



## Supreme Court of Georgia

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## SUMMARIES OF OPINIONS

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### **IHEARTMEDIA, INC. V. SHERIDAN ET AL. (S17Q0345)**

The Supreme Court of Georgia has ruled that a company's popular streaming of music over the internet is legal under Georgia law.

In response to a question by the United States District Court for the Middle District of Georgia, **Justice Harold Melton** writes for the state's high court that the internet radio services offered by iHeart Radio are exempt from a Georgia statute that makes it illegal to transfer sound recordings without the owner's consent.

iHeartRadio, owned by iHeartMedia, Inc., a Delaware corporation, offers internet radio services in the form of customizable music "stations" that stream music over the internet to users based on their individual preferences. iHeart also owns hundreds of traditional AM and FM radio stations, sometimes referred to as "terrestrial stations," and streams their broadcasts online. iHeart offers its internet radio services on a variety of internet platforms, including computers, digital media devices, tablets and smartphones. Streaming music and other programming over the internet involves the transfer of a series of digital "packets" to the temporary random access memory of the listener's internet-connected device.

According to briefs filed in the case, in the 1950s and 1960s, Arthur Sheridan owned several recording companies that recorded and sold doo-wop, jazz, and rhythm and blues music. Today he owns several master sound recordings of the music that was made prior to 1972, including jazz, blues and doo-wop songs. Barbara Sheridan owns the pre-1972 master sound recording of "Golden Teardrops" by The Flamingos. Arthur and Barbara, who live in Illinois, also own the intellectual property and contract rights associated with the recordings.

iHeart has regularly streamed the Sheridans' pre-1972 recordings to Georgia customers, despite having no license, authority or consent from the Sheridans to do so. Furthermore, iHeart has never compensated the Sheridans for the use and transfer of their pre-1972 master recordings.

Federal law governs sound recordings made after 1972, while sound recordings made before 1972 are governed by state law. In 1972, Congress granted federal copyright protection to sound recordings but left the states free to continue regulating sound recordings made before the law went into effect. In Georgia, Georgia Code § 16-8-60 gives owners of master sound recordings the sole right to transfer the sounds of those recordings under the law entitled, "Criminal Reproduction and Sale of Recorded Material." Specifically, § 16-8-60 makes it illegal to transfer "any sounds or visual images recorded...onto any other...phonograph record, disc, wire, tape, videotape, film, or article without the consent of the person who owns the master phonograph record, master disc, master tape...." However, the statute includes an exemption that states that § 16-8-60 "shall not apply to any person who transfers or causes to be transferred any such sounds or visual images intended for or in connection with radio or television broadcast transmission or related uses."

At issue in this case is whether iHeart's internet radio services qualify as "radio broadcast transmission" or "related uses."

On Sept. 29, 2015, the Sheridans filed a one count class action lawsuit in the U.S. District Court for the Middle District of Georgia against iHeart, alleging violations of the Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act on behalf of themselves and others like them who owned pre-1972 master recordings. The Sheridans alleged that iHeart repeatedly violated Georgia Code § 16-8-60 in a form of racketeering by the ongoing transfer of songs without the consent of the owners of the master recordings. In response, iHeart filed a motion to dismiss the case, claiming the exemption applies to its streaming over the internet. Because the Georgia courts have not clearly ruled on the matter, the U.S. District Court certified this question to the state Supreme Court: "Whether the exemption to Georgia Code § 16-8-60, set forth in § 16-8-60 (c) (1), applies such that internet radio services are exempt from application of § 16-8-60." The federal court stayed resolution of the case pending the state Supreme Court's response.

In today's unanimous opinion, "we find that the type of internet radio services being offered by iHeartMedia, Inc. in this case do fall under the exemption set forth in § 16-8-60 (c) (1)."

"On its face, § 16-8-60 (c) (1) provides an exemption for *both* radio broadcast transmissions *and* related uses," the opinion says.

