

United States Court of Appeals,
Thirteenth Circuit.
Charlie SHINE, Plaintiff, Appellee,

v.

THREE-AND-A-HALF MEN CO., a South
California Corporation, and ROSE VECINA,
Defendants, Appellants.

No. 36353-2011

Argued and Submitted: May 19, 2011.
Decided: June 8, 2011.

Appeal from the United States District Court for the
District of South California; Patty Hayes, District
Judge, Presiding, No. CV-193411.

Before: J. CEGLIA, Chief Judge, B. LANE, and A.
HARPER, Circuit Judges.

Opinion by Chief Judge CEGLIA; Dissent by Judge
LANE.

CEGLIA, Chief Judge:

In this appeal, we consider two issues of first
impression in this circuit. First, we must determine
whether the South California Anti-Paparazzi Act is
an unconstitutional restriction on freedom of the
press in violation of the First Amendment. Second,
we must determine whether the Copyright Act of
1976 requires the commemoration of a work-made-
for-hire before the creation of the work, or whether
the writing may commemorate a previous oral
agreement.

The parties do not dispute the facts before this court.
The parties' disagreement is limited to the
interpretation of constitutional and statutory authority
and applicable case law.

I. FACTUAL BACKGROUND

After California's passage of the Ugg-ly Footwear
Prevention Act of 2010, which prohibited the sale,
distribution, or public display of sheepskin-lined
footwear, the citizens located in Southern California
were incensed. A mass movement to create a
separate state of South California followed. Shortly
thereafter, in July 2010, the state of South California

separated from California and became the fifty-first
state.

In their first act of business as the newly elected
legislature of South California, the South California
Congress created a South California Constitution that
specifically provided for the equal protection of
sheepskin-lined *790 footwear. Drawn to the new
state of South California as a result of the broad
sheepskin-lined footwear protections, many
celebrities permanently settled in the new state.

The influx of celebrities led to an influx of paparazzi
photographers. The large population of paparazzi
brought with them a host of issues. As they stalked
celebrities on the street to get better photographs,
photographers caused traffic congestion and engaged
in dangerous driving. They crowded entrances to
hospitals and other vital public institutions to
photograph celebrities entering or exiting. They
trespassed on private property and occasionally
injured non-celebrity citizens while trying to get
close-up shots of celebrities. In addition, they
traumatized the innocent children of celebrities by
stalking them and constantly photographing them.

In response to these public concerns, the South
California legislature passed its first regulation,
Section 2.5 of the South California Civil Code, also
known as the South California Anti-Paparazzi Act.

Among other things, the statute prohibits individuals
from "knowingly enter[ing]" a thirty-foot buffer zone
surrounding certain sensitive areas with the "intent to
capture any type of visual image, sound recording, or
other physical impression of the public figure
engaging in a personal or familial activity." So. Cal.
Civ. Code § 2.5(a)(1) (2010). Additionally, the
statute fines the first publisher of a visual image,
sound recording, or other physical impression
captured in violation of subsection (a) if that
publisher had "actual or constructive knowledge"
prior to purchasing the image or impression that it
was unlawfully captured. So. Cal. Civ. Code § 2.5(c)
(2010).

Appellee Charlie Shine ("Shine") is a middle-aged
aspiring comedian and actor. His first big break as a

lead character on a popular television show fell apart in early 2010 following a widely publicized and ill-fated *791 sheep-shearing incident. Shine's contract for the show was not renewed.

In August 2010, Shine returned to BCS Studios to pick up his final paycheck. On his way out, Shine ran into Ashton Kitchen ("Kitchen"), the Director of Commercial Advertisement for Appellant Three-and-a-Half Men Company ("TMC"). Kitchen struck up a conversation with Shine and began discussing his latest TMC project, a commercial for sheepskin-lined footwear called Huggz. Kitchen recalled Shine's memorable involvement in a prior sheep-shearing incident and believed Shine would be an excellent spokesperson for the product. Kitchen suddenly exclaimed, "Dude, want to be in my commercial? It can be a work-for-hire kind of thing." Shine responded, "I'm winning every second. I'm addicted to winning and sheepskin footwear. I've got magic and poetry in my fingertips, and my sales success rate is 100%. I'm in!" Kitchen shouted, "Sweet!" and left.

