

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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SMALL JUSTICE LLC,	)
RICHARD A. GOREN,	)
and,	)
CHRISTIAN DUPONT dba	)
ARABIANIGHTS-BOSTON	)
MASSACHUSETTS	)
	)
Plaintiffs,	)
	) CIVIL ACTION NO. 1:13-cv-11701-DJC
v.	)
	)
XCENTRIC VENTURES LLC,	) PURSUANT TO LEAVE GRANTED 10-15-13
Defendant.	)
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**PLAINTIFFS’ COMBINED MEMORANDUM IN OPPOSITION TO DEFENDANT’S  
MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFFS’ MOTION FOR  
PARTIAL JUDGMENT ON THE PLEADINGS**

Plaintiffs file this combined memorandum: (i) in opposition to defendant’s September 16, 2013 motion to dismiss and, (ii) in support of plaintiffs’ motion for partial judgment on the pleadings.

**I. INTRODUCTION AND SUMMARY.**

There are two separate, and radically different, causes of actions pleaded in the First Amended Complaint (“FAC”) for which the three plaintiffs seek separate relief under five different theories. The author Christian DuPont (the “Author”) and his assignee Small Justice LLC (“Author’s Assignee”) sue Xcentric LLC, the owner and operator of the Ripoff Report (“Xcentric”), for copyright infringement seeking declaratory relief and damages. Richard A. Goren (“Goren”) sues Xcentric seeking damages and equitable relief for past and continuing injury to his reputation as a lawyer from Xcentric’s repeated publication under color of Xcentric’s claimed ownership of copyright of the Author’s *per se* libel of Goren.

***The Copyright claims.*** In early 2012 the Author penned two essentially identical works constituting *per se* libel of Goren. These works were initially published on the Ripoff Report website under color of Xcentric's claimed ownership of copyright pursuant to a "Work Made for Hire" contract between Xcentric and the Author. The Author and the Author's Assignee contend that: (i) there is no writing signed by the Author whereby he transferred ownership of his copyright in these works for consideration; (ii) Xcentric neither engaged the Author to write either of the two works as an employee nor commissioned either work pursuant to a written instrument signed by both the Author and Xcentric; and (iii) XCENTRIC's March 7, 2012 registration of copyright ownership must be declared invalid. The Author's Assignee seeks statutory damages and injunctive relief.

Xcentric moves to dismiss the Author and his assignee's copyright cause of action, implicitly contending that as a matter of law it must prevail on its affirmative defense that the copyright rights in the Author's two works were transferred to it. Ignoring the more than plausible allegations that Xcentric cannot prove a contract signed by the Author pursuant to which he transferred all his ownership rights in the two works, defendant's motion simply does not address the FAC.<sup>1</sup> Instead, Xcentric contends that as matter of law there is no plausible basis under the FAC for plaintiffs to prove what is completely immaterial, namely, if the Author were not a party, whether the Author's Assignee standing alone has standing to sue for copyright infringement.

Instead, on plaintiffs' cross motion for partial summary judgment the Court must hold that Xcentric cannot meet its burden of production to demonstrate a trial worthy issue, sufficient to overcome the Author's presumptive ownership, of a writing signed by the Author whereby for

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<sup>1</sup> The caption of the case in defendant's motion is that of the superseded, and now void, Complaint in which the Author was not a party.

consideration he transferred ownership of his copyright. Standing alone, the fact that the purported contract by which Xcentric asserts ownership is not signed by Xcentric is decisive that it cannot constitute a Work Made for Hire contract. Even assuming *arguendo* that Xcentric comes forward with some evidence demonstrating a trial worthy issue that the Author effected a transfer of his copyright rights to Xcentric, because there was no Work Made for Hire contract the Court must hold Xcentric's March 2012 registration of ownership unenforceable.

Second, while the FAC alleges that the Author executed assignments that are valid and enforceable under 17 U.S.C. §201(d),<sup>2</sup> Xcentric incorrectly contends that the title of the Author's Assignee flows directly and solely from Goren's Massachusetts judgment against the Author. Third, on that false predicate Xcentric argues that this Court should collaterally attack the Massachusetts judgment and summarily hold that judgment to be an involuntary governmental seizure and hence not entitled to the full faith and credit clause of the Constitution.

***The Tort claims.*** Mischaracterizing Goren's explicitly stated theory of his case, Xcentric contends that as a matter of law it has satisfied its burden of proof on its affirmative defense of immunity. Not contesting the Rule 12 (b)(6) sufficiency of the allegations of libel, interference with advantageous relations, deceptive business practices, and the harm to Goren, Xcentric argues that because of its mere status as the owner and operator of an internet bulletin board it has been granted blanket immunity by Congress. (Paper 14, at 4<sup>3</sup>). That Xcentric is the owner and operator of an interactive website providing a 21<sup>st</sup> century message board on which third party authors may post their works standing alone is immaterial. Xcentric is sued "for its

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<sup>2</sup> The assignments by the Author to Goren and by Goren to Small Justice LLC appended to the Goren Affidavit include certificates of acknowledgement by a notary public. 17 U.S.C. §204. Hence the instrument of conveyance signed by the Author's attorney in fact, appointed by Order of the Massachusetts Superior Court, and duly acknowledged as the Author's free act and deed ... [are] "prima facie evidence of the execution of the transfer."

<sup>3</sup> According to XcentricXcentric, "to the extent these ... [three] claims arise from XcentricXcentric's 'publication' of the two [indisputably libelous works] about Mr. Goren, those claims are wholly barred by [section 230 (c)(1) of] the Communications Decency Act."

own speech” and hence Goren’s cause of action is not “inconsistent with” 47 U.S.C. § 230 (c)(1), (e)(3). See *Universal Communications Systems, Inc. v. Lycos*, 478 F. 3d 413, 415, 418 (1<sup>st</sup> Cir. 2007).

Just as a congressman “may not with impunity publish a libel ...in his home district ...[by reading aloud] the libel ...[originally published in an absolutely privileged] official committee report” (*Doe v. McMillan*, 412 U.S. 306, 314 (1973)), Xcentric may not, without legal responsibility, publish a libel on its Ripoff Report website under color of Xcentric’s claimed ownership of copyright.

Second and independent of the posting on the Ripoff Report website, Xcentric has authorized Google and other search engines to display on their servers copies of Xcentric’s copyrighted work. Rather than only directing an inquiring party to the original Ripoff Report website page, as instructed or permitted by Xcentric, Google periodically takes snapshots and makes copies of Xcentric’s copyrighted work and maintains on its servers so-called “cached” copies of the originally published libel. See generally *Field v. Google*, 412 F. Supp. 2d 1106 (D. Nev. 2006). Hence when a potential client or member of his community investigates Goren on Google and clicks on one or more of the cached copies of the libel, Xcentric thereby knowingly, intentionally and maliciously publishes—outside of the Ripoff Report website—information that the Massachusetts courts have adjudged to constitute *per se* libel. Even assuming the original publication on the Ripoff Report to be immune, the public purpose on which immunity under 47 U.S.C. § 230 (c)(1) is conditioned is not served by Xcentric’s causing, directing or enabling publication of copies on the servers of search engines.

