

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GERARD A. SELBY, JR., et al., :

Plaintiffs, :

v. :

HENRY G. ZAPRUDER, et al., :

Defendants :

88- 3043

OCT 20 1988

MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION

Plaintiffs Gerard A. Selby, Jr. ("Selby") and Harold Weisberg ("Weisberg") moves this Court, pursuant to Rule 65 of the Federal Rules of Civil Procedure, to preliminarily and permanently enjoin the defendants, Henry G. Zapruder ("Zapruder") and the LMH Company, from:

(1) asserting that the sale of the rights to or the showing or copying of plaintiff Selby's documentary videotape "Reasonable Doubt: The Single Bullet Theory and the Assassination of President John F. Kennedy" infringes any copyright which the LMH Company may have in the motion picture film of the assassination of President John F. Kennedy ("the Zapruder film") taken by Abraham Zapruder in Dealey Plaza on November 22, 1963;

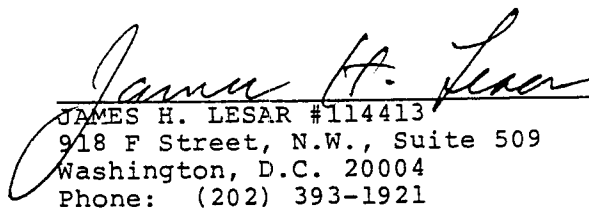
(2) asserting that the making of slides by the National Archives and Records Administration of frames from the original of the Zapruder film containing the material between the sprocket holes for plaintiff Weisberg infringes upon any copyright which the LMH Company may have in the Zapruder film; and

(3) withholding any authorization required by the National Archives and Records Administration to make slides of the original of the Zapruder film containing the material between the sprocket holes as requested by plaintiff Weisberg.

A Memorandum of Points and Authorities and a proposed Order are submitted herewith.

Incorporated herein by reference are the declarations of Gerard A. Selby, Jr. and W. Clark Bunting, which are attached to the Complaint.

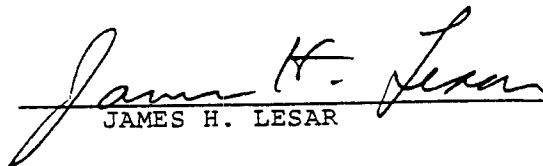
Respectfully submitted,


JAMES H. LESAR #114413
918 F Street, N.W., Suite 509
Washington, D.C. 20004
Phone: (202) 393-1921

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I have this 20th day of October, 1988, caused a copy of the foregoing Motion for Preliminary and Permanent Injunction to be hand-delivered to the office of Mr. Henry G. Zapruder, Morgan, Lewis & Bockius, 1800 M Street, N.W., Suite 630, Washington, D.C. 20036.


JAMES H. LESAR

UNITED STATES DISTRICT COURT
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PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Statement of the Case

This action arises under the Copyright Act, 17 U.S.C. § 101, et seq., the First Amendment to the United States Constitution, and the Declaratory Judgment Act, 28 U.S.C. § 2201, et seq. The plaintiffs, Harold Weisberg ("Weisberg") and Gerard A. Selby, Jr. ("Selby"), seek declaratory and injunctive relief in support of their efforts to disseminate ideas and information about the assassination of President John F. Kennedy through study and analysis of the motion picture film of the assassination taken by amateur photographer Abraham Zapruder in Dealey Plaza on November 22, 1963.

This film, known as "the Zapruder film," has played a crucial role in the long-standing controversy over the President's assassination. The court in Time Incorporated v. Bernard Geis Associates, 293 F. Supp. 130, 131 (S.D.N.Y. 1968), characterized it as "an

historic document and undoubtedly the most important photographic evidence concerning the fatal shots. . . ."

Three days after the assassination Abraham Zapruder sold the original and all three first-generation copies of the film, and all rights therein, to Life Magazine ("Life"), a division of Time, Inc., for \$150,000. Two of the three first-generation copies were turned over to the Secret Service. Geis, at 134.