Two days later, Shine arrived to film the Huggz commercial at TMC Studios. Upon his arrival, Shine learned that Kitchen had not prepared a script for the commercial. Visibly angry, Shine shouted, "This charlatan chose not to do his job, which is to write! Clearly someone believes he is above the law!" He reassured himself aloud, "Good thing I have magic and poetry in my fingertips, I will effortlessly and magically convert your tin cans into pure gold!" With that, Shine ad-libbed the Huggz commercial. It quickly became wildly popular due to Shine's famous statements: "People who don't wear Huggz lay down with their ugly wives in front of their ugly children and just look at their loser lives and then they look at me and they say, 'I can't process it,' and I tell them get yourself some Huggz!" After filming the commercial, but before Shine left the studio, Kitchen asked Shine to sign a form in exchange for his check. The form stated "Payee (Charlie Shine) acknowledges payment in full for services rendered on a work-for-hire basis in connection with the Huggz television commercial project." Shine and Kitchen signed the form. With that, Shine left the studio and returned home.

Unemployed yet again, Shine began looking for work. He was unable to find any new employment opportunities. But recognizing the wide popularity of his Huggz commercial, Shine decided to capitalize on its success. Shine organized a one-man comedy tour about his exploits in the industry entitled *Fleecing the Man: Magic & Poetry in My Fingertips*. Although Shine had a pre-planned comedy routine, the audience was not receptive. To turn the tide, Shine began showing the clip from his popular Huggz commercial and poking fun at himself and Huggz. His comedy show soon became a hit and TMC and Kitchen heard about his deprecating comments towards Huggz as *792 well as his use of the commercial excerpts.

Demi Less ("Less"), President and CEO of TMC, was infuriated about Shine's jokes that poked fun at TMC's best-selling Huggz line. Seeking to discredit Shine, TMC offered a \$5000 reward for a photograph or video of Shine losing his temper with his children. Shine's neighbor Rose Vecina ("Vecina") contacted Less and inquired whether TMC would still purchase the video even if she took it in violation of the new South California Anti-Paparazzi Act. Less simply responded, "We really need that video of Charlie. We won't ask how you got it, and he does *only* see his children when he picks them up from the daycare center."

That afternoon, Vecina waited just outside the front door of the Superstar Daycare Center for Shine and his children to exit. When Shine and his daughters eventually exited the daycare center, his youngest daughter Lilly tripped on the steps just a few feet from the front door and scraped her knee. She began crying and Shine angrily yelled "You little weakling, I knew you didn't have tiger blood like your father!" Standing beside them, less than ten feet from the front door, Vecina filmed the entire incident. Vecina then sold the video to TMC in exchange for the \$5000 reward. TMC quickly posted the video on its website with the caption "Hard to Process Shine's Ugly Parenting." Protests of Shine's show quickly followed, and the rest of his tour was cancelled.

II. PROCEDURAL BACKGROUND

On November 8, 2010, Shine filed a complaint against TMC and Vecina in the Superior Court of the City of Malibu in South California, alleging violations of section 2.5 of the South California Civil Code.

On November 29, 2010, TMC and Vecina filed answers in response to Shine's complaint. In addition, TMC filed a cross-complaint against Shine, alleging copyright infringement for his use of the Huggz commercial footage. TMC properly removed the entire action to federal court.

On March 5, 2011, both parties filed cross-motions for summary judgment on all claims in the district court. Specifically, TMC and Vecina argued that the South California Anti-Paparazzi Act *793 was unconstitutional under the First Amendment because it infringed upon freedom of the press and that they therefore were not liable to Shine for civil damages under the statute. Additionally, TMC argued that the parties had a valid work-for-hire agreement as required by § 101 of the Copyright Act and that therefore Shine infringed upon its copyright interest in the commercial footage.

Shine's motion for summary judgment countered that the California statute was constitutional and that, based upon the uncontested facts, both TMC and Vecina had violated the statute. He also countered that § 101 of the Copyright Act expressly required a work-for-hire agreement be signed before the creation of the work in order to be valid and that because no such agreement was signed, he is the sole owner of the work.

The district court granted TMC and Vecina's motions for summary judgment and denied Shine's cross-motions for summary judgment. The district court held that section 2.5 of the South California Civil Code violated the First Amendment and that the Copyright Act permitted work-for-hire writings to follow the creation of the work if they memorialized a previous oral agreement.

Shine now appeals, arguing that the District Court erred in holding that section 2.5 of the South

California Civil Code violates the First Amendment and in holding that the Copyright Act permits work-for-hire writings to follow the creation of the work if they are memorializing a previous oral agreement.

