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## 'Heroes' IP Suit Against NBC Needs 2nd Shot, 9th Circ. Hears

By **Ciaran McEvoy**

Law360, Los Angeles (February 04, 2013, 6:18 PM ET) -- A comic book author suing NBC Universal Inc. for allegedly ripping off his work in the TV series "Heroes" urged the Ninth Circuit to revive his copyright infringement and unfair competition claims Monday, saying a trial judge used an overly rigorous test for the works' similarity in dismissing his lawsuit.

In oral arguments before a three-judge panel, attorney Theodore F. Shiells asked the appeals court to allow his client, Jazan Wild, to proceed with his complaint, which claims the carnival theme in the fourth season of NBC's show "Heroes" copied his graphic novel "Carnival of Souls."

In May 2011, U.S. District Judge Gary Allen Feess of the Central District of California dismissed Wild's lawsuit without leave to amend. He ruled that the author's graphic novel and the television series "differ markedly in mood and setting" and were not substantially similar works, and that Wild had thus failed to state a claim for copyright infringement.

In briefs filed with the court in March 2012, Wild contends that when Judge Feess determined there wasn't substantial similarity between "Heroes" and "Carnival of Souls," he didn't accept Wild's argument that the wide availability of his novel meant that he had a lower standard of proof to show NBC ripped off his work. As a result, the judge's finding of a lack of substantial similarity was incorrect, Wild said.

At oral arguments on Monday, Shiells said if Wild's complaint were reinstated, he would amend it to show that NBC used artwork from "Carnival of Souls" on its storyboards during the preproduction of the fourth season of "Heroes."

Gail Migdal Title, a lawyer for NBC, called Wild's storyboard argument "a red herring."

"If, at the end of the day, the work that is being alleged to have been infringed is not substantially similar to plaintiff's work, there is no infringement," Title said. "Random similarities cannot form the basis of copyright infringement. That's simply not the law. It's not good policy."

The Ninth Circuit took the matter under submission.

Wild had sued NBC in May 2010, alleging copyright infringement, intentional and negligent interference with prospective economic advantage, unfair competition, and unfair enrichment. He claimed that the carnival theme of the fourth season of the TV series was pulled from his own carnival-themed graphic novel.

In dismissing Wild's lawsuit with prejudice, Judge Feess ruled that the "purported

similarities are described at a level of abstraction that belies the merits of plaintiff's copyright claim."

"While it is true that "Heroes" added a carnival clan as an element of its fourth season, the notion of a carnival, even a bizarre or threatening carnival with a 'dark leader,' is too generic to warrant copyright protection," Judge Feess ruled, noting the dark carnival theme had been explored elsewhere, including Ray Bradbury's 1962 novel "Something Wicked This Way Comes."

U.S. Circuit Judges Consuelo M. Callahan, Sandra Segal Ikuta and Andrew D. Hurwitz sat on the panel for the Ninth Circuit.

Jazan Wild is represented by Theodore F. Shiells of Shiells Law Firm PC.

NBC Universal Inc. is represented by Cory Baskin, Rebecca Faye Ganz, Gail Migdal Title and Joel Robert Weiner of Katten Muchin Rosenman LLP.

The case is Jazan Wild v. NBC Universal Inc., et al., case number 11-56065, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Kat Laskowski.

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