## II. FACTUAL BACKGROUND.<sup>4</sup>

Goren practices law in Boston, Massachusetts. In late January and early February 2012 the Author, Christian DuPont dba Arabianights-Boston Massachusetts, wrote two works alleging that Goren routinely commits crimes in his practice of law, routinely defrauds both his clients and others, routinely commits perjury and has a history of violent crimes in his personal life. Each of the works is completely baseless and false. Each of the two works impairs Goren's reputation as a lawyer, discredits him in the minds of a considerable and respectable segment of the community and as a matter of law constitutes *per se* defamation.

Xcentric is the owner and/or operator of the Ripoff Report "an interactive website" which holds itself out as "an online consumer advocacy forum that allows users to post free complaints called 'reports' about companies and/or individuals who they feel have wronged them in some manner."

Seeking to publish his works on Xcentric's Ripoff Report the Author visited Xcentric's website. When he clicked on the screen to post a report, the Author was informed that creation of a "free account" was a condition precedent to publishing his work on the Ripoff Report. To create his free account, the Author was confronted with a screen on which he was directed to type in his real name and address, a "Display Name" or pseudonym if different from his/her real

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<sup>4</sup> While plaintiffs cross move for partial judgment on the pleadings, without converting Xcentric's motion into one for summary judgment, to decide defendant's motion the Court may look beyond the four corners of the FAC and also take "into account facts set out in ... documents the authenticity of which are not disputed by the parties[,] ... official public records[,]... documents central to Plaintiff[s'] claims, ... or documents sufficiently referred to in the complaint." *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir.1993); *Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 17 (1st Cir.1998) (When "a complaint's factual allegations are expressly linked to—and admittedly dependent upon—a document (the authenticity of which is not challenged), that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6)."). The court may also consider "matters susceptible to judicial notice," *Jorge v. Rumsfeld*, 404 F.3d 556, 559 (1st Cir.2005), including "documents submitted [that] are part of the public record ... without converting the motion to dismiss into a motion for summary judgment." *Santiago v. Bloise*, 741 F.Supp .2d 357, 361 (D.Mass.2010). See *Gargano v. Liberty Int'l Underwriters, Inc.*, 572 F. 3d 45, 51 n.1 (1<sup>st</sup> Cir. 2009)(pleadings in related state court action); *McGrath and Co. LLC v. PCM Consulting Inc.*, 2012 WL 503629, \*9 n.2 (D. Mass. 2012) (Casper, J.) (website pages attached to complaint). See also Affidavit of Richard A. Goren, filed herewith.

name, an email address, and telephone number. The Author registered his name, Christian DuPont, his address in Boston Massachusetts, the Display Name “Arabianights-Boston Massachusetts,” an email address, and telephone number. After creating his free account the Author was presented with a screen captioned “Submit your Report.” Beneath that caption on this screen shot appeared the words “Submit your Report,” and beneath that the caption “Terms and Conditions” which is above a box. In order to post his free report the Author was required to click on a box, alongside which were the words set forth on Exhibit A to the FAC. On the screen along the right hand margin of the box in which the Exhibit A words appeared, is a square figure with no markings or identification which if dragged down revealed additional words of the Ripoff Report Membership Terms & Conditions. The complete version, including both the revealed screenshot and the portion only revealed if the viewer found the unidentified scroll down button and then scrolled completely through, is set forth on Exhibit B to the FAC. It is not known if the Author read or saw the complete terms and conditions. What is known is that there was no requirement or direction to the Author to read Xcentric’s “Ripoff Report Membership Terms & Conditions,” that the Author checked the box to post his free report and then clicked on a button to “Continue.” The Author was then presented with a screen on which, after he inserted his work, the Author instructed Xcentric to publish it.

According to Xcentric, before an author “is allowed to post anything,” he must “affirmatively accept and agree to Xcentric’s Terms of Service {sic Conditions}” and authors “who do not agree to Xcentric’s Terms of Service are prohibited from” publishing anything. (Paper 14 at 13). These terms, to which upon information and belief were not agreed by the Author, included that: (i) the act of registering constituted a transfer to Xcentric of all the copyright rights of the work to be published, including specifically the exclusive right to copy

and further publish and/or display and to grant sublicenses to others; (ii) the Author warranted his title to the work; (iii) the Author agreed prospectively and broadly to indemnify Xcentric for costs, liabilities and expenses “relating to or arising out of” his “use of” the website and/or breach of the Agreement entered into by and between Xcentric and the Author; and, (iv) that Xcentric reserved the right to change the terms of the contract at any time without notice by posting a link to the changed terms on Xcentric’s website.

In the process of creating the Author’s Ripoff Report membership account, there was no action taken by Xcentric. Indeed, Xcentric contends the contract with the Author was formed directly by, and as a sole result of, the Author’s registration for a free account on its website. (Paper 14 at 12-13). Therefore according to Xcentric it is “the sole rightful owner” and “lawful registered owner of the works at issue.” (Paper 14 at 11).

It is not known if Xcentric and the Author had any other relationship or dealings concerning ownership of the two works other than those actions by which the Author effected his registration and the posting of his work.

On March 7, 2012, Xcentric filed a registration with the United States Copyright Office asserting ownership of the Author’s two works. According to its certificate of registration Xcentric’s ownership is derived from a contract of Work Made for Hire. The FAC alleges Xcentric neither engaged the Author to write either of the two works as an employee nor commissioned either work pursuant to a written instrument signed by both the Author and Xcentric.

Xcentric informed Google, Yahoo, Bing and other internet search engines that it is the exclusive owner of the copyright rights in the two works. Pursuant to generally accepted internet industry standard protocols, including without limitation its use of robots meta tag and so-called

serving directives, Xcentric has the option of precluding or instructing Google to include the two works in Google's index.

Google, like other search engines, uses an automated program ... to continuously crawl across the Internet, to locate and analyze available Web pages, and to catalog those Web pages into Google's searchable Web index. As part of this process, Google makes and analyzes a copy of each Web page that it finds, and stores the HTML code from those pages in a temporary repository called a cache. Once Google indexes and stores a Web page in the cache, it can include that page, as appropriate, in the search results it displays to users in response to their queries.

*Field v. Google*, 412 S. Supp. 2d 1106, 1110-1113 (D. Nev. 2006).

To protect its exclusive right to publish copies of its copyright works, Xcentric can instruct the search engines that "it does not want [their] robots to crawl the ... [Ripoff Report] Web site."

