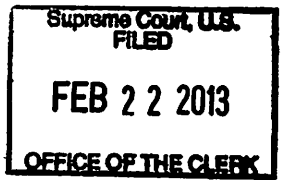


12-1047



No. 12-A694

In the
Supreme Court of the United States

CHARLES E. YEAGER, aka Chuck,
GENERAL CHUCK YEAGER
FOUNDATION,

Petitioners,

v.

CONNIE BOWLIN; ED BOWLIN; AVIATION AUTOGRAPHS,
a non-incorporated Georgia business entity; BOWLIN &
ASSOCIATES,

Respondents.

**On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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February 22, 2013

QUESTION PRESENTED

1. Does California's single-publication rule govern the accrual of a Lanham Act claim arising from a web-based merchant's refusal to remove a celebrity's unauthorized endorsement from the merchant's website?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, General Charles E. Yeager and the General Chuck Yeager Foundation (collectively “General Yeager”), respectfully petition the Court for a writ of certiorari to review a Memorandum opinion issued by the United States Court of Appeals for the Ninth Circuit affirming the grant of summary judgment in favor of Respondents (collectively “the Bowlins”) on a claim arising under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

STATEMENT OF JURISDICTION

This Court’s jurisdiction rests on 28 U.S.C. § 1254(1). On October 25, 2012, the Ninth Circuit denied rehearing of the challenged order. App. D. This Court extended the time for filing this petition to February 22, 2013.

DECISIONS BELOW

The Ninth Circuit Court of Appeals issued an Opinion on September 10, 2012, affirming the entry of summary judgment in favor of Respondents on claims brought under California law. That Opinion is published at 693 F.3d 1076 and reproduced in the appendix attached hereto (“App.”) at App. 1. On the same day, the Ninth Circuit issued an unpublished Memorandum opinion, in which it affirmed the district court’s disposition of a claim brought under the Lanham Act. That opinion is available at 2012 WL 3900671 and reproduced at App. 15.

The underlying Memorandum and Order of the United States District Court for the Eastern District of California is also unpublished, but it is available on Westlaw at 2010 WL 95242 and is reproduced at App. 22.

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

Title 15 United States Code, Section 1125(a)

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

...

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such an act.

STATEMENT OF THE CASE

General Yeager is a towering figure in American aviation. He served as a decorated pilot in the Air Force during World War II and Vietnam and flew the first aircraft in history to break the sound barrier. His exploits provided inspiration for Tom Wolfe's bestselling novel, *The Right Stuff*, and an eponymous film. Over the years, General

Yeager has carefully cultivated his name and image, using it sparingly in well-known and longstanding marketing endorsements for AC Delco car batteries and Rolex watches.

The Bowlins are retired Delta Airlines pilots who market and sell aviation memorabilia through their website, www.aviationautographs.com. Beginning in 2000, the Bowlins began selling Yeager memorabilia on their website through a series of arrangements with General Yeager. General Yeager initially gave the Bowlins limited permission to use his name.

However, according to General Yeager, his relationship with the Bowlins deteriorated when he became concerned that the Bowlins were retaining profits for themselves instead of devoting proceeds to charity, as they had previously agreed. General Yeager rescinded his permission to use his name, image and likeness on August 16, 2005, when his attorney sent the Bowlins a cease and desist letter demanding that they discontinue their unauthorized and unlawful use of General Yeager's name, image and likeness on their website. The Bowlins refused to comply.

On January 14, 2008, General Yeager filed suit in the United States District Court for the Eastern District of California, invoking its diversity and federal question jurisdiction. In his amended pleadings, General Yeager alleged, *inter alia*, that the Bowlins violated the Lanham Act by using Yeager's name, likeness, identity or feats without his authorization to market memorabilia on their website.

Specifically, General Yeager complained that the website contained a claim that the Bowlins were "best of friends" with General Yeager and sold items from Yeager's

“personal collection.” General Yeager also cited a photograph that purportedly showed Yeager “inspecting” merchandise. According to General Yeager, such representations, and others on the website, falsely implied that: (1) he had an affiliation, connection or association with the Bowlins; (2) he endorsed their products; and (3) he guaranteed or vouched for the veracity and authenticity of their merchandise.

General Yeager maintained that the Bowlins continued to use his name, image and likeness on their website well after he rescinded his permission. General Yeager also alleged that the Bowlins continued to use his name in their website’s “metadata,” which is hidden information that internet search engines use to locate and prioritize websites in response to inquiries by search engine users.

On November 16, 2009, the Bowlins moved for summary judgment on all claims. The Bowlins argued the statute of limitations barred the Lanham Act claim. The Bowlins invoked California’s single-publication rule, under which:

No person shall have more than one cause of action for damages for . . . invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture

CAL. CIV. CODE § 3425.3. According to the Bowlins, the federal claim accrued in 2000, when the challenged content

first appeared on their website.