Beginning with the November 29, 1963 issue of Life, certain frames of the Zapruder film received wide public exposure as stills. Life also published frames from the Zapruder film in its December 7, 1963 special "John F. Kennedy Memorial Edition," and in its issues of October 2, 1964; November 25, 1966; and November 24, 1967.

The President's Commission on the Assassination of President Kennedy ("the Warren Commission") made extensive use of the Zapruder film. Its report relied greatly on the Zapruder film. See, e.g., Warren Report, pp. 97-115. Six frames are reprinted in the Report (at pp. 100-103, 108, 114) and some 160 Zapruder frames are included in Volume XVIII of the Commission's 26 volumes of Hearings and Exhibits. Geis, at 134.

Analysis of the Zapruder film became a weapon for critics seeking to cast doubt on the validity of the Warren Commission's findings. See, e.g., Harold Weisberg, Whitewash--the report on the Warren Report (New York: Dell Publishing Co., 1965), pp. 36, 97-109, 285-287, 298, 310-312; Sylvia Meagher, Accessories After the Fact:

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The Warren Commission, the Authorities, and The Report (Indianapolis: Bobbs-Merrill Company, Inc., 1967), pp. 5, 22, 27-35, 164, 167, 169, 461; Howard Roffman, Presumed Guilty (South Brunswick and New York: A. S. Barnes and Company, 1976), pp. 36, 51, 54, 116, 226.

In 1967 Bernard Geis Associates published Prof. Josiah Thompson's Six Second in Dallas. This book contained numerous copies of frames from the Zapruder film, and this led to a suit by the copyright holder, Time, Inc. Finding that "[t]here is a public interest in having the fullest information available on the murder of President Kennedy[,] " the court held that the extensive use of frames from the Zapruder film in Six Seconds in Dallas was "fair use" outside the protection of the Copyright Act. Geis, supra, at 146.

In March 1975 the public first saw the Zapruder film as a motion picture when it was broadcast on the "Goodnight, America" show hosted by Geraldo Rivera on ABC-TV. The powerful impact of the motion picture film and the questions it raised undoubtedly contributed greatly to the climate of opinion which led Congress to establish the House Select Committee on Assassinations ("the HSCA") in 1976 to investigate the murders of President Kennedy and Dr. Martin Luther King, Jr.

Shortly after ABC's unauthorized broadcast of the Zapruder film, Time, Inc. assigned its copyright in the film over to Lillian Zapruder, Myrna Faith Hauser and Henry Zapruder (whose first ini-

tials are "LMH"). Since 1975 Henry G. Zapruder ("Zapruder"), acting as the agent for the LMH Company, has required that copies of the Zapruder film authorized by him bear the copyright notice: "Copyright (c) 1967 by LMH Company, All rights reserved".

Plaintiff Selby has used substantial portions of the Zapruder film in a 51-minute videotape entitled "Reasonable Doubt: The Single Bullet Theory and the Assassination of John F. Kennedy" ("the videotape"). Selby's videotape was produced, at a cost of \$18,000, in order to fulfill the "production thesis" option for a Master of Arts degree in the Department of Communications Arts & Theatre at the University of Maryland, College Park. See Declaration of Gerard A. Selby, Jr. ("Selby Declaration"), ¶¶1-2, 8. His documentary has just been awarded the Golden Eagle Award from the CINE ("Council on International Non-Theatrical Events") Film & Video Festival, an honor which means that it will represent the United States of America, along with other CINE Golden Eagle winners, for the next year in film and video festivals held throughout the world. Id., ¶14.

