



Publications

CASES OF INTEREST

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

January 11, 2012

Table of Contents

- Liberty Media Holdings, LLC v. Tabora
- Pollick v. Kimberly-Clark Corp.

Liberty Media Holdings, LLC v. Tabora, USDC S.D. California, January 4, 2012

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

- District court in California dismisses copyright infringement action alleging Florida-based defendant unlawfully distributed plaintiff's copyrighted adult movie over peer-to-peer file-sharing protocol for lack of personal jurisdiction, finding that defendant did not personally direct his activities to California.

Plaintiff Liberty Media Holdings, LLC creates and produces adult movies, including the motion picture "Corbin Fisher's Down on the Farm." Plaintiff sued Cary Tabora and Schuyler Whetstone, both non-residents of California, in federal court in the Southern District of California, alleging that that defendants infringed plaintiff's copyright in the motion picture by unlawfully republishing and distributing the work to 840 individuals over the internet using peer-to-peer file-sharing protocol BitTorrent. Plaintiff filed a motion for default judgment against Whetstone, who failed to respond to the complaint. Defendant Tabora filed a motion to dismiss, arguing that plaintiff failed to allege sufficiently that the court had general or specific personal jurisdiction over defendants and that venue was improper. The court agreed and granted Tabora's motion to dismiss. The court also denied plaintiff's motion for default judgment against defendant Whetstone and, sua sponte, dismissed the case against Whetstone for lack of jurisdiction.

The court found that plaintiff failed to allege sufficiently that Tabora had minimum contacts with California under the Ninth Circuit's test for analyzing specific personal jurisdiction. Plaintiff alleged that Tabora both distributed the copyrighted work in California and knew that his acts would cause harm in that forum. Defendant argued that he did not purposefully direct any of his activities toward California, that he did not know plaintiff's location and that, because of the way that BitTorrent works, his participation in a BitTorrent "swarm" was insufficient to confer personal jurisdiction over him.

The court applied the three-part "*Calder* effects test," from the Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783 (1984), to determine whether Tabora purposefully directed any activities toward the forum state. The Ninth Circuit has held that, under this test, "the defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006). The court found that while plaintiff easily satisfied the first element – that it allege that Tabora had committed an intentional act of copyright infringement – it failed to satisfy the second element of the test – that it allege that Tabora expressly aimed his activities toward California. A defendant's presence on the web or passive participation in a BitTorrent "swarm" is not activity expressly aimed at any particular forum,



Publications

CASES OF INTEREST

LOEB & LOEB adds Depth.

even if it allows end users in that forum to download copyrighted materials from the defendant. Finally, plaintiff failed to allege adequately the third element of the test – that the harm within the forum was foreseeable. Although plaintiff alleged that Tabora watched the copyrighted work and that it contained a title screen that disclosed the location of the producer's records custodian, the court found that the title screen did not suggest that the address given was the location of the copyright holder or the producer. Plaintiff's website, which contained a terms-of-use agreement, also did not provide plaintiff's address in California. The court rejected plaintiff's argument that it should impute knowledge of plaintiff's location to Tabora under a theory of "willful blindness" (that it was highly probable that plaintiff was located in California and Tabora took steps to avoid learning that fact). Because it failed to establish that Tabora expressly aimed any activities toward California or could reasonably foresee causing harm in California, plaintiff failed to allege adequately that Tabora purposefully directed his activities toward the forum state for the purpose of establishing personal jurisdiction.

The court denied plaintiff's request for jurisdictional discovery, finding that plaintiff had provided no more than a "hunch" that it would be able to discover jurisdictionally relevant facts. The court also denied plaintiff's motion for default judgment against Whetstone and plaintiff's request that the court transfer the action to Florida, on the grounds that there was insufficient evidence presented of Whetstone's domicile and plaintiff failed to demonstrate that it would be prejudiced by dismissal.

Pollick v. Kimberly-Clark Corp., USDC E.D. Michigan, January 5, 2012

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

- District court denies defendant's motion for reconsideration of dismissal of copyright infringement action involving dispute between designers of "diaper jeans" and "jeans diapers," holding that diapers, when viewed as a whole, were not substantially similar.

Plaintiff, designer and owner of copyright in "diaper jeans," brought suit against defendant, manufacturer of Huggies® "jeans diapers" for copyright infringement, alleging that defendant created unauthorized reproductions and derivatives of his work. The court previously granted defendant's motion to dismiss, holding that plaintiff had not stated a claim of copyright infringement. Plaintiff moved for reconsideration of the dismissal and the court denied the motion, finding that it presented the same issues previously ruled upon by the court – whether the diapers, when viewed as a whole, are "substantially similar." The court also rejected plaintiff's argument that because the diapers are "thematically related," the court's previous point-by-point comparison was insufficient to support an absence of substantial similarity.

Noting that courts will not grant motions for rehearing or reconsideration that merely present the same issues already ruled upon, either expressly or by reasonable implication, the court found plaintiff's motion for reconsideration reasserted his argument that defendant infringed his copyright because the parties' products shared common themes – each show stitching, a blue color, pockets, belt loops, and an exterior label – and once again found the argument "unpersuasive." As it had in its previous opinion, the court reasoned that enumerating all of the differences between the parties' works was both inefficient and unnecessary, since a simple visual comparison showed not only that the diapers are not substantially similar, but that they are substantially different. Nonetheless, the court undertook a "brief review" of some of the differences in order to illustrate the broad divergence in the aesthetic appeal of the works, citing differences in color, pattern, stitching, number and placement of front pockets, front fly, front and back belt loops, back label and back waist, and concluded: "In sum, the



Publications

CASES OF INTEREST

LOEB & LOEB adds Depth.

aesthetics of the diapers are not substantially similar – they are, in fact, substantially different.”

Plaintiff argued that where similarities are related thematically, the court must look at these similarities holistically and give greater weight to what would otherwise be slight similarities. The court acknowledged that it must look at all similarities – whether slight or otherwise – as a whole to determine whether collectively they could prove substantial similarity, and that one relevant consideration to this “holistic” assessment is whether the works have “thematically related” similarities or merely random similarities scattered throughout the works. Copyright protects against unauthorized copying and random, scattered similarities are less likely to suggest copying to a lay observer than systematic, concentrated similarities.

The court stated, however, that plaintiff does not hold a copyright to the general concept or “theme” of diapers resembling jeans, but rather in his particularized expression of a diaper resembling jeans. While the two works share a general concept and superficial similarities incident to this general idea, such as stitching and pockets, when considered as a whole, no reasonable observer would conclude that plaintiff’s expression of his “diaper jeans” is substantially similar to defendant’s expression of its “jeans diapers.” Rather, a reasonable observer would conclude that these two expressions are substantially different.

The court also denied plaintiff’s request for reconsideration of its award of attorneys’ fees, finding that plaintiff’s complaint was objectively unreasonable in light of well-established law that plaintiff’s copyright did not confer a broad right to exclude others from producing diapers designed to resemble jeans but a narrow right to prevent others from reproducing his particular expression of diaper jeans, and that the two works were not substantial similar.

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