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9th Circuit Confirms The Hurt Locker Is Fully Protected By The First Amendment

Army Sergeant's Right of Publicity Claim Was Properly Dismissed

By David Halberstadter

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The U.S. Court of Appeals for the 9th Circuit has finally issued its decision in an appeal that has been pending since 2011, affirming that the makers and distributors of the Academy Award®-winning motion picture *The Hurt Locker* is protected by the First Amendment from claims by a real-life Army bomb disposal technician that the film both violated his right of publicity and defamed him. *Sarver v. Chartier et al*., 2016 WL 625362 (9th Cir. February 17, 2016).

The appellate court left no room for doubt that the First Amendment "safeguards the storytellers and artists who take the raw materials of life – including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays." But by reaching this constitutional issue rather than applying the test established by California's Supreme Court for balancing creators' rights of free expression against individuals' rights of publicity, the panel may have been struggling with how to reconcile this case with contrary decisions it issued in 2013 and 2015 in cases involving realistic video games, despite the fact that video games are entitled to the same First Amendment protections as other expressive works.

The Sergeant, the Screenwriter, the Article and the Film

Sergeant Jeffrey Sarver was an explosive ordnance disposal (EOD) technician in the U.S. Army who was deployed to Iraq in 2004, one of approximately 150 EOD technicians stationed in Iraq at that time. Mark Boal, a journalist embedded with various units serving in Iraq during 2004, spent approximately two weeks with Sarver's unit. During that time, Boal interviewed Sarver at length as part of the research he was conducting on EOD teams working in Iraq. Boal subsequently wrote a non-fiction article for Playboy magazine that focused on Sarver and his experiences.

Boal subsequently wrote the screenplay for *The Hurt Locker*. A fictional work about fictional characters, the screenplay was drawn from Boal's creative imagination, military history and the research Boal conducted while embedded in Iraq. The film initially premiered at overseas film festivals, and had its U.S. premiere on June 26, 2009, which Sarver attended. *The Hurt Locker* was nominated for nine Academy Awards® and won six, including Best Picture, Director and Original Screenplay.

Defendants' Anti-SLAPP Motion Is Granted

On March 2, 2010—five days before the Academy Awards® ceremony—Sarver commenced his action against *The Hurt Locker's* filmmakers and distributors in federal court in New Jersey, where he was stationed at the time. Sarver alleged that the film misappropriated his likeness and life experiences, defamed him, invaded his privacy and intentionally caused him emotional distress. The defendants succeeded in having the case transferred to the U.S. District Court for the Central District of California, following which they filed a special motion to strike the complaint in its entirety pursuant to California's "anti-SLAPP" statute, Code of Civil Procedure section 425.16.

The district court issued a tentative ruling on the anti-SLAPP motion, proposing to strike all of Sarver's claims *except* for the misappropriation of his likeness. The district court tentatively concluded that Sarver had made a sufficient *prima facie* showing that he was identifiable as the film's main character and that his "life story" was the sole basis for the film. At the hearing on the motion, the defendants argued that basing a fictional character upon an

actual person is not the legal equivalent of using a person's name, voice, or likeness; that many fictional characters are based to one degree or another on real people; that the court appeared not to have engaged in the California Supreme Court's First Amendment versus right of publicity balancing test; and, that had the court done so, it would have concluded that the film was a prototypically transformative work that is entitled to First Amendment protection.

In its final order, the district court reversed its tentative conclusion about the misappropriation claim and struck all of Sarver's causes of action. The district court ultimately agreed with the defendants that "even if the Will James character was based on Plaintiff, no reasonable trier of fact could find that the [film] was not transformative." The court found that the defendants "unquestionably contributed significant distinctive and expressive content . . . through the writing of the screenplay, and the production and direction of the movie." Sarver timely appealed.

Appeal Is Deemed Submitted, Then Submission Is Deferred

The appeal was fully briefed by September 2012 and the 9th Circuit heard arguments in May 2013. But immediately after the argument had concluded, the appellate panel vacated and deferred the submission of the appeal pending a determination whether the 9th Circuit would consider *en banc*, in an unrelated matter, if California's anti-SLAPP law should have any application in federal courts. (*Makaeff v. Trump University, LLC*, 2013 WL 1633097 (9th Cir. 2013).)