Since April 1985, Selby persistently has sought permission from Zapruder to use the Zapruder film in his documentary. Over the past three and a half years, it has proved impossible to communicate with Zapruder. He has never responded to a letter from Selby nor returned a phone call. On the rare occasion when Selby succeeded in speaking personally with Zapruder about securing rights to use the Zapruder film, when Zapruder himself answered the

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phone, Zapruder made outrageous fee demands. On that occasion, June 29, 1988, Selby approached Zapruder to secure authorization from the LMH Company so that he could exploit his documentary commercially. Zapruder informed him that the standard cost for worldwide TV distribution was \$30,000. This amount is more than 30 times higher than the per second rate charged by the newsreel libraries from which Selby gathered historical footage for his film. For example, the costs per second for film/videotape footage from the Sherman Grinberg Film Libraries range from \$40 to \$45 per second, whereas the rate charged by the LMH Company is approximately \$1500 per second. Id., ¶8.

Notwithstanding the exorbitant fee demanded by Zapruder, Selby sought to negotiate a deal whereby he would give Zapruder all monies that he made from "Reasonable Doubt" until Zapruder's \$30,000 fee was paid off. Alternatively, Selby offered to pay \$5,000 a year for six years regardless of whether he made any money from the videotape. Zapruder refused to accept either of these offers. Id.

The Discovery Channel, a national cable television network based in Landover, Maryland, which airs documentaries, has offered to pay Selby \$10,000 for a two-year contract to air his videotape, with the first six months of the contract being broadcast exclusive and the entire term of the contract being cable exclusive. However, the Discovery Channel will not purchase or air the documentary until all rights, including rights to the Zapruder film, have been secured

by Selby. Declaration of W. Clark Bunting, ¶3.

The 25th anniversary of the President's assassination, now little over a month away, will once again focus media attention on that tragedy. Numerous special programs on the assassination are in the works, including productions by CBS, NBC, British ITV, Jack Anderson Productions, the Geraldo Rivera Show, the Phil Donahue Show, the Oprah Winfrey Show, WBAI and Pacifica, KRON-TV News Department (ABC-TV, San Francisco), and two public TV broadcasts by The Kwitny Report and NOVA. The period of maximum commercial value for Selby's videotape is between now and November 22, 1988. After that date, the value of the documentary to the Discovery Channel "will be substantially reduced." Bunting Declaration, ¶4.

Plaintiff Harold Weisberg is the author of six books on the assassination of President Kennedy. He is recognized as a leading authority on the subject. He has long been interested in examining material which is latent on the original of the Zapruder film but which is not visible on copies of the motion picture or on slides made from such copies. The Zapruder film contains approximately 486 frames. About 22% of the film surface of each frame lies between the sprocket holes which are used to advance the film. On about two-thirds of the frames, this material has never been reproduced.

Weisberg called attention to the possible significance of the material between the sprocket holes in his book Whitewash II:

The FBI-Secret Service Cover-up (New York: Dell Publishing Co., Inc., 1967). Using the Zapruder film as a reference, official accounts state that the first time at which it was possible to shoot the President from the Sixth Floor of the Texas School Book Depository ("TSBD"), coincides with frame 210 of the Zapruder film ("Z 210"). However, *in the film between the sprocket holes* at Z 202 a witness to the assassination, Phil Willis, appears to be removing a camera from his eye as he moves into the street. By all official accounts, Willis involuntarily took a photograph of the President in reaction to the first shot. Weisberg states that copies of Zapruder frames containing the sprocket hole material would provide the clearest evidence that the first shot occurred prior to Z 210 and before it was possible for Lee Harvey Oswald to have fired a shot from the Sixth Floor of the TSBD. *Z agreed to this much earlier in Oct 78 or 82, & Weisberg provided the written assurance that Zapruder had disclaimed, without any response.*

By letter dated November 19, 1987, Weisberg, through his attorney, James H. Lesar, wrote the National Archives and Records Administration ("NARA"), and requested that he be allowed to have slides made which would capture the missing sprocket hole material. The letter stated that this would "make possible scholarly study of this latent photographic evidence, and that it [would] preserve this 'lost' evidence for posterity." Lesar concluded his letter by stating that he had discussed the Weisberg project with Zapruder and understood that he interposed no objection to it. He sent a copy of his letter to Zapruder. See Complaint Exhibit 1.

