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Home-birth blogging battle leads to copyright suit

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A copyright suit between dueling bloggers whose subject of debate is midwifery could result in guidance on an issue of Internet law that the 1st U.S. Circuit Court of Appeals has yet to weigh in on.

Briefs in Tuteur v. Crosley-Corcoran, addressing the "misrepresentation" provision of the Digital Millennium Copyright Act with regard to take-down notices, have been submitted to U.S. District Court Judge Richard G. Stearns in Boston.

The statute, 17 U.S.C. §512(f), makes a copyright owner liable for damages incurred by an alleged infringer when the copyright owner knowingly issues a take-down notice on material that is not infringing.

The case stems from a debate between two bloggers that escalated when defendant Gina Crosley-Corcoran — midwife, home-birth advocate and former bassist for Courtney Love's band Bastard — posted a photograph of herself "making a graphic gesture with her middle finger that is often associated with an unrealized ambition of French soldiers at the Battle of Agincourt," in Stearns' words.

Crosley-Corcoran directed the gesture at Dr. Amy Tuteur, a former obstetrician gynecologist and instructor at Harvard Medical School, writing that she was giving Tuteur "something else to go back to her blog and obsess about."

"Dr. Amy" then copied the photo in a blog post, to which Crosley-Corcoran fired back with a cease-and-desist letter alleging copyright infringement. She also issued a take-down notice to the host site of Tuteur's blog.

Tuteur's husband, Michael J. Tuteur of Foley & Lardner in Boston, responded on behalf of his wife that she had posted the photo under fair use.

When the defendant continued to issue notices, Amy Tuteur filed suit, alleging that Crosley-Corcoran was abusing the DMCA.

"If take-down notices are left unchecked, you're opening the floodgates to abuse," says Russell Beck of Beck, Reed, Riden in Boston, who's representing the plaintiff with Stephen D. Riden. The plaintiff's attorneys are concerned that if copyright holders can issue improper notices under the DMCA without repercussions, recipients of those notices will have no way to defend themselves.

Meanwhile, defense counsel Evan Fray-Witzer of Boston's Ciampa Fray-Witzer argues that copyright holders can't be expected to evaluate affirmative defenses before sending notices.

"Certainly that's not what Congress intended — that someone is going to do the full, exhaustive investigation before sending a take-down notice," Fray-Witzer says.

In March, Fray-Witzer filed a motion to dismiss the case. Stearns responded with an order for the plaintiff to show cause. Both sides have since briefed the issue and the case has drawn amici briefs from national interest groups, including the Motion Picture Association of America, represented by Boston lawyer Daniel J. Cloherty of Collora. After a July 1 hearing that drew a large crowd, Stearns took the motion under advisement.

Kas R. DeCarvalho, who practices entertainment law though he's not involved in the case, says he hopes the plaintiff's claims survive the motion to dismiss, but that the law appears to be against her.

"I think it should require a level of diligence beyond just saying, 'We own the copyright.' Not requiring more than that sets a bad precedent for a kind of robo-signing situation," says DeCarvalho, counsel at the Providence firm Pannone, Lopes, Devereaux & West. "But I don't think the statute as written really requires an evaluation. Ultimately, this issue will be something for Congress and not the courts."

A brief submitted by the Electronic Frontier Foundation and the Digital Media Law Project of Harvard Law School's Berkman Center for Internet & Society supports the plaintiff on grounds that the improper use of take-down notices chills speech.

Jeffrey P. Hermes, director of the Digital Media Law Project, says that notices increasingly are being used "to attack speech which doesn't infringe copyright and is only offensive in the way that it portrays the copyright holder."

The MPAA, on the other hand, argues that evaluating affirmative defenses is too high a burden.

"We do believe that the argument of the MPAA is not consistent with the statute and dangerous to freedom of speech concerns … in a way that would result in unfair take-down notices without any judicial remedy," Hermes says.

If the case is dismissed, Beck and Riden say they will appeal to the 1st Circuit.