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

December 14, 2011

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New Sensations, Inc. v. Does 1-1,474, USDC N.D. California, December 7, 2011
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- District court grants motion of defendants, users of peer-to-peer file sharing network, to dismiss and/or quash subpoena in copyright action, concluding that, based on publically available information, plaintiff, license owner of copyrighted adult film, did not have good-faith basis to believe that venue was proper and jurisdiction was attainable.

Plaintiff New Sensations, Inc., the owner of an exclusive license in the adult film *Big Bang Theory: A XXX Parody*, filed a copyright lawsuit against 1,474 unidentified defendants, alleging that defendants illegally reproduced and distributed the work using the internet peer-to-peer file sharing program BitTorrent. The court previously granted plaintiff leave to take limited expedited discovery to serve subpoenas on defendants' Internet Service Providers (ISPs), seeking information to identify the defendants. Several defendants filed motions to dismiss and/or quash the subpoena, arguing that they have no connection with California.

In order to subject defendants to personal jurisdiction in the state of California, plaintiff must establish that the defendant purposefully availed itself of the privilege of conducting activities within the state. In considering defendants' motion to dismiss and/or quash the subpoena, the court selected and investigated random IP addresses identified in plaintiff's complaint. The results of the court's investigation – presumptive geographic data indicating that the defendants resided outside of California – suggested that the court lacked personal jurisdiction over many of the defendants. The court reasoned that, even if one or more of the unidentified defendants allegedly downloaded the file at some point during the time period in question from a computer located in the district, no case law existed to support personal jurisdiction over all 1,474 defendants, based on this connection. Noting that the logical extension of this unprecedented holding would be that everybody who used BitTorrent would subject themselves to jurisdiction in every state, the court held that defendants did not purposefully avail themselves of the privilege of conducting activities in California.

The court also concluded that venue was improper. In the statutory venue provision for copyright, venue is proper in the district in which the defendant or his agent resides or may be found. The court found that plaintiff did not and likely could not allege that each of the 1,474 defendants – or their agents – were found in the Northern District of California. In a federal question case, venue is proper case in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, and nothing in the complaint suggested that plaintiff had a good-faith basis for alleging that a substantial

part of the events or omissions giving rise to the claim related to all 1,474 defendants occurred in the court's district.

Noting that good cause may exist for granting a motion for early discovery where the need for the discovery, in consideration of the administration of justice, outweighs the prejudice to the party required to respond, the court reasoned that, where plaintiff has made no effort to determine jurisdiction, "the administration of justice is not served by requiring out-of-state recipients of subpoenas to bring challenges to the subpoenas in far-flung jurisdictions." In addition, from the perspective of judicial economy, the court found that it made more sense for plaintiff to bring suit against the defendants "in the court where they have a good faith belief that venue and personal jurisdiction are attainable and the case can actually be prosecuted," and that plaintiff would suffer no prejudice by being required to do so.

The court ordered plaintiff to conduct a search to obtain geographic information about the IP Addresses listed in its Complaint to thereafter submit a declaration identifying the location for each IP address at issue. For all IP Addresses outside of the district, the court ordered plaintiff to either: (a) file a voluntary dismissal without prejudice as to those defendants; or (b) show good cause as to why it has a good faith belief that jurisdiction exists and venue is proper as to each individual defendant. As to the latter, the court cautioned that "general arguments" would not suffice, and that plaintiff needed to make a specific showing, as to each defendant, why plaintiff has a good faith belief that jurisdiction and venue are proper.

Sarver v. Summit Entertainment LLC, USDC C.D. California, December 8, 2011
Click here for a copy of the full decision.

- District court awards defendants more than $187,000 in attorneys' fees as prevailing parties under California's Anti-SLAPP statute, finding attorneys' hourly rates reasonable, slightly reducing hours billed for vague block billing or excessive redaction, and adjusting the lodestar amount by 10 percent to account for the coordinated efforts of counsel.

Plaintiff, a U.S. Army veteran, filed suit against defendants alleging that they based the motion picture *The Hurt Locker* on his personal experiences in the military, without his consent, and asserting claims including violation of his right of publicity, false light, defamation, breach of contract, intentional infliction of emotional distress and fraud. Defendants, screenwriter Mark Boal, director Kathryn Bigelow, the Hurt Locker LLC and Summit Entertainment LLC, the producer of the film, brought two motions to strike plaintiff's complaint under the California Anti-SLAPP (Strategic Lawsuit Against Public Participation) statute, which the district court granted, striking plaintiff's complaint in its entirety. Defendants then moved for attorneys' fees as the prevailing parties and the district court granted the motions, awarding defendants more than $187,000.

