



# Intellectual Property News

*“Congress shall make no law...abridging the freedom of speech”<sup>1</sup> but...“I know it when I see it.”<sup>2</sup>*

By William B. Richards

“When things become complacent in my space of work, I feel the need to seek out new ventures to express myself and what I am involved with, whether it’s my brand, or me personally.”<sup>3</sup>

## Introduction

On Dec. 15, 2017, the CAFC handed down a decision in *In re: Erik Brunetti* which held that the Trademark Trial and Appeal Board (TTAB) did not err concluding the applied-for mark “FUCT” comprises immoral or scandalous matter, but that Trademark Act Section 2(a)’s bar on registering immoral or scandalous marks is an unconstitutional restriction on free speech.<sup>4</sup>

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## Factual and Procedural Background

Erik Brunetti has been in the news lately, not for his edgy art and brand of clothing, but for intellectual property, no less. While his clothing company, fuct, has been in business since 1990, a few years ago he decided to apply to the U.S. Patent and Trademark Office (PTO) for registration of his trademark, “FUCT”.<sup>5</sup> The application was initially filed *pro se* by two other individuals and later assigned to Brunetti. Trademark counsel was also engaged. In due course, the mark was approved for publication.

Then, less than one month later, an office action was sent with a Trademark Act Section 2(a) refusal asserting the applied-for mark “consists of or includes immoral or scandalous matter.” As explained in the office action, “[a] mark is immoral or scandalous when the evidence shows that a substantial composite of the general public (although not necessarily a majority) would consider the mark to be scandalous in the context of contemporary attitudes and the relevant marketplace.” (Citations omitted). As evidence supporting the 2(a) refusal, the examiner asserted that the Urban Dictionary defined fuct as the “past tense of the verb fuck.”

Subsequent responses to the office action and requests for reconsideration were unavailing. As argued by Brunetti, the PTO was assuming, incorrectly, that “fuct” was the same as “fucked” as in the past tense of “fuck.” Fuct was, as put forward by Brunetti, an “arbitrary, made-up mark.”<sup>6</sup> Brunetti further argued that since “fucked” means the same as “screwed” and since “screwed” is not vulgar, it followed that “fucked” was not vulgar, certainly a tour de force of syllogistic logic.<sup>7</sup>

On appeal to the TTAB, the examiner’s Section 2(a) refusal was affirmed. In doing so, the TTAB panel determined that: (i) based upon applicant’s use of the term fuct in association with “pictures...that...contain strong, and often explicit, sexual imagery that objectifies women

and offers degrading examples of extreme misogyny, generally immediately next to Applicant’s use of his proposed mark” that “[i]t is clear from the record that the term ‘Fuct’, as used by applicant, will be perceived by his targeted market segment as the phonetic equivalent of the word ‘fucked,’” and leaves an unmistakable aura of negative sexual connotations” and (ii) based upon secondary dictionary definitions, “‘fucked’ (or ‘fuct’) is still ‘an extremely offensive word.’”<sup>8</sup> Brunetti appealed to the U.S. Court of Appeals for the Federal Circuit.

## U.S. Supreme Court Opinion in *Tam*<sup>9</sup>

In this long-awaited trademark-related free speech case, a unanimous Court held that: (i) trademarks are private, not government, speech; (ii) Section 2(a)’s bar of the registration of disparaging remarks discriminated based on viewpoint; and (iii) speech may not be banned on the ground that it expresses ideas that offend. Simon Tam, the lead singer of the rock group “The Slants”, chose the name to “reclaim” the term and drain its denigrating force as a derogatory term for Asian persons.” When Tam sought federal registration of the mark THE SLANTS, it was denied under the Lanham Act’s disparagement clause, which states in relevant part, “No trademark...shall be refused registration on account of its nature unless it —... consists of or comprises matter which may disparage... persons...or bring them into contempt, or disrepute ....”<sup>10</sup> Left open, however, was the question of whether *Central Hudson*<sup>11</sup> provides the appropriate test for deciding free speech challenges to provisions of the Lanham Act.