Then in July 2013, the 9th Circuit decided *Keller v. Electronic Arts Inc*., 724 F.3d 1268 (9th Cir. 2013), in which it ruled that EA's *NCAA Football* series of video games did not qualify for First Amendment protection under the "transformative use" test developed by the California Supreme Court. In September 2013, Electronic Arts filed a petition for certiorari in the U.S. Supreme Court for review of this decision, as well as a similarly-decided 3rd Circuit ruling. (*Hart v. Electronic Arts, Inc*., 717 F.3d 141 (3d Cir. 2013)). Soon after that happened, the 9th Circuit panel assigned to *Sarver* issued another order further deferring submission of Sarver's appeal pending the disposition of EA's petition in *Keller*.

In late November 2013, the 9th Circuit issued an order in the *Makaeff* appeal denying rehearing *en banc*. In September 2014, the parties to *Keller* and *Hart* settled and EA dismissed its writ petitions. That cleared the way for the 9th Circuit to decide Sarver's appeal. But for unknown reasons, nothing happened until December 2015, when the 9th Circuit "resubmitted" the appeal.

Going Straight to the First Amendment

In its published decision, the appellate court first disposed of all preliminary issues in the filmmakers' favor, finding that the district court properly applied New Jersey's choice-of-law rules and correctly concluded that California's substantive law applied to Sarver's claims. The Ninth Circuit panel next found that the anti-SLAPP motion had been timely filed, and that the filmmakers had satisfied the first "prong" of the anti-SLAPP statute's requirements, observing that the film's focus "on the conduct of the Iraq War . . . its dangers, and soldiers' experiences were subjects of longstanding public attention" and that "the film and the narrative of its central character . . . speak directly to issues of a public nature."

Turning to the "second prong" of the anti-SLAPP test—i.e., whether Sarver had demonstrated a probability of prevailing on his claims—the appellate panel concluded that allowing Sarver to pursue his right of publicity claim against the filmmakers would infringe their constitutional right to free speech, and that if California's right of publicity law permitted Sarver to pursue such a claim, then that law was "simply a content-based speech restriction" that is "presumptively unconstitutional . . .unless Sarver can show a compelling state interest in preventing the defendants' speech."

The court began its analysis with a review of the only U.S. Supreme Court decision to review the constitutionality of a state's right of publicity law. (*Zacchini v. Scripps-Howard Broadcasting Co*., 433 U.S. 562 (1977).) As interpreted by the Ninth Circuit, the Supreme Court in *Zacchini* determined that the First Amendment interest in broadcasting Zacchini's

entire performance was minimal, but the threat to the economic value of that performance was substantial; and, thus, "the First Amendment did not prevent Ohio from protecting Zacchini's right of publicity."

The appellate panel in *Sarver* then explained that the 9th Circuit has interpreted *Zacchini* to "uphold the right of publicity in a variety of contexts where the defendant appropriates the economic value that the plaintiff has built in an identity or performance." It cited as examples Paris Hilton's image and her "that's hot" catch phrase (*Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010)) and the likenesses of both college and professional football players that were incorporated into EA's video games without consent. (*Keller* and *Davis v. Electronic Arts, Inc*., 775 F.3d 1172 (9th Cir. 2015).) The court noted in a footnote that these cases addressed the First Amendment "only through the lens of California's 'transformative use' doctrine." Without explaining why, the panel concluded that it "need not and do not reach the question of whether such a defense applies in this case."

The Ninth Circuit panel found these cases, as well as those involving the use of celebrity likenesses in commercial advertising, to be inapplicable to Sarver's appeal. *The Hurt Locker* is not speech proposing a commercial transaction, the court observed, and "unlike the plaintiffs in *Zacchini*, *Hilton*, and *Keller*, Sarver did not 'make the investment required to produce a performance of interest to the public." According to the court, "Sarver is a private person who lived his life and worked his job" and, "while his life and story may have proven to be of public interest, . . . [t]he state has no interest in giving Sarver an economic incentive to live his life as he otherwise would."

It is not entirely clear how the Ninth Circuit might reconcile its decisions in the future, were it forced to consider a situation in which the work at issue was a documentary or "docu-drama" about a celebrity or athlete who had invested a great deal of time and effort in his identity or her performance and which attempts to "literally recreate" that celebrity "in the very setting in which he has achieved renown." But for now, it would appear that in the Ninth Circuit, storytellers in all media safely may incorporate "the raw materials of life" into their works.

David Halberstadter, a partner with Katten Muchin Rosenman LLP, Los Angeles, represented defendants in this case. Plaintiff was represented by Michael R. Dezsi, Law Office of Michael R. Dezsi, PLLC, Detroit.