

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
FRANKLIN COUNTY, ILLINOIS

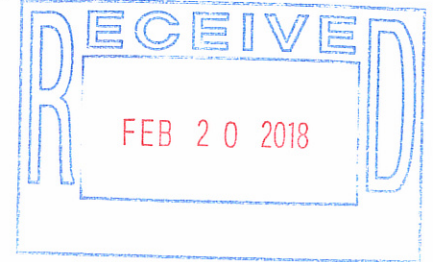
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Jim Maize
FRANKLIN COUNTY CIRCUIT CLERK

In re Marriage of)
Linda Sue Shelton,)
 Petitioner,)
 vs.)
Danny Lee Shelton,)
 Respondent.)

2005-D-30



ORDER

On July 24, 2017, a hearing was held on the Respondent's Motion For Directed Finding. It was filed on June 14, 2017, the Petitioner having filed a Response To Motion For Directed Finding on July 18, 2017, and the Respondent having filed a Reply to said Response on July 21, 2017. Attorney Kurt B. Bickes of Decatur, Illinois, appeared for and with the Petitioner, Linda Sue Shelton and Attorney Morris Lane Harvey of Mt. Vernon, Illinois, appeared for and with the Respondent, Danny Lee Shelton. At the hearing, and the two day presentation of evidence by Petitioner which is the subject of Respondent's motion at bar, counsel, as is their wont, provided the Court with literally thousands of pages of case opinions, exhibits, and deposition transcripts not to mention the manuscript and the three published books at issue. Over the course of several months since the

hearing on the Respondent's Motion For Directed Finding, the Court has reviewed this mountain of material in pertinent part, the task of which reminds it of something Michelangelo once said: "Every block of stone has a statue inside it and it is the task of the sculptor to discover it." While the Court does not consider itself a highly talented sculptor of legal rulings nor this ruling to be a masterpiece, nevertheless the sentiment of the quote seems fitting in this situation.

The Court also has considered the aforesaid pleadings together with arguments of counsel; and, as usual, counsel have done an outstanding job in serving their respective clients. WHEREFORE, THIS COURT MAKES THE FOLLOWING FINDINGS:

1. The gist of this suit was set out by a Rule 23 Order issued in this cause by the Illinois Fifth District Appellate Court in *In re Marriage of Shelton*, 2013 IL App (5th) 120274-U in which the Appellate Court concluded that the pivotal question here is the legal relationship between the Respondent's manuscript of November, 2003, entitled *The Ten Commandments Twice Removed* and three books each authored by the Respondent and Shelley J. Quinn, namely: *The Antichrist Agenda Ten Commandments Twice Removed*, *The Ten Commandments Never Forget God's Words*, and *Ten Commandments Twice Removed*. It is undisputed that *The Antichrist Agenda*

Ten Commandments Twice Removed is essentially the template for the other two books, so throughout these proceedings reference is often made by both sides to “the book” as opposed to “the books”.

2. In the aforesaid Order, the Appellate court, referring to the Respondent as Danny and to the Petitioner as Linda, stated at paragraph 25:

“The parties agree that the manuscript was created by Danny during the course of the marriage and, as the trial court correctly ruled in its February 16, 2012, order, is marital property. As the owner of the copyright to the manuscript, one of Danny’s rights was the right to transfer to Shelley Quinn the right to create one or more derivative works based upon the manuscript. Although Linda does not own the copyright to the manuscript, the manuscript is marital property, and Linda therefore is entitled to an economic interest in the copyright that is attached to the manuscript.”

The Appellate Court then went on to say at paragraph 26:

“Accordingly, whether the books are, or are not, derivative works of the manuscript is of no small significance. If they are, then when Danny gave Shelley permission to create the books as derivative works, he conveyed to Shelley a right to which Linda held an economic interest; Linda, therefore, would have the right to ask the trial court to place a monetary value on her economic interest in the right that Danny conveyed to Shelley. The determination, however, of whether the books are derivative works of the manuscript (and, if so, the determination of the value of Linda’s economic interest in the right Danny conveyed to Shelley by giving her permission to create them) is best left to the trier of fact, after: (1) full briefing of this issue, (2) the presentation of evidence (including the facts set forth in detail at the beginning of this order, as well as additional evidence and, to the extent the parties deem it desirable, expert testimony), and (3) argument.”