## U.S. Court of Appeals for the Federal Circuit Opinion in *Brunetti*

At issue on appeal was whether: (i) registration of “FUCT” was properly refused under Section 2(a) of the Lanham Act which provides that trademark registration may be refused if the mark “[c]onsists of or comprises immoral, deceptive, or scandalous matter” and (ii) Section 2(a) was unconstitutional under the First Amendment of the U.S. Constitution.





On appeal, Brunetti argued that: (i) substantial evidence does not support the Board's finding that the mark FUCT is vulgar under Section 2(a) and (ii) Section 2(a)'s ban on immoral or scandalous marks is unconstitutional. Brunetti further argued that even if fuct is vulgar, § 2(a) does not expressly prohibit the registration of vulgar marks. He also argued that Urban Dictionary relied upon by the PTO to determine that "fuct" is the past tense of the verb "fuck" and therefore vulgar is not a "standard" dictionary which has been professionally edited.

The CAFC first agreed that the mark FUCT was, in fact, vulgar and, therefore, scandalous. The word "fuct" was found to be a "phonetic twin" of "fucked," the past tense of the word "fuck," which is undeniably vulgar. The CAFC further agreed that use of the word "fuct" in the marketplace in conjunction with sexual imagery, negative sexual connotations, group sex and the word "fuck" weighed heavily toward the likelihood that "fuct" would be perceived as the phonetic equivalent of "fucked." Finally, the CAFC agreed that the examining attorney could properly consider materials from the Internet, such as Urban Dictionary. In conclusion, the CAFC held there was "no merit in Mr. Brunetti's arguments relating to whether the mark is scandalous and therefore prohibited registration under § 2(a)."<sup>12</sup>

Brunetti fared much better under his First Amendment argument. Interestingly, when the instant appeal was filed, *McGinley*, binding CAFC precedent foreclosed a constitutional argument.<sup>13</sup> After *Tam*, the CAFC reconsidered *McGinley* en banc and in *In re Tam*, held that as either a content-based or viewpoint-based regulation of expressive speech, the disparagement provision was subject to strict scrutiny and that the measure did not survive such scrutiny.<sup>14</sup>

Content-based statutes are presumptively invalid and to survive the required strict scrutiny review the restriction must further a compelling interest and must be narrowly

tailored). The PTO conceded that Section 2(a)'s ban on registering immoral or scandalous marks is a content-based restriction and did not argue that the immoral or scandalous provision survives strict scrutiny. The PTO asserted, however, that the First Amendment is not implicated because trademark registration is a "government subsidy program" (a reasonable exercise of its spending power) and that trademark registration is a "limited public forum." And finally, the PTO asserted that trademarks are commercial speech so only intermediate scrutiny under *Central Hudson* is implicated. None of these arguments were persuasive with the CAFC.

The CAFC first held that trademark registration was not a government subsidy program and reasoned that: (i) "the government may not restrict a recipient's speech simply because the government provides him a benefit"; (ii) trademark registration does not implicate Congress' power to spend funds; and (iii) "an applicant does not receive federal funds upon the PTO's consideration of, or grant of, a trademark."<sup>15</sup>

Second, the CAFC held that trademarks was not a public forum, neither a traditional public forum (e.g., streets and parks), designated public forum (e.g., where government property is intentionally opened up for a specific purpose) or limited public forum (e.g., military bases, prisons, airport terminals, city buses and military cemeteries).

Third, and most importantly, Section 2(a)'s prohibition of registration of immoral or scandalous trademarks targets expressive content and so should be evaluated under strict scrutiny. And, even if intermediate scrutiny is applied, Section 2(a)'s bar does not survive. The immoral or scandalous provision targets the expressive components of the speech (e.g., offensive ideas related to "objectifying women," "extreme misogyny," "nihilism," "anti-social imagery" and "lacking in taste"). Thus, strict scrutiny is appropriate.

Analyzed as purely commercial speech, Section 2(a)'s bar does not survive under *Central Hudson* intermediate scrutiny:

(i) addresses speech that concerns lawful activity that is not misleading (Prong I met);

(ii) the asserted governmental interest is not substantial (Prong II not met);

(iii) fails to directly advance that government interest (Prong III not met);

(iv) not narrowly tailored (Prong IV not met).

