

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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JAMES F. DAVEY, Clerk

HAROLD WEISBERG,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 78-0322
	:	
WILLIAM H. WEBSTER, ET AL.,	:	
	:	
and	:	
	:	
FEDERAL BUREAU OF INVESTIGATION,	:	Civil Action No. 78-0420
ET AL.,	:	
	:	(Consolidated)
Defendants	:	

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S
MOTION FOR AN ORDER COMPELLING DEFENDANTS TO SEEK
JOINDER OF COPYRIGHT HOLDERS PURSUANT TO RULE 19(a)

Plaintiff has moved the Court for an order compelling defendants to seek joinder of the copyright holders of materials which have been withheld in these cases on the ground that their release is barred by Exemption 3 and the Copyright Act. In response, defendants have asserted that nothing in Weisberg v. Department of Justice, 203 U.S.App.D.C. 242, 631 F.2d 824 (1980), suggests that a court has the authority to order a defendant to seek joinder of another party. Accordingly, they urge that either plaintiff or the court carry the burden of joining alleged copyright holders.

However, as defendants note, the Weisberg court stated that Rule 19(a) of the Federal Rules of Civil Procedure "puts the burden on existing parties and the court to bring in those whose presence is necessary or desirable...." Id., 203 U.S.App.D.C. at 248, n. 40. (Emphasis added) Except as a last resort, it is not generally expected that a court will fulfill the role of a party to a lawsuit. Thus it is highly preferable that in the first instance the burden imposed by Rule 19 should be placed upon a party to the litigation. Only if that is of no avail should it be placed upon the court.

There are both legal and practical reasons why defendants should initially bear the burden of seeking joinder of copyright holders. First, this is a Freedom of Information Act ("FOIA") case, and in such an action the burden is on the agency to establish that the requested information is exempt. 5 U.S.C. § 552(a)(4)(B). Federal Open Market Committee v. Merrill, 443 U.S. 340, 352 (1979). Insofar as defendants claim that requested records are exempt under 5 U.S.C. § 552(b)(3) and the Copyright Act, 17 U.S.C. §101 et seq., they should be required to bring in the alleged copyright holders to substantiate and litigate such claims.

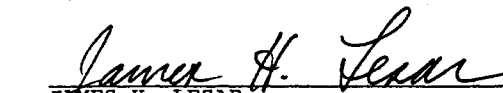
Secondly, as a practical matter, defendants have on hand the information needed to determine what materials may be subject to a copyright claim and who is the alleged copyright holder. Neither plaintiff nor the Court necessarily know this information or has any expedient means of ascertaining it. For example, prior to receipt of defendants' response to his motion, plaintiff did not know that the copyright holder of the Zapruder film is the LHM Company, and he still does not know where that company is located, information that is essential to its being joined as a party. Since defendants have the required information readily at hand or easily can obtain it, they rather than plaintiff or the court should be required to seek joinder of copyright holders in the first instance.^{1/}

^{1/} Although defendants allude only to the Zapruder film located in Dallas File No. 89-43-1A81, plaintiff is aware of two other copyright claims, and believes there may be more. One of the two, Dallas File No. 89-43-1A383, was described on the worksheets provided plaintiff as an 817 page manuscript dated 3/26/79. After plaintiff's counsel called this to the attention of Mr. Daniel Metcalfe, defendants' previous counsel, the copyright holder was contacted by defendants. Upon authorization by the copyright holder, the manuscript was released to plaintiff. The second copyright claim (other than the Zapruder film) is New Orleans File No. 89-69-1A3, described on the worksheet as a 15-page "Copy of story re Oswald" dated 11/26/63. Although it is conceivable that this was released to plaintiff upon reprocessing, he was not able to ascertain this on a check of his records made on July 5, 1982.

CONCLUSION

For the foregoing reasons, the Court should compel defendants to seek joinder of all alleged copyright holders of materials withheld pursuant to FOIA Exemption 3 and the Copyright Act. Should that prove unsuccessful, the Court should itself then seek joinder of such copyright holders.

Respectfully submitted,

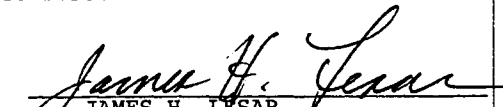


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Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this 6th day of July, 1982, mailed a copy of the foregoing Plaintiff's Reply to Defendants' Response to Plaintiff's Motion for an Order Compelling Defendants to Seek Joinder of Copyright Holders Pursuant to Rule 19(a) to Mr. Henry LaHaie, Civil Division, Room 3338, U.S. Department of Justice, Washington, D.C. 20530.



JAMES H. LESAR