

Breaking the Sham Barrier in Yeager v. Bowlin

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Two recent Ninth Circuit Court of Appeals decisions in *Yeager v. Bowlin*, Nos. 10-15297 and 10-16503 (9th Cir. Sept. 10, 2012), a Lanham Act and right-of-publicity dispute between legendary test pilot Gen. Charles Yeager and purveyors of aviation memorabilia incorporating Yeager's name and/or likeness, highlight several important issues relevant to false-advertising and related litigation.

The Circuit Court affirmed the District Court's summary judgment of all of Yeager's claims, primarily for untimeliness. It appears that the defendant persuaded the District Court to dispose of the case on statute of limitations grounds, and Yeager failed to preserve this issue for appeal by omitting to argue at the District Court level that the Lanham Act has no statute of limitations. The Ninth Circuit therefore affirmed without resolving whether a statute of limitations applies to the Lanham Act. In other circuits, it is generally accepted that the Lanham Act has no statutory limitations period, and untimeliness therefore is typically asserted by defendants in the form of a laches or equitable estoppel defense. In any event, the Ninth Circuit affirmed the untimeliness ruling where the plaintiff sued in January 2008 over content published on a web site in October 2003.

For purposes of determining the elapsed time, the court considered the application of the "single publication" rule to a typical web site that is updated piecemeal. "The single-publication rule limits tort claims premised on mass communications to a single cause of action that accrues upon the first publication of the communication, thereby sparing the courts from litigation of stale claims when an offending book or magazine is resold years later," the court explained, quoting *Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1166-67 (9th Cir. 2011). Yeager contended that the defendants' web site was republished in its entirety whenever any part of it was updated, but the court held that the specific part of the web site that was the basis of the was "not republished unless the statement itself [was] substantively altered or added to, or the website [was] directed to a new audience." This is a ruling of obvious relevance to any advertiser seeking to establish the date when the courts will deem specific advertising claims on its web site to have been published for purposes of the timeliness of litigation challenges.

Yeager's counsel argued that the single-publication rule does not apply to equitable actions such as its California Unfair Competition Law and False Advertising Law claims, but this argument also was found to be waived by failure to make it before the District Court.

In the course of ruling, the court had disregarded a declaration submitted by Yeager in support of his opposition as a "sham affidavit." Under this rule, an affidavit can be ruled a sham where it clearly contradicts the affiant's deposition testimony. The wrinkle in this case was that the deposition testimony of Yeager, apparently the classic "forgetful" witness, consisted almost entirely of "I don't recall." Counsel for Yeager argued that newly remembered facts in a later affidavit don't contradict earlier failures to recall. But the court ruled that where the witness claimed no recall of difficult-to-forget events such as being involved in court proceedings or plane crashes, only to recall them in great detail in a declaration three months later with no convincing explanation for the forgetting or

recollection, the disparity between the oral and written testimony can rise to the level of clear contradiction.

Of course, the court really was punishing the plaintiff for what it considered a sham deposition rather than a sham affidavit. Every litigator has experienced the frustration of having a deposition witness seemingly develop amnesia as to everything except his or her own name, and in many situations, not much can be done about this phenomenon. But when that witness has significant evidentiary water to carry, obstructive deposition tactics can be perilous if blatant enough.

Click to view the court's [published opinion](#), addressing the sham affidavit and single publication rulings, and its [unpublished memorandum](#), discussing the untimeliness ruling.