

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SMALL JUSTICE LLC,)
RICHARD A. GOREN,)
and,)
CHRISTIAN DUPONT dba)
ARABIANIGHTS-BOSTON)
MASSACHUSETTS)
)
Plaintiffs,)
)
)
v.)
)
XCENTRIC VENTURES LLC,)
Defendant.)

) CIVIL ACTION NO. 1:13-cv-11701-DJC
) LEAVE GRANTED 3/3/14
) **PLAINTIFFS'SUPPLEMENTAL FILING.**

Pursuant to leave, plaintiffs file this post hearing supplemental brief. The Fourth Affidavit of Richard A. Goren (“Goren Fourth Aff.”) is filed in support.

1. Xcentric cannot meet its burden of proof on copyright claims. As a matter of law the plaintiff author is the presumptive owner of the work in question. 17 U.S.C. §201(a). While according to Xcentric, the author had electronically executed an assignment of all copyright rights, it is undisputed Xcentric’s purported instrument of conveyance lacks a certificate of acknowledgment. Moreover Xcentric’s March 7, 2012 Certificate of Registration does not constitute a registration of ownership of any of the individual works collectively comprising the compiled works published on the Ripoff Report website between January 1, 2012 and March 7, 2012. *Muench Photography, Inc. v. Houghton Mifflin Harcourt Pub. Co.*, 712 F. Supp. 2d 84 (S.D. N.Y. 2010). Xcentric concedes this point but insists it is entitled to summary judgment that it owns all of the copyright ownership rights of the plaintiff author’s two works under its standard terms and conditions that apply to anyone making a report and posting her

work on the Ripoff Report website. (See Paper 38 Tr. at 4:23-25-5:1-9).¹ The United States Copyright Office has issued a certificate of registration of the plaintiff author's January 31, 2012 work. (Paper 33-1, Exhibit A). By his court appointed attorney in fact the author executed an instrument of conveyance transferring all his rights of ownership of copyright in and to the two works in question. (Paper 20-1). That written assignment bears a certificate of acknowledgement by a person authorized to administer oaths in Massachusetts and constitutes prima facie evidence that the plaintiff author conveyed all his rights to Richard Goren who then assigned them to Small Justice LLC. 17 U.S.C. §204.²

a. Xcentric and its counsel have knowingly filed a perjurious misrepresentation of the "little box that the author has to check to submit" his work.

The dispositive copyright issue turns on whether the plaintiff author is bound to Xcentric's Terms of Service and/or whether he granted an "exclusive" license of his work to Xcentric when he checked the Step 5 box to post his work on the Ripoff Report website. An author who wants to post his work "must do so by completing a five step process" which, according to Xcentric, except for adding a step 4 to allow optional posting of photos has been unchanged since 2008.³ Exhibit A to the FAC is a copy of the August 29, 2013 screenshot of the box that, according to plaintiffs, is the Step 5 box that must be checked by an author to post a work on the Ripoff Report website. (Goren Fourth Aff. ¶¶2, 3). That Step 5 screenshot does not reference "Terms

¹ Insisting it has "a legally binding, exclusive, irrevocable license, ...[Xcentric concedes that] whether or not they had a registration of the individual reports is not relevant." (Paper 38, Tr. at 19).

² Given such title as well as the presence of the author as a party, resolution of Xcentric's affirmative defense does not require the Court to address the hypothetical issue of whether a duly entered default judgment in which damages are waived constitutes a prohibited "Involuntary Transfer" under 17 U.S.C. §201(e).

³ Papers 8-1, 15 and 37, August 8, 2013, September 16, 2013 and March 3, 2014 affidavits of David Gingras, Esq. Except for the addition of an optional step 4 to add images and/or documents, "the report submission process has been the same from 2008 through the present;" (Paper 37, at 1 n.1); and, an author who wants to post his work "must do so by completing a five step process." (*Id.* ¶2). Mr. Gingras swears that he has represented Xcentric from 2005 to the present and that from July 2009 through July 2013 he was general counsel. (Paper 15, ¶3). Included in his duties as general counsel were the preparation and "occasional updating of the Terms of Service." (*Id.*). Mr. Gingras swears that "[a]s part of this process [to post a report] users must affirmatively accept and agree to Xcentric's Terms of Service;" and, that Xcentric's current Terms of Service "has been used continuously on the Ripoff Report website since April 8, 2010." (*Id.*, ¶5).

of service” or any “exclusive license” much less state: “I agree to the Ripoff Report terms and conditions;” or, include words “granting Ripoff Report's operators an exclusive license.” (*Id.*). In moving to dismiss the FAC, Xcentric implicitly relied on the plaintiff author’s act of checking the Step 5 box to post his work as constituting his electronic signature and affirmative acceptance of its Terms of service and in particular paragraph 6. (*See* Paper 14 at 12; Paper 15, ¶¶5-7).

