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Trials & TRIBULATIONS

Can Iron Man successfully fight off a copyright infringement action?

We have all seen Iron Man duke it out on the big screen, but now his strength is being tested in court. In the recent case of *Horizon Comics Productions, Inc. v. Marvel Entertainment, LLC, et al.*, pending in the Southern District of New York, the creators of a comic book series known as Radix allege copyright infringement claiming that the defendants illegally copied a promotional poster for the Radix comic series and the mechanized body armor depicted in the Radix comic book in connection with the Iron Man movies.

According to the complaint, the plaintiff, Horizon Comics Productions, Inc. (“Plaintiff”), owns copyrights in connection with the Radix comic books and the promotional materials created and marketed in connection with those comic books. Radix was the brainchild of two comic book artist brothers — Ben and Ray Lai (“Lai brothers”), who created the series in 2001. The Lai brothers claim that certain of the defendants were aware of the artwork they created for Radix as they were hired by one of the defendant’s predecessors-in-interest as artists. In addition, the Lai brothers claim that they provided some of the Radix artwork to certain defendants.

The Lai brothers claim copyright infringement on two fronts. First, they assert that the defendants copied a promotional poster for Radix when creating an Iron Man 3 poster. Second, they claim that Iron Man’s body armor as modernly depicted was essentially the result of stealing their artwork. They claim that prior to their Radix comics, Iron Man mainly outfitted himself in “spandex-like attire and minimal armor” [see Case 1:16-cv-02499, Dkt. No. 2 (Complaint), ¶ 24].



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After Plaintiff filed the complaint, defendants moved to dismiss on two grounds. First, defendants asserted that the claimed copied parts were not protectable. Second, they argued that there was no substantial similarity between the Radix works and the Iron Man 3 poster or Iron Man’s body armor.

Under the federal Copyright Act, it is a plaintiff’s burden in a copyright infringement action to demonstrate that its work was actually copied and that it was illegal for the defendant to copy plaintiff’s work because there is a “substantial similarity” between the original and copied works. The stringency of the test for whether a “substantial similarity” exists differs depending on whether the entire works at issue are protectable, or whether the works contain both protectable and unprotectable elements. In the latter case, the standard is more stringent, requiring a court to consider if the protected elements are substantially similar, while also determining whether the “overall concept and feel” of the works are substantially similar. The way a court accomplishes this analysis is by visually comparing both works.

The court in *Horizon* analyzed the two prongs of Plaintiff’s copyright infringement claims separately. It determined that the works at issue contained both protectable and unprotectable parts and that, therefore, the more stringent substantial

similarity test applied.

With respect to the promotional posters, the defendants argued, and the court agreed, that the concept of a mechanized suit and Iron Man’s pose on the poster were not protectable because they are “scènes à faire” — meaning they are so common to the comic book genre that they are not protectable.

The court found, however, that there were similarities with respect to the poster characters, including that they had similar haircuts, blue lights on their body armor, similar notches on the shoulders of their suits and their suits were the same color — though noting that none of the elements was identical. For example, despite defendants’ contention that the Radix character had a crew cut and Iron Man does not have a crew cut, the court found that the haircuts looked similar.

When considering the “total concept and overall feel” of the two characters to determine whether a reasonable jury would find the characters to be substantially similar, the court found that it could not conclusively determine that a jury would not find substantial similarity between the two characters. Therefore, it denied defendants’ motion to dismiss Plaintiff’s claims with respect to the promotional poster.

The court then considered Plaintiff’s copyright infringement claim with respect to the mechanized body armor as portrayed in the Iron Man movies. Plaintiff asserted that certain aspects of the mechanized body armor as depicted in the Iron Man films are substantially similar to

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those portrayed in the Radix comics. In particular, Plaintiff argued that Iron Man's boots and shin covers are similar to those used in the Radix comics.

The court granted the defendants' motion to dismiss on this issue, finding that Plaintiff failed to state a claim on two grounds. First, as previously discussed, the court indicated that mechanized body armor is a "standard scène à faire for the superhero genre." Second, in reviewing the protectable parts of the body armor on each character, the court determined that

no reasonable jury would find substantial similarities between them because the colors, heels, top-foot and toe-box shapes of the boots were different. The court also determined that no reasonable jury could determine that the shins depicted on the two characters were substantially similar because the shapes and colors are different. In sum, the court indicated that "[a]n average observer would clearly see the dissimilarities between the works and would not conclude that one was copied from the other."

It appears that, for now, Iron Man's mechanized body armor has defeated Ra-

dix. However, stay tuned to see if Radix will conquer Iron Man in the promotional poster saga. The posters at issue are included in the complaint for anyone who would like to make a prediction regarding the existence of substantial similarities between the two works — don't worry, the fate of the world does not depend on your conclusion.

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