

UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF MASSACHUSETTS

| | | |
|------------------------|---|-------------------|
| AMY TUTEUR, M.D., |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civil Action No.: |
| |) | |
| GINA CROSLEY-CORCORAN, |) | |
| |) | |
| Defendant. |) | |

COMPLAINT

1. This is a civil action seeking injunctive relief and damages for misrepresentation of copyright claims under the Digital Millennium Copyright Act (“DMCA”) and damages for tortious interference with contracts.

2. Plaintiff Amy Tuteur, M.D., publishes an online blog called “The Skeptical OB.” Dr. Amy drew the ire of another blogger, Defendant Gina Crosley-Corcoran, when she published an article in December 2012 that posed a series of critical, rhetorical questions directed to Crosley-Corcoran. Crosley-Corcoran responded by posting a story on her own blog, “The Feminist Breeder,” criticizing Dr. Amy’s online advocacy. Crosley-Corcoran’s blog post featured a picture of herself “giving the finger” to the camera lens. Crosley-Corcoran offered the photo as something Dr. Amy “can take back to [her] blog and obsess over”

3. In response to Crosley-Corcoran’s pointed criticism and offer to take the confrontational photo back to her blog, Dr. Amy published a commentary about Crosley-Corcoran on The Skeptical OB that incorporated Crosley-Corcoran’s photo. Crosley-Corcoran was apparently not content to participate further in the free (and freewheeling) exchange of ideas, so she commenced a campaign to silence Dr. Amy. Even though Dr. Amy’s use of the

photo was clearly a fair use for the purpose of commentary and criticism, Crosley-Corcoran escalated the controversy by issuing serial takedown notices compelling Dr. Amy's online service providers to remove the photo under the terms of the DMCA.

4. Crosley-Corcoran's heavy-handed tactics constitute an unlawful and misguided effort to manipulate copyright law in order to stifle lawful speech critical of her views.

5. Through this lawsuit, Dr. Amy seeks to halt Crosley-Corcoran's unlawful campaign of making false copyright claims and to obtain recovery for monetary losses she suffered as a result of Crosley-Corcoran's repeated misuse of DMCA takedown notices.

PARTIES

6. Plaintiff Amy Tuteur, M.D., is an individual who resides in Sharon, Massachusetts.

7. Upon information and belief, Defendant Gina Crosley-Corcoran is an individual who resides in Illinois.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this claim pursuant to the Copyright Act (17 U.S.C. §§ 101 et seq.), 28 U.S.C. §§ 1331 and 1338.

9. On information and belief, Defendant is subject to the specific jurisdiction of this Court.

10. Venue is proper in this district pursuant to 28 U.S.C. § 1391.

FACTUAL ALLEGATIONS

DR. AMY AND THE SKEPTICAL OB

11. Plaintiff Amy Tuteur, M.D. ("Dr. Amy") is an obstetrician gynecologist.

12. Dr. Amy received her undergraduate degree from Harvard College in 1979 and her medical degree from Boston University School of Medicine in 1984.

13. Dr. Tuteur is a former clinical instructor at Harvard Medical School.

14. In 1994, Dr. Amy's book, How Your Baby Is Born, an illustrated guide to pregnancy, labor and delivery, was published by Ziff-Davis Press.

15. Dr. Amy left the practice of medicine in 1995 to raise her four children.

16. In 2006, Dr. Amy started a blog known as "Homebirth Debate," and, in 2008, renamed her blog "The Skeptical OB," which is located at <http://www.skepticalob.com>.

17. Having seen thousands of births and the serious risks posed to both mother and baby, especially when such births are deliberately performed at home rather than a hospital, Dr. Amy writes for The Skeptical OB to "tell the truth about and expose the lies of self-proclaimed homebirth 'midwives', and to protect babies who don't have to die."

