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U.S. DISTRICT COURT E.D.N.Y.

**IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK**

★ JAN 07 2020 ★

BROOKLYN OFFICE

TAJE MONBO, et al

*

Civil Action No.: CV-18-5930

Plaintiffs

*

Assigned Judge: Margo K. Brodie

V.

*

Magistrate Judge: Steven L. Tiscione

LOTFY NATHAN, et al

*

Defendants

*

* * * * *

**PLAINTIFFS' RESPONSE TO DEFENDANTS' OVERBROOK ENTERTAINMENT,
SONY PICTURE ENTERTAINMENT AND WILL SMITH MOTION TO DISMISS**

Plaintiffs, Taje Monbo and Deafueh Monbo (collectively, the "Monbo Parties or Plaintiffs"), submit the following Brief in Opposition to Overbrook Entertainment, Inc., Overbrook Entertainment, LLC, Willard Carroll Smith, Jr. (Will Smith), Sony Pictures Entertainment, Inc. (collectively, "Overbook Entertainment & Sony or Defendants") Motion to Dismiss the Amended Complaint ("Complaint"). For the reasons set forth below, Plaintiffs request that this Court deny the Motion to Dismiss in its entirety.

I. INTRODUCTION

On August 29, 2019, Plaintiffs filed a First Amended Complaint ("FAC") against Overbook Entertainment & Sony *et al.* alleging Copyright Infringement, Contributory Copyright Infringement, Vicarious Copyright Infringement, Trademark Infringement, False Designation of Origin Passing Off and Unfair Competition, Trademark Dilution, Trademark Infringement Under Maryland Code Bus Reg. 1-414 et. seq., False Advertising and Unfair Competition under Common Law, Contributory Trademark Infringement, Vicarious Trademark Infringement and Unjust Enrichment.

For the following reasons, the Defendants' Motion to Dismiss should be **DENIED**.

II. FACTUAL BACKTOUND

The following facts are alleged in the First Amended Complaint.

Plaintiffs' copyright infringement claims arise out of Defendant's Lotfy Nathan's creation of an infringing 2013 film entitled "12 O'Clock Boys" (the infringing "12 O'Clock Boys (2013) film") and a feature adaptation entitled 12 O'Clock Boys (the "12 O'Clock Boys Feature Adaptation") based on the infringing 12 O'Clock Boys (2013) film, the 12 O'Clock Boys Feature Adaptation Script, or a version thereof.

Plaintiffs own the copyrights in the 12 O'Clock Boyz franchise, which includes two 12 O'Clock Boyz films spanning nearly nineteen years. Defendants Overbrook Entertainment and Sony are the production company of the infringing 12 O'Clock Boys Feature Adaptation. Defendant Will Smith is the controlling principal and member of Overbrook Entertainment and executive producer of the infringing 12 O'Clock Boys Feature Adaptation.

A. Plaintiffs' 12 O'Clock Boyz Copyrighted Works

12 O'Clock Boyz is a is a legendary film series that was released in 2001 and 2003, showcasing the exploits of young African-American dirt bike riders in Baltimore, Maryland. 12 O'clock Boyz (2001) is the first independent urban dirt-bike film released in the northeastern region of the United States. The title of the film is a phrase coined by Taje to describe the way in which riders would elevate the front of their bikes and ride only on the back wheels until their bikes would be perpendicular to the road or in the " 12 O'Clock" position.

Taje who is a dirt-bike rider also appeared in title films as an actor. As an actor, Taje's character, Moe-Town, delivered breathtaking dirt-bike stunts, comic relief, boisterous bravado, camaraderie, and excitement which captured his audience.

The 12 O'Clock Boyz film series were sold throughout the Maryland, Washington DC, and Virginia metropolitan area via independent advertising and promotional efforts. The first 12 O'Clock Boyz film released in 2001 sold 50,000 copies in two weeks and revolutionized the Baltimore dirt-bike culture. Taje subsequently released the second film in a series of 12 O'Clock Boyz films titled "The Paparazzi Edition" in 2003. The success of Plaintiffs' films is the reason kids in Baltimore aspired to be 12 O'Clock Boyz.

Plaintiffs have plans to release the third 12 O'Clock Boyz film in the 12 O'Clock Boyz film series in the upcoming year or so.

Plaintiffs are also authors of the 12 O'Clock Boyz logo and visual artworks. Plaintiffs own United States copyrights in the 12 O'Clock Boyz film series and the 12 O'clock Boyz visual artworks (collectively, the "12 O'Clock Boyz Copyrighted Works").

B. The Infringing films

Plaintiffs allege that *both* the infringing 12 O'Clock Boys (2013) and the infringing 12 O'Clock Boys Feature Adaptation infringe their works by using elements of Plaintiffs' 12 O'Clock Boyz including but not limited to the settings, characters, concepts, feel, and mood. (FAC, Dkt 98, at Line 3 and 9). Defendant Lotfy Nathan raised \$30,910 to produce the infringing 12 O'Clock Boys (2013). (*See* FAC, Dkt 98, Exhibit 27, at Page 2). **While Defendants Overbrook Entertainment & Sony received millions of dollars to produce the infringing 12 O'Clock Boys Feature Adaptation.**

1. The Infringing 12 O'Clock Boys (2013)

12 O'Clock Boys (2013) is a docu-fiction film directed by Defendant Lotfy Nathan that tells the story of Pug, who wants to join the 12 O'Clock Boys. Defendant Lotfy Nathan *et al* have

incorporated numerous elements of Plaintiffs' 12 O'Clock Boyz Copyrighted Works into the infringing 12 O'Clock Boys (2013) film, including the character Pug.

The infringing 12 O'Clock Boys (2013) film is intended to be a production that, by Lotfy's own admission, unabashedly take Plaintiffs' intellectual property and aim to "match the concept and approach" of Plaintiffs' 12 O'Clock Boyz films. (FAC, Dkt 98, at Line 4)

Defendant Lotfy Nathan funded the infringing 12 O'Clock Boys (2013) film through Kickstarter, a crowdsource fundraising website. Currently, Defendant Lotfy Nathan *et al* are distributing the infringing 12 O'Clock Boys (2013) domestically and worldwide in theaters, film festivals, and online via Netflix.com, Vimeo.com, YouTube.com, Chassy.com, Kanopy.com, and other means not yet known to Plaintiffs.

2. The Infringing 12 O'Clock Boys Feature Adaptation

The 12 O'Clock Boys Feature Adaptation is an adaptation film produced by Defendants Overbrook Entertainment, Sony and Will Smith, which is based on the infringing 12 O'clock Boys (2013) film by Defendant Lotfy Nathan, et al.

Defendants Overbrook Entertainment, Sony and Will Smith have written a script (the "Feature Adaptation Script") for a feature adaptation entitled 12 O'Clock Boys. (*See* FAC, Dkt 98, at Line 7).

Defendants Overbrook Entertainment, Sony and Will Smith began filming on October 1, 2018. Defendants Overbrook Entertainment, Sony and Will Smith have announced that as of November 17, 2018, they have "filmed all the scenes for the 12 O'Clock Boys Feature Adaptation". (*See* FAC, Dkt 98, at Line 142 -143)

Defendants Overbrook Entertainment, Sony and Will Smith have also announced that they will spend some time working on the post-production for the 12 O'Clock Boys Feature Adaptation". (See FAC, Dkt 98, Exhibit 47)

Plaintiffs allege that in addition to the infringing elements already copied into the infringing 12 O'Clock Boys (2013) film, Defendants Overbrook Entertainment, Sony and Will Smith have incorporate numerous other protected copyrighted 12 O'Clock Boyz elements into their infringing 12 O'Clock Boys Feature Adaptation, including but not limited to: the character named Pug from the 12 O'Clock Boyz 2001 and 2003 films. (See FAC, Dkt 98, at Line 292)

III. JUDICIAL STANDARDS

A. MOTION TO DIMISS UNDER 12(B)(6)

A motion filed under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of a complaint's factual allegations. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007); *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir.1993). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 545, 127 S. Ct. 1955 (internal quotation marks omitted) (interpreting Fed. R. Civ. P. 8(a)). Consistent with the Supreme Court's rulings in *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009), the Third Circuit requires a two-part analysis when reviewing a Rule 12(b)(6) motion. *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 219 (3d Cir.2010); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir.2009). First, a court should separate the factual and legal elements of a claim, accepting the facts and disregarding the legal conclusions. *Fowler*, 578 F.3d at 210–11. Second, a court should determine whether the

remaining well-pled facts sufficiently show that the plaintiff “has a ‘plausible claim for relief.’ ” *Id.* at 211 (quoting *Iqbal*, 556 U.S. at 679, 129 S. Ct. 1937). As part of the analysis, a court must accept all well-pleaded factual allegations in the complaint as true, and view them in the light most favorable to the plaintiff. *See Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L.Ed.2d 1081 (2007); *Christopher v. Harbury*, 536 U.S. 403, 406, 122 S. Ct. 2179, 153 L.Ed.2d 413 (2002); *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 231 (3d Cir.2008). In this regard, a court may consider the pleadings, public record, orders, exhibits attached to the complaint, and documents incorporated into the complaint by reference. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L.Ed.2d 179 (2007); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384–85 n. 2 (3d Cir.1994).

