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### **PRELIMINARY STATEMENT**

This is an action brought under the Copyright Act seeking injunctive relief ordering the Defendants to turn over copies of tape recorded interviews Plaintiff conducted with Gilda Radner in the late 1980s (“Taped Interviews”). Injunctive relief is necessary so that Plaintiff can register her copyrights in the Taped Interviews and pursue copyright infringement claims against the Documentary Defendants, who copied and used excerpts of the Taped Interviews in a recently released documentary about Gilda Radner entitled, *Love, Gilda*, without compensating or crediting Plaintiff.

### **FACTUAL BACKGROUND**

Plaintiff is a professional journalist. For many years, she was a regular contributor to *Rolling Stone* magazine and she has published stories in many other publications. Plaintiff is the author of *Osler’s Web* and other highly acclaimed books.

In the spring of 1987, Simon & Schuster hired Plaintiff to conduct a series of interviews with Gilda Radner, who was then suffering from ovarian cancer and had a book contract to write about her experience. Plaintiff’s task was to draw Radner out and help her to organize her thoughts for the book. There were several writers vying for the job and Gilda Radner chose Plaintiff. FAC ¶ 11.

Plaintiff’s interviews of Radner resulted in numerous audiotapes (hereinafter the “Taped Interviews”), the fruit of their weekly lunch dates at the Good Earth health food restaurant in the Westwood neighborhood of Los Angeles and later in Connecticut, and an outline for the autobiography. Plaintiff invested significant time and effort creating and organizing questions for the Taped Interviews and her creativity and skill as an interviewer resulted in material that contributed to the commercial success of Gilda Radner’s autobiography, entitled *It’s Always*

*Something*, which was published by Simon & Schuster in 1989. In view of Plaintiff's significant contributions to the Taped Interviews and the intent of Plaintiff and Radner to jointly work together to generate content for Radner's book, Plaintiff is, at least, a co-owner of the copyrights in the Taped Interviews, which are not (contrary to Defendants' assertions) merely "dictations" of the initial draft of the manuscript but rather separate and discrete copyrighted works. FAC ¶¶ 12-15.

In or about the fall of 2016, the Producer of *Love, Gilda*, Lisa D'Apolito, contacted Plaintiff to say that she had come across the Taped Interviews in Defendant Michael Radner's attic.<sup>1</sup> D'Apolito was very excited about the prospect of using the Taped Interviews in her movie and wanted to do an interview with Plaintiff. Recognizing the extraordinary value of the Taped Interviews and her unique expertise as to their creation, Plaintiff asked for a modest sum of money in exchange for her cooperation, but Plaintiff never heard from D'Apolito or anyone else connected with *Love, Gilda* again. FAC ¶ 16.

In or about August of 2018, Plaintiff saw a synopsis and trailer for *Love, Gilda* released by the Defendants on the Internet. The synopsis and trailer make reference to "recently discovered audiotapes" that "open up a unique window" into Gilda Radner "whose greatest role was sharing her story." Based on the synopsis and trailer and the call from D'Apolito, it was evident that the "recently discovered audiotapes" were used in the film and that the "recently discovered audiotapes" referenced in the synopsis and trailer for *Love, Gilda* are Plaintiff's Taped Interviews of Gilda Radner. FAC ¶¶ 17-18.

On August 10, 2018, counsel for Plaintiff wrote to Defendant Magnolia Films

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<sup>1</sup> According to the Documentary Defendants, Michael Radner is Gilda Radner's brother. It is unclear, without discovery, how or when he came into possession of the Taped Interviews and what his rights are in them.

notifying them of Plaintiff's ownership interest in the Taped Interviews and demanding that Plaintiff "receive appropriate credit in *Love Gilda*" and "be fairly and reasonably compensated for her undeniable contribution to the film." On September 4, 2018, counsel for Defendant 3 Faces films LLC responded refusing to provide credit or reasonable compensation to Plaintiff. The tone of counsel's letter made clear that Documentary Defendants had no intention of resolving this matter amicably. FAC ¶¶ 22-23.

On September 21, 2018, *Love, Gilda* was released by the Defendants and significant use was made of excerpts from the Taped Interviews without any credit or compensation to Plaintiff. FAC ¶ 24.

## **ARGUMENT**

### **I. LEGAL STANDARD**

To survive a motion to dismiss, a Plaintiff must plead sufficient facts, which accepted as true, allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged, here copyright infringement. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Plaintiff's Complaint readily meets this standard.

The elements of a claim for copyright infringement are (i) ownership of a valid copyright, (ii) access to the copyrighted work and (iii) substantial similarity between the original and the allegedly infringing work. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991). In her First Amended Complaint, Plaintiff alleges that she is the lawful co-owner of the copyrights in the Taped Interviews. FAC ¶ 14. Plaintiff also alleges that the Documentary Defendants had access to the Taped Interviews. FAC ¶ 16. Finally, Plaintiff alleges that excerpts from the Taped Interviews were used in *Love, Gilda*. FAC ¶ 24.