18. Questions about the merits of home births are a topic of broad public interest and the focus of extensive scholarship, debate, and press coverage. For example, an article titled "Mommy Wars: The Prequel," about the "battle for at-home births" appeared in the New York Times Magazine on May 23, 2012, and has so far received more than 700 comments on the New York Times website.

CROSLY-CORCORAN AND THE FEMINIST BREEDER

19. Defendant Gina Crosley-Corcoran is a former semi-professional rock band member turned "childbirth educator," doula, and self-styled birth "activist."

20. Upon information and belief, Crosley-Corcoran began her "childbirth educator," doula, and self-styled birth "activist" roles in or around 2010.

21. Crosley-Corcoran currently advocates through a blog known as “The Feminist Breeder,” located at <http://www.thefeministbreeder.com>.

THE DEBATE OVER HOME BIRTHS

22. Both Dr. Amy and Crosley-Corcoran have engaged in spirited public debate about the dangers of home birth.

23. On December 6, 2012, Dr. Amy posted “Questions for The Feminist Breeder,” at <http://www.skepticalob.com/2012/12/questions-for-the-feminist-breeder.html>. A copy of the December 6, 2012, post is attached hereto as Exhibit A. (All blog posts attached to this Complaint omit accompanying public comments.)

24. Dr. Amy’s December 6, 2012, post focused on Crosley-Corcoran’s acknowledgement in a December 5, 2012, blog post that her perspective on maternity care, providers, settings, and safety had become less radical after experiencing twenty births as a doula. Specifically, Dr. Amy’s post discussed Crosley-Corcoran’s admission in the context of her relatively limited experience, and suggested that were she to have the vastly greater experience that a practicing obstetrician-gynecologists typically has, Crosley-Corcoran might further develop a greater appreciation for the true risks attendant in home births.

25. On December 13, 2012, Crosley-Corcoran responded with a post titled “This One’s For You, ‘Dr.’ Amy,” located at <http://thefeministbreeder.com/this-ones-for-you-amy>. A copy of the post is attached hereto as Exhibit B. Crosley-Corcoran’s post was a vitriolic rant, leveling *ad hominem* attacks about and directed to Dr. Amy. Near the end of the post, Crosley-Corcoran stated, “I don’t want to leave you without *something you can take back to your blog* and obsess over, so here’s a picture of me, sitting at my dining room table” (Emphasis

added.) The referenced picture (shown here) is a color photograph in the post that features Crosley-Corcoran smirking and displaying her raised middle finger (the “Finger Photograph”):



26. On December 14, 2012, Dr. Amy did precisely what Crosley-Corcoran invited her to do: Dr. Amy posted the Finger Photograph on her own blog and included it, together with links back to both Dr. Amy’s “Questions for The Feminist Breeder” post and to Crosley-Corcoran’s “This One’s For You, ‘Dr.’ Amy” post, in a post titled “Pounding the table,” located at <http://www.skepticalob.com/2012/12/pounding-the-table.html>. A copy of the December 14, 2012 post is attached hereto as Exhibit C.

27. In her “Pounding the table” post, Dr. Amy commented on the Finger Photograph as follows:

Lawyers say:

“If you have the facts, pound the facts. If you have the law, pound the law. If you have neither the facts nor the law, pound the table.”

I guess the obstetrical equivalent would be:

“If you have the experience, pound the experience. If you have the scientific evidence, pound the evidence. If you have neither the experience nor the scientific evidence, pound the table.”

Here’s an outstanding example of table pounding:

[Finger Photograph displayed in original post]

This One’s For You, “Dr.” Amy

I guess she was hoping that no one would notice that she was afraid to answer the questions.

28. On December 16, 2012, Crosley-Corcoran responded with a post titled “And ‘Dr.’ Amy Now Owes me \$750 (or \$30,000, her choice.)” located at <http://thefeministbreeder.com/and-dr-amy-now-owes-me-750-or-30000-her-choice/>. In that post, Crosley-Corcoran included a letter that her lawyer was going to, and subsequently did, send to Dr. Amy.

