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CASES OF INTEREST

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

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Arenas v. Shed Media US Inc., USDC C.D. California, August 22, 2011



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- Court denies plaintiff's request for preliminary injunction and grants defendants' Anti-SLAPP motion to strike, finding that plaintiff is unlikely to succeed on the merits of his claims for common law misappropriation of identify and trademark infringement, and that defendants' reality television show is protected as an expression of their First Amendment free speech rights in connection with a matter of public concern.

Plaintiff Gilbert J. Arenas, Jr., a professional basketball player for the Orlando Magic, brought this action against defendants Shed Media, the producer of the *Basketball Wives* television series, as well as Laura Govan, his former girlfriend, who is scheduled to appear on the *Basketball Wives: Los Angeles* (BWLA) version of the show. The *Basketball Wives* series comprises a cast of women, most of whom have or have had relationships with professional basketball players, and the show is about the women's relationships with one another and their lives. While the players are mentioned as part of the storyline to the extent that they are part of the women's lives, the players do not appear on the show as cast members and are not themselves the focus of the storyline. Plaintiff brought suit against defendants alleging, among other things, trademark infringement and common law and statutory misappropriation of likeness and right of publicity under California law. Plaintiff also sought a preliminary injunction enjoining defendants from using his alleged trademarks in association with any reality television show and, if his former girlfriend appears in the show, using "Basketball Wives" or any other term that would suggest affiliation with basketball players in the title, promotional text, or the show itself.

Defendants moved to strike plaintiff's complaint under California's statute prohibiting Strategic Lawsuits Against Public Participation (the Anti-SLAPP statute). Under the Anti-SLAPP statute, the court would grant a special motion to strike a cause of action if (1) the cause of action arises from any act by the defendants in furtherance of their free speech rights under the federal or state constitution; (2) the act is "in connection with a public issue"; and (3) the plaintiff fails to establish a probability that he will prevail on



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the claim. To establish a probability of prevailing on a claim, the plaintiff must show that the complaint is legally sufficient and supported by a *prima facie* showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. If the plaintiff fails to present a sufficient legal basis for the claims or if the evidence offered is insufficiently substantial to support a judgment in favor of the plaintiff, then the defendant's anti-SLAPP motion should be granted.

To merit a grant of injunctive relief, plaintiff also must show that he is likely to succeed on the merits. He must also show he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor and that an injunction is in the public interest. An injunction also would be appropriate when a plaintiff raises serious questions going to the merits of his claims, shows that the balance of hardships tips sharply in his favor and that there is a likelihood of irreparable injury, and that the injunction is in the public interest.

The court denied Arenas' request for a preliminary injunction and granted defendants' Anti-SLAPP motion, concluding that Arenas was unlikely to succeed on the merits of his claims for common law misappropriation of identity and trademark.

California common law recognizes the right of a person whose identity has commercial value – most often a celebrity – to control the commercial use of his identity. To sustain a common law claim for commercial misappropriation, plaintiff must prove the defendants' use of the plaintiff's identity, the appropriation of plaintiff's name or likeness to defendants' advantage, commercially or otherwise; that plaintiff did not consent, and resulting injury. Because defendant Shed Media did not dispute that it lacked Arenas' consent, the court focused on plaintiff's potential injury in the context of irreparable harm and confined its analysis to the first two elements of the claim – defendants' use of plaintiff's identity to its advantage, as well as Shed Media's asserted First Amendment defense to the claim.

While the court acknowledged that, based on the record that did not include an episode of BWLA, it had difficulty determining that defendant Shed Media would use Arena's name and likeness, the court reasoned that Govan would likely refer to Arenas in the context of their former relationship, given that the reason for the show was the participants' relationships with professional basketball players. The court concluded that Govan's likely on-air conversations about Arenas – and any future promotional materials relating to them – would constitute the use of Arenas' identity as a celebrity under California law.