*Id.* Xcentric also has the option of precluding or permitting Google to make cached copies. *Id.*

Xcentric then has the option of requiring Google to direct a searcher to Xcentric's Web site rather than permitting Google to allow a searcher to access the cached copy on Google's servers.

*Id.*

Xcentric notified Google and the other search engines, among other reasons for purposes of 17 U.S.C. §512, that it is owner of the copyright rights to the works at issue, and that the search engine may make and maintain cached archival copies of the works for periods consistent with the so-called safe harbor provisions of 17 U.S.C. §512. Xcentric chose to enable Google and the other search engines to publish and/or display on their servers—rather than directing a searcher to the Ripoff Report web site—copies of the two works.

Xcentric's instructions to the search engines are designed to maximize the number of times each of the two works is listed on Google's index so as to maximize the number of hits or page views by search engine users. Pursuant to its claimed copyright ownership Xcentric has licensed Google and other search engines to publish and/or display on the search engine servers the

defamatory two works.<sup>5</sup> Because of its instructions to the search engines the two defamatory works are indexed separately by more than fifty different terms, words or descriptions. As a result when the potential client or other person interested in Goren as an attorney conducts a search and clicks on any one or more of the fifty different URL's so indexed, Xcentric thereby publishes or displays on its licensee's server either or both of the two works.

Xcentric published the two defamatory works as the author and owner of each work. But Xcentric falsely and/or deceptively advertised to Goren and other victims of Xcentric's other defamatory works that because it was not the "original author," it did not own the work and had no legal responsibility for causing the harm. Xcentric informs the world that under no circumstances will it remove works that have been adjudged defamatory. But as the owner of the copyright of the libel, Xcentric states that if Goren and any other defamed person would only pay Xcentric a fee, Xcentric will

make your search engine listings change from a negative to a positive ... [and] no matter how you search your name on search engines, it will all look as it should. Positive.

What Goren and other victims are not told is that as the owner of the copyright, Xcentric caused the libel to be published and republished extensively and repeatedly, and as copyright owner Xcentric can preclude Google and the other search engines from listing the Ripoff Report libel on the search engine index. Because search engines will not keep cached copies beyond a few weeks, Xcentric also can cut off all further publication of the copies it had authorized the search engines to make.

When notified by Goren of his lawsuit and proposed injunction against the Author, Xcentric informed Goren that the Author was solely responsible as the author of the defamatory

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<sup>5</sup> "The offering to distribute copies ... to a group of persons for purposes of further distribution, ... or public display, constitutes publication.... To 'display' a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process 17 U.S.C. § 101.

work and that it had no ownership of, or responsibility for, the work. The Massachusetts Superior Court entered a preliminary injunction enjoining the Author and “any other person or entity in active concert or participation” with the Author from continuing to publish or republish the initial defamatory work.

Upon being served with the injunction Google removed from its index at least one of URLs linked to the defamatory work. But Xcentric as the owner of the copyright instructed Google to continue taking snapshots of the work which it would not remove from its web site and to maintain and publish copies of the defamatory work on Google’s servers. In January 2013 Goren again notified Google of the presence of several more URLs, including upon information belief some of the same which Google had previously removed from its index. Again Google removed some, but not all, of the URLs from its index as Xcentric continued to instruct Google to maintain and publish the cached copies of the defamatory work.

In his state court action, Goren served the Author with notice of his intention to waive his damages claim upon entry of a judgment enjoining the publication and also requiring the Author to transfer his copyright ownership in the work to Goren or his nominee. While he had actual notice of Goren’s proposed action, the Author did not oppose the motion, the damage claims were voluntarily dismissed, and Judgment entered.

Goren served Xcentric with the Judgment and twice demanded that Xcentric remove from the Ripoff Report web site the initial defamatory work, but Xcentric refused. Xcentric informed Goren that the injunction could not be enforced against it because it was not liable for defamation published on its Ripoff Report by a third party information content provider.

Having actual knowledge of the Judgment, and unbeknownst to Goren and the Massachusetts Superior Court, under color of contractual privity with the

Author, Xcentric continued its standing instructions to Google. By mid July 2013 there were more than fifty different URLs listed on Google's index to the defamatory works. Pursuant to the license granted to it Google has continued to display and publish on its servers the defamatory works to potential clients and other persons in Goren's community inquiring about him as an attorney. While Google will honor requests to remove URLs linked to the defamatory works, it continues to adhere to Xcentric's instructions as copyright owner and continues to take snapshots of the two defamatory works on the Ripoff Report web site and to display and publish on its servers copies of the defamatory works to searchers who conduct a search for Richard Goren attorney.

Xcentric knowingly and intentionally continues to publish under color of its claimed copyright the defamatory works but continues to offer to Goren to "repair his reputation" if only he will pay it to do so.

On August 30, 2013, the Author's duly appointed attorney in fact executed a writing, duly acknowledged by a notary public, transferring to Goren all the Author's right, title and interest in and to both works; and, by a concurrent duly acknowledged written assignment Goren transferred to the Author's Assignee all the Author's right, title and interest in and to both works. On September 2, 2013 the Author's Assignee filed an application for Certificate of Copyright Ownership with respect to the two published work of the Author

### **III. ARGUMENT.**

#### **A. Motion to Dismiss Standards.**

A complaint need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests" and allege "a plausible entitlement to relief." *Decotits v.*

*Whittemore*, 635 F.3d 22, 29 (1st Cir. 2011) (quoting *Bell Atl. Corp . v. Twombly*, 550 U.S. 544,

555, 559 (2007)). “The Court accepts non-conclusory factual allegations in the complaint as true, . . . and “draw[s] all reasonable inferences in favor of the Plaintiff . . . .” *Sumner v. Mortg. E. R. S., Inc.*, 2012 WL 3059429 \*1 (D. Mass. 2012) (Casper, J.)<sup>6</sup>.

**B. The Copyright claims.** The parties dispute ownership of the Author’s two works. The FAC presents a justiciable cause for a declaration of rights as to the ownership of the copyright rights in the two works in question. The Author and his assignee Small Justice LLC allege there is no enforceable contract whereby he transferred ownership of his copyright rights in and to the two works to Xcentric. FAC ¶¶58-62. Xcentric contends that it “is the lawful registered owner of the works at issue.” (Paper 14 at 11). In support of this contention Xcentric filed its March 7, 2012 Registration of ownership of the two works. (Paper 14 at 13). According to this registration Xcentric’s claimed ownership is pursuant to a Work Made for Hire contract<sup>7</sup> which contract, according to Xcentric, is comprised in the Author’s registration for Ripoff Report membership. The Author’s Assignee has filed application for Certificate of Copyright Ownership of both works at issue. FAC ¶57. By their motion for partial judgment on the pleadings the plaintiffs contend that Xcentric cannot meet its burden of production to demonstrate a trial worthy issue on its claimed ownership of the Author’s work. The Author’s Assignee seeks statutory damages for copyright infringement.<sup>8</sup>

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<sup>6</sup> See also *Anderson News, LLC v. American Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 846 (2013) (a district court should not choose between two plausible inferences that may be drawn from factual allegations, dismissing a complaint “merely because [it] finds a different version more plausible”).

