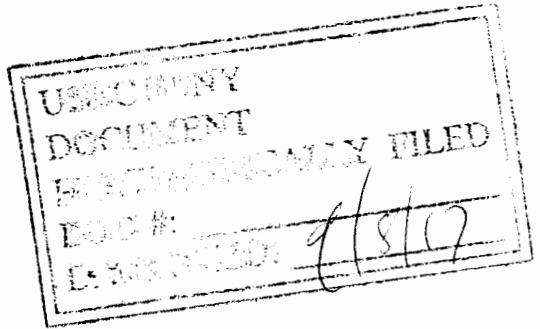


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PENGUIN RANDOM HOUSE LLC; SIMON & :
SCHUSTER, INC.; ALAN U. SCHWARTZ :
as trustee of THE TRUMAN CAPOTE :
LITERARY TRUST; JOHN SAMPAS as :
Literary Representative of THE :
ESTATE OF JACK KEROURAC; NANCY :
BUMP; ANTHONY M. SAMPAS; JOHN :
LASH, Executor of THE ESTATE OF :
JAN KEROUAC; THE DR. ARTHUR C. :
CLARKE TRUST; HEMINGWAY COPYRIGHTS, :
LLC; THE PATRICK HEMINGWAY AND :
CAROL T. HEMINGWAY REVOCABLE :
LIVING TRUST; and THE HEMINGWAY :
FAMILY TRUST, :
:
Plaintiffs, :
:
-v- :
:
FREDERIK COLTING and MELISSA :
MEDINA, d/b/a MOPPET BOOKS, :
:
Defendants. :
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17-cv-386 (JSR)
OPINION AND ORDER



JED S. RAKOFF, U.S.D.J.

On January 19, 2017, Penguin Random House LLC, Simon & Schuster, Inc., Alan U. Schwartz as trustee of The Truman Capote Literary Trust, John Sampas as literary representative of The Estate of Jack Kerouac, Nancy Bump, Anthony M. Sampas, John Lash as executor of The Estate of Jan Kerouac, The Dr. Arthur C. Clarke Trust, Hemingway Copyrights, LLC, The Patrick Hemingway And Carol T. Hemingway Revocable Living Trust, and The Hemingway Family Trust (collectively "plaintiffs") brought this suit against Fredrik Colting and Melissa Medina (d/b/a Moppet Books) (collectively "defendants"), alleging nine counts of copyright infringement.

Plaintiffs are the owners and exclusive licensees of copyrights in four famous novels: Breakfast at Tiffany's by Truman Capote, The Old Man and the Sea by Ernest Hemingway, On the Road by Jack Kerouac, and 2001: A Space Odyssey by Arthur C. Clarke (collectively, the "Novels"). Defendants have published "a series of illustrated children's books" "based on" these Novels (collectively, the "Guides"), which contain "condensed, simplified version[s] of the[ir] plot[s]." See Defendants' Response to Plaintiffs' Rule 56.1 Statement of Material Facts ("Def. 56.1 St."), ECF No. 44 ¶¶ 65, 89.

Following the completion of discovery, plaintiffs sought summary judgment in their favor on the issue of liability, and defendants cross-moved for summary judgment in their favor on the issue of liability and on the affirmative defense of fair use. Plaintiffs also moved for summary judgment on the issue of willfulness. In a bottom line order dated July 28, 2017, ECF No. 47, the Court granted summary judgment to plaintiffs on all nine counts of copyright infringement – two for each of the four Novels and one for the character of Holly Golightly – and rejected the affirmative defense of fair use as a matter of law. On the issue of willfulness, the Court permitted defendants, based on representations made by their counsel in open court, see Transcript, dated July 24, 2017, ECF No. 48, to raise (somewhat belatedly) an advice of counsel defense and permitted additional discovery on that defense. As a consequence of that decision, plaintiffs no longer seek summary judgment on the issue of willfulness, and the Court has set the case

down for trial on October 2, 2017 to resolve the remaining issues. See Order, ECF No. 51.

This Opinion and Order sets forth the reasons for these rulings.

