

1 **IN THE UNITED STATES DISTRICT COURT**

2 **WESTERN DISTRICT OF OKLAHOMA**

3	SOUTHWEST CASINO AND	)	
4	HOTEL CORP.,	)	NO. CIV-07-949-C
5		)	
	Plaintiff,	)	
6		)	
7	vs.	)	
		)	
8	DARRELL FLYINGMAN and DORIS	)	
9	THUNDERBULL, et al.	)	
		)	
10	Defendants.	)	
		)	

11 **MOTION TO LIFT STAY/MOTION FOR SUMMARY**  
 12 **JUDGMENT/MOTION TO DISMISS AND BRIEF**  
 13 **IN SUPPORT OF MOTIONS**

14 Defendants Flyingman and Thunderbull (collectively "Flyingman") hereby move  
 15 the Court to: (1) lift the stay placed over this action pending completion of a matter  
 16 pending before the Cheyenne and Arapaho Tribal Court (which is now complete); (2)  
 17 grant summary judgment in favor of Flyingman on plaintiff's copyright infringement  
 18 and "RICO" claims; and (3) stay the remaining claims in plaintiff's suit, all of which are  
 19 common law claims, until they have been completely resolved by the Tribal Court.  
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21 **I. PROCEDURAL BACKGROUND.**

22 Plaintiff filed this action on August 24, 2007, asserting six claims: conversion;  
 23 copyright infringement; tortuous interference with contract; defamation; conspiracy and  
 24 conspiracy in violation of the Racketeer Influenced and Corrupt Organization Act  
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1 (“RICO”). Flyingman sought to dismiss the present action or, in the alternative, stay the  
2 present action pending resolution of a declaratory judgment action then pending in  
3 Cheyenne and Arapaho Tribal Court.<sup>1</sup> The Court granted Flyingman’s alternative  
4 request for stay on February 13, 2008.  
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6 The declaratory judgment has concluded by way of Final Judgment, entered on  
7 June 23, 2008. (Flyingman has filed a concurrent “Notice of Filing of Judgment From  
8 Tribal Court, placing the Final Judgment in this Court’s record.) As is relevant here,  
9 the Tribal Court found that the Cheyenne and Arapaho Tribes (the “Tribes”) were the  
10 owners of the electronic surveillance video from its Casinos and had been since the  
11 video images were first generated.<sup>2</sup> No appeal has been taken from that Final Judgment  
12 and the time for appeal has expired.  
13

## 14 II. FLYINGMAN’S MOTIONS.

### 15 1. Motion to Lift Stay.

16 In its February 13, 2008 Memorandum Opinion and Order, the Court stated:  
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18 “All proceedings in this matter are STAYED pending resolution of Flyingman et al. v.  
19 Sw. Casino & Hotel Corp., No. CNA – CIV – 08 – 02 (Chey. – Arap. Dist. Ct. filed  
20 January 14, 2008).” That Tribal Court matter has now been resolved. It is appropriate,  
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24 <sup>1</sup> Both Flyingman and Thunderbull are members of the Cheyenne and Arapaho Tribes,  
25 the Tribal Court of which is located in Concho, Oklahoma.

26 <sup>2</sup> The Final Judgment was the product of a stipulation between the parties to the Tribal  
Court action.

1 therefore, to lift the stay previously imposed and utilize the Final Judgment of the Tribal  
2 Court to resolve certain issues in the present action.

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4 2. Motion for Summary Judgment.

5 Flyingman moves for summary judgment, pursuant to Rule 56, Fed.R.Civ.P., on  
6 Count 2 (Copyright Infringement) and Count 6 (“RICO”) of plaintiff’s Complaint.  
7 Summary judgment is appropriate because plaintiff cannot establish a critical element of  
8 each claim -- the existence of a valid copyright held by plaintiff. Indeed, because the  
9 surveillance video lacks sufficient originality, it is not subject to copyright in the first  
10 instance. Even if subject to copyright, the Tribal Court’s Final Judgment finding of  
11 ownership of the surveillance video in the Tribes, not plaintiff, is fatal to plaintiff’s  
12 necessary proofs.  
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15 a. Copyright Infringement.

