiff's motion for a preliminary injunction is denied. The contested issues should be decided upon a trial on the merits and if the parties proceed with due diligence the case may readily proceed to trial.

n15 *Diversified Mortgage Investors v. U.S. Life Title Ins. Co.*, 544 F.2d 571, 576 (2d Cir. 1976); *Schneider v. Whaley*, 541 F.2d 916, 921 (2d Cir. 1976); see also *Medical Soc'y of State of New York v. Toia*, 560 F.2d 535, 538 (2d Cir. 1977) (stating that interim injunctive relief is "an extraordinary and drastic remedy which should not be routinely granted").

[**14]

So ordered.