The court's determination is not whether the non-moving party “will ultimately prevail,” but whether that party is “entitled to offer evidence to support the claims.” *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 302 (3d Cir.2011). This “does not impose a probability requirement at the pleading stage,” but instead “simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of [the necessary element].” *Phillips*, 515 F.3d at 234 (quoting *Twombly*, 550 U.S. at 556, 127 S. Ct. 1955). The court's analysis is a context-specific task requiring the court “to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 663–64, 129 S. Ct. 1937.

B. LEAVE TO AMEND

Leave to amend a complaint should be given freely “when justice so requires.” Fed. R. Civ. P. 15. However, a district court may dismiss a complaint without granting leave to amend where a plaintiff's proposed amendments would be futile. *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir.2011). Leave to amend need not be given if a complaint,

as amended, would be subject to dismissal. *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir.1989).

The court liberally construes pro se pleadings. *See Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir.1987). **“Unless it is absolutely clear that no amendment can cure the defect ... a Pro Se litigant is entitled to notice of the complaint's deficiencies and an opportunity to amend prior to dismissal of the action.”** *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir.1995).

IV. DISCUSSION AND ARGUMENT

To establish copyright infringement, Plaintiff must demonstrate “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Defendants Overbrook & Sony argue that the Court should dismiss Plaintiffs’ claims for failure to state a claim for copyright infringement and to dismiss Plaintiffs’ claim because their claims are not ripe.

Both parties do not dispute that Plaintiffs own the copyrights to the 12 O’Clock Boyz Copyrighted works. Plaintiffs have identified the copyright registrations for the 2001 and 2003 12 O’Clock Boyz films and the registrations for the 12 O’Clock Boyz logos and artwork designs. (See FAC, Dkt 98, Exhibit 1). However, Defendants Overbrook Entertainment & Sony offer various arguments that Plaintiffs fail to state a claim for copyright infringement.

A. Plaintiffs Plead with Sufficient Specificity

Defendants Overbrook Entertainment and Sony argue that Plaintiffs fail to state a claim for copyright infringement with sufficient specificity, thus not providing Defendants Overbrook Entertainment and Sony with requisite notice to determine the potentially infringing elements. Defendants Overbrook Entertainment and Sony also argue that Plaintiffs fail to state a claim for copyright infringement because the First Amended Complaint does not identify each element that

were allegedly infringed to provide notice of and allow investigation into the claims to assess liability. **The Plaintiffs disagree.**

Courts do not require copyright claims to be pled with such particularity; rather, courts find a complaint sufficiently pled if it “alleges representative acts of infringement rather than a comprehensive listing.” *Blizzard Entm’t, Inc. v. Lilith Games (Shanghai) Co. Ltd.*, 3:15-CV-04084-CRB, 2015 WL 8178826, at *6 (N.D. Cal. Dec. 8, 2015).

Plaintiffs have alleged copyright infringement as to the 12 O’Clock Boyz franchise as a whole, going to great lengths to compare and contrast allegedly infringing elements of the 12 O’Clock Boyz franchise through photographs and vivid descriptions.

Defendants Overbrook Entertainment and Sony cite to several district court cases in support of their argument that Plaintiffs fail to state a claim for copyright infringement and fail to identify each infringing element at issue. But Defendants arguments are misplaced.

First, in the First Amended Complaint, Plaintiffs define the 12 O’Clock Boyz Copyrighted Works and include a detailed description of the allegedly infringing elements.

Second, Plaintiffs clearly identify infringing elements of Defendants’ Overbrook and Sony’s 12 O’Clock Boys Feature Adaptation (in addition to the infringing elements copied from Lotfy Nathan’s 12 O’Clock Boys (2013)). Third, the First Amended Complaint clearly enables the Court to understand what elements of Plaintiffs’ 12 O’Clock Boyz Copyrighted Works are infringed.

The First Amended Complaint sufficiently provides Defendants Overbrook Entertainment and Sony notice of the infringing elements at issue. For example, Plaintiffs allege that Pug, a character first seen in Plaintiffs’ 2001 film and later seen in Plaintiffs’ 2003 film, appears in Defendants Overbrook and Sony’s 12 O’Clock Boys Feature Adaptation portraying himself as the

same Pug character as in Plaintiffs' 12 O'Clock Boyz Copyrighted Works. (See FAC, Dkt 98, at Line 292). This provides Defendants Overbrook Entertainment and Sony with sufficient notice that their use of Pug in the context of the Overbrook/Sony 12 O'Clock Boys Feature Adaptation is potentially infringing each (plaintiffs) 12 O'Clock Boyz Copyrighted Work in which Pug appears.

B. Vicarious Infringement: Direct Financial Benefits

To sufficiently plead vicarious infringement, Plaintiffs must allege facts as to how Defendants have enjoyed a "direct financial benefit." *Ellison v. Robertson*, 357 F.3d 1072, 1078 (9th Cir. 2004). To sufficiently plead vicarious copyright infringement, a profit does not have to be realized. *Capitol Records, Inc. v. MP3tunes, LLC*, 48 F. Supp. 3d 703, 712 (S.D.N.Y. 2014). Rather, "[f]inancial benefit exists where the availability of infringing material 'acts as a "draw" for customers.'" *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001) (quoting *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263-64 (9th Cir. 1996)). According to Defendants Overbrook Entertainment and Sony, Plaintiffs' allegations that Defendants Overbrook Entertainment and Sony enjoyed a "direct financial benefit" is insufficient and fails to state a claim. **The Plaintiffs disagree.**

Plaintiffs allege that the infringing 12 O'Clock Boys (2013) was "funded on Kickstarter, a crowdsourcing website where parties can raise money for future projects" and that "Defendant Lotfy Nathan et al. are currently distributing and publicly performing the infringing 12 O'Clock Boys (2013) domestically and worldwide in theaters, film festivals, and online via Netflix.com, Vimeo.com, YouTube.com, Chassy.com, Kanopy.com, and other means not yet known to Plaintiffs." (See FAC, Dkt 98, at Line 91)

Plaintiffs also allege that Defendants Overbrook Entertainment and Sony received millions of dollars to produce the infringing 12 O’Clock Boys Feature Adaptation and that Defendants Overbrook Entertainment and Sony have announced that as of November 17, 2018, they have “filmed all the scenes for the 12 O’Clock Boys Feature Adaptation”. (See FAC, Dkt 98, at Line 142 -143). Also see Dkt 98, Exhibit 47 for DVD evidence.

Defendants Overbrook Entertainment, Sony, Will Smith and the other Defendants stand to earn a profit from the infringing 12 O’Clock Boys Feature Adaptation, although realizing a profit is irrelevant to this analysis. The Court can easily infer that by receiving several millions of dollars to produce the infringing 12 O’Clock Boys Feature Adaptation and disseminating advertisements of the infringing 12 O’Clock Boys Feature Adaptation on Twitter, Instagram and other social media platforms, the infringing 12 O’Clock Boys Feature Adaptation material “acts as a ‘draw’ for customers” to watch Defendants’ Overbrook Entertainment and Sony’s infringing 12 O’Clock Boys Feature Adaptation film. *A&M Records, Inc.*, 239 F.3d at 1023 (quoting *Fonovisa, Inc.*, 76 F.3d at 263-64).

