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GIPSON HOFFMAN & PANCIONE

IN THIS ISSUE

["Bananas!*" Free Speech vs. Discredited Documentary](#)

[Taking Down Twitter](#)

LAWRENCE R. BARNETT



Mr. Barnett is the firm's managing partner. Mr. Barnett represents diverse domestic and international private and public companies, as well as individual entrepreneurs, in the full range of corporate, securities and business

IP INSIGHT

A Newsletter Featuring Practical Analysis of Intellectual Property, Entertainment and Media Issues

Welcome to our fall issue of the GHP online newsletter "IP Insight" featuring articles by [Corey J. Spivey](#) and [Gregory A. Fayer](#). We hope that you enjoy this issue and the practical insights the articles provide regarding the risks of defamation in documentary filmmaking and battling celebrity impostors on social networking sites.

GHP has a long history of defending and preserving the intellectual property rights of its clients. At GHP, we strive to make tangible contributions to our clients' success with services that extend beyond the routine.

[Lawrence R. Barnett](#)

"Bananas!*": Free Speech vs. Discredited Documentary
[by Corey J. Spivey](#)

This one falls into the category of so strange Hollywood could not make it up.

What happens when the first amendment rights of a documentary filmmaker collide with a court's finding that the underlying events on which the filmmaker's work is based were fabricated? In a scuffle between Dole Food Company, Inc. and Swedish documentarian Fredrik Gertten, the sequence has gone: heavy-handed defamation lawsuit, a boycott and, then, a voluntary dismissal of the lawsuit.

matters.

Mr. Barnett frequently advises clients with regard to financing, distribution and licensing agreements in connection with entertainment industry related projects.

Recently, Mr. Barnett advised an international film distributor in a refinancing deal collateralized by the distributor's film library.

Mr. Barnett is responsible for the content of this newsletter.

[More: About Mr. Barnett](#)
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COREY J. SPIVEY



Mr. Spivey is a member of the firm's litigation group, with experience in all aspects of general business litigation and First Amendment, copyright, trademark, privacy, internet and

[Dole filed defamation claims in Los Angeles County Superior Court](#) on July 8, 2009, against Gertten and the other filmmakers of the controversial documentary film "Bananas!*". The documentary film chronicles the plight of Los Angeles-based personal injury attorney Juan Dominguez in his representation of plantation workers supposedly suffering from sterility and other reproductive injuries allegedly caused by exposure to the pesticide DBCP on Nicaraguan -based banana plantations which supply Dole.

In the first of the Nicaraguan plaintiffs' lawsuits against Dole to go to trial, jury verdicts for compensatory damages of approximately \$2.5 million and for punitive damages totaling \$2.5 million were rendered in favor of a handful of the Nicaraguan plaintiffs. Through post-trial legal wrangling, the punitive damages award was thrown out and the compensatory damages award was reduced to approximately \$1.6 million.

Much more interestingly, in two later cases also involving Nicaraguan plaintiffs similarly suing Dole for reproductive injuries, Los Angeles Superior Court Judge Victoria Chaney came to discover a scheme of pervasive fraud by the Nicaraguan plaintiffs and their counsel, which she called "truly heinous and repulsive," involving recruitment of sham plaintiffs, fabricated work certificates, sham laboratory reports and perjured testimony by the plaintiffs. Judge Chaney dismissed the two later cases and stated that she would have terminated the first case had the fraud been revealed prior to the verdicts in the first case.