III. DISCUSSION

A. The Constitutionality of South California's Anti-Paparazzi Statute

Under South California's Anti-Paparazzi Statute, a person may be held civilly liable for "knowingly enter[ing] an area within 30 feet of any: (i) vital public institution including, but not limited to, hospitals, courthouses, police stations, and fire stations; (ii) childcare and education facilities including, but not limited to, schools and daycare facilities; or (iii) private residence with the intent to capture any type of visual image, sound recording, or other physical impression of the public figure engaging in a personal or familial activity." So. Cal. Civ. Code § 2.5 (2010). The Act further provides that "the first transmission, publication, broadcast, or other use of any visual image, sound recording, or other physical impression" taken in violation of the Act's prohibitions may result in a civil fine *794 if the person transmitting, publishing, or broadcasting the image had "actual or constructive knowledge" that it was taken in violation of the law. *Id.*

TMC and Vecina argue that the South California Anti-Paparazzi Act is unconstitutional in two respects. First, they argue that subsection 2.5(a) of the statute amounts to an unconstitutional restriction on newsgathering activities in violation of First Amendment freedom of the press protections. Second, they argue that subsection 2.5(c) impermissibly restrains publication of true information in violation of First Amendment protections for freedom of speech and of the press. The parties have agreed that the statute is constitutional in all other respects and thus, these are the only two First Amendment challenges before us.

The First Amendment prohibits both state and federal governments from restraining "freedom of speech, or of the press." U.S. Const. amend. I; *see also Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding that

the freedom of speech and freedom of the press provisions of the First Amendment applied to the states through the Fourteenth Amendment). The outer reaches of this constitutional restraint on government power, however, remain uncertain. The South California Act forces us to confront the undefined edges of those constitutional boundaries.

Turning to TMC and Vecina’s first constitutional challenge, we note that although the courts have long recognized the importance of protecting freedom of the press, they have never held that the First Amendment grants members of the press an unconstrained right to gather information for publication. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (“[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”); *Branzburg v. Hayes*, 408 U.S. 665, 684–85 (1972) (recognizing that the press has no general right of access to information not available to the public at large). Certainly, *795 laws that single out the press for special treatment are subject to some degree of First Amendment scrutiny because they present dangers of abuse that laws of general applicability do not. *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 640–41 (1994) (citing *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221 (1987)). But where a law is applicable to the public at large, “[t]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering.” *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971).

Our analysis thus turns on whether the South California Anti-Paparazzi Act is a law of general applicability that incidentally burdens the press or is a law that singles out the press for special treatment, making it suspect under the First Amendment. First, we note that section 2.5 of the South California Civil Code applies to *any* “person” that enters the proscribed buffer zone to capture a “visual image, sound recording, or other physical impression.” So. Cal. Civ. Code § 2.5(a)(1) (2010). Moreover, the persons who seek to take photographs of celebrities include both private individuals and members of the

press.¹ Indeed, in this case the individual charged with violating the statute—Vecina—has no affiliation with a news organization and was merely an opportunistic private individual attempting to sell video footage for profit. Given the broad applicability of the statute to all persons—citizens and press alike—we conclude that subsection 2.5(a) of the South California Civil Code is a law that merely incidentally affects the media’s ability to gather and report the news. Because the prohibitions in the statute are rationally related to the important public policy goals that the South California legislature identified, we hold that subsection 2.5(a) of the South California Civil Code is constitutional.

TMC and Vecina’s second constitutional challenge asks this court to resolve whether and when a state may restrain publication of true information under the First Amendment—a question that the Supreme Court has generally left unanswered. *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) (plurality opinion) (recognizing the Court’s “repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment”). However, the Court has recognized certain particularized circumstances wherein the First Amendment does provide protection against publication restraints. *See id.* at 527–29 (listing cases in which the First Amendment prevented regulations that restricted publication of truthful material).

Bartnicki presented a situation closely analogous to this case. *Id.* at 529–35. In *Bartnicki*, a *796 plurality of the Supreme Court held that where a publisher lawfully obtains information that its source obtained unlawfully, the First Amendment precludes the government from imposing any punishment upon the publisher of that information. *Id.* at 528–29. This is true even if the publisher “knew or had reason to know” that the information it was publishing was obtained in an unlawful manner. *See id.* at 519–20.

