



MEDIA, ENTERTAINMENT AND FIRST AMENDMENT NEWSLETTER

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Recent Supreme Court Cert Denial Highlights Need for Passage of Federal Anti-SLAPP Statute

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Strategic Lawsuits Against Public Participation (otherwise known as “SLAPP” suits) are more prevalent than ever given the ease of communication and multitude of platforms available for getting messages out. They are gaining even more notoriety in the presidential election since candidate Donald Trump vowed to “open up” the current libel laws to further protect him from facing public criticism. The irony is, Trump has been filing and threatening lawsuits to shut up critics and adversaries his entire career. He forced reporter Tim O’Brien through years of litigation over the Trump biography that assigned a lower valuation of his net worth than Trump felt was correct. He sued the Chicago Tribune’s architecture critic over a piece in which he commented that a planned Trump skyscraper in lower Manhattan would be “silly.” He used the threat of litigation to get an investment firm to fire an analyst who correctly predicted that the Taj Mahal casino would not be a financial success. And, he sued comedian Bill Maher over a joke. When asked about this laundry list of litigation arising out of other people’s speech, Trump commented at times he knew he couldn’t win but brought the suit anyway to make a point. “I spent a couple of bucks on legal fees, and they spent a whole lot more. I did it to make his life miserable, which I’m happy about.” This is a quintessential SLAPP suit – one without merit brought to silence a critic.

The Legislatures in twenty-nine states, the District of Columbia and the territory of Guam have all seen the merit in passing Anti-SLAPP legislation to curtail the ability of bullies from using the court system to squelch the First Amendment rights of others. This has left a patchwork of protection that savvy plaintiffs have been known to work around by filing actions in jurisdictions that have not enacted SLAPP statutes. Another quandary presented by this primarily state-born protection is whether it applies in federal court. For more than fifteen years, federal courts have applied state anti-SLAPP statutes to federal cases when sitting in diversity jurisdiction because they have viewed SLAPP statutes as being

IN THE NEWS

Laura Prather received the Franklin Jones Best CLE Article Award for her article, which she co-authored with First Court of Appeals Justice Jane Bland, “Bullies Beware: Safeguarding Constitutional Rights Through Anti-SLAPP in Texas.”

designed to prevent substantive consequences – the impairment of First Amendment rights and the time and expense of defending against litigation that has no demonstrable merit under state law regarding defamation. In 2014, however, the D.C. Circuit found the Erie doctrine barred the application of the D.C. anti-SLAPP statute in federal court. The conflict now results in a circuit split.

The U.S. Supreme Court had the chance to solve this problem when petition for certification was filed in the *Mebo International v. Yamanaka*, D.C. No. 4:13-cv-03240-YGR, (9th Cir. 2015) case because the sole question presented in that proceeding was:

Whether state anti-SLAPP statutes are properly applied in federal diversity cases, or whether doing so runs afoul of the Erie doctrine. A split in the circuit courts on this question currently exists with the Ninth Circuit applying state anti-SLAPP statutes in diversity actions, but the D.C. Circuit refusing to do so. *Compare U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 972 (9th Cir. 1999) and *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015).

On March 21, 2016 the High Court declined the invitation making the need for a federal anti-SLAPP statute even more crucial.

Efforts to create a federal anti-SLAPP law started at least six years ago, but this year marks the first time that a sizable and bipartisan group is backing such a bill. One impetus is the growing number of SLAPP suits aimed at Web-based businesses (and their customers) that provide a forum for the public to discuss, rate and criticize the world around them. The proposal – HR 2304 – or the “SPEAK FREE Act” by Rep. Blake Farenthold (R-Texas) and Rep. Anna Eshoo (D-California) – has, at last count, 32 co-sponsors

from both sides of the aisle. Groups and companies that support the effort include: American Center for Democracy, American Society of News Editors, Avvo, Competitive Enterprise Institute, Consumer Electronics Association, Consumer Technology Association, Electronic Frontier Foundation, Glassdoor, Information Technology & Innovation Foundation, Media Law Resource Center, Online News Association, Newspaper Association of America, Public Knowledge, Public Participation Project, R Street, Reporters Committee for Freedom of the Press, Trip Advisor, and Yelp.

