

FILED

99 AUG 18 AM 11:54

LANCE S. WILSON
CLERK
BY _____ DEPUTY

U.S. DISTRICT COURT
DISTRICT OF NEVADA
ENTERED & SERVED

AUG 18 1999

CLERK, U.S. DISTRICT COURT
BY _____ DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

STEPHEN E. POE, CV-N-99-006-HDM (RAM)
Plaintiff,
v. ORDER

ROY TRAYWICK YOUNG, a natural
person; AnhR Publication, a
business form, unknown, and
DOES I-X,
Defendants.

Before the court is defendant Roy Young's ("Young") motion for summary judgment (#19) and related motions. Plaintiff Stephen Poe ("Poe") alleges that Young's version of a concordance entitled "Big Book Concordance," which is an index of every significant word used in the book entitled "Alcoholics Anonymous" (a.k.a. the "Big Book," infringes upon a concordance prepared by Poe. Poe asserts five claims for relief: negligence, interference with present contractual relationships, interference with prospective contractual relationships, copyright infringement, and conversion. Poe is a Nevada resident who has a copyright on his 1990 book entitled "A Concordance to Alcoholics Anonymous." Poe claims that

1 he used the third edition of the Big Book to make his concordance.
2 Currently, the third edition, first printed in 1976, is the edition
3 that is being printed. Poe states that he used a complex computer
4 program to establish his concordance. He maintains the process was
5 difficult and time consuming. Young, a New York resident, used his
6 personal computer to make a concordance of the Big Book. Young
7 made his version available on the Internet in 1997, and shortly
8 thereafter was contacted by Poe's attorney, who claimed that Young
9 was infringing on Poe's copyright.

10 Summary judgment is appropriate where the pleadings,
11 discovery, and affidavits show that there is no genuine issue as to
12 any material fact, and that the moving party is entitled to
13 judgment as a matter of law. Fed. R. Civ. P. 56(c). The initial
14 burden is on the moving party to show the absence of material
15 factual issue. *De Homey v. Bank of America National Trust and*
16 *Savings*, 879 F.2d 459, 464 (9th Cir. 1989). An issue is genuine
17 only "if the evidence is such that a reasonable jury could return a
18 verdict for the non-moving party. *Anderson v. Liberty, Inc.*, 477
19 U.S. 242, 248-50 (1986). The burden on the moving party defendant
20 "may be discharged by 'showing'--that is, pointing out to the
21 district court--that there is an absence of evidence to support the
22 nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317,
23 325 (1986)

24 Once the moving party meets its burden, the burden then shifts
25 to the non-moving party to set forth specific facts demonstrating a
26 genuine issue for trial. *Program Engineering v. Triangle*
27 *Productions*, 634 F.2d 1188, 1193 (9th Cir. 1980) . A party opposing
28 a motion for summary judgment must introduce `sufficient evidence

1 supporting the claimed factual dispute...to require a jury or judge
2 to resolve the parties' differing versions of the truth at trial.'
3 A mere scintilla of evidence will not do, for a jury is permitted
4 to draw only those inferences of which the evidence is reasonably
5 susceptible; it may not resort to speculation. *British Airways*
6 *Board v. Boeing Company*, 585 F.2d 946, 952 (9th Cir. 1978) (citation
7 omitted). When considering a motion for summary judgment, the
8 court must view the facts and inferences drawn therefrom most
9 favorable to the non-moving party. *Baker v. Centennial Ins. Co.*,
10 970 F.2d 660, 662 (9th Cir. 1992)

11 To succeed on the merits of a copyright infringement
12 claim, Poe must prove 1) ownership of a valid copyright, and 2)
13 copying of constituent elements of the work that are original.
14 *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S.
15 340, 361 (1991) (citation omitted). The first requirement is not
16 contested. Poe has a valid copyright. The second requirement,
17 that there is copying of original material, is dispositive of the
18 motion for summary judgment. To prove copying, Poe must
19 demonstrate that Young had access to Poe's concordance and that
20 Young's concordance is substantially similar to the protectable
21 expression in Poe's concordance. *Apple Computer v. Microsoft Corp.*,
22 35 F.3d 1435, 1442 (9th Cir. 1994).

23 Poe cannot establish that Young's concordance is substantially
24 similar to Poe's protectable expression. First, Young contends
25 that Poe's version is entitled to little or no protection. Poe's
26 concordance is considered a "compilation" under the Copyright Act
27 of 1976 because it was created by collecting and assembling
28 existing data. The scope of protection afforded a compilation is

1 set forth expressly in § 103 of the Copyright Act and "extends only
2 to the material contributed by the author of such work,
3 distinguished from the preexisting material employed in the work,
4 and does not imply any exclusive right in the preexisting
5 material." 17 U.S.C. § 103(b).