¹ This court is skeptical of any argument that the “paparazzi” may be considered members of the press as many, like Vecina, are private individuals seeking to make a quick profit.

It would thus appear at first glance that *Bartnicki* is controlling in this case. But several factors distinguish the South California statute at issue here from the relevant facts in *Bartnicki*. First, the published material in *Bartnicki* involved a matter of great public concern, whereas the South California prohibition deals with photographs of “the personal or familial activit[ies]” of public figures, not including public officials—a matter of much lesser importance. See So. Cal. Civ. Code § 2.5 (2010); *Bartnicki*, 532 U.S. at 533–34. In a related vein, to the extent the information is of some public interest, the statute leaves open several alternative means for reporting the same information, including describing the conduct in the wrongfully captured image or publishing photographs taken outside the protected buffer zone. Second, while the publishers in *Bartnicki* engaged in no wrongdoing prior to the ultimate publication of information, in this case, the statute presupposes wrongful conduct on the part of the publisher prior to the ultimate publication as a result of the “actual or constructive knowledge” *prior to purchase or acquisition* limitation. See So. Cal. Civ. Code § 2.5(c)–(d); *Bartnicki*, 532 U.S. at 535–36 (Breyer, J., concurring); see also *Quigley v. Rosenthal*, 327 F.3d 1044 (10th Cir. 2003) (determining that *Bartnicki* was distinguishable in part because the publisher in the case before the Court had actual knowledge prior to acquiring the information that its source was violating the law to obtain the information). For example, in this case, TMC “directed, solicited, induced, or caused another person” to violate the Anti-Paparazzi Act in order to obtain the photograph that it wanted. So. Cal. Civ. Code § 2.5(d) (2010). Third, whereas the restraint on publication in *Bartnicki* did nothing to actually deter the unlawful conduct of the source, the Anti-Paparazzi Act does deter a source’s unlawful conduct because it eliminates *797 the market for illegally obtained images and recordings—a market that created the paparazzi industry in the first place. See *Bartnicki*, 532 U.S. at 531 (plurality opinion) (“[T]here may be an occasional situation in which an anonymous scanner will risk criminal prosecution by passing on information without any expectation of financial reward or public praise, [but] surely this is the exceptional case. Moreover, there is no basis for assuming that imposing sanctions upon respondents

will deter the unidentified scanner from continuing to engage in surreptitious interceptions.”); H.R. 1, 1st Leg., 2d Spec. Sess. (So. Cal. 2010). These differences from the *Bartnicki* facts are of great legal significance. *Bartnicki*, 532 U.S. at 535–36 (Breyer, J., concurring) (“I agree with [the Court’s] narrow holding limited to the special circumstances present here: (1) the radio broadcasters acted lawfully (up to the time of final public disclosure); and (2) the information publicized involved a matter of unusual public concern, namely, a threat of potential physical harm to others. . . . [T]he Court’s holding does not imply a significantly broader constitutional immunity for the media.”).

We are also not unmindful of the policy implications of applying the *Bartnicki* rule to this case. It would allow the press to incentivize outside citizens to engage in unsavory behavior to obtain information for publication. Then it would allow the media to claim constitutional immunity for publishing that unlawfully obtained information. We decline to facilitate this behavior.

For these reasons, we conclude that the South California Anti-Paparazzi Act is constitutional. As the parties have stipulated that TMC’s and Vecina’s conduct did violate the South California Act, we find that Shine is entitled to summary judgment on this issue.

B. Work for Hire Writing Requirement

*798 Section 101 of the Copyright Act of 1976 (“the Act”) defines a “work made for hire” as a “work prepared by an employee within the scope of his or her employment,” or “a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.” 17 U.S.C. § 101. The parties agree that Shine was not a formal employee of TMC when the commercial was produced and have no dispute over whether the work was specially ordered or commissioned. The parties also agree that the commercial is a “collective work” within the meaning of the statute. Thus, we are left

with deciding whether the parties “expressly agree[ed] in a written instrument signed by them that the work shall be considered a work made for hire.”

Assuming, without deciding, that the language of the writing is sufficient to create a valid work-for-hire relationship, the fact that the writing was retroactive in nature remains problematic. Because the parties dispute whether the language and policy of the Act require the signed writing before the creation of the work, we must determine when the Act requires the writing.