By letter dated December 4, 1987, NARA replied that it could provide the slides Weisberg wanted, but it insisted upon written permission from Zapruder before it would undertake the project. See Complaint Exhibit 2. Thereafter, Zapruder stated that if Lesar would confirm in writing "that the material is exclusively for personal use and is not intended to be exhibited or reproduced for consideration[,]. . . we will be pleased to provide you with a limited license (no license fee) together with authorization for the material. See Complaint Exhibit 4. Lesar immediately provided the requested assurance. See Complaint Exhibit 5. When the authorization by Zapruder did not arrive, Lesar followed up by phone and mail. In an April 1988 phone conversation, Zapruder told Lesar that the authorization for the Weisberg project would be sent in a couple of days. See Complaint Exhibit 6. The authorization has still not been provided.

The efforts of both plaintiffs having been stymied, they have now brought suit. At issue in this case is whether one man acting for the alleged copyright owner of perhaps the most vital piece of documentary evidence in the history of the United States is to be allowed to use the Copyright Act to dictate what ideas and information the public may receive concerning the President's assassination and what evidence scholars and researchers may study.

ARGUMENTI. PLAINTIFFS QUALIFY FOR ISSUANCE OF A PRELIMINARY INJUNCTIONA. General Standard

Three years ago, in Foundation on Economic Trends v. Heckler, 756 F.2d 143 (D.C.Cir. 1984), the D.C. Circuit reiterated the standards for issuing a preliminary injunction:

Under this Circuit's long-standing test, the District Court should consider (1) the plaintiff's likelihood of prevailing on the merits, (2) the threat of irreparable injury to the plaintiff in the absence of injunctive relief, (3) the possibility of substantial harm to other interested parties from the injunctive relief, and (4) the interest of the public. WMATC v. Holiday Tours, 559 F.2d 841, 845 (D.C.Cir. 1977); Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C.Cir. 1958).

Plaintiffs qualify under each of these criteria.

B. Likelihood of Prevailing on the Merits

Plaintiffs have set forth four claims which warrant the relief they seek. If they are likely to prevail on any one of these claims, they meet the first test for a preliminary injunction. Therefore, each claim will be discussed in turn.

1. "Fair Use"

One court already has had occasion to rule that a specific use of the Zapruder film frames without authorization of the copyright owner--then Time, Inc.--constituted "fair use" under the Copyright Act of 1909, 17 U.S.C. § 19, the predecessor of the

present statute. That case, Time Incorporated v. Bernard Geis Associates, 293 F. Supp. 130 (S.D.N.Y. 1968), involved publication of a book, Six Seconds in Dallas, which included "a number of what are called 'sketches' but which are in fact copies of parts of the Zapruder film." Id., at 132.

The Geis court expressed an "initial reluctance" to find "fair use" because the author, Prof. Josiah Thompson, had copied the Zapruder frames by stealth and had deliberately appropriated them in defiance of the copyright owner. However, it found that there was little injury to Time, Inc., the copyright owner, stating:

There is no competition between plaintiff and defendants. Plaintiff does not sell the Zapruder pictures as such and no market for the copyrighted work appears to be affected.

Id., at 146. The court further found that:

There is a public interest in having the fullest information available on the murder of President Kennedy. Thompson did serious work on the subject and has a theory entitled to public consideration.

Id. In balancing these considerations, the court found that use of the Zapruder film copies in Six Seconds in Dallas constituted fair use.