3. As stated above, the matter before the Court now is the Respondent’s

Motion For Directed Finding filed following the Petitioner's resting of her case in chief presented to this Court on February 27th and 28th of 2017. Said Motion is filed pursuant to 735 ILCS 5/2-1110, which provides in pertinent part that:

"In all cases tried without a jury, defendant may, at the close of plaintiff's case, move for a finding or judgment in his or her favor. In ruling on the motion the court shall weigh the evidence, considering the credibility of the witnesses and the weight and quality of the evidence. If the ruling on the motion is favorable to the defendant, a judgment dismissing the action shall be entered."

4. In ruling on a motion for directed finding, the Court, unlike in criminal cases, is not to view the evidence in the light most favorable to the Petitioner, and it must engage in a two-part analysis. First, the Court must determine, as a matter of law, whether the petitioner has presented a *prima facie* case. A petitioner establishes a *prima facie* case by presenting at least some evidence on every element essential to his cause of action. If the Court finds that the Petitioner has presented a *prima facie* case, then the Court moves to the second part of the analysis which is that the Court must consider the totality of the evidence presented by the Petitioner, weighing all the evidence, determining credibility and drawing reasonable inferences therefrom. After weighing the quality of all the Petitioner's evidence, the Court should determine, applying the standard of proof required for the

Petitioner's *prima facie* case, whether sufficient evidence remains to establish the Petitioner's *prima facie* case. If the Court finds that sufficient evidence still remains to establish the Petitioner's *prima facie* case ("some evidence on every element essential to the cause of action"), the Court should deny the Respondent's motion and proceed with the trial. *Kokinis v. Kotrich*, 81 Ill.2d 151 (1980), *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264 (2003).

5. Additionally, in weighing the evidence as part of the aforesaid two-part analysis, it is only the evidence presented by the Petitioner that is to be considered by the Court. *Century-National Insurance Company v. Tracy*, 316 Ill. App. 3d 639 (2nd Dist; 2000). For this reason and in an attempt to be as fair as possible to the Petitioner in deciding Respondent's Motion, the Court has not considered any of the deposition of Professor Frye, an expert engaged by the Respondent, even though said deposition was admitted into evidence in the Petitioner's case, subject to certain objections, and even though the Court is well aware that it ruled that it would consider said deposition in making this ruling. The Court also has not considered his report or any other evidence originating from him.

6. The standard of proof to be applied in this case is preponderance of the evidence.

7. On July 22, 2016, this Court entered a Declaratory Judgment which held in pertinent part:

“3. The test for what constitutes a derivative work is that “[a] work will be considered a derivative work only if it would be considered an infringing work if the material which it has derived from a prior work had been taken without the consent of a copyright proprietor of such prior work. *Shelton, supra* at paragraph 24 citing *United States v. Taxe*, 540 F.2d 961, 965 n.2 (9th Cir. 1976).

4. The test for what constitutes an infringement on a copyright in this case is that the protected parts of the two works are substantially similar in either expression or structure. *Leary v. Manson*, 118 F. Supp.3d 460 (2015).”

8. The Petitioner has consistently maintained that the infringement applicable to this case involves Shelley Quinn’s appropriation of the structure of Respondent’s manuscript and not the expression aspect of it; i.e. what is known in the field of copyright law as non-literal infringement.

9. The crux of the task of the Petitioner is, then, to prove by a preponderance of the evidence that the structure of the aforesaid books is substantially similar to the structure of the protected parts, if any, of the Respondent’s aforesaid manuscript.

10. The Petitioner did present some evidence on each element of her cause of action and has therefore established enough, albeit thinly, for a *prima facie* case thereby meeting the requirements of the first part of the

two-part analysis set out above for motions for directed finding. *Kokinis v. Kotrich, supra*. The Court bases this finding on the following:

A. In the Respondent's deposition, which is in evidence in the Petitioner's case in chief, the Respondent acknowledges that he and only he wrote the manuscript. Also, the Petitioner's expert and only witness, a University of Illinois College of Law professor, opined that within a reasonable degree of certainty within the field, the structure of the manuscript is original. So, this is some evidence, such as it is, that the structure of the manuscript is original to the Respondent and therefore protected by copyright.