C. Non-Protected Elements

To prove copyright infringement, Plaintiffs must demonstrate that the “protectable elements, standing alone, are substantially similar,” so the Court must “filter out and disregard the non-protectable elements in making [its] substantial similarity determination.” *Funky Films, Inc. v. Time Warner Entm’t Co., L.P.*, 462 F.3d 1072, 1077 (9th Cir. 2006) (quoting *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996)). Defendants Overbrook Entertainment and Sony argue that the Court must “filter out” non-protectable elements of Plaintiffs’ 12 O’Clock Boyz Copyrighted Works. Defendants Overbrook Entertainment and Sony contend that non-protectable elements include the following: (1) the Pug character identified by Plaintiffs; (2) the Baltimore,

Maryland setting; (3) the mood or theme of “dirt-bike docu-fiction”; and (4) scenes-a-faire elements. The Plaintiffs finds that Defendants’ Overbrook Entertainment and Sony’s argument mischaracterizes the scope of Plaintiffs’ copyright claims.

When viewed in a vacuum, each of these elements may not individually be protectable by copyright. Plaintiffs, however, do not seek to enforce their copyright in each of these elements individually. Rather, Plaintiffs’ copyright infringement claims are based on the 12 O’Clock Boyz Copyrighted Works as a whole. The First Amended Complaint clearly defines the works at issue (the 12 O’Clock Boyz Copyrighted Works), and includes the copyright registration numbers for the Plaintiff’s original 2001 and 2003 films. It is unnecessary to analyze whether the allegedly non-protectable elements of Plaintiffs’ 12 O’Clock Boyz Copyrighted Works are eligible for copyright protection because Plaintiffs describe these elements in the Amended Complaint solely in an effort to demonstrate how the Defendants Overbrook Entertainment and Sony’s 12 O’Clock Boys Feature Adaptation are substantially similar to Plaintiffs’ 12 O’Clock Boyz Copyrighted Works. And, also to demonstrate how Lotfy Nathan’s 12 O’Clock Boys (2013) is substantially similar to Plaintiffs’ 12 O’Clock Boyz Copyrighted Works.

Further, even if each individual element were not protected by copyright, unprotectable elements “may gain some protection in combination with each other. Specific combinations of unprotectable elements may be copyrightable provided that the elements combined are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship.” *Muromura v. Rubin Rostaer & Associates*, CV 12-09263 DDP AGRX, 2015 WL 1728324, at *3-4 (C.D. Cal. 2015). *Muromura’s* proposition states that unprotectable elements may be copyrightable when combined. *Muromura*, therefore, supports Plaintiffs’ claims because Plaintiffs allege elements that, when combined with one another, form

the entire 12 O’Clock Boyz franchise of films. Plaintiffs allege Defendants Overbrook Entertainment and Sony copied numerous aspects of Plaintiffs’ 12 O’Clock Boyz Copyrighted Works such as the Pug character, the feel, setting, mood and theme. Plaintiffs do not allege that Defendants Overbrook and Sony copied each of these 12 O’Clock Boyz elements separately, but rather that Defendants Overbrook Entertainment and Sony copied each of these elements and combined them together in such a way that recreates Plaintiffs’ 12 O’Clock Boyz films. Thus, Plaintiffs’ allegations are sufficient to support the copyright infringement claims.

D. Plaintiffs’ Claims are Ripe for Adjudication

Defendants Overbrook Entertainment and Sony argue that Plaintiffs’ claims regarding their infringing 12 O’Clock Boys Feature Adaptation are premature because the film is not yet released. Defendants Overbrook Entertainment and Sony maintain that without a released film, the Court is unable to analyze substantial similarity, evaluate a fair use defense, or evaluate a de minimus use defense.

However, Defendants Overbrook Entertainment and Sony’s argument is flawed. Because Plaintiffs’ allegations of infringement are based upon an entire franchise of works, the Plaintiffs anticipates that the Court’s substantial similarity analysis will primarily be based on Defendants’ Overbrook Entertainment and Sony’s utilization of similar character, theme, setting, and mood in their infringing 12 O’Clock Boys Feature Adaptation, rather than copying a specific plot line or dialogue sequence. Despite Defendants Overbrook Entertainment and Sony arguments, the Court must find Plaintiffs’ allegations of a Feature Adaptation Script and Defenandants’ completion of the filming of all the scenes for their infringing 12 O’Clock Boys Feature Adaptation sufficient to conduct the substantial similarity analysis.

Plaintiffs allege that Defendants Overbrook Entertainment and Sony have a Feature Adaptation Script, and have already filmed all of the scenes for their infringing 12 O’Clock Boys Feature Adaptation and are now in post-production for their infringing 12 O’Clock Boys Feature Adaptation. (See FAC, Dkt 98, at Line 142 -143).

Defendants Overbrook Entertainment and Sony, however, argue that their film has not been released yet so the Court is unable to determine substantial similarity. At the motion to dismiss stage, the Court looks to whether Plaintiffs’ claims, taken as true, are plausible on their face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Taking Plaintiffs’ allegations as true, the Court must find it plausible that Defendants Overbrook Entertainment and Sony have completed a Feature Adaptation Script of their infringing 12 O’Clock Boys Feature Adaptation. Further, the Court will be able to analyze substantial similarity based on the Feature Adaptation Script and the already completed scenes.

Further, in accordance with the Copyright Act, a work, including an infringing work, is “fixed in a tangible medium of expression when its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. . . . When the work is ‘prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time.’” *Walt Disney Productions v. Filmmation Associates*, 628 F. Supp. 871, 876 (C.D. Cal. 1986) (citing 17 U.S.C. § 101). At this time, Plaintiffs sufficiently allege that the infringing 12 O’Clock Boys Feature Adaptation is a work consisting of the North Monroe Street Scene, the Feature Adaptation Script and all of the completed scene as of November 17, 2018. (See FAC, Dkt 98, Line 141-143).

Because Plaintiffs have sufficiently alleged Defendants Overbrook Entertainment and Sony created the North Monroe Street Scene as well as a Feature Adaptation Script and have finished filming all the scenes for the 12 O’Clock Boys Feature Adaptation and are now in post-production., Plaintiffs’ claims based on the infringing 12 O’Clock Boys Feature Adaptation are ripe for adjudication.

E. The 12 O’Clock Boyz Copyrighted Logo Design and Artwork Design

Plaintiffs are owners of the copyrighted 12 O’Clock Boyz logo design and DVD cover artwork design.

Plaintiffs have also alleged that the infringement of Plaintiffs’ 12 O’Clock Boyz Logo design and Artwork design “starting in” October 1, 2018 was the beginning of a longer course of action by Defendants Overbrook Entertainment and Sony that has also not ended. Plaintiffs’ complaint at page 34 -35 more specifically references the same 12 O’Clock Boyz copyrighted logo design and artwork design that Defendants Overbrook Entertainment and Sony infringed from **2018 to the present,**” and includes supporting exhibits as proof that the infringement occurred as late as 2019.

Defendants Overbrook Entertainment and Sony therefore cannot establish from the face of the amended complaint that all of the allegedly infringing acts occurred outside the limitations period such as to warrant complete dismissal of Plaintiffs’ claims.

F. Defendants’ Trademark Violations are Ongoing

Claims for trademark or service mark infringement are usually brought pursuant to the Lanham Act, 15 U.S.C. § 1051 et. seq. But that Act contains no statute of limitations. “Regardless of whether a statute of limitations defense is applicable to Plaintiff’s trademark infringement claim, **the alleged violations are ongoing, and thus, “the statute of limitations is conceivably only a**

bar to monetary relief for the period outside of the statute of limitations.” *Sonoma Foods, Inc. v. Sonoma Cheese Factory, LLC*, No. 07-554, 2008 WL 913279 (N.D. Calif. April 3, 2008) (White, J.).