The case for "fair use" in this case is even stronger than that in Geis. Unlike the author of Six Seconds in Dallas, plaintiffs have not engaged in improper conduct nor sought to defy the alleged copyright owner. To the contrary, both plaintiffs have taken pains to seek authorization for use of the Zapruder film from

the agent for the alleged copyright owner, only to have him ignore them repeatedly and to make promises he has not kept. This conduct ill serves the public interest. Indeed, to this point the public interest has been totally thwarted by the dictatorial control over access to vital information on the Kennedy assassination that is being wielded by Zapruder as agent for the LMH Company. This contradicts the very purpose of the copyright clause of the United States Constitution, Article I, § 8, cl. 8, and is also inconsistent with the ultimate aim of the Copyright Act: "While the immediate effect of copyright law is to secure a fair return for an author's creative labor, the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." 18 Am. Jur. 2d, Copyright and Literary Property, § 1, citing Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975).

Weisberg's interest in having slides of the Zapruder film made which contain certain "lost" material between the sprocket holes is scholarly in nature. He has no commercial interest at all. Selby has a commercial interest, but it is very much attenuated by the fact that the sale of his documentary to the Discovery Channel can only net him a little over half of his costs in making the videotape. Moreover, it is clear from the facts that aside from fulfilling a requirement for a graduate degree and attempting to recoup some of his costs, Selby is primarily motivated by a desire to serve the public interest by shedding additional light on a critical aspect of the President's murder. That dissemina-

Only able to see this in 25 min. of the film. The film is a masterpiece of editing. The film is a masterpiece of editing. The film is a masterpiece of editing. The film is a masterpiece of editing.

tion of his videotape will perform that function is indicated by the fact that it has received a CINE Golden Eagle award and will be shown as an entry from the United States at various film and videotape festivals throughout the world for the next year.

The injury to the LMH Company is at best speculative. With respect to Weisberg's proposed project and use there is, of course, no possibility of injury to the LMH Company. With regard to Selby, his position is somewhat akin to that of Josiah Thompson in the Geis case. Selby does not sell or seek to sell the Zapruder film as such. Less than 5% of the total length of his documentary is devoted to display of the Zapruder film and frames. The Discovery Channel is interested in purchasing Selby's documentary, not the Zapruder film per se. There is no reason to believe that sale of the documentary to the Discovery Channel will adversely affect the market for the sale of the Zapruder film to those able to afford the enormous tolls which the LHM Company exacts for its use.

As in the Geis case, the overriding consideration in determining whether plaintiffs' uses of the Zapruder film constitute "fair use" should be the "public interest in having the fullest information available on the murder of President Kennedy." Albeit in different legal contexts, this Circuit has recognized the strength of the public interest on this subject. See, e.g., Allen v. Central Intelligence Agency, 636 F.2d 1287, 1300 (1980) (Kennedy assassination is "an event in which the public has demonstrated almost un-

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ending interest."); Allen v. F.B.I., 551 F. Supp. 694, 697 (D.D.C. 1982) (same).

In view of these considerations and the prior ruling in the Geis case, there is a strong likelihood that plaintiffs will prevail on the merits of their "fair use" claim.

2. Unconstitutionality of Copyright Act as Applied to the Zapruder Film

Plaintiffs contend that to the extent that their uses of the Zapruder film would infringe the Copyright Act, the Act is unconstitutional because it violates the freedom of speech protected by the First Amendment to the United States Constitution. The potential conflict between the Copyright Act and the First Amendment has long been the subject of extensive analysis by legal scholars. See, e.g., Paul Goldstein, Copyright and the First Amendment, 70 Col. L.R. 983 (June 1970); Robert C. Demicola, Copyright and Free Speech: Constitutional Limitations on Protection of Expression, 67 California Law Review 284 (1979); Note, Constitutional Law--Commercial Speech--Copyright and the First Amendment--Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 445 F. Supp. 875 (S.D.Fla. 1978), 1979 Wisconsin Law Review 242; Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press? 17 U.C.L.A. L. Rev. 1180 (1980); Sobel, Copyright and the First Amendment: A Gathering Storm? 19 ASCAP Copyright Symposium 43 (1971).

