GIBSON DUNN

March 18, 2021

MEDIA, ENTERTAINMENT AND TECHNOLOGY LITIGATION UPDATE – MARCH 2021

To Our Clients and Friends:

Gibson Dunn's Media, Entertainment and Technology Practice Group highlights some recent notable rulings and developments that may impact future litigation in this area.

Issue: Profit Participation
Case: *Nye v. The Walt Disney Co. et al.*, L.A. County Superior Court, Case No. BC 673736
Date: Feb. 2, 2021
Holding: SVOD/EST revenues are included within the definition of "Video Device" in a 1993 agreement regarding production and distribution of the series *Bill Nye The Science Guy*.

Summary: In August 2017, Bill Nye sued the Walt Disney Company and several Disney-related entities for fraudulent concealment, breach of contract, and breach of fiduciary duty, alleging that he was deprived of millions of dollars in profits for the program *Bill Nye The Science Guy*, which originally aired on PBS in the 1990s. At issue in Los Angeles County Superior Court Judge David Cowan's February 2 ruling was whether Nye could present a key contract interpretation issue to a jury, or instead if the court could resolve it as a matter of law.

The parties' dispute was over what revenues are included within "Gross Receipts," as defined in Nye's 1993 agreement with Buena Vista Television. Specifically, are streaming revenues arising from subscription video on demand (SVOD) (including income from Netflix) or electronic sell-through (EST) (for example, purchases through iTunes) included within gross receipts? In 1993 there was no such thing as streaming technology and SVOD/EST revenues did not exist, so the court had to interpret the agreement's application to technology that neither party was thinking about decades ago.

Buena Vista Television argued that SVOD and EST revenues are similar to a video cassette or video disc and thus are income derived from a "Video Device," which the 1993 agreement defined as "an audio visual cassette, video disc or any similar device." Nye argued that income derived from a "Video Device" does not include SVOD and EST revenues. The issue was significant because if the SVOD/EST revenues were from a "Video Device," then the 1993 agreement permitted Buena Vista Television to contribute only 20% of that income towards Gross Receipts and pay an 80% royalty to its related entity distributing the series. If EST/SVOD revenues were not video device income, then, according to Nye, 100% of the income should have been applied to gross receipts.

The 1993 agreement provided Nye and Buena Vista Television with a 50% stake of Net Profits, which the agreement defined as receipts remaining from gross receipts after certain specified deductions. So the dispute was over the size of the Net Profits pie. Roughly speaking, if EST/SVOD counted as a

"Video Device," then the Disney companies could take 80% of the revenue off the top and would only need to split the remaining 20% with Nye. Under Nye's view, the parties' agreement required the full 100% of EST/SVOD revenue, after deductions, to be split between them.

The court ruled that Nye could not present his argument to a jury because, even if a jury were to find his position valid, it was inconsistent with other terms of the 1993 agreement—and therefore was not a reading of the agreement to which it was reasonably susceptible.

Of particular importance to the court was language in the agreement stating that Buena Vista Television's rights to exploit the series applied not just to technology then existing but also to any future technology still to be developed. The *Nye* court found that California law is "seemingly silent" on the point, but "new use cases" in other jurisdictions found that extrinsic evidence was rarely useful. The court, for example, cited the Second Circuit's holding in *Boosey & Hawkes v. Music Publishers, Ltd. v. Walt Disney Co.*, 145 F.3d 481 (2d Cir. 1998), that "intent is not likely to be helpful when the subject of the inquiry is something the parties were not thinking about." *Id.* at 487. What mattered was the language of the agreement, which expressly contemplated future types of distribution. According to the *Nye* court, it could not reach a conclusion that rendered that language "superfluous."

For similar reasons, the court also focused on Nye's contention that SVOD/EST did not fall into any category of distribution in the 1993 agreement that would entitle Buena Vista Television to a distribution fee. Under Nye's reading, neither Buena Vista Television nor its affiliated distributor would receive any compensation for SVOD/EST distribution; there would be no distribution fee for Buena Vista Television and no video royalty for its affiliated distributor. Whereas Buena Vista Television would receive distribution fees ranging from 10% to 40% for other means of distribution, when it came to SVOD and EST, according to Nye, it would get no fee at all. The court concluded that this would be "inconsistent with [Buena Vista Television] receiving a distribution fee under the Agreement for all other means of distribution of the Series."

Nor could Nye rely on the fact that Buena Vista Television would receive 50% of Net Profits. To the court, that did not equate to a guaranteed distribution fee or royalty; "[r]eceiving half of net profits is not the same as a distribution fee because there might not have been any net profits." According to the court, it was "not reasonable to infer that the party with the bargaining power – as all agreed [Buena Vista Television] had – would only provide for its compensation if the show proved to be successful."