The California Anti-SLAPP statute specifically provides that prevailing defendants on special motions to strike are entitled to recover attorneys' fees and the California Supreme Court has upheld the "lodestar" method to determine the appropriate award of fees. The court uses a two-step process to calculate the award, first multiplying the reasonable hours expended by counsel on the litigation by a reasonable hourly rate to obtain the "lodestar" figure, and then second, determining whether to enhance or reduce the lodestar figure based on any applicable "Kerr" factors not already considered as part of the initial lodestar calculation. Kerr factors are: (1) the time and labor required, (2) the novelty and difficulty of the questions involved,

(3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to the acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. In addition, a strong presumption exists that the lodestar figure is reasonable.

The issue before the court was whether the amounts requested by defendants were reasonable. Noting that several of the lawyers reduced their hourly rates, the court concluded that the hourly rates requested were reasonable, and that the experience, reputation and ability of defendants' attorneys supported a finding of reasonableness. The complex procedural and substantive issues involved in the litigation of the anti-SLAPP motion, including choice of law and First Amendment issues, also supported the requested hourly rate, and other courts in the Central District had likewise held rates at or above $450/hour to be reasonable for the Los Angeles area.

The court rejected plaintiff's challenge to defendants' evidence on the prevailing market rates, and specifically plaintiff's contention that defendants could not make a sufficient showing of prevailing market rates through declarations of their own attorneys alone. Noting that, even in the absence of evidence regarding prevailing rates in the community, it has broad discretion to set reasonable hourly rates, the court found that the documents plaintiff proffered in support of lower hourly rates – an article summarizing a 2009 study on rates for small and mid-sized firm, and an unpublished tentative opinion from a California trial court in another case – to be unauthenticated, irrelevant and inadmissible. The court also found the authority upon which plaintiff relied, in which anti-SLAPP defense counsel received fees lower than $450, to be unpersuasive. Noting that neither case involved a reduction in the rates requested, the court reasoned that "[w]hile cases approving rates higher than those requested by defendants may shed light on the reasonableness of [d]efendants' rates, it does not necessarily follow that cases approving lower requested rates compel a finding that [d]efendants rates are unreasonable." The court concluded: "in light of the evidence provided by [d]efendants, and in keeping with this [c]ourt's own experience regarding prevailing rates in the community, the [c]ourt finds [d]efendants' hourly rates reasonable.

Acknowledging its obligation to provide a clear and concise explanation for its fee award, as well as its discretion to make cuts to the number of hours requested to ensure that excessive, redundant or unnecessary hours were excluded from the calculation, the court concluded that no reductions to the amount of time billed for defendants Boal, Bigelow and Summit were warranted. Plaintiff argued that the hours billed on behalf of all defendants were excessive and should be reduced because a considerable amount of the attorneys' time was spent performing tasks that overlapped and were redundant, and that the billing records lack credibility due to discrepancies between the number of hours expended by each defendant and between defendants' initial projected fees and ultimate fee requests. The court disagreed, finding that some overlap in tasks was reasonably to be expected where three groups of defendants have each retained separate counsel, and that the "minute discrepancies" that plaintiff cited were also insufficient evidence of large-scale abuse necessitating a sizable reduction in hours.

The court also rejected plaintiff's argument that defendants should not be entitled to recover fees related to hours expended on motions on which defendants did not prevail or that were necessitated by defendants' own conduct. The California statute permitted recovery of fees for all hours reasonably spent on the underlying claim, including hours spent litigating the award

of attorney's fees, and defendants were required to expend resources responding to these motions in order to fully litigate their anti-SLAPP motion.

The court did reduce the requested hours for defendant The Hurt Locker LLC by 30 percent, finding that 24 entries, totaling 88.5 hours, constituted impermissibly vague block billing that failed to sufficiently differentiate between different types of work performed or contained excessive redaction. The court specifically noted that it had pinpointed and reduced only those entries where block billing or redaction raised questions regarding the reasonableness of billed hours.

Finally, the court exercised its discretion to reduce the lodestar figure for each defendant by 10 percent, acknowledging that while it was not a case where defendants had egregiously inflated the number of hours spent on the anti-SLAPP litigation, their success was due to the coordinated efforts of counsel, which, to a large extent, should have lessened the burden on each individual defendant.

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