THE HONORABLE KAREN L. STROMBOM

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KEN ARONSON,

Plaintiff,

v.

DOG EAT DOG FILMS, INC.,

Defendant.

NO. 3:10-CV-05293-KLS

PLAINTIFF'S OPPOSITION TO DEFENDANT'S SPECIAL MOTION TO STRIKE PLAINTIFF'S CLAIMS OF MISAPPROPRIATION OF LIKENESS AND INVASION OF PRIVACY

NOTE FOR MOTION CALENDAR:

JULY 9, 2010

ORAL ARGUMENT REQUESTED

I. RELIEF REQUESTED

Plaintiff respectfully requests the Court deny the defendant's motion because (1) it has failed to meet its burden of showing that Plaintiff's claims are subject to an Anti-SLAPP motion, (2) it has failed to prove that judgment should be entered as a matter of law, and (3) a reasonable jury could find that the defendant knowingly misappropriated and publicly disclosed Plaintiff's film footage, song lyrics, voice, and likeness without his permission.

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II. BACKGROUND FACTS

A. The Defendant Used Plaintiff's Video Footage, Plaintiff's Song Lyrics, Plaintiff's Image, and Plaintiff's Voice Without His Permission

Plaintiff borrowed his girlfriend's video camera and purchased a tape to use it. The purpose of the video camera was for Plaintiff to record his "private memories" during a trip to Europe with his friend, Eric Turnbow. Plaintiff considered the resulting footage his property.[1]

Turnbow has admitted that Plaintiff, not Turnbow, brought the video camera and recorded the footage that appears in the defendant's movie, *Sicko*. He also admits that Plaintiff wrote the lyrics to the song "Oh, England" that Plaintiff is singing in the movie.[2]

When they returned, Turnbow offered to convert Plaintiff's video footage to VHS for easier viewing.[3] Turnbow converted Plaintiff's footage to VHS, but held onto the original.[4] Plaintiff asked Turnbow to return the footage, but Turnbow claimed he was still using it.[5] Although Turnbow had the original footage, Plaintiff considered it to be his property. He never sold it to Turnbow and he always expected it would be returned.[6]

Years later, after they had a prolonged falling out, Turnbow "accidentally" called his old friend. He eventually mentioned the defendant was looking for stories regarding social

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[1] Deposition of Ken Aronson, Declaration of Thomas B. Vertetis in Support of Plaintiff's Opposition to Defendant's Special Motion to Strike Plaintiff's Claims of Misappropriation of Likeness and Invasion of Privacy ("Vertetis Decl."), Ex. 1, at 12:14-24; at 11:8-20; at 14:20-15:1; at 34:22-24.

[2] Deposition of Eric Turnbow, Vertetis Decl., Ex. 2, at 18:20-23; at 26:7-19; at 27:10-14; at 27:20-28:3; at 78:7-10; at 78:17-79:2; at 58:17-22; at 80:14-18; at 94:8-14; at 95:3-14.

[3] Deposition of Ken Aronson, Vertetis Decl., Ex. 1, at 20:10-20; Deposition of Eric Turnbow, Vertetis Decl., Ex. 2, at 22:11-23:11.

[4] Deposition of Ken Aronson, Vertetis Decl., Ex. 1, at 24:11-25:3; Deposition of Eric Turnbow, Vertetis Decl., Ex. 2, at 21:4-21:16.

[5] Deposition of Ken Aronson, Vertetis Decl., Ex. 1, at 32:6-14

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medicine, and that he was communicating with the defendant about his experience that Plaintiff had filmed during their trip to Europe. After hearing this, Plaintiff asked Turnbow to return his footage, but Turnbow claimed the footage was stolen. Later, Turnbow changed his story and tried to convince Plaintiff he sold him the footage and the recorder. This was false – Plaintiff had no interest in selling his memories and the recorder belonged to someone else.[7]

Turnbow did not disclose that he was considering sending Plaintiff's video footage to the defendant. Instead of returning Plaintiff's original tape, he submitted a copy of it to the defendant without Plaintiff's consent, along with a copy of their CD, "I'm Alive," again without his consent.[8] A few months before the defendant's blockbuster movie was released, Turnbow finally disclosed that he had submitted Plaintiff's footage without his permission. This came as a surprise to Plaintiff because Turnbow did not have his permission and he did not believe Turnbow would "run out and show everybody" the footage. They were friends and Turnbow had a history of keeping Plaintiff's confidences.[9]

Plaintiff had good reason to believe Turnbow would keep the tape private, as it contained footage that Plaintiff found very embarrassing and that he would not want his family members, the defendant, or the public to see: "Like I said, I never expected it to go beyond Eric's house and beyond our ... eyes."[10] This includes Plaintiff smoking marijuana in Amsterdam, "running around the room in our underwear acting goofy," and singing an

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[6] *Id.* at 35:3-13; at 39:12-20; at 42:5; at 56:13-15; at 71:2-21.

[7] *Id.* at 26:19-27:3; 31:11-32:23; at 34:7-24; at 46:16-22; at 48:1-9; at 49:12-50:1; at 71:2-21.

