



Publications

CASES OF INTEREST

LOEB & LOEB adds Depth.

IP/ENTERTAINMENT LAW WEEKLY CASE UPDATE FOR MOTION PICTURE STUDIOS AND TELEVISION NETWORKS

September 21, 2011

Table of Contents

- Sony BMG Music Entertainment, et al. v. Tenenbaum
- Olson v. Cohen

Sony BMG Music Entertainment, et al. v. Tenenbaum, USCA First Circuit, September 16, 2011

 [Click here for a copy of the full decision.](#)

- First Circuit holds district court committed reversible error by reducing jury award in favor of recording companies and against individual copyright infringer on constitutional grounds without first considering issue of remittitur.

Plaintiff recording companies Sony BMG Music Entertainment, Warner Brothers Records, Inc., Arista Records, LLC, Atlantic Recording Corp. and UMG Recordings, Inc., brought an action for copyright infringement against defendant Joel Tenenbaum, alleging that Tenenbaum illegally downloaded thousands of copyrighted music recordings and other copyrighted works using file-sharing software. Plaintiffs sought injunctive relief and statutory damages relating to 30 of those music recordings. After a five-day jury trial, the court found that, as a matter of law, the recording companies owned the copyrights to the 30 music recordings and that defendant infringed those copyrights by downloading and distributing the copyrighted works.

The court left to the jury the issues of whether Tenenbaum's violation was willful and the amount of damages. Under Section 504(c) of the Copyright Act, the jury was permitted to award between \$750 and \$30,000 for each non-willful infringement, and up to \$150,000 for each willful infringement. Because defendant continued file sharing after being warned several times – by his parents, his school and the recording companies – that it was illegal, the jury found Tenenbaum liable for a willful infringement for each of the 30 copyrighted works and awarded the recording companies \$22,500 per infringement, for a total award of \$675,000.

Defendant moved for remittitur and a reduction of the judgment to the statutory minimum due to the excessiveness of the award. In the case of remittitur, the recording companies would have the option of accepting a reduced award or seeking a new trial. Instead of reaching a decision on remittitur, however, the district court found that the \$675,000 award was unconstitutionally excessive and that it violated due process. The court reduced the award to \$67,500, and did not give plaintiffs an opportunity to seek a new trial in lieu of accepting the reduced award.



Publications

CASES OF INTEREST

LOEB & LOEB adds Depth.

On appeal, the recording companies argued that the district court impermissibly reduced the jury's damages award, since the award was within the range of damages allowed by the Copyright Act. The United States, intervening to defend the constitutionality of the Copyright Act, argued that the court impermissibly bypassed the issue of remittitur to reach the constitutional question. The First Circuit agreed, finding that the lower court was obligated to consider the issue of remittitur before reaching any constitutional question. The court reinstated the jury award of \$675,000 and remanded the case to the lower court for consideration of the remittitur issue.

Tenenbaum also appealed, arguing that the Copyright Act is unconstitutional because the Supreme Court has allowed juries to determine statutory damages, whereas Congress intended for judges only to impose those damages. He also argued that Congress did not intend for the act to apply to "consumer copying" and that statutory damages were unavailable absent a showing of actual harm to the recording companies. The court of appeals rejected all of these arguments, finding that the defendant had waived his constitutional challenge, that he was not a mere "consumer copier" of the copyrighted works, and that the recording companies had shown actual harm resulting from Tenenbaum's activities.

Olson v. Cohen, Court of Appeals of California, September 12, 2011 (not for publication)

 [Click here for a copy of the full decision.](#)

- California Court of Appeals affirms order granting defendants' anti-SLAPP motion to strike plaintiffs' complaint, which alleged tort claims based on conduct that occurred during filming of mock documentary-style feature film.

Plaintiffs appeal from an order granting defendants' motion to strike the complaint under California's statute prohibiting Strategic Lawsuits Against Public Participation (the Anti-SLAPP statute). Plaintiffs' complaint alleged tort claims based on conduct that occurred during the filming of the feature film comedy *Bruno*, starring defendant Sacha Baron Cohen, in his persona as "Bruno"— a gay, Austrian fashion reporter.

Plaintiffs, the executive director of a nonprofit charity that managed charity bingo events, and her husband, who assisted her in managing the bingo games, agreed to participate in a "documentary-style" movie defendants planned to film during an evening of charity bingo games. Plaintiffs alleged that they were told a well-known host/celebrity wanted to visit the charity bingo game and "call" the bingo numbers during the game while being filmed, but that they did not know the actual identity of the "celebrity," or the true purpose of the visit, filming the mock-documentary *Bruno*, in which Cohen portrays "Bruno," a gay Austrian celebrity and addresses the issue of American homophobia by placing the character in situations intended to elicit reactions. Plaintiffs signed both a "Standard Location Agreement" to allow defendants to enter the bingo hall and to bring the cast, crew and all of the equipment, and to use the location for the purpose of filming, as well as a "Standard Consent Agreement," under which they were to be paid to be



Publications

CASES OF INTEREST

LOEB & LOEB adds Depth.

filmed.

Defendant Cohen appeared as “Bruno” and plaintiffs agreed to allow him to call numbers for two bingo games that evening. The video footage submitted to the court showed Cohen announcing bingo numbers and, during the second game, making comments to the audience in which he related some of the bingo numbers to certain aspects of his homosexual lifestyle. After an interaction on the stage in which plaintiff attempted to remove Cohen, she allegedly became distraught and thereafter fainted, allegedly injuring herself. Plaintiffs’ complaint asserted nine tort causes of action arising out of the filming of *Bruno* at the bingo hall and Cohen’s interaction with plaintiff.