At the least, iHeartMedia's services qualify as a related use to a radio broadcast transmission because in reference to the user's experience, "iHeartRadio is nearly identical to terrestrial AM/FM radio," the opinion says. "For example, one of iHeartMedia's internet services, 'simulcast,' concurrently broadcasts the exact programming offered by its terrestrial radio stations over the internet. The only difference for the listener is that the music would be accessed through an internet-connected device such as a smartphone or computer, rather than a traditional radio receiver."

iHeart's services also qualify as a related use because "the nature of the streaming of sound recordings by iHeartRadio and the nature of the broadcast by terrestrial AM/FM radio are qualitatively the same," the opinion says. iHeartRadio digitally broadcasts a track to the listener

for a single use, then the track disappears from the listener's device, just as the recording on a radio is not stored for replaying.

"Therefore, because there is no significant difference in either the user experience or the nature of the broadcast of sound recordings between terrestrial AM/FM and internet transmissions of the type offered by iHeartMedia in this case, the latter is a related use of the former."

As a result, the exemption of § 16-8-60 applies to the type of internet radio services offered by iHeartMedia, the opinion concludes.

**Attorneys for Appellant (iHeart):** Gregory Garre, Jonathan Ellis, Daniel Griffin, Michael Kohler, James Lynch, Andrew Gass

**Attorneys for Appellees (Sheridans):** Matthew Galin, Joseph Durham, Jr.

### **OASIS GOODTIME EMPORIUM I, INC. ET AL. V. CITY OF DORAVILLE (S17A0421)**

Under an order today by the Supreme Court of Georgia, the City of Doraville has won a partial victory in its long-time dispute with a strip club.

Less than two weeks after attorneys for the Oasis Goodtime Emporium I argued its appeal of a pre-trial injunction that prohibits it from selling alcohol while the case is being litigated, a unanimous Supreme Court has upheld the **DeKalb County** court's ruling in a one-sentence order, with no opinion. Oasis had argued that it no longer operated as a "sexually oriented business" – or SOB – as it now regularly features "performances of serious artistic value," and therefore is in compliance with the City's alcohol code.

But under today's order, "The judgment of the court below is affirmed without opinion pursuant to Supreme Court Rule 59." "Rule 59 cases have no precedential value," that rule states.

According to briefs filed in this high-profile case, for nearly 25 years, the Oasis has operated as a restaurant featuring nude dancing and alcohol service on Peachtree Industrial Boulevard. Beginning in 1991, a number of adult entertainment businesses filed lawsuits against DeKalb County for enacting ordinances that prohibit providing both nudity and alcohol together. Eventually, a number of the establishments entered into an agreement with the County in which they dismissed their pending lawsuits in exchange for the right to continue operations. The establishments agreed to pay the County a graduated licensing fee, which eventually cost Oasis \$100,000 a year. In 2012, the Georgia Legislature adopted a bill that expanded the boundaries of the City of Doraville to include Oasis. In 2012, following a presentation on the negative secondary effects of sexually oriented businesses, the Doraville City Council adopted Ordinance No. 2012-18, the "Sexually Oriented Business Code." The ordinance requires sexually oriented businesses to be licensed by the City. Like the Brookhaven ordinance in the Pink Pony case, as well as the DeKalb County code, Doraville's ordinance allows semi-nude dancing (i.e. G-string and pasties) but prohibits full nudity and on-premises alcohol consumption. The Doraville Alcohol Code also contains provisions that prohibit and regulate adult nude entertainment at establishments that allow drinking. When Oasis applied for a Doraville alcohol license, the City denied it the license. In December 2012, Oasis challenged the constitutionality of Doraville's SOB and alcohol codes. The DeKalb Superior Court ruled against Oasis and in June 2015, the Georgia Supreme Court upheld the trial court's ruling, finding that, "The SOB code defines a 'sexually oriented business' to include an 'adult cabaret,' which in turn is defined as 'a nightclub, bar, juice bar, restaurant, bottle club, or similar commercial establishment that

