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## FEES DENIED ALTHOUGH SUIT 'FRIVOLOUS'

Beth Bar

AN ATTEMPT by Fox Entertainment Group to recoup almost \$280,000 in attorney's fees it spent staving off a copyright suit that a judge agreed was frivolous has been re-buffed. Southern District Judge Denise Cote held in *Ninox v. Fox Entertainment Group*, 04 Civ. 7891, that, although Fox had demonstrated that its reality show 'The Complex: Malibu' was not substantially similar to one created by the plaintiff Ninox, called 'Dream Home,' fees should not be awarded.

'Any litigation is burdensome and expensive, and this litigation is no exception,' Judge Cote wrote. 'That said, the cost of litigation was controlled through Fox's successful litigation strategy.'

She explained that, in settling the case and getting Ninox, a New Zealand-based TV production company, to agree to dismiss the action with prejudice, Fox successfully limited its legal exposure.

Ninox's 'Dream Home' series originally aired in New Zealand and has been licensed for production in countries around the world. Ninox's Australian licensee, Nine Films & Television Pty Ltd., created a popular 'spin-off' version of 'Dream Home' in April 2003 called 'The Block.'

Nine Films licensed rights in 'The Block' to Fox, and in 2004 Fox created 'The Complex: Malibu' in the United States. 'The Complex' was a ratings disaster, and survived only one season.

Nevertheless, Ninox filed a suit against Fox in October 2004. It argued that Nine Films had misappropriated 'The Block,' and therefore Fox had committed copyright infringement by purchasing the rights to the series.

Ninox, in its suit against Fox, argued that both shows 'consist of a renovation competition over several months between couples in the comprehensive renovation of dilapidated homes which are situated near each other....Both programs are sponsored by a home renovation supply store, which provides a budget allowing each couple to spend as they wish at the store, which they visit in virtually every episode.'

It also said that 'Dream Home' and 'The Complex: Malibu' each begin with a renovation of the master bedroom and one team in both shows is chosen as the winner 'via a combination of viewers' and expert judges' reaction.'

After Ninox sued Fox, Nine Films filed a lawsuit against Ninox in Australia seeking a declaration that 'The Block' did not infringe 'Dream Home.' Nine Films prevailed on the merits and shortly afterwards Fox and Ninox settled their dispute.

Although both sides agreed that the U.S. action should be dismissed with prejudice, Fox moved for an award of attorney's fees, arguing that Ninox sued even though it knew that 'The Complex: Malibu' was not substantially similar to 'Dream House.'

'A compensatory fee award in these circumstances also encourages the defense of future meritless actions,' attorneys for Fox wrote in a letter to Judge Cote. 'Like the gambler who raises the stakes in poker while holding no face cards, a litigant who loses this type of bet should bear the expenses incurred by the adversary in calling the bluff.'

Judge Cote agreed that Fox was the prevailing party in the underlying copyright litigation. Nevertheless, she held that, 'although Ninox's copyright claim is frivolous under the prevailing law, because this litigation would have applied copyright principles to a relatively new field of intellectual property, format licensing, as a matter of discretion, the Court will refrain from awarding attorney's fees.'

Ninox Television was represented by partner Toby Butterfield and associate Matthew Kaplan of Cowan, Debaets, Abrahams & Sheppard.

Messrs. Butterfield and Kaplan said in a statement that 'while we disagree with the Court's view of the strength of our case, we are pleased that the Court properly denied Fox's motion.'

Fox was represented by partners Jeffrey Conciatori and Margret Caruso of Quinn Emanuel Urquhart Oliver & Hedges.

Mr. Conciatori called Judge Cote's decision a mixed bag.

'What she says about whether the format is copyrightable is the interesting thing for media companies,' he said.

Mr. Conciatori explained that Fox's decision to apply for fees was based on the fact that the other side 'caved in after going through the expense of filing for summary judgment.'

Beth Bar can be reached at [bbar@alm.com](mailto:bbar@alm.com).

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