## Judge Dyk Concurrence

Judge Dyk pointed out, and the majority agreed, that *Tam* does not dictate the facial invalidity of the immoral-scandalous provision, only the disparagement provision, and because it was not viewpoint neutral. Judge Dyk would have construed the statute to avoid constitutional issues by limiting the reach of § 2(a) to obscene speech. He would do that by limiting Section 2(a) to obscene marks, which are not protected by the First Amendment. In the final analysis, however, Judge Dyk was left with the conclusion that since there was no suggestion that Brunetti's mark is obscene, the TTAB decision must be reversed.

## Conclusion

One only need agree with Judge Dyk's concurrence to wonder about the outcome had the analysis gone in the direction he outlined. Instead, we are left with the problem outlined in the closing of the concurrence, "the majority's result leaves the government with no authority to prevent the registration of even the most patently obscene marks."<sup>16</sup> Thus, those looking to register such provocative and edgy brands will find it easier to obtain federal trademark registration.

*By William B. Richards, Esq.,  
Patent Attorney with The Richards Law Firm LLC*

## Endnotes

<sup>1</sup>U.S. Const. amend. I, cl. 3.

<sup>2</sup>J. Potter Stewart, *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

<sup>3</sup>Erik Brunetti, graffiti artist and founder and owner of Fuct, Interview by Eugene Kan, Feb. 24, 2010.

<sup>4</sup>*In re: Erik Brunetti*, No. 2015-1109, slip op. (Fed. Cir. Dec. 15, 2017) (Brunetti).

<sup>5</sup>U.S. Trademark Registration Application. Serial No. 85/310,960.

<sup>6</sup>In *Brunetti*, the CAFC noted with favor that the Board found, in light of the record, "Mr. Brunetti's assertion that the mark 'was chosen as an invented or coined term stretches credulity.'"

<sup>7</sup>Response to Office Action Dated July 3, 2012, Jan. 2, 2013. (Other arguments included that only one complaint about FUCT had been received since 1990, that the public does not view FUCT as the equivalent of "fucked," and finally asserting a violation of the First Amendment.) As noted in *Brunetti*, "the PTO may prove scandalousness by establishing that a mark is 'vulgar.'" Slip Op. at 9.

<sup>8</sup>*In re Brunetti*, App. Ser. No. 85/310,960, slip op. (TTAB Aug. 1, 2014) (non-precedential).

<sup>9</sup>*Matal v. Tam*, 582 U.S. \_\_\_, 137 S.Ct. 1744, 198 L.Ed. 366, 122 U.S.P.Q.2d 1757 (2017) (*Tam*) (*Tam* affirmed *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015) (en banc) (*In re Tam*) *aff'd*, 582 U.S. \_\_\_ (2017)).

<sup>10</sup>15 U.S.C. § 1053(a).

<sup>11</sup>*Central Hudson Gas & Elect. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

<sup>12</sup>*Brunetti*, Slip Op. at 9.

<sup>13</sup>*In re McGinley*, 660 F.2d 481 (CCPA 1981), *overruled on other grounds by In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015 (en banc), *aff'd*, *Tam*, 582 U.S. \_\_\_).

<sup>14</sup>*Brunetti*, Slip Op. at 10.

<sup>15</sup>*Brunetti*, Slip Op. at 16.

<sup>16</sup>*Brunetti* Concurrence at 8.





# *Life Technologies Corp. et al. v. Promega*<sup>1</sup>: Supreme Court takes a quantitative approach to Section 271(f)(1)

By Nataly Mualem

## Introduction

Promega owned four patents and held an exclusive license for a fifth patent, which were used in combination to assemble genetic testing kits. Promega sublicensed the patent to Life Technologies which manufactured four of the kit components in the United Kingdom. The fifth component was manufactured in the United States by Life Technologies and shipped to the United Kingdom where it was combined with the remaining components to form the genetic testing kits. Promega sued Life Technologies alleging infringement

under 35 U.S.C. § 271(f)(1) when they went beyond the licensing scope.

The issue before the court was whether supplying a single component of a multi-component invention from the United States for sale abroad exposes the manufacturer to liability for infringement.

