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Jarecki v. Ohoven: MedImmune as a Sword for Certain Copyright Owners

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Copyright, compared to other forms of intellectual property, is acutely and uniquely attuned to the film and television industry. Somewhat distinctive of these industries are the numerous, low-threshold hurdles that can significantly interfere with a copyright owner's commercial exploitation of their work in connection with a film or television production.

Judge Kozinski once said that "[\[m\]ovie makers do lunch, not contracts.](#)" While this may be true, they also operate on representations and warranties. Indeed, a copyright owner's ability to represent and warrant that he controls 'all rights' in a work (e.g. a screenplay) is critical to the successful commercial exploitation of a motion picture and/or television project. In such a highly-competitive, interchangeable industry, projects are unlikely to generate significant interest from investors, studios, production companies, and other key parties if there is even a slight risk that an adverse legal claim in an underlying work exists. Accordingly, the purported owner of a copyright to be exploited in connection with a film or television project must typically make certain representations and warranties that they do in fact control all rights in the film. If the owner cannot make these guarantees, the project is unlikely to be sold.

Unfortunately, as this is a well-known truth in the entertainment industry, it is not uncommon for jilted parties to try and abuse this knowledge to maliciously interfere with the commercial exploitation of a project by attempting to generate a "cloud of title" over key copyrighted works. This is particularly dangerous, since even a *legally deficient* cloud of title can significantly disrupt and impair a copyright holder's ability to successfully market its work if it causes investors and other essential parties to hesitate. Due to the strict, time-sensitive nature of film and television production and release schedules, even a fleeting cloud of title risks burning a permanent "black spot" into a project that can stop it in its tracks and disrupt it beyond the realm of commercial feasibility. This is *precisely* where the *MedImmune* decision can help copyright owners in the film and television industry. In fact, as illustrated by the recent case of *Jarecki v. Ohoven*, there are certain unique circumstances in copyright law where the *MedImmune* standard would be a welcome development.

In *Jarecki*, Nicholas Jarecki—writer and director of the [Sundance](#) and [commercial hit](#), *Arbitrage*, starring Richard Gere, Susan Sarandon, and Tim Roth, and the screenplay by the same name—brought a declaratory judgment action against Hollywood producer Michael Ohoven and his production company, Infinity Media, to establish "(1) that Defendants [held] no copyright interests in the Screenplay or in the Film, and (2) that,

as between [Jarecki] and Defendants, the Screenplay is not a joint work and [Jarecki] is the sole author of the work.”

Prior to the suit, Infinity Media had been in talks with Jarecki to finance and perhaps produce the film. During this time, a third party consultant known to both parties provided “general comments” to the screenplay. Notably, the consultant did not contribute independently–copyrightable elements to the screenplay; and, in any event, no party expressed co–authorship intent. Due to several disputes over financing, principal photography, and Infinity Media’s insistence that Jarecki assign them an ownership interest in the screenplay, the parties ended their negotiations and Jarecki obtained financing elsewhere.

After Jarecki parted ways with Infinity Media and became deeply invested in the principal photography of the Film, he received a cease–and–desist letter from Infinity Media’s counsel, which asserted among other things, that they would “seek immediate, emergency injunctive and equitable relief” and “pursue all available legal and equitable claims” if Jarecki did not cease–and–desist from engaging in all conduct related to the screenplay and/or film. As a consequence of the letter, Jarecki and the Film faced concerned investors and were required to renegotiate the completion bond for the Film at great expense and a higher interest rate. Less than three weeks later, Jarecki filed for declaratory relief.

The Central District of California [promptly granted](#) Jarecki’s motion for summary judgment because the black letter law of the Copyright Act plainly established that Jarecki was the sole owner of copyright in the screenplay and film. Indeed, Infinity Media did not even attempt to argue on the merits in their Opposition Brief. Additionally, and in tandem, the court dismissed Infinity Media’s Motion for Judgment on the Pleadings, finding that the [Infinity Media’s actions created a live “case or controversy.”](#) In holding that a “case or controversy” did in fact exist, Judge Feess characterized Defendants’ actions as “[Damoclean threat\[s\] \[that\] could hardly more clearly threaten suit.](#)”

Although the Central District of California decided *Jarecki* under the reasonable apprehension standard, the case is nonetheless instrumental for illustrating the enormous potential benefits of increased *MedImmune* deference in this copyright setting. Such disputes are all too common in the film and television industry, and a cloud of title—*whether real or imagined*—can truly destroy an otherwise promising project. In light of this danger, the “reasonable apprehension” test arguably made *Jarecki* a closer call than it should have been.

MedImmune was not required to reach the right outcome in *Jarecki* because of the explicit and unrestrained nature of Infinity Media’s litigious threats and acts, which buoyed the court’s decision to grant Jarecki immediate declaratory relief. However, it is too easy to imagine similar facts under which a valid copyright owner might not have been as victorious as Jarecki. Fortunately, this danger can be policed with greater success under the *MedImmune* standard, thanks to its elimination of the explicit “reasonable apprehension of suit” requirement in lieu

of a more permissible rule that considers the facts “under all [] circumstances” as a cohesive whole. Accordingly, for certain copyright owners, *MedImmune* has the potential to be a valuable tool to quickly dissipate nebulous, peripheral clouds of title that would otherwise risk significantly damaging the commercial exploitation of their works. *MedImmune* may create a great deal of headaches in patent and trademark, but in certain specialized areas of copyright, it is far more likely to *relieve* them.

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