The circuits are split over this issue. The Seventh and Ninth Circuits have held that a written work-for-hire agreement must precede the creation of the work. *See, e.g., Gladwell Gov’t Servs., Inc. v. Cnty. of Marin*, 265 F. App’x 624, 626 (9th Cir. 2007); *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 413 (7th Cir. 1992). The Second Circuit, on the other hand, has held that a written work-for-hire agreement might postdate the creation of the work if the agreement is memorializing an earlier oral agreement. *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 559 (2d Cir. 1995).

We begin our analysis with the plain language of the Act. *See K & N Eng’g, Inc. v. Bulat*, 510 F.3d 1079, 1081 (9th Cir. 2007). Unfortunately, the Act gives no guidance on *when* a written agreement must be made to satisfactorily commemorate a work-made-for-hire *799 agreement. *See* 17 U.S.C. § 101 (“[T]he parties [must] expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”). The remainder of the Act is equally unhelpful.

Because the statutory language is unclear, we interpret the meaning of the “work-made-for-hire” definition in light of the underlying purpose of the Act. *See Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir. 2003) (en banc).

In testimony before Congress, an official with the U.S. Copyright Office stated that it was her understanding of the Act that a work “would not be considered a ‘work made for hire’ if the contract were signed later on—after the work was written, for

example.” H.R. Rep. No. 51-374, pt. 5, at 145 (1965). Moreover, the Act already includes provisions requiring a written instrument to transfer a copyright after the creation of a work. 17 U.S.C. § 204(a); *see also Dumas v. Gommerman*, 865 F.2d 1093, 1097–98 (9th Cir. 1989) (“Section 201(b) [establishing the work-made-for-hire writing requirement] is therefore necessary to establish the employer as initial owner of the copyright in works made for hire. Without this provision, copyright would vest in employees at the moment of fixation, and a written instrument would be required to transfer copyright to the employer.”). Thus, written work-for-hire agreements must precede the creation of the work in order to avoid rendering § 204 written transfer agreements redundant. *See Conn. Nat. Bank v. German*, 503 U.S. 249, 253 (1992) (noting that courts should generally disfavor interpretations of statutes that render language redundant).

Accordingly, this court finds that the writing was insufficient within the meaning of the Act to make the commercial a work-for-hire because the writing did not precede the creation of the work. Shine is, therefore, the owner of the copyright.

IV. CONCLUSION

On Shine’s appeal, the judgment of the district court is REVERSED.

LANE, Circuit Judge, dissenting:

I respectfully dissent from the majority’s holding that the South California Anti-Paparazzi Act is constitutional under the First Amendment and from the majority’s interpretation of the *800 writing requirement under § 101 of the Act.

Turning first to the South California Anti-Paparazzi Act, I believe that the statute is both an unconstitutional constraint on newsgathering activities and an unconstitutional restraint on publication of truthful material.

As the majority noted, laws that single out the press for special treatment are suspect under the First Amendment. *Turner Broad. Sys.*, 512 U.S. at 640–41

(citing *Ark. Writers' Project, Inc.*, 481 U.S. at 221). Contrary to the majority's conclusion, the South California Anti-Paparazzi Statute is such a regulation. The statute's name alone—the “*Anti-Paparazzi*” Act—indicates that it is targeted towards members of the media. And despite the majority's assertions, paparazzi are members of the media. They use video and photographs to report on matters of public interest. The fact that they sell this information does not change their classification, as all news providers both sell subscriptions to their publications and purchase stories and photographs from other news outlets. Moreover, even if the purpose of the statute was slightly ambiguous, the legislative history makes clear its focus on members of the press. See H.R. 1, 1st Leg., 2d Spec. Sess. (So. Cal. 2010) (repeatedly emphasizing the regulation's focus on “paparazzi” and the “newspapers and magazines” that purchase the images and other impressions that the paparazzi capture). Because the statute imposes restrictions on the ability of the press to gather news and report on activities related to public figures and their activities in public places, I conclude that the South California Anti-Paparazzi Act is subject to strict scrutiny and violates the First Amendment. See *Branzburg*, 408 U.S. at 681 (“[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.”).

As I find the statute regulating the conduct of paparazzi photographers unconstitutional, I also conclude that the conduct of the Vecina in this case was lawful. It is thus clear that any attempt to punish TMC, would be a restraint on the *801 publication of true and lawfully obtained information—a clear violation of the First Amendment. *Bartnicki*, 532 U.S. at 527–28.