Appropriation of a celebrity's identity requires that the publication identify the celebrity, either by directly using his name or image or by emphasizing signs or symbols associated with him. Noting that even the direct use of the celebrity's name wouldn't violate his right of publicity if the use does not appropriate his identity as a celebrity, the court concluded that defendants' likely use of Arenas' name is in the context of a show about "Basketball Wives" that features famous basketball players' current and former wives and girlfriends, and that Govan's likely mentioning of Arenas by name on BWLA would be in the context of his status as a famous basketball player. Plaintiff was likely to prove the first two elements of commercial



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misappropriation.

The court rejected defendant Shed Media's argument it could not be found to have appropriated Arenas's identity, given that Govan was participating in the show as the sister of another "basketball wife" and that Shed Media's publicity about the show had only highlighted Govan's identity as a sister and not as Arenas's former girlfriend. The court found it both unsurprising and relevant that, within the same day of the official press release, other media outlets caught on to the connection between Govan and Arenas, and disseminated plaintiff's name, to defendants' benefit. Acknowledging that if Govan did not mention her former relationship with plaintiff, her inclusion in the show was insufficient to invoke plaintiff's identity as a celebrity, the court also found that the assumption that Govan would not mention Arenas was improbable. Given that Govan was likely to mention Arenas at some point during her appearances on the show, defendants were likely to appropriate his identity for their commercial gain. The court also found it immaterial that the show focused on the women's relationships with one another and their lives rather than on Arenas, reasoning that whether defendant appropriated the plaintiff's identity, not how defendant had done so, was important.

After determining that Govan's appearance on BWLA would likely result in an appropriation of Arenas's name, however, the court concluded that Shed Media's First Amendment transformative use and public interest defenses prevented Arenas from succeeding on his misappropriation claim.

To be entitled to the defense of transformative use, defendants must show that the work contained significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame, and was therefore protected by the First Amendment. The transformative use defense is a balancing test between the First Amendment and the right of publicity that requires the court to examine and compare the allegedly expressive work with defendant's use of the plaintiff's identity to discern if the work contributes significantly distinctive and expressive content. If the value of the work comes principally from some source other than the fame of the celebrity – from the creativity, skill and reputation of the artist – sufficient transformative elements are presumed and warrant First Amendment protection. If, however, the creator's skill and talent is subordinated to the overall goal of creating a conventional portrait of the celebrity to exploit commercially his fame, then the creator's right of free expression is outweighed by the celebrity's right of publicity. The court concluded that any reference to Arenas would be incidental to BWLA's plot as a whole, since the show was about the women who have or have had relationships with basketball players rather than the players themselves, and that the show was transformative.

The court likewise concluded that Shed Media was also entitled to the public interest defense, which extends to almost all reporting of recent events, as well as to publications about celebrities – people like professional athletes who have achieved a marked reputation or notoriety by appearing before the public and may legitimately be mentioned and discussed in print or on radio and television.



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The court rejected Arenas' argument that any discussion of his family life was not sufficiently related to his celebrity to make the show's use of his identity a matter of public concern, noting that the "tens of thousands" of Twitter followers who follow Arenas as he tweeted about a variety of daily, mundane occurrences clearly indicated a public interest in him and his activities. The court also rejected Arenas' argument that defendants acted with actual malice, finding that plaintiff had not shown any defamatory statements that Govan was likely to make about him on the show, thereby failing to meet his burden of establishing by clear and convincing evidence that defendants published any defamatory statements with either knowledge of their falsity or with reckless disregard for the truth.

Finally, the court declined to take Arenas' suggestion that the court issue an injunction preventing defendants from using his name in BWLA promotional materials, holding that the analysis was the same. BWLA advertising was not actionable under an appropriation of publicity theory so long as the advertising does not falsely claim that the public figure endorses BWLA.