6 Poe actually states in the preface of his concordance that
7 "All text on every page of the Concordance is pure Third Edition
8 Big Book text. There are no changes, interpretations, or
9 modifications whatsoever." Thus, whatever material Poe copied from
10 the Big Book is not original. The page numbers that he copied are
11 not original. Merely creating an alphabetical listing of the words
12 that appear in the Big Book is not original. As the Supreme Court
13 has stated, alphabetizing names in listings is "an age-old
14 practice, firmly rooted in the tradition and so commonplace that it
15 has come to be expected as a matter of course." *Feist*, 499 U.S. at
16 363 (listing of names in white pages of telephone book not
17 original, nor deserving of protection). Therefore, Poe's creation
18 of listing each word alphabetically and providing the corresponding
19 page number is not original material deserving of protection. Poe
20 claims that putting the words in bold typeface in the Big Book was
21 original expression. However, this does not constitute protectable
22 expression. Putting the subject word in bold type to set it apart
23 from the accompanying definition is a standard practice. Moreover,
24 Poe bolded every single cited word, thus he did not demonstrate
25 original expression by choice of arrangement.

26 The only remaining element in examining Poe's concordance is
27 his word selection. Poe indicated that he included every word
28 except those that are excluded generally due to their common usage,

1 || such as a, an, and, any, are, as, at, etc. This is not original
2 || material that he contributed that deserves protection.

3 || Accordingly, there appears to be no creativity deserving of
4 || protection in this concordance.¹

5 || Second, Poe cannot establish that Young substantially copied
6 || the similar words. While Poe excluded words that are most commonly
7 || used in the English language, Young excluded words based on their
8 || frequency and significance in the Big Book. As a result of the
9 || different criteria employed by Young and Poe, their concordance
10 || versions contain many differences in word structure. For example,
11 || Young's version contains the words did, can, any, too, said,
12 || himself, I'm, I've, it's, and that's. The inclusion of words in
13 || Young's version that are not contained in Poe's version suggests
14 || the work was not copied.

15 || Also, there is no evidence of tell-tail signs of copying. For
16 || example, Poe does not point to any common errors between the two
17 || works that would be evidence of copying. In fact, in examining 50
18 || random words (the first and last 25) of Poe's concordance and
19 || comparing it to Young's version, it results in a different number
20 || of references to that word in 18 of the 50 words (36%). These
21 || differences further show that Young did not copy Poe's work.
22 || Because there is no evidence that there is a substantial similarity
23 || between the protectable expression of Poe's version and Young's

24 || _____
25 || ¹The forward, preface, and acknowledgments and appendices are
26 || original in Poe's version, thus deserving of protection. However,
27 || these aspects of the work were not contained in Young's work, and are
28 || not the subject of this litigation.

1 version, Poe has failed to show that a material issue of fact
2 exists upon which he can prove copying of original material.
3 In addition to the copyright infringement claim, Poe asserts
4 four state law claims against Young. The Copyright Act provides
5 that state law claims are preempted if they create "legal or
6 equitable rights that are equivalent to any of the exclusive rights
7 within the general scope of copyright as specified by Section 106."
8 17 U.S.C. § 301(a). A state law claim is preempted by the
9 Copyright Act unless the state law contains an extra element that
10 is not included in the federal copyright claim and which changes
11 the nature of the state law claim so that it is qualitatively
12 different from a copyright infringement claim. *Summit Tool Mfg.*
13 *Corp. v. Victor CNC Systems, Inc.*, 7 F.3d 1434, 1442 (9th Cir.
14 1993).

15 Poe asserts a claim of negligence. Poe contends that Young
16 had a duty to refrain from copying the page numbers from Poe's
17 concordance and had a duty to search the literature to ensure no
18 copyright violations occurred. In *Dielsi v. Falk*, 916 F. Supp. 985
19 (C.D. Cal. 1996), the court held that a negligence claim was
20 preempted by the Copyright Act where the claim "merely
21 recharacterizes a copyright infringement claim as one for
22 negligence." *Id.* at 992. Here, Poe's negligence claim is
23 qualitatively similar to Poe's copyright infringement claim, thus
24 the negligence claim is preempted by the copyright claim.

25 Poe also asserts a claim for intentional interference with
26 present contractual relationships in count 2 and intentional
27 interference with prospective business relationships in count 3.
28 Claims for intentional interference with contractual relationships

1 are preempted by the Copyright Act where the alleged interference
2 is based on copyright infringement. See *Worth v. Universal*
3 *Pictures, Inc.*, 5 F. Supp.2d. 816, 822 (C.D. Cal 1997); *Motown*
4 *Record Corp. v. George A. Hormel & Co.*, 657 F. Supp. 1236, 1240
5 (C.D. Cal. 1987). In this case, Poe's claim for intentional
6 interference with contractual relationships and prospective
7 business relationships are based upon the act of copyright
8 infringement. Essentially, the same conduct Poe alleges for the
9 copyright infringement claim is alleged for the intentional
10 interference claims.

11 Finally, Poe asserts a claim of conversion in count 5.
12 Conversion is also preempted by the Copyright Act if the acts
13 alleged as to conversion are the same as those underpinning the
14 copyright claim. See *Worth v. Universal Pictures, Inc.*, 5 F.
15 Supp.2d. 816, 822-823 (C.D. Cal 1997); *Dielsi v. Falk*, 916 F. Supp.
16 985 (C.D. Cal. 1996). In this case, there is nothing in the
17 conversion claim that would render it qualitatively different from
18 the copyright infringement claim. The same alleged facts are the
19 basis for both causes of action.

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