By the time of Judge Chaney's fraud finding, the filmmakers of "Bananas!*" already had their film in the can and were slated to premiere it on June 20 and 23, 2009, at the Los Angeles Film Festival. Despite stern demand letters insisting that the filmmakers and the LAFF cease and desist from promoting and exhibiting the film because it was based on falsified evidence and was, therefore, defamatory, the film had its premiere as scheduled. The screenings opened with a prepared disclaimer stating that serious questions had been raised about the film's credibility. A statement by the LAFF read, "[T]here seems to be little question that the version of reality that the film portrays does not match the reality that emerged in the courtroom Nor, given what we now know, do we believe that 'Bananas!*' - in its present form - presents a fair and accurate account of Juan Dominguez or the [first] trial. That is why we're showing this film - out of competition, as a case study, to illuminate a timely exploration of what makes and does not make a responsible documentary." The premiere screenings also included a video response from Dole to the documentary, in which Dole hammered home the fact that the judge had found the lawsuits by the Nicaraguan plaintiffs to be fraudulent.

Dole's lawsuit against the filmmakers was filed one day after an appeals court ruled that the Nicaraguan plaintiffs' judgment in the

media law.

Mr. Spivey has successfully represented film, internet, and television companies in contract, defamation, employment, and intellectual property matters.

Amongst his most recent victories, Mr. Spivey won a jury trial for a defendant company where the critical issue was whether a joint venture was created because of the plaintiffs' various alleged contributions and improvements to the defendants' intellectual property.

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GREGORY A. FAYER



Mr. Fayer specializes in entertainment, intellectual property, First Amendment and appellate litigation. Mr. Fayer has served as an extern for the

first case, which Dole had appealed, should be reviewed in the lower court to determine whether it was tainted by potential fraud and subject to dismissal.

Success on the defamation claims requires proof of a statement or a fixed representation to the eye that is false, unprivileged and harmful to Dole's reputation. As a public company, and given the documentary's subject matter on an issue of public concern, proof of actual malice also is required, that is, that the filmmakers exhibited their film with actual knowledge or reckless disregard of its false content.

To go on offense, [the filmmakers' response to Dole's complaint was an anti-SLAPP motion and a counterclaim](#). "SLAPP" stands for "strategic lawsuit against public participation," and an anti-SLAPP motion is a mechanism for a defendant to strike civil actions brought primarily to chill the exercise of free speech. An anti-SLAPP motion is decided as a two-part analysis: (1) the filmmakers must first make a prima facie showing that Dole's suit is a SLAPP suit because it has the effect of chilling free speech on an issue of public interest; and (2) Dole must then show a reasonable probability of prevailing on the defamation claims. The filmmakers supported their motion by arguing that Dole's lawsuit sought to "poison the fountain of free speech" through intimidation. Dole opposed the motion by arguing that the filmmakers' conduct of screening the film while knowing it to make discredited claims, found by a court to be false, was a textbook case of actual malice.

The outcome of the case, however, did not depend upon the legal arguments made by lawyers. Instead, the case was won by applying pressure in the court of public opinion: Gertten appealed to his countrymen in Sweden, arranging for a boycott of Dole products by major Swedish grocers and food chains. Corresponding on behalf of the filmmakers, members of the Swedish Parliament wrote to Dole, "As the saying goes: all business is local. We strongly recommend a change of bureau and tactics, if you are at all interested in the Swedish market. But first and most we urge you - in the name of free speech - to withdraw your lawsuit against Mr. Gertten."

On October 14, 2009, before the scheduled October 26 hearing on the filmmakers' anti-SLAPP motion, [Dole announced that it was voluntarily dismissing its defamation claims](#) against the filmmakers.

Whether or not this was a victory for free speech, it was certainly a triumph for the strategic use of public relations pressure in a litigation context.

Taking Down Twitter

[by Gregory A. Fayer](#)

Honorable Sonia Sotomayor, Second Circuit Court of Appeals, who is now an Associate Justice on the United States Supreme Court.

Mr. Fayer devotes significant time to pro bono activities, including his representation of a coalition of environmental organizations challenging the U.S. Navy's use of sonar off the California coast. In March 2008, the Ninth Circuit Court of Appeals affirmed the preliminary injunction that Mr. Fayer argued and won before the U.S. District Court. In November 2008, a 5-4 majority of the U.S. Supreme Court reversed two of the six mitigation measures mandated by the injunction.