As a result, the court interpreted the 1993 Agreement to include SVOD/EST within its definition of "Video Device," entitling Nye only to roughly 10% of overall SVOD/EST revenue rather than 50%.

Why It Matters: The long-term impact of the ruling will be worth watching. Some have read it broadly to mean that the court equated streaming with home video, and have questioned how a digital file streamed over the internet could be a "video device" like a physical VHS tape or disc. That is not what the court held. Rather, the court concluded that the similarity between SVOD/EST and a video cassette or video disc was "debatable," and ruled that it "cannot hold as a matter of law that SVOD and EST are sufficiently similar to a video cassette or disc that they are a 'video device.'"

That is not to say that the court believed a jury would agree with Nye's view that SVOD and EST are outside the 1993 agreement's definition of a video device. It noted, for example, that Buena Vista Television "put on evidence to suggest that even with internet distribution there were still physical devices like a Roku or Apple TV box – thereby undercutting Nye's argument that SVOD/EST do not also have a similar physical component to make them operable." In turn, the court acknowledged, Buena Vista Television "might still argue that the software that would be inside a smart tv screen is in some sense still a physical device – even if not a separate device." In short, SVOD/EST might be an evolution of, and similar to, home video, even without the clunky plastic case.

In a vacuum, the dispute about similarity could have been a jury question. But the court concluded that the disputed issue was immaterial, and that Nye could not reach a jury, for two primary reasons: (1) the 1993 agreement had a "by any means or methods now or hereafter known" clause, and (2) Nye argued that all streaming and download revenue should be allocated to gross receipts, with no distribution fee or royalty going to the Disney companies. The language in these agreements will differ, particularly when they pre-date the advent of streaming by years or decades. But the lasting impact of the *Nye* ruling is more likely to be in elevating the importance of these two issues than in deciding whether SVOD/EST revenue is derived from a "video device."

Issue: Anti-SLAPP Law
Case: *Coleman v. Grand*, E.D.N.Y. No. 18-cv-5663 (ENV) (RLM)
Date: Feb. 26, 2021
Holding: New York's 2020 amendment of its anti-SLAPP law broadly expanded the universe of defamation plaintiffs who must show actual malice, and that expanded scope applies in federal court actions and is retroactive.

Summary: In October 2018, plaintiff Steven Coleman filed a defamation lawsuit against his former romantic partner, defendant María Grand. Grand then filed counterclaims alleging defamation and intentional infliction of emotional distress. Eastern District of New York District Judge Eric Vitaliano held that all the claims failed as a matter of law and granted the parties' cross-motions for summary judgment. The unique aspect of *Coleman* was the standard the court applied in rejecting the parties' respective defamation claims.

Coleman's defamation claim arose from an email Grand sent to approximately 40 friends and colleagues, describing her experiences in the relationship with Coleman and her belief that Coleman had used his age and professional status to harass and take advantage of her. Grand's counterclaim arose from, among other communications, a May 2018 email that Coleman sent to approximately 80 people saying that Grand's accusations were false, giving his account of the events, and including explicit text messages between them.

Citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and other authorities, the *Coleman* court noted that federal constitutional law requires plaintiffs who are public figures to show that libel defendants acted with actual malice (knowledge the statement was false or with reckless disregard of whether it was false or not), whereas private figures need only meet a gross negligence standard. The court further noted, however, that "for statements on matters of public concern, New York law has long

required all plaintiffs to show defendants acted with gross irresponsibility and . . . recently imposed an actual malice standard in some cases."

The court's reference to the "recently imposed . . . actual malice standard" related to New York's November 2020 amendments to its anti-SLAPP law targeting "Strategic Lawsuits Against Public Participation." A component of the new law that garnered significant attention was its expansion of the types of cases that would be subject to an anti-SLAPP motion to dismiss. New York's old anti-SLAPP statute narrowly applied only to a claim brought by someone who had sought or obtained a permit, lease, zoning change or other similar government entitlement where the claim related to the efforts by the defendant to report on that application or permission. In essence, it was limited to controversies over public permits and real estate development.

The amended anti-SLAPP law made numerous fundamental changes that better enable a defamation defendant to quickly escape a bad-faith SLAPP suit without laboring through time-consuming and expensive discovery. It expands the universe of cases subject to an anti-SLAPP motion, stays discovery while the anti-SLAPP motion is pending, requires the plaintiff to show that their libel claim has a substantial basis in law, and requires a plaintiff to pay a successful defendant's attorneys' fees in bringing the anti-SLAPP motion.