[8] *Id.* at 46:5-10; at 46:16-47:3; at 47:8-15; at 50:8-14; at 51:24-52:15; at 63:15-20; at 84:2-6; at 85:1-5.

[9] *Id.* at 36:21-37:4; at 51:24-53:13; at 83:19-84:17; at 87:7-23; at 88:3-6

[10] *Id.* at 37:5-38:3; at 39:14-20; at 42:12-23; at 43:2-17; at 44:20-2; at 53:5-13; at 54:1-21; at 55:9-24; at 74:19-75:24; at 77:3-10.

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"embarrassing and awful" version of a song he wrote.[11] Plaintiff found it "real shocking and embarrassing" to learn that the footage was shared with the defendant and to see portions of that footage appear in a very public movie.[12] He had no idea what parts of his footage were actually in the defendant's blockbuster movie until the day it premiered.[13]

Turnbow's motives are well-illustrated by his reaction when Plaintiff confronted him about using the footage without permission: "… he started cussing at me on the phone, and he says, F you. You're trying to jump on my F-ing bandwagon. And I said, Excuse me. You're taking my footage and calling it your bandwagon."[14] Turnbow was so eager for the spotlight that he lied to Plaintiff when the defendant invited him to the *Sicko* premier.[15]

In total, Plaintiff asked Turnbow to return the tape three or four times between the time they returned from Europe and the time the tape was sent to the defendant.[16] Tellingly, Turnbow now claims the footage was "misplaced."[17]

Although Turnbow and the defendant may thrive on the spotlight, Plaintiff does not: "I don't like my image being put in a movie without me having any control over it. I don't like a song that I originated, "Oh, England," … with an awful version a cappella being put into a movie. I had no control over anything. Nobody contacted me about it at all. … The embarrassing part was all of it. I wouldn't have agreed [to] have any of my image or my

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[11] *Id.* at 37:23-38:3; at 43:2-17.
[12] *Id.* at 38:7-13; at 43:2-17; at 44:20-2; at 53:5-13; at 55:7-12; at 58:15-60:1; at 77:3-10.
[13] *Id.* at 62:2-6; at 65:25-66:7.
[14] *Id.* at 62:17-63:4.
[15] *Id.* at 65:1-24.
[16] *Id.* at 32:24-33:7.
[17] Deposition of Eric Turnbow, Vertetis Decl., Ex. 2, at 30:14-18.

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voice or me signing a song that I wrote in the footage. … We're a small town, and everyone knows everything about people, and especially when you print something in the newspaper or it's on a major international movie and they see you and make reference to what they saw."[18]

And while Turnbow and the defendant may be desensitized to misappropriating smaller works for the defendant's blockbuster movies, those smaller works are meaningful to Plaintiff because everything used was either written, sang, or videotaped by Plaintiff, not by Turnbow and not by the defendant.[19] "I want somebody to come in contact with me and say, ["]Do we have permission to use your footage, your video, your image, your voice, and your song in a movie that's going to be shown to millions of people across the world[?"][20]

Plaintiff was equally surprised the defendant never asked for his permission:

> Q: If Michael Moore were to use your video footage in the movie, did you have any expectation as to whether he would try to contact you?
>
> A: I would have assumed that most definitely because of the legal ramifications behind things that he would have contacted me. If he would have questioned Eric concerning the video of who this is with you, whose video is it, whose song that you are signing, and all the questions that surround the video that he used in his movie, and nobody contacted me at all.[21]

B. The Defendant Acknowledges the Value of Plaintiff's Intellectual Property

Although he initially thought the defendant wanted his personal story on socialized medicine, Turnbow eventually learned Plaintiff's intellectual property was the focus:

> "… the thing of Abbey Road was what [Michael Moore] was focusing on most; that he thought he could use it because of the socialized medicine there and the

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[18] Deposition of Ken Aronson, Vertetis Decl., Ex. 1, at 54:12-21; at 58:15-21; at 79:20-80:6.

[19] *Id.* at 57:21-58:7; at 63:21-25.

[20] *Id.* at 59:17-60:1.

[21] *Id.* at 85:17-86:1.

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> way it tied into his film. … That was the focus of interest eventually. It took us a while to get to that, but that's what caught Michael Moore's eye. … Mainly all he wanted was the Abbey Road. That's the only thing he wanted. … That's the major thing that he needs."[22]

After Turnbow sent the defendant a "very edited" copy of Plaintiff's video footage, the defendant called back and said they "like it," "it was awesome," and they wanted him to send the higher-quality originals: "She said it was awesome and that the quality was a little grainy. And, if at all possible, Michael would like to have the original tapes that were actually inserted in the camera." Turnbow complied, sent the defendant more of Plaintiff's footage, and was told "[t]hey liked what they saw."[23]

In addition to Plaintiff's footage, Turnbow also sent the defendant a copy of a CD, "I'm Alive," that contained lyrics written by Plaintiff. The only lyrics from that CD that appear in the defendant's movie are the lyrics that were written by Plaintiff and that Plaintiff is shown singing in the movie. Turnbow conceded in his deposition that his motive for giving more of Plaintiff's intellectual property to the defendant was his desire for "exposure."[24]

As with Plaintiff's video footage, the defendant liked Plaintiff's lyrics: "They listened to it and liked it very much. They said, We like your work. We think you have potential. We enjoy it. We might use some of it in the movie." The defendant liked the lyrics enough that they included them, and footage of Plaintiff singing them, in its movie.[25]

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[22] Deposition of Eric Turnbow, Vertetis Decl., Ex. 2, at 40-52; *see id.* at 44:12-14, 45:4-46:9; at 48:3-15; at 50:19-24.