In their motion papers, the Defendants do not challenge Plaintiff's claim of co-ownership in the Taped Interviews, conceded that they had access to the Taped Interviews and concede that they used excerpts from the Taped Interviews in *Love, Gilda*. They argue instead that (i) there is no actual controversy between Plaintiff and the Documentary Defendants because the Documentary Defendants do not claim co-ownership of the Taped Interviews; (ii) Plaintiff cannot maintain an action for copyright infringement or seek injunctive relief because she has not registered her copyrights; and (iii) Documentary Defendants should be awarded attorneys' fees and costs. For all of the following reasons, these arguments must be rejected.

## **II. AN ACTUAL CONTROVERSY EXISTS BETWEEN THE PARTIES**

The issue in determining whether an actual controversy exists is "whether the facts alleged, under all circumstances, show that there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). The Copyright Act permits "[a]ny court having jurisdiction of a civil action arising under this title . . . [to] grant temporary and final injunctions of such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. § 502(a). This power to grant injunctive relief is not limited to registered copyrights. Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010). The Court, therefore, may grant injunctive relief despite Plaintiff's inability to register her copyrights. See, Found. For Lost Boys & Girls of Sudan, Inc. v. Alcon Entm't, LLC, 2016 U.S. Dist Lexis 183684 \*23 (N.D. Ga. March 22, 2016).

The Documentary Defendants argue that there is no actual controversy because they do not claim co-ownership of the Taped Interviews. ECF 24 at 4-5. This argument is a non-sequitor. Plaintiff alleges that the Documentary Defendants infringed her copyrights in the

Taped Interviews by copying and using them in *Love, Gilda* without compensating and crediting her. FAC ¶¶ 16, 22-24. She is co-owner of the copyrights in the Taped Interviews and has asked for injunctive relief ordering the Defendants to turn over copies to enable her to register her copyrights and pursue her claim for damages. The Documentary Defendants refused to do so, claiming that the authority to turn over the Taped Interviews lies with Defendant Michael Radner.<sup>2</sup> ECF 17 at 2, 5; ECF 24 at 7. Plaintiff amended her complaint to include Michael Radner as a Defendant and is in the process of serving him with a summons and the First Amended Complaint. Clearly, there is a controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment ordering the Defendants to turn over copies of the Taped Interviews so that Plaintiff can register her copyrights and proceed with her infringement claims.

### **III. PLAINTIFF IS ENTITLED TO INJUNCTIVE RELIEF**

Plaintiff does not dispute that Section 411(a) of the Copyright Act provides that “no action for infringement of the copyright . . . shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.” Plaintiff also does not dispute that courts in the Second Circuit consistently enforce the statutory requirement of registration prior to suit. However, none of the cases cited by the Documentary Defendants involve the unique factual circumstances presented here where Plaintiff is unable to satisfy the statutory requirement that “the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit [a

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<sup>2</sup> On information and belief, the Taped Interviews are currently in the possession of the Documentary Defendants.



copy of the copyrighted work(s)] together with the application and fee,” 17 U.S.C. 408(a), because the Defendants control the only copies.

Although this case appears to present a novel issue in the Second Circuit, courts in other jurisdictions have grappled with the issue and concluded that a plaintiff in these circumstances is entitled to injunctive relief requiring that the Defendants give her copies of the interviews so that she can register her copyrights and prevent continuing infringement. See, e.g., Lost Boys, 2016 U.S. Dist Lexis 183684 \*26-29.

In correspondence, the Documentary Defendants have argued that the Taped Interviews do not constitute original works of authorship because they consist merely of ideas, facts and opinions made during a conversation. Shatzkin Decl. Ex. A. This argument was rejected by the court in Lost Boys, which correctly noted that “all that an ‘original work’ must possess is ‘some minimal degree of creativity’ . . . even a slight amount will suffice”” and held that “[p]laintiffs’ telling of their personal stories in response to questions designed to elicit material to create a fictional script for a feature film likely includes enough creativity to render the interviews an original work of authorship.” Lost Boys, 2016 U.S. Dist LEXIS 183684 \*23. Plaintiff has clearly alleged that the Taped Interviews are a joint works that she and Gilda Radner created together and that they intended that the interplay between Plaintiff’s prompts and Radner’s responses would necessarily merge into an inseparable whole. FAC ¶ 14. The fact that the Taped Interviews were created for the purpose of generating an outline and structural framework for an autobiography as opposed to a feature film does nothing to diminish the degree of creativity that went into the interviews themselves.

Furthermore, the FAC states facts supporting Plaintiff’s claim to injunctive relief. Under well-established principles of equity, a plaintiff seeking a permanent injunction must

demonstrate: (i) irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for the injury; (3) a remedy in equity is warranted when considering the balance of hardships; and (4) the public interest would be served by a permanent injunction. eBay, Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006). The FAC meets these requirements.