<sup>7</sup> A “Work Made for Hire” is--

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. . . .

<sup>8</sup>The elements of a claim of copyright infringement are simple. The plaintiff must show “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Pub. Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

***1. Standing; Subject matter jurisdiction.***

The Copyright Act provides that only the “legal or beneficial owner” of a copyright is entitled to sue when the copyright is infringed. 17 U.S.C. §501(b). By joining in this lawsuit the Author and his co-plaintiff assignee Small Justice LLC present a federal question under the Copyright Act even assuming *arguendo* some infirmity in the written assignment of title.

*Monroig v. RMM Records & Video Corp.*, 194 F.R.D. 388 (D. P.R. 2000); *Jim Henson Productions, Inc. v. John T. Brady & Assoc.*, 16 F. Supp. 2d 259, 284 (S.D.N.Y. 1997).

***2. Legal standards for determining ownership of copyright; burden of proof.***

We start with the fundamental principle that the Author is the presumptive owner. 17 U.S.C. §201 (a) “Initial Ownership” (“Copyright in a work ... vests initially in the author”).

Xcentric bears the burden of proof at trial on its affirmative defense that the copyright rights in the Author’s two works were transferred to it by the Author. *Jim Henson Productions, Inc. v. John T. Brady et al*, 16 F. Supp. 2d 259, 285 (S.D.N.Y. 1997). To meet this burden Xcentric must prove by a preponderance of the evidence “that the mutual intention of ...[the Author and Xcentric] was to effect an irrevocable transfer of ...[the Author’s] copyrights to [Xcentric].” *Id.* citing *Gaste v. Kaiserman*, 863 F.2d 1061, 1064 (2d Cir. 1988)

The purpose of U.S. copyright laws is to “promote” the production of creative works. U.S. Const., Art. I § 8, Cl. 8. It has long been recognized that in order to stimulate authorship and intellectual expression, authors must have the economic incentive of ownership rights. *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156, ... (1975). In enacting the 1976 Copyright Act, Congress strengthened protections for authors and created a legislative framework designed to prevent unintended divestments of their rights. The Act reaffirms the principle that the “author” is “the fundamental beneficiary of copyright under the Constitution.” H.R.Rep. No. 94–1476, 94th Cong.2d Sess. at 140 (1976) (“*House Rep.*”). Thus, under both the 1909 and 1976 Copyright Acts, unless the author has given up his or her rights under copyright in a clear and unequivocal manner, he or she retains these rights. *See Warner Bros. Pictures, Inc. v. Columbia Broadcasting System*, 216 F.2d 945, 949 (9th Cir.1954) (quoting *Philipp v. Jerome H. Remick & Co.*, 145 F.Supp. 756, 758 (S.D.N.Y.1956) (“The clearest language is

necessary to divest the author of the fruits of his labor.”)), cert. denied, 348 U.S. 971... (1955) ....

*Jim Henson Productions*, 16 F. Supp. 2d at 285. In considering Xcentric’s claim, the Court must bear in mind that Xcentric’s purported instrument of transfer

should be construed against the drafter [Xcentric]. ... Any ambiguities or doubts concerning the scope of rights assigned by ...[the Author] as [the] author[] of rights protected under copyright, pursuant to the ...[Author’s registration for membership in the Ripoff Report] must be construed in favor of the ...[Author].

*Id.*

17 U.S.C. §204(a) dictates that a contract for

[a] transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance ... is in writing and signed by the owner of the rights conveyed or such owner’s duly authorized agent.

The requirement of a signed writing of § 204(a) “ensures that the creator of a work will not give away his copyright inadvertently and forces a party who wants to use the copyrighted work to negotiate with the creator to determine precisely what rights are being transferred and at what price.” *Effects Assoc., Inc. v. Cohen* (“*Effects*”) 908 F.2d 555, 557 (9th Cir.1990). See *Metro. Reg’l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, 722 F.3d 591, 600 (4th Cir. 2013) (same). “No magic words must be included in a document to satisfy § 204(a). Rather, the parties’ intent as evidenced by the writing must demonstrate a transfer of the copyright.” *Vergara Hermosilla v. Coca-Cola Co.*, 10-21418-CIV, 2011 WL 744098 (S.D. Fla. Feb. 23, 2011) *aff’d sub nom. Hermosilla v. Coca-Cola Co.*, 446 F. App’x 201 (11th Cir. 2011).

According to Xcentric, proof that the Author clicked “yes” and “affirmatively accept[ed] and agree[d] to Xcentric’s Terms of Service” will satisfy the condition of a signed writing. (Paper 14 at 12).<sup>9</sup> To constitute the Author’s electronic signature, his action, whether clicking or

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<sup>9</sup> We note Xcentric’s purported contract does not bear any acknowledgement by a notary public and, unlike the Author’s assignment to the plaintiff assignees, does not constitute “prima facie evidence of the execution of the

checking a box must constitute an action or “process [that is] attached to or logically associated with a contract or other record and executed or adopted by ...[the Author] with the intent to sign the record.” 15 U.S.C. §7006 (5) “Electronic signature.”

***2. The manner in which copyright rights may be transferred and the interpretation of a contract purportedly transferring copyright rights are each a matter of substantive federal law; but the Court’s determination of whether the Author and Xcentric entered into a binding contract is a question of state law; under the forum state’s choice of law principles Massachusetts has the most significant relationship to the transaction and the parties.*<sup>10</sup>**

Xcentric’s conclusory assertion of an enforceable contract effecting a transfer of all of the Author’s copyright rights does not satisfy its burden of proof, much less constitute a basis for judgment as a matter of law from the face of the FAC.

The FAC at ¶¶ 8-11, 16, 27-31, and 60 more than plausibly puts at issue whether Xcentric is the “sole rightful owner of the work[s] at issue in this case” pursuant to a contract signed by the Author. (Paper 14 at 11).

Indeed, on plaintiffs’ cross motion the Court should grant partial judgment on the pleadings to plaintiffs and hold that Xcentric cannot meet its burden to demonstrate any trial worthy issue of an enforceable contract pursuant to which the Author in a clear and unequivocal manner intentionally effected a transfer of all his copyright rights in his work when he registered for a free membership in the Ripoff Report.<sup>11</sup>

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[claimed] transfer.” 17 U.S.C. §204(b). The September 2, 2013 duly acknowledged assignments to the Author’s Assignee are exhibits to the Goren affidavit.