The Supreme Court of the United States decided as a matter of law that one component cannot be a “substantial portion” of a patented invention, and is unable to invoke liability under 35 U.S.C. § 271(f)(1). Therefore, supplying one component of a multi-component

patented invention does not qualify as infringement if that component is later used for assembly abroad.

## Legal Background

Section 271(f)(1) reads:

Whoever without authority supplies or causes to be supplied in or from the United States all or a substantial portion of the components of a patented invention, where such components are uncombined in whole or in part, in such manner as to actively induce the combination of such components outside



of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.

The enactment of this section was the congressional response to the Supreme Court decision in *Deepsouth Packing Co. v. Laitram Corp.* which relieved parties from liability if they shipped all components of a patented invention and assembled them overseas, recreating the patented invention.<sup>2</sup>

The purpose of this safeguard is to encompass infringement occurring abroad based on exported components of patented inventions into U.S. patent protections.

## **Factual Background**

Respondent Promega held an exclusive license for the Tautz patent, a patent used in combination with four other patents owned by Promega to create a genetic testing toolkit. Promega sublicensed the Tautz patent to Life Technologies for use in law enforcement field kits worldwide. One of the components, known as Taq Polymerase, was manufactured by Life Technologies in the U.S. and then shipped to United Kingdom where it was combined with four other components manufactured abroad. Life Technologies began using the licensed technology outside the scope of the license. Promega sued claiming infringement under 35 U.S.C. § 271(f)(1).

## **Procedural Posture**

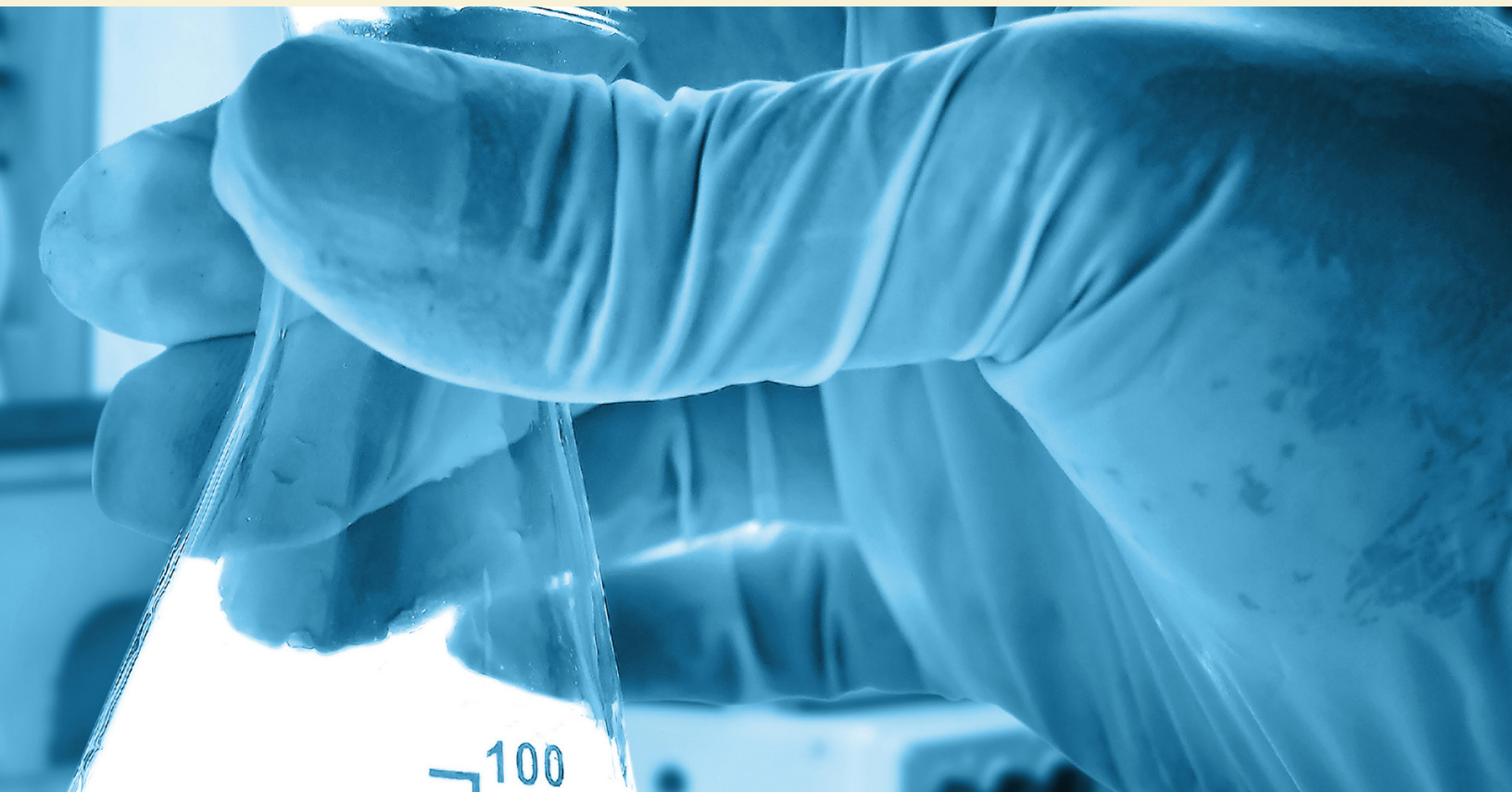
The U.S. District Court for the Western District of Wisconsin granted Life Technologies motion for a judgment as a matter of law, holding that one component does not qualify as “all or substantial portion” in Section 271(f)(1) despite a jury verdict for Promega. The Federal Circuit reversed the lower court’s decision and determined that a single important component was within the scope of the contemplated protection.

