

OPINIONS BELOW

The opinion of the Second Circuit affirming the district court's ruling is reproduced at Appendix A and is not published.

The district court did not issue any opinion with the final judgment but pre-trial opinions are reproduced in Appendix B,C, and D.

JURISDICTION

The Second Circuit issued its opinion on October 30, 2015. On January 19, 2016 this Court granted an extension of sixty days to submit this petition. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 17 U.S.C. §§ 102, 103, 106, 107, and 501. These provisions are reproduced in Appendix D.

STATEMENT OF THE CASE

I. BACKGROUND- A TALE OF TWO LAWSUITS

My name is Eve Hars and I am the defendant/appellant/petitioner in this case. In 2006 in New York City, I began producing, *Point Break LIVE!*, a funny, low budget stage presentation of the 1991 action movie, *Point Break*, about a gang of bank-robbing surfers that starred Keanu Reeves and Patrick Swayze. I produced it at the invitation of Jamie Hook, who was a partner in the original creation and staging of the production in Seattle in 2003.

In 2007, with the permission of Hook I brought the show to Los Angeles on my own. Soon after arriving in Los Angeles I faced the prospect of two lawsuits from

two different parties claiming to own the copyright to *Point Break LIVE!* One threat came from Chris Taylor whose company LEI Development Projects, owned the copyright of the movie, *Point Break*, and the other from Jaime Keeling, who was Hook's partner in the initial creation and run of the stage production back in 2003 in Seattle.

First came Keeling. Knowing nothing about copyright law and feeling threatened, I signed an agreement with Keeling for the rights to the show a few weeks before the opening of the Los Angeles production in September of 2007. The agreement presented by Keeling named her as "sole owner and creator" of *Point Break LIVE!* However on opening night of the show, a man approached me by the name of Chris Taylor. He told me that because *Point Break LIVE!* took so much from the movie that he owned the copyright to, it was from him, *not Keeling*, I needed to obtain license from in order to do the show.

The problem with Keeling's claim to sole ownership of the *Point Break LIVE!* script was the fact that it was an unauthorized derivative work in which the plot, characters, and dialogue *were copied entirely* from the movie, *Point Break*. Keeling had never obtained or even sought license or permission from Taylor for the use of his copyright. I also learned that it was Hook, *not Keeling* who came up with the most important and novel concept of the show- that of an audience member playing the lead role of Johnny Utah.¹ That is what makes the show successful. There is nothing in Keeling's script about any audience volunteers or audition process.

¹ The Second Circuit's assertion that Keeling came up with the concept is false. Keeling never even disputed the fact that it was Hook that came up with that idea.

Regardless of that, the only things added to the *Point Break* movie script by either Hook or Keeling were concepts, ideas, actions, and use of props describe by stage directions (i.e. elements listed as being not copyrightable under §102(b) of the Copyright Act).

In light of Taylor's copyright claim and Hook's crucial contributions, I asked Keeling to lower the percentage of gross² she was taking from the show but she refused and threatened to "unleash a lawsuit" against me. So what is a producer to do? Pay the person who actually owns the rights to the material being used (Taylor) or pay the person who copied that material without permission (Keeling)? What would the members of this Court do? After considering copyright law as it then stood, I chose not to renew the agreement with Keeling under the terms she demanded. Several months later, seeing the show was successful, Taylor began taking action to start a lawsuit against me, so I agreed to license the material from him. I paid Taylor \$5,000 up front and another \$10,000 in royalties for the rights to the *Point Break* movie script and I continued producing the show with license from Taylor and permission of Hook, who I consider a co-creator of *Point Break LIVE!*

I did not hear from Keeling for several years. In all the years between 2003 when the production started until 2010, by which time I had made it a critically acclaimed success, there was nothing preventing her from producing the show herself but instead, in December of 2010 she initiated a lawsuit against me accusing me of infringing on her alleged copyright of *Point Break LIVE!*

² Keeling was demanding 5% of gross which is the highest percentage usually given out to sole authors/rightsholders of scripts which would leave no room to accommodate other claims.

II. DISTRICT COURT

In the two years preceding the trial Keeling's legal team insisted in various memorandums of law that although Keeling's script was an unauthorized derivative work it was entitled to a copyright. They based this on a new legal principle on a passage from the Congressional Notes of the Copyright Act to conclude that if an infringing work qualifies as fair use under 17 U.S.C. §107, it is not really infringing and thus it is lawful and thus it is entitled to copyright protection under 17 U.S.C. §103(b). So here, fair use was not invoked by a defendant as a defense against infringement but rather by a plaintiff as a prosecutory instrument to accuse others of infringement on her unauthorized derivative work. The approach was approved and adopted by the district court judge who, in various orders denied our motion for the case to be dismissed as well as a motion for summary judgment and a motion to appeal those orders. The judge ordered a trial in which he, along with Keeling's counsel, told the jury that if they found that Keeling's script was a fair use of *Point Break* then she would have a valid copyright regardless of how much she appropriated from the movie. The judge instructed the jury that the four factors of fair use were "without content or meaning"³ and proceeded to describe only one factor of §107 of the Copyright Act in a somewhat confusing way. Based on this instruction the jury found that Keeling's script constituted fair use and that Keeling therefore had a valid copyright that I was guilty of infringing upon. December 7, 2012 the jury awarded Keeling a judgment of \$250,000 even though no one involved with the show including me made anywhere near that amount because it

³ Opinion at 8 quoting Judge Griesa.

was always a small, underground production. The district court judge issued a judgment on January 16, 2013 but *did not* accompany it with any opinion.

III. COURT OF APPEALS FOR THE SECOND CIRCUIT

I could not afford a lawyer but felt there had been a miscarriage of justice so I appealed pro se. After a three year delay, in an opinion dated October 30, 2015 the Second Circuit affirmed the lower court's conclusion that fair use can engender copyright protection for unauthorized derivative works and that Keeling's script therefore is entitled to copyright protection even though by the appellate court's own description, her script "relies almost exclusively on selected dialogue from the screenplay"(Opinion at 3) of *Point Break*. Because Keeling's script had no tangible expression that was original to her, in order to rule in her favor the Second Circuit sanctioned copyright protection for her "original contributions": the stage directions that describe concepts ideas, tone, and use of props etc.

I also asked and argued in my appellate brief for the court to reverse the judgment because of 'plain error' in the jury instruction during the trial. However, the appellate court excused the district judge's failure to describe more than one of the four factors of the fair use statute to a jury who were deciding the outcome of the case based on an understanding of fair use. The Second Circuit held that this didn't constitute plain error.

IV. MISSING THE CHANCE FOR A REHEARING

The same week as the Second Circuit issued its ruling on my appeal I was diagnosed with a serious, life threatening disease, so in the weeks following I was in no condition physically, psychologically or emotionally to deal with the case at all

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.