

Is Warner 'diminishing' the Tolkien brand or keeping alive?

Latest struggle over property saw judge nix parody

By TED JOHNSON

Several days before the release of "The Hobbit: An Unexpected Journey," a federal judge delivered victory to Warner Bros., New Line and the Saul Zaentz Co. when he halted the distribution of a homevideo parody, "Age of Hobbits," ruling that its title was likely to cause confusion in the marketplace, diluting the branding goldmine that has come from the J.R.R. Tolkien characters.

The timing is ironic: Less than a month ago, Warner, New Line and the Zaentz Co. were sued by the Tolkien estate for overstepping the bounds of a merchandising agreement by exploiting "Lord of the Rings" and "The Hobbit" via online games, slot machines, even plans for hotels, restaurants, travel agencies and housing developments. Rather than diluting the brand, the estate is claiming that Warner Bros. et al. is tarnishing it.

"Anyone seeking to exploit the rights in the works of Professor Tolkien that they don't own should be prevented from doing so," said Bonnie Eskenazi of Greenberg Glusker, who is representing the Tolkien estate. "That is precisely what happened with the 'Age of Hobbits' movie and is precisely what we are trying to do in our case."

Warner Bros. has so far filed no response to the Tolkien suit, and had no comment, but litigation is fact of life for just about any major release these days, often in the form of idea theft claims and sometimes in the form of unexpected copyright claims, like a tattoo artist who sought to halt the debut of Warner's "Hangover 2" by filing a copyright infringement claim over one of his creations. The suit was settled.

The Tolkien estate's suit doesn't seek to halt "The Hobbit" but at least \$80 million in damages and a declaratory judgment that it retains the rights to such merchandising. In the suit, the estate says that starting in 2010, it attempted to settle the case with the three entities, but to no avail.

So why file now?

Eskenazi said that "the filing of the action had nothing to do with the release date of the film. The parties had been in settlement discussions which subsequently broke down. The timing of the filing was related purely to those events, and the plaintiffs had no wish to distract from 'The Hobbit' release."

Nevertheless, such timing doesn't necessarily hurt a plaintiff's case.

Bryan Sullivan of Early Sullivan said, "There is a perception that it is an advantage to file close to the release of the film because the studios do not like any bad press on the eve of a film's opening, and some believe that such a fear of negative publicity will compel a quicker resolution."

Stanton "Larry" Stein of Liner, Grode, Stein said, "As a general proposition, litigation is both a judicial proceeding and a PR proceeding, and when you can maximize negative publicity, it can maximize your negotiating position." Sullivan and Stein were talking about the timing of filing of litigation in

general, not specifically "The Hobbit" case.

Nevertheless, any Tolkien enthusiast knows that there's long been tension between the estate and the entities that have made Middle-earth into a multibillion-dollar (and counting) bonanza. A 2008 suit was settled (the estate claimed that New Line failed to pay 7.5% of gross receipts after it received only a \$62,500 upfront payment for the "Lord of the Rings" trilogy), and the estate reportedly will have a stake in the upcoming trilogy.

Last summer, Christopher Tolkien, the author's son and executor of his estate, gave a rare interview to Le Monde in which he said, "The chasm between the beauty and seriousness of the work, and what it has become, has overwhelmed me. The commercialization has reduced the aesthetic and philosophical impact of the creation to nothing. There is only one solution for me: to turn my head away."

When the suit was filed, along with HarperCollins, the estate claimed that the merchandising of all sorts of doodads "has offended and distressed Tolkien's devoted fans, harming Tolkien's legacy and reputation." In fact, Eskenazi said that the harm to the goodwill of the Tolkien franchise will be the subject of damages, calculated via expert testimony.

That is if the case ever gets to trial. Although it's murky, it's not hard to see Warner Bros., et al. arguing for its interpretation of the contract and that, far from diminishing the brand, they have kept it alive, to the point where "The Lord of the Rings: The Return of the King" won the Oscar for best picture. Wired magazine pointed out that, as the films eclipse the original literary source material, the latest dispute is a "tug-of-war to decide who controls the iconography of Tolkien's masterworks and their place in our society."

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