<sup>10</sup> See *Specht v. Netscape Comm’n Corp.*, 150 F. Supp. 2d 585, 590 n. 7 (S.D.N.Y. 2001). See *St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP*, 233 F. Supp. 2d 171, 178-79 (D. Mass. 2002); *Romani v. Cramer, Inc.*, 992 F. Supp. 74, 77-78 (D. Mass. 1998).

<sup>11</sup> “Ordinarily the question of whether [in Massachusetts] a contract has been made is one of fact. If the evidence consists only of writings, or is uncontradicted, the question is for the court; otherwise it is for the jury.” *Ismert and Assoc., Inc. v. New England Mut. Life Ins. Co.*, 801 F. 2d 536, 541 (1<sup>st</sup> Cir. 1986).

Contrary to Xcentric's representation to this Court it presented no button or icon for the Author to click "yes" in order to indicate that he "affirmatively accept[ed] and agree[d] to Xcentric's Terms of Service." It is undisputed that when he visited the Ripoff Report website in order to post his work on the website the Author was invited to create a "free account" by registering his real name, a pseudonym if he chose, his email address and telephone number. Upon doing so the Author was then presented with a screen, FAC, Exhibit A, "Submit Your Report." The "Terms and Conditions" presented (Exhibit A) revealed only a portion of what Xcentric contends were the terms by which the Author assigned all his copyright rights to his work. There was no box for the Author to check or click "yes" and thereby specify his consent to be bound by anything other than:

By posting this report/rebuttal, I attest this report is valid. I am giving Rip-off Report irrevocable rights to post it on the website. I acknowledge that once I post my report, it will not be removed, even at my request. Of course, I can always update my report to reflect new developments by clicking on UPDATE. Further, I agree that by posting the report/rebuttal that the state of Arizona has exclusive jurisdiction over any disputes between me and the operators of Ripoff Report arising out of this posting or the report to which this posting relates.

After checking the box the Author was then directed to click on a button "Continue." The Author was then presented with a screen on which he submitted his work. He was not prevented from posting his work until he clicked on an icon stating his assent to a transfer of his copyright rights. There was no icon or text stating or alerting the Author to even look at anything else much less incorporate any other terms by reference.

Even assuming some evidence that the Author had in fact explored, located the unmarked scroll down button, and read more, he would have been invited to "[p]lease read the Agreement carefully before registering for ...[the Ripoff Report]." There was no condition but only a polite request. The next paragraph informs the viewer that "[t]he Terms [defined as the Agreement]

are subject to change by Xcentric, at any time, without notice, effective upon posting of a link to same on our website.”

This is not a case of a consumer who knowingly enters into a purchase and sale agreement, pays the price, gets the software or other goods and then complains about the terms of use embodied in a license included in the packaging. Those are so-called “browse-wrap agreements” where the user’s conduct shows implied consent the agreement’s terms.<sup>12</sup> No reasonable author would know or have reason to believe that in exchange for the free membership Xcentric expected to be compensated by all rights of ownership of the author’s work. The Author had no way of knowing that Xcentric expected to own all rights to his work. *Restatement (Second) of Contracts* § 19(2).<sup>13</sup> The obvious purpose in clicking on the “continue” button was to post the Author’s work.

“[R]egardless of the apparent manifestation of his consent, [by clicking on the “continue” button the Author] is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious. *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 993, 101 Cal. Rptr. 347 (Ct. App. 1972). See *Hunt v. Perkins Mach. Co.*, 352 Mass. 535, 539-40 (1967) (UCC).

*Specht v. Netscape Communications Corp.*, 150 F. Supp. 585 (S.D.N.Y. 2001) (California law) *aff’d*, 306 F.3d 17 (2d Cir. 2002), is squarely on point in what is called a “click-through

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<sup>12</sup> See “Browse-wrap Agreements: Strategies for Avoiding Disputes on the Validity of Assent,” 57 *Business Lawyer* 401 (Nov. 2001).

<sup>13</sup> “The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.”.... Illustration b: A person has reason to know a fact, present or future, if he has information from which a person of ordinary intelligence would infer that the fact in question does or will exist. A person of superior intelligence has reason to know a fact if he has information from which a person of his intelligence would draw the inference. There is also reason to know if the inference would be that there is such a substantial chance of the existence of the fact that, if exercising reasonable care with reference to the matter in question, the person would predicate his action upon the assumption of its possible existence.

agreement” case. A click through agreement contextually is where a party such as Xcentric sets up an electronic form agreement on its website. The other party, the website visitor, assents to contracting by clicking an icon or a button with words on it or assenting words alongside it or by typing in pre-selected words. In *Specht*, the District Court held that a consumer who accepted the benefit of free software was not bound by the terms and conditions of the software owner’s license agreement. In *Specht*, defendants’ website invited an Internet user to download free software from the website.

Visitors wishing to obtain ...[the free software] from ...[defendant]’s web site arrive at a page pertaining to the download of the software. On this page, there appears a tinted box, or button, labeled “Download.” By clicking on the box, a visitor initiates the download. The sole reference on this page to the License Agreement appears in text that is visible only if a visitor scrolls down through the page to the next screen. If a visitor does so, he or she sees the following invitation to review the License Agreement:

Please review and agree to the terms of the *Netscape SmartDownload software license agreement* before downloading and using the software.

Visitors are not required affirmatively to indicate their assent to the License Agreement, or even to view the license agreement, before proceeding with a download of the software.

150 F. Supp. 2d at 588. The primary purpose of the act which the defendant contended constituted an “unambiguous indication of assent,” was “to obtain a product, not to assent an agreement.” 150 F. Supp. 2d at 595. The District Court held that the failure of Netscape “to require users of ...[the software] to indicate assent to its license as a precondition to downloading and using its software is fatal to its argument that a contract has been formed.” *Id.* The district court noted that even if before downloading the user had scrolled down and seen the text “which the user need not see before obtaining the product,” a mere invitation as “please review and agree” before downloading “does not indicate that a user *must* agree to the license terms before downloading and using the software.” *Id.* at 595-96 (emphasis original).

The Second Circuit affirmed the District Court's decision and held that

a reasonably prudent Internet user ...[under the] circumstances would not have known or learned of the existence of the license terms before responding to defendants' invitation to download the free software, and that defendants therefore did not provide reasonable notice of the license terms. In consequence, plaintiffs' bare act of downloading the software did not unambiguously manifest assent to the arbitration provision contained in the license terms.

306 F. 3d at 20.

A reasonably prudent author would analogize the Ripoff Report's offer of a free membership as an invitation to post his work on a public bulletin board. Because the full text of paragraph 1 is not evident the Author is unaware he is entering into any formal legally binding agreement.