[23] *Id.* at 51:22-52:11; at 53:7-19; at 53:7-19; at 53:20-54:6; at 55:5-22; at 56:4-11.

[24] *Id.* at 56:22-57:3; at 58:17-59:5; at 93:19-94:7; at 94:8-14.

[25] *Id.* at 60:10-61:5.

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Eventually, Turnbow gave the defendant "permission to use whatever they wanted to, because I was absolutely thrilled to be in the movie and be a part of [the] project." This included free, carte blanche permission to use Plaintiff's video footage and Plaintiff's lyrics.[26]

Despite informing the defendant that Plaintiff was with him, despite the fact that Plaintiff appears on the video footage, despite the fact that Plaintiff's name is listed as the author of the lyrics, and despite the fact that someone other than Turnbow obviously filmed his fall on Abbey Road and the subsequent footage, the defendant never asked Turnbow about Plaintiff and never asked him to obtain Plaintiff's permission.[27]

The defendant was very happy to give Turnbow free "exposure." At both the movie premiere and after, the defendant repeatedly thanked Turnbow for "his" intellectual property: "They thanked me over and over and said that my part in the movie really made the movie. It was humorous antidote (sic), is what they said." Sadly for Turnbow (and Plaintiff), since the defendant learned that it was not going to get away with using Plaintiff's likeness and his intellectual property, the defendant has not returned "many, many" calls from Turnbow.[28]

III. EVIDENCE RELIED UPON

This opposition brief relies upon the Declaration of Thomas B. Vertetis in Support of Plaintiff's Opposition to Defendant's Special Motion to Strike Plaintiff's Claims of Misappropriation of Likeness and Invasion of Privacy, as well as the factual record to date.

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[26] *Id.* at 46:10-22; at 62:3-63:3.

[27] *Id.* at 65:16-66:23; at 67:5-16; at 67:21-68:14.

[28] *Id.* at 63:11-19; at 70:10-71:3; at 71:12-72:11; at 76:2-12.

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IV. LEGAL ARGUMENT

The Court should deny the defendant's special motion because (1) it has failed to meet its burden of showing that Plaintiff's claims are subject to an Anti-SLAPP motion, (2) it has failed to prove that judgment should be entered as a matter of law, and (3) a reasonable jury could find that the defendant knowingly misappropriated and publicly disclosed Plaintiff's film footage, song lyrics, voice, and likeness without his permission. Fed. R. Civ. P. 56(c).

This is particularly true where Plaintiff's evidence must "be believed, and all justifiable inferences are to be drawn in plaintiff's favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The defendant cannot try to frame its motion as a motion on the pleadings because (1) an Anti-SLAPP motion requires the Court to "consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based," Wash. Anti-SLAPP Act § 2(4)(c),[29] and (2) its motion relies on facts outside of the pleadings.[30] Fed. R. Civ. P. 12(d).

A. Plaintiff's Claims are Not Subject to an Anti-SLAPP Motion Because the Defendant Has Failed to Show that Plaintiff's Claims are Based on Public Participation and Petition

The defendant's "special motion" should be denied because it fails to meet its burden of showing that the challenged claims are based on an "action involving public participation and petition." Wash. Anti-SLAPP Act § 2(4)(b) (moving party must show that the claim is

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[29] For consistency, Plaintiff will cite the Anti-SLAPP legislation using the same format as the defendant used in its motion, and Plaintiff incorporates by reference the copy of that legislation that was attached as Exhibit A to the defendant's motion.

[30] *See* Declaration of Noelle H. Kvasnosky, Dkt. #17, filed on June 11, 2010, at ¶ 2, which was filed in support of the defendant's motion and offers facts in support of that motion; *see* Declaration of Eric Turnbow, Dkt. #16, filed on June 11, 2010, at ¶¶ 1-3 and Exhibits A-C attached thereto, which was filed in support of the defendant's motion and offers facts in support of that motion; *see also* defendant's motion at 2-4, 12:6-10 (relying on the facts contained in the declarations of Kvasnosky and Turnbow).

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based on an "action involving public participation and petition"); Wash. Anti-SLAPP Act § 2(2) (defining an "action involving public participation and petition").

The defendant offers no meaningful analysis of this threshold issue, other than the conclusory argument that "[i]t cannot be seriously argued that *Sicko* does not address issues of public concern." Defendant's motion, at 6:16. But that argument skips a step: the issue is not whether the defendant was discussing an issue of public concern when it misappropriated Plaintiff's intellectual property and invaded his privacy; rather, the threshold issue is whether the defendant has met its burden of showing that Plaintiff's claims are "based on an action involving public participation and petition."