16 Plaintiff asserts in the copyright infringement Count of the Complaint (Count II)  
17 that it is the legal and/or beneficial owner of the electronic surveillance footage and  
18 “holds the copyright to the same”. (Plaintiff’s Complaint, ¶32) The first portion of this  
19 allegation has been affirmatively disproven by the Final Judgment. There is simply no  
20 proof of the second, critical portion of this allegation and, moreover, in the absence of  
21 ownership, that evidence does not and cannot exist. Plaintiff next asserts that  
22 Flyingman “violated Southwest’s copyright interest in the security camera footage by  
23 intentionally and willfully distributing said footage via the Internet and DVD and other  
24 means.” (Plaintiff’s Complaint, ¶ 33) Finally, it asserts that it is entitled to actual or  
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1 statutory damages (under the Copyright Act) resulting from Flyingman's infringement  
2 of its copyright.

3 Plaintiff's copyright infringement claim fails for at least three reasons. First, the  
4 surveillance videotape, which simply records objective events that are factual in nature,  
5 is not "copyrightable". Second, even if the ability to copyright the video existed,  
6 authorship and ownership rests with the Tribes, not plaintiff. Finally, without a valid  
7 registration of a copyright, plaintiff may not press a claim for copyright infringement.  
8

9 Any one of these reasons supports summary judgment in favor of Flyingman.  
10

11 i. Copyrightability of surveillance videotape.

12 In Feist Publications, Inc. v. Rural Telephone Service, Inc., 499 U.S. 340, 111 S.  
13 Ct. 1282 (1991), the United States addressed whether the white pages of a telephone  
14 directory were subject to copyright protection. There, Rural had compiled the names,  
15 towns of residence and telephone numbers of subscribers of its telephone service. Feist  
16 simply lifted this information for use and publication in its regional telephone directory,  
17 and did so without the permission of Rural. Rural sued for copyright infringement. The  
18 Supreme Court initially analyzed why facts are not copyrightable, but factual  
19 compilations are. The Court started with "the most fundamental axiom of copyright  
20 law:" "No author may copyright his ideas or the facts he narrates." Feist Publications,  
21 499 U.S. at 345, 111 S.Ct. at 1287, quoting Harper & Row, Publishers, Inc. v. Nation  
22 Enterprises, 471 U.S. 539, 556, 105 S.Ct. 2218, 2228 (1985).  
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1 The essence of copyright, the Supreme Court noted was the originality of the  
2 work. “Original, as the term is used in copyright, means only that the work was  
3 independently created by the author (as opposed to copied from other works), and that it  
4 possesses at least some minimal degree of creativity.” Feist Publication, 499 U.S. at  
5 345, 111 S.Ct. at 1287. While the level of prerequisite creativity may be low, the work  
6 at issue must possess “some creative spark”. Id.

8 The Supreme Court concluded that the information copied by Feist Publications  
9 from Rural was not subject to copyright protection inasmuch as it did not pass the  
10 minimal test of creativity.

12 We conclude that the names, towns, and telephone numbers  
13 copied by Feist were not original to Rural and therefore not  
14 protected by the copyright in Rural’s combined white and  
15 yellow pages directory. As a constitutional matter, copyright  
16 protects only those constituent elements of work that possess  
17 more than a de minimis quantum of creativity. Rural’s white  
18 pages, limited to basic subscriber information and arranged  
19 alphabetically, fall short of the mark. As a statutory matter,  
20 17 U.S.C. § 101 does not afford protection from copying to a  
21 collection of facts that are selected, coordinated, and arranged  
22 in a way that utterly lacks originality.

23 Feist Publications, 499 U.S. at 363-64, 111 S.Ct. at 1297.

24 In the present action, the surveillance video lacks the sufficient creativity needed  
25 to secure copyright protection. Indeed, there is no creativity whatsoever involved in  
26 creating the surveillance video. The video merely depicts the “goings on” of the  
Casino, and, more specifically, the cashier’s window of the Casino. There is no  
“creative spark” involved. No judgment or creativity was utilized to create the work.

1 The camera simply recorded all that transpires within its scope. There was no creativity  
2 involved on what to record; when to record; or how to record it.

3 Flyingman is entitled to summary judgment on this basis.

4  
5 ii. The Tribes are the authors and owners of the surveillance  
6 videotape.

7 Even if the surveillance videotape was a work that could be copyrighted, it is the  
8 Tribes that presumptively hold that copyright.