General Yeager disputed the applicability of the single-publication rule. He argued the rule should not apply to the ongoing infringement at issue because “each sale of a piece of memorabilia without General Yeager’s permission to use his trademark and name or likeness” constitutes a “separate act of infringement.” Relatedly, General Yeager contended that the single-publication rule should not apply because the Bowlins “republished” the communications at issue when they edited other portions of their website while leaving intact the unauthorized content. In addition, General Yeager distinguished the Bowlins’ website, which served solely to facilitate the sale of merchandise, from websites that served only to publish and disseminate information to the general public.

The district court granted summary judgment in favor of the Bowlins, holding that all claims were barred by the statute of limitations. With respect to the Lanham Act claim, the district court noted the “statute of limitations . . . is less certain since the Lanham Act does not contain its own statute of limitations provision.”

Nevertheless, the district court looked to the statutes of limitations under California law and held that either the two-year statute applicable to state-law right to privacy claims or the three-year statute applicable to state-law fraud claims applied to the Lanham Act claim. The court then held that the federal claim was time-barred because, under California’s single-publication rule, the claim accrued when the Bowlins first distributed the unauthorized content to the public, which, according to the court, occurred no later than October 2003, when the Bowlins last edited the portion of the website pertaining to General Yeager.

General Yeager appealed this decision to the Ninth Circuit Court of Appeals. On appeal, General Yeager challenged the accrual calculation employed by the district court, again maintaining that the unauthorized content was republished when the Bowlins revised other portions of the website, regardless of whether the unauthorized content remained unchanged. General Yeager also maintained that the causes of action could not have accrued prior to the cease and desist letter sent in 2005 because General Yeager had originally authorized the use of his name, image, and likeness. Thus, the initial publication was not tortious and could not possibly trigger the accrual of his claims. Additionally, he disputed the applicability of the state-law single-publication rule to the federal cause of action.

The Ninth Circuit Court of Appeals rejected these arguments in companion opinions, both issued on September 10, 2012. The Ninth Circuit addressed the republication argument in its published Opinion. The court invoked California's "single integrated publication" test, under which a "printed publication is republished when it is reprinted in something that is not part of the same 'single integrated publication.'" App. 10. (quoting *Christoff v. Nestle USA, Inc.*, 213 P.3d 132, 137 (Cal. 2009)). The Ninth Circuit observed that application of the single integrated publication test to non-traditional publications can be "tricky" and noted that California courts have not squarely addressed whether substantive modifications to authorized content on a website constitutes republication of the unauthorized content. App. 10-11.

Notwithstanding the uncertainty surrounding this body of law, the Ninth Circuit held that "under California law, a statement on a website is not republished unless the

statement itself is substantively altered or added to, or the website is directed to a new audience.” App. 11. Based on this holding, the Ninth Circuit affirmed the district court’s determination that the statute of limitations had run on the state-law right to privacy and right to publicity claims. App. 14.

In the unpublished Memorandum opinion, the Ninth Circuit separately addressed the arguments concerning the Lanham Act claim and two other claims arising under California law. App. 17. With respect to the Lanham Act claim, the court first recognized that it has not “resolved whether a statute of limitations defense applies to claims under the Lanham Act, which are of ‘equitable character.’” App. 17 (quoting *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 836 (9th Cir. 2002)). The court declined to rule on the argument that the California single-publication rule should not apply to a federal Lanham Act claim because General Yeager did not raise that claim in opposition to summary judgment. App. 17. Nevertheless, the Ninth Circuit affirmed summary judgment on the Lanham Act claim, stating, if “the statute of limitations defense applies to a claim under the Lanham Act, the single-publication rule would apply to it.” App. 17-18.

This timely petition followed.

REASONS FOR GRANTING THE WRIT

General Yeager asks this Court to resolve a question of paramount importance: whether California’s single-publication rule governs the accrual of a Lanham Act claim arising from a web-based merchant’s refusal to remove a celebrity’s unauthorized endorsement from the merchant’s website.

Here, General Yeager requested that the Bowlins cease using his name, image and likeness on their website. The Bowlins declined to do so, and instead retained portions of the unauthorized content on their website. In so doing, the Bowlins continued to profit from an unauthorized endorsement by General Yeager.

Rather than applying the equitable doctrine of laches, a framework favored by most courts and one better suited to claims brought under 15 U.S.C. § 1125(a), the district court and the Ninth Circuit rigidly applied California's statutes of limitations. Additionally, in determining when the claim accrued, the courts applied a *state* single-publication rule to this *federal* cause of action.

General Yeager submits that the application of the single-publication rule, a doctrine designed to meet challenges associated with print media, makes little sense in the context of false endorsement claims stemming from marketing material displayed on a merchant's website. For the reasons set forth below, this Court should grant this petition and review the decisions below.