The court likewise held that Arenas likely would not succeed on his trademark claims, noting that his trademark infringement claim was muddled and that he failed to articulate a coherent theory of infringement or clearly identify the marks that allegedly infringe his own. Arenas asserted ownership in a variety of marks and claimed that Govan's presence and the title of the show was an obvious reference to him and the use of plaintiff's likeness. Arenas also alleged that defendants are using or have threatened to use his marks in commerce in connection with BWLA advertising and promotion.

To succeed on a claim of trademark infringement under the Lanham Act, Arenas must prove that the defendants' use of his alleged mark is likely to cause consumer confusion, based on the case-by-case application of the eight nonexclusive factors, including (1) the similarity of the marks; (2) the strength of the plaintiff's mark; (3) the proximity or relatedness of the goods or services; (4) the defendant's intent in selecting the mark; (5) evidence of actual confusion; (6) the marketing channels used; (7) the likelihood of expansion into other markets; and (8) the degree of care likely to be exercised by purchasers of the defendant's product.

The court "easily dismissed" Arenas' argument that Shed Media was infringing his marks through the title of its show, holding that Arenas has virtually no chance of succeeding on an infringement claim based on the mark "Basketball Wives." While Arenas' own marks are strong, they are completely dissimilar to the *Basketball Wives* title – no one would confuse Arenas with a basketball wife and Arenas provided no evidence of actual confusion. Arenas provided no evidence that he competes for celebrity endorsements with Shed Media or that he has plans to develop a reality television series about women who date basketball players.

The court likewise concluded that Arenas was also unlikely to succeed on his trademark claim based on defendants' direct use of his name. "Nominative fair use" – where defendant uses the mark to refer to the trademarked good itself – does not constitute infringement. To determine nominative fair use, the court



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considers whether the “product” was readily identifiable without use of the mark, defendant used more of the mark than necessary, or defendant falsely suggested he was sponsored or endorsed by the trademark holder. The court reasoned that it would be virtually impossible for defendants to refer to Arenas without using his name. Defendants had not yet used any of Arenas’ marks in commerce, so the court could not predict whether they would eventually use more of Arenas’ marks than necessary. Finally, and most importantly, the court reasoned that allowing Govan to talk about her relationship with Arenas on BWLA and permitting Shed Media to advertise that the show would feature these discussions would in no way suggest that Arenas endorsed the show. In fact, common sense would suggest that a celebrity may not agree with his former girlfriend’s opinion of him.

Finding that Arenas had failed to show a likelihood of success or even serious questions going to the merits of his claims, and that the rest of the factors did not support his request, the court held that plaintiff was not entitled to injunctive relief. Specifically, the court rejected Arenas’ contention that being associated with a “disreputable” show that featured “cat fights” and “infidelity issues” would cause irreparable reputational harm, given his highly publicized behavior that included pulling a gun on a teammate over a gambling debt, pleading guilty to carrying a pistol without a license, and publicizing on Twitter views of women and other groups that would be characterized by many, if not most, people as crude and offensive. The court also noted that Arenas had undermined his claim that he would be injured by an association with the show by his own tweets calling attention to Govan’s upcoming appearance on BWLA.

The court also found that the balance of equities also tipped “sharply” in defendants’ favor, given that the potential reputational harm to Arenas was slight but that Shed Media would face tremendous hardship if it were subjected to an injunction, including a claim by the television station that defendant was in breach of their agreement to timely deliver the show, causing Shed Media to lose payments, subject it to liability for lost advertising revenues, and injure its reputation in the industry. Similarly, the court noted that the significant public interest in upholding First Amendment principles outweighed the any “highly attenuated” public interest in protecting intellectual property.

Given that Arenas was unlikely to prevail on his right of publicity claim, the court granted Shed Media’s Anti-SLAPP motion to strike, finding that defendants’ conduct – producing BWLA – was in furtherance of defendants’ free speech rights in connection with a matter of public concern.