It is a fundamental principle that copyright does not protect an author's "ideas" per se, but only the expression of those ideas.

"If it did [protect "ideas"], there would certainly be a serious encroachment upon First Amendment values. The marketplace of ideas would be utterly bereft, and the democratic dialogue largely stifled, if the only ideas which might be discussed were those original with the speakers." Nimmer on Freedom of Speech: A Treatise on the Theory of the First Amendment, § 2.05[C] (New York: Matthew Bender, 1984), citing Lee v. Runge, 404 U.S. 887 (1971) ("The arena of public debate would be quiet, indeed, if a politician could copyright his speeches or a philosopher his treatise and thus obtain a monopoly on the ideas contained. We should not construe the copyright laws to conflict so patently with the values that the First Amendment was designed to protect.")

Ordinarily, the idea-expression dichotomy serves as a "definitional balance" which adequately protects both the copyright interest and the free speech and free press interest embodied in the First Amendment. In this case, however, the idea-expression dichotomy fails to protect the free speech interest adequately because idea and expression are indistinguishable. Prof. Nimmer has discussed this problem using the example of the selfsame Zapruder film at issue in this case. Because his thoughts on this matter speak with such eloquence, clarity and authority, they are repeated here in extenso:

At this point, however, it becomes necessary to strike the balance in the opposite direction with respect to certain types of graphic works. Consider the photographs from the Vietnam War of the My Lai massacre. Here is an instance where

the visual impact of a graphic work made a unique contribution to enlightened democratic dialogue. No amount of words describing the "idea" of the massacre could substitute for the public insight gained through the photographs. The photographic expression, not merely the idea, became essential if the public was to fully understand what occurred in this tragic episode. It would be intolerable if the public's comprehension of the full meaning of My Lai could be censored by the copyright owner of the photographs. Here it would seem that the speech interest outweighs the copyright interest. Something of the same considerations were at play in Time, Inc. v. Bernard Geis Associates, the case involving the Zapruder home movie films of the John Kennedy assassination. Though Judge Wyatt in that case did not expressly invoke the First Amendment, he did justify the defendant's right to copy frames of this film on the ground of the "public interest in having the fullest information available on the murder of President Kennedy." Note that in both the My Lai situation and in the Zapruder film case, the public could have learned the facts even without recourse to the photographs thereof. Judge Wyatt made a point of the fact that Life Magazine's copyright in the Zapruder film did not result in its having an "oligopoly" on the facts of the assassination. But without access to the photographs, in Meiklejohn's phrase, "all facts and interest relevant to the problem . . . [would not be] fully and fairly presented. . . ." In the case of My Lai, a denial that in fact any deaths had occurred would have been devastatingly refuted by the photographs in a way that the verbal reports of the deaths simply could not do. Anyone who would have to pass on their "ideas," i.e., the fact that dead bodies were seen sprawled on the ground, would be at least as suspect as those who originally reported the occurrence of the deaths. The photographs themselves--the "expression of the idea,"--made all the difference.

Similarly, in the welter of conflicting versions of what happened that tragic day in Dallas, the Zapruder film gave the public authoritative answers that it desperately sought; answers that no other source could supply with equal credibility. Again, it was only the expression, not the idea alone, that

could adequately serve the needs of an enlightened democratic dialogue. But if one agrees that the My Lai photographs and the Zapruder home movie film properly fall on the free speech side of the copyright-free speech definitional balance, the problem remains as to how to generalize from the My Lai and Zapruder specifics. Graphic works per se should not be deprived of full copyright protection. What, then, is an appropriate category within which to include the My Lai and Zapruder films? It should not include all graphic works in which there is a substantial "public interest" since this would include works which contribute little to the enlightenment function. I would, tentatively, suggest that this special category should be limited to "news photographs."