I. THIS COURT SHOULD RESOLVE A CONFLICT REGARDING THE APPLICABILITY OF STATE-LAW STATUTES OF LIMITATIONS TO LANHAM ACT CLAIMS.

As noted by the Ninth Circuit in its Memorandum opinion below, it is unclear whether claims brought under the Lanham Act are subject to state-law statutes of limitations. App. 17. Ordinarily, when Congress does not expressly provide a statute of limitations, courts generally presume the

most closely analogous state-law statute of limitations applies. *See, e.g., Reed v. United Transp. Union*, 488 U.S. 319, 324 (1989).

That presumption may be overcome, however, if “a rule from elsewhere in federal law clearly provides a closer analogy than available state law statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.” *Id.* Claims for monetary relief under the Lanham Act are “subject to the principles of equity,” 15 U.S.C. § 1117(a), and a number of courts have found that the equitable defense of laches provides the more appropriate framework. *See, e.g., Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187, 191 (2d Cir. 1996) (applying laches analysis, as informed by analogous state-law statute of limitations, instead of state-law statutory limitations); *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813 (7th Cir. 1999) (rejecting state statute of limitations analysis in favor of laches analysis).

In contrast, other appellate courts have adhered to the general rule and applied state-law statutes of limitations. *See, e.g., PBM Products, LLC v. Mead Johnson & Co.*, 639 F.3d 111, 121 (4th Cir. 2011) (“it is proper to use the analogous state limitations period for Lanham Act suits because the Act provides no express statute of limitations”). The Ninth Circuit has recognized the uncertainty regarding the applicability of state statutes of limitations, but has declined to resolve the question. *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 836 (9th Cir. 2002) (recognizing uncertainty regarding the applicability of state statutes of limitations but declining to resolve the question).

This uncertainty has led to uneven results. *See* Christopher Bucklin, *Trademarking “Jeet Kune Do”*, 40

SANTA CLARA L. REV. 511, 526 (2000) (collecting cases and noting that “[L]aches defenses have been rejected for delays ranging from four months to thirteen years. Conversely, other cases found laches defenses valid for delays ranging from three to sixty-nine years.”); 4 CALLMAN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 23:31 n.9 (4th Ed.) (surveying cases where district courts applied state statutes of limitations ranging from one year to six years).

The greater weight of scholarly opinion supports the view that laches is the more appropriate analytical framework, with analogous state limitations providing benchmarks regarding the timeliness of a claim. *See, e.g.* CALLMAN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 23:31 n.9 (4th Ed.) (stating laches provides “better rule”); Malla Pollack, *Suing for False Advertising Under Federal Lanham Act*, 111 AM. JUR. TRIALS 303 (“The better rule . . . is to use the analogous state limitations period to set presumptions regarding laches. If the claim is filed within the analogous state statute of limitations, the defendant has the burden of persuading the court that laches [applies]”); *see also* David C. Stimson, *Statute of Limitations in Trademark Actions*, 71 TRADEMARK REP. 605, 611-14 (1981) (statute of limitations defense likely inapplicable because § 43(a) claims are equitable in nature); 6 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31:33 (4th ed.) (noting that, in Lanham Act cases, most federal courts will use the closest state statute of limitations to establish a guide or presumption as to whether the delay is sufficient to establish the defense of estoppel by laches). General Yeager adopts this reasoning and submits that the lower tribunals should have conducted a laches analysis, rather than rigidly applying California’s statutes of limitations.

This Court should take this opportunity to clarify

whether Lanham Act claims are subject to the equitable defense of laches or to analogous state-law statutes of limitations.

II. THIS COURT SHOULD ADDRESS THE PROPRIETY OF EMPLOYING A STATE-LAW SINGLE-PUBLICATION RULE TO DETERMINE WHEN A FEDERAL LANHAM ACT CLAIM ACCRUES.

In addition, the Court should address the propriety of employing state-law single-publication rules to determine when a federal Lanham Act claim accrues. While there is a dearth of authority on the applicability of single-publication rules to Lanham Act claims, federal appellate courts have applied single-publication rules to determine the accrual of state-law tort claims. *See, e.g., Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 142 (5th Cir. 2007) (applying Texas single-publication rule to resolve state-law libel claim); *Van Buskirk v. The New York Times Co.*, 325 F.3d 87, 89 (2d Cir. 2003) (similar). The Ninth Circuit has extended the applicability of the single-publication rule to federal causes of action. *Oja v. U.S. Army Corps of Engineers*, 440 F.3d 1122, 1129 (9th Cir. 2006) (applying single-publication rule as set forth in Restatement (Second) of Torts § 577A(3) (1977) to federal claim brought under the Privacy Act of 1974, 5 U.S.C. § 552(a)).