Capitol Records, Inc. v. MP3tunes, LLC, USDC S.D. New York, August 22, 2011

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

- In a copyright infringement action, defendant MP3tunes, which provides a service that allows users to search the internet for free song files and a service that allows the online personal storage of such song files, was determined to qualify for DMCA safe harbor protection except with respect to certain specific songs identified in DMCA takedown notices and not removed from user lockers.



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MP3tunes LLC owns and operates MP3tunes.com which, among other services, provides a storage service that allows users to upload music files to personal online storage lockers and play and download the uploaded songs. MP3tunes also owns and operates Sideload.com, which allows users to search for free song files on the internet; if the user has an MP3tunes locker, Sideload.com will download the song from a third-party website and save it to the user's MP3tunes locker. MP3tunes also has a service that syncs cover art with the user's music file. MP3tunes has a license from Amazon.com to use its cover art for the principal purpose of driving traffic to Amazon.com.

MP3tunes has an anti-infringement policy for both websites. Users must agree to MP3tunes' policy prohibiting storage of infringing content and acknowledge MP3tunes' right to sever its relationship with repeat infringers before they can activate an MP3tunes locker. Though Sideload.com does not impose similar conditions for use, the website links to the anti-infringement policy. MP3tunes also registered an agent with the Copyright Office to receive notices of alleged infringement from copyright owners and displays the contact information of the agent on both websites.

In late 2007, MP3tunes received several takedown notices from EMI Music Group North America ("EMGNA") and EMI Entertainment World ("EEW") that identified specific infringing songs and web addresses and demanded the takedown of all other EMI copyrighted works. In response, MP3tunes removed all the specific links on Sideload.com but did not remove any content from users' lockers. MP3tunes also requested that EMGNA and EEW specifically identify any other infringing links. Neither EMGNA nor EEW responded and EMI instead filed this lawsuit, alleging that MP3tunes failed to qualify for the DMCA safe harbor provisions, and direct infringement and unfair competition. EMI moved for summary judgment, and MP3tunes also moved for summary judgment claiming protection under the safe harbor created by the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. §512.

For a service provider to be eligible for DMCA protection, it must first comply with §512(i), which requires the service provider to have adopted and reasonably implemented a repeat infringer policy. While service providers "have no affirmative duty to police their users," 512(i) denies protection to websites that "purposefully fail to keep adequate records of the identity and activities of their users and fail to terminate users no matter how persistent and flagrant their infringement." EMI argued that MP3tunes purposefully blinded itself to its users' blatant infringement; MP3tunes countered that they reasonably implemented a procedure to deal with takedown notices and have complied with the notices sent by EMGNA and EEW. MP3tunes also terminated the accounts of 153 repeat infringers who violated copyrights by sharing the contents of their lockers with other users.

The court noted that case law absolves service providers from policing users who merely consume the infringing content from third-party websites, and agreed with MP3tunes, finding that its users are not blatant infringers because its users do not upload or post unauthorized content to the web, but rather sideload content from other websites and do not know for certain whether the material downloaded is infringing copyrights. The court also found that MP3tunes adhered to §512(i) because it tracked the



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source and web address of every sideloaded song in its users' lockers, can and did terminate the accounts of repeat infringers, and demonstrated that it not only has a procedure for responding to DMCA takedown notifications but also that it responded to such notices.

Finding that MP3tunes is eligible for DMCA protection, the court then analyzed whether MP3tunes complied with the DMCA takedown notices as required by §512(c)(3) and §512(d)(3). Subsection 512(c) governs material stored on the service provider's servers at the direction of a user, and potentially applies to MP3tunes' locker service. Subsection 512(d) governs information location tools like search engines, and potentially applies to Sideload.com. The eligibility requirements for both subsections are the same, though each service must independently qualify.