Furthermore there can be no acceptance of an offer the material terms of which are not disclosed. See *Goren v. Royal Investments Inc.*, 25 Mass. App. Ct. 137, 140-41, 516 N.E.2d 173, 175-76 (1987); see also *NaviSite, Inc. v. Cloonan*, CIV.A. 02-1949, 2005 WL 1528903 (Mass. Super. May 11, 2005). There is no reference on Exhibit A to paragraphs 2 through 12 of the Ripoff Report terms and conditions. Paragraph 6 states that the Author grants what is essentially all ownership rights<sup>14</sup> in his work and that he warrants ownership of the copyright. In Paragraph 3 the Author agrees to a broad indemnification of Xcentric. By clicking on the "continue" button the Author is not made aware that he is entering into any contract either that he is selling all his copyright rights or that he burdening himself with prospective obligations.

Finally as a matter of law there can be no contract implied in this case where the offeror purports to retain the right to change the material terms of the contract including the prospective

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<sup>14</sup> Namely, "an irrevocable, perpetual, fully-paid, worldwide exclusive license, to use, copy, perform, display and distribute such information and content and to prepare derivative works of, or incorporate into other works, such information and content, and to grant and authorize sublicenses of the foregoing."

affirmative obligations of the offeree. See *Goren v. Royal Investments Inc.*, supra, 25 Mass. App. Ct. at 140-41.<sup>15</sup>

a. ***Xcentric's March 7, 2012 registration is unenforceable.*** Xcentric's registration of copyright ownership cannot be enforceable against the Author and the Author's Assignee for several reasons. First, Xcentric cannot meet its burden to demonstrate a trial worthy issue as to whether the Author knowingly and willfully executed an assignment of all his copyright rights; consequently Xcentric has no title to any claim of copyright. Assuming *arguendo* that Xcentric has any enforceable copyright right, its registration is unenforceable because it is predicated on a false representation of ownership under a Work Made for Hire contract. *Sierra-Pascual v. Pina Records, Inc.*, 660 F. Supp. 2d 196, 201 (D.P.R. 2009). The contract by which Xcentric claims ownership is not signed by Xcentric and hence cannot constitute a contract for Work Made for Hire.

Plaintiffs are entitled to partial judgment on the pleadings that Xcentric's March 7, 2012 registration of copyright ownership is unenforceable.

b. ***Small Justice has valid title.*** While technically immaterial to the issue of standing, the author's assignee Small Justice LLC holds title to the two works by the Author's assignment of his copyright rights executed by the Author's agent, his attorney in fact as duly appointed by Order of the Massachusetts Superior Court. That conveyance is acknowledged by a notary

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<sup>15</sup> We note if there were a binding contract, the Author's Assignee would have recourse under 93A. Xcentric's "offer" constitutes deceptive advertising under both applicable federal and Massachusetts law because it is likely to mislead a reasonable author under the circumstances and is material to an author's decision to transfer his copyright rights. *Aspinall v. Philip Morris*, 442 Mass. 381, 394-95 (2004).

public and hence is prima facie evidence of the execution of the transfer by the Author 17 U.S.C. §204. FAC 55; Goren Aff. Exhibit 1.

***c. The Judgment does not constitute an invalid involuntary transfer prohibited by the Copyright Statute.***

Xcentric has no standing to contest the Superior Court's exercise of *in personam* jurisdiction over the Author. That Court was satisfied that the Author had been served notice of Goren's intention to waive his claim to damages upon entry of a judgment whereby, among other things, Goren would be appointed the Author's attorney in fact and specifically authorized to execute an assignment of the Author's copyright. The Author's Assignee's title is directly and immediately derived from an instrument signed by the Author's duly appointed agent and acknowledged by a notary public. So while the state court blessed and indeed directed the conveyance, the act of conveyance by which Small Justice LLC asserts its title does not constitute the action of the Commonwealth of Massachusetts.

Independent of the precise privity of title, the law is not as Xcentric represents. The sole First Circuit decision touching on 17 U.S.C. §201(e) establishes only that the statute “does not does not define the phrase ‘by operation of law,’” and secondly that the few cases addressing the question “focus on whether the author of the transfer provided express or implied consent to such change of ownership.” *Society of the Holy Transfiguration Monastery, Inc. v. Archbishop Gregory*, 689 F. 3d. 29, 41 (1st Cir. 2012).

In Goren's state court action the Author was served with the application for judgment along with the accompanying voluntary dismissal of Goren's claims for damages. FAC ¶53. The Author had actual knowledge of the proposed Order sought by Goren and chose not to oppose the proposed judgment. That voluntary choice constitutes explicit consent to the entry of the

Order. That voluntary choice also constitutes implied consent to the transfer of his copyright rights in exchange for Goren foregoing his damage claims. *See Valdez v. Laffey Assoc.*, 2010 WL 1221404 (E.D. N.Y. 2010).

Xcentric's sole citation is completely inapposite. In *Rodrigue v. Rodrigue*, 55 F. Supp. 2d 534 (E.D. La. 1999) *rev'd* 218 F.3d 432 (5<sup>th</sup> Cir. 2000), the District Court addressed the question of whether the civil community property law of Louisiana by which a spouse is entitled to half ownership of marital property is preempted by the federal Copyright Act. The District Court "concluded that, as a matter of *conflict* preemption, subjecting copyrights on works of the author-spouse to Louisiana community property law would damage federal interests in national uniformity and efficient exchange of copyrights." *Rodrigue v. Rodrigue*, 218 F. 3d at 434. The Fifth Circuit reversed and held that the Copyright Act does not preempt Louisiana's civil community property and the spouse was entitled as a matter of law to 50% of the economic benefits derived from the copyright.

***d. The 93A claims; Xcentric's web site advertisements and statements to Goren are actionable.***

Xcentric stated, and continues to state on its web site, that it cannot be sued for defamatory content but that "victims" are free to "pursue the original author of a false statement." That statement is deceptive because unbeknownst to Goren and other victims Xcentric had filed registrations of copyright ownership claiming to be the deemed author of the false statement under a Work Made for Hire contract. Xcentric's solicitation of victims who have been defamed by works that Xcentric has published under color of its ownership to pay Xcentric to restore their reputation on search engines is oppressive, unscrupulous and unethical. Xcentric's refusal of Goren's repeated demand to take down the two defamatory works was predicated on

its knowingly false representation that it was not the owner, or publisher in its own right, of the libel. Xcentric's policy that it will never remove defamatory statements coupled with its standing offer to Goren to restore his reputation is oppressive, unscrupulous and unethical. Fully aware that it asserted ownership of the libel pursuant to a contract with the Author and that for its commercial dealings with Google it was the deemed author of the libel, Xcentric's refusal to comply with the Massachusetts injunction was unscrupulous and unethical.

While Xcentric and Goren are not in privity of contract, Xcentric's unfair and deceptive actions were undertaken in the course of Xcentric's pursuit and/or solicitation of business in the Commonwealth of Massachusetts. Goren has suffered a loss of money that is causally connected with those unfair and deceptive acts and practices.