In this case here, Defendants’ Overbrook Entertainment and Sony’s infringement activity is ongoing. “Therefore, even assuming a statute of limitations defense may bar some portion of Plaintiffs’ trademark infringement claim, Plaintiffs would still be entitled to pursue damages based on the infringement activity that occurred within the statute of limitations period.” *Sonoma Foods, Inc.*

G. As the Plaintiffs’ 12 O’Clock Boyz Films Became More Popular, So Too Did the 12 O’Clock Boyz Mark

1. Plaintiffs’ 12 O’Clock Boyz Mark

As the Plaintiffs’ 12 O’Clock Boyz films became more popular, **so too did the 12 O’Clock Boyz Mark** and as a result of the 12 O’Clock Boyz films widespread publicity, the Mark is now well-known in the dirt-bike culture. Through Plaintiffs’ efforts to police and enforce its rights in the 12 O’Clock Boyz Mark, the 12 O’Clock Boyz Mark is well-known in the dirt-bike culture as the title of Plaintiffs’ 2001 and 2003 films. The fact that Plaintiffs invested in publicity for the 12 O’Clock Boyz Mark, such that it is now so well known in the dirt-bike culture, does not erase the fact that the Mark is coined by Taje.

2. Plaintiffs 12 O’Clock Boyz Mark Has Acquired Distinctiveness

The Plaintiffs’ long history of exclusive use dating back to 2001, significant promotional and advertising efforts that feature the Plaintiffs’ 12 O’Clock Boyz Mark (the “Mark”), clearly demonstrate that the Mark has acquired distinctiveness such that consumers immediately associate Plaintiffs’ Mark solely with Plaintiffs’ Original 2001 and 2003 films.

Further, Plaintiffs have invested a lot of time, money and resources in the advertising and promotion of the 12 O'Clock Boyz brand including the Plaintiffs' Mark. Plaintiffs' Mark is advertised and promoted in the 12 O'Clock Boyz branded films, the 12 O'Clock Boyz merchandise, the 12 O'Clock Boyz branded social media accounts, and 12 O'Clock Boyz branded exhibitions. *See Exhibit 1.* However, Plaintiffs do not have to rely solely on their own efforts to promote their "12 O'Clock Boyz" Mark. Plaintiffs receive a lot of coverage from third-party media targeting consumers in the United States. *See Exhibit 2* for a copy of relevant example of such third-party media coverage.

As a result, Plaintiffs have been successful, creating an urban dirt-bike entertainment brand that now rivals other brands in the United States for popularity. At the center of all this success is Plaintiffs' distinctive and recognizable Mark, a potent symbol of Plaintiffs' Original 2001 and 2003 films. Plaintiffs' overall success is a testament to the fact that the Mark has acquired a tremendous amount of consumer awareness, since consumers immediately associates the Mark with Plaintiffs' Original 2001 and 2003 films.

H. PLAINTIFFS' MOTION FOR THE ISSUANCE OF REQUEST TO THE REGISTER OF COPYRIGHTS PURSUANT TO 17 § U.S.C. 411(8)(2)

On September 4, 2019, Plaintiffs filed a Motion for the Issuance of Request to the Register of Copyrights (Docket # 103). The Court have deferred ruling on Docket 103.

Under the "fair use" defense, another author may make limited use of the original author 's work without asking permission. **However, in this case, Red Gap is not a true author of the 12 O'Clock Boys 2013 film** and therefore, can not use the fair use defense against Plaintiffs' copyright infringement claims because the fair use defense is allowed for authors. The issuance of a request to the Register of Copyrights is crucial and important because if the Register of

Copyrights opines that Red Gap is not a true author of the 12 O’Clock Boys 2013 film because Red Gap did not exist at the time the 12 O’Clock Boys 2013 Film was produced, then Defendants can not use the fair use defense against Plaintiffs’ copyright infringement claims under the copyright act. Therefore, at this time the Court should not permit Defendants to use the fair use defense **until the Copyright Office opines whether or not Red Gap is an author.**

I. The Court has Jurisdiction Over Will Smith, Overbrook and Sony

This Court has jurisdiction over Defendants Will Smith, Overbrook Entertainment and Sony.

1. SONY

This Court has general and/or specific personal jurisdiction over Sony because they purposefully availed itself of the privilege of conducting business in New York.

Specifically:

- Sony’s is a subsidiary of Sony Entertainment who maintains its headquarters in New York and Sony does business in New York. **See Exhibit 3**
- Sony bought the movie rights to make the infringing 12 O’Clock Boys Feature Adaptation from New York Residents, Lotfy Nathan, Oscilloscope Pictures, Inc and Oscilloscope, Inc.
- Sony entered into agreements and contracts with Riders from New York to appear in their infringing 12 O’Clock Boys Feature Adaptation.
- Sony regularly advertises its movies to the resident of New York through New York theaters and film subscriptions.

2. OVERBROOK AND WILL SMITH

This Court has general and/or specific personal jurisdiction over Overbrook Entertainment and Will Smith because they purposefully availed itself of the privilege of conducting business in New York.

Specifically:

- Overbrook Entertainment and Will Smith has done business with Sony, a New York business resident for over ten years. **See Exhibit 4**
- Overbrook Entertainment and Will Smith bought the movie rights to make the infringing 12 O’Clock Boys Featuare Adaptation from New York Residents, Lotfy Nathan, Oscilloscope Pictures, Inc and Oscilloscope, Inc.
- Overbrook Entertainment and Will Smith entered into agreements and contracts with Riders from New York to appear in their infringing 12 O’Clock Boys Feature Adaptation.
- Sony entered into agreements and contracts with Riders from New York to appear in their infringing 12 O’Clock Boys Feature Adaptation.
- In 2014, Overbrook Entertainment and Will Smith produced a film entitled Annie 2014 film which they again premiered in New York theaters to the residents of New York.
- In 2017, Overbrook Entertainment and Will Smith produced a film entitled Bright 2017 film, which they advertised on Netflix subscription to the residents of New York.
- In the last ten years, Overbrook Entertainment and Will Smith have produced over ten films. **All of which were advertised and marketed to the residents of New York. (See Exhibit 5**
- In addition to films, Overbrook Entertainment and Will Smith also advertises and markets music and movie soundtrack residents of New York.

V. Conclusion

Plaintiffs’ claim will live long enough to survive Defendants’ Motion To Dismiss. For the foregoing reasons, the Court should DENY Defendants’ Motion To Dismiss.

Respectfully Submitted:

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Dated: January 6, 2020

CERTIFICATE OF SERVICE

I hereby certify that a copy of this PLAINTIFFS' RESPONSE TO DEFENANTS' OVERBROOK ENTERTAINMENT, SONY PICTURES ENTERTAINMENT AND WILL SMITH MOTION TO DISMISS was sent January 6, 2020 to:

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Dated: January 6, 2020

EXHIBIT 1

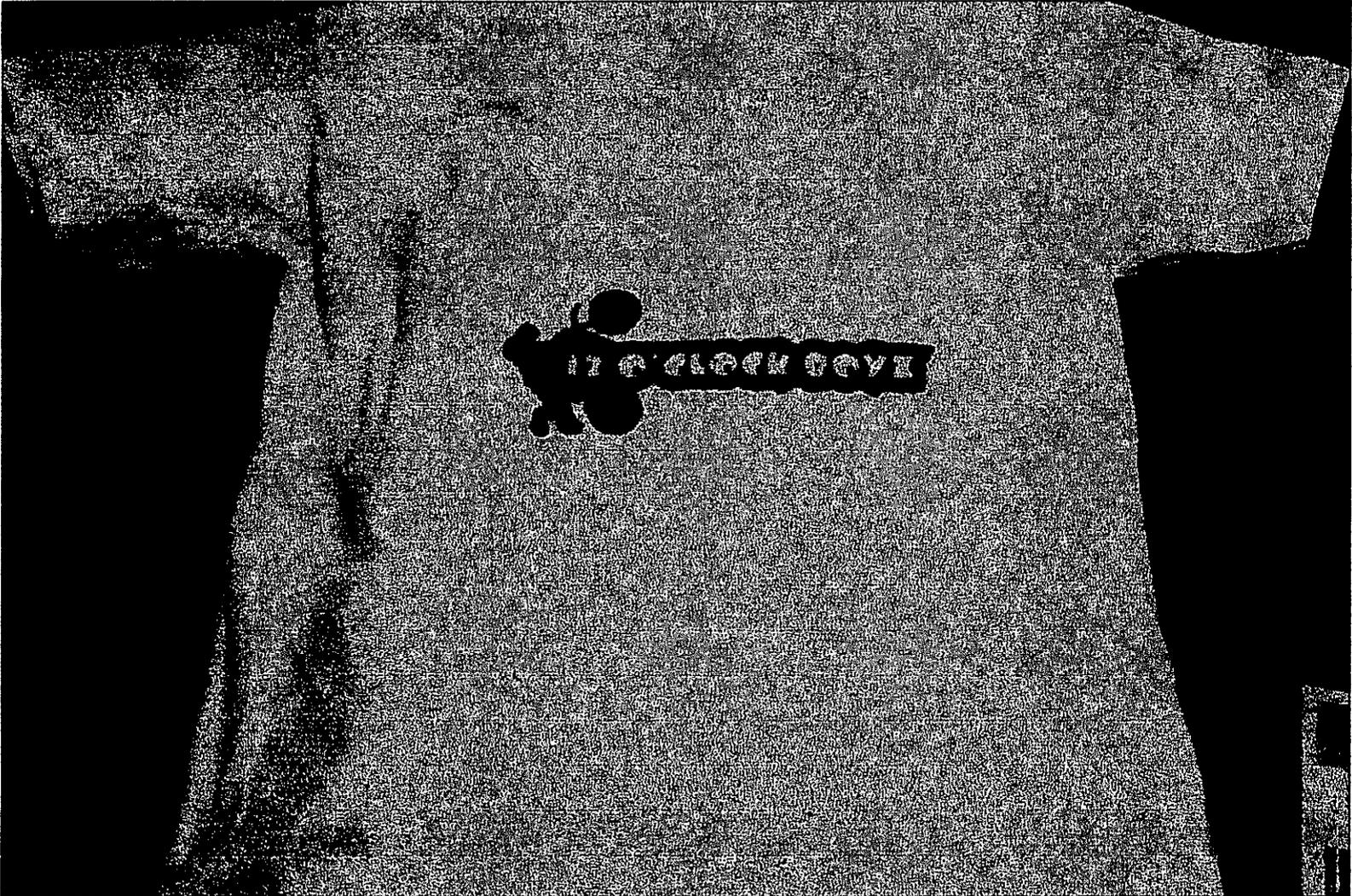


EXHIBIT 2

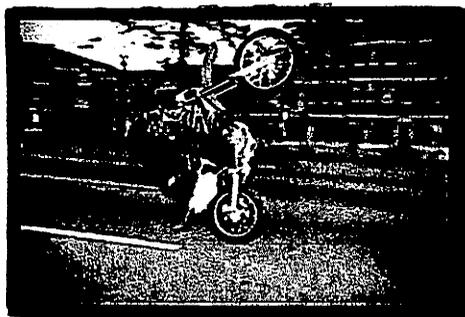
HOME >> FEATURE

High Noon: Taking it to the Streets with the 12 O'Clock Boyz

By Tim Hill (/index.php?category=author&s=Tim Hill) | May. 21, 2003



PHOTOS BY JEFFERSON JACKSON STEELE



It's a cool spring evening, and Druid Hill Park is jumping. Cars and motorcycles are parked all along a narrow road near Latrobe Pavilion. Everyone's hanging out by their rides, listening to car stereos and chatting up their neighbors. The road itself is jammed: freshly washed cars, SUVs, and motorcycles, all going back and forth, up the road to the basketball courts and down to the statue of George Washington. It's the kind of slo-mo cruise you'd find at any decent beach, except here the nearest body of water is the reservoir at the bottom of the hill.

The distinct high whine of a two-cycle engine calls from the other side of the reservoir, along Druid Park Lake Drive. It's a dirt bike. First one, then another, then a dozen or more young guys on motorcycles hit the park, weaving along the cruise route and zooming across the grass. The weekly Sunday gathering is hardly quiet, with the sound of the hornetlike motors cutting through the crowd, yet the roadside gauntlet erupts with laughter and shouting. The 12 O'Clock Boyz have arrived.

One rider hits the circuit, leans back on his Honda CR85R, and pulls the front forks high into the air—popping a wheelie. But Wayne, the rider, holds the bike this way for a good stretch of road, turning the handlebars slightly to keep balance and gently nudging the throttle to keep his speed and position in the queue of cars around him. He hits 12 o'clock—vertical, nearly 90 degrees perpendicular to the pavement—and scrapes his plastic back



fender. A few "Yeah!"s and "Goddamn"s fly up. But it's hard to hold, in this stop-and-go traffic, so Wayne drops the front end and cuts to the shoulder, where some of his buddies idle.

Pee Wee's not far behind. He has a little more open road before him, so he's comfortably 12 o'clock on his yellow four-wheel Yamaha ATV, his 5-year-old daughter nestled in his lap. One hand's on the throttle, twisting in quick, herky-jerky bursts that elevate the motorcycle when it starts to flag. The other hand is in the air, a steady fist that punctuates the stunt. He scrapes his fender.



"He carries the beat!" someone yells. "That man carries the beat!"

Within a half-hour, the group has gathered on the empty promenade along the reservoir, down the hill from the pavilion. Nearly 20 dirt bikes circle the stretch of pavement, each guy taking turns going vertical. Guys on ATVs whiz by, their legs outstretched in an almost balletlike display. A moped goes vertical, looking more like a begging, squat-legged dog than the more elegant beasts that pass him, but the rider gets plenty of cheers. Then the party breaks up with a couple shouts of "Five-oh." Sure enough, a police cruiser, blue lights flashing, has stopped at the top of the hill. Half the crew zips off to meet on the other side of the park, white exhaust smoke wafting into the young green foliage. The remaining bikers wait it out.

With the warm weather, it's like this all the time. Summer is fast approaching: When snoball stands break out the marshmallow pumps and ice-cream trucks endlessly loop that electronic "Turkey in the Straw" tape, the dirt bikes come out of storage. Follow the drone and smoke trails along North Avenue, Reisterstown Road, wherever, and you might catch a glimpse of the 12 O'Clock Boyz.

Young guys have ridden dirt bikes on city streets for years. For many Baltimoreans, it's an annoyance. It's definitely illegal. Though police are instructed not to chase the bikes after a number of hot-pursuit accidents, there are still confrontations. It's also dangerous, with or without police chases. A kid on a dirt bike with no helmet against a truck—guess who wins? There have been a handful of fatalities in the past few years, yet hundreds of local teenagers and young men take the risk.

But the 12 O'Clock Boyz aren't your ordinary dirt bikers taken to asphalt. Their numbers are small—they estimate 15 to 20 core members, with plenty of tagalongs. They laugh at the guys who ride dirt bikes in the woods or on trails—they call them "wingworms," which is "a better word for a dirty person," Pee Wee says. They stick to the streets and the parks, looking for places to ride vertical, practice their form of motorized ballet, impress the crowd—especially the girls—and try to avoid the police. Nor are they into speed, like the street racers—the Boyz prefer urban acrobatics.

The idea is simple: Take your dirt bike, learn how to pull back the handlebars and stay there. You're at 12 o'clock. A scraped fender gets a cheer. Find ways to balance and move around on the bike. Be elegant, be flashy, but don't look like you're trying too hard. "It's just balance and control," a biker called Moe-Town says, belying the amount of practice it takes.

It's another spring day; clouds and a threatening storm keep most of the 12 O'Clock guys home. A few have shown up to ride a stretch of Reisterstown Road for the benefit of a group hanging out in front a car wash and a photographer who's shown up. After a half-hour of pulling stunts, a police cruiser arrives. After the cruiser rapidly backs off the curb, nearly hitting Pee Wee's ATV, he and the cop exchange harsh words. The bikers dissipate.

Pee Wee returns all fired up. The cops should leave them alone, Pee Wee, 27, says. "I'm not doing any drugs or any alcohol. . . . When's the last time you saw a bunch of black people, smiling, without any guns, drugs, or alcohol?" Pee Wee defends his sport, and motorcycles in general, which he and his fellow 12 O'Clock Boyz say is a good outlet for kids in a city that offers few recreational choices. He goes on to list library closings, the lack of basketball courts, dwindling rec centers, the temptation of drugs and alcohol, and the crime that goes along with them. "There wouldn't be any bodies if you let these kids ride bikes," he says.

Moe, 27, echoes the sentiment, saying there's just not enough stuff for kids to do. "Not everybody can play basketball or get into music," he says.