In this case, however, unlike *Oja*, the Ninth Circuit affirmed the application of *state* single-publication rule to determine when a *federal* cause of action accrues. In this respect, the holding of this case conflicts with the reasoning of *Wallace v. Kato*, 549 U.S. 384 (2007), where this Court held that the “accrual date of a § 1983 cause of action is a

question of federal law that is *not* resolved by reference to state law.” *Id.* at 388 (emphasis in original). By granting certiorari in this case, the Court could clarify how, if at all, the Ninth Circuit’s rule cases can be reconciled with the rule for § 1983 cases, as set forth in *Wallace v. Kato*.

III. THIS COURT SHOULD DISAPPROVE THE APPLICATION OF THE SINGLE-PUBLICATION RULE TO BAR LANHAM ACT CLAIMS ARISING FROM THE CONTINUING USE OF MARKETING CONTENT ON A MERCHANT’S WEBSITE.

This Court should grant this petition to provide guidance regarding the applicability of the single-publication rule to website operators, whose marketing content gives rise to false endorsement claims under the Lanham Act. A number of federal appellate courts have held that the single-publication rule applies to online publications. *See, e.g., Van Buskirk*, 325 F.3d at 89 (applying single-publication rule to internet publication of letter on website for non-profit veterans organization); *Oja*, 440 F.3d at 1129 (applying single-publication rule to an internet publication on an Army Corps of Engineers public affairs website); *Belo Corp.*, 512 F.3d at 142 (applying single-publication rule to an internet publication of column which was simultaneously published in print edition of newspaper). The overwhelming majority of these cases arise in the context of libel or defamation claims. *See id.*

In those contexts, there is a strong policy justification for the application of the single-publication rule: to “protect defendants from harassment through multiple suits and to reduce the drain of libel cases on judicial resources.” *Oja*,

440 F.3d at 1131 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777 (1984)). Without the single-publication rule, the “endless retriggering of statute of limitations” would inevitably have a “serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise.” *Oja*, 440 F.3d at 1131-32 (quoting *Firth v. State*, 98 N.Y.2d 365, 747 N.Y.S.2d 69, 775 N.E.2d 463 (2002)).

The policy concerns that animate such decisions are not present in Lanham Act claims. Claims under the Lanham Act necessarily entail commercial speech, which is not afforded the same protection as journalistic or expressive publication. See *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987). Here, the Bowlins did not publish the disputed content to disseminate information or ideas. They published it to sell merchandise. Thus, the disputed content in this case is more like a commercial billboard than a book. As such, liability for its publication under the Lanham Act poses a far less serious threat to the free flow of ideas than in cases stemming from the publication of expressive or journalistic content on the internet.

Likewise, the concern regarding the endless retriggering of statutes of limitations is absent here. The facts of this case present a continuing wrong, one which the statute of limitations would not ordinarily bar, except as to damages flowing from a period outside of the statute of limitations. See *Lyons Partnership, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 797 (4th Cir. 2001) (“[T]he statute of limitations does not shield the defendant from liability for wrongful acts actually committed during the limitations period, and ... [this] rationale applies equally to trademark infringement claims brought under the Lanham Act.”); 6 MCCARTHY ON

TRADEMARKS AND UNFAIR COMPETITION § 31:33 (4th ed.)
("Usually, infringement is a continuing wrong, and a statute of limitations is no bar except as to damages beyond the statutory period.")

Under the rule advocated by General Yeager, each sale of goods made through the use of an unauthorized endorsement is actionable, notwithstanding that the applicable statute of limitations may have run on claims stemming from the initial publication. However, once the disputed content is removed from the website, the statute of limitations would begin to run on all claims. Thus, there is no danger of an endless retriggering of the statute of limitations, unless the defendant renews the conduct that violates the Lanham Act.

Moreover, broad application of the single-publication rule to Lanham Act claims carries its own policy concerns. For instance, a website operator could theoretically publish a celebrity's false endorsement on a website that does not permit search engines such as Google to list the website in search results. *See generally Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1113 (D. Nev. 2006) (describing manner in which website operators can disallow Google access to "crawl" their webpage). In this way, the website operator has "published" the content on the internet for the general public to see, thereby triggering the statute of limitations under the single-publication rule, regardless of whether the celebrity has discovered the false endorsement.

Then, after the applicable period, the web-based merchant could use the false endorsement in perpetuity without any fear of legal reprisal on the part of the celebrity. This countervailing policy concern outweighs the concerns that the single-publication rule was meant to address.

Accordingly, this Court should seize this opportunity to declare the inapplicability of the single-publication rule to false endorsement claims brought against web-based merchants for false endorsements on their websites.

CONCLUSION

For the reasons described herein, the Petitioners respectfully request that this Court grant their petition for a writ of certiorari, and review the proceedings below.

Respectfully submitted on this 22nd day of February, 2013.

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