Coleman addressed another consequence of the amended anti-SLAPP law, which, when viewed in tandem with existing New York law, significantly raised the bar for most defamation plaintiffs to state a claim. Holding that Coleman was not a public figure, the court recognized that, prior to November 2020, New York law would have required Coleman to show that Grand acted with "gross irresponsibility" in making the purportedly defamatory statements. But, Grand argued, the amended anti-SLAPP statute imposed a new standard that required Coleman to make the higher showing that she acted with actual malice.

The *Coleman* court agreed, noting that "[i]t was an important tweak to New York law." New York Civil Rights Law section 76-a(2) has always imposed an actual malice standard in any "action involving public petition and participation." But New York's amended anti-SLAPP law broadly expanded what actions satisfied that definition, and thus the universe of cases subject to the actual malice standard. Rather than just actions brought by a "public applicant or permittee," an action involving public petition and participation now includes:

1. any communication in a place open to the public or a public forum in connection with an issue of public interest; or

2. any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.

The *Coleman* court noted that the only other court to address the amendment at that point concluded that the amendment to § 76-a applies in federal court and has retroactive effect. *See Palin v. New York Times Co.*, ___ F. Supp. 3d ___, 2020 WL 7711593, at *3-4 (S.D.N.Y. Dec. 29, 2020). It then reached the same conclusion. According to *Coleman*, "[t]he anti-SLAPP provision at issue here, § 76-a, applies in

federal court because it is 'manifestly substantive,' governing the merits of libel claims and increasing defendants' speech protections." And, the *Coleman* court held, the anti-SLAPP amendments were just the type of remedial legislation that should be given retroactive effect to effectuate its beneficial purpose. *See In re Gleason (Michael Vee, Ltd.)*, 96 N.Y.2d 117, 122 (2001).

Because Coleman's claim was based upon "lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest," N.Y. Civ. Rights Law § 76-a(1)(a), the court held that he had to prove that Grand acted with actual malice. Invoking a pre-existing protection in New York's anti-SLAPP law that now also has much broader application, the *Coleman* court further noted that Coleman had to establish actual malice "by clear and convincing evidence." N.Y. Civ. Rights Law § 76-a(2). The district court held that Coleman failed to meet that burden, and that Grand's statements were protected opinion in any event, so his defamation claim was dismissed. As "for the flip side," as the court described it, Grand failed to meet her burden to show actual malice by clear and convincing evidence, and Coleman's statements were protected opinion, so Grand's counterclaims failed as well. Grand's intentional infliction of emotional distress claim also failed because the alleged acts did not meet the "exceedingly high bar required to constitute IIED."

Why It Matters: In *Palin*, the Southern District of New York court recognized that former vice presidential candidate Sarah Palin was a public figure, so the court held that it "need not and does not address whether § 76-a subjects to New York's actual malice rule a broader collection of plaintiffs than does the First Amendment." 2020 WL 7711593, at *4 n.5. Less than two months later, *Coleman* reached that exact conclusion. It is the first federal court to hold that New York's amended anti-SLAPP law requires a vastly expanded universe of defamation plaintiffs to prove actual malice, and to do so by clear and convincing evidence.

That standard does not apply to every defamation claim by a private plaintiff. But if the challenged speech is on a "matter of public interest," the plaintiff's burden increases significantly regardless of whether they are a public or private figure. And in defining the scope of those matters of public interest, the amended law states that "'public interest' shall be construed broadly, and shall mean any subject other than a purely private matter." N.Y. Civ. Rights Law § 76-a(1)(d). *Coleman* thus shows both how New York has significantly increased its protections for a wide range of defamation defendants and that its now broadly applicable "actual malice" protection applies in cases filed in federal court.

The following Gibson Dunn lawyers assisted in the preparation of this client update: Michael Dore and Marissa Moshell.

Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or the following leaders and members of the firm's Media, Entertainment & Technology Practice Group:

Scott A. Edelman – Co-Chair, Media, Entertainment & Technology Practice, Los Angeles (+1 310-557-8061, sedelman@gibsondunn.com)

Kevin Masuda – Co-Chair, Media, Entertainment & Technology Practice, Los Angeles (+1 213-229-7872, kmasuda@gibsondunn.com)
Orin Snyder – Co-Chair, Media, Entertainment & Technology Practice, New York (+1 212-351-2400, osnyder@gibsondunn.com)
Brian C. Ascher – New York (+1 212-351-3989, bascher@gibsondunn.com)
Michael H. Dore – Los Angeles (+1 213-229-7652, mdore@gibsondunn.com)
Howard S. Hogan – Washington, D.C. (+1 202-887-3640, hhogan@gibsondunn.com)
Ilissa Samplin – Los Angeles (+1 213-229-7354, isamplin@gibsondunn.com)
Nathaniel L. Bach – Los Angeles (+1 213-229-7241,nbach@gibsondunn.com)