



# Publications

## CASES OF INTEREST

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

August 17, 2011

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**Doe v. Gangland Productions, Inc., et al.**, USDC C.D. California, August 1, 2011

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

- District court denies defendants' motion to strike under California's Anti-SLAPP statute, holding that defendants failed to show that disclosing plaintiff's gang nickname and face in their documentary was in furtherance of the exercise of their constitutional right of free speech in connection with a public issue or an issue of public interest.

Plaintiff, a former prison gang member, sued defendants, Gangland Productions, Inc., and A&E Television Network, for showing his face and identifying his gang nickname in an episode of the television series Gangland, in which clips from a taped interview he gave about his previous gang were used. The program was a documentary television show that explored a gang with a white-supremacist reputation similar to plaintiff's former gang. Among the topics plaintiff discussed in the interview were the facts surrounding the murder of a former gang member, including the theory that he was killed by his own gang because he gave an interview about the gang to the media. Plaintiff alleged that he only agreed to be interviewed in reliance on defendants' promise to conceal his identity and that the woman who interviewed him assured him that his identity would be concealed. Prior to taping the interview, plaintiff signed a Program Participation and Release Agreement that defendants argued expressly consented to their unrestricted use of his name and identity, and waived his right to any claims based on that use. Plaintiff asserted that he signed the release because the interviewer misled him, assuring him it was just a receipt for the \$300 defendants paid him for the interview.

Plaintiff's first amended complaint asserted six claims based on defendants' disclosure of his face and name, including appropriation of likeness, public disclosure of private information, false promise, negligent infliction of emotional distress, intentional infliction of emotional distress, and declaratory relief. The court denied defendants' motion to strike plaintiff's complaint under California's statute addressing Strategic Lawsuits Against Public Participation (Anti-SLAPP Statute), finding that defendants failed to show that revealing plaintiff's identity in violation of an alleged promise not to do so – the basis for plaintiff's claims against them – was in furtherance of their exercise of free speech or that including plaintiff's identity in the program was in connection with a public issue or an issue of public interest.

California enacted its Anti-SLAPP statute to address lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The statute provides for a special motion to strike a cause of action "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue ... unless the court determines that



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the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” Defendants filing an Anti-SLAPP motion to strike must make an initial showing that the plaintiff’s suit arises from an act in furtherance of defendants’ right of petition or free speech. Once the defendants make that showing, the burden shifts to the plaintiff to establish a probability that it will prevail on its claim.

The court concluded that defendants failed to show that revealing plaintiff’s identity was in furtherance of their exercise of free speech. Defendants argued their disclosure of plaintiff’s identity fell within the statute’s protection for “other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” Specifically, they argued that subject of the television program — gang activity in southern California and the killing of a gang-affiliated police informant — was in connection with an issue of public interest and that their creation of the program was an exercise of free speech. Defendants also argued that their disclosure of plaintiff’s identity was in furtherance of that free speech and that plaintiff’s claims were complaints about the content of the program.

Plaintiff argued that the proper analysis under the Anti-SLAPP Statute was whether the principal thrust of the claims arose from protected speech. The thrust of his claims were that defendants should have kept their promise and not disclosed his identity. While not disputing that the television program discussing gang-related activity is “in connection with a public issue or an issue of public interest,” plaintiff argued that the disclosure of his identity was not, and had defendants concealed his identity, as they had with two other interviewees in that episode, the protected content of the program would not have been affected. The court acknowledged that defendants’ television show about gang violence – a generally protected activity – “lurk[ed] in the background” of plaintiff’s claims, but held that background activities don’t define the “principal thrust” of the claim for relief.

The court rejected defendants’ argument that a broad reading of the statute required that “any communicative activity” would be protected, reasoning that to so hold would be contrary to the California legislature’s intent and would “prop[] open floodgates that would drown the courts in the waters of anti-SLAPP litigation.”

