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CASES OF INTEREST

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IP/Entertainment Law Weekly Case Update For Motion Picture Studios And Television Networks

November 3, 2011

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Bethesda Softworks, L.L.C. v. Interplay Entertainment Corp., USCA Fourth Circuit, October 26, 2011

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

- Appeals court affirms district court's denial of motion for preliminary injunction, holding that (1) the fact that defendant contractually agreed that a breach of the contract would cause irreparable harm does not bind the court, (2) the possible loss of exclusive rights alone does not constitute irreparable harm, and (3) irreparable harm cannot be presumed for preliminary injunctions (any more than for permanent injunctions) in copyright cases.

Plaintiff Bethesda Softworks sought a preliminary injunction in the district court prohibiting defendant Interplay Entertainment Corp. from infringing Bethesda's copyrighted works relating to Bethesda's "Fallout" video game series. The district court denied the motion and Bethesda appealed, arguing that the court abused its discretion and misapplied the law in concluding that plaintiff had failed to establish a likelihood of irreparable harm. The appeals court affirmed.

The court rejected plaintiff's argument that the district court abused its discretion in holding that plaintiff had not established irreparable harm, despite contractual language between the parties that a breach of an asset purchase agreement would "result in irreparable injury for which there is no adequate remedy at law," and that Bethesda would be entitled to equitable relief in the event of a breach. The court held that contractual agreements alone do not control the district court's exercise of its equitable discretion, and the district court did not abuse its discretion when it looked beyond the parties' stipulation to determine whether plaintiff could establish irreparable harm.

The court also rejected plaintiff's argument that, under *Hughes Network Systems, Inc. v. InterDigital Communications Corp.*, 17 F.3d 691 (4th Cir. 1994), defendant's alleged insolvency required a finding of irreparable harm. The purpose of a preliminary injunction is to protect the status quo and to prevent irreparable harm during the pendency of a lawsuit, in order to preserve the court's ability to render a meaningful judgment on the merits. *Hughes Network*



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Systems suggests that a defendant's insolvency may alter the status quo and undermine a court's ability to render a meaningful judgment, such that a preliminary injunction might be appropriate to preserve the plaintiff's ability to receive a damages award. The appeals court concluded, however, that the injunctive relief Bethesda sought would not preserve Interplay's assets, such that it could satisfy a judgment if Bethesda ultimately prevailed in the case.

The court determined that after the U.S. Supreme Court's decision in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006), irreparable harm is no longer presumed at the preliminary injunction stage based on the plaintiff's showing of a likelihood of success on the merits. The court rejected Bethesda's attempt to distinguish *eBay* because it involved a permanent injunction, not a preliminary injunction. Agreeing with other courts of appeal who have considered the issue, the court concluded that despite the differences in the two forms of relief, the same equitable principles upon which *eBay* was based applied with equal force to both permanent and preliminary injunctions. The court also rejected plaintiff's argument that the court's decision in *Christopher Phelps & Associates, LLC v. Galloway*, 492 F.3d 532 (4th Cir. 2007), required a rebuttable presumption of irreparable harm in cases where copyright infringement would likely result. Noting that plaintiff's reading of the case was "impermissibly broad," the court concluded that its finding of irreparable harm in *Phelps* was not based on the intangible nature of the copyright alone – reasoning that would lead to the presumption prohibited by *eBay* – but on the circumstances surrounding the infringement that established the likelihood of irreparable harm.

Finally, the court of appeals concluded that the district court had applied the proper standard for showing a likelihood of harm. On review of the record below, the court rejected plaintiff's assertion that the district court had required Bethesda to identify with particularity each element of the copyrighted works being infringed and the resulting specific, tangible harm. Rather, the court had required Bethesda to demonstrate copyright infringement that could be stopped or needed to be stopped before it caused irreparable harm, and concluded that Bethesda has offered no evidence in support of its claim that its alleged loss of intangible rights in the copyrighted material alone established irreparable harm.

Tiwari v. NBC Universal, Inc., USDC N.D. California, October 25, 2011

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

- District court denies defendant's motion to dismiss federal constitutional and state-law claims related to defendant's television show "To Catch A Predator," rejecting defendant's First Amendment defense.

Plaintiff filed suit against defendant NBC Universal asserting both federal and state-law claims based on defendant's production, filming, and broadcast of its television program "Dateline



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NBC: To Catch a Predator." Plaintiff alleged defendant violated his federal constitutional rights under the Fourth Amendment and the substantive due process clause, and committed the state-law torts of defamation and intentional infliction of emotional distress. Defendant moved to dismiss plaintiff's federal and state-law claims arguing, *inter alia*, that the First Amendment protected its conduct. The district court rejected the First Amendment argument, finding that that plaintiff's claims mainly alleged harm from NBC's conduct in the course of recording the broadcast, and not harm from the broadcast itself, and that the First Amendment did not shield defendant from liability for those actions.

The premise of the show, as its title suggests, is to apprehend sexual predators. The plaintiff alleged, *inter alia*, that in producing the show, NBC (1) paid members of an organization called the Perverted Justice Foundation to assume the identities of teenagers in order to engage adults in conversations, with the goal of convincing an adult to meet a teenager at a "sting house"; (2) at a sting house in California, orchestrated the video-recorded arrest of plaintiff; (3) directed local police officers to arrest him in a manner that was physically and emotionally abusive, including having some officers draw their guns and aim them at plaintiff's head; (4) following plaintiff's arrest, filmed plaintiff as he entered a "pre-booking facility" that NBC had constructed specially for the show, and then filmed plaintiff's interrogation; and (5) did not disclose to plaintiff until the end of his interrogation that the video-recordings of him would be used for an episode of the NBC show *Dateline*.

Plaintiff claimed that since the police were acting at the direction of NBC, NBC was liable for violating his federal constitutional rights, as well as for several state-law torts.

NBC moved to dismiss plaintiff's federal and state-law claims arguing, among other things, that the First Amendment protected its conduct. Drawing heavily on a Southern District of New York case that also addressed claims arising from the *Predator* show (*Conrad v. NBC Universal, Inc.*, 536 F. Supp. 2d 380 (S.D.N.Y. 2008)), the district court disagreed, finding that plaintiff, for the most part, was not seeking "broadcast damages," but rather was mainly alleging harm from NBC's conduct in the course of producing and recording the show. The court declined to adopt NBC's argument that the production of the show and its broadcast are intertwined, and that both are protected by the First Amendment.

The court did find that, in some instances, plaintiff was alleging broadcast damages – for example, in his claim that by airing the show, NBC violated his substantive due process rights by punishing him prior to his trial. The court reasoned, however, that the First Amendment did not automatically insulate NBC from all liability from broadcast damages. The court had to balance NBC's rights against plaintiff's constitutional right and this balancing was not appropriate at the motion to dismiss stage.



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NBC also sought to strike plaintiff's state-law claims pursuant to California's anti-SLAPP statute (California Code Civil Procedure §425.16), which allows for the dismissal of claims arising from the exercise of the right of free speech, unless plaintiff has established a probability of success on the merits. Again, the court rejected NBC's First Amendment defense, finding that plaintiff was claiming injury from NBC's "production conduct," not its broadcast of the show. For this reason, the court denied NBC's special motion to strike plaintiff's state-law claims.

The court did grant NBC's motion to dismiss plaintiff's defamation claim, which was based on the allegation that, in an epilogue to subsequent rebroadcast NBC had incorrectly reported the nature of his criminal punishment. The court found the broadcast to have been substantially true, however, and dismissed plaintiff's defamation claim pursuant to California Civil Code §47(d), which insulates from suit "fair and true" broadcasts.

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