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### **Repugnant Foreign Judgments**

By: James B. Astrachan

I am between flights at Dallas-Ft. Worth Airport, sitting on a comfortable chair outside of Starbucks and thinking about an editorial that ran in the *New York Times* a few weeks earlier. It seems that an author, resident in New York State, had authored a book accusing a Saudi sheik of financing terrorism. The sheik sued the author in Great Britain for libel where it was reported only a few copies of her book were sold. She failed to appear or defend and a default judgment was entered against her.

The author had no assets in Great Britain or Saudi Arabia so the sheik sought to enforce his judgment in New York under New York's Uniform Foreign Money Judgment Recognition Act (UFMJRA) which provides, with a few exceptions, that foreign judgments are final, conclusive and enforceable in the country where rendered and are deemed conclusive between the parties and enforceable by United States Courts. The *Times* was outraged because it believed that the author would have been able to assert First Amendment defenses had she been sued in the United States.

The *Times'* editorial caught the eye of a long-time Maryland politician who felt that this "travel liable" liability should not be permitted in Maryland if the suit brought in the foreign jurisdiction was based on a cause of action that might be defended under the First Amendment. Maryland, however, has also adopted the UFMJRA.

A recent New York case illustrates the complexity of the UFMJRA, and the need for it. A website was sued in France for copyright infringement and "parasitism" by two French-based houses of couture – Féraud and Balmain. The site had published photos of plaintiffs' fashion shows without authorization. The site, *Viewfinder*, was owned and run by the fashion photographer, Donald Ashby, who sells annual subscriptions for \$999. Ashby likens his website to an electronic version of a magazine that contains topics of interest to fashion industry persons.

Féraud and Balmain sued *Viewfinder* in the Tribunal de Grande Instance in Paris because the published photographs of plaintiffs' fashion shows revealed the upcoming season's designs to its subscribers. *Viewfinder* failed to respond to the suit and a default judgment was entered against it.

*Viewfinder* appealed the judgment to the Cour d'Appel de Paris, but inexplicably withdrew its appeal. The plaintiffs filed in New York to enforce the final French judgments and an attachment order was issued. That's where this story begins.

*Viewfinder* filed with the New York court motions to dismiss, for summary judgment, and to vacate the attachment order, presenting a number of reasons why it should have its way. The court held that enforcing the French judgment would be repugnant to the public policy of New York on the ground that doing so would violate *Viewfinder's* First Amendment rights. Specifically, the court held that the fashion show photos depicted by *Viewfinder*, a magazine, were of public events and that publication of the photos was a protected First Amendment activity.

The court's decision was appealed. UFMJRA makes clear that the first step in analyzing whether a judgment is unenforceable under the UFMJRA due to repugnance to public policy is to identify the cause of action on which the judgment is based. Incredibly, the trial court had not done so, and the appellate court was left on its own to conclude that the essence of the cause of action on which the French judgment was based was the "complete or partial performance or reproduction made without consent of the author" of the reproduced or performed work. The court then compared the French law on which the judgment was obtained to comparable United States copyright law and found them similar. Under the laws of both countries, photographs are subject to copyright protection and the French court ruled that publication of the photos by *Viewfinder* infringed the rights of the plaintiffs.

There was no basis for the court of appeals to second guess the French court's finding of unauthorized reproduction and found, for purposes of its review, that *Viewfinder's* acts resulted in infringement. *Viewfinder*, however, claimed that as an online "magazine" its actions were entitled to First Amendment protection and a finding of fair use. The appellate court wasn't buying it, however, and held:

The 'public policy' inquiry rarely results in refusal to enforce a judgment unless it is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense.

Laws that are antithetical to the First Amendment will create such a situation. Foreign judgments that impinge on First Amendment rights will be found to be 'repugnant' to public policy

A court's failure to enforce a foreign judgment requires a complete analysis by the court. Here, the district court agreed that *Viewfinder* was a magazine and concluded it had an absolute First Amendment defense to infringement, which was simply wrong. This is because in the United States, First Amendment and IP rights co-exist. Clearly, a magazine can infringe a third party's copyright to a photo.

Thus, the proper inquiry for the district court would have been to ask whether the causes of action under French law for violations of IP rights conflicted with the rights a magazine might have, in these circumstances, via the First Amendment or the statutory defense of fair use – clearly rights that may lend themselves more to the defense of a liable charge than

a garden variety charge of copyright infringement, although classification as a magazine might impact a finding that a fair use defense might have been available to it under U.S. law.

The process, then, requires two steps. First, the court must identify the protection afforded the accused under the United States Constitution or statute, and second, determine whether similar protections are available under the laws of the country the accused has been charged with violating. In this case, a careful review of the fair use exceptions to infringement was warranted because for the most part, fair use deals with a person's right to reproduce or perform work that it claims is protected under the First Amendment or by a statute that recognizes these rights. The district court missed the mark when it concluded, without any analysis, that even if the designs were protectable under French law, U.S. law provides "as a matter of First Amendment necessity a 'fair use' exception for the publication of newsworthy matters." This is of course, blatantly and grossly untrue. A protracted analysis was needed and never occurred. *Viewfinder* was remanded for the development of a full record.

A remedy does exist in Maryland to prevent enforcement of a foreign judgment under certain circumstances, and likely will be an important defense to enforcement of a liable judgment against a news source. Although it is not talismanic there is likely no sense in creating a new law to do the same thing that UFMJRA would do. As *Viewfinder* will likely learn, it is best to be careful and respect the rights of others unless it is sure of its position.

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