Nowhere in its motion does the defendant meet that burden. More specifically, nowhere does the defendant explain how Plaintiff's claims are "based on" any of the five statutory definitions of "action involving public participation and petition." Instead of trying to meet that burden, the defendant argues that *Sicko* addresses an issue of public concern so any claims regarding its blockbuster movie are subject to a "special motion" to strike.

But such a broad, over-reaching argument is not supported by Washington's Anti-SLAPP law, and is not supported by California's Anti-SLAPP law that the defendant references throughout its motion. Simply put, the Anti-SLAPP law does not apply to Plaintiff's claims because (1) Plaintiff's claims are not based on the defendant's exercise of free speech, but on the defendant knowingly misappropriating and publicly disclosing Plaintiff's film footage, song lyrics, voice, and likeness without his permission, (2) the defendant's claim of protected free speech activity is merely incidental to its misconduct upon which Plaintiff's claims are based, and (3) unlike the plaintiffs in the cases cited by the

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defendants, Plaintiff is not a public figure and did not inject himself into the public debate on social medicine.

1. The Defendant's Motion Ignores the Purpose of Washington's Anti-SLAPP Law and the Defendant's Motion Ignores Its Burden of Proof under Washington's Anti-SLAPP Law

The plain language of Washington's Anti-SLAPP law weighs against applying it to Plaintiff's claims because the legislature was not concerned with any claim that arises from speech, but with "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Wash. Anti-SLAPP Act § 1(1)(a). The legislature was concerned because "such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues," and "[i]t is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process." Wash. Anti-SLAPP Act § 1(1)(c) and (d).

While the legislature acknowledged these concerns, it also acknowledged that the legislation should not be abused: a purpose of the legislation is to "[s]trike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concerns." Wash. Anti-SLAPP Act § 1(2)(a). With this balance in mind, the legislature put the burden on the defendant to show that a challenged claim "is based on an action involving public participation and petition, as defined in subsection (2) of this section." Wash. Anti-SLAPP Act § 2(4)(a) and (b) (emphasis added).

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The Court should deny the defendant's special motion because it makes no effort to meet that burden. This is not surprising because Plaintiff's claims are not "based on" an action involving public participation and petition; rather, they are "based on" the defendant violating Plaintiff's copyright, invading his privacy, and misappropriating his likeness.

2. The Defendant's Motion Ignores California Case Law that Rejects Its Arguments, Including Cases Cited in the Defendant's Motion

A number of California cases have rejected the defendant's arguments, including cases the defendant cites in its motion and refers to as "instructive."[31]

Most notably, California courts recognize that the "principal thrust or gravamen" of the challenged claims dictate whether they are subject to an Anti-SLAPP motion. Incidental allegations of protected activity are not sufficient if the claims are principally based on unprotected activity. *Martinez v. Metabolife Int'l, Inc.*, 113 Cal. App. 4th 181, 187-88, 6 Cal. Rptr. 3d 494, 499 (Cal. Ct. App. 2003).

This threshold requirement is well-illustrated in *Dyer v. Childress*, 147 Cal. App. 4th 1273, 55 Cal. Rptr. 3d 545 (Cal. Ct. App. 2007). Although the defendant favorably cites *Dyer* in its motion,[32] the case's holding is contrary to its arguments.

In *Dyer*, the plaintiff sued various actors, producers, and other individuals for defamation and invasion of privacy. His claims arose from an allegation that the defendants portrayed him in a false light in *Reality Bites*, a critically acclaimed movie that addressed social issues facing Generation X in the 1990s. *Id.* at 1276. The film used the plaintiff's

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[31] According to the defendant, "[t]he well-developed case law on California's anti-SLAPP statute … is instructive given the two statutes' similarity." Defendant's motion, at 5:1-2.

[32] Defendant's motion at 6:4-7 (suggesting that Dyer and other courts "have previously found films like Sicko to be communications upon which it is appropriate to base an Anti-SLAPP motion to strike").

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name for a character; the screenplay author admitted the film's characters were based on her friends from school, including the plaintiff; and, while she asserted she had permission to use Dyer's name, the screenplay author claimed it was an "inside joke" because the fictional Dyer "was dissimilar to the plaintiff who was 'straight laced, mature, and conservative…'" The plaintiff denied the screenplay author had permission to use his name, and alleged his reputation and his business interests were damaged by the unflattering and unauthorized way he was depicted in the film. *Id.* at 1276-77.

The defendants brought a special motion to strike Dyer's claims under California's Anti-SLAPP statute because of the widespread social issues raised in the film, but the trial court denied the motion. *Id.* at 1276, 1278. In upholding that decision, the Court began by recognizing that Anti-SLAPP motions are intended to "provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights." *Id.* at 1278. It then focused on the requirement that the moving party "make a threshold showing that the challenged cause of action arises from protected activity." *Id.* In doing so, the Court explained "we analyze whether the defendant's act underlying the plaintiff's cause of action *itself* was an act in furtherance of the right of petition or free speech." *Id.* at 1279 (emphasis in original). The Court does not focus on "generalities that might be abstracted" from the challenged conduct, but on "the specific nature of the challenged protected conduct." *Id.* Citing and quoting *Martinez*, the Court recognized that "[t]he principal thrust or gravamen of the claim determines whether" the Anti-SLAPP statute applies. *Id.*

