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Potential Fourth Trial to Determine Punitive Damages in Trade Dress and Publicity Rights Infringement Case

WRITTEN BY

Karl M. Zielaznicki | Victoria D. Summerfield | Tina Lin

Punitive damages are on the line in a potential fourth trial between toy manufacturer, MGA Entertainment (MGA) and rapper T.I. and his wife (the Harrises). But it remains to be seen if the trial will commence, as MGA is seeking permission for an interlocutory appeal — arguing that punitive damages tied to disgorgement of profits are for the judge to decide. Nonetheless, the case highlights important legal considerations when addressing punitive damages in intellectual property disputes.

Following a mistrial and vacated trial verdict, [a third jury trial](#) found that MGA's dolls infringed on the trade dress and likeness of the Harrises' girl pop group, OMG Girlz. The jury awarded a total of \$71.4 million in damages to the Harrises—with \$53.6 million of the award being punitive and \$17.8 million for disgorgement of profits.

Judge [James Selna](#) reduced the damage award to a \$1 remitter, which the Harrises rejected. Now, the judge is leaving it to a jury to reconsider and decide the issue, unless he agrees to MGA's request to certify the new trial order for an interlocutory appeal. If an interlocutory appeal is ultimately granted to MGA, the 9th Circuit will rule whether a judge or jury should ultimately decide on punitive damages.

Case Overview

In the third trial, a jury found that some of MGA's L.O.L. Surprise! O.M.G. dolls' hair, accessories, and clothing infringed on the publicity rights and trade dress of OMG Girlz. In addition to awarding compensatory damages, the jury also awarded punitive damages pursuant to [California Civil Code, Section 3294](#), which allows a plaintiff to claim punitive damages if there is clear and convincing evidence that a defendant acted with fraud, oppression, or malice.

But the judge has now overturned the jury's award, deeming the evidence insufficient to support punitive damages, stating, "there must be a finding of intent, conscious disregard, or willfulness to support punitive damages in California."^[1]

The Harrises contended that evidence of the designers' knowledge, overlapping markets, and MGA's credibility issues related to copying other celebrities for doll designs were sufficient to support punitive damages.

Nonetheless, the judge ruled that the Harrises failed to meet the burden of proof for the following reasons:

- **No Clear and Convincing Evidence:** According to the judge, the evidence did not establish that MGA acted with willfulness, intent to harm, or conscious disregard for the OMG Girlz's rights. The judge concluded that the

evidence only supported that the conduct was negligent or could be explained by nonwillful alternatives. For instance, the court found the designers' knowledge of the OMG Girlz was, at best, a passing reference and did not show a deliberate intent to copy OMG Girlz's trade dress. Similarly, the judge noted the overlapping markets could merely be coincidental and that MGA's copying of other celebrities did not automatically mean there was intentional copying of OMG Girlz.

- **Lack of Reprehensibility:** The judge also found that MGA's conduct was not sufficiently reprehensible under the Due Process Clause, holding the harm was economic and there was little evidence of physical or emotional harm. The judge also determined there was no evidence of indifference to health or safety or that OMG Girlz was financially vulnerable. Finally, the judge noted that while there was repeated infringement, there was no evidence of knowledge on the part of MGA.

Key Takeaways

1. **When claiming punitive damages, look for your “smoking gun.”** Clear and convincing evidence of malicious or oppressive behavior, or reckless disregard, is often required to obtain a punitive damage award. Circumstantial evidence, evidence that is open to multiple interpretations, or credibility determinations may be insufficient to support a finding of “clear and convincing.” Many states require a plaintiff to show clear and convincing evidence that the defendant acted with malice, oppression, or fraud. The standard is higher than a “preponderance of the evidence” (more likely than not) but lower than the criminal standard of “beyond a reasonable doubt.”^[2]
2. **State law will dictate available punitive damages in trademark and publicity cases.** The federal Lanham Act does not provide for punitive damages in the case of trademark infringement, and publicity rights are governed by state law. However, states have a variety of laws, including unfair and deceptive trade practice or consumer protection laws, that may allow for punitive damages, attorneys' fees, expert fees, etc., in the case of trademark or other IP infringement. In advance, plaintiffs should take these laws into account when determining venue for a litigation matter, and defendants should understand how these laws can potentially increase risk exposure.
3. **Constitutional limitations on punitive damages apply.** Even if state punitive damages are potentially available in an infringement dispute, there are limits to how much a jury can award. Under constitutional precedent governing due process,^[3] this is often evaluated based on the degree of reprehensibility of the defendant's misconduct, the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and the difference between the punitive damages awarded by the jury and the compensatory damages. “Reprehensibility of the alleged conduct is ‘the most important indicium of the reasonableness’ of punitive damages^[4].” Generally, punitive damages cannot exceed a single-digit ratio (e.g., 9:1) to the compensatory damages, and the specifically allowed ratio depends on the facts and circumstances of a particular case. This means low compensatory damage awards could also reduce a defendant's risk exposure when facing a potential punitive damage award.
4. **Whether a judge or jury decides punitive damages may hinge on whether a plaintiff is awarded compensatory damages or equitable relief.** The crux of MGA's latest argument is that the disgorgement of profits award was an equitable remedy, meaning all related punitive damages are also equitable in nature and for the judge to determine. It remains to be seen whether Judge Selna and/or the 9th Circuit will allow an interlocutory appeal on the issue.

[1] *Id.* Dkt No. 113, at 7.

[2] *Addington v. Texas*, 441 U.S. 418 (1979).

[3] *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

[4] *Riley v. Volkswagen Grp. of Am., Inc.*, 51 F.4th 896, 902 (9th Cir. 2022) (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003)).

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