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CASES OF INTEREST

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IP/ENTERTAINMENT LAW WEEKLY CASE UPDATE FOR MOTION PICTURE STUDIOS AND TELEVISION NETWORKS

June 16, 2011

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Smith v. Summit Entertainment LLC, USDC ND Ohio, June 6, 2011

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- District Court refuses to dismiss copyright owner's claims for (1) wrongful assertion of copyright, (2) tortious interference with contract and (3) defamation, arising from defendant's "take down" notices that allegedly falsely assert a copyright interest in plaintiff's song.

Plaintiff Matthew Smith, a professional singer also known as Matt Heart, asserted copyright and wrongful assertion of copyright claims, as well as state law claims for fraud/misrepresentation, intentional infliction of emotional distress, intentional interference in contractual relationship, intentional interference with business relationships and defamation against defendant for defendant's allegedly false representation of a copyright interest in plaintiff's copyrighted song in "take down" notices to various websites, which resulted in plaintiff's song being removed from the websites.

Plaintiff posted a song that he had copyrighted in 2002 on various websites including YouTube, iTunes, CD Baby and Amazon. He thereafter received an email notice from YouTube advising that his song may have violated copyright laws and instructing him to delete any infringing materials. After learning that defendant Summit Enterprises had caused the YouTube notice, plaintiff contacted an attorney representing Summit, who responded by email stating that the issue was one of trademark, not copyright. The attorney advised that the song's CD cover violated Summit's copyright in the term "twilight," based on two aspects of the cover. First, although plaintiff had copyrighted his song well before Summit had produced a series of movies known as the "Twilight Saga," the song's cover stated, "inspired by the twilight saga." The song's title ("eternal knight") also appeared on the cover in a typeface similar to that used for Summit's "twilight" mark. The next day, Summit informed plaintiff that he was free to repost his song on YouTube, as long as it was without reference to Summit's trademarked materials. Plaintiff notified Summit that he had removed the video from YouTube and would remove the "inspired by the twilight saga" from that site as well.

According to the complaint, Summit also filed notices of infringement with the websites, some notices alleging copyright infringement and some alleging trademark infringement by plaintiff, causing the websites to remove his song. Plaintiff contended defendant's action damaged his reputation and caused him to lose



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business opportunities, including the opportunity to have his song played in movie theaters for 28 weeks.

On plaintiff's copyright claims, the court found that plaintiff's conclusory allegation that "defendant has breached the copyright," without any additional factual allegations, failed to state a claim for copyright infringement. The court granted defendant's motion to dismiss as to the copyright infringement claim, but denied it as to the wrongful assertion of copyright infringement claim, finding that plaintiff has sufficiently plead that cause of action.

The Copyright Act allows for a cause of action for improper infringement notification where the notification is a knowing misrepresentation. The court found that the "admittedly sparse allegations" in the complaint, together with attachments including copies of the various emails, stated a plausible claim sufficient to survive defendant's motion to dismiss. At least some of defendant's "take down" notices to the various websites stated that plaintiff was infringing defendant's copyright and the fact that defendant promptly acknowledged that it had no copyright interest in plaintiff's song did not matter. Plaintiff alleged that defendant made an "unquestionably false" assertion in these take down notices and the song was taken down. His complaint also contained a factual basis for finding that defendant knew at the time it sent the notices that it did not have a copyright interest in the song.

The court rejected defendant's contention that it had "no choice" because some websites had only one notice form – for copyright violations – reasoning that whether those facts were true and whether they provided defendant with a defense was not a matter for consideration at that time.

The court also found that plaintiff has asserted an actionable claim for defamation. The complaint and its attachments together could be read as alleging that defendant knowingly made the false assertion that plaintiff had infringed its copyright to the song, that it had no privilege to make such assertion, as plaintiff was the copyright holder, and that defendant acted with negligence if not willfully, and that the plaintiff was damaged. In a footnote, the court noted that a false claim that an artist's work infringes another's copyright might be defamatory per se.

Plaintiff's claims for intentional interference with contractual relations and tortious interference with business also survived defendant's motion to dismiss.

With respect to the intentional interference claim, the complaint and attachments adequately plead that the defendant knew of plaintiff's contractual relationship with the websites and intentionally interfered with those relationships, as well as the termination of the relationship and resulting damages. The court reasoned that "[t]he whole purpose of a take down notice is to cause removal of infringing material from a website. If the plaintiff can show that defendant knowingly falsely asserted such interest, he in all likelihood can also show that it knew that such false assertion, once made, would lead to removal of plaintiff's song from the website. Given the contemporary importance to a creator of an artistic work of unimpeded website display, plaintiff's claim of resulting damages is not implausible".



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With respect to the tortious interference claim, the court found that the complaint was sufficient only with respect to the alleged interference with plaintiff's business relations with the websites hosting his song. Plaintiff's claim was insufficient with respect to the claimed loss of future contractual relationships because he failed to allege defendant's awareness of those potential relationships.

The court granted defendant's motion to dismiss plaintiff's fraud claim, agreeing that the conclusory allegations of fraud fail to meet the heightened pleading requirements of Fed. R. Civ. P. 9(b). The court also dismissed plaintiff's claim for intentional infliction of emotional distress because it contained no allegation that defendant intended to cause, or knew or should have known its false assertion of a copyright interest would cause serious emotional distress, or that plaintiff suffered "severe psychological injury."

Armstrong v. NBC Universal, Inc., USDC WD Kentucky, June 6, 2011

 [Click here for a copy of the full decision.](#)

- District court declines to dismiss claims for invasion of privacy, intentional infliction of emotional distress, and negligence against television network brought by man featured on television series *To Catch a Predator*.

Plaintiff, a prison inmate, filed a *pro se* lawsuit against NBC Universal, asserting a variety of state-law tort claims and a federal civil rights claim relating to his appearance on the NBC show *To Catch a Predator*.

According to Plaintiff, he struck up an online conversation with someone he thought to be an underage girl, who invited him to a house in Bowling Green, Kentucky. Plaintiff initially declined the invitation, but eventually agreed to meet "her." When Plaintiff arrived at the house, police placed him under arrest. NBC was waiting at the sting house along with the police, and aired video of the arrest on *To Catch a Predator*, and – according to Plaintiff – also posted to the Internet conversations Plaintiff had with the "underage girl."

Based on other courts having allowed similar claims to proceed, and specifically that a court had allowed similar claims with respect to the series *To Catch a Predator*, the court held that plaintiff's state-law claims of invasion of privacy, intentional infliction of emotional distress and negligence could proceed, although the court did not opine on the strength of these claims. The court dismissed the federal civil rights claim brought under 42 U.S.C. § 1983 because the statute of limitations had expired. Plaintiff's final claim was for "violation of the Journalistic Code of Ethics." The Court stated that it was not aware of any cognizable federal or state claim for such a violation, and dismissed this claim also.

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