At the February 27, 2014 hearing (Paper 38, Tran. at 5-6) attorney Speth represented to the Court that the Step 5 box the plaintiff author had checked did include both an acceptance of Xcentric’s terms and conditions and an explicit grant of an exclusive license:

And one of the things I think the papers do not do a good job of is explaining that the little box that the author has to check to submit not only says that the author is agreeing to the terms of use, but specifically says, I agree to the Ripoff Report terms and conditions and that by posting this rebuttal, this report or rebuttal, I attest this report is valid. I'm giving Ripoff Report irrevocable rights to post it on the website and granting Ripoff Report's operators an exclusive license....So not only is the statement in the agreement of use, but the statement is in the actual box that gets checked by the author. There was clearly a meeting of the minds that this was an exclusive license and it was irrevocable.

According to Ms. Speth, the FAC’s Exhibit A screenshot of Step 5 of the Ripoff Report process was a false statement of the key material fact and hence plaintiffs’ claims were “outrageous and frivolous.” (*Id.* at 5-8). Ms. Speth insisted the box which the plaintiff author had checked included an express acceptance of the terms of use and also a grant of an “exclusive license.”(*Id.*). On March 3, 2014, Xcentric filed Mr. Gingras’ third affidavit (Paper 37). Xcentric’s long time counsel avers that continuously since 2008 the “little box” to be checked has included both an express acceptance of the terms of service and words granting an “exclusive license.” (*Id.*, ¶4).

Attorney Speth’s representations to the Court and Mr. Gingras’ March 3, 2014 affidavit are frontally inconsistent with, and impeached by, affidavits which attorneys Speth and Gingras filed in August and September 2010 in two other federal district courts. (Exhibits A and B,

Goren Fourth Aff.). In support of Xcentric's motions for summary judgment in the Northern District of Georgia, Atlanta Division, and in the Central District of California, Ms. Speth and Mr. Gingras filed affidavits of two outside, independent computer service contractors attesting to Step 5 screenshots of the little box that must be checked. (*Id.*). Each affidavit set forth as an exhibit a screenshot of the Step 5 process which—as of August 12, 2010 and May 24, 2010—is substantively identical to the FAC August 29, 2013 Exhibit A screenshot. (*Id.*). Represented by Ms. Speth and Mr. Gingras Xcentric was granted two summary judgments predicated in part on a sworn Step 5 box that did not include an acceptance of the terms of use or any words granting an “exclusive license.”

Contrary to Ms. Speth's representations and Mr. Gingras' latest affidavit, the box that the plaintiff author had to have checked did not include: “I agree to the Ripoff Report terms and conditions;” or, words “granting Ripoff Report's operators an exclusive license.” Contrary to Ms. Speth's argument, the box that the plaintiff author had to have checked does not satisfy Xcentric's burden of proof that it owns all rights of copyright. An author eager to publish his work who grants Xcentric “irrevocable rights to post it on its website,” does not thereby either grant an exclusive license or thereby sell all rights to his work including the right to reproduce or distribute copies. *See Dallal v. New York Times Co.*, 352 Fed. Appx. 508 (2d Cir. 2009). *See also New York Times v. Tasini*, 533 U.S.483 (2001).

2. There is no immunity solely because the content originated with a third party.

It is the defendant's burden to show that the cause of action is inconsistent with section 230 of the Communications Decency Act (“CDA”). Like any other website owner Xcentric “remains liable for its own speech.” *Universal Comm'n Sys., Inc. v. Lycos, Inc.*, 478 F. 3d 413, 419 (1st Cir. 2007). The CDA does not limit the definition of an “information content provider” to a person who merely creates the content. 47 U.S.C. §230(f)(3). By adopting

ownership of the work Xcentric materially contributed to the unlawfulness of the *per se* libel. *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (a website is a content provider “if it contributes materially to the alleged illegality of the conduct”). “The projectionist in the theatre may push the last button before a film is displayed on the screen, but surely this doesn’t make him the sole producer of the movie.” *Id.* at 1167-68. So too when under color of its claimed copyright ownership Xcentric publishes on its website the January 31, 2012 and February 2, 2012 works it is both an interactive computer service provider and the information content provider. *Id.*; *Jones v. Dirty World Ent. Recordings LLC*, 840 F. Supp. 2d 1008, 1010 (E.D. Ky. 2012).

It is undisputed Xcentric is not the interactive computer service provider but is the sole information content provider when Google and other search engines re-publish on their servers, under license granted to them by Xcentric, copies of the original January 31, 2012 and February 2, 2012 works. While Xcentric might require its licensee search engines to direct a searcher back to its website to read its original publication, for commercial gain Xcentric authorizes its licensees to maintain cached copies of the two works and separately to display those copies on the search engine servers.

Respectfully submitted,
SMALL JUSTICE LLC, RICHARD A. GOREN,
and CHRISTIAN DUPONT,
Plaintiffs,
by their attorney,

March 10, 2014

/s/ Richard A. Goren
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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system 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 March 10, 2014.

/s/ Richard A. Goren