An Overlooked First Amendment Milestone: The Copyright Fight Over the Rodney King Beating Video

By Steven Perry and Jordan Segall[1]

Shortly after midnight on March 3, 1991, a plumber named George Holliday was jolted awake in his Los Angeles apartment by multiple police sirens and the roar of a hovering helicopter. Holliday grabbed his new Sony Camcorder, stepped out on his balcony and began to record the beating of Rodney King. While most of us can readily visualize the searing images on that videotape even today, far fewer would recall that the tape's widespread broadcast led to a copyright infringement suit by George Holliday against CNN, NBC, CBS, ABC and others. And even fewer would be aware that the lawsuit itself was a landmark event, for the federal judge who presided over the case became the first judge in U.S. history to rule explicitly that the First Amendment provides an independent defense to a copyright claim – regardless of whether the challenged use was "fair" under the Copyright Act.

Judge Irving Hill's 1993 opinion is little known because it was issued from the bench over the course of a two-day hearing and was never published – until 2016, on the 25th anniversary of the King beating. *See Holliday v. CNN, et al.*, 1993 WL 13953406 (C.D. Cal. June 10, 1993); *Holliday v. CNN, et al.*, 1993 WL 13953407 (C.D. Cal. June 11, 1993); *Holliday v. CNN, et al.*, 1993 U.S. Dist. LEXIS 21123 (C.D. Cal. 1993). Readers of Judge Hill's opinion will see that the social and legal issues that Hill addressed in 1993 remain with us today. *See, e.g., Holliday*, 1993 WL 13953406 (Tr., p. 110) (describing the tape as capturing "what has been a consistent civic, moral and governmental problem for decades: the alleged mistreatment of minorities in our urban areas by the police.").

This article: (1) describes the chronology of events provided by Judge Hill at the summary judgment stage; (2) recaps the Court's opinion granting summary judgment for the defendants; (3) discusses Holliday's appeal to the Ninth Circuit and the parties' eventual settlement; and (4) explores whether Judge Hill's analysis is less, or more, relevant today than it was 25 years ago.

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The Chronology[2]

March 3, 1991 (12:30 a.m.)

George Holliday creates a 9 minute, 21 second videotape of a violent confrontation between Rodney King and officers from the Los Angeles Police Department and the California Highway Patrol.

March 3, 1991 (2:00 a.m.)

Holliday calls CNN in an unsuccessful effort to contact someone with CNN's "Newshound" program, under which amateur photographers were paid for videotape footage.

March 4, 1991 (noon)

Holliday calls local television station KTLA and tells an assignment manager that he has a videotape of an arrest that had happened over the weekend. The KTLA employee asks Holliday to bring the tape to the station so that it could be copied. There is no discussion of payment.

March 4, 1991 (1:00 p.m.)

Holliday drops off the original tape at KTLA. There is no discussion of payment.

March 4, 1991 (6:00 p.m.)

A KTLA reporter tapes an interview with Holliday at his apartment. There is no discussion of payment.

[2] All times are Pacific (and are approximate). The dates and events are taken from *Holliday*, 1993 WL 13953406 (Tr., pp. 36-59) and from the parties' summary judgment submissions.

March 4, 1991 (10:00 p.m.)

KTLA airs about 90 seconds of the tape on its 10:00 p.m. newscast.

March 4, 1991 (10:00 p.m.)

KTLA (which had an arrangement with CNN under which CNN could use footage aired on KTLA) contacts CNN just prior to the initial newscast and describes the beating footage. CNN reviews the KTLA story and asks for, and receives, a "clean feed" of the entire videotape.

March 4, 1991 (10:30 p.m.)

CNN calls Holliday and asks permission to show the tape; Holliday says yes. CNN says it will send a release form and a check for $150. Holliday later testifies that he thought the payment only covered a one-time airing. He never signs the release form and never cashes the check.

March 5, 1991 (6:15 a.m.)

Representatives of ABC and CBS separately call Holliday at his home and ask for a copy of the videotape. Holliday tells them that they need to obtain a copy from KTLA. There is no discussion of payment. Holliday later testifies that he has no memory of these conversations.

March 5, 1991 (9:00 a.m.)