The pertinent facts, either undisputed, or, where disputed, taken most favorably to the respective non-movant, are as follows:

At all times here relevant, plaintiffs owned valid copyrights to Breakfast at Tiffany's, The Old Man and the Sea, On the Road, and 2001: A Space Odyssey. Def. 56.1 St. ¶¶ 1-13. Defendants' "colorfully illustrated story summaries," called "KinderGuides," are designed to "introduce" these works to children. Id. ¶ 68.

On or about September 22, 2016, defendants published their four Guides (part of a planned 50-book series). Id. ¶ 65. On their front covers, the Guides very prominently display the titles of plaintiffs' Novels and the names of the authors of plaintiffs' Novels, along with the words "KinderGuides," in large print and, in much smaller print, the words "Early Learning Guides to Culture Classics." Declaration of Marcia B. Paul, Esq. in Support of Plaintiffs' Motion for Summary Judgment ("Paul Decl."), Exs. 49-52, ECF No. 35. The only other words are "Illustrations by _____," in very small print at the bottom.

All four Guides share the same layout. The first four pages feature illustrations and one-line quotations taken from and attributed to the authors of the Novels (Capote, Hemingway, Kerouac, and Clarke). The fifth page contains publication information, and

the sixth is a title page, stating, to take one example, "KinderGuides: Early Learning Guides to Culture Classics," "On the Road," "by Jack Kerouac," and, in smaller font, "Illustrations by Rose Forshall," "a division of Moppet Books/Los Angeles, CA." The seventh and eighth pages contain a "Table of Contents." The ninth displays an illustration of the original author of the Novel, and the tenth is a page "About the Author." Following these front-pages are "Story Summaries," which comprise a few dozen pages. Appended after these "Story Summaries" are a series of back-pages, two each devoted to "Main Characters," "Key Words," "Quiz Questions," and "Analysis." See Paul Decl., Exs. 49-52.

Defendants admit that they had access to plaintiffs' Novels in preparing their Guides and that they relied on them. Def. 56.1 St. ¶ 73. Indeed, a side-by-side comparison of plaintiffs' and defendants' works reveals as much. Not only do the plots, settings, and characters of the Guides mirror the Novels, but the Guides also include many specific details from the Novels. For example, in both versions of Breakfast at Tiffany's, Holly Golightly's business card reads "Holly Golightly, Traveling," and in both versions Holly describes an experience she calls "the mean reds," or feeling afraid "but you don't know what you're afraid of." See Paul Decl., Ex. 46, Truman Capote, Breakfast at Tiffany's (2012 edition) at 32 ("the mean reds are horrible. You're afraid . . . but you don't know what you're afraid of"); Id., Ex. 50, KinderGuides, Breakfast at Tiffany's (2016) at 11, (" . . . the mean reds. That means she is

afraid but doesn't know what she is afraid of."). Similarly, in both versions of On the Road, Sal drives across the United States with \$50 in his pocket and goes to see a blind jazz pianist named George Shearing; in both versions of 2001: A Space Odyssey, Dr. Heywood Floyd travels to Clavius Base, a space station on the moon, where there is a large monolith named "TMA-1" and a crater named "Tyco"; and, in both versions of The Old Man and the Sea, Santiago has gone 84 days without catching a fish and roots for the New York Yankees.¹ See Paul Decl., Exs. 45-52. While, of course, many aspects of plaintiffs' Novels do not appear in defendants' shorter Guides, all of the plots, characters, and settings in defendants' Guides appear in plaintiffs' Novels.

It is also undisputed that there is an established market for children's books based on adult novels, and that it is not unusual for copyright holders to publish, or license publication of, children's versions of works originally intended for adults. Def. 56.1 St. ¶¶ 95, 145 (noting that "Defendant Colting understood, prior to publishing the KinderGuides, that there was a market for children's editions of adult novels"). Defendants, however, never sought permission to prepare children's guides for plaintiffs' Novels. Id. ¶ 150.

It is further undisputed that plaintiffs have never authorized anyone to publish children's versions of their Novels, Def. 56.1 St.

¹ Admittedly, the Old Man of this Court shares the latter failing.

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