Applying these principles, the Court addressed the defendants' argument that the plaintiff's claims were aimed at chilling the valid exercise of their constitutional rights. While

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the Court recognized that "movies involve free speech," it acknowledged that "not all speech in a movie is of public significance and therefore entitled to protection under the anti-SLAPP statute." *Id.* at 1280. Instead, "[t]he issue turns on the specific nature of the speech rather than generalities abstracted from it." *Id.*

The Court upheld the trial court's decision to dismiss the special motion because "the conduct at the heart of Dyer's lawsuit, the assertedly false portrayal of Dyer's persona in the movie *Reality Bites*, is not conduct in furtherance of the defendants' exercise of their constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." *Id.* at 1276.

Importantly for this case, the Court held the defendants could not wrap themselves in a "broad and amorphous" flag of public interest in order to bring an Anti-SLAPP motion: "Here, the specific dispute concerns the misuse of Dyer's persona. However, the representation of Troy Dyer as a rebellious slacker is not a matter of public interest and there is no discernable public interest in Dyer's persona. Although Reality Bites may address topics of widespread public interest, the defendants are unable to draw any connection between those topics and Dyer's defamation and false light claims." *Id.* at 1280.

Moreover, the Court rejected the same argument the defendant makes here, "that because they are media defendants and movies are entitled to free speech protection, *Reality Bites* should be protected under the anti-SLAPP statute …" *Id.* at 1281. While the statute may apply to claims that arise from a plaintiff "voluntarily thrust[ing]" himself into a discussion of public topics, or to claims that arise from a plaintiff injecting himself to

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"inevitable scrutiny and potential ridicule by the public and media," the Court concluded the statute did not apply where the claims arise from no such voluntary act of the plaintiff. *Id.*

Similarly, the Court rejected the argument that a defendant can bring an Anti-SLAPP motion when the underlying issue is of widespread interest, but the plaintiff is a private citizen, unless the plaintiff is "directly connected to a discussion of topics of widespread public interest." *Id.* The Court concluded that the statute did not apply to the plaintiff in *Dyer* because he was not a public figure and he did not thrust himself into a public discussion of the social issues addressed in *Reality Bites*. *Id.*; *cf. Taus v. Loftus*, 40 Cal. 4th 683, 689-90, 712-13, 151 P.3d 1185, 1189 (2007) (plaintiff was the subject of a case study in a prominent article and her claims were based on articles related to that study); *Stewart v. Rolling Stone*, 181 Cal. App. 4th 664, 679 (Cal. Ct. App. 2010) (plaintiff bands were part of an "extremely popular genre of music" and their claims were based on an article written about their genre).

In its conclusion, the Court noted that the plaintiff is "a financial consultant living in Wisconsin who happened to have gone to school with [the screenplay writer], was not connected to these issues in any way. Thus, the defendants failed to meet their initial burden of showing the activity underlying Dyer's lawsuit was in furtherance of the defendants' constitutional right of free speech in connection with a public issue or an issue of public interest." *Dyer*, 147 Cal. App. 4th at 1284.

Just like the plaintiff's claims in *Dyer*, the Plaintiff's claims in this case are not based on protected speech or conduct. Instead, they are based on the defendant violating Plaintiff's copyright, invading his privacy, and misappropriating his likeness. His claims are not based on the defendant's free speech or petitioning the government, but with using his video

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footage, his song lyrics, and his likeness without his permission. Like the "conduct at the heart of Dyer's lawsuit," the conduct at the heart of Plaintiff's lawsuit "is not conduct in furtherance of the defendants' exercise of [its] constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." *Dyer*, 147 Cal. App. 4th at 1276.

Similarly, while *Sicko* "may address topics of widespread public interest," just like *Reality Bites*, Plaintiff's video footage, his song lyrics and his likeness are "not a matter of public interest and there is no discernable public interest" in those materials, just like the plaintiff's persona in *Reality Bites*. Plaintiff is a private citizen and he did not inject himself into the public debate about social medicine or any other issue raised in *Sicko*.

This is the fundamental problem with the defendant's attempt to make this an Anti-SLAPP lawsuit. While the defendant may be correct that "[i]t cannot be seriously argued that *Sicko* does not address issues of public concern," that statement falls short of meeting its threshold burden. Just like the defendants in *Dyer*, the defendant here is "unable to draw any connection between those [issues] and [plaintiff's claims]." *See also City of Cotati v. Cashman*, 29 Cal. 4th 69, 78, 52 P.3d 695 (2002) (just because a claim "may have been triggered by protected activity does not entail that it is one arising from such. … the critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech."); *Ramona Unified Sch. Dist. v. Tsiknas*, 135 Cal. App. 4th 510, 519-520, 37 Cal. Rptr. 3d 381, 388 (Cal. Ct. App. 2005) (a party cannot frustrate the purposes of SLAPP by combining allegations of protected and nonprotected activity); *Mann v. Quality Old Time Serv., Inc.*, 120 Cal. App. 4th 90, 103, 15 Cal. Rptr. 3d

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215, 221 (Cal. Ct. App. 2004) (a cause of action is not subject to an Anti-SLAPP motion if the protected conduct is incidental to the unprotected conduct).