Holliday visits KTLA and asks for the tape because he has been receiving calls from other media outlets. KTLA keeps the tape but offers Holliday $500 for exclusive rights to the tape. Holliday subsequently cashes the check, but then testifies that he had only granted KTLA the right to possess the original tape, not to show it or allow others to show it.[3]

March 5, 1991 (morning)

NBC calls Holliday and asks if it can broadcast the beating tape. Holliday says yes, but tells NBC to get the tape from KTLA. NBC contacts KTLA, which refuses to provide the tape. NBC calls Holliday again and asks to purchase the rights to broadcast the tape for $500. Holliday says that he doesn't need the money, but he agrees that NBC can broadcast and duplicate the tape. NBC then begins to air the tape, using CNN footage taped off the air by an NBC affiliate in Phoenix. A few days later, Holliday cashes NBC's check for $500. Holliday subsequently testifies that he has no memory of the discussion that led him to receive the check from NBC.

March 8, 1991

KTLA tapes an "interview" of Holliday, not for broadcast purposes but to help establish KTLA's rights to broadcast (and, if it chooses, to allow others to broadcast) the beating videotape. Holliday

[3] Judge Hill found Holliday's testimony on this point to be "so bizarre as not to be worthy of belief." *Holliday*, 1993 WL 13953406 (Tr., p. 50).

agrees during the taped interview that KTLA has these rights, but he later testifies that he was suffering during the interview from "pressure and fear."

May 1991

Holliday hires a lawyer, who registers the videotape with the Copyright Office and sends out more than eight hundred cease-and-desist letters, most or all of which offer to license the videotape for an unspecified fee.

April/May 1992

One year later, Los Angeles erupts in six days of rioting after the acquittal on assault charges of four officers involved in the King beating. Fifty-five people die in the riots, which results in over $1 billion in property damage.[4]

May/June 1992

Holliday retains new counsel, who files a copyright infringement lawsuit against CNN, KTLA, ABC, CBS, NBC and Turner Broadcasting.

The Summary Judgment Motions

After the close of discovery, each defendant filed a motion for summary judgment that contended that: (1) Holliday had consented to the defendant's use of the videotape; (2) Holliday was estopped by his conduct from asserting a copyright claim against the defendant; (3) the defendant's use of the videotape was "fair" under the Copyright Act; and (4) regardless of whether summary judgment was appropriate under grounds (1)-(3), summary judgment was required because the First Amendment precluded any recovery for copyright infringement under the unusual circumstances presented by this case. The motions were supported in part by declarations from the defendants' employees who had spoken with Holliday about the videotape.

Holliday opposed each defendant's motion on a variety of grounds. He claimed, for example, that he had only granted KTLA a non-exclusive license to air the tape for a single evening, had not given permission to KTLA to duplicate the tape or to provide it to other media outlets, and had not licensed any other defendant's use of the tape. Holliday also contended that the defendants had not established fair use, noting that the fair use defense is an "equitable rule," not a "license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying material contains material of possible public importance." *See* Plaintiffs' Opposition to KTLA's Motion for Summary Judgment, filed April 2, 1993, at 9-11, *quoting Twin Peaks Productions, Inc. v.*

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[4] In what the Ninth Circuit would later refer to as "television synecdoche," the 1992 riots also led to a series of copyright suits involving the footage of the beating of truck driver Reginald Denny. *See Los Angeles News Service v. CBS Broadcasting, Inc.*, 305 F.3d 924, 929 (9th Cir. 2002) ("In this age of television news, it is frequently the image accompanying the story that leaves an event seared into the viewership's collective memory. The riots that shook Los Angeles in April 1992 are bookended by two such images: the footage of police officers beating motorist Rodney King, which led to the trial and verdict that sparked the rioting, and the footage of rioters beating truck driver Reginald Denny, which through television synecdoche has come to symbolize in a few moments the multiple days of violence that swept over the city.")

Publications Int'l, 778 F. Supp. 1247, 1250 (S.D.N.Y. 1991) (hereinafter *"Twin Peaks*") (internal citations omitted).