Likewise Xcentric's written communications to Goren that the injunction could not be enforced against it were unfair and deceptive statements not because of Xcentric's opinion of the CDA but because of its knowingly false and/or deceptive representation that it was not the party responsible for publishing the libel.

The plaintiffs do not assail Xcentric for taking an aggressive litigation position,<sup>16</sup>

These statements are not shielded by the litigation privilege. Indeed plaintiffs contend that Xcentric's statements and its representations to this Court constitute violations of 93A. See

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<sup>16</sup> 93A applies only to actions taken in the course of 'trade or commerce. Litigation tactics, such as bad faith claims, may constitute 93A violations provided there is a commercial context or solicitation of a contractual relationship. See *Arthur D. Little v. Dooyang*, 147 F. 3d 47, 56 (1<sup>st</sup> Cir. 1998).

If a violation of G. L. c. 93A, § 11, forces another to incur attorney's fees, those fees are a loss of money or property and may be recovered as G. L. c. 93A damages. ...Because Trust's litigation expenses were actual damages (a "loss of money") caused by the G. L. c. 93A violation, those expenses were recoverable, and, because Columbia's violation was wilful and knowing, the judge was warranted in doubling them. *Columbia Chiropractic Group, Inc. v. Trust Ins. Co.*, 430 Mass. 60, 63 (1999). See *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 778 (1986); *International Fidelity Ins. Co. v. Wilson*, 387 Mass. 841, 857 (1983)("Multiple damages are 'the appropriate punishment' for forcing plaintiffs to litigate clearly valid claims.").

*Trenwick America Reinsurance Corp. v. IRC, Inc.*, 764 F. Supp. 2d 274, 304 (D. Mass. 2011)(“while there is considerable debate about whether litigation tactics alone can rise to the level of a Chapter 93A violation, there is little doubt that a course of conduct beginning before litigation and continuing unabated, thereafter may do so.”). See *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 778 (1986); *Arthur D. Little v. Dooyang Corp.*, 147 F.3d 47 (1<sup>st</sup>. Cir. 2004).

***D. The Defamation claims; Xcentric has the burden of proof because Immunity is an Affirmative Defense; There is no immunity solely from the status of the actor; As a matter of law Xcentric has no immunity under 47 U.S.C. §230 (c)(1).***

Xcentric does not question that the two works constitute libel *per se* or that Goren has suffered, and continues to suffer, irreparable injury to his reputation initially from the publication of each of the two works on the Ripoff Report website and continuing thereafter from the publication of several dozens of copies on the servers of Google and other search engines. Nor does Xcentric deny that it instructed Google regularly to make copies of the two works and to store those cached copies on Google servers. Nor does Xcentric deny that pursuant to its allegedly registered copyright it authorized Google to publish or display on Google’s servers any one or more of the fifty plus copies of the libelous works whenever a searcher inquiring about Goren as a lawyer clicks on the link—not to the original work on the Ripoff Report website—to the cached copy on the Google server. Nor does Xcentric deny that fully aware of the continuing injury to Goren, it refused to comply with the Massachusetts injunction to take down the original works. Nor does Xcentric deny that while Google attempted to comply with the injunction and removed the original link to the Ripoff Report URL, Xcentric continues to publish—via its license to Google-- these fifty plus cached copies on Google’s servers. Nor does Xcentric deny that if only Goren would pay it a fee, determined in part by the number of copies

on Google's servers, Xcentric would "restore his reputation" such that "no matter how ... [he] search[ed] ...[his] name on search engines, it will look at it should-positive."

Xcentric boldly informs the Court that it is the sole owner of the copyright rights to "use, copy, perform, display and distribute" the two works. But according to Xcentric, regardless of the reprehensibility of its conduct and solely because of its status as the owner and operator of the Ripoff Report website, a quasi public bulletin board, the Communications Decency Act, 47 U.S.C. §(c) (1) requires dismissal as a matter of law.

"Immunity under the CDA constitutes an affirmative defense that 'is generally not fodder for a Rule 12 (b)(6) motion.' .... Rather, 'such a defense is generally addressed as a Rule 12 (c) or Rule 56 motion.'" *Federal Trade Commission v. LeanSpa, LLC*, 920 F. Supp.2d 270, 275 (D. Conn. 2013).

In *LeanSpa* the District Court denied the website operator's motion to dismiss. The defendants had argued that mere knowledge of the actionable (deceptive) nature of the information does not undermine the website owner's immunity under the CDA. 920 F. Supp. at 276-77. Because the FTC had alleged the website operator's participation in actions resulting in the information content, it was plausible the FTC could prove the website operators "were 'actively responsible' for the 'development of' at least part of the deceptive content." *Id.*

Nonetheless Xcentric contends that even if it publishes the libel as the copyright owner on its website or if as owner it licenses or authorizes search engines to publish or display the libel on their search engines, as a matter of law Goren has no recourse against Xcentric. (Paper 14 at 5). But there is not a single case, including all the federal and state reported decisions touted by Xcentric, that so holds such volitional publication to be immune. In all the cases reviewed by plaintiffs' counsel Xcentric was treated as, or deemed to be, the owner of a publicly accessible

internet bulletin board whose only role was that of a passive publisher that permitted a third party author to post his work.

There is no case holding that 47 U.S.C. §230 (c)<sup>17</sup> which bears the title “Protection for ‘good samaritan’ blocking and screening of offensive material” provides absolute immunity for a website host. The beneficial public purpose warranting immunity lies in the passive proffer of a forum, a neutral, electronic bulletin board--- “serv[ing] as [an] intermediary[y]--- ...facilitat[ing] the speech of others on the internet.” *Universal Communication Systems, Inc. v. Lycos*, 478 F. 3d 413, 415, 419 (1<sup>st</sup> Cir. 2007) (“Thus, an interactive computer service provider remains liable for its own speech”). *See also Johnson v. Arden*, 614 F.3d 785, 791 (8<sup>th</sup> Cir. 2010) (“Congress thus established a general rule that providers of interactive computer services are liable only for speech that is properly attributable to them”); *FTC v. Accusearch*, 570 F. 3d 1187, 1197 (10<sup>th</sup> Cir. 2009)(“An interactive computer service that is also an information content provider of certain content is not immune from liability arising from publication of that content”); *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7<sup>th</sup> Cir.2008)(“§230(c) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts....”).

In enacting the Communications Decency Act Congress did not clothe all interactive computer service providers with immunity. It only “protects **certain** internet-based actors from **certain** kinds of lawsuits.” *Barnes v. Yahoo!, Inc*, 570 F. 3d 1096, 1099 (9<sup>th</sup> Cir. 2009) (emphasis added). There is no general immunity from liability from publishing libel that is

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<sup>17</sup> (1) Treatment of publisher or speaker: No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.(2) Civil liability.No provider or user of an interactive computer service shall be held liable on account of—(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

derived from third party content. *Id.* at 1100 (“neither ... subsection [§230 (c) (1)] nor any other declares a general immunity from liability derived from third-party content”).