9 17 U.S.C. §201(a) holds that ownership of a work originally vests with the author  
10 of that work. While the term owner is not defined by statute, the United States Supreme  
11 Court long ago defined author in a copyright setting as follows: “An author in that sense  
12 is ‘one to whom anything owes its origin; originator; maker ...’” Burrows-Giles  
13 Lithographic Co. v. Sarony, 111 U.S. 53, 57-8, 4 S.Ct. 279, 281 (1884). While the  
14 Supreme Court’s definition did not arise under the Copyright Act, that definition  
15 remains viable today in the context of the Copyright Act. See Meshworks, Inc. v.  
16 Toyota Motor Sales, USA, Inc., 528 F.3d 1258 (10<sup>th</sup> Cir. 2008); Medforms, Inc. v.  
17 Healthcare Mgt. Solutions, Inc., 290 F. 3d 48 (2<sup>nd</sup> Cir. 2002).

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20 In the present action, the videotape originated with the Tribes. The Tribes  
21 equipment generated the video images and stored the video images. The Tribes were  
22 the makers of the video images. Indeed, it was for this very reason that the Tribal Court  
23 concluded that the Tribes were the owners of the surveillance video captured by their  
24 equipment at their Casinos.  
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1           Because plaintiff is not the author of the video, it cannot be the owner of the  
2 copyright for the surveillance video. That ownership rests solely and squarely with the  
3 Tribes. Flyingman is entitled to summary judgment on this basis as well.  
4

5                           iii.     Plaintiff's lack of a valid copyright precludes any  
6                                     infringement action.

7           To prevail on a claim for copyright infringement, a plaintiff must establish that:  
8 (1) it held a valid copyright; and (2) defendant in some impermissible manner copied  
9 elements protected in the copyrighted work. Feist Publications, 499 U.S. at 361, 111  
10 S.Ct. at 1296; Country Kids N' City Slicks, Inc. v. Sheen, 77 F3d 1280, 1284 (10<sup>th</sup> Cir.  
11 1996). Plaintiff cannot satisfy the first element. Copyright registration is a prerequisite  
12 to maintaining an action for copyright infringement. 17 U.C.S. § 411. See Murray Hill  
13 Publications, Inc. v. ABC Communications, Inc., 264 F.3d 622 (6<sup>th</sup> Cir. 2002); Tang v.  
14 Hwang, 799 F.Supp. 499 (E.D. Pa. 1992); Quincy Cablesystems, Inc. v. Sully's Bar,  
15 Inc., 650 F. Supp. 838 (D. Mass. 1986).<sup>3</sup> Some Courts hold that without a valid  
16 registration of a copyright, the Federal Courts lack subject matter jurisdiction to hear the  
17 infringement action. Torres – Negron v. J&N Records, LLC, 504 F.3d 151 (1<sup>st</sup> Cir.  
18 2007); Berry v. Penguin Group (USA), Inc., 448 F. Supp.2d 1202 (W.D. Wash. 2002);  
19 Sully's Bar, Inc., supra.  
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25 <sup>3</sup> Indeed, this District requires any Complaint for copyright infringement to identify the  
26 copyright registration number for the copyright in issue, or if none is yet available, the  
serial or identification number issued by the Registrar of Copyrights. L.Cv.R.3.6.

1 In Sully's Bar, Inc., plaintiff, a cable television program provider, brought suit  
2 against a number of bars that, using satellite dish antenna systems, intercepted  
3 programming designed for customers of the provider. Among the claims made by the  
4 provider was one for copyright infringement. However, the provider did not allege that  
5 it had registered the copyrights that it was seeking to protect. The defendants sought to  
6 dismiss the copyright claim based upon that failure. The District Court agreed and  
7 dismissed the copyright infringement action stating:  
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10 Copyright registration under §411(a) is a condition precedent  
11 to filing an infringement action. As the court in Conan  
12 Properties stated, "[a]lthough recitation of the fact that  
13 copyrights have been registered appears to be a mere  
14 technicality, it is a prerequisite to the court's jurisdiction."  
15 The complaint in this case does not allege compliance with  
16 the copyright registration requirements. Accordingly, the  
17 motion to dismiss the copyright infringement claim should be  
18 granted. (Citations omitted)

19 Sully's Bar, Inc., 650 F. Supp. at 850-51.

20 In the present action, there is no allegation of registration, much less evidence of  
21 it. Plaintiff has not complied with the local rule of this District requiring citation to the  
22 copyright registration number for the surveillance video. The reason is plain – there was  
23 not and never has been a registration of the surveillance video. Without this critical  
24 prerequisite, plaintiff cannot prevail or even proceed on its claim of copyright  
25 infringement.