Pee Wee and Moe-Town produced a video in 2001 that captures many of the 12 O'Clock Boyz performing stunts and cutting up for the camera. They've just finished a second video, which they hope will further publicize their group. *Don Diva* magazine recently filmed them for an urban-lifestyle documentary, and the Boyz have been invited to participate in a new motorcycle stunt show called Baltimore Bike Blast, slated for the M&T Bank Stadium parking lot in July. The show is scheduled to feature the motorcycle stunt groups the StarBoyz and the Ruff Ryders. But until then, the show goes on whenever the Boyz hit the streets.

The following Sunday at Druid Hill Park the Boyz are back. Their numbers are fewer, but they ride the gauntlet as usual, provoking shouts and cheers. Down on the promenade, a couple of dirt bikes whiz back and forth. One guy is giving younger kids rides on his ATV. He's going pretty slow, but they love it. After each of the four kids takes his turn, he hops back on his little motocross bike and tries to hit 12 o'clock. Someone suggests they take off their front wheels, to help the balance, but they laugh it off.

After one young bike rider gets vertical for maybe two seconds, he shouts, "We're 12 O'Clock Boyz, too!"

EXHIBIT 3

WIKIPEDIA

Sony Entertainment

Sony Entertainment, Inc. is a global entertainment company established in 2012. It focuses on most of Sony's motion picture, television and music businesses. It is a subsidiary of the Japanese Sony Corporation, managed by Sony's American hub, Sony Corporation of America.^[1]

In terms of revenue, as of 2019, it is currently the world's 6th largest entertainment company at \$14.1B, alongside The Walt Disney Company (\$55.13B), Comcast (inc. NBCUniversal \$33B), AT&T (inc. WarnerMedia \$31.27B), Bertelsmann (€17.96b/\$20.30b), Vivendi (€13b/\$14.70b), CBS Corporation (\$13.69B), and Viacom (\$13.26B).

Sony Entertainment, Inc.

SONY

Type	Subsidiary of Sony Corporation of America
Industry	Film Television Music
Founded	2012
Headquarters	New York City, United States
Area served	Worldwide
Key people	Kaz Hirai (Chairman) Kunimasa Suzuki (Executive Vice President)
Owner	Sony Corporation of America
Parent	Sony Corporation
Subsidiaries	Sony Pictures Entertainment Sony Music Group
Website	www.sony.com/SCA/index.shtml (http://www.sony.com/SCA/index.shtml)

Contents

History

Companies

- Sony Pictures Entertainment
- Sony Music Group

References

External links

History

On March 30, 2012, Michael Lynton, co-chairman and CEO of Sony Pictures Entertainment (SPE), was named as CEO of Sony Corporation of America to oversee all of Sony's global entertainment businesses and Nicole Seligman, Executive Vice President and General Counsel of Sony Corporation, was named as president.^[2] On April 9, 2013, Lynton renewed his contract with the company.^[3]

On February 18, 2016, Seligman resigned after 15 years working for Sony and remained with the company until the end of March.^[4]

On January 13, 2017, Lynton announced that he was stepping down as CEO of Sony Entertainment and chairman and CEO of Sony Pictures Entertainment to be chairman for Snap Inc.^{[5][6]} He was later replaced by Anthony Vinciguerra on June 1, 2017 after he was named as chairman/CEO of SPE.^[7]

It was reported in December of 2016 by multiple news outlets that Sony was considering restructuring its U.S. operations by merging its TV & film business, Sony Pictures Entertainment, with its gaming business, Sony Interactive Entertainment. According to the reports, such a restructuring would have placed Sony Pictures under Sony Interactive's CEO, Andrew House, though House wouldn't have taken over day-to-day operations of the film studio.^{[8][9][10]} According to one report, Sony was set to make a final decision on the possibility of the merger of the TV, film, & gaming businesses by the end of its fiscal year in March of the following year (2017).^[8] However, judging by Sony's activity in 2017, the rumored merger never materialized.

On July 17, 2019, Sony announced that they will merge Sony Music Entertainment and Sony/ATV Music Publishing to form the Sony Music Group. The merger was finalized on August 1, 2019.^[11]

Companies

Sony Pictures Entertainment

- Sony Pictures Motion Picture Group (Film)
 - Columbia Pictures
 - TriStar Pictures
 - TriStar Productions
 - Sony Pictures Classics
 - Screen Gems
 - Sony Pictures Animation
 - Sony Pictures Imageworks
 - Sony Pictures Releasing
 - Sony Pictures Worldwide Acquisitions Group
 - Destination Films
 - Stage 6 Films
 - Affirm Films
- Sony Pictures Home Entertainment
 - Sony Wonder
 - Genius Brands (equity stake)

- Sony Pictures Television (Television)
 - Califon Productions, Inc.
 - Jeopardy Productions, Inc.
 - 2waytraffic
 - Sony Crackle
 - CPT Holdings, Inc.
 - TriStar Television
 - Culver Entertainment
 - Embassy Row
 - Starling Productions
 - Huaso
 - Lean-M Producers Center
 - Teleset (50%)
 - Fable Pictures
 - Floresta
 - Left Bank Pictures (majority stake)
 - Electric Ray
 - Stellify Media
 - Playmaker Media
 - Funimation (95%)
 - Funimation Films
 - FunimationNow
 - Manga Entertainment (UK)

Sony Music Group

- Sony Music Entertainment
 - Columbia Records
 - Epic Records
 - RCA Records
 - Arista Records
 - The Orchard
 - Syco (50%)
- Sony/ATV Music Publishing
 - EMI Music Publishing
 - APM Music
 - Extreme Music
 - Hickory Records
 - EMI Production Music

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External links

10/23/2019

Sony Entertainment - Wikipedia

- **Sony Pictures Entertainment - Official site** (<http://www.sonypictures.com>)
 - **Sony Music Entertainment - Official site** (<http://www.sonymusic.com>)
 - **Sony/ATV Music Publishing - Official site** (<http://www.sonyatv.com>)
-

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EXHIBIT 4

SHADOW AND ACT



Will Smith's Overbrook Ent. will not renew deal with Sony Pictures. What happens next?

f Facebook

t Twitter

January 9th 2018

It was announced last week that Will Smith's Overbrook Entertainment will not be renewing its long-standing (over a decade) first-look deal with Sony Pictures, and just might be taking the production company's business to streaming giant Netflix, where Smith's most recent film, the fantasy-thriller *Bright*, calls home, and where it garnered 11 million streaming viewers in the USA over its first three days, according to Nielsen.

Although, at this time, there's no official confirmation that Overbrook will indeed ink any deal with Netflix, meaning the company is, in effect, "homeless" and just might function entirely as an indie for the time being.

The announcement has led to speculation on what this might suggest about Will Smith's star power - once one of the most valuable movie brands in the world. Did Overbrook dump Sony, or did Sony dump Overbrook? Was it a mutual agreement? And in either of the 3 scenarios, what were the reasons? What direction does Will Smith's career take next without the comfort that a first-look deal with a major studio can provide, assuming Overbrook doesn't deal up with Netflix or another? None of those questions have been answered, hence the broad speculation.

But to be frank, in a rapidly changing business - one fraught with many new uncertainties - the writing may have been on the wall, since there really hasn't been a Will Smith-branded critical and commercial blockbuster movie (essentially, films that he has carried) since *I Am Legend* a decade ago (which was actually made with Warner Bros., not Sony). In fact, looking over his resume, going back to the 1990s, we could break down Smith's career into 2 halves: pre-*I Am Legend* and post-*I Am Legend*. There's a marked difference in terms of box office grosses and critical appeal between those 2 Will Smith eras. The pre-*I Am Legend* Will Smith movies grosses an average (domestic) of about \$157 million, while the post-*I Am Legend* Will Smith movies grossed, on average, around \$90 million. That's a significant drop-off. Note that I didn't include *Suicide Squad* in the post- count because, again, it's not a Will Smith movie. He didn't carry the film; it was an ensemble cast adaptation of a known property with a built-in fan base. And arguably, Margot Robbie may have been the draw for many fans, especially considering that hers (Harley Quinn) is the only character from the movie with a stand-alone, spin-off project in development.

But even the addition of *Suicide Squad* to the post-*I Am Legend* era will still result in a box office average that's well below the pre-*I Am Legend* period.

It should also be noted that the post- era gave birth to a Will Smith that seemed less interested in big box office spectacle, and more focused on projects with award-winning (specifically Academy Award) potential: *Seven Pounds*, *Concussion*, and *Collateral Beauty* for example. Unfortunately Oscar continues to elude him, despite his best efforts. Some have suggested that he abandon the chase and instead return to the kind of movie-making that made him an international superstar.