29. Despite having urged Dr. Amy to post the Finger Photograph, Crosley-Corcoran nevertheless stated as follows in her “And ‘Dr.’ Amy Now Owes me \$750 (or \$30,000, her choice.)” post:

Think twice before stealing things off people’s blogs. In case you’re wondering, that is a VERY serious offense. And since I KNOW she reads this, she can’t act like she didn’t get the letter! Considering that she’ll have to pay my attorney [sic] fees if she ignores the notice, I can’t wait to see how this will play out. Her host has also been contacted, and by law, they must remove the content.

30. Crosley-Corcoran’s post was subsequently revised to remove the her lawyer’s letter “on advice of new counsel.”

CROSLY-CORCORAN’S EFFORTS TO SILENCE
DR. AMY’S CRITICISM AND COMMENTARY

31. On December 16, 2012, Crosley-Corcoran’s attorney, Kim Bilbrey, sent a cease and desist letter (the “Cease and Desist Letter”) via email to Dr. Amy. A copy of the Cease and Desist Letter is attached hereto as Exhibit D.

32. In the Cease and Desist Letter, Attorney Bilbrey demanded, among other things, that Dr. Amy remove the Finger Photograph and pay Crosley-Corcoran “\$750 minimum for this single incident.” The Cease and Desist Letter also threatened legal action and damages up to \$30,000 if Dr. Amy failed to capitulate.

33. Later on December 16, Dr. Amy responded through her husband, an attorney, in a letter explaining that Dr. Amy's use of the Finger Photograph was expressly authorized by Crosley-Corcoran, and, in any event, was a fair use under 17 U.S.C. § 107. A copy of that letter is attached hereto as Exhibit E.

CROSLEY-CORCORAN'S FIRST TAKEDOWN NOTICE

34. On December 17, 2012, Dr. Amy received an email from The Skeptical OB's web hosting service, Bluehost.com, that it had received a notice of alleged infringement from Crosley-Corcoran (the "First Takedown Notice"). A copy of the First Takedown Notice (along with Bluehost.com's cover email) is attached hereto as Exhibit F.

35. The First Takedown Notice purported to be issued in accordance with, and tracked the language of, the Digital Millennium Copyright Act, 17 U.S.C. § 512(c).

36. On information and belief, Bluehost.com treated the First Takedown Notice as a request for takedown pursuant to Section 512(c)(3) of the DMCA.

37. In its December 17, 2012, cover email to Dr. Amy, Bluehost.com notified her that "Failure to eliminate or disable access to such alleged infringing material within [48 hours] could result in suspension or termination of your website."

38. In light of the threatened termination of her website, Dr. Amy temporarily removed the Finger Photograph from The Skeptical OB.

39. On December 22, 2012, Dr. Amy submitted a so-called "counter notice" to Bluehost.com, formally rebutting Crosley-Corcoran's claim of copyright infringement. A copy of Dr. Amy's counter notice is attached hereto as Exhibit G.

40. Thereafter, Dr. Amy reinserted a cropped version of the Finger Photograph into her "Pounding the table" post.

41. On or about December 30, 2012, Dr. Amy's husband and Crosley-Corcoran's new attorney, Ms. Jake Marcus, had a telephone conversation concerning the conflict between Crosley-Corcoran and Dr. Amy. During their phone call, Attorney Marcus said that Crosley-Corcoran would be willing to settle her dispute if (a) Dr. Amy permanently removed the Finger Photograph from The Skeptical OB; and (b) both parties would agree to never to discuss the other party in a blog post.

42. On or about January 10, 2013, Dr. Amy's husband and Attorney Marcus had another telephone conversation. During that phone call, Dr. Amy's husband informed Attorney Marcus that Dr. Amy was not willing to settle on Crosley-Corcoran's terms. Attorney Marcus said words to the effect that Dr. Amy's decision was regrettable, because Crosley-Corcoran would then "unleash her vitriol." Notably, during this phone call, Dr. Marcus conceded that it was obvious that Crosley-Corcoran had no copyright claim against Dr. Amy, and that, as a result, Attorney Marcus would not be pursuing any such claim on Crosley-Corcoran's behalf.