Defendants filed an anti-SLAPP motion to strike, asserting that the acts underlying appellants’ claims were the conduct and words spoken by Cohen while he appeared as “Bruno” at the bingo hall, and that this conduct furthered respondents’ right of free speech in making the film in connection with a public issue or matter of public interest. They also asserted that plaintiffs had waived and released any and all claims arising out of the filming under the Location and Consent Agreements.

The lower court granted defendants’ anti-SLAPP motion, concluding that plaintiffs’ tort claims arose from defendants’ conduct in furtherance of their First Amendment rights to free speech. The lower court also concluded that plaintiffs had failed to satisfy their burden of showing that they had a probability of prevailing on their claims, having submitted no admissible evidence in support of their causes of action.

On appeal, the appeals court rejected plaintiffs’ argument that the lower court erred because the conduct underlying plaintiffs’ claims had no connection to the exercise of defendants’ rights to free speech or an issue of public interest.

California’s Anti-SLAPP provides that “[a] cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” A court engages in a two-step process to evaluate motions to strike, first determining whether the defendant has made a threshold showing that the acts at issue arose from protected activity. If the defendant makes this showing, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the merits of the claim.

Noting that motion pictures are expressive works entitled to First Amendment protection, the court of appeals found no dispute that defendants were engaged in making a feature film, *Bruno*, that they came to the bingo hall to shoot video footage of respondent Cohen calling bingo games, and that plaintiffs were aware of this purpose and agreed to participate. According to the court, plaintiffs’ claims that they were misled as to the nature of the film and that the film was a comedy intended to generate a profit did not deprive defendants of First Amendment protection. The court also found that defendant Cohen’s words



Publications

CASES OF INTEREST

LOEB & LOEB adds Depth.

and non-expressive conduct furthered the purpose of the movie, which was to depict "Bruno" in various locations and under circumstances where his conduct and statements might prompt a strong homophobic reaction from those around him, for entertainment and social satire. Finally, the court concluded that plaintiffs' claims "arose out of" those activities.

Plaintiffs also argued that their claims did not arise from any act in furtherance of free speech – from Cohen's words or any other constitutionally protected conduct – but rather from a private controversy, namely defendant Cohen's refusal to leave the stage of the bingo hall. Finding the argument "unconvincing," the court reasoned that plaintiff's anger at the apparent deception, and her humiliation and embarrassment, which gave rise to plaintiffs' various tort claims, were caused by defendants' free speech conduct, including Cohen's words and the filming of the event. Even assuming that Cohen's refusal to leave the stage and plaintiffs' alleged realization that she had been misled gave rise to her injuries, the court found those circumstances "inseparable" from defendants' constitutionally protected actions.

Finally, the court concluded that the movie and Cohen's conduct in the movie concerned issues of public interest. It found that no doubt existed that homosexuality, gay culture, lifestyles and rights, and the public reactions to those issues, were matters of public interest and controversy, and that the evidence supported the lower court's finding that the purpose of the film was to show audiences what would happen when a film crew followed a blatantly homosexual character in his interactions with members of the public, and to raise those issues in an attempt to craft a commentary on homophobia in society. The video footage showed that Cohen's conduct, his comments about his gay partner and his characterization of Bruno as a flamboyant gay fashion reporter, directly referenced issues related to homosexuality, gay stereotypes and gay culture. Even if plaintiffs were unaware of Cohen's purpose, they voluntarily became involved in the issues Cohen sought to highlight when they agreed to allow him to participate in the bingo games while making the film. Plaintiff also voluntarily engaged with Cohen while the cameras filmed the encounter, approaching the stage and instigating the confrontation with Cohen because of what he was saying about his lifestyle. Cohen did not utter expletives, profanity or obscene language, or describe overtly sexual behavior, but rather relayed information about his former partner and made comments about the history of their relationship, which, at most, might be considered sexual innuendo.

On the second prong of the anti-SLAPP analysis, the appeals court agreed that plaintiffs failed to establish a probability of success. The allegations in an unverified complaint are insufficient to avoid an order to strike the complaint once the court determines the first prong of the statute has been met. Plaintiffs must provide the court with sufficient evidence to permit a determination on the probability of success and the court found plaintiffs failure to do so, despite their representations that they *could* present this evidence, to be dispositive. In a footnote, the court also noted that, given this conclusion, it need not consider or decide the applicability or validity of Location and Consent Agreements plaintiffs had signed.



Publications

CASES OF INTEREST

LOEB & LOEB adds Depth.

For more information, please contact [Jonathan Zavin](mailto:jzavin@loeb.com) at jzavin@loeb.com or at 212.407.4161.

Westlaw decisions are reprinted with permission of Thomson/West. If you wish to check the currency of these cases, you may do so using KeyCite on Westlaw by visiting <http://www.westlaw.com/>.

Circular 230 Disclosure: To assure compliance with Treasury Department rules governing tax practice, we inform you that any advice (including in any attachment) (1) was not written and is not intended to be used, and cannot be used, for the purpose of avoiding any federal tax penalty that may be imposed on the taxpayer, and (2) may not be used in connection with promoting, marketing or recommending to another person any transaction or matter addressed herein.

This publication may constitute "Attorney Advertising" under the New York Rules of Professional Conduct and under the law of other jurisdictions.

© 2011 Loeb & Loeb LLP. All rights reserved.