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

January 26, 2011

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ivi, Inc. v. Fisher Communications, Inc., USDC W.D. Washington, January 19, 2011

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

- Court grants defendant television broadcasters' and content owners' motion to dismiss plaintiff's declaratory judgment action, holding that plaintiff's first-filed action was improperly anticipatory.

Plaintiff *ivi, Inc.* is a Seattle-based company that obtains over-the-air broadcasts of television content that originates with broadcast providers in Seattle and New York City. *ivi* then distributes those broadcasts over the Internet to customers who download the *ivi* TV player.

Defendants are television networks, stations, and others who own broadcast television stations serving the New York City and Seattle markets, or who own copyrighted programming exhibited on one or more of the stations serving New York and Seattle.

ivi began operations on September 13, 2010. One day later, defendants Fisher Communications, Inc. and NBC Universal sent cease and desist letters to *ivi*. On Friday, September 17, *ivi* sent substantially similar letters to both Fisher and NBC, inviting both companies to discuss an amicable resolution and to negotiate an agreement to resolve the dispute. On the following Monday, September 20, 2010, *ivi* filed this declaratory judgment action in the W.D. of Washington, seeking a declaration of non-infringement.

One week later, the defendants filed a copyright infringement action in the S.D. of



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New York. The defendants in the Washington action moved to dismiss, on the grounds that the first-to-file rule should not be followed because ivi's suit was "improperly anticipatory." The court agreed with defendants and granted their motion to dismiss.

According to the court, an action is anticipatory when the plaintiff files it after receiving specific, concrete indications that a suit by the defendant is imminent. The court held that case law in the Ninth Circuit instructs "that when, as here, a declaratory judgment action has been triggered by a cease and desist letter, equity militates in favor of allowing the second-filed action brought by the true plaintiff in the dispute to proceed to judgment rather than the first."

The court noted that ivi received not one, but three, cease and desist letters in short succession, two of which set specific deadlines for compliance on September 21, 2010, and September 22, 2010. ivi responded to two of these cease and desist letters on Friday, September 17, 2010, stating in writing its willingness to negotiate and arrive at an amicable arrangement short of litigation. "The record demonstrates, however, the disingenuity of ivi's settlement posture, because on the following Monday, September 20, 2010, ivi filed suit in the Western District of Washington. . . . If there was any question left regarding the anticipatory nature of ivi's suit, that question was resolved by ivi's own press release which acknowledged that its lawsuit was 'a preemptive move' against 'big media.'"

The totality of the circumstances led the court to conclude that ivi filed the action in the W.D. of Washington "because of imminent threat of suit by the defendants, and to secure its own forum. While the court notes the importance of generally adhering to the first-to-file rule, in this case, it properly exercises its discretion to recognize an exception and to decline to hear ivi's case."

Hayne v. The Innocence Project, USDC S.D. Mississippi, January 20, 2011

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

- Court denies advocacy group's motion to dismiss defamation claim brought by doctor (a public figure), despite voluminous evidence that advocacy group researched its allegedly defamatory statements.

Plaintiff, a doctor, brought a defamation action against The Innocence Project, its co-director and one of its staff attorneys. The Innocence Project is an organization that seeks to exonerate wrongfully convicted individuals. In 2008, the organization



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sent a letter to the Mississippi State Board of Medical Licensure, asking the board to revoke plaintiff's medical license. In the letter and accompanying 750 pages of supporting documents, The Innocence Project alleged that plaintiff's work in criminal prosecutions led to the wrongful convictions of individuals sentenced to death or life in prison. The Innocence Project issued several press releases through its web site that made similar allegations in less detail.

Plaintiff sued defendants for defamation, false light invasion of privacy, intentional infliction of emotional distress, and negligent infliction of emotional distress. Defendants filed a motion to dismiss, which the court granted and denied in part. The court denied the motion as to the defamation claim, which defendants disputed on the grounds that plaintiff did not sufficiently allege actual malice, falsity and defamatory nature. Defendants also argued that their statements were opinion and thus not actionable as defamation.

The court first found that the doctor, a public figure, sufficiently alleged actual malice, defined as a statement made with knowledge or recklessness as to its falsity. Despite the defendants' showing of substantial research and supporting documentation, the court held that plaintiff alleged actual malice by pleading that defendants selectively used and distorted facts, and minimized facts that would have mitigated the harm to plaintiff. With regards to the statements' falsity, plaintiff listed 29 statements he claimed to be false. In Mississippi, a plaintiff need only give notice of the statements at issue, not provide specific information at the pleading stage as to why each statement is false.

The court also found defendants' statements could be defamatory, if not true, as they injured plaintiff's reputation by claiming that he was incompetent and dishonest, and had harmed the lives of innocent people. Finally, the court found that even if defendants' statements were expressions of opinion, such expressions can still be actionable as defamatory if they imply or rely on assertions of fact.

The court also declined to dismiss plaintiff's claims for false light invasion of privacy and intentional infliction of emotional distress. It did, however, dismiss plaintiff's claim for negligent infliction of emotional distress, finding that Mississippi does not recognize such an action arising from a defamation claim.

For more information, please contact [Jonathan Zavin](mailto:jzavin@loeb.com) at jzavin@loeb.com or at 212.407.4161.



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