Even assuming that the regulation governing the activities of paparazzi photographers is constitutional, the South California statute's restraint on publication of truthful information cannot pass constitutional muster. As the Court made clear in *Bartnicki*, “[w]here the . . . publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully” the government may not punish publication of truthful information under the First

Amendment, even if the publisher had actual or constructive knowledge that its source violated the law. See generally *id.* This stems from a recognition that any other rule runs the risk of chilling a significant amount of speech regarding true information of public interest—a core concern of the First Amendment. *Id.* at 533–34 (“The enforcement of [the statute] in these cases, however, implicates the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern.”). “In these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance.” *Id.* at 534.

The majority was concerned that a holding of this sort would incentivize the news media to find outsiders to perform its “dirty work.”² If this is truly the problem, the South California legislature may punish the media for its wrongful conduct in *procuring* the information, not in *publishing* it. See *id.* at 532 n.19 (“Our holding, of course, does not apply to punishing parties for obtaining the relevant information unlawfully.”). Allowing the government to punish entities for publishing material that an unaffiliated source obtained unlawfully sets too dangerous a precedent that risks too sacred a First Amendment right.

Turning to the work-for-hire issue, upon examination of the Act's legislative history, it is clear that its purpose is to “provid[e] broad copyright protection

² I also note that the South California statute may punish publication where the publisher has engaged in no cognizable wrongful conduct, despite the majority's contrary suggestions. For example, the statute punishes a publisher that had constructive knowledge that its source violated subsection 2.5(a) because it “directed, solicited, induced, or caused another person” to violate the subsection. The legislative history suggests that newspapers' and magazines' mere offer to purchase photographs of celebrities may constitute “encourag[ing] and facilitat[ing]” dangerous paparazzi behavior. If this is the case, normal media operations, including purchasing truthful stories and photographs from news outlets, may give rise to liability if the source obtained the information unlawfully, directly contrary to the Supreme Court's holding in *Bartnicki*.

1000 F.3d 789
(Cite as: 1000 F.3d 789)

while maintaining a robust federal register.”
Cosmetic Ideas, Inc. v. IAC/Interactivecorp, 606 F.3d
612, 619 (9th Cir. 2010). *802 I believe that a broad
interpretation of the definition better effectuates this
purpose and therefore would hold that a writing
commemorating an earlier oral agreement satisfies
the writing requirement prescribed by § 101 of the
Act. The copyright should vest with TMC.

For the forgoing reasons, I respectfully dissent.

C.A. 13 (So. Cal.) 2011
Shine v. Three-and-a-Half Men Company, Inc.
1000 F.3d 789

END OF DOCUMENT

C

Effective: August 1, 2010

South California Codes (Currentness)

Civil Code (Refs & Annos)

Division 1. Obligations (Refs & Annos)

Part 1. Obligations Imposed by Law

§ 2.5. South California Anti-Paparazzi Act

(a)(1) A person is liable for invasion of privacy damages when he knowingly enters an area within 30 feet of any: (i) vital public institution including, but not limited to, hospitals, courthouses, police stations, and fire stations; (ii) childcare and education facilities including, but not limited to, schools and daycare facilities; or (iii) private residences with the intent to capture any type of visual image, sound recording, or other physical impression of the public figure engaging in a personal or familial activity.

(a)(2) For the purposes of this Section 2.5 of the South California Civil Code, the term “public figure” shall be defined as it is under the law of defamation. However, public officials shall be excluded from the term “public figure” for the purposes of this definition.

(a)(3) For the purposes of this section, “personal and familial activity” includes, but is not limited to, intimate details of the plaintiff’s personal life, interactions with the plaintiff’s family or significant others, or other aspects of the plaintiff’s private affairs or concerns in which the plaintiff had a reasonable expectation of privacy. “Personal and familial activity” does not include illegal or otherwise criminal activity.

(a)(4) The provisions in this Section 2.5 of the South California Civil Code shall not apply if the public figure gives consent to the capture of a visual image, sound recording, or other physical impression within the protected areas.

(b) A person who commits any act described in subsection (a) is liable for up to three times the amount of any general and special damages that are proximately caused by the violation of this section. This person may also be liable for punitive damages, subject to proof. If the public figure proves that the invasion of privacy was committed for a commercial purpose, the defendant shall also be subject to disgorgement to the public figure of any proceeds or other consideration obtained as a result of the violation of this section.

