

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
www.flsb.uscourts.gov

In re:

LORRAINE BROOKE ASSOCIATES,
INC.,

Case No. 07-12641-BKC-AJC
Chapter 7

Debtor.

SUPPLEMENT TO TRUSTEE DILLWORTH'S EMERGENCY MOTION¹

Drew M. Dillworth, the duly appointed, qualified and acting Chapter 7 Trustee ("Trustee Dillworth") for the bankruptcy estate of Lorraine Brooke Associates, Inc. (the "Debtor"), through undersigned counsel, pursuant to 11 U.S.C. Sections 105(a) and 362(a)(3), files this *Supplement to Trustee Dillworth's Emergency Motion* (the "Supplement") in order to provide greater clarity for this Court with respect to the substance of the Emergency Motion. Because of the nature of this case and the torrid pace of the Internet publication, dissemination and distribution of the Manuscript (as defined in the Emergency Motion) due to the actions of TMZ (as defined in the Emergency Motion), additional facts and information regarding the ongoing damage to the estate is now available and should be before this Court prior to the hearing on the Emergency Motion.

1. On June 19, 2007, at approximately 9:30 p.m., Trustee Dillworth filed the Emergency Motion seeking an expedited hearing to prevent any further dissipation of estate assets than what has already occurred through the unauthorized publishing of the manuscript of IF I DID IT.

¹The Emergency Motion can be found on the Bankruptcy Court for the Southern District of Florida's Electronic Docket and is formally titled *Trustee Dillworth's Emergency Motion To (I) Enforce The Automatic Stay; (II) For an Order to Show Cause Why Tmz.Com Should Not Be Held In Contempt Of Court For Violation Of The Automatic Stay; (III) Compel The Person With Most Knowledge At Tmz.Com To Appear And Testify At A 2004 Examination; and (IV) Compel Compliance with Order of this Court* (the "Emergency Motion")

2. After filing the Emergency Motion, Trustee Dillworth and undersigned counsel spent numerous hours reviewing multiple Internet websites in order to understand the breadth of the publication, dissemination and distribution of the Manuscript as a result of the wrongful publication by TMZ on the TMZ Website². What Trustee Dillworth and undersigned counsel learned through Internet research is staggering. Mere minutes after the original post on the TMZ website, references to the TMZ Website and the excerpts of the Manuscript contained thereon were readily available at countless websites, all of which could be found through a simple search on www.google.com using the search logic "If I Did It leaked." Undersigned counsel was able to catalogue a random sampling of the websites that typical Internet user, using the above-referenced search logic, would find available. That list of websites is included herein as Exhibit "A."

3. As noted in Comments on the TMZ.com website, our own diligence, and simple internet searches, the Manuscript is readily available throughout the Internet and the downloads are "growing exponentially." As of the filing of the Emergency Motion, the TMZ Website had over 400 comments posted relating to the Manuscript. As of the time of the filing of this Supplement, the comments relating to the Manuscript have already grown to nearly 700.

4. While this instant case involves the rapid dissemination and distribution throughout the Internet in mere minutes, this is not the first case where publication rights have been usurped through the publication of direct verbatim excerpts. In fact, the United States Supreme Court in *Harper & Row v. Nation Enterprises*, 105 S.Ct. 2218, 471 U.S. 539 (1984), addressed similar circumstances. Of course, in 1984, the aggravating factor of immediate global dissemination on the Internet was not a factor.

² Attached hereto as Exhibit "B" are the first three pages of the Manuscript, which was published on the TMZ Website and bears the TMZ.COM watermark on each and every page.

