

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
STUART Y. SILVERSTEIN, :
 :
 Plaintiff, :
 : 01 Civ. 309 (JFK)
 -against- :
 : Findings of Fact and
 PENGUIN PUTNAM, INC., : and Conclusions of Law
 :
 Defendant. :
-----X

JOHN F. KEENAN, United States District Judge:

APPEARANCES:

For Plaintiff Stuart Y. Silverstein:

Mark A. Rabinowitz
Christopher Mickus
Neal, Gerber & Eisenberg, LLP
Two North LaSalle Street
Chicago, Illinois 60602-3801

For Defendant Penguin Putnam, Inc.:

Richard Dannay
Thomas Kjellberg
Cowan, Liebowitz & Latman, PC
1133 Avenue of the Americas
New York, New York 10036-6799

JOHN F. KEENAN, United States District Judge

JOHN F. KEENAN, United States District Judge

Background

This case revolves around the poems of Dorothy Parker, the famous writer who was a member of the Algonquin Round Table. Ms. Parker published her literary works mainly during the first half of the 20th century. She authored poems, verses, dramatic reviews, short stories, plays, and screen plays.¹ Her works appeared in various periodicals, including: The New York Tribune, Vanity Fair, Vogue, The New Yorker, New York World, The New York Herald Tribune, The Saturday Evening Post, and Life. Over the years, Ms. Parker collected her poems in several books: Enough Rope (1926), Sunset Gun (1928), Death and Taxes (1931), Not So Deep as a Well (1936), and The Portable Dorothy Parker (1944).

At issue in this case is whether plaintiff Stuart Y. Silverstein's compilation of Dorothy Parker's previously uncollected poems in Not Much Fun: The Lost Poems of Dorothy Parker (Scribner 1996) ("Not Much Fun") is entitled to copyright protection and, if so, whether the defendant Putnam Penguin Inc.'s book Dorothy Parker: Complete Poems (Penguin Books 1999)

¹ Parker also wrote under the pseudonyms Henriette Rousseau, Helen Wells, Constant Reader, or D.P. She also published items under her maiden name, Dorothy Rothschild.

("Complete Poems") infringed upon that copyright. Silverstein also raises claims of "reverse passing off" under the Lanham Act and unfair competition and immoral trade practices under New York state law.

On April 4, 2003, this Court entered summary judgment for the plaintiff and enjoined the defendant from selling or further distributing Complete Poems. On appeal, the Court of Appeals for the Second Circuit vacated the judgment and the injunction and remanded the case for trial. Silverstein v. Penguin Putnam, Inc., 368 F.3d 77 (2d Cir. 2004).

The Court of Appeals held that issues of material fact existed as to whether Silverstein exercised sufficient creativity in the selection of poems for Not Much Fun for copyright protection to attach. Id. at 78-79, 83. In particular, the Court of Appeals ruled that trial was required to determine if Silverstein exercised any creativity at all in his selection process or if he merely included as many of Parker's uncollected poems as he could find. Id. at 79.

This case was tried without a jury from July 17, 2007 through July 25, 2007. The Court heard the testimony of seven live witnesses: the plaintiff Stuart Y. Silverstein; Jane von Mehren, a former employee of defendant Putnam Penguin, Inc. ("Penguin"); Gillian Blake, a former employee of Scribner, who

was the editor assigned to work on Not Much Fun; Michael Millman, a former Penguin employee; David Shanks, the Chief Executive Officer of Penguin; John Makison, the director of Penguin's parent company and the Chairman and Chief Executive of the Penguin Group; and Kathryn Court, president and publisher of Penguin Books, a division of Penguin Group USA. The Court also viewed and heard the video depositions of Colleen Breese, who edited Complete Poems for Penguin and Professor Randall C. Calhoun, assistant professor of English at Ball State University in Indiana, Dorothy Parker scholar and the author of Dorothy Parker: A Bio-Bibliography. Calhoun also participated in this case by providing two affidavits dated February 1, 2005 and July 14, 2005, respectively.

I. Findings of Fact

Silverstein included in Not Much Fun every work that he decided was (1) a poem or verse (2) authored by Parker (3) that had not been previously published within a collection. The primary question presented is whether these decisions entailed any creativity at all and, if so, whether the amount of creativity suffices for copyright protection to attach.

The Court finds that Silverstein simply selected for inclusion in Not Much Fun all of the uncollected Parker poems that he could find and that this selection process involved no