By the way, Smith himself seems to acknowledge that *I Am Legend* was kind of a critical moment for him, stating during a *Concussion* press junket in 2015: "I'm obsessed with trying to put small character dramas into the middle of blockbuster packages. The most successful I've ever been with that concept is *I Am Legend*. *I Am Legend* easily could've been a stage play, right? You know, a one-man show, a dude with a dog — you generally would think you need a little bit more than that for a blockbuster, but to date that's my biggest opening and my second biggest film. So that's an obsession for me, to not act so much that people don't want to see it. You [can] act so much that you turn people off, or you [can] put so many creatures in it that now people don't take the acting seriously."

A prequel to *I Am Legend* was in the works, with Will Smith reprising his role as Robert Neville, but it was eventually buried.

Remembering his early years in Hollywood (before his first big studio movie, *Bad Boys* with Sony) , in an interview with THR two years ago, the actor talked about how he and manager (now Overbrook business partner) James Lassiter strategized his career path: "I said to JL, 'I want to be the biggest movie star in the world.' And he said, 'Okay. Well, let's figure out what that means.' And he went and got the top 10 movies of all time, the list of the top 10 movies of all time at the box office — top 10 box office successes — and we also looked at them, adjusted for inflation and views versus dollar value. Also, we looked at all the different variations... What we found is, at the center, there were always special effects... So it was always special effects, there was always creatures, there was always a love story. So we started looking for movies that had special effects, creatures, and a love story."

And his next film, after *Bad Boys*, which checked all those boxes for the most part, was *Independence Day* in 1996. He followed that up with hit after hit, after hit (although not all of them were special effects creature features with love stories), in films like *Men in Black* (I and II), *Enemy of the State*, *I, Robot*, *Hitch*, *The Pursuit of Happyness*, another *Bad Boys* movie, and *I Am Legend*. There was *Ali*, which wasn't a box office hit, although it was received mostly favorably by critics, and we could say was his first taste of Oscar; he received an Academy Award nomination for Best Actor, although he didn't win.

I remember this old quote from Mr. Smith: "I've never really viewed myself as particularly talented; where I excel is in a ridiculous, sickening work ethic. While the other guy is sleeping, I'm working. While the other guy is eating, I'm working."

This was evident to anyone who was paying attention to how strong his self-promotion game was. While researching for this article, I was scouting YouTube looking for related clips, and I stumbled upon one video of Big Willie going to one *Hancock* premiere after another,

each one in a different city, all within a span of about 5 days. And each time, he looked just as euphoric, mingling with countless excited fans, as he did during the previous city's premiere, even if it was just the night before, several hundred, if not thousands of miles away. He stops to sign autographs, shakes hands, honors kiss requests, and even dances with a band, all-the-while maintaining his signature Big Willie smile, seemingly thoroughly and gladly drowning himself in each moment. First he's in Paris, then a few days later, he's in London, and the following night he's in Moscow, and so on, and so forth, maintaining the same level of intensity each time, leading to the film's USA premiere, where, naturally, he most certainly was present, Big Willie style as usual, as adoring fans clamor for a mere sighting or touch of one of Hollywood's biggest stars at the time.

But the magic doesn't end there; the traveling continues for another 2 to 3 straight months, as *Hancock* premieres followed in other countries around the world, and there is Will, walking the red carpet at each locale, flashing that smile, satisfying old fans, and winning new ones over with what feels like an unpretentious charm. Is it any wonder why he was the biggest star, not only in America, but in the world? Making the film is half the job. Promoting it is just as important, and Will certainly hasn't ever taken that phase of the process lightly. It's a prime example of the "ridiculous, sickening" work ethic he mentions in the above quote. He's smart enough to know that he's not only promoting the movie, but he's also promoting himself, which, especially earlier in his career, helps with awareness of the next film, the one after that, and so on.

But then something happened that seemed to reshape his initial career strategy. Gone were the special effects creature features, to be replaced with more of what we could describe simply as adult dramas. Listening to Smith talk about it years later, the "failure" that was *After Earth* (2013) may have been the catalyst. For the average Hollywood actor, a film they're headlining that grosses \$244 million worldwide, would probably feel like a gift. But Will Smith, at least at that time, wasn't the average Hollywood actor. He was an international superstar who had seemingly *transcended* race (as some said), with appeal to almost every demographic. So a \$244 million *cume* for a Will Smith project – as was the case with *After Earth* (although his son, Jaden Smith, really was the star of the movie) – was considered a disappointment within the industry.

Of the \$244 million, just \$60 million of it was domestically-earned. Which means that the bulk of its box office came from overseas. And we know how important overseas box office has come to be for studio films, especially big budget productions. Keep in mind though that the film's production budget (minus any marketing costs, which I'm sure were significant) was an astounding \$130 million, for a film that looked like it cost about half of that.

Although, in all fairness, we could, again, ask whether *After Earth* was really a Will Smith movie, or more of a Jaden Smith "failure." But I suppose, either way, it's a "Smith movie," and Will's name and face were pivotal in how it was marketed and sold to audiences.

In addition, some would argue that, even though the studio (Sony) erased him and his name from the film's marketing campaign, word still eventually got around that M. Night Shyamalan was the film's director. And he wasn't exactly the most beloved Hollywood filmmaker at the time. According to then reports, Will insisted on Shyamalan directing the film, suggesting that there may have been other voices of influence who didn't agree with the choice. It makes one wonder why Smith did that, especially since *After Earth* material wasn't quite Shyamalan's forte. The last time (before A.E.) that he attempted a sci-fi fantasy adventure film, was with *The Last Airbender*, which was ripped by critics and audiences.

Reviews of *After Earth* were decidedly negative, as it still ranks as Will Smith's worst-rated feature film ever, currently at a low 11% on movie review aggregator site Rotten Tomatoes. It tops 2016's *Collateral Beauty* as the worst-reviewed Will Smith movie of all time (*Collateral Beauty* is at 14% as of the time of this posting).

This was a few years after *Seven Pounds* (2009) which was also a box office and critical dud, as well as the disappointment that was the summer of 2008's *Hancock* (although it made good money worldwide). And so the "failure" of *After Earth* that would follow, led to some questioning whether Smith's box-office appeal was then beginning to fade – even just a little. The choices he would make from then on were crucial in providing answers.

It wasn't long after *After Earth* opened in 2013 that Mr. Smith voiced his desire to take on edgier roles and challenge himself. During a press conference for the film in the UK, in the summer of 2013, he said: "There's something about making movies that just really gets me excited... I love people being wrapped in a story and being able to deliver that emotional punchline at the end. It's been an absolute necessity that the movie be a blockbuster, but I think I'm going to start moving out of that and finding more danger in my artistic choices."

(Related: See Adam Thompson's "On Will Smith's Seemingly Strategic Aversion To Controversial Roles..." piece published on Shadow and Act in 2012.)

And then, 2 years later, there was this from Big Willie, during a press conference for *Focus* just before that film's release in February 2015: "For me, this film really marks a transition in my life and emotionally and in my career. After the failure of *After Earth*, a thing got broken in my mind. I was like, 'Oh, wow. I'm still alive. Oh, wow. Actually, I still am me, even though the movie didn't open number one. Wait. I can still get hired on another movie.' I realized that I still was a good person... So when I went into *Focus*, I completely released the concept of goal orientation and got into path orientation. This moment, this second, these people, this interaction. It is a huge relief for me to not care whether or not *Focus* is number one or number ten at the box office. I've already gained everything that I could possibly have hoped for, from meeting the people that I met and from the creation of what we did together. And it's just painting. I'm going to paint, and some paintings are going to be fantastic. Others are going to be not so good, but I no longer measure the quality of myself on whether or not somebody else thinks what I painted is beautiful. Ali would say, 'I'm the greatest. I'm the greatest.' And when we talked, it would be because how much like the greatest he didn't feel, right? So it was almost a mantra for himself. And that's sort of a thing that I've developed. It's actually nerve-wracking for me sometimes to walk into a new space. My experience is, if I just let myself go, it's a whole lot easier than letting the voices say, 'Oh, my God! You know, *Focus* may not be as good as *Enemy of the State*! Rather than letting all those things come in, I just like to leap."