43. On or about January 18, 2013, Dr. Amy entered into an agreement with a new web hosting service, DaringHost, and then moved The Skeptical OB to DaringHost.

44. On January 18, 2013, Crosley-Corcoran published a post titled "On Negotiating with Terrorist Amy," located at <http://thefeministbreeder.com/on-negotiating-with-terrorist-amy/>. A copy of Crosley-Corcoran's January 18, 2013, post is attached hereto as Exhibit H. In that post, Crosley-Corcoran acknowledged that her intention is to silence Dr. Amy's criticism using the threat of copyright claims as follows:

She could owe me statutory damages, but because I'm a fair and reasonable human being, my attorney and I felt it was best to discuss a **non-monetary** settlement with Amy and her lawyer. I'm not looking to be greedy – I simply wanted a resolution. In exchange for me not pursuing the damages, we wanted Amy to agree to stop personally attacking me. **It was that simple.**

For any reasonable person, this settlement would have been a no-brainer. I was paying her an undeserved kindness by offering her the chance to simply stop badgering me in exchange for the great deal of money that a judge could make her pay me for trying to profit from my copyrighted work.

(Emphasis in original.)

45. Crosley-Corcoran concluded her January 18, 2013, post with two calls to action to her readers. First, Crosley-Corcoran asked her readers to contribute to her legal fund to “help fund the fight” against Dr. Amy, and Second, Crosley-Corcoran solicited her readers to report instances when they suspected that Dr. Amy used their copyrighted work, concluding that “I, or one of my representatives, may be contacting” readers who submit such reports.

CROSLY-CORCORAN’S SECOND TAKEDOWN NOTICE

46. On January 21, 2013, Dr. Amy received an email from DaringHost that it had received a notice of alleged infringement from Crosley-Corcoran (the “Second Takedown Notice”). A copy of the Second Takedown Notice (along with DaringHost’s cover email) is attached hereto as Exhibit I.

47. The Second Takedown Notice purports to be issued in accordance with, and tracked the language of, the Digital Millennium Copyright Act, 17 U.S.C. § 512(c).

48. On information and belief, DaringHost treated the Second Takedown Notice as a request for takedown pursuant to Section 512(c)(3) of the DMCA.

49. In response to the Second Takedown Notice, Dr. Amy submitted a formal counter-notice to DaringHost rebutting Crosley-Corcoran’s renewed claim of copyright infringement.

50. In DaringHost’s cover email to Dr. Amy, DaringHost asked Dr. Amy to remove the Finger Photograph from The Skeptical OB “to avoid service interruption.”

51. In an effort to avoid further interruption of public access to The Skeptical OB, Dr. Amy again removed the Finger Photograph from her website.

CROSLEY-CORCORAN'S "PLAN"

52. In addition to The Feminist Breeder blog, Crosley-Corcoran maintains a publicly-accessible Facebook page for The Feminist Breeder.

53. Posts by Crosley-Corcoran on The Feminist Breeder's Facebook page reveal that Crosley-Corcoran has, upon information and belief, been working on a plan to interfere with Dr. Amy's relationship with her website host.

54. On January 21, 2013, Crosley-Corcoran posted the following on The Feminist Breeder's Facebook page:

Bowing to pressure, "Dr." Amy moved her website to a different server yesterday. :)

55. On January 22, 2013, Crosley-Corcoran posted the following on The Feminist Breeder's Facebook page:

So much loving goodness is coming out if this latest "Dramy" fiasco, I cannot WAIT to tell you all about it. Let me just say: a home run for us feminist breeders. Thanks for your continued support and patience **while I move things into place.**

(Emphasis added.)