First, Plaintiff pleads that she will be irreparably harmed by her inability to register her copyrights and unable to prevent future infringement because she does not possess copies of the Taped Interviews, which are solely within the possession of the Defendants. FAC ¶¶ 25-26. Second, Plaintiff pleads that she lacks an adequate remedy at law because her inability to register her copyrights deprives her of any right to sue for infringement (FAC ¶ 27), which is “one of the most valuable “sticks” in the “bundle of rights” of copyright. Davis v. Blige, 505 F.3d at 103. Third, Plaintiff pleads that the Defendants will not suffer any harm by turning over copies of the Taped Interviews. Plaintiff has not demanded the originals, which arguably could be lost or damaged in the process. She simply seeks copies to deposit with the Copyright Office.<sup>3</sup> FAC ¶ 28. The Defendants have not raised any legally cognizable harm that would result from the entry of Plaintiff’s requested injunction ordering them to turn over copies of the Taped Interviews. Finally, the public interest favors the protection of copyrights and, therefore, also favors entry of a permanent injunction in this case. FAC ¶ 29. When a copyright owner has established a threat of continuing infringement, the owner is entitled to an injunction regardless of registration. See, Lost Boys, 2016 U.S. Dist. LEXIS 183684 \*28-29.

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<sup>3</sup> Documentary Defendants’ unwarranted concerns about “enabling” infringement by Plaintiff were rendered moot by naming Michael Radner in the FAC.

For all of the foregoing reasons, Plaintiff is entitled to seek injunctive relief and Documentary Defendants' motion to dismiss must be denied.

**IV. THE CO-OWNER OF A COPYRIGHT LACKS AUTHORITY TO CONVEY OR LICENSE THE INTEREST OF HIS FELLOW CO-OWNER WITHOUT THEIR EXPRESS WRITTEN CONSENT**

In its original, now moot, memorandum of law, (ECF 17 at 2), the Documentary Defendants argued that, as the co-owner of the copyrights in the Taped Interviews, Michael Radner had the authority to grant them permission to use the Taped Interviews. The problem with this argument is that the Documentary Defendants had already approached Plaintiff and knew that she wanted reasonable compensation and credit in exchange for the use of the Taped Interviews. Documentary Defendants cannot, therefore, circumvent her demand or extinguish her infringement claims by seeking or claiming permission to use the Taped Interviews from Michael Radner. See, Davis v. Blige, 505 F.3d 90, 103 (2d Cir. 2007) (“a retroactive license or assignment that can be obtained from a co-owner not bringing suit, or one willing to settle for a lower price than the co-owner bringing the action, is likely to cost much less than the value of the copyright interest including the cost of litigation. The result is that infringement is encouraged and rewarded. This economic incentive to infringe runs directly counter to the intent of Congress in passing 17 U.S.C. § 504 – namely to ‘compensate the owner for losses from the infringement, and. . . . to prevent the infringer from unfairly benefiting from a wrongful act.’”), cert. denied, 555 U.S. 822 (2008).

Contrary to the Documentary Defendants' argument the FAC does not “admit” that 3 Faces was “using the Audiotapes with [Michael Radner's] permission before plaintiff was contacted by the director to give permission.” ECF 24 at 9. However, even if Michael Radner had already granted permission by the time D'Apolito contacted Plaintiff in the fall of 2016, he

still had an obligation to account to Plaintiff (which he has not done) and lacked authority to over-ride her demand for compensation and credit, which was made well before the release of the film. Under these circumstances, Michael Radner's, actions diminished the value of Plaintiff's copyrights and deprived her of both compensation and credit. *Id.* at 100 (a "non-exclusive license presumptively does not diminish the value of the copyright to the co-owners").

Because Michael Radner lacked authority to over-ride Plaintiff's reasonable request for compensation and credit for the use of her interviews, Defendants' Rule 12(b)(6) motion must be denied.

#### **V. DEFENDANTS' REQUEST FOR ATTORNEYS FEES MUST BE DENIED**

Putting aside the patronizing tone of Defendant's argument, Plaintiff simply points out that Documentary Defendants have merely cited authorities in their favor. They have in no way "decisively distinguished the single decision referenced by plaintiff's prior litigation counsel" or conclusively "point[ed] out the fatal flaws" in Plaintiff's position. The views expressed in Shatzkin Decl. Ex. A are blindly one-sided, not only about co-ownership, but also about fair use. In any event, it was clear to both the undersigned and Plaintiff's previous counsel that counsel for Documentary Defendants is not interested in compromise.

Plaintiff's claims are not "opportunistic," "unreasonable" or "frivolous". Plaintiff simply seeks reasonable compensation and credit for the unauthorized use of her interviews of Gilda Radner, things she rightfully demanded from the Documentary Defendants prior to release of the film. As a professional journalist and copyright owner, she also has a strong interest in deterring similar infringing conduct in the future. Unfortunately, she has now been forced to incur unnecessary legal fees in her effort to secure reasonable compensation and credit, which she will seek to recoup at the appropriate time. Once she has been granted access to copies of the

Interview Tapes and her copyrights have been duly registered, she can proceed with her infringement claims against the Documentary Defendants. In sum, none of the factors set forth in Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 n. 19 (1994) favor Documentary Defendants, therefore, their demand for attorneys' fees must be denied.

### **CONCLUSION**

For all of the foregoing reasons, Documentary Defendants' motion to dismiss must be denied.

Dated: November 22, 2018

Respectfully submitted,

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*Katherine J. Daniels*

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