There's nothing like one major box office flop to give you some new sense of purpose, I suppose.

So the post-*I Am Legend* shift is clearly something that he'd been pondering for some time. And more danger in his artistic choices is something we here at S&A had been hoping for, also for some time. I remember when it was announced that he was Quentin Tarantino's first choice to play Django, and all the discussion that followed about whether Will was *courageous* enough to take on a controversial project like that. Although I should note that he has since revealed what his reasons were for not taking the part, and they had nothing to do with fear of controversy.

But don't cry for Mr. Smith. He's done and continues to do very well financially, as one of the highest paid actors in the business, and one of the few whose payment deal structures have included collecting a portion of the back-end. Plus, he's still popular enough; the question is for how much longer, especially if he doesn't produce a film (or TV show) that wins over audiences and critics alike, like he used to do during his far more successful pre-*I Am Legend* days. And unfortunately, frustratingly forgettable films like Netflix's most expensive film ever, *Bright* (despite 11 million views within the first 3 days) certainly don't help. One wishes Smith would take on a *smaller* project with a really interesting director that would challenge him, like Steve McQueen or Barry Jenkins. It may come as a surprise to some, but Will Smith has never worked with a black director. Not once. One of the biggest stars of African descent in Hollywood, and he's never been directed by a filmmaker of African descent. It's truly puzzling to me. There are many strong black directors (up-and-comers and veterans) who would probably love the opportunity to direct Smith in a film, but who may never get the opportunity. However, that's another post for another time.

Despite ending its relationship with Sony, Smith's Overbrook production company will continue to work with the studio on projects that were already in development under their previous partnership, notably the *Bad Boys* threequel (*Bad Boys For Life* as it's currently titled); yes it's still in the works. There's also an adaptation of the graphic novel, *The Harlem Hellfighters* by Max Brooks. It's an interpretation of the real-life story of the 369th Infantry Regiment of the United States Army that saw action in World War I and World War II. The 369th Infantry is known for being the first African American regiment to serve with the American Expeditionary Force during World War I and was nicknamed "The Harlem Hellfighters" (hence the title of the graphic novel), as well as the "Black Rattlers," in addition to several other nicknames.

Overbrook and Sony are also collaborating on a YouTube Red *Karate Kid* series titled *Cobra Kai*.

Other projects in the works at Overbrook, although not with Sony, include *The City That Sailed*, which is set up at 20th Century Fox, and follows the director of Homeland Security in New York City whose daughter, because of family circumstances, lives in Spain with her mother. Apparently, mother and father are divorced. Wanting to reunite her father and mother, the little girl makes a wish that both will get back together, while holding a magical snow globe, causing the island of Manhattan to break away and sail across the ocean towards Spain.

There's also the very long-in-development remake of *Uptown Saturday Night*, which is currently set up at Warner Bros. It's been 16 years since the project entered development limbo. In 2002, Will Smith, via Overbrook, secured the rights to the original Sidney Poitier-directed trilogy (including *Let's Do It Again*, 1975; and *A Piece of the Action*, 1977), with interest in remaking the films, starting with

Uptown Saturday Night, in what sounded like a possible all-star African American *Ocean's Eleven*-style romp, starring Smith, Denzel Washington, Eddie Murphy, Martin Lawrence, and others who were said to be part of the conversation at the time. The project, which has been touched by several different writers since the initial announcement, is still in development hell. Our last update on it was in 2014, when yet another a new writer was hired to work on the script - Nicholas Stoller (*Forgetting Sarah Marshall*). Also, Adam McKay (*The Big Short*) has been attached to direct since 2012.

As I said at the time of the announcement of Stoller's hiring, it's baffling to me that, throughout the long rotation of writers and directors the project has seen, not one of the names mentioned has been African American, despite all the more than capable black writers and directors in Hollywood, and even outside of it, who would love to tackle this project. For a number of reasons, these are jobs that really should go to a black writer and a black director, if only to keep it somewhat in the spirit that the first trio of films were made: all 3 directed by Sidney Poitier, a black man; 2 written by African American playwright Richard Wesley; the other by Charles Blackwell, also African American. At a time when words like diversity and inclusion are *cause célèbre*, and we lament the fact that black talent (in front of and behind the camera) isn't being cultivated within the Hollywood studio system, here's a perfect opportunity for some of Hollywood's most powerful black figures (Will Smith, Denzel Washington, and whoever else might be involved) to affect change by giving this opportunity to talented black writers and directors. It's one of those films that would be sold mainly on its big-name stars anyway, and not on who's directing or writing it, so why not give a *brotha* or *sista* a shot? Of course, I'm assuming that Will Smith and Denzel Washington, individually or combined, are powerful enough within the industry to have some influence on who gets to write and/direct films they are starring in.

Other Overbrook projects in the works include the indie drama *Life in a Year* starring Jaden Smith, and *Hala*, from writer-director Minhal Baig, which is a feature film adaptation of Baig's short about a Muslim American teenager's struggles to reconcile desire with family obligations. The short caught the attention of an executive at Overbrook, who then took it to Jada Pinkett Smith, who watched it and fell in love with it, and decided that they should come on board to produce the film. It's currently in post-production.

A sequel to *Bright* is also in the works at Netflix, with Will Smith reprising his role, suggesting that he just may be considering returning to favor the brand of Will Smith movies that launched his pre-*I Am Legend* blockbuster years (special effects, action/adventure, creature features).

Although maybe what he said in the above 2015 quote is what we should instead focus on - that he has essentially stopped worrying about whether or not his movies are great, or commercial hits, and he's going to do what feels right for him in the moment, everything else be damned.

by **Tambay Obenson** on January 9th 2018



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2 COMMENTS

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Mark & Daria / Jan 9, 2018 1:05:31 PM

Bright assume success on Netflix is deceptive.

ericb / Jan 9, 2018 7:12:37 PM

EXHIBIT 5

WIKIPEDIA

Overbrook Entertainment

Overbrook Entertainment is an American production company and record label based in Culver City, California.^[1] It was founded by partners Will Smith and James Lassiter in 1998^[2], around the same time production for *Wild Wild West* (1999) was underway.

The name "Overbrook" is derived from Will Smith's neighborhood in West Philadelphia. The company produces music, films and television shows. Smith claimed to have started the company in order to serve as producer and find roles. He uses his role in the company to help unknown artists record music and also records music for some of his films in Overbrook.

Contents

- Filmography**
- Soundtrack**
- Distribution**
- References**

Filmography

- *Ali* (2001)
- *All of Us* (2003)
- *I, Robot* (2004)
- *Saving Face* (2004)
- *Hitch* (2005)
- *ATL* (2006)
- *The Pursuit of Happyness* (2006)
- *I Am Legend* (2007)
- *Hancock* (2008)
- *The Human Contract* (2008)
- *Lakeview Terrace* (2008)
- *The Secret Life of Bees* (2008)
- *Seven Pounds* (2008)
- *The Karate Kid* (2010)
- *Hawthorne* (2010)
- *This Means War* (2012)
- *After Earth* (2013)
- *The Queen Latifah Show* (2013)
- *Annie* (2014)
- *Collateral Beauty* (2016)
- *Bright* (2017)
- *To All the Boys I've Loved Before* (2018)
- *Cobra Kai* (2018)
- *Hala* (2019)
- *Bad Boys for Life* (2020)

Overbrook Entertainment



Type	Private
Industry	Entertainment
Founded	1998
Headquarters	Culver City, California
Key people	Will Smith (partner) James Lassiter (partner) Jada Pinkett Smith (partner)
Products	Motion pictures, music, home entertainment, talent management, television production
Website	www.overbrookent.com (http://www.Overbrookent.com)

- *Harold and the Purple Crayon* (TBA)
- *Uptown Saturday Night* (TBA)

Soundtrack

- *Wild Wild West* (1999)
- *Love & Basketball* (2000)
- *Men in Black II* (2002)
- *Annie* (2014)

Distribution

- *The 7th Commandment* (2005) (DVD)

References

1. "Overbrook Entertainment" (<http://www.kftv.com/company-5400522.html>). Kftv.com.
2. "Overbrook Entertainment company information, funding & investors" (https://uktest1.dealroom.co/companies/overbrook_entertainment). *uktest1.dealroom.co*. Retrieved 2019-10-01.

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