

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Judge William J. Martínez**

Civil Action No. 18-cv-3127-WJM-SKC

MARTY STOUFFER and  
MARTY STOUFFER PRODUCTIONS, LTD,

Plaintiffs,

v.

NATIONAL GEOGRAPHIC PARTNERS, LLC;  
NGSP, INC.;  
NGHT, LLC, d/b/a NATIONAL GEOGRAPHIC DIGITAL MEDIA;  
NGHT DIGITAL, LLC;  
NGC NETWORK US, LLC; and  
NGC NETWORK INTERNATIONAL, LLC,

Defendants.

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**ORDER GRANTING IN PART AND DENYING WITHOUT PREJUDICE IN PART  
DEFENDANTS' MOTION TO DISMISS**

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Plaintiffs Marty Stouffer and Marty Stouffer Productions, LTD (together, “Stouffer,” unless the context requires otherwise), sue Defendants (collectively, “National Geographic”) for trademark infringement, copyright infringement, and unfair competition.<sup>1</sup> Currently before the Court is National Geographic’s Rule 12(b)(6) Motion to Dismiss Plaintiffs’ Complaint. (ECF No. 23.) For the reasons explained below, the Court:

- denies National Geographic’s motion without prejudice as to Stouffer’s trademark causes of action—although the Court finds merit in the First

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<sup>1</sup> National Geographic claims that Defendant NGHT Digital, LLC, “is unaffiliated with (and entirely unknown to)” the other Defendants. (ECF No. 23 at 8 n.1.)

Amendment concerns National Geographic raises, the Court believes the test for accommodating such interests should be somewhat different than what National Geographic has advanced, and no party has had an opportunity to argue under the test formulated by this Court;

- grants National Geographic's motion with prejudice as to Stouffer's trade dress cause of action; and
- grants National Geographic's motion without prejudice as to Stouffer's copyright cause of action.

In light of these rulings, Stouffer will be given an opportunity to amend his complaint and National Geographic will be given another opportunity to move to dismiss. Should National Geographic file that motion, the stay of discovery will remain in place until the motion is resolved.

### I. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a claim in a complaint for "failure to state a claim upon which relief can be granted." The 12(b)(6) standard requires the Court to "assume the truth of the plaintiff's well-pleaded factual allegations and view them in the light most favorable to the plaintiff." *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007). In ruling on such a motion, the dispositive inquiry is "whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Granting a motion to dismiss "is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Dias v. City & Cnty. of Denver*, 567 F.3d 1169,

1178 (10th Cir. 2009) (internal quotation marks omitted). “Thus, ‘a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.’” *Id.* (quoting *Twombly*, 550 U.S. at 556).

## II. BACKGROUND

Stouffer alleges substantially as follows.

### A. The “Wild America” Series

Beginning in 1982 and continuing for the next fourteen years, the Public Broadcasting Service (“PBS”) regularly televised the Wild America nature documentary series. (¶¶ 28, 30.)<sup>2</sup> During those fourteen years, Wild America “never fell out of the top ten most viewed television shows on PBS,” and in some years it was “PBS’s most-watched show.” (¶¶ 30–31.)

Wild America was produced by Plaintiff Marty Stouffer Productions, LTD, a company founded by Plaintiff Marty Stouffer and his brother, Mark, to produce nature documentaries. (¶¶ 17, 19, 26–27.)<sup>3</sup> “Throughout Wild America’s fourteen year run, the Stouffer Brothers developed a unique filming style for the show, which utilized slow motion, close-ups, and time lapses to give viewers a more immersive experience than other nature and wildlife documentary programming.” (¶ 37.) The series also became known for an image of two bighorn rams butting heads. (¶ 137.)

When Wild America’s run ended on PBS, the Stouffer Brothers continued to produce direct-to-video nature documentaries under the “Wild America” mark. (¶ 33.)

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<sup>2</sup> All “¶” citations, without more, are to the complaint (ECF No. 1).

<sup>3</sup> For unexplained reasons, Mark Stouffer is not a party to this lawsuit.

They also produced a feature film titled “Wild America,” which depicted their childhood and the origins of their passion for nature and filmmaking. (¶¶ 44–45.)

All Wild America episodes remain available to purchase on DVD, or to stream through major video-streaming platforms such as those run by Amazon, Google, and Apple. (¶ 46.) Through syndication, the original Wild America documentary series remains available to watch on television to this day. (¶¶ 39, 41.)

Marty Stouffer Productions owns a trademark on “Wild America,” which it federally registered in 1982. (¶ 29.)

### **B. Stouffer’s Discussions with National Geographic**

National Geographic launched a television station, commonly known as Nat Geo TV, in 2001. (¶ 53.) National Geographic launched a sister channel, Nat Geo WILD, in 2010. (¶ 54.) Both channels feature nature-oriented documentary programming. (¶¶ 53, 55.)

In 2010 and 2011, Stouffer and National Geographic “engaged in numerous discussions regarding [National Geographic] potentially licensing or purchasing” Stouffer’s Wild America film library. (¶ 59.) National Geographic “declined to purchase the Wild America Film Library, but asked [Stouffer] to keep [National Geographic] apprised of any updates regarding the sale of the film library.” (¶ 60.)

### **C. National Geographic’s “Wild”-Themed TV Programs**

On November 1, 2010, a Nat Geo TV executive e-mailed Stouffer, asking permission to title an upcoming natural history miniseries “Wild Americas” or “Wildest Americas.” (¶¶ 61–62.) Stouffer responded “that Wild America was trademarked and that both of [the] titles proposed . . . would be too close to the Wild America Mark.” (¶ 63.) National Geographic ended up airing the series in 2012 under the title “Untamed

Americas” within the United States, and “Wild America” outside of the United States.

(¶¶ 65–66.) The series “can be purchased under the title Wild America and shipped into the United States” (¶ 68), but Stouffer does not allege that National Geographic has any control over such sales.

Stouffer, unaware of the Untamed Americas series, continued discussions with National Geographic in 2012 about licensing or selling the Wild America film library.

(¶ 69.) These discussions included “using Wild America footage to create content for a new, then-unnamed Nat Geo TV series starring television personality Casey Anderson.”

(¶ 70.) These discussions did not bear fruit. (¶ 71.)

In 2013, National Geographic released a television series titled “America the Wild.” (¶ 72.) Stouffer says that America the Wild “replicat[es] the most minute details of Wild America in its production” (¶ 73), as illustrated by:

- “virtually indistinguishable” titles (¶ 74);
- “several episodes” of both series in which the host interacts with a grizzly bear that he raised from a cub (in the following still shots, Marty Stouffer/Wild America is on the left and Casey Anderson/America the Wild is on the right):



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