Holliday also argued (with some force) that the fair use question should be resolved at trial given that the defendants had used "the heart" of the beating videotape, over and over again. *Id*. at 11-12. Finally, Holliday responded to the defendants' First Amendment defense by arguing that: (1) there was a second videotape that defendants could have licensed; (2) the defendants could have reported on the beating by interviewing Holliday, his wife and his neighbors; and (3) as a matter of law, no separate First Amendment defense exists because "First Amendment concerns regarding use of copyrighted materials are subsumed within the fair use analysis." *Id*. at 14, *citing Twin Peaks*, 778 F. Supp. at 1252.[5] Holliday's opposition was supported by excerpts from depositions and interrogatories and by declarations from Holliday.

Judge Hill's Opinion

On June 10, 1993, Judge Hill delivered his tentative opinion from the bench from around 10:00 a.m. until approximately 3:30 p.m., with a break for lunch. Judge Hill began with a lengthy account of the relevant facts and then provided his tentative ruling that each defendant's motion should be granted on four separate grounds.

Judge Hill first found it to be undisputed that Holliday had consented to each defendant's use of the videotape. The evidence was especially strong with respect to KTLA, in light of Holliday's decision to cash two checks from the station and his admission during a taped interview that he had licensed his footage to KTLA. For many of the same reasons, Judge Hill further held that Holliday was estopped from asserting claims for copyright infringement against the defendants because Holliday had led them to believe they had permission to broadcast all or any part of the video. The court also held that no triable issue of fact was created by Holliday's testimony that he could not recall the conversations with the NBC, CBS, ABC or CNN representatives who had provided declarations recounting their discussions with Holliday.

Third, Judge Hill held that each defendant's use of the beating videotape was a "fair" use, after noting that the fair use provision in the Copyright Act identifies news reporting as one of its purposes, that the tape reflected a matter of significant public concern (the "subject of police treatment of minorities in America's cities"), and that Holliday, as an amateur photographer trying out a new camcorder, received "more than the customary price" for the rights he provided to KTLA and NBC.

Grounds (1) through (3) represented familiar territory in copyright cases. Near the end of day 1 of the hearing, Judge Hill tackled a rather more novel question: did the First Amendment independently preclude Holliday's copyright claim? Hill noted that both the Ninth Circuit and Nimmer's copyright

[5] The district court in *Twin Peaks* had held a defendant liable for copyright infringement that had published a blow-by-blow synopsis of the highly popular "Twin Peaks" television program. *Id*. On appeal, the Second Circuit affirmed many of the District Court's holdings, but it added an important gloss on the First Amendment issue. *See Twin Peaks Productions, Inc. v. Publications Int'l, Ltd.*, 996 F.2d 1366, 1378 (2d Cir. 1993) (observing that First Amendment concerns are encompassed within the fair use doctrine "except perhaps in an extraordinary case," such as, "perhaps," the Zapruder footage of the Kennedy assassination). The Second Circuit's opinion issued only a few days before the two-day hearing in *Holliday* on the motions for summary judgment and was not available to the parties or the Court.

treatise had suggested that when broad use of a visual work is "necessary to democratic discussion," the First Amendment requires that copyright protection give way to unfettered access. 1993 WL 13952964 (Tr., p. 16). Judge Hill acknowledged that a First Amendment defense to a Copyright Act claim should be confined to "vital" and "very exceptional" graphic works "where words cannot serve the democratic purposes." *Id.* Hill would place such a "severe" limit on the First Amendment defense because "the property interest involved in copyright protection is an important and precious one, and if you destroy it, you destroy certain incentives for artistic and news creation." *Id*. at 17.

Judge Hill relied primarily on two facts in explaining that the video of King's beating satisfied this high standard. First, like the Zapruder film of the Kennedy assassination, or Ronald Haeberle's photographs at My Lai, the searing images of the King beating offered the public a unique insight into a matter of extraordinary public importance. The Court explained that the Holliday tape had "dramatized in actual motion pictures, apparently for the first time in our history, what has been a consistent civic, moral and governmental problem for decades: the alleged mistreatment of minorities in our urban areas by the police." *Id.* Indeed, it appeared to Judge Hill that "in terms of national interest and democratic dialogue, the King beating tape may be as important or even more important" than the My Lai photographs. *Id*. Second, Holliday's videotape contained the only audible recording of the King beating. These factors made it "intolerable" for Holliday to have the power to block the tape's wide public dissemination. *Id.* Hill concluded by urging the Ninth Circuit to "separately consider" his First Amendment analysis on appeal, and he noted that his analysis presupposed that Holliday had not consented to the use of his video, was not estopped, and that fair use had not been established. *Id*.

