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ORIGINAL UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

RECORDED

Case No. CV 06-6849-RGK (RCx) Date December 12, 2006
Title JESSE JAMES HOLLYWOOD v. UNIVERSAL STUDIOS, INC., et al.

Present: The Honorable R. GARY KLAUSNER, U.S. DISTRICT JUDGE
Sharon L. Williams Not Reported N/A
Deputy Clerk Court Reporter / Recorder Tape No.
Attorneys Present for Plaintiffs: Attorneys Present for Defendants:
Not Present Not Present
Proceedings: **(IN CHAMBERS) PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION (DE 12)**

I. INTRODUCTION

Plaintiff, Jesse James Hollywood ("Hollywood"), is awaiting trial for murder and kidnapping. Plaintiff sued Universal Studios, Inc. ("Universal") seeking to enjoin Universal from releasing the motion picture, "Alpha Dog" (the "film"), for an indefinite period pending his criminal trial. The film depicts Plaintiff's alleged crimes. Hollywood argues that if the film released, potential jurors will be biased and he will not receive a fair criminal trial.

Presently before the Court is Plaintiff Motion for Preliminary Injunction. For the reasons stated below, the Court denies Plaintiff's Motion.

II. FACTUAL BACKGROUND

The following facts are alleged by the parties.

In October of 2000, Hollywood was charged with first degree murder of Nicholas Markowitz, and kidnapping for purposes of ransom or extortion. Special circumstances¹ are alleged. The People of the State of California seek the death penalty.

Hollywood fled, but was arrested in Brazil in March, 2005, and returned to the US for prosecution. While Hollywood was a fugitive, four other defendants charged in the same indictment were convicted and are presently awaiting sentences for their crimes. Hollywood's prosecution is currently stayed pending a State of California appellate decision regarding issues relating to recusal of the County of Santa Barbara prosecutor and his office.

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¹Pursuant to California Penal Code § 190.2(a)(1)(B).
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In 2003, after obtaining convictions of the four individuals for their role in the kidnapping and killing of Nicholas Markowitz, the prosecutor assigned to the case, Ronald Zonen, assisted film-makers in the creation of a screenplay for a fictional motion picture. The screenplay is based on the individuals and circumstances surrounding the kidnapping and killing. Zonen apparently provided access to the materials and information in possession of the prosecutor's office.

Based on the screenplay, and with Zonen's continuing consultation, "Alpha Dog" was produced. The film is scheduled for release on January 12, 2007. This date is prior to Hollywood's criminal trial.

III. JUDICIAL STANDARD

The basis for injunctive relief in federal courts is irreparable injury and the inadequacy of legal remedies. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); accord *Beacon Theatres v. Westover*, 359 U.S. 500, 506-07 (1959). "An injunction should issue only where the intervention . . . is essential in order effectually to protect . . . rights against injuries, otherwise irreparable." *Id.* (internal quotation omitted).

District Courts in the Ninth Circuit use two tests when analyzing a request for a preliminary injunction: the "traditional" and "alternative" criteria tests. *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005).

Under the traditional test, a plaintiff must demonstrate "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to [the moving party] if preliminary relief is not granted, (3) a balance of hardships favoring the [moving party], and (4) advancement of the public interest (in certain cases)." *Id.* (internal quotation and citation omitted).

Under the alternative test, a plaintiff must show either "[1] a combination of probable success on the merits and the possibility of irreparable injury or [2] that serious questions are raised and the balance of hardships tips sharply in his favor." *Id.* (internal quotations omitted; emphasis in original).

These two tests represent "two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. They are not separate tests but rather outer reaches of a single continuum." *Id.* (internal quotation marks and citations omitted).

IV. DISCUSSION

Plaintiff seeks an injunction preventing Universal from distributing the film for an indefinite period of time pending his criminal trial.