A proper DMCA notice under each subsection must "identify the copyrighted work or provide a representative list, if multiple works are subject to the same notice, and identify the infringing material with enough information to locate it." Citing to *Viacom v. YouTube*, 718 F.Supp.2d 514 (S.D.N.Y. 2010), the court noted that notice merely stating "all songs" by a particular artist or some other vague descriptor, and nothing more, is inadequate for the service provider to locate the allegedly infringing material. After proper notice, a service provider must act expeditiously to remove the specific infringing material identified in the notice, but is not required to search for other materials that may infringe the identified copyrighted works. Following *Viacom*, the court determined that MP3tunes did not qualify for safe harbor protection for songs stored in user lockers that were sideloaded from the unauthorized websites identified in the EMGNA and EEW takedown notices because MP3tunes needed to remove the stored content identified in the compliant takedown notice in addition to removing the links. However, the court found that MP3tunes did qualify for safe harbor protection for songs sideloaded from websites not listed in the takedown notices as those notices were not proper as they did not provide the location of additional infringing material.

Though MP3tunes qualified for safe harbor protection, such protection is not available under subsections 512(c)(1)(A) or (d)(1) if MP3 had actual knowledge that the material on its websites infringed another's copyrights or was aware of facts and circumstances that made such infringement apparent. The court found no actual knowledge, because EMI failed to provide evidence that MP3tunes' executives sideloaded songs from clearly pirated websites, as the sides that they used did not use the words "pirate" or "bootleg" or other words to indicate their illegal purpose. The court also found that MP3tunes did not ignore red flags. Though there are facts and circumstances that may suggest illegal file sharing through the links on Sideload.com and the files stored on MP3tunes, because an investigation would have been required to determine whether the material is infringing, those facts and circumstances are not red flags. MP3tunes had no way of knowing for sure whether free songs on the internet are unauthorized unless it investigated, and the DMCA is explicit that a safe harbor is not conditioned on "a service provider monitoring its service or affirmatively seeking facts indicating infringing activity." 17 U.S.C. §512(m)(1).

Finding that MP3tunes did not have actual knowledge of infringing activities and did not ignore red flags, the court then analyzed whether MP3tunes is a vicarious infringer. Under subsections 512(c)(1)(B) and



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(d)(2), service providers that directly benefit from and have the right and ability to control their users' infringing activity are ineligible for DMCA safe harbor protection. The court found that MP3tunes did not have a direct financial benefit that was attributable to the infringing activity. MP3tunes did not promote infringement, the sideloaded songs were stored free of charge, and both infringing and non-infringing users paid the same or nothing at all for the locker services. On the issue of control, the court found that MP3tunes merely had the ability to remove or block access to materials posted on its website – it did not participate in the decisions of its users to link specific websites to Sideload.com and the songs that they sideloaded and stored. The court found that MP3tunes merely enabled its users to download infringing material, and if that is enough to create liability, search engines would also be without DMCA protection. Thus, the court found that MP3tunes is not a vicarious infringer and qualified for DMCA protection except for the songs sideloaded from links identified in EMGNA and EEW's takedown notices that it failed to remove from user lockers.

The court then turned to the contributory infringement claim. Contributory infringement is secondary liability for copyright infringement, and EMI must show direct infringement by a third party, and that MP3tunes knew or had reason to know of the infringement and materially contributed to the infringement. To show direct infringement, EMI must show ownership of a valid copyright and unauthorized copying. There was no dispute over EMI's ownership of the copyrights and the court found that there was unauthorized copying by MP3tunes' users of those songs identified in the takedown notices. MP3tunes unsuccessfully argued that EMI either abandoned its copyrights altogether or authorized downloads outside of the promotional context through offering promotional downloads of copyrighted songs from an authorized website. Having found direct infringement, the court then found that EMI established contributory liability as well.

MP3tunes, through the takedown notices, had actual knowledge that its users had stored and continued to have access to infringing copies of EMI's works. Moreover, because MP3tunes provided the exclusive venue to download, store and playback infringing records, the court found that MP3tunes had materially contributed to the infringement. Because MP3tunes continued to provide locker services to its users even after it knew they had unlawfully downloaded EMI's protected material and continued to allow them to store and access those works on its servers, the court granted summary judgment for EMI on its claim for contributory infringement as to the songs listed in the takedown notices that MP3tunes failed to remove from users' lockers.