Judge Hill resumed the hearing on June 11, 1993 and, after a lengthy argument, adopted his tentative ruling. That same day, Judge Hill issued a brief written order that granted the defendants' motions for summary judgment and that incorporated the two-day transcript by reference. *See* 1993 WL 13952864.

The Ninth Circuit Appeal and Ultimate Settlement

Holliday timely filed a Notice of Appeal to the Ninth Circuit. His opening brief on appeal, which contained a detailed description of the evidence, nevertheless failed to include more than a handful of record cites. His principal argument was that the evidence of oral license grants was "disputed and ambiguous" and should be presented to a jury. Holliday also contended that the representatives of NBC, CBS and ABC who had provided declarations about their conversations were employees of the local affiliates of those networks, who could and did negotiate solely on behalf of the affiliate, not the network.

Holliday also engaged in a full-blown attack on Judge Hill's First Amendment analysis. Holliday argued that: (1) he was "willing and ready to negotiate" a license and should have been able to receive "tremendous financial rewards" from such licenses; (2) the defendants had used the videotape footage for commercial purposes, not to further the democratic debate that Judge Hill had suggested; and (3) even under Nimmer's First Amendment analysis, Holliday should have received remuneration through a compulsory license arrangement.

Briefing on appeal was completed by January 1994. A few months later, the parties reached a global settlement. The terms were not confidential; they included the following:

- Each of the five defendants would deliver a check for $6,000 to plaintiff's counsel, made out to counsel's trust account;[6]

- In turn, Holliday released the defendants and all of their affiliates from any claims arising from their prior use of the video;

- Holliday granted a non-exclusive license to each of the defendants and to all of the past, present and future affiliates, licensees, sublicensees, transferees, etc. of each defendant, pursuant to which each of them was licensed "in perpetuity and throughout the universe" to copy, display and/or air the videotape, and to prepare derivative works of that tape, "in any media now known or hereafter invented," *and* to sublicense any or all of those rights to anyone.

Holliday's appeal was dismissed by order of the Ninth Circuit on June 9, 1994.

CONCLUSION

In January 1994, the New York Law Journal mused that Judge Hill's opinion "may have a greater impact on American law than the incendiary criminal trials which stemmed from the incident." Charles J. Sanders, From the Zapruder Film to the Rodney King Video: Twenty-five Years of Photography, Fair Use and the First Amendment, N.Y.L.J., Jan. 21, 1994 at p. 6. That didn't happen, in part because Judge Hill's order granting summary judgment simply relied on and incorporated by reference the 200+ page hearing transcript, and in part because that transcript was unpublished until 2016, when the authors of this article provided it to Westlaw and Lexis. As a consequence, the opinion was virtually unknown to the legions of commentators who have written about the interplay between the Copyright Act and the First Amendment, some of whom even mused in print about how Judge Hill should have ruled on a First Amendment defense if it had been presented to him.

But even if Judge Hill's opinion had been widely available to courts and scholars, it seems unlikely that the opinion would have itself been transformative, in light of the extraordinary technological transformations that have occurred over the past 25 years that Judge Hill could not have anticipated. Surveillance cameras dot our streets, the majority of Americans have a camera at the ready at all times, cops wear cameras, and their vehicles do too.[7] It is thus much less likely that an event of extraordinary national importance would be captured only in a single video, and it is much more likely that any such video would be widely shared on Twitter, SnapChat, Instagram and elsewhere in a matter of minutes. And in part because of the ubiquity of cameras, video footage of a black man being beaten, choked or shot by a police officer (whether justified or not) may have lost much of its power to shock our consciences. Nevertheless, Judge Hill's opinion deserves our attention and our recognition as an overlooked First Amendment milestone.

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[6] Holliday initialed that provision, and the settlement agreement, before a notary.

[7] *See generally* Jocelyn Simonson, *Beyond Body Cameras: Defending A Robust Right To Record The Police*, 104 Georgetown Law Journal (forthcoming 2016).