Judge Finds That FBI in FOIA Case "Officially Confirmed" Identity of Civil Rights Informant

By Christine N. Walz and Charles D. Tobin

In a significant victory for the cause of government transparency, a D.C. federal judge has ruled that the FBI must produce a full accounting of noted Civil Rights photographer Ernest Withers' file as a confidential informant. *Memphis Publishing Company v. Federal Bureau of Investigation*, 2012 WL 269900 (D.D.C. January 31, 2012 D.D.C.). This ruling comes in response to the FBI's consistent denials that it had any obligation under the Freedom of Information Act (FOIA) to acknowledge that Withers had been an informant.

The *Commercial Appeal* newspaper, which is part of the E.W. Scripps group of newspapers, and its reporter Marc Perrusquia have spent years chasing down rumors of Withers' relationship with the FBI. Withers was the most well-known photographer from the era, creating some of the iconic images of the Civil Rights Movement through the trust and unparalleled access the leadership gave him. After Withers died in 2007, the newspaper filed a FOIA request for Withers' FBI file. Documents the FBI released in response showed that Withers had served as a FBI informant confidential informant number ME-338-R. The "R" designation belonged to the category of "racial informants" recruited by the FBI to monitor civil rights organizers.

The ruling also sharply curtails the government's ability to withhold older documents that would shed light on troubling episodes in the country's history.

Despite the release of this information, the FBI continued to refuse to admit the existence of an informant file -- or even that Withers was an informant -- relying on a seldom-invoked exception to FOIA, 5 U.S.C. §552(c), which allows the agency to shield information about informants when a FOIA request asks about the informant by name. The statute was enacted in 1986 as part of President Ronald Reagan's war on drugs policy, with a legislative history making clear the FBI and Department of Justice were concerned with organized crime bosses using FOIA to root out informants in their midst. The statute provides that the FOIA exception is not available, however, when an informant's status has been "officially confirmed."

When the FBI continued to hide Withers' role in responding to the newspaper's summary judgment motion, the newspaper filed a motion to compel the FBI to provide a Vaughn index of Withers' file. The newspaper argued that the FBI's previous releases had "officially confirmed" Withers' work for the bureau. Because of that confirmation, the newspaper asserted, the FBI had to follow ordinary FOIA procedure by listing all documents it wanted to withhold, with citations to specific FOIA exemptions.

In her January 31 ruling, U.S. District Court Judge Amy Berman Jackson in Washington D.C. agreed with the newspaper and said that the FBI could not continue to deny that Withers was an informant. The court rejected the FBI's claims that the records released did not on their face disclose Withers' work for the FBI, holding, "This argument is not worthy of serious consideration and it insults the common sense of anyone who reads the documents." The court also dismissed the agency's claims that the documents had been inadvertently released, finding that documents had not been "leaked or disclosed by some other agency or a rogue employee" and that the "claim of inadvertence being advanced here is a day late and a dollar short."

In addition to being the first public finding that Withers was an informant, the court's ruling requires the FBI to produce a full index of records in his informant file. This index is expected to provide insight into the extent of the relationship between Withers and the FBI. With this ruling, the newspaper will be better positioned to press the FBI for full access to the file's contents.

The ruling also sharply curtails the government's ability to withhold older documents that would shed light on troubling episodes in the country's history. Citing a case decided in another D.C. federal court last year involving the Nixon grand jury proceedings, the court in this case noted that there may be special circumstances in which an "undisputed historical interest in the requested records—far outweigh[s] the need to maintain the secrecy of the records."

Specifically, the court said that the agency's use of the exclusion for records pertaining to confidential informants in this case was under less than compelling circumstances, as the FBI invoked the exclusion "not to protect a living

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informant, but only the deceased informant's descendents; not to protect them from danger or bodily harm, but only from the potential stigma or embarrassment, some of which has already come to pass as a result of previous media articles on the subject; and not to avoid revealing the informant's participation in an ongoing, legitimate criminal investigation that could be compromised, but simply to withhold information related to an unfortunately episode in our nation's history from which lessons can be learned."

Charles D. Tobin and Christine N. Walz of Holland & Knight, LLP, Washington, D.C. represent the Commercial Appeal and its reporter Marc Perrusquia. Lesley R. Farby and Wendy M. Doty, Federal Programs Branch, U.S. Department of Justice, Washington, D.C., represent the Federal Bureau of Investigations.

Benay v. Warner Bros. – Happy Valentine's Day for Warner Bros. and John Logan

By David Aronoff

On February 14, 2012 in the long-running case of *Benay v. Warner Bros., et al.*, CV 05-8508, Judge Gutierrez of the U.S. District Court for the Central District of California issued a Valentine's Day Order granting summary judgment for several (but not all) defendants and denying a motion for terminating sanctions.

This most recent ruling in *Benay*, a case in which the Ninth Circuit previously had rendered the decision *Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620 (9th Cir. 2010), both (a) illustrates the importance of basic contractual defenses, such as lack of privity, now that Copyright Act preemption of implied-in-fact contract claims for the use of ideas seems to be a dead letter in the Ninth Circuit following *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975 (9th Cir. 2011) and (b) serves as a cautionary reminder that forged documents can be an invidious risk even in the most high-profile cases.

The Prelude

The *Benay* case was filed on December 5, 2005 by two brothers, Aaron and Matthew Benay, who contended that their screenplay entitled "The Last Samurai" ("the Screenplay") had been infringed by the motion picture starring Tom Cruise also entitled "The Last Samurai" ("the Film"), which was released exactly two years earlier, on December 5, 2003. They sued Warner Brothers Entertainment, Inc. ("WB"), the distributor of the Film, Radar Pictures, Inc. and Bedford Falls Productions, Inc. ("Bedford Falls"), the two production companies that produced the Film, Edward Zwick and Marshall Herskovitz, two of the producers of the Film and the founders of Bedford Falls (Zwick also directed the Film), and John Logan, the screenwriter of the Film.

The Benay brothers alleged claims for copyright infringement under federal law and breach of implied-in-fact contract under California law, based on allegations that their agent had "pitched" the Screenplay to Bedford Falls before the Film was produced. *Desny v. Wilder*, 46 Cal. 2d 715 (1956).

On January 11, 2008, the Defendants filed a joint motion for summary judgment, contending that (a) as to the copyright claim, the Film was not substantially similar to the protectable expression contained in the Screenplay under the Ninth Circuit's "extrinsic test" for substantial similarity (*Funky Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072 (9th Cir. 2006)), and (b) as to the breach of implied-in-fact contract claim, the undisputed evidence established that the ideas in the Film had been created independently of the screenplay. *Hollywood Screentest of Am., Inc. v. NBC Universal, Inc.*, 151 Cal. App. 4th 631 (2007).

The District Court granted the motion in full, dismissing the action. However, on appeal, the Ninth Circuit affirmed only the dismissal of the copyright claim, and remanded the breach of implied contract claim for further proceedings in the District Court. *Benay*, 607 F.3d at 634.

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