56. Later on January 22, 2013, Crosley-Corcoran posted the following on The Feminist Breeder's Facebook page:

She's trying her hardest to spend all the money people have donated to the legal fund. **Oh man, her brain is going to EXPLODE when she sees what I'm up to.**

(Emphasis added.)

57. The Skeptical OB has since suffered periodic outages.

58. On January 23, 2013, Crosley-Corcoran posted the following on The Feminist Breeder's Facebook page:

For those of you who asked for these updates... (for those of you who don't want them, ignore.) Account Suspended as of 3 pm CST.

59. Later on January 23, Crosley-Corcoran posted the following on her Facebook account concerning The Skeptical OB's disruption of service:

I wish I could take all the credit here, but this was WAY WAY WAY more than me. When will a certain person learn that no host in their right mind is going to keep her hateful content on their servers? They're not stupid.

60. Later that same day, Crosley-Corcoran again posted on her Facebook account concerning The Skeptical OB's disruption of service. Specifically, Crosley-Corcoran posted the following:

I'm prepared for the site to be back up in another 5 minutes, BUT, if she keeps on doing what she's doing, this will keep happening.

61. On January 24, 2013, Dr. Amy received notice from her website host, DaringHost, that DaringHost would no longer host The Skeptical OB. Upon information and belief, DaringHost's decision was based on the DMCA notices sent by Crosley-Corcoran and Crosley-Corcoran's planned interference with Dr. Amy's relationship with DaringHost.

62. On information and belief, Crosley-Corcoran sent the DMCA notices and has engaged in her plan that would cause Dr. Amy's "brain to explode" based not on the particular characteristics of Dr. Amy's use of the Finger Photograph in The Skeptical OB, or any good faith belief that Dr. Amy actually infringed a copyright, but on Crosley-Corcoran's misguided belief that the issuance of DMCA takedown notices is an appropriate method to silence one of her critics.

COUNT I

(17 U.S.C. § 512(f) Misrepresentation)

63. Dr. Amy repeats and incorporates herein by reference the allegations in the preceding paragraphs of this complaint.

64. Dr. Amy's use of the Finger Photograph in The Skeptical OB does not infringe any copyright owned or administered by Defendant Crosley-Corcoran.

65. As a threshold matter, there is no infringement because Dr. Amy only posted the Finger Photograph after Defendant Crosley-Corcoran publicly and expressly granted Dr. Amy permission to do the same.

66. In addition, Dr. Amy's use of the Finger Photograph is a self-evident non-infringing fair use under 17 U.S.C. § 107. This is in part because Dr. Amy used the Finger Photograph in The Skeptical OB for purposes of criticism and commentary on important health and social issues, and her use does not substitute for the work or harm any market for the work.

67. On information and belief, Defendant Crosley-Corcoran had actual subjective knowledge of The Skeptical OB's treatment of the Finger Photograph and that it did not infringe any copyrights on the dates Defendant Crosley-Corcoran sent Bluehost.com and DaringHost the takedown notices regarding the Finger Photograph. With this actual subjective knowledge, Defendant Crosley-Corcoran acted in bad faith when she sent the takedown notices, knowingly and materially misrepresenting that she had concluded that The Skeptical OB was infringing. In this regard, Defendant Crosley-Corcoran's public expressions of support on Facebook and elsewhere for The Skeptical OB's recent service disruptions reveal her lack of *bona fides* as well as her true intentions with respect to The Skeptical OB.

68. In the alternative, Defendant Crosley-Corcoran should have known, if she had acted with reasonable care or diligence, or would have no substantial doubt had she been acting in good faith, that Dr. Amy's use of the Finger Photograph did not infringe any of Defendant Crosley-Corcoran's copyrights on the dates she sent her takedown notices under the DMCA. In this regard, whether or not Defendant Crosley-Corcoran personally has a sophisticated understanding of copyright law, she has been represented by at least two attorneys during the period when she issued the DMCA takedown notices and, therefore, should have known that Dr. Amy's use of the Finger Photograph did not infringe any copyrights.