5. In *Nation Enterprises*, the Supreme Court was confronted with the following set of facts, as outlined in the syllabus to the Supreme Court's opinion. In 1977, former President Ford contracted with petitioners to publish his as yet unwritten memoirs. The agreement gave petitioners the exclusive first serial right to license prepublication excerpts. Two years later, as the memoirs were nearing completion, petitioners, as the copyright holders, negotiated a prepublication licensing agreement with Time Magazine under which Time agreed to pay \$25,000 (\$12,500 in advance and the balance at publication) in exchange for the right to excerpt 7,500 words from Mr. Ford's account of his pardon of former President Nixon. Shortly before the Time article's scheduled release, an unauthorized source provided The Nation Magazine with the unpublished Ford manuscript. Working directly from this manuscript, an editor of The Nation produced a 2,250-word article, at least 300 to 400 words of which consisted of verbatim quotes of copyrighted expression taken from the manuscript. It was timed to "scoop" the Time article. As a result of the publication of The Nation's article, Time canceled its article and refused to pay the remaining \$12,500 to petitioners.

6. Given the above facts, the Supreme Court held the following:

(a) In using generous verbatim excerpts of Mr. Ford's unpublished expression to lend authenticity to its account of the forthcoming memoirs, The Nation effectively arrogated to itself the right of first publication, an important marketable subsidiary right.

(b) Taking into account the four factors enumerated in § 107 as especially relevant in determining fair use, leads to the conclusion that the use in question here was not fair. (i) The fact that news reporting was the general purpose of The Nation's use is simply one factor. While The Nation had every right to be the first to publish the information, it went beyond simply reporting uncopyrightable information and actively sought to exploit the headline value of its infringement, making a "news event" out of its unauthorized first publication. The fact that the publication was commercial as opposed to nonprofit is a separate factor tending to weigh against a finding of fair use. Fair use presupposes good faith. The Nation's unauthorized use of the undissemated manuscript had not merely the incidental effect but the intended purpose of supplanting the copyright holders' commercially valuable right of first publication. (ii) While there may be a greater need to disseminate works of fact than works of fiction, The Nation's taking of copyrighted expression exceeded that necessary to disseminate the facts and infringed

the copyright holders' interests in confidentiality and creative control over the first public appearance of the work. (iii) Although the verbatim quotes in question were an insubstantial portion of the Ford manuscript, they qualitatively embodied Mr. Ford's distinctive expression and played a key role in the infringing article. (iv) As to the effect of The Nation's article on the market for the copyrighted work, Time's cancellation of its projected article and its refusal to pay \$12,500 were the direct effect of the infringing publication. Once a copyright holder establishes a causal connection between the infringement and loss of revenue, the burden shifts to the infringer to show that the damage would have occurred had there been no taking of copyrighted expression. Petitioners established a prima facie case of actual damage that respondents failed to rebut. More important, to negate a claim of fair use it need only be shown that if the challenged use should become widespread, it would adversely affect the potential market for the copyrighted work. Here, The Nation's liberal use of verbatim excerpts posed substantial potential for damage to the marketability of first serialization rights in the copyrighted work.

7. There is no doubt that large excerpts of the Manuscript, and even the full Manuscript itself, have been published, disseminated and distributed throughout the world as a result of the original wrongful publishing by TMZ on the TMZ Website, causing irreparable damage to the single most valuable asset of this bankruptcy estate.

I HEREBY CERTIFY that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualification to practice in this Court set forth in Local Rule 2090-1(a).

I HEREBY CERTIFY that a true and correct copy of the foregoing was served upon Jeremy Williams, S.V.P. and Deputy General Counsel, Warner Bros. Entertainment, Inc. via electronic mail and via Regular U.S. mail, postage prepaid, to all parties listed on the attached service list this 20th day of June, 2007.

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Case 07-12641-AJC
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Miami
Wed Jun 20 12:25:54 EDT 2007

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EXHIBIT "A"

http://www.nationalledger.com/artman/publish/article_272614182.shtml

http://www.postchronicle.com/news/original/article_21287433.shtml

<http://www.hollywoodhooked.com/>

<http://www.gambling911.com/OJ-Simpson-If-I-Did-It-Manuscript-Leaked-Online-061907.html>

<http://news.ninemsn.com.au/article.aspx?id=274093>

<http://www.hollywoodgrind.com/>

<http://defamer.com/hollywood/oj-simpson/>

IF I DID IT
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EXHIBIT
B

AUTHOR'S NOTE:

If I did it, this is what happened.

TAMZ.com

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