EMI also alleged direct infringement by MP3tunes. EMI alleged that MP3tunes executives and employees sideloaded its recordings and MP3tunes is vicariously liable for that activity under respondeat superior. The court denied summary judgment for EMI on this claim because a genuine dispute exists as to whether any of the songs were downloaded by MP3tunes employees in the course of their employment, thereby making MP3tunes liable. However, the court found that Robertson, a named defendant and founder of MP3tunes, is directly liable for songs that he personally sideloaded from unauthorized sites.



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EMI also alleged that MP3tunes' storage system violated its right to public performance because MP3tunes employs a "master copy" that it uses to rebroadcast songs to users who upload different copies of the same song. However, the record shows that MP3tunes does not use such a master copy but that it preserves the exact digital copy of each song uploaded to the website.

EMI also alleged direct infringement by MP3tunes' use and storage of its copyrighted cover art. MP3tunes has a license from Amazon.com to display the cover art though it is only for the purpose of driving traffic to Amazon.com. There remains a genuine dispute as to whether the use and storage of the art contravenes the terms of the license and the court denied EMI's summary judgment motion on this claim.

EMI also claimed unfair competition by MP3tunes, and MP3tunes moved for summary judgment to dismiss that claim. An unfair competition claim requires showing that the defendant used plaintiff's works without authorization, and either (i) the defendant competed with the plaintiff in the market place, (ii) the defendant acted for commercial benefit, or (iii) the defendant deceived the public. However, the court found a genuine dispute as to whether MP3tunes competes with EMI because MP3tunes offers free copies and storage of song files to internet users and EMI distributes its works over the internet., and denied MP3tunes' motion.

Shropshire v. Canning, USDC N.D. California, August 22, 2011

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

- In copyright infringement and DMCA misrepresentation action involving the creation of a video in Canada which was then uploaded to You Tube's servers in California, the court denied defendant's motion to dismiss the infringement claim on extraterritoriality grounds, holding that extraterritoriality (whether or not the claim arises in the U.S.) is an element of a claim and not an issue of subject matter jurisdiction and further held that the doctrine of extraterritoriality does not apply if at least some part of the infringement occurs in the U.S.; court also denies in part defendant's motion to dismiss DMCA misrepresentation claim.

Plaintiff, Elmo Shropshire, is a co-owner of the copyright in the musical composition "Grandma Got Run Over By a Reindeer" ("Grandma"). Defendant allegedly created a video using Christmas-themed still images and an audio recording of "Grandma" performed by a Canadian musical group. Defendant, who was located in Canada, posted the video on YouTube and a copy of the video resided on YouTube's California servers.

Plaintiff's office manager contacted defendant and asked him to remove the video, which he refused to do. Plaintiff then filed a DMCA takedown notice and YouTube removed the video. Defendant subsequently filed a DMCA counter-notice and YouTube restored the video.



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Plaintiff filed suit for copyright infringement, misrepresentation under Section 512(f) of the DMCA, and declaratory judgment. Defendant moved to dismiss all claims.

The court first addressed the issue of extraterritoriality, because defendant argued that his act of creating the video in Canada took place outside the U.S. and thus falls outside the reach of the U.S. Copyright Act. The court noted that courts are divided on whether extraterritoriality is an issue of subject matter jurisdiction or an element of an infringement claim. Relying on *Litecubes, LLC v. Northern Light Products, Inc.*, 523 F.3d 1353 (Fed. Cir. 2008), the court held that extraterritoriality is an element of a copyright claim and proceeded to analyze defendant's motion to dismiss under Rule 12(b)(6).