Other examples illustrate why this case is not an Anti-SLAPP case. If the defendant is correct, its star, Michael Moore, could have filmed himself spitting on an insurance company CEO, and then asserted the resulting claim for battery was subject to an Anti-SLAPP motion. Or if the defendant's star crashed his car while talking to the camera, the defendant could assert the resulting negligence claim is subject to an Anti-SLAPP motion. Or if the defendant's star filmed himself stealing $1,000 in medicine from an American hospital, but left a $100 bill to visually represent the "true cost" of those supplies, the defendant could assert the resulting conversion claim is subject to an Anti-SLAPP special motion.

These examples highlight the rationale of *Dyer* and why Plaintiff's claims are not properly subject to an Anti-SLAPP motion. *Cf. Lam v. Ngo*, 91 Cal. App. 4th 832, 851, 111 Cal. Rptr. 2d 582 (Cal. Ct. App. 2001) (Anti-SLAPP statute did not apply to claims arising from acts of physical violence and property damage during a protest and demonstration); *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129 Cal. App. 4th 1228, 1245, 29 Cal. Rptr. 3d 521, 534 (Cal. Ct. App. 2005) (Anti-SLAPP statute did not apply to claims arising from vandalism because such conduct is not a legitimate exercise of free speech rights); *Benasra v. Mitchell Silberberg & Knupp LLP*, 123 Cal. App. 4th 1179, 1185, 20 Cal. Rptr. 3d 621, 625 (Cal. Ct. App. 2004) (Anti-SLAPP statute did not apply to legal malpractice claims because defendant failed to show that "the substance of the plaintiff's cause of action was an act in furtherance of the right of petition or free speech"); *Santa Monica Rent Control Bd. v. Pearl St.*, 109 Cal. App. 4th 1308, 1318, 135 Cal. Rptr. 2d 903

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(Cal. Ct. App. 2003) (Anti-SLAPP statute did not apply because "defendants were not sued for their conduct in exercising such constitutional rights. They were sued … to compel their compliance with the provisions of the rent control law.").

Finally, it is worth repeating that, just like the plaintiff in *Dyer*, the plaintiff here is a private citizen who found himself unknowingly thrust into the public spotlight. He is not a public figure, he has no connection to the public issues addressed in the defendant's movie, he did not voluntarily inject himself into the defendant's public debate, and he did not voluntarily inject himself or his intellectual property into the defendant's movie or its political dialogue.

At most, the defendant's exercise of free speech is incidental to Plaintiff's claims, which is not sufficient to support an Anti-SLAPP motion. It should be denied.

B. Plaintiff Can Show a Probability of Prevailing on His Claims by Clear and Convincing Evidence

Even if Plaintiff's claims are subject to an Anti-SLAPP motion, which they are not, the legislation does not create a higher burden of proof. Instead, Plaintiff only has to show clear and convincing evidence that he will probably prevail. *Cf.* Wash. Anti-SLAPP Act § 2(4)(b) (party must establish "a probability of prevailing on the claim") *with* Wash. Anti-SLAPP Act § 2(4)(d)(ii) (a special motion "does not affect the burden of proof or standard of proof that is applied in the underlying proceeding"). As noted above, Plaintiff's evidence must "be believed, and all justifiable inferences are to be drawn in plaintiff's favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

1. Plaintiff's State Law Claims are not Preempted by the Copyright Act

Plaintiff's state law claims are not preempted because (1) the subject matter of those claims does not fall within the Copyright Act, and (2) the rights afforded by Washington law

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are not equivalent to the rights contained in the Copyright Act. *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1137-1138 (9th Cir. 2006).

While Plaintiff's video footage and lyrics fall within the subject matter protected by the Copyright Act, his state law claims for invasion of privacy and misappropriation do not. In other words, while Plaintiff can sue the defendant for using his material under the Copyright Act, he can bring separate claims for invading his privacy and misappropriating his likeness. *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1004-1005 (9th Cir. 2001). As the Court concluded in *Downing*, neither preemption requirement is met because (1) Plaintiff's privacy and his likeness are not copyrightable, and (2) Plaintiff's right to privacy and right to his likeness are not equivalent to the rights provided under the Copyright Act. *Id.* at 1005.

2. Plaintiff's State Law Claims are Not Barred by the Applicable Statutes of Limitations

Neither Plaintiff's claim for invasion of privacy nor his claim for misappropriation are barred by the statute of limitations.

First, the defendant's reliance on *Lee v. AFT-Yakima*, 2010 WL 2243992 (E.D. Wash. 2010), is misplaced because the law cited in that opinion was concerned with claims for invasion of privacy that are akin to claims for libel and slander. *See id.* at *3 (citing RCW 4.16.100 and *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 474, 722 P.2d 1295 (1986)).

In *Eastwood*, the Court acknowledged there are four types of invasion of privacy claims: intrusion, disclosure, false light and appropriation. 106 Wn.2d at 469. Rather than establishing the statute of limitations for all four, the Court was concerned only with "[t]he

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difficulty in deciding which statute of limitations to apply to an invasion of privacy claim stems from the similarities between false light and defamation claims." *Id.* at 470-71.