Amongst other projects, Mr. Fayer is currently representing a [CYBERSitter LLC](#), a small American software company, in its intellectual property claims against various infringers throughout the world.

[More: About Mr. Fayer](#)
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Twitter has become a critical online tool for many celebrities and public figures to use in establishing and maintaining their own personal brand awareness. However, this opportunity for brand growth is not without its dangers.

In March of 2009, press reports were rapidly multiplying of celebrity imposters tweeting and twitting in the names of those with whom they had no affiliation: Charles Barkley, Tina Fey, Keith Olbermann - it seemed that none was safe from the clutches of this ever expanding network of false tweeters - [not even the Reverend Dr. Robert H. Schuller](#).

Dr. Schuller and Crystal Cathedral Ministries had sent multiple emails and requests asking Twitter to take down the false tweeter but to no avail. Dr. Schuller received nothing other than an automated email from Twitter stating that the matter was being investigated - leaving thousands of innocent followers with no indication that the person they were following was not in fact the person they thought they were following. While Twitter's policy has since loosened somewhat, in March 2009 Twitter was refusing to budge when asked to take down any of these imposter sites.

As a result, many of the impersonatees sought out legal representation. Dr. Schuller retained GHP to address the issue. We, like many others, drafted and sent a cease and desist letter outlining potential claims against Twitter relating to the imposter site. Within 24 hours of receiving the letter, Twitter had taken down the Schuller imposter site. Shortly thereafter, [Dr. Schuller created a Twitter page](#) of his own and began tweeting and twitting in his own name.

So why did Twitter respond to Dr. Schuller's takedown request at a time when it was staunchly refusing to take down other imposter sites? Of course, no one knows for certain except Twitter itself.

Whatever the reason, there are a few simple principles to keep in mind when faced with a situation such as this. In such situations the first legal claims that are likely to spring to mind are the unauthorized use of one's name and likeness, violations of the celebrity's right to publicity or right to privacy, and perhaps fraud or misrepresentation claims. The problem with such claims is that they are "soft" claims from a legal perspective. The standards for what constitutes an illicit use of one's name or image are relatively nebulous. Fraud and misrepresentation claims are notoriously difficult to establish. Even if established, the website's responsibility for such actions is at some remove from that of the speaker itself, and it may be difficult to show that the website was complicit in depriving one of one's rights.

Such "soft" claims, however, are not necessarily the only weapons available. It is extremely unlikely that anyone who is serious about pretending to be someone famous on a forum like Twitter will set up a generic bare-bones account with a name and text unaccompanied by any background or adornment of any kind. It is far more likely that the impersonator will attempt to surround him or herself with the stylistic "accoutrements" of the object of their fascination - and in so doing, there is a very good chance that the impersonator will have stolen some of the protected intellectual property of the impersonatee. In the case of Dr. Schuller, the imposter had stolen wholesale the background of the official Crystal Cathedral website and had displayed certain trademarked phrases of the organization on the imposter site.

Unlike right of publicity and misrepresentation claims, copyright and trademark claims are "hard" claims and they do get the attention of legal departments that receive them. Under the Copyright Act, internet sites have an obligation to comply with the "notice and takedown" regime established by the Act. This means that if a website like Twitter receives notice (in accordance with the statutory requirements) that someone has posted unauthorized copyrighted materials on its site, it must take those materials down unless and until it determines that the materials are not in fact infringing. There is no corresponding obligation for the unauthorized use of one's name and likeness. Similarly, under the Lanham Act, willful infringers of a trademark face the prospect of statutory treble damages for their conduct, while punitive damage claims are notoriously difficult to establish for right of publicity and right of privacy claims.

While there is no silver bullet to dealing with online impersonators, copyright and trademark claims are likely the most powerful weapons in one's arsenal to get the attention of Internet sites whose users may post infringing materials.

Thank you again for taking the time to read our newsletter. If there is an issue or topic that you would like to see covered in a future IP Insight, please contact any GHP lawyer.



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