## **Supreme Court Decision**

Justice Sotomayor authored the 7-0 decision, reversing the Federal Circuit and remanding the case back to the lower court. The Court first turned to the text of the statute. They recognized that “substantial” may refer to qualitative significance or quantitative parts. However, in context, the Court determined that use of the terms “all” and “portion” lend to a quantitative meaning. Additionally, the Court proffered that the term “of the components” would be unnecessary under a qualitative approach.

The Court further considered the applicability of an alternate application, citing the difficulty for a jury to determine relative qualitative significance of components especially since every single component of an invention can be important or one component may not be necessary to the functioning of the whole invention.





Next, the Court determined that, as a matter of law, a single component cannot constitute a “substantial portion” of a multicomponent invention under Section 271(f)(1). First, the statute’s use of the term “components” in the plural demonstrated that multiple components constitute the substantial portion. Subsequently, the Court conferred that adopting an alternative interpretation would leave little room for Section 271(f)(1) which provides that single component liability is only acceptable if the component is “especially made or especially adapted for use in the invention and not a staple article or commodity of commerce suitable for substantial noninfringing use.” Lastly, the Court relied on the history of the section, which was intended to extend the enforceability of patents to components manufactured in the United States but assembled abroad.

### On Remand

The Supreme Court decision made it necessary for the Federal Circuit to reassess its previous holding to reverse the lower court’s decision to grant Life Technologies’ motion for judgment as a matter of law that Promega failed to prove an infringement case. Life Technologies contended that the Federal Circuit should affirm the District Court’s decision. The Federal Circuit agreed noting that “the only way Promega could preserve the jury’s damages verdict is

by showing that the record supports a finding that all of Life’s accused products that did not infringe under § 271(f)(1) infringed under § 271(a). Promega has failed to make this showing.”

### Outlook

The Supreme Court created a bright-line rule that one component of a multi-component invention cannot constitute infringement under Section 271(f)(1) if only one component was supplied from the United States. Uncertainty remains regarding how many components beyond one constitute a substantial portion. Additionally, this case was simplistic since the parties agreed that the invention consisted of five components, but this case provided no insight about determining how many components constitute an invention. This case leaves many unanswered questions which are likely to be faced by market participants in the near future.

*By Nataly Mualem, Esq., an attorney in Strongsville.*

### Endnotes

<sup>1</sup>580 U.S.\_\_\_\_, No. 14-1538 (Sept. 22, 2017).

<sup>2</sup>406 U.S. 518 (1972).