(c) The first transmission, publication, broadcast, or other use of any visual image, sound recording, or other physical impression that was taken or captured in violation of subsection (a) shall constitute a violation of this subsection if the person transmitting, publishing, or broadcasting the visual image, sound recording, or other physical impression had actual or constructive knowledge that it was taken or captured in violation of subsection (a). A violation of this subsection is subject to a civil fine of not less than five thousand dollars (\$5,000) and not more than fifty thousand dollars (\$50,000).

(d) For the purposes of subsection (c), “actual knowledge” means actual awareness, understanding, and recognition, obtained prior to the time at which the person purchased or acquired the visual image, sound recording, or other physical impression, that the visual image, sound recording, or other physical impression was taken or captured in violation of subsection (a). For the purposes of subsection (c), “constructive knowledge” means that the person

transmitting, publishing, or broadcasting the visual image, sound recording, or other physical impression should have known prior to the time at which the person purchased or acquired the visual image, sound recording, or other physical impression, that the visual image, sound recording, or other physical impression was taken or captured in violation of subsection (a) because the person transmitting, publishing, or broadcasting the likeness directed, solicited, induced, or caused another person, regardless of whether there is an employer-employee relationship, to violate subsection (a) to obtain the visual image, sound recording, or other physical impression. Actual or constructive knowledge must be proven by clear and convincing evidence.

(e) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

CREDIT(S)

(Enacted 2010.)

Legislative History

Proceedings and Debates of the 1st Congress, 2nd Special Session

§ 2.5. South California Anti-Paparazzi Act

The Legislature finds and declares all of the following:

(a) Individuals and their families have been harassed and endangered by being persistently followed or chased in a manner that puts them in reasonable fear of bodily injury, and in danger of serious bodily injury or even death, by paparazzi photographers, videographers, and audio recorders attempting to capture images or other reproductions of their private lives for commercial sale to magazines and newspapers.

(b) The legitimate privacy interests of individuals and their families have been violated by photographers, videographers, and audio recorders who physically trespass in order to capture images or other reproductions of their private lives for sale to magazines or newspapers, or who do so constructively through intrusive modern visual or auditory enhancement devices, such as powerful telephoto lenses and hyperbolic microphones that enable invasion of private areas that would otherwise be impossible without trespassing.

(c) Such harassment and trespass threaten not only professional public persons and their families, but also private persons and families. As these paparazzi photographers attempt to get better images or other reproductions of celebrities, they engage in dangerous driving behaviors, cause traffic congestion, and impede the entrances to vital public institutions like hospitals, police stations, and fire stations, thus interfering with the functioning of society at large. These photographers also traumatize innocent children by stalking celebrities outside of schools and daycare facilities.

(d) There is no right, under the United States Constitution or the South California Constitution, to persistently follow or chase another in a manner that creates a reasonable fear of bodily injury, to trespass, or to constructively trespass through the use of intrusive visual or auditory enhancement devices.

(e) The right to privacy and respect for private lives of individuals and their families must be balanced against the right of the media to gather and report the news. The right of a free press to report details of an individual's private life must be weighed against the rights of the individual to enjoy liberty and privacy.

(f) Newspapers and magazines that feature articles focused on gossip about the private lives of celebrities have encouraged and facilitated these dangerous paparazzi behaviors by paying exorbitant fees in exchange for close-up photographs of private celebrity lives. This statute seeks to curb the publisher demand that fosters the illicit behav-

ior of the paparazzi.

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Supreme Court of the United States
THREE-AND-A-HALF MEN CO., and ROSE VECINA, Petitioners,
v.
Charlie SHINE, Respondent.

No. 11–772.
July 29, 2011.

Case below, 1000 F.3d 789.

On petition for writ of certiorari to the United States Court of Appeals for the Thirteenth Circuit. Petition for writ of certiorari granted for the following issues:

- (1) Does the South California Anti-Paparazzi Statute violate the First Amendment, specifically: (a) Does subsection 2.5(a) of the South California Civil Code constitute a restriction on newsgathering activities that violates the First Amendment freedom of the press protections?; (b) Does subsection 2.5(c) of the South California Civil Code unconstitutionally restrain publication of true information in violation of First Amendment protections for freedom of speech and the press?
- (2) Does the Copyright Act of 1976 require a written work-made-for-hire agreement before the creation of the work?

U.S., 2011
Shine v. Three-and-a-Half Men Company, Inc.

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