B. The Petitioner's expert also testified that within a reasonable degree of certainty within the field, it was his opinion that the structure of the manuscript and the structure of the three books in question were substantially similar.

11. In taking up the second part of the aforesaid two-part analysis, the Court must determine whether sufficient evidence still remains to support the Petitioner's *prima facie* case.

12. In so doing, as is set out in paragraph 4, above, the Court must weigh the totality of the Petitioner's evidence, determining credibility and drawing reasonable inferences therefrom:

A. As to the originality and therefore the protected status of the Respondent's manuscript, and, if such exists,

B. As to the issue of infringement upon its structure by the subject books.

13. With regard to whether the structure of the Respondent's manuscript is original, the Petitioner has failed to meet her burden of proof, and therefore the structure is not protected by Federal copyright law. The Court makes this finding for the following reasons:

A. As to just what copyright protects, the Court agrees with the guidelines set out in Respondent's citation of the following law:

"The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the *sine qua non* of copyright; copyright protection may extend only to those components of a work that are original to the author." *Feist Publications Inc. v. Rural Telephone Service Co.*, 499 US 340, 348 (1991).

"In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C.A. §102(b).

"Where we compare products that contain both protectable and unprotectable elements, our inspection must be 'more discerning'; we must attempt to extract the unprotectable elements from our consideration and ask whether the protectable elements, standing alone, are substantially similar." *Knitwaves, Inc. v. Lollytogs Ltd. (Inc.)*, 71 F.3d 996, 1002 (2d Cir. 1995).

“The concepts or ideas set forth in works of authorship, without more, are not protectable by copyright.” *FMC Corporation v. Control Solutions, Inc.*, 369 F.Supp.2d 539, 560 (E.D. Penn. 2005).

B. The Respondent’s manuscript is a very lengthy *opus* considering that it is apparently an attempt to make a single, relatively obscure, theological point. It is fraught with Christian Bible references, whether they be cites, quotes, Bible history or the recounting of illustrations therefrom. In addition, the manuscript contains a huge number of statements which are stock Christian tenets of faith; known, I’m sure, to most people who identify as Christians, and many of which the Petitioner’s expert assumed are common to the Seventh Day Adventist denomination. Indeed, the Respondent characterized himself in his deposition as having been the best-known Seventh Day Adventist in the World at one time, so it seems fair for the Court to assume that he is quite knowledgeable in that denomination’s religious doctrine. Also of note, many, many references to and recountings of ancient and modern history appear in the manuscript. All of these words, except those not protected by virtue of the statute cited above, are phrases and sentences known as *scènes à faire* which arises when an author uses incidents, characters, features or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic and therefore cannot be protected by copyright. *Incredible Technologies, Inc. v.*

Virtual Technologies, Inc., 400 F.3d 1007, 1011-1112 (7th Cir. 2005). *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1444 (9th Cir. 1994). *Duffy v. Penguin Books USA Inc.*, 4 F.Supp.2d 268, 272-73 (S.D.N.Y. 1998).

C. If all of the *scènes à faire* material and material not otherwise protected by copyright law were deleted from the manuscript, as it must be in this analysis, there would be little text left, save references to the Respondent's personal life and some of his statements of advocacy. Put another way, there is so much *scènes à faire* text and other statutorily unprotected text in the manuscript as to render its so-called structure to be insufficient in originality for a comparison to the subject books within the meaning of prevailing copyright law.

D. No evidence was presented by the Petitioner to show that the structure of the manuscript was original to the Respondent save the testimony of the Petitioner's expert. That expert's testimony gave no credible basis for his opinion as to originality of structure. The expert stated that his opinion was based on subjective analysis and that he did not make any attempt whatsoever to determine whether the structure of the manuscript was original or similar to other works on the Seventh Day Adventist denomination or any other religion. It appears that his opinion that the

manuscript's structure was original was based on his subjective belief that the Respondent created it with really nothing more to support that opinion.

