

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
WEST PALM BEACH DIVISION

Case No. 03-Civ-80515-Hurley/Lynch

KATY JOHNSON,

Plaintiff,

vs.

TUCKER MAX,

Defendant.

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**DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR REMAND  
AND NOTICE OF RELIANCE ON BRIEF REGARDING SUBJECT MATTER  
JURISDICTION AND NOTICE OF REMOVAL**

In the interest of brevity, Defendant hereby gives notice of his reliance on his Brief Regarding Subject Matter Jurisdiction, previously filed on June 30, 2003, as well as the Notice of Removal filed on June 6, 2003, in response to Plaintiff's Motion for Remand filed on June 19, 2003.

In addition to the facts, argument and legal authorities cited in Defendant's Notice of Removal and Defendant's Brief Regarding Subject Matter Jurisdiction (including the Declarations of Tucker Max, Ross M. Hendin and Richard J. Mockler), Defendant makes the following additional points:

**Amount in Controversy**

Since Plaintiff has failed to make any affirmative statement regarding the amount in controversy, or to provide any evidence whatsoever regarding the amount, Defendant's averments and evidence of the amount in controversy are thus far unrebutted in the record.

Defendant therefore has more than satisfied “a preponderance of the evidence” his burden of proof on the issue. *Williams v. Best Buy Company, Inc.*, 269 F.2d 1316, 1319 (11th Cir. 2001).

Even if Plaintiff were to state, in reply, some nominal value of her damages in an attempt to induce remand, the law is clear that the court would still have to consider the objective<sup>1</sup> value, from Plaintiff’s perspective, of the permanent injunctive relief she seeks. *Ericsson GE Mobile Comm. Inc. v. Motorola Comm. & Electronics, Inc.*, 120 F.3d 216, 220-221 (11th Cir. 1997).

A plaintiff’s valuation of the injunctive relief is not entitled to any deference from the court. Although a plaintiff’s estimation of her damages is entitled to some deference presumably because a plaintiff can be bound by such a representation, *see, e.g., Federated Mut. Ins. Co. v. McKinnon Motors, LLC*, 329 F.3d 805, 808 (11th Cir. 2003), deferring to a plaintiff’s subjective valuation of injunctive relief would allow her to assign a nominal value to injunctive relief without the potential of suffering any prejudice.

The value of Plaintiff’s claim for permanent injunctive relief is “the monetary value of the benefit that would flow to the plaintiff if the injunction were granted.” *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1077 (11th Cir. 2000); *see also Morrison v. Allstate Indemnity Co.*, 228 F.3d 1255, 1268 (11th Cir. 2000).

Here, the monetary value to Plaintiff is the damage to her career and reputation that would be avoided if the permanent injunction is granted. Thus, with respect to the permanent injunctive relief sought by Plaintiff, the proper measure of the amount in controversy is the value of the adverse impact the continued publication of the “Miss Vermont Story” will have on the

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<sup>1</sup> *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1096 (11th Cir. 1994) (amount in controversy is determined by an objective standard; “plaintiff’s or plaintiff’s counsel’s subjective intent in drafting the prayer is not the true issue”).

rest of her entire career increased by any additional future damages, including embarrassment and invasion of privacy, Plaintiff might personally suffer by the story's continued publication.

Plaintiff testified in support of the *ex parte* injunction that, as a result of the story's publication, she has "suffered great embarrassment and harm." See Exhibit A to Defendant's Notice of Removal, Affidavit of Katy Johnson, ¶ 10 (emphasis added).

Plaintiff's own mother and business manager herself testified, "[t]here is no amount of money that can adequately remedy the continuing damages that has been done to Katy Johnson, our family and our business." See Exhibit A to Defendant's Notice of Removal, Affidavit of Kathleen Johnson, ¶ 12 (emphasis added).

Accordingly, it would be unreasonable to conclude that the objective value of the permanent injunctive relief Plaintiff seeks is, in and of itself, worth less than the jurisdictional minimum.

### **Substantial U.S. Constitutional Question**

Although addressed in his Brief Regarding Subject Matter Jurisdiction, Defendant would re-emphasize that, contrary to Plaintiff's argument in support of remand, the U.S. constitutional questions present in this case are not merely defenses, but rather are implicated by the elements of Plaintiff's claims under Count I and Count II of the Complaint.

In a case decided last year in the Middle District of Florida also involving Fla. Stat. § 540.08, the statute plead by Plaintiff in Count I here, the Court equated whether the challenged publication falls within the § 540.08(3) exception for publications having a "legitimate public interest" directly with whether the publication was subject to First Amendment protection. *Tyne v. Time Warner Entertainment Co.*, 204 F. Supp. 2d 1338, 1342 (M.D. Fla. 2002). In disposing of the claim on summary judgment, the Court concluded that "[it] is thus clear that the

[challenged publication] is entitled to First Amendment protection, and would therefore, be excepted from liability under § 540.08.” *Id.*

Likewise, Plaintiff’s invasion of privacy claim under Count II of the Complaint directly implicates the very same constitutional question, as the elements of that claim are: (1) the disclosure was public; (2) private facts were disclosed; (3) the matter publicized was highly offensive to a reasonable person; and (4) the matter is not a legitimate concern to the public. *Heath v. Playboy Enterprises, Inc.*, 732 F. Supp. 1145, 1148 (S.D. Fla. 1990) (citing *Cape Publications v. Hitchner*, 549 So. 2d 1374, 1377 (Fla. 1989) (emphasis added)).