Nimmer on Freedom of Speech, § 2.05[C].

In line with this reasoning, the Zapruder film is outside the scope of copyright protection because to hold otherwise would violate the freedom of speech guaranteed by the First Amendment. To date only one court appears to have held that a copyright infringement, although it was not fair use, was nevertheless defensible by reason of the First Amendment, Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 445 F. Supp. 875 (S.D.Fla. 1978). That decision was upheld on appeal, 626 F.2d 1171 (5th Cir. 1980), but on "fair use" rather than First Amendment grounds.

Thus, this is a case of first impression in this Circuit and elsewhere. Although there is no existing case law on point, the constitutional point is obvious and its resolution in plaintiffs' favor virtually inescapable. Supported by the commanding authority of Prof. Nimmer and the compelling logic of his analysis, there is ample reason to conclude that plaintiffs are likely to prevail on the merits of their constitutional contention.

3. Abandonment of Copyright

It has been held that where the copyright owner has not attempted to prevent others from infringing his copyright over a long period of time, he has abandoned it. See Nimmer on Copyright, ¶ 13.06, citing Stuff v. E.C. Publications, Inc., 342 F.2d 143 (2d Cir. 1965); Cf. Rexnord, Inc. v. Modern Sys. Handling, Inc., 379 F. Supp. 1190 (D.Del. 1974).

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volume* Over the past 13 years the Zapruder film has been widely published on nationwide TV and in at least one best-selling book without authorization from the alleged copyright owner. Additionally, "bootleg" copies of the film are widely available from collectors of Kennedy assassination artifacts. See Selby Decla-
ration, ¶13(d).

So far as plaintiffs are aware, the LMH Company has never brought suit to protect its copyright. As a practical matter, the Zapruder film has entered the public domain. The LMH Company, have done nothing to protect its copyright claim, has abandoned it.

4. Incorrect Year Date in Notice

If the year contained in the notice is more than one year later than the actual year of first publication (or the year in which the copyright was obtained under the 1909 Act as an unpublished work) the work is considered to have been published without any notice. Nimmer on Copyright, § 7.08[C]. In that case, it is subject to the consequences which flow from the omission of notice. Id., citing Lifshitz v. Walter Drake & Sons, Inc.,

806 F.2d 1426, 1432 (9th Cir. 1986). Because the Zapruder film was first published in 1963 but the LMH Company notice of copyright carries a 1967 date, the film should be declared to have entered the public domain. Again, there is a clear likelihood that plaintiffs will prevail on the merits of this contention.

C. Threat of Irreparable Harm

It is readily apparent that in the absence of injunctive relief, plaintiff Selby will suffer irreparable harm. First, proof of a likelihood of success on the merits creates a presumption of irreparable harm sufficient to support the issuance of a preliminary injunction in a copyright case. Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983), cert. dismissed, 464 U.S. 1033 (1984); Apple Computer, Inc. v. Formula International, Inc., 725 F.2d 521 (9th Cir. 1984).

Second, Selby has invested significant time, money and effort in his documentary. The market for his product is likely to have substantial economic value only between now and November 22, 1988, the 25th anniversary of the President's assassination. Not only will he have a documentary with a greatly diminished commercial value after that date, but he will also be unable to fulfill his objective of disseminating his views on the Kennedy assassination evidence to the public as widely as possible. See Midway Manufacturing Co. v. Dirkschneider, 543 F. Supp. 466 (D.Neb. 1981) (observing that popularity of audiovisual games is "notoriously

short-lived," that plaintiff had invested large sums of money in developing games in question, and that without injunction, public's interest in games might dissipate before plaintiff was able to vindicate its rights).

D. Possibility of Substantial Harm to Other Interested Parties

Balanced against the irreparable harm to plaintiff Selby, there is little possibility of substantial harm to other interested parties. Interested parties such as the Discovery Channel who want to purchase the rights to Selby's videotape will benefit from, rather than be harmed by, an injunction.

