

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RICHIE PHILLIPS dba R&D)
COMPUTERS,)
)
Plaintiff(s