26 Moreover, it cannot register the video surveillance for copyright. The Tribes'  
ownership of the electronic surveillance video dooms any attempt to register by plaintiff



1 to failure. The application to register a copyright requires the applicant to identify the  
2 owner of the work and provide other information concerning ownership when the  
3 applicant is not the author of the work. 17 U.S.C. § 409(1), (5) and (11). Here, because  
4 the Tribes are the authors and owners of the surveillance video, no registration by  
5 another could be approved by the United States Copyright Office. In other words, not  
6 only does plaintiff not have a registered copyright over the surveillance video, given the  
7 current facts before the Court, it could not obtain such registration even if it tried.  
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9 This, too, provides more than an adequate basis to grant summary judgment in  
10 favor of Flyingman.  
11

12 b. RICO Claim Based Upon 17 U.S.C. § 506.

13 To prevail on a claim under RICO, plaintiff must establish: “(1) conduct (2) of  
14 an enterprise (3) through a pattern (4) of racketeering activity.” Cayman Exploration  
15 Corporation v. United Gas Pipe Line Company, 873 F.2d 1357, 1362 (10<sup>th</sup> Cir. 1989),  
16 quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S.Ct. 3275 (1985).  
17 RICO defines racketeering activity as any act that violates specified federal statutes. 18  
19 U.S.C. §1361; Bancoklahoma Mortgage Corp. v. Capital Title Co., 194 F.3d 1089, 1102  
20 (10<sup>th</sup> Cir. 1999). Violations of the criminal aspect of the Copyright Act, 17 U.S.C. §  
21 506, will serve as predicate offenses. However, conduct that does not support a civil  
22 action for infringement cannot form the basis of a criminal violation of Section 506.  
23  
24 Kelly v. LL Cool J, 145 F.R.D. 32, 39 (S.D.N.Y. 1992); Berry v. Hawaii Express  
25 Service, Inc., 2006 WL 50319 (D. Hawaii 2006).  
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1 17 U.S.C. 506 holds that a person commits criminal copyright infringement if the  
2 person infringes on a copyright “for purposes of commercial advantage or private  
3 financial gain”.<sup>4</sup>  
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5 Here, plaintiff’s RICO claim, thinly couched under a violation of the criminal  
6 Copyright Act, fails for several reasons. First, it fails for the three reasons set forth  
7 above as the bases for summary judgment on the civil copyright claim. At the most  
8 fundamental level, plaintiff did not own any copyright in the surveillance video. In the  
9 absence of the necessary ownership element, there can be no predicate offense upon  
10 plaintiff can manufacture a RICO claim. Flyingman’s conduct could not have infringed  
11 on any of plaintiff’s copyright because plaintiff owned no copyright.  
12

13 Second, and equally as important, no conduct of Flyingman was for purpose of  
14 commercial advantage or personal financial gain.<sup>5</sup> Indeed, plaintiff does not even allege  
15 such was the motivation behind the purported conduct of Flyingman. Plaintiff alleges  
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19 <sup>4</sup> The statute identifies two additional bases for imposing criminal liability: copying or  
20 distributing copies of records or distributing a work that is being prepared for  
21 commercial distribution. Neither of these sections, on their face, are applicable here.

22 <sup>5</sup> Governor Flyingman has admitted that he sent copies of the surveillance video to  
23 Tribal members as part of the recall campaign that was lodged against him and that still  
24 photos were made from the surveillance videos and distributed with campaign literature.  
25 Both Governor Flyingman and Ms. Thunderbull have denied placement of the video on  
26 “You Tube” and Ms. Thunderbull has denied distribution of the surveillance video to  
Tribal members in DVD or still photograph format. Solely for the purposes of this  
motion, however, even if one assumes that both defendants posted the surveillance  
video on You Tube and distributed it in DVD and still photograph format to Tribal  
members, as alleged by plaintiff, no criminal violation has occurred.

1 that the conduct was “an attempt to gain control over or exercise dominion over  
2 Southwest and its contracts with the Tribes.” Plaintiff’s Complaint, ¶ 58.