The possibility of harm to the LMJ Company is not substantial. The order drafted by plaintiffs is narrowly tailored to enjoin the LMH Company from asserting that the Copyright Act bars Selby from selling the rights to his videotape "Reasonable Doubt" without authorization from the LMH Company. At best, LMH's damage would be limited to its loss of fees which it might collect from Selby. Since the fees demanded by the LMH Company far exceed what Selby can afford to pay for rights to use the Zapruder film, there is no possibility of LMH receiving those fees in any event, and hence no possibility of harm to it. *Any possible harm comes from LMH's need only*

E. Interest of the Public

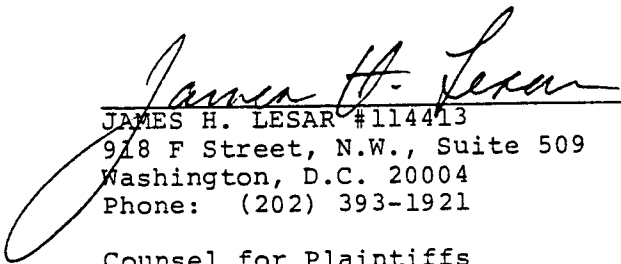
As plaintiffs have shown in discussing "fair use" in part I(B) above, there is an overriding public interest in the fullest

possible disclosure of information concerning the Kennedy assassination. This interest will be measurably advanced by issuance of injunctive relief so that plaintiff Selby's award-winning documentary may be shown to the public.

CONCLUSION

For the reasons set forth above, plaintiffs meet the standard for issuance of injunctive relief. This Court should issue the injunctive relief prayed for.

Respectfully submitted,



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Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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 Defendants :

O R D E R

Plaintiffs seek a preliminary injunction in this case. In order to grant a preliminary injunction, plaintiffs must (1) make a showing that they are likely to prevail on the merits; (2) show that they will be irreparably harmed absent the relief sought; (3) show that the issuance of an injunction would not substantially harm others; and (4) show that the public interest would not be harmed by the injunctive relief. Virginia Petroleum Jobbers Association v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C.Cir. 1958); American Federation of Government Employees v. O.P.M., 618 F. Supp. 1254, 1258 (1985). The Court concludes that plaintiff Selby has met this burden.

As to the likelihood of success, plaintiffs are likely to prevail on the merits of this action in view of the prior ruling in Time Incorporated v. Bernard Geis Associates, 293 F. Supp. 130, (S.D.N.Y. 1968) that copying of the Zapruder film constitutes

"fair use" under the Copyright Act, 17 U.S.C. § 107.

Other claims raised by the plaintiffs also have strong merit, particularly their claim that affording copyright protection to the Zapruder film would violate the right of free speech secured by the First Amendment.

The Court finds that plaintiff Selby would suffer irreparable harm if injunctive relief does not issue. Selby must obtain injunctive relief if he is to protect the market value of his documentary and be able to disseminate his ideas and information on the assassination of President Kennedy widely. Since Selby cannot afford to pay the LMH Company the copyright fees it demands, any injury to it arising out of the injunction is at best speculative and indirect.

The public interest favors issuance of an injunction because there is an overriding interest in the fullest possible disclosure of information about the President's murder.

Therefore, it is by this Court this ____ day of _____
_____, 1988,

ORDERED, that the defendants, Henry G. Zapruder and the LMH Company, are enjoined from asserting that the sale of rights to or the showing or copying of plaintiff Selby's documentary videotape "Reasonable Doubt: The Single Bullet Theory and the Assassination of President John F. Kennedy" infringes any copyright the LMH Company may have in the motion picture fil_l of the assassina- M

tion of President John F. Kennedy ("the Zapruder film") taken by Abraham Zapruder in Dealey Plaza on November 22, 1963.

UNITED STATES DISTRICT JUDGE