A. Plaintiff's Claims Fail Under The Traditional Test

1. Plaintiff Cannot Show Strong Likelihood of Success on the Merits

The Supreme Court has repeatedly recognized that government restriction of speech in the form of a prior restraint² against the media constitutes "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Prior restraints may be justified only in the most exceptional circumstances, such as to prevent the dissemination of information about troop movements during wartime, *Near v. Minnesota*, 283 U.S. 697, 716 (1931), or to

²Both parties agree that enjoining "Alpha Dog" amounts to a prior restraint.

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"suppress[] information that would set in motion a nuclear holocaust." *New York Times Co. v. United States*, 403 U.S. 713, 726 (1971)(Brennan, J., concurring).

The antipathy toward prior restraints remains even where substantial competing interests are present. For example, in *Nebraska Press*, the Supreme Court rejected a prior restraint against the publication of a criminal defendant's murder confession, even though the Supreme Court found that the publicity "might impair the defendant's right to a fair trial" under the Sixth Amendment. 427 U.S. at 563. Like the present case, *Nebraska Press* involved a highly-publicized capital murder case. *Id.* at 542. There, the murders of six family members took place in a small town with a population of only 850. The defendant had been identified to the community as the perpetrator and had also allegedly confessed to the crime. Concerned about the press coverage of the case, attorneys from both sides asked the court for a restraining order, which led to an order barring the media from "publishing or broadcasting accounts of confessions or admission made by the accused or facts 'strongly implicative' of the accused . . ." *Id.* at 541. The Supreme Court noted that publishing the defendant's confession might impair his Sixth Amendment rights but nevertheless struck down the order as unconstitutional.

Applying this precedent, and others, the Ninth Circuit has consistently refused to issue prior restraints against the media; this refusal extends to cases where criminal defendants have argued that pretrial publicity might jeopardize their Sixth Amendment rights. *See, e.g., Goldblum v. NBC*, 584 F.2d 904 (9th Cir. 1978)(refusal to enjoin NBC from airing docudrama about alleged crimes despite plaintiffs claim that his rights in subsequent civil and criminal proceedings would be harmed); *Mendez v. Fox Broadcasting*, 22 Med. L. Rep. 1702, 1703 (C.D. Cal. 1994)(denying request to enjoin docudrama about highly-publicized murders while retrial of defendants was pending); *CBS, Inc. V. District Court*, 729 F.2d 1174, 1182 (9th Cir. 1984)(during highly publicized criminal trial of John DeLorean it was improper for the District Court to enjoin the broadcast of government videotapes depicting their "sting" operation.)

In *Hunt v. NBC*, 872 F.2d 289 (9th Cir.1989), the Ninth Circuit refused to enjoin the broadcast of a 1988 docudrama about the "Billionaire Boys Club" murders. In that case, Joe Hunt, who had been convicted of one murder and awaited trial on a second murder charge, "contended that the broadcast of [a] docudrama would infringe his Sixth Amendment right to fair trial." *Id.* at 290. He asked the Court to enjoin future broadcasts of the docudrama until the second trial and any appeals were concluded. The Ninth Circuit declined. Citing *Nebraska Press*, *Goldblum*, and *CBS, Inc.*, the Ninth Circuit said that a prior restraint may issue only where its is clear "that without the restraint, pretrial publicity would so distort the views of potential jurors that *12 could not be found* who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court." *Id.* at 293-94 (citation omitted; original emphasis). The court found that the large number of potential jurors meant that, even after broadcast, there would remain an "extremely large pool of untainted potential jurors from which to draw twelve." *Id.* at 295. The court also noted that "substantial and unrestrained publicity concerning Hunt and the Billionaire Boys Club has already been exposed to the public." *Id.* at 296. The court accordingly denied the prior restraint under the First Amendment. *Id.* at 291.