Given "the duplication inherent in false light and defamation claims," the Court concluded that "a false light invasion of privacy claim is governed by the 2-year statute of limitations for libel and slander, RCW 4.16.100(1)." *Id.* at 474.

In contrast to the "false light" claim at issue in *Eastwood*, which was akin to a defamation claim, the privacy claims in this case are for intrusion, disclosure, and appropriation. As such, they are not subject to the two-year statute of limitations for defamation that is found in RCW 4.16.100(1), but to the three-year statute of limitations "for taking, detaining, or injuring personal property … or for any other injury to the person or rights of another" that is found in RCW 4.16.080(2). *Cf. Beard v. King County*, 76 Wn. App. 863, 869 n. 6, 889 P.2d 501 (1995) (acknowledging that an invasion of privacy claim for disclosing confidential material may be governed by a three-year statute of limitations).

Second, but related, the defendant's reliance on *Eastwood* to suggest that Plaintiff's misappropriation claim should be subject to a two-year statute of limitations is also misplaced. If anything, the defendant's argument highlights the problem with imposing a two-year statute of limitations on Plaintiff's right of privacy claim.

As discussed above, in *Eastwood* the Court acknowledged four types of invasion of privacy claims: intrusion, disclosure, false light and appropriation. 106 Wn.2d at 469. Plaintiff's claims are not based on the defendant portraying him in a false light and the harm he alleges is not "akin to the harm redressed by defamation," as suggested by the defendant.

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Instead, Plaintiff's claims are based on the defendant intruding his privacy, disclosing his personal life to the public, and appropriating his likeness and intellectual property.

The defendant may have a self-interest in casting Plaintiff as having "hurt feelings," but that perspective is betrayed by his testimony. His claims are not based on the defendant portraying him in a false light, but on the defendant intruding his privacy, disclosing his private life to the public, and misappropriating his likeness and intellectual property. These claims are not for damages "akin to the harm redressed by defamation," but for damages akin to "taking, detaining, or injuring personal property … [and] for any other injury to the person or rights of another," as found in the three-year statute of limitations of RCW 4.16.080(2).

3. Plaintiff's Misappropriation Claim is Not Barred by the First Amendment and RCW 63.60.070

As with the defendant's Anti-SLAPP arguments, the defendant cannot evade liability by relying on the First Amendment or RCW 63.60.070 because Plaintiff is not a public figure and the information the defendant misappropriated has nothing to do with the public interest.

Just like its Anti-SLAPP arguments, the defendant fails to meet its burden of proving that its conduct was privileged under the First Amendment. Instead of offering any meaningful analysis on this issue, the defendant just repeatedly shouts "First Amendment" and summarily concludes that it can do whatever it wants along the way. While the defendant fails to apply the law it cites to the facts of this case, each of its cited cases is distinguishable.

This case is not analogous to a case where a popular boy band, New Kids on the Block, sued two newspapers for using their band's name while running news accounts about the band and taking a poll from their readers. *New Kids on the Block v. News Am. Pub., Inc.*,

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971 F.2d 302, 310 (9th Cir. 1992). While the defendant appears to assert that its use of Plaintiff's likeness and intellectual property was for an "informative and cultural" purpose, it fails to explain why it needed to use *Plaintiff* for that purpose. Unlike the defendants in *New Kids on the Block*, who had to use the band's identity to discuss the band, the defendant was not required to use Plaintiff's likeness in order to discuss social medicine.

Nor is this case analogous to a case where the plaintiff allowed herself to be filmed kissing a public figure and the defendant used the footage in a work about the public figure. *Daly v. Viacom, Inc.*, 238 F.Supp.2d 1118, 1122, 1124-25 (N.D. Cal. 2002). Although the defendant favorably cites *Daly*, it fails to recognize that *Daly* relied heavily upon *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal. 3d 860, 603 P.2d 454, 459-460 (1979), where the California Supreme Court explained the First Amendment privilege arises when the material is needed to promote dialogue on social issues or "the thoughts and conduct of public and prominent persons." *Guglielmi*, 25 Cal. 3d at 864-65, 870-72 ("the context and nature of the use is of pre-eminent concern"); *cf. also Dora v. Frontline Video, Inc.*, 15 Cal App. 4th 536, 540-43 (Cal. App. 1993) (privilege applied where plaintiff was a "legendary figure in surfing" and the documentary addressed him and other famous surfers from a specific time period).

The defendant's motion should be denied because it cites no law that gives a documentary film-maker First Amendment immunity to profit off another citizen's likeness and intellectual property, particularly where the citizen is not a public figure and he did not voluntarily inject his intellectual property into the marketplace of ideas.

Moreover, but related, nowhere does the defendant explain how using Plaintiff's likeness is a matter of "cultural, historical, political, religious, educational, newsworthy, or

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public interest," as required by RCW 63.60.070(1). Plaintiff is a private citizen who had his private footage misappropriated by a famous filmmaker. If the defendant was correct, any filmmaker could pick a random citizen and freely use their likeness for political commentary.