69. Defendant Crosley-Corcoran violated 17 U.S.C. § 512(f) by knowingly materially misrepresenting that Dr. Amy's use of the Finger Photograph in the Article infringed Defendant Crosley-Corcoran's copyright.

70. As a direct and proximate result of Defendant Crosley-Corcoran's actions, Dr. Amy has been injured substantially and irreparably. Such injury includes, but is not limited to, the financial and personal expenses associated with responding to the claim of infringement and harm to her free speech rights under the First Amendment.

COUNT II

(Tortious Interference With Contracts)

71. Dr. Amy repeats and incorporates herein by reference the allegations in the preceding paragraphs of this complaint.

72. Dr. Amy has contracts with Bluehost.com and DaringHost for the provision of web hosting services.

73. Defendant Crosley-Corcoran intentionally interfered with Dr. Amy's contracts with Bluehost.com and DaringHost by using bad faith tactics: Defendant Crosley-Corcoran

issued bogus takedown notices to Bluehost.com and DaringHost that were designed to (1) cause Bluehost.com and DaringHost to terminate, interrupt, or otherwise limit public access to The Skeptical OB by misrepresenting that Dr. Amy's use of the Finger Photograph violated her copyrights; (2) encourage Bluehost.com and DaringHost to terminate their contracts with Dr. Amy; and (3) otherwise interfere with Dr. Amy's ability to publish The Skeptical OB.

74. Defendant Crosley-Corcoran is aware of Dr. Amy's contracts with Bluehost.com and DaringHost. Indeed, she admits knowledge of Dr. Amy's relationship with Bluehost.com in her January 18, 2013, post titled "On Negotiating with Terrorist Amy."

75. Defendant Crosley-Corcoran's takedown notices disrupted Dr. Amy's contractual relations with Bluehost.com, causing Bluehost.com to make immediate demands to Dr. Amy, and to threaten interruption of The Skeptical OB's service.

76. Defendant Crosley-Corcoran's takedown notices disrupted Dr. Amy's contractual relations with DaringHost, causing DaringHost to make immediate demands to Dr. Amy, to threaten interruption of The Skeptical OB's service, and ultimately to inform Dr. Amy that it was terminating its hosting services for The Skeptical OB.

77. Defendant Crosley-Corcoran's improper takedown notices have interjected an element of uncertainty in Dr. Amy's ability to maintain continuous public availability of The Skeptical OB.

78. Defendant Crosley-Corcoran is acting with improper motive and/or improper means in causing harm to Dr. Amy and preventing her exercise of contractual rights.

79. Dr. Amy has suffered and will continue to suffer substantial damages as a result of Defendant Crosley-Corcoran's intentional interference with her contractual relationships with, *inter alia*, Bluehost.com and DaringHost.

PRAYERS FOR RELIEF

WHEREFORE, the Plaintiff prays for judgment as follows:

A. Injunctive relief restraining Defendant Crosley-Corcoran, her agents, servants, employees, successors and assigns, and all others in concert and privity with Defendant Crosley-Corcoran, from bringing any lawsuit or threat against Plaintiff Amy Tuteur, M.D., for copyright infringement in connection with the Finger Photograph;

B. Enter judgment for Plaintiff Amy Tuteur, M.D., on the Complaint, and award damages to Plaintiff Amy Tuteur, M.D., in an amount to be determined at trial, together with interest and costs;

C. Award attorneys' fees to Plaintiff Amy Tuteur, M.D., pursuant to 17 U.S.C. § 512(f), other portions of the Copyright Act, or otherwise as allowed by law; and

D. Grant such other and further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff Amy Tuteur, M.D., hereby demands a trial by jury on all claims and issues so triable.

Respectfully submitted,

/s/ Russell Beck

/s/ Stephen D. Riden

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