After discussing two lines of California appellate cases with differing tests for establishing whether a statement was “in connection with a public issue or an issue of public interest,” the court declined to choose one test over the other, finding instead that defendants’ disclosure of plaintiff’s identity during the episode failed both tests. Defendants’ revelation of plaintiff’s identity was not in connection with a public issue or an issue of public interest, even though the court agreed with defendants’ argument that the subject matter of their program was of public interest. Even if viewers of the program were curious about plaintiff’s identity, curiosity does not make its disclosure of public interest. Plaintiff’s identity was not of concern to a substantial number of people, even if gang activity in southern California is, and the challenged statement – the disclosure of plaintiff’s identity – and defendants’ asserted public interest – gang violence – were not closely related. The court agreed with plaintiff that the absence of his identity from the show would not have impacted the content or defendants’ ability to communicate their protected speech. The public’s knowledge of plaintiff’s identity would not improve the general knowledge of gang-related activity and defendants also could not turn otherwise private information into a matter of public interest by broadcasting the information to a large number of people.



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Finding that defendants had failed to meet their burden under the Anti-SLAPP statute, the court concluded that it need not determine plaintiff's probability of prevailing on his claims.

**Goldberg v. Cameron**, USDC N.D. California, August 11, 2011

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

- District court awards attorneys' fees of approximately \$350,000 to defendants unsuccessful copyright infringement action against James Cameron and others involved in the production of The Terminator and The Terminator 2: Judgment Day.

In 2005, plaintiff Neil Goldberg sued director and writer James Cameron, writer Gale Ann Hurd, and Pacific Western Productions for copyright infringement, claiming that he sent a script and soundtrack to New World Pictures in or around 1979 that were later incorporated into the motion pictures The Terminator (T-1) and The Terminator 2: Judgment Day (T-2). Goldberg also alleged copyright infringement with respect to the later motion pictures Terminator 3: Rise of the Machines (T-3) and Terminator 4: Salvation (T-4) and the television series the Sarah Connor Chronicles (Chronicles).

Defendant Cameron directed T-1 and T-2, and both he and defendant Hurd co-wrote T-1 and T-2. Defendants had no involvement with T-3, T-4 or Chronicles. Hurd assigned her rights to the Terminator franchise in 1998.

In February 2007, the court granted defendants' motion to dismiss Goldberg's claims arising prior to August 2002 as barred by the statute of limitations. Defendants' counsel then wrote to Goldberg's counsel and advised him to dismiss the action and to pursue any claims against the companies involved in the production of T-3, T-4 and Chronicles. Plaintiff did not dismiss the action.

Goldberg filed an amended complaint, portions of which the court dismissed in July 2007, and the remainder of which was resolved by summary judgment in favor of the defendants in December 2008. Goldberg then amended his complaint again to pursue a claim of contributory copyright infringement against Hurd, in connection with her assignment of rights to the Terminator Franchise. The court granted summary judgment for Hurd in April 2011.

The court awarded defendants discretionary attorneys' fees of approximately \$350,000 under Section 505 of the Copyright Act. In awarding such fees, the court considered several factors, such as (1) the degree of success obtained, (2) frivolousness, (3) motivation, (4) objective unreasonableness of the factual and legal arguments, (5) the need to advance considerations of compensation and deterrence.

After acknowledging defendants' success in the matter, the court found that Goldberg's claims of infringement with respect to T-1 and T-2 were frivolous and objectively unreasonable because they were long time-barred and because Goldberg failed to offer any evidence of access or substantial similarity. Goldberg's claim of contributory infringement against Hurd was not frivolous, but was objectively unreasonable because Goldberg failed to bring a direct infringement claim against anyone involved in T-3, T-4 or Chronicles, and failed to substantiate the claim beyond offering speculative testimony. Although the court found that Goldberg was not motivated by bad faith in bringing his claims, it concluded that an award of



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fees was appropriate in order to deter such meritless suits and to compensate defendants for the resources they had expended after litigating for six years.