### **Copyright Preemption**

Plaintiff’s motion for remand notably does not challenge that the Copyright Act provides for “complete preemption,” and therefore removal, of state law claims that are preempted by federal copyright law.<sup>2</sup>

Equally as notable, Plaintiff’s motion for remand does not dispute that her claim for unauthorized Website linking (1) involves subject matter that is within the scope of copyrightable subject matter, and (2) seeks to enforce a claimed right that is equivalent to one or more of the exclusive rights protected by the federal copyright laws.

Accordingly, Plaintiff’s claim is undeniably preempted. *See Crow v. Wainright*, 720 F.2d 1224, 1225-26 (11th Cir. 1983) (holding that a state law claim is preempted by federal copyright

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<sup>2</sup> As previously noted by Defendant, both federal courts of appeal that have considered the question have held that the Copyright Act does provide for removal of preempted state law claims. *See Rosciszewski v. Arete Associates, Inc.*, 1 F.3d 225, 232-33 (4th Cir. 1993); *DeCarlo v. Archie Comic Publications, Inc.*, 11 Fed. Appx. 26, 29, 2001 WL 604184, \*3 (2d Cir.), *cert. denied*, 122 S. Ct. 647 (2001). As also initially noted in the Notice of Removal, a plethora of federal district courts have likewise held that state law claims preempted by the federal copyright laws are “completely preempted,” and therefore removable. *See Dielsi v. Faulk*, 916 F. Supp. 985, 992 (C.D. Cal. 1996); *Patrick v. Francis*, 887 F. Supp. 481, 485 (W.D.N.Y. 1995); *Wharton v. Columbia Pictures Indus., Inc.*, 907 F. Supp. 144, 146 (D. Md. 1995); *Aldridge v. The Gap, Inc.*, 866 F. Supp. 312, 314 (N.D. Tex. 1994); *Artie Fields Productions v. Channel 7 of Detroit, Inc.*, 32 U.S.P.Q.2d 1539, 1540-41 (E.D. Mich. 1994); *Gemcraft Homes, Inc. v. Sumurdy*, 688 F. Supp. 289, 294-95 (E.D. Tex. 1988).

law if the right at issue falls within the subject matter of copyright set forth in 17 U.S.C. §§ 102 and 103, and is equivalent to one of the exclusive rights of § 106).

The Court should further note that copyright preemption of Plaintiff's state law claim for unauthorized Website linking is of paramount importance in this case. This is because Website linking is a common, and unquestionably legal, practice throughout the World Wide Web. Indeed, it is one of the features and capabilities that makes the Internet the most popular and most prolific communications medium ever invented in the history of the world.

If Plaintiff is allowed to maintain a claim, under the guise of Florida state law, that seeks to regulate and enforce local standards regarding the practice of Website linking, then users of the Internet will face the prospect of a variety of divergent and inconsistent standards of use and conduct on the Internet which will seriously undermine the efficacy and popularity of the Internet as a worldwide communications medium. Defendant submits that such a result would be unworkable and undesirable from any standpoint, and is precisely the type of situation that Section 301 of the Copyright Act exists to prevent. In enacting the copyright preemption clause, Congress intended to adopt and implement a uniform national standard for what is, and what is not, permissible conduct under the copyright laws. Most significantly, copyright preemption was made expressly applicable to state law claims involving subject matter that, while within the scope of copyrightable subject matter, does not actually qualify for legitimate copyright protection under federal standards. The purpose of this broad reach of copyright preemption is to prevent state law recognition of "copyright-light" claims that would not suffice under federal law – the very type of state law claim that the Court is presented with here from the Plaintiff. To put it differently, copyright preemption exists – and should be applied in this case – because the

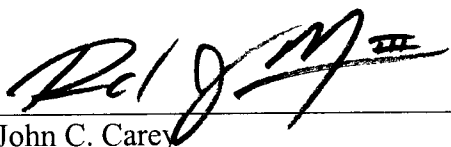
same body of federal law governs not only what enforceable rights exist, but also what rights do not exist or are not enforceable.

As should be plain, if Plaintiff's claim is not examined from the lens of federal copyright preemption, then Internet users throughout the country, indeed the world, may be free to continue the well-known and unquestionably legal practice of Website linking everywhere else on the planet, except for links to "Florida" websites. Plaintiff's preempted claim plainly demands federal adjudication. Indeed, one of the reasons that copyright preemption provides for "complete" preemption is because copyright questions are the exclusive province of the federal courts. *See* 28 U.S.C. § 1338(a); *Rosciszewski*, 1 F.3d at 232-33.

Dated: July 7, 2003

Respectfully submitted,

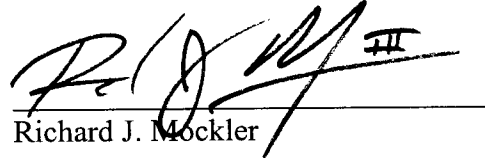
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**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was served by United States mail this 7th day of July, 2003, on **Michael I. Santucci, Esq.**, Law Offices of Michael I. Santucci, P.A., Counsel for Plaintiff, 500 West Cypress Creek Road, Suite 500, Fort Lauderdale, Florida 33309.

  
Richard J. Mockler