In *Lycos*, the plaintiff complained of anonymous postings on an internet message board operated by the defendant. In its first review of the CDA, the First Circuit found that “[i]n light of the[] policy concerns” supporting the congressional grant of limited immunity “the context of ...[ Lycos’] conduct in operating the ...website [in question] fits comfortably within the immunity intended by Congress.” 478 F. 3d at 419. Upholding the District Court’s allowance of Lycos’ motion to dismiss, the First Circuit ruled that:

Taking ...[the plaintiff’s] allegations as true, Lycos has done nothing in this case that might make the misinformation at issue its own, rather than that of ‘another information content provider.’”

*Id.* at 421.

The First Circuit has provided some very general guidance to this Court to determine whether from the allegations of the FAC it may determine as a matter of law that Xcentric’s conduct “fits within the immunity intended by Congress.” Bearing in mind that “an interactive computer service provider remains liable for its own speech,” the Court should consider whether the FAC assails Xcentric’s actions as more than a mere intermediary for a third party to post his work on its Ripoff Report Website.

In the FAC Goren seeks to hold Xcentric liable for its own speech. FAC ¶¶72-74, 78 (“to the extent XCENTRIC has published or publicly displayed ...[the two indisputably libelous works] under color of its exclusive ownership of each such work”). There are two types of volitional actions that make Xcentric the owner and responsible party for the actionable speech and a proper defendant.

The first is the publication on the Ripoff Report by Xcentric in its capacity as the author, owner or party who directed or commissioned the work. Having taken ownership of the speech, Xcentric cannot be said to be a neutral passive publisher. Furthermore, as the party who directed, specially ordered, or commissioned the Author to prepare the two works, Xcentric should be held responsible for the creation, and/or one or more of the initial and subsequent publications of the two works.

Xcentric takes the position that it “is the sole rightful owner of the [libelous] work at issue in this case.” According to Xcentric, pursuant to its standard terms and conditions if the Author had not assigned his ownership to Xcentric the work could not have been published. Hence according to Xcentric it owned and it was the publisher of the initial publication of the libel. Indeed Xcentric has filed an affidavit attesting to its Copyright Ownership as Works Made for Hire. According to Xcentric because it employed or specially engaged the Author to write the two works, for purposes of the Copyright Act it is entitled to all the benefits of authorship of the work. The public purpose served by the internet bulletin board is to provide a venue for the public to exercise their First Amendment rights and publish even the most offensive speech. If Xcentric posts its own opinion on its website it does so as an author and not as a neutral provider of a publicly accessible bulletin board. *Doe v. McMillan*, 412 U.S. 306, 314-15, 323-24 (1973).

The second and different publication of the libel is Xcentric’s publication and/or public display of the actionable speech on the servers of Google and other search engines.

The FAC also alleges that Xcentric instructed Google’s robot crawler periodically to visit the Ripoff Report website and take snapshots of the two libelous works. Under color of its registered copyright ownership Xcentric instructs Google to keep those snapshots or copies on Google’s servers. When a searcher, a potential client or interested person, conducts a search for

“Richard Goren attorney,” the searcher is presented with more than fifty so-called URL’s or links. After being served with Goren’s state court injunction, Google informed Goren that it had removed the link or links to, upon information and belief, the original January 31, 2012 Ripoff Report work. Upon information and belief however because Xcentric instructed Google to take and retain so many snapshots of the two works, there are more than fifty copies of the libel which are published on Google’s servers when a searcher clicks on one or more of the URLs listed on Google. Xcentric is the owner and volitional publisher of those publications or displays on Google and other search engines; and as such it is the information content provider.

Even assuming arguendo the initial publication to be immune, what Xcentric did was the equivalent of the congressional staffer running off copies of defamatory information contained in the privileged congressional record and then publishing the copies for reasons unrelated to “legitimate legislative activity,” or reading aloud outside of Congress the defamatory material. *See Doe v. McMillan*, 412 U.S. at 324.

Because the affirmative defense of immunity under the CDA is to be judicially determined on a case by case basis with an eye toward advancement of the general public policy statements of the Act, Supreme Court decisions on official immunity are instructive. The doctrine of immunity attempts to balance two competing, equally vital considerations. At common law, and hence under the due process clause of the Constitution an individual is protected against pecuniary damage caused by the wrongdoing of another. Where the injury is caused by action taken in good faith, for example, by a public official in the exercise of her official duties, the protection of the public interest warrants shielding her from liability. And so, there is no “fixed invariable rule of immunity but ... [this court must make] a discerning inquiry into whether the contributions of [the] immunity ... [to the public interest it shields] outweigh the

... harm to individual citizens....” *Doe v. McMillan*, 412 U.S. at 320. Immunity does not automatically lie based on the status or title of the actor. *See Kilbourn v. Thompson*, 103 U.S. 168 (1880). *See also Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971).

The immunity doctrine whether for government officials or neutral interactive websites provides no shield unless the volitional publication is sufficiently connected with the proper functioning of the public purpose being served. *Doe v. McMillan*, 412 U.S. at 317, 319-20. Even when the actor is clothed with sovereign’s mantle, “the scope of immunity from defamation suits should be determined by the relation of the publication complained of to the duties entrusted to the [otherwise immune] officer.” *Barr v. Matteo*, 360 U.S. 564, 573-74 (1959). Even the constitutionally mandated immunity of a member of Congress must be scrutinized so as carefully to “confine[] that immunity to protect only acts within the sphere of legitimate legislative activity.” *Tenney v. Brandhove*, 341 U.S. 367, 376-77 (1951) (emphasis added). “The scope of immunity has always been tied to the scope of authority.” *Doe v. McMillan*, 412 U.S. at 320. A libel published in the congressional record by a member of Congress is absolutely privileged even if read aloud on the floor; but if a member of Congress for example in his home district reads aloud the official record, he has personally become the publisher of the defamation and will be subject to liability. *Id.* at 320-324. The publisher of a libel, even the Public Printer and Superintendent of Documents disseminating the congressional record outside of Congress will only be shielded with immunity upon a determination that such publication served legitimate legislative function. *Id.*

### III. CONCLUSION.

For the foregoing reasons the Court should deny the defendant’s motion to dismiss and grant plaintiffs’ motion for partial judgment on the pleadings.

Respectfully submitted,

SMALL JUSTICE LLC,  
RICHARD A. GOREN, and,  
CHRISTIAN DUPONT dba ARABIANIGHTS-  
BOSTON MASSACHUSETTS  
Plaintiffs,

By their attorney,

DATE: October 15, 2013

*s/Richard A. Goren*

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#### **CERTIFICATE OF SERVICE**

I hereby certify that this document will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and that paper copies will be sent to those non-registered participants (if any) on October 15, 2013.

*/s/ Richard A. Goren*