Next, the court discussed whether all parts of the infringing act must take place in the U.S. for the U.S. Copyright Act to apply, or if it is sufficient that only some part of the infringing act take place in the U.S. The court held that uploading a video from Canada to YouTube's servers located in California for display within the U.S. is not "wholly extraterritorial" to the U.S. Accordingly, the court held that the plaintiff sufficiently alleged an act of direct copyright infringement and denied defendant's motion to dismiss that claim.

Plaintiff also claimed that defendant filed a false counter-notice with YouTube. Section 512(f) of the DMCA provides that "any person who knowingly materially misrepresents . . . that material or activity was removed or disabled by mistake or misidentification shall be liable for any damages" to an injured copyright owner.

Defendant's counter-notice stated (1) "I have a good faith belief the material was removed due to a mistake or misidentification of the material to be removed or disabled;" and (2) "No sound was copied, no visuals were copied and no part of my Grandma video is a copy of any original work made by Elmo. My video's audio as performed by the Canadian Irish Rovers under Section 107 of the Copyright Act of 1976 of the United States allows for 'fair use'."

Regarding the first statement in the counter-notice, the court relied on emails between plaintiff's office manager and defendant about removing the video in which the office manager explained why defendant's video was infringing plaintiff's copyright and which ended with defendant telling plaintiff to file a takedown notice with YouTube. The court concluded that the plaintiff made specific and plausible allegations that defendant did not have a good faith belief that defendant's video was removed due to mistake or misrepresentation. The court denied defendant's motion to dismiss the DMCA claim on this issue.

However, the court granted the defendant's motion to dismiss the DMCA claim as it related to the second statement. The court held that plaintiff failed to establish that defendant's statement "no part of [the] Grandma song video is a copy of any original work made by Elmo" is a misrepresentation.



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The court also denied defendant's motion to dismiss the claim for declaratory relief.

Muller v. Twentieth Century Fox Film Corp., USDC S.D. New York, August 22, 2011

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- After granting summary judgment to film producers on plaintiff's copyright infringement claim, court finds that attorney's fees for defendants are appropriate because plaintiff's claim was frivolous and objectively unreasonable, but court reduces amount of fees to \$40,000 in light of plaintiff's financial standing.

James Muller sued Twentieth Century Fox Film Corp., Paul Anderson and Davis Entertainment, claiming that the film "AVP: Alien v. Predator" infringed his screenplay titled "The Lost Continent." The court's March 2011 order granted defendants' motion for summary judgment, holding that defendants' film was independently created and that no reasonable jury could find probative or striking similarity between the film and plaintiff's screenplay.

Defendants then moved for attorney's fees and costs under Section 505 of the Copyright Act. In this decision, the court held that Muller's claim was frivolous and objectively unreasonable for three reasons: (1) the film and the screenplay tell very different stories; (2) Muller's claim that copying could be inferred from an alleged striking similarity between the two works was "ill conceived from the outset" (stating that the mere existence of multiple similarities is insufficient to meet the test for striking similarity); and (3) the only similarities between the two works were unprotectible.

Having determined that an award of attorney's fees is appropriate, the court then turned to the issue of the amount of the award. Defendants contended that the presumptively reasonable amount of attorney's fees is \$432,077.45, but defendants requested only \$150,000 in attorney's fees, "in light of the belief that the lesser award will adequately serve the statutory goals of compensation and deterrence."

The court accepted the amount of \$150,000 as a reasonable amount, but explained that a court may, in its discretion, reduce the award to reflect the relative financial strength of the parties. The court stated that while an award of attorney's fees is necessary to deter objectively unreasonable copyright infringement claims in the future, "the goals of the Copyright Act would not be promoted by bringing about Muller's financial ruin." On the other hand, the court continued, individuals who bring objectively unreasonable claims should not be given a "free pass." In light of Muller's financial standing, the objective unreasonableness of his claim, and the goals of the Copyright Act, the court reduced the amount of attorney's fees to \$40,000.

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