3  
4 Here, there is no suggestion, much less evidence that any commercial advantage  
5 was sought by either Governor Flyingman or Ms. Thunderbull. Indeed, there was no  
6 commercial aspect to the use of the surveillance video. Moreover, there was no personal  
7 financial gain. Again there is not even an allegation that either Governor Flyingman or  
8 Ms. Thunderbull was motivated by personal financial gain. The allegations of the use of  
9 the surveillance video amply demonstrate that personal financial gain by either Governor  
10 Flyingman or Ms. Thunderbull are not implicated by the use to which they allegedly put  
11 the surveillance video.  
12

13 Because plaintiff cannot establish a criminal copyright infringement, it cannot  
14 prevail on its RICO claim. Defendants are entitled to summary judgment on that claim.  
15

16 3. Motion to Reinstitute Stay.

17 Once the Court grants summary judgment over plaintiff’s copyright infringement  
18 and RICO claims, it should reinstitute the stay in the matter, requiring plaintiff to  
19 exhaust its remedies in Tribal Court on the remaining common law claims. As the Court  
20 recalls from Flyingman’s earlier Motion to Dismiss, as a matter of comity, there is a  
21 strong public policy of federal abstention in matters that should be adjudicated in the  
22 first instance in tribal courts. See Flyingman Motion to Dismiss, p. 5-7. Iowa Mutual  
23 Insurance Company v. LaPlante, 480 U.S. 9, 16 n.8, 107 S.Ct. 971, 94 L.Ed.2d 10  
24 (1987); National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845,  
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1 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). This policy is rooted in the fact that tribes retain  
2 their sovereignty over both their members and their territory. United States v. Mazurie,  
3 419 U.S. 544, 557, 95 S.Ct. 720, 717, 42 L.Ed.2d 706 (1975). Under this abstention  
4 policy, “[T]he federal courts should not consider a suit arising from activities on tribal  
5 land until the plaintiff has exhausted his or her tribal court remedies.” Brown v. Washoe  
6 Housing Authority, 835 F.2d 1327 (10<sup>th</sup> Cir. 1988); Calumet Gaming Group – Kansas,  
7 Inc. v. The Kickapoo Tribe of Kansas, 987 F. Supp. 1321, 1327 (D. Kan. 1997).  
8 Moreover, “a party’s status as a non-Indian is material for this purpose.” Id., citing  
9 Smith v. Moffett, 947 F.2d 442, 444 (10<sup>th</sup> Cir. 1991).  
10  
11

12 Flyingman recognizes that previously this Court, relying on the Tenth Circuit  
13 preference of staying an action to permit tribal court adjudication rather than dismissal  
14 of that action, stayed this case pending the Tribal Court’s ruling on the ownership issue.  
15 It should stay this matter again in order to allow plaintiff to go to the Tribal Court and  
16 present its claims for conversion, tortuous interference, defamation and conspiracy.  
17 Each of these claims are common law claims that are appropriate for resolution, in the  
18 first instance, by the Cheyenne and Arapaho Tribal Court.  
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21 Moreover, the Court should set a date certain by which plaintiff brings the claims  
22 in Tribal Court, if they are to be brought. This case has been pending for approximately  
23 one year in this Court. The parties and the Court all have an interest in progressing the  
24 litigation. That interest is best served by requiring the plaintiff to move apace in Tribal  
25 Court by filing and prosecuting their claims if it is their desire to do so. There is no  
26

1 significant effort needed to move forward in Tribal Court, as a Complaint and  
2 allegations have already been made in this Court. Certainly, plaintiff should be given  
3 the opportunity to decide whether it wishes to pursue the matter in Tribal Court, but that  
4 decision can and should be made fairly quickly.<sup>6</sup>

6 III. CONCLUSION.

7 For the reasons set forth herein, the Court should lift the stay in place in the  
8 present action to rule upon and grant Flyingman's Motion for Summary Judgment. It  
9 should reinstitute the stay and require plaintiff to bring its common law claims against  
10 Flyingman in Tribal Court.

12 DATED this 28th day of August, 2008.

14 **CAMPBELL, YOST, CLARE & NORELL, P.C.**

15 By /s/ Martin P. Clare

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24 \_\_\_\_\_  
25 <sup>6</sup> Certainly, to the extent that plaintiff chooses not to pursue an action in Tribal Court or  
26 chooses to omit some of the common law claims pending here, Flyingman will seek  
dismissal of all or part of what remains of the present action.