14. But, assuming *arguendo* that the Court had found that the Petitioner had met her burden of proof that the Respondent's manuscript was original in structure and had moved on to the issue of infringement, the Court would not have found the manuscript and the books to be substantially similar in structure for the following reasons:

A. The Court would embrace the Respondent's argument that in determining "substantial similarity" the structures of the manuscript and the books should be "virtually identical", because the manuscript consists largely of unprotected non-literal material. *Frybarger v. Int'l Bus. Machines Corp.*, 812 F.2d 525, 530 (9th Cir. 1987); *Worth v. Selchow & Righter Co.*, 827 F.2d 569, 573 (9th Cir. 1987); *Cooling Systems & Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485, 492 (9th Cir. 1985); *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 205 (9th Cir. 1989). That test is definitely not met in the case at bar. The manuscript is not divided into chapters and has no discernable outline. It is a 42 page, single spaced, fine print somewhat rambling work with considerable repetition of points. The books are much more sophisticated, each containing an introduction, chapters and an epilogue; and as the Court and the Petitioner's expert

observed, the books contain considerably more information than the manuscript and their actual structure is not even close to the same as the manuscript.

Federal copyright case law supports the above definition of “substantial similarity”, when applied to comparing the structures of a work which contains a very high percentage of unprotected material and an infringing work. The Court rejects the Petitioner’s argument that to apply the law here is unfair to her. The Court, in its much touted July 22, 2016, Declaratory Judgment, ruled that, based on this court’s interpretation of established case law, “substantial similarity” would be the standard to be applied here. Both parties accepted that ruling, neither making a move toward reconsideration or appeal. Obviously, that standard must be applied consistent with prevailing applicable Federal copyright case law, as cited above.

B. To put it as kindly as the Court can, the testimony of the Petitioner’s expert left much to be desired; and his credibility was thereby seriously damaged.

1. At no time did he compare the complete structure of the two works, including their many differences, however, he admitted that there were structural differences between the manuscript and the books.

2. He did not construct a complete structural outline of each work.
3. He did not consider the actual chapters of the books, omitting from his consideration five entire chapters out of fourteen of *The Antichrist Agenda Ten Commandments Twice Removed*, the first of the three published books.
4. He, in effect, asserted that the organization of the books was not relevant to his analysis of structure comparison.
5. He admitted that in making his structural comparison of the two works, he left out a little over 25% of the manuscript.
6. He admitted that many of the same subjects covered in the manuscript and the books were not presented in the same order in at least six instances.
7. He was, in fact, confronted or impeached with his own deposition testimony on numerous occasions under cross examination. No purpose will be served in enumerating all of them here, but, suffice it to say, he obviously did not review his deposition before testifying, and he had to be reminded that he had sought assistance in his expert analysis through an e-mail listserv. He did state that it was his first time to testify as an expert, however.

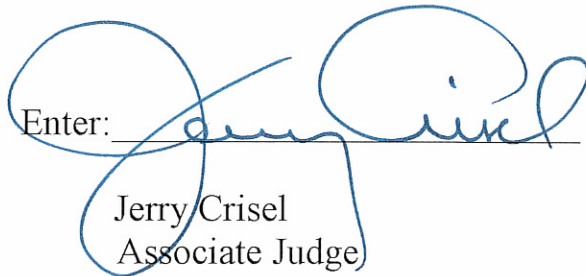
8. Lastly, and perhaps the strain under cross-examination is to blame, but the Petitioner's expert was, at times, argumentative, evasive and smart-alecky, thereby further hurting his credibility in the eyes of the Court.

15. Therefore, in assessing the totality of the Petitioner's expert's testimony in the weighing process, the evidence presented by him did not give the Court confidence in it and so his testimony was not, by and large, credible. The Court's assessment of the Petitioner's expert's testimony and manner while testifying is not meant as a personal criticism of the expert. His professional achievements at such a relatively young age are quite impressive and they have brought him some admiration by the Court.

16. Further, it is for the reason that the Court finds the Petitioner's expert's testimony to lack the necessary credibility and for the reason that the Court's own assessment and comparison of the structures of the manuscript and the published books, that even if the Court had not applied the "virtually identical" definition of the "substantially similar" standard, the Court, nevertheless, would not have found that the Petitioner had proved by a preponderance of the evidence that the manuscript and the books are substantially similar in structure. Indeed, the essence of Petitioner's argument appears to be that some similarity constitutes substantial similarity. That just is not the case here.

NOW, THEREFORE, the Court having made the foregoing findings, the Respondent's Motion For Directed Finding is GRANTED and the Petitioner's Petition is DISMISSED with prejudice.

Dated: February 12, 2018

Enter: 
Jerry Crisel
Associate Judge