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NBC Beats Graphic Novelist's 'Heroes' IP Claims In 9th Circ.

By **Scott Flaherty**

Law360, New York (February 28, 2013, 6:56 PM ET) -- The Ninth Circuit on Thursday shot down a comic book author's claims that the NBC Universal Inc. television show "Heroes" infringed the copyright on his work, finding there were no substantial similarities between the graphic novel and the series.

A three-judge appeals panel upheld the dismissal of copyright infringement allegations brought against NBC by Jazan Wild, author of "Carnival of Souls." Wild had contended the fourth season of NBC's "Heroes," which allegedly included a carnival theme, infringed the copyright on his work.

The Ninth Circuit said Thursday it agreed with the decision of the lower court, which conducted a detailed comparison of "Heroes" and Wild's graphic novel and found that the two works were dissimilar enough to warrant dismissal of the complaint.

"The district court ... concluded that 'other than the presence of generic carnival elements and standard scenes that logically flow from those elements, the two works differ radically in their plot and story lines, their characters, the dialogue, the setting and themes, and the mood,'" the Ninth Circuit said, quoting the lower court's ruling in the case. "We have independently reviewed the works and agree."

Wild had also argued that there were visual similarities between his graphic novel and "Heroes," and attempted to demonstrate the likeness by juxtaposing scenes from the TV show with individual frames of the comic, according to the circuit court's ruling.

Those depictions — which the appeals panel ruled were "scenes a faire" not subject to copyright protection — included "a character approaching a carnival, characters in the house of mirrors, and a view through a gun sight," the Ninth Circuit said.

"These images ... are simply unprotectable 'stock scenes' or 'scenes a faire' (situations that naturally flow from a basic premise)," the appeals panel said. "Any remaining comparable aspects of these scenes constitute nothing more than 'random similarities scattered throughout the works' that are insufficient to support a claim of substantial similarity."

Wild initially filed suit against NBC in May 2010 in California federal court, making copyright infringement, unfair competition and unjust enrichment claims, among others. In a May 2011 ruling, the district court judge dismissed Wild's allegations without leave to amend.

The graphic novel author later appealed and, on Feb. 4, the two sides engaged in oral arguments in front of the three-judge Ninth Circuit panel. Thursday's decision keeps the

lower court's dismissal in place.

An attorney for Wild and a representative for NBC Universal did not immediately respond to requests for comment.

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

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

NBC is represented by Gail Migdal Title, Joel R. Weiner, Cory Baskin and Rebecca F. Ganz of Katten Muchin Rosenman LLP.

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

--Additional reporting by Ciaran McEvoy. Editing by Eydie Cubarrubia.

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