## *Who Is That Masked Man?*

By Stephen L. Grant

In addition to some interesting facts, the Sixth Circuit case of *Signature Management Team, LLC v John Doe*<sup>1</sup> presents some interesting issues about the interactions between the First Amendment right to speak anonymously, the “unmasking” of “Doe” defendants and the public access to judicial records.

Signature Management (SMT) produces and sells a book providing practice tips to individuals practicing multi-level marketing (MLM).<sup>2</sup> SMT owns a federal copyright in various editions of the book “The Team Builder’s Textbook” (the Work).

Doe<sup>3</sup> writes an anonymous blog with the title “Amthrax,” which takes clear aim (should we say “snipes”?) at the MLM industry and, presumably, a well-known MLM company in Michigan.<sup>4</sup> In 2013, Doe posted a hyperlink in the blog to a downloadable copy of the entire fourth edition of the Work, although the current edition at that point was the ninth edition.

SMT complained<sup>5</sup> to the host of Doe’s website and Doe removed the hyperlink. SMT followed the complaint with a lawsuit<sup>6</sup>, requesting only a permanent injunction against Doe and an order that Doe destroy all copies of the Work in his possession. SMT also requested that the court identify Doe. In an answer, Doe asserted fair use<sup>7</sup>, copyright misuse and a First Amendment right to anonymous speech.<sup>8</sup>

This attempt to “unmask” Doe quickly became the focus of the matter, as SMT moved to compel discovery of Doe’s identity. The trial court ruled on the motion based on a case<sup>9</sup> from the Ninth Circuit involving an anonymously-run blog. In holding that revealing Doe’s identity would be a “significant and irreversible injury” to Doe and that Doe appears to have a chance to prevail on the fair use defense, the trial judge ordered Doe to reveal his identity to the court and to SMT’s attorneys, but a protective order was issued to shield the information from SMT.



Doe moved for summary judgment on the issues of fair use and copyright misuse. The trial court denied the motion, indicating it would be inclined to grant summary judgment that Doe had infringed the copyright, but would not issue a permanent injunction. However, the court was inclined to require Doe to destroy any copies of the Work. The parties were provided time for supplemental briefing on the issue of the summary judgment for SMT.<sup>10</sup> When the summary judgment issued for SMT, the permanent injunction was not granted, based on Doe's assertion to the court that all copies of the Work had been destroyed. The trial court determined that unmasking Doe was unnecessary under these circumstances.

SMT's appeal to the Sixth Circuit takes an interesting turn. In looking to relevant copyright law in another circuit, SMT claimed that the trial court erred in ignoring a clear policy of the Sixth Circuit to have open judicial records. Further, as a copyright infringer, SMT claimed that Doe lacked First Amendment protection of his identity. Lastly, the injunction would need to name the party enjoined.

In the Sixth Circuit, the standard for review is "abuse of discretion" for a decision to seal its records<sup>11</sup>, for a decision on injunctive relief under the Copyright Act<sup>12</sup> and applying the wrong legal standard, misapplying the correct legal standard, or relying on clearly erroneous findings of fact.<sup>13</sup>

On the right to speak anonymously, the majority of the panel held that the law provides for anonymous speech<sup>14</sup>, but that copyright infringement on the Internet has seen courts moving towards a balancing test, especially during discovery, to allow the plaintiff to serve process and to allow non-liable defendants to properly assert defenses. In this case, the copyright infringement liability has already been established, but this must be balanced against the defendant's compliance with the limited injunction granted. Also, it is not uncommon for a "Doe" defendant in a copyright infringement matter involving file-sharing to assert that the file-sharing is protected under the First Amendment, but this argument is somewhat strained, especially when the defendant has added no original expression to the file being shared.<sup>15</sup>

The Sixth Circuit has a strong policy in favor of open court records, for reasons that should be abundantly apparent. Failing to unmask a Doe defendant is not exactly equivalent to sealing a court record<sup>16</sup>, but it implicates the same public

interest. In other words, the balancing process now goes beyond the parties to the public, for whom the court has provided an open gallery. Not only that, but the plaintiff also does not know the defendant's identity, due to the protective order.

