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## 3rd Circ. Won't Revive Copyright Suit Over Fox's 'Empire'

By **Bonnie Eslinger**

Law360 (August 28, 2018, 11:24 PM EDT) -- The Third Circuit on Tuesday refused to revive a Philadelphia actor-turned-writer's copyright infringement suit accusing the creator of the Fox television drama "Empire" of poaching from his pitched pilot about an African-American record company owner, saying the two works weren't substantially similar.

Clayton Prince Tanksley filed suit in January 2016 alleging that the creator of "Empire," Lee Daniels, expressed interest in his story idea at a 2008 Greater Philadelphia Film Office event where local writers pitched movie concepts to entertainment professionals. Tanksley said he provided Daniels with a DVD and a script of his proposed series, "Cream," which he wrote, directed and starred in. In 2015, nearly seven years later, Fox aired the debut episode of "Empire."

The suit was tossed by a district court judge in April 2017. On Tuesday, the Third Circuit affirmed that decision.

"We conclude that, superficial similarities notwithstanding, 'Cream' and 'Empire' are not substantially similar as a matter of law. This conclusion flows unavoidably from a comparison of the two shows' characters, settings and storylines," the federal appellate court stated. "As a preliminary matter, we note that the shared premise of the shows — an African-American, male record executive — is unprotectable. These characters fit squarely within the class of 'prototypes' to which copyright protection has never extended."

On appeal, Tanksley raises two main arguments, the federal appellate court noted in its Tuesday ruling: He argues that, procedurally, the question of substantial similarity is too fact-intensive to be resolved at the pleading stage and also maintains the district court erred in determining the differences outweighed the similarities between the two television storylines.

In its Tuesday ruling, the Third Circuit said while summary judgment decisions have traditionally been disfavored in copyright litigation, in recent years, several courts of appeals have affirmed such dismissals. The court have dismissed an infringement action by concluding that "no trier of fact could rationally determine the two works to be substantially similar," the Third Circuit noted.

"On appeal, Tanksley criticizes the court for rendering its decision 'without the benefit of witness testimony, documentary evidence or expert analysis,' ... but fails to explain how any such evidence could have been relevant," the federal appellate court stated in its Tuesday opinion.

In "Cream," the protagonist, Winston St. James, runs Big Balla Records, a label that is not presented as being glamorous or high-profile, the appellate court underscored.

"In 'Empire,' [main character] Lucious Lyon's company, Empire Entertainment, is portrayed as a massive corporate conglomerate, with stakes in music, clothing and entertainment," the Third Circuit stated. "Lucious' life is portrayed as the epitome of luxury: lavish offices and homes, state-of-the-art studios and yacht parties."

Tanksley argues that substantial similarity can be found in the fact that Lucious and Winston are both diagnosed with a disease, but the Third Circuit found any comparison ended there.

"In 'Empire,' Lucious' diagnosis of ALS — which is fatal — creates the urgency to choose his successor, the focal point of the entire series. In 'Cream,' Winston's diagnosis of herpes — which is painful — merely serves to interfere with his romantic liaisons and introduces the venereal whodunit that follows," the federal appellate court stated.

No reasonable jury could find the works are substantially similar, the Third Circuit said.

"As the district court concluded, even when 'viewing the comparisons in the light most favorable to [Tanksley], ... 'Cream' and 'Empire' contain dramatically different expressions of plot, characters, theme, mood, setting, dialogue, total concept and overall feel," the court stated.

Without substantial similarity, Tanksley's complaint fails to state a claim of copyright infringement and was properly dismissed, the Third Circuit concluded, adding that it also agreed with the lower court that giving Tanksley the chance to amend the complaint "would have been futile."

Back in April of 2017, U.S. District Judge Joel Slomsky **similarly said** that the overall plot lines of "Empire" and "Cream," both of which deal with fights for succession at successful record labels helmed by characters with checkered pasts, were too general for Tanksley to pursue a viable claim of copyright infringement.

Judge Slomsky also rejected claims of contributory copyright infringement and negligence against the Greater Philadelphia Film Office and its executive director, Sharon Pinkenson, over their organization of the networking event where Tanksley shared his idea for "Cream" with Daniels.

Tanksley appeared as a guest star in episodes of "The Cosby Show" and "Spin City" in the 1980s and '90s.

Counsel for Tanksley did not immediately respond to a request for comment Tuesday from Law360.

An attorney for the Fox defendants, Richard L. Stone of Jenner & Block LLP, provided a written statement to Law360 in response to the ruling.

"We are pleased with the Third Circuit's thorough order affirming the district court's dismissal of these claims, and with the Third Circuit's decision to join other circuits in approving the dismissal of copyright infringement claims at the pleading stage where the works before the court are not substantially similar," the attorney said.

U.S. Circuit Judges Michael A. Chagares, Thomas I. Vanaskie and D. Michael Fisher sat on the appellate panel that issued Tuesday's decision.

Tanksley is represented by Mary E. Bogan of Bogan Law Group LLC and Predrag Filipovich of the Law Offices of Predrag Filipovic.

The Fox defendants are represented by Andrew J. Thomas, Andrew G. Sullivan and Richard L. Stone of Jenner & Block LLP and Michael K. Twersky of Fox Rothschild LLP.

The Greater Philadelphia Film Office and Sharon Pinkenson are represented by Mathieu J. Shapiro of Obermayer Rebmann Maxwell & Hippel LLP.

The case is Clayton Prince Tanksley v. Lee Daniels et al., case number 17-2023, in the U.S. Court of Appeals for the Third Circuit.

--Additional reporting by Matt Fair. Editing by Katherine Rautenberg.

*Update: The story has been updated with comment from an attorney for the Fox defendants.*