**Mattel, Inc. v. MGA Entertainment, Inc.**, USDC C.D. California, August 4, 2011

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

- After jury verdict in favor of MGA for improper misappropriation of trade secrets, district court awards MGA exemplary damages equal to corrected jury award of \$85 million, and costs and attorneys' fees of \$2.52 million.

After the second trial in litigation between Mattel, Inc., the maker of Barbie dolls, and MGA Entertainment, Inc., maker of Bratz dolls, the jury returned a verdict in favor of MGA on its counterclaim for misappropriation of trade secrets. MGA's claim arose out of the activities of Mattel's so-called "Market Intelligence" Group, a collection of employees dispatched to international toy fairs and directed to gather information from Mattel's competitors' private showrooms through the use of false pretenses. The jury found that Mattel had misappropriated 26 categories of trade secrets and that the company's conduct was willful and malicious, and awarded \$3.4 million for each category of trade secret. After remittitur of the award to \$85 million to correct for computation errors made by the jury, the court awarded MGA an additional \$85 million in exemplary damages under the California Uniform Trade Secrets Act (CUTSA). The court rejected MGA's request for damages in an amount equal to twice the compensatory damages, describing Mattel's nefarious tactics as "silly, not evil" and not worthy of the most severe economic sanctions.

In cases of willful and malicious misappropriation, CUTSA allows for the award of exemplary damages not to exceed twice the award of compensatory damages. To determine the proper measure of exemplary damages under the statute, California courts consider common law factors traditionally used to determine both whether and to what extent exemplary damages are warranted: (1) the nature of the misconduct; (2) the amount of compensatory damages; and (3) the defendant's financial condition.

Noting that the largest exemplary awards are reserved for the most reprehensible acts, in breach of basic commercial ethics and fraud, and that exemplary damages equal to twice the compensatory award may be awarded in cases involving conduct causing purely economic loss, the court concluded that that large an award was not warranted in Mattel's case. Mattel's "market intelligence" tactics were "intentional, pervasive, long-standing and egregious," and fell "far short" of basic ethical standards. Its senior management encouraged employees to use false pretenses to gain access competitors' private displays at international toy fairs and improperly acquire competitive information, disseminated the information throughout the company, praised the employees that committed the wrongdoing, and used the trade secrets information to preempt MGA's unreleased products, reaping \$85 million in unjust enrichment. Nonetheless, the court reasoned that the need for deterrence was not at its strongest, since other members of the toy industry had been alerted to Mattel's misconduct and were already likely be wary of Mattel. Mattel's "use of cheap fake business cards, silly nicknames, and amateurish tactics in a futile effort to stave off legitimate competition" also did not evoke a "strong desire to punish." The court concluded: "That one of California's largest companies abandoned innovation and resourcefulness for bumbling fraud evokes disappointment instead."



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Acknowledging that, under California law, the jury's large award of \$88.5 million, remitted to \$85 million, would support an exemplary damages award double that amount, and that Mattel's substantial net worth suggested that a high award of exemplary damages would be necessary to deter future misconduct, the court concluded Mattel's conduct did not represent the most reprehensible form of trade secret misappropriation imaginable. Even recognizing its maliciousness, the conduct should not be punished by the largest exemplary damage award available.

The court also held that MGA was entitled to recover the reasonable attorneys' fees and costs it incurred to prosecute Mattel's willful and malicious misappropriation of trade secrets. Rejecting Mattel's argument that MGA was not entitled to fees and costs incurred prior to filing its claim, the court found that MGA could recover its fees spent on pre-filing activities that were reasonably expended on the litigation. While most of the time spent on its affirmative claims between 2004 and 2010 did not advance its successful claim for trade secret misappropriation, relating instead to Mattel's alleged manipulation of retailers, licensees, and other industry groups that did business with MGA, the court found that some of the factual investigation performed by MGA's attorneys between 2007 and 2010 helped lay the foundation for its claim that Mattel used misappropriated information to create products that mimicked unreleased MGA products. The court concluded that MGA reasonably spent \$2.52 million prosecuting its trade secrets claim – \$2,172,000 in fees and \$350,000 in costs for the litigation of its claim.

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