The defendant also cannot seek shelter in RCW 63.60.070(2) because Plaintiff has testified that he found it embarrassing to be pictured in the defendant's movie and he did not want to be pictured in the defendant's movie. In other words, by including Plaintiff in its movie and suggesting that Plaintiff submitted his footage and likeness for the movie, the defendant inaccurately suggests that Plaintiff endorses the defendant and its movie.

For that same reason, the defendant cannot evade liability under RCW 63.60.070(6) because a jury must decide whether the use of Plaintiff's likeness was "insignificant, de minimis, or incidental." While the defendant may find the embarrassing video of Plaintiff to be "insignificant," a jury could easily find the opposite, particularly where Plaintiff has testified that he lives in a small town and has faced criticism because of it.

4. A Jury Could Find that the Private Facts Disclosed by the Defendant Would be Highly Offensive to a Reasonable Person

The very case law cited by the defendant affirms that a jury must decide whether the private facts disclosed by the defendant would be highly offensive to a reasonable person. *Cowles Publ'g Co. v. State Patrol*, 109 Wn.2d 712 (1988).

Again, while the defendant and its movie star may want to have their private moments put in a public movie, shared with millions on the big screen, and shared with millions more on DVD, plaintiff's testimony establishes that he did not:

> I don't like my image being put in a movie without me having any control over it. I don't like a song that I originated, "Oh, England," … with an awful version a

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> cappella being put into a movie. I had no control over anything. … The embarrassing part was all of it. I wouldn't have agreed [to] have any of my image or my voice or me signing a song that I wrote in the footage. … We're a small town, and everyone knows everything about people, and especially when you print something in the newspaper or it's on a major international movie and they see you and make reference to what they saw.

The suggestion that Plaintiff "viewed the underlying video from which the clips … were culled with other people present" is also misplaced. As recognized in *Cowles*, there are some facts that a person "keeps entirely to himself or at most reveals only to his family or to close personal friends." 109 Wn.2d at 721. The fact that Plaintiff disclosed some footage to his close friends does not give the defendant the right to turn around and expose it to millions.

And as discussed above, the defendant cannot meet its burden of proving that its use of Plaintiff's likeness is protected by a "newsworthy privilege" by just repeating its mantra that *Sicko* addresses an issue of public concern. *Cf. Moloney v. Tribune Pub. Co.,* 26 Wn.App. 357, 361, 613 P.2d 1179 (1980 (discussing a First Amendment privilege to publish information "concerning official action or proceedings and public meetings").

The problem is illustrated by this argument: "Plaintiff's photograph and voice are used as components of *Sicko's* dissemination of information about … issues of legitimate public concern." Defendant's motion at 12:19-22. But nowhere does the defendant explain why it is privileged to use Plaintiff's likeness to "disseminate" its message.

C. The Court Should Award Plaintiff His Attorneys' Fees and Costs for Having to Respond to a Frivolous Anti-SLAPP Motion

The Court should deny the defendant's request for relief under the Anti-SLAPP statute because it has failed to show that Plaintiff's claims are based on protected conduct, including any showing that the claims were "brought primarily to have a chilling effect on speech."

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With all due respect, the fact that the defendant made no attempt to meet that burden suggests its "special motion" is an early, frivolous effort to cast Plaintiff in a bad light. Accordingly, the Court should award Plaintiff the $10,000 penalty, as well as the attorneys' fees and costs he incurred in responding to it. Wash. Anti-SLAPP Act § 2(6)(b).[33]

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court deny the defendant's special motion, award Plaintiff a $10,000 penalty for the defendant's frivolous motion, and award Plaintiff his attorneys' fees and costs for having to respond to the same.

RESPECTFULLY submitted this 5th day of July 2010.

By: _____

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[33] If the Court finds that this relief is appropriate, Plaintiff will promptly provide the Court with evidence to support his request for attorneys' fees and costs.

THE HONORABLE KAREN L. STROMBOM

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KEN ARONSON,

Plaintiff,

v.

DOG EAT DOG FILMS, INC.,

Defendant.

NO. 3:10-CV-05293-KLS

CERTFICATE OF SERVICE

I, Terry Asbert, hereby certify that on today's date, I caused to be filed electronically (1) Plaintiff's Opposition to Defendant's Special Motion to Strike Plaintiff's Claims of Misappropriation of Likeness and Invasion of Privacy, and (2) the Declaration of Thomas B. Vertetis in Support of Plaintiff's Opposition to Defendant's Special Motion to Strike Plaintiff's Claims of Misappropriation of Likeness and Invasion of Privacy, with the court, using the CM/ECF system, which will send email notification of such filing to the below addresses, and I served a true and correct copy of the following documents by the method indicated below and addressed as follows:

__X__ CM/ECF Notification via email service to: Bruce E. H. Johnson, at brucejohnson@dwt.com and Noelle Kvasnosky, at noellekvasnosky@dwt.com.

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I declare under penalty of perjury under the laws of the United States of America, 28 U.S.C. ¶ 1746, that the foregoing is true and correct.

Dated this 5th day of July 2010 in Seattle, Washington.

By _____
Terry Asbert

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