The majority<sup>17</sup> of the panel proceeds to set out many factors that balance the public interest against an interest of the plaintiff in the injunctive relief, bearing in mind that the requested permanent injunction against Doe was denied. SMT did not appeal this denial. In using the Ninth Circuit precedent, the trial court failed to distinguish between unmasking for discovery purposes and unmasking for an open public record. Discovery occurred in this case and the case proceeded to the summary judgment granted.

In a dissent, Judge Suhrheinrich emphasizes that Doe lost his First Amendment protection when he lost the copyright infringement claim, as copyright infringement is not "protected speech."<sup>18</sup> Further, this case is easily distinguished from a sealed record, as it involves shielding the name of an adjudged copyright infringer. Judge Suhrheinrich would order the trial court to name the defendant, to identify him to the plaintiff, if for no other reason. Lacking a permanent injunction, Doe is in no way barred from blogging anonymously in the future.<sup>19</sup> The dissent concludes that Doe would have continued to be anonymous, but for his conscious decision to infringe SMT's copyright.

The dissent makes another interesting point. SMT considers itself a "prevailing party," due to the judgment of copyright infringement, but Doe has filed a motion for attorney's fees, as the judgment is *de minimis*, if he is not permanently enjoined or stripped of his anonymity.<sup>20</sup>

The Sixth Circuit remanded this case to the trial court for reconsideration by applying the factors, including the presumption of open judicial records.

*By Stephen L. Grant, Senior Attorney, Standley Law Group, LLP, Dublin, Ohio.*

## Endnotes

<sup>1</sup>*Signature Management Team, LLC v John Doe*, Case 16-2188, decided 28 November 2017.

<sup>2</sup>Ironically, SMT is itself involved in multi-level marketing, also known as pyramid marketing, in which sales commissions are derived not only from an individual's sales, but also from the sales of sellers recruited by the individual, hence, the "pyramid" designation.

<sup>3</sup>We will assume that "Doe" is a "John Doe" and not a "Jane Doe," as the identity is never unmasked.

<sup>4</sup>There is no indication in the opinion that there is any relationship between SMT and the probable target of the Amthrax blog, nor is the target of Doe's blog ever identified by name.

<sup>5</sup>The Digital Millennium Copyright Act, 17 USC 512, provides for a "take down" notice in cases of copyright infringement.

<sup>6</sup>In the Eastern District of Michigan, sitting in Ann Arbor, before Judge Judith Levy.

<sup>7</sup>While somewhat unusual, it is possible that reproduction of an entire work can be a "fair use" under 17 USC 107, as the amount of the work reproduced is only one of at four factors to be considered in assessing availability of the defense.

<sup>8</sup>Anonymous speech was clearly anticipated by the Founding Fathers, who used it quite effectively themselves. However, in the "internet of everything," anonymous speech is common.

<sup>9</sup>*Art of Living Found. v. Does 1–10*, No. 10-CV-05022, 2011 WL 5444622 (N.D. Cal. Nov. 9, 2011).

<sup>10</sup>Doe then moved for reconsideration, but no briefing. SMT provided briefing.

<sup>11</sup>*Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 306 (6th Cir. 2016).

<sup>12</sup>*Dig. Filing Sys., L.L.C. v. Aditya Int'l*, 323 F. App'x 407, 411 (6th Cir. 2009); see also *S. Cent. Power Co. v. IBEW, Local Union 2359*, 186 F.3d 733, 737 (6th Cir. 1999).

<sup>13</sup>*First Tech. Safety Sys., Inc. v. Depinet*, 11 F.3d 641, 647 (6th Cir. 1993).

<sup>14</sup>*McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995).

<sup>15</sup>*First Time Videos, LLC v. Does 1–76*, 276 F.R.D.254, 256 (N.D. Ill. 2011).

<sup>16</sup>As noted in fn 2 of the SMT opinion.

<sup>17</sup>The majority opinion is penned by Judge Helene White.

<sup>18</sup>Obscenity and fighting words also lack First Amendment protection. The majority acknowledges this point.

<sup>19</sup>Although he may need a new pseudonym, in my opinion.

<sup>20</sup>17 USC 505 provides the judge with discretion to award reasonable attorney's fees to a "prevailing party" in an infringement case.





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