Here, Plaintiff argues that the Court should give less deference to Universal's First Amendment rights because this case involves a fictional motion picture rather than a news report.³ Plaintiff offers no authority in support of this argument. The Court is unpersuaded that motion pictures deserve less protection than "news." Precedent suggests otherwise. *Winters v. New York*, 33 U.S. 507, 510 (1948) (both entertainment and news are fully protected by the First Amendment; "[t]he line between informing and entertaining is too elusive for the protection of that basic right [of a free press]).

This case fits squarely within the scope of Supreme Court and Ninth Circuit decisions that have refused to enjoin the distribution of news reports or dramatic works that relate to ongoing criminal proceedings. Plaintiff has failed to demonstrate that he is likely to succeed on the merits of his claim. Accordingly, Plaintiff's request for a preliminary injunction is improper under the "traditional" test.

B. Plaintiff's Claims Fail Under The Alternative Test

2. Even If Serious Questions Are Raised,⁴ the Balance of Hardships Does Not Tip Sharply in Favor of Plaintiff

The Court first notes that Universal will suffer significant economic harm if it is forced to withhold the release of one of its motion pictures. (Decl. Egan). Moreover, the public itself is harmed whenever the government uses its power to silence the media. The marketplace of ideas loses vibrancy whenever the shadow of government censorship is cast over it.

Plaintiff argues that the balance of hardships tips heavily in his favor. Plaintiff contends that if "Alpha Dog" is released he will suffer severe harm because the jury pool will be "infected." (Pl. Mot. at 19). The Court is unpersuaded for a number of reasons.

To accept Plaintiff's argument, the Court must assume that the release of "Alpha Dog" will make it impossible to find twelve people who are untainted. *Hunt*, 872 F.2d at 293-94. Given the relatively large pool of jurors in Santa Barbara County, the Court is certain 12 untainted jurors can be found.⁵ Moreover, courts have consistently rejected the notion that publicity by itself is enough to taint a jury pool. Procedural safeguards such as voir dire afford a criminal court the means to ensure that the jury is not prejudiced by pretrial media coverage. See *Nebraska*, 427 U.S. at 565 ("[P]retrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial."); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1054 (1991) (noting that "[e]mpirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict on the evidence presented in court.").

³Plaintiff also argues that this case is different because here, the prosecutor was directly involved in the creation of the film. While this fact may be novel, the Court considers it irrelevant to the issues at hand. Mr. Zonen may or may not face legal consequences for his actions. But the origin of the material does not affect the Court's First Amendment analysis.

⁴The Court need not address this aspect of the test since Plaintiff's claims clearly fail to show that the balance of hardships tips sharply in his favor.

⁵The California Department of Finance, based upon the 2000 census, estimated the population of Santa Barbara at 407,900. The Court takes judicial notice of this fact.

Finally, any hardship the Plaintiff may suffer from the threat of a biased jury pool can not be reasonably attributed solely, or even primarily, to the film. There has already been substantial media coverage of the Markowitz murder and Hollywood's flight from justice.⁶ As the California Court of Appeal noted, plaintiff was featured on nine separate episodes of the national television program, "America's Most Wanted." *Hollywood v. Superior Court*, 143 Cal. App. 4th 858, 863 n.3 (2006). Unlike other media coverage, "Alpha Dog" does not name or otherwise identify Hollywood (or anyone else), it is far from clear whether and to what extent the film may prejudice even those members of the public who see it. Although the film includes an acknowledgment of prosecutor, Zonen, in its closing credits, he is not feature prominently or even identified as a prosecutor. His name appears in the middle of a list of dozens of individuals and entities who are "thanked" for their assistance. (Decl. Egan, Ex. Q).

Against this backdrop, the Court finds that the balance of hardships does not tip sharply in favor of Plaintiff. A preliminary injunction is not proper under the "alternative" test.

V. CONCLUSION

Accordingly, for the reasons stated above, the Court denies Plaintiff's Motion for Preliminary Injunction.

IT IS SO ORDERED.

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⁶See, e.g., Decl. Sager, Ex. T,U.