regularly features live conduct characterized by semi-nudity...Under this definition, Oasis is a sexually oriented business.” Oasis now claims that shortly before the Supreme Court issued its 2015 ruling, it changed its entertainment format to comply with Doraville’s ordinances. According to Oasis’ lawyers, Oasis sought to become “a mainstream performance venue which regularly featured performances with serious literary, scientific, political or artistic value – a class of establishments which Doraville’s Code of Ordinances specifically exempts from the ban on alcohol and nudity.” Following the high court’s 2015 ruling, the City sent an investigator and undercover police officers who said they observed that Oasis was still operating as an adult cabaret and selling alcohol in violation of the City’s SOB code and alcohol code.

In December 2015, three years after Oasis had come under Doraville’s jurisdiction and six months after the state’s high court upheld the City’s SOB and alcohol codes, Doraville sued Oasis, seeking an “interlocutory” or pre-trial injunction against it, as well as a permanent injunction to prohibit Oasis from 1) operating in violation of the SOB code, and 2) selling alcohol without a Doraville alcohol license in violation of the alcohol code. In March 2016, the trial court entered an interlocutory injunction prohibiting Oasis from engaging in the conduct that violates the SOB and alcohol ordinances, finding that “uncontroverted evidence demonstrates that Oasis continues to be an adult cabaret as defined in the SOB code” and continues to sell alcohol without a Doraville alcohol license. Under Georgia Code § 9-5-1, an injunction may be issued if the party seeking it may prove one of four factors, which include: 1) whether there is a threat of irreparable harm if the injunction is not granted; 2) whether that threat outweighs the threatened harm to the other party if it is granted; 3) whether the party seeking the injunction has a substantial likelihood of winning its case in court; and 4) whether the injunction will not be a disservice to the public interest. In this case, the trial court ruled that Oasis’ ongoing violation of laws designed to protect the health, safety and welfare of the City was an irreparable harm, and that an injunction was the appropriate and preferable legal remedy for Oasis’ illegal acts. The court also ruled that the City had a substantial likelihood of succeeding in court on the merits, and that an interlocutory injunction would serve the public interest. Oasis then appealed to the Georgia Supreme Court, but with today’s order, this court has affirmed the pre-trial injunction.

**Attorneys for Appellants (Oasis):** Alan Begner, Eric Coffelt, G. Brian Spears, Linda Dunlavy  
**Attorneys for Appellee (Doraville):** Scott Bergthold, Bryan Dykes

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**IN OTHER CASES**, the Supreme Court of Georgia has upheld **murder** convictions and life prison sentences for:

- \* Ezwekwesiri Ngumezi (Fulton Co.)      **NGUMEZI V. THE STATE (S17A0417)**
- \* Timothy Demetrius Sapp (Camden Co.)      **SAPP V. THE STATE (S17A0478)**

**IN DISCIPLINARY MATTERS**, the Georgia Supreme Court has **disbarred** the following attorney:

- \* Keith Brian Harkleroad      **IN THE MATTER OF: KEITH BRIAN HARKLEROAD (S16Y1645)**

The Court has accepted a petition for voluntary discipline and ordered a **one-month suspension and Review Panel reprimand** of attorney:

\* Jon Gary Branan                    **IN THE MATTER OF: JON GARY BRANAN (S17Y0770)**

The Court has accepted a petition for voluntary discipline and ordered the **Review Panel reprimand** of attorney:

\* John Andrew Leslie                **IN THE MATTER OF: JOHN ANDREW LESLIE (S17Y0374)**

The Court has **rejected petitions for voluntary discipline** as insufficient discipline from attorneys:

\* Samuel Williams, Jr.                **IN THE MATTER OF: SAMUEL WILLIAMS, JR. (S17Y0897)**

\* Christopher J. Palazzola            **IN THE MATTER OF: CHRISTOPHER J. PALAZZOLA (S17Y1037)**

\* Emmanuel Lucas West              **IN THE MATTER OF: EMMANUEL LUCAS WEST (S17Y0657)**