Borrowing heavily from the California and Texas SLAPP statutes, the bill would allow people sued in federal court or in states with little protection against SLAPPs to have a federal judge dismiss frivolous claims based on speech “made in connection with an official proceeding or about a matter of public concern.” The bill has been referred to the House Subcommittee on the Constitution and Civil Justice and a hearing is anticipated in the near future. A consistent approach to the application of anti-SLAPP laws in federal court is critical to serve the purpose of Anti-SLAPP statutes and to avoid forum shopping, and nothing would satisfy that need more efficiently than passage of the SPEAK FREE Act.

Celebrity Privacy – Trials About Videotapes

Kenneth G. Parker



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Early 2016 was eventful for observers of media-related trials. In Florida, Terry Bollea (whose wrestling name is Hulk Hogan) obtained a massive \$140 million verdict against Gawker Media and its CEO for the publication of a portion of what Bollea testified was an illegally made adult tape. And in Tennessee, Erin Andrews, an ESPN sports commentator, won a \$55 million verdict against the operator of a Nashville hotel and the

man that illegally videotaped her in her hotel room. Although the cases have significant differences, both trials are tremendously interesting and have at least one lesson in common.

The Hogan Trial

Terry Bollea, who wrestled under the name Hulk Hogan, is a professional wrestling star whose racist comments got him fired from the WWE not long ago. Bollea has been wrestling as the Hogan character since at least the 1980s. Bollea claimed that Gawker Media and its CEO, Nick Denton, crossed the line when Gawker published a portion of a secretly-recorded tape depicting Bollea having sex with his best friend's wife. At trial, Gawker argued that as a public figure Bollea could not use, manipulate, and take advantage of the media on a systematic basis for decades to advance his career and then complain when the media reported news about him. Gawker further pointed out that there is a First Amendment right to comment on public figures. Finally, Gawker asserted that Bollea had boasted of his sexual prowess in the media in the past, making the sex tape relevant. Lurking in the background of the case were Gawker's allegations that Bollea had filed the lawsuit to squelch release of a *second* sex tape of him that showed him using a racial slur, and that Bollea was focused on the potential adverse publicity related to the slur rather than the depiction of him having sex in either tape. Further, both tapes had apparently been leaked by Bollea's former best friend, Bubba "the Love Sponge" Clem; Gawker alleged that Clem knew of Bollea's real motive to stop release of the two tapes (to avoid bad publicity related to the racial slur). Clem exercised his Fifth Amendment right against self-incrimination and refused to testify in deposition or trial. Gawker claimed that Clem's testimony would have supported its theories of the case.

Setting aside the murky facts and allegations, the key to the Bollea victory in the trial was his testimony and his lawyer's argument that even celebrities deserve

privacy in the bedroom. On the stand, Bollea admitted making statements about sexual prowess in the past, but claimed he was in character as Hulk Hogan when he did it. He stated that although he cultivated a public image of a braggadocious wrestler, he tries to shield aspects of his life from public view. His lawyer argued at closing that talking on radio shows and elsewhere about matters related to sexual prowess "does not open the door to putting a camera in a bedroom and putting that on the Internet." Deliberating for about four hours, the Florida jury found for Bollea on March 18, 2016, awarding him \$115 million - \$55 million for economic injuries and \$60 million for emotional injuries. Three days later, the jury awarded punitive damages of \$25.1 million, including \$10 million against Gawker CEO Denton. Obviously, Gawker is appealing.

The Andrews Trial

Erin Andrews, an ESPN sports commentator and NFL sideline reporter, sued the operator of a Nashville Marriott, West End Hotel Partners LLC ("**West End**"), and the peeping Tom who illegally videotaped her in her room, Michael David Barrett. Ms. Andrews was also stalked in two other locations by Mr. Barrett, who went to prison for stalking her. Andrews' claim against West End was that its hotel employees had given Barrett her room number and allowed him to rent the room connected to hers. Barrett reversed the peephole to Andrews' door, used the adjoining room to hear when she was showering, and secretly videotaped her while she was naked. Barrett posted the four-and-a-half minute illegal video on the Internet, where it quickly went viral and reportedly continues to be available to this day, despite Andrews' efforts to eliminate it.

Andrews testified emotionally at trial that her life had been devastated by the invasion of privacy by Mr. Barrett, as well as the fallout from publication of the tape. She said she was "embarrassed, humiliated, and mortified" by the video. She explained in detail how her personal routines had changed and persuasively testified about the personal emotional injuries she

had suffered. On cross-examination, counsel for West End suggested Andrews' career had been helped and her income increased by the publicity surrounding the video, pointing out Andrews' endorsements – for Reebok, for Degree deodorant, for Diet Mountain Dew and others – and a commercial for Victoria's Secret.

This defense strategy apparently backfired. The jury found for Andrews, returning a \$55 million verdict on March 7, 2016. The jury divided the responsibility for paying the award – Barrett must pay just over \$28 million, and West End \$27 million. The case has settled since the verdict; terms were not disclosed.

The Common Theme

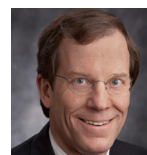
Although there are significant differences between the two cases, the two have something in common. First, in both cases, a key theme of the defense was that the public figure involved had no right to complain because he or she had benefitted from media publicity, and therefore should not be heard to complain. In Bollea's case, this argument was explicit and the publicity had preceded the injurious event – Gawker's attorney argued that because Bollea, as the flamboyant Hogan character, had taken advantage of publicity and even commented on issues related to sex, that he could not then complain about publication of the sex tape and commentary about it. In Andrews' case, West End's attorney was more subtle – he implied that Andrews' career had been enhanced, not hindered, by the publication of the illegal videotape of her. Second, the key theme was supported, entirely or in part, by the facts – Bollea did not dispute that he had talked about sex in the media before; Andrews did not dispute, on cross-examination, that she had signed multiple endorsement deals since the illegal taping and its publication. In Andrews' case, however, it is unclear how much, if any, of her success was attributable to publicity surrounding the publication. But finally, and most importantly, neither jury bought these arguments. Both juries rejected the theory that

public figures are “fair game” for egregious invasions of privacy, as well as the theory that public figures should not be heard to complain if they may have “benefitted” financially from invasions of privacy or media publicity generally. Importantly, particularly in the Bollea case, the jury simply did not believe that a public figure was “fair game” for commentary about what went on in the privacy of a bedroom, regardless of what that public figure might have said before. In Andrews' case, the defense argument that Andrews had no, or lesser, damages because of her successful career post-event was a dangerous one, and it is no surprise the jury found it unpersuasive, if not offensive.

It is likely that the Hogan case will change significantly on appeal – that the appellate court will rule that the First Amendment allows Gawker to publish portions of the sex tape and comment on it. And there are other potential problems with the evidence excluded in the Hogan case. In any event, the fact remains that jurors do not believe the media has carte blanche to say and publish what it wants about public figures; nor did the jurors buy the argument, implicit at the Andrews trial, that there is “no such thing as bad publicity.”

Senate Passes FOIA Improvement Bill

Thomas J. Williams



Thomas J.
Williams

In today's political climate, it is a rare topic that enjoys unanimous support in Congress. Yet that is exactly the case, at least in the Senate, when it comes to the “FOIA Improvement Act of 2016,” a bill amending the federal Freedom of Information Act and which the United States Senate passed by unanimous consent on March 15, 2016. The White House announced the same day that President Obama would sign the bill if it reaches his desk in the form which passed the Senate.

Co-sponsored by a bipartisan group of senators led by Republican John Cornyn of Texas and Democrat Patrick Leahy of Vermont, the bill, S. 337, contains a number of important changes to the law. Perhaps most importantly, it codifies a presumption of openness and requires federal agencies seeking to withhold information to show not only that an exception to disclosure might apply, but also that “the agency reasonably foresees that disclosure would harm an interest protected by an exemption....” This standard has been the policy of the Obama administration Justice Department, but not all administrations in the past have followed such a policy. For example, during the George W. Bush administration, the Justice Department would generally defend any FOIA case in which there was a legitimate basis to claim an exemption, without regard to whether disclosure of the requested information would actually harm the agency involved.

Other key features of the bill include a 25-year “sunset” on an agency’s ability to invoke the deliberative process exemption provided at 5 U.S.C. §552(b)(5), so that agencies could not claim that exemption to disclosure for records more than 25 years old. The bill also strengthens the Office of Government Information Services, the FOIA ombudsman office, and makes clear that frequently requested public records must be provided in electronic format.

Supporters of the bill are optimistic about its chances in the House of Representatives, and some key supporters of the bill, including Senate Judiciary Committee Chairman Charles Grassley, are hoping it can be passed and signed into law by this July 4th, which will be the 50th anniversary of President Johnson’s signing of the original FOIA bill.

Section 111 Compulsory License for Internet Streaming Still Up in the Air

Jason P. Bloom and Matthew Chiarizio



Jason Bloom



Matthew Chiarizio

The fallout from the U.S. Supreme Court’s decision in *American Broadcasting Companies, Inc. v. Aereo, Inc.*¹ remains unsettled almost two years after the ruling. Although Aereo

itself shut down and declared bankruptcy shortly after the Supreme Court’s decision, FilmOn – an Aereo competitor – continues the fight. Latching on to the Supreme Court’s reasoning in *Aereo III*, FilmOn continues to champion its entitlement to a compulsory license under 17 U.S.C. § 111. Lower court decisions on FilmOn’s entitlement to the compulsory license have established the potential for a circuit split that may bring Internet broadcasting before the Supreme Court once again.

In *Aereo III*, the Court found that Aereo’s services were “highly similar” to those of the cable television systems Congress sought to regulate with the 1976 Copyright Act.² Attempting to capitalize on this comparison, Aereo almost immediately changed course. Aereo argued that it was in fact a cable system and therefore eligible for a compulsory license to broadcast content under § 111.³ The Southern District of New York rejected Aereo’s argument, holding that the Supreme Court’s silence on this issue left the binding Second Circuit precedent in place.⁴ Thus, in at least the Second Circuit, Internet-based streaming services remained ineligible for the compulsory license of § 111.⁵ Aereo filed for bankruptcy soon after, effectively ending its fight.

FilmOn, however, has continued the fight with mixed results. FilmOn uses the same technology that Aereo did for one part of its service. It has arrays of miniature antennas connected to digital recorders, each antenna and recorder capturing and recording a unique copy

of broadcast programming that are then transmitted to subscribers via the Internet. Following the Supreme Court's *Aereo III* decision, FilmOn, like Aereo, embraced its new status as a cable system and asserted its eligibility for the compulsory license of § 111. FilmOn has now made its § 111 argument in four different venues and has gained only one favorable ruling.

First, in a Southern District of New York case dating back to 2010, FilmOn relied on the § 111 argument to justify its continued operations in spite of a previous injunction by the court barring its actions.⁶ FilmOn asserted that, based on the Supreme Court's reasoning in *Aereo III*, it was entitled to the compulsory license, and therefore its continued operation did not violate the injunction against infringing plaintiffs' copyrights. The court disagreed, explaining that the Supreme Court's mere implications in *Aereo III* were an insufficient basis to disregard the settled precedent of the Second Circuit. The court held FilmOn in contempt of its injunction and imposed a sanction of \$90,000. Largely accepting the district court's reasoning, the Second Circuit recently upheld the decision and the sanction against FilmOn on appeal.⁷

In another case, in the Central District of California, FilmOn and a group of plaintiff-broadcasters filed cross-motions for summary judgment on the question of the § 111 compulsory license.⁸ In a thorough discussion of both policy and legal implications, the court rejected the interpretations of § 111 by both the Copyright Office and the Second Circuit's *ivi* decision. Instead, the court granted FilmOn's motion for summary judgment, holding that FilmOn is entitled to a compulsory license under § 111. The court discounted the Copyright Office's interpretation due to a perceived bias by the Office, believing that the Office disagrees with Congress on the compulsory license, and thus, seeks "to cabin the statute whenever possible."⁹ The California court also disputed the Second Circuit's interpretation of the statutory language in *ivi*, finding that court's reasoning "not persuasive."¹⁰ Explaining that it is Congress's role

to make policy, not the courts', the court held that, upon complying with the requirements of the statute, FilmOn was entitled to a compulsory license under § 111. Understanding the importance of this decision, the court also authorized an immediate appeal of the issue to the Ninth Circuit. Briefing is scheduled through May 2016 at the Ninth Circuit.

The D.C. District Court also weighed in on cross-motions for summary judgment on the compulsory license.¹¹ The D.C. court determined that the plain language of § 111 contradicted FilmOn's position. Congress, the court held, did not intend to include Internet-based transmitters in the compulsory licensing scheme.¹² Further, even if the statutory text is ambiguous, the court deferred to the long-held position of the Copyright Office, noting that Congress is and has been fully aware of the Copyright Office's position, but has not amended § 111.¹³ For these reasons, the court held that FilmOn is not entitled to a compulsory license and granted summary judgment in favor of the plaintiffs. FilmOn appealed this ruling to the D.C. Circuit.

Finally, the Northern District of Illinois also confronted cross-motions for summary judgment on the compulsory license.¹⁴ The court analyzed the statutory language, *Aereo III*'s discussion of "cable systems," the statutory scheme, legislative history, and the Copyright Office's view before siding with the Second Circuit, Southern District of New York, and District of D.C. courts.¹⁵ The court denied FilmOn's entitlement to the statutory license and granted summary judgment against FilmOn.

Although there is a split in the application of the § 111, FilmOn remains barred from offering its broadcast-retransmission service nationwide while the legal issue remains unsettled. The D.C. District Court granted an injunction against FilmOn's streaming service nationwide, with the exception of the Second Circuit, which was previously exempted due to the previous Second Circuit ruling allowing Aereo to operate.¹⁶ Also,

UPCOMING SPEECHES

Thomas J. Williams

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Reston, Virginia

despite granting summary judgment in FilmOn's favor with regard to the compulsory license, the Central District of California court maintained its preliminary injunction barring FilmOn's streaming services pending the outcome of the appeal, citing the close legal issues and its recognized disagreement with existing Second Circuit precedent.¹⁷ And, based on the contempt ruling from the Second Circuit, FilmOn is now barred from transmitting broadcast television there.¹⁸

Although the votes weigh against FilmOn, a Ninth Circuit affirmation of the California court's ruling that FilmOn is eligible for the § 111 compulsory license could nonetheless create a circuit split allowing FilmOn to operate only in the Ninth Circuit, while remaining barred from operating anywhere else in the United States. Such a split could lead the issue of Internet-based retransmission back to the Supreme Court, with the question of the § 111 compulsory license – which the Court neatly avoided in *Aereo III* – squarely presented and unavoidable.

¹ 134 S. Ct. 2498 (2014) [hereinafter *Aereo III*].
² 134 S. Ct. at 2511 (2014).
³ *Am. Broad. Cos., Inc. v. Aereo, Inc.*, No. 12-cv-1540, 2014 WL 5393867, at *2 (S.D.N.Y. Oct. 23, 2014).
⁴ *Id.* at 4-6.
⁵ *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 282-84 (2d Cir. 2012).
⁶ *CBS Broad. Inc. v. FilmOn.com, Inc.*, No. 10-cv-7532, 2014 WL 3702568, at *4 (S.D.N.Y. July 24, 2014).
⁷ *CBS Broad. Inc. v. FilmOn.com, Inc.*, 814 F.3d 91, 98-99 (2d Cir. 2016).
⁸ *Fox Television Stations, Inc. v. AereoKiller*, 115 F. Supp. 3d 1152, 1154 (C.D. Cal. 2015).
⁹ *Id.* at 1164.
¹⁰ *Id.* at 1169.
¹¹ *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-cv-758, 2015 WL 7761052 (D.D.C. Dec. 2, 2015).
¹² *Id.* at *11-16.
¹³ *Id.* at *16-21.
¹⁴ *FilmOn X, LLC v. Window to the World Commc'ns, Inc.*, No. 13-cv-8451, 2016 WL 1161276, at *1 (N.D. Ill. Mar. 23, 2016).
¹⁵ *Id.* at 5-13.
¹⁶ *Fox Television Stations, Inc. v. FilmOn X LLC*, 966 F. Supp. 2d 30, 51-52 (D.D.C. 2013) (citing disagreement with the Second Circuit in *WNET, Thirteen v. Aereo*, 712 F.3d 676 (2d Cir. 2013) (overruled by *Aereo III*)).
¹⁷ *AereoKiller*, 115 F. Supp. 3d at 1171.
¹⁸ *CBS Broad. Inc.*, 814 F.3d at 100.

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