

Court: Mugshot aggregator looses anti-SLAPP claim

Panel rules company cannot use First Amendment protection over business model

By L.J. Williamson
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A company that posts mugshots online and solicits payment for their removal does not have an anti-SLAPP claim, the 2nd District Court of Appeal held Wednesday, affirming a lower court's decision.

JustMugShots.com, which posts individuals' booking photos, inflates search engine results to bring the site to the top of searches under those individuals' names, and charges \$199 to remove the photos, argued its activities were protected under the First Amendment. Both the trial court and the appellate panel determined that the company's separate act of charging a fee to remove the photos enjoyed no such protection.

"If this case involved only defendant's posting of publicly available booking photographs on its Web sites, defendant would have a strong argument that plaintiff's claims are based on protected activity," wrote Justice Madeline Flier. "Defendant does not argue that the acts of charging the removal fee and using pictured individuals' names in advertising are protected speech activities, so the anti-SLAPP statute does not apply." *Zim Rogers, v. JustMugShots.com, Corp.*, B258863 (Cal. App. 2nd Dist. Oct. 7, 2015)

Presiding Justice Tricia A. Bigelow and Justice Elizabeth

A. Grimes concurred.

Senate Bill 1027, which went into effect on Jan. 1, makes it unlawful to publish a mugshot and then solicit or accept a fee to take the picture down. The bill's author, state Senator Jerry Hill, said the practice was "nothing more than extortion, plain and simple."

The lawsuit was filed before the law went into effect, however, and thus argues that these acts are a "misappropriation of likeness" and violate the spirit of extortion and profiteering laws.

Before the legislation California had significant privacy protections against commercial use of another's likeness because of the film and television industry, said plaintiff's attorney Brian Kabateck, a consumer rights attorney with Kabateck Brown Kellner LLP.

The mugshot statute, Kabateck added, "really has a laser-like focus on this practice," bolstering the plaintiff's case.

"We think the decision was unfortunately wrongly decided," said co-counsel for JustMugShots.com Joshua Jones of Austin, Texas-based Reed and Scardino. "We think that it implicates a broader array of news sources such as newspapers and traditional media."

Jones said the defense counsel didn't see a difference between an ad-supported news source publishing a mugshot and the actions of JustMugShots.com, which in addition to removal fees also ran advertisements.

"If a newspaper published a mugshot, someone could sue that paper and say we're quibbling with the newspa-

per using advertising," Jones said. "We don't think you can separate the publication of a mugshot versus how the website supports itself, whether through advertising or any other manner."

Jones said use of individual's images was not a violation of commercial misappropriation because their practice "easily falls within the newsworthiness exception to that statute." When asked if he considered JustMugShots.com a news site, Jones said, "I don't know how my client categorizes himself, but what he does publish is news."

This is not a simple free speech issue, Ken Klein, professor at California Western School of Law said, because "not all speech is of equal dignity in the eyes of the law ... You don't have the same kind of protection if you are profiteering."

Klein said the case is very likely to settle, but not before class certification. "If we know it's a class action, we'll know if the plaintiff or the defendant will have to settle ... Either way this case doesn't make economic sense. We just don't know for whom it will not make economic sense."

Given Wednesday's decision and the additional pressure created by state legislation, Kabateck rated JustMugShots.com's odds of prevailing in the suit as "pretty low."

"I guess maybe they should start thinking about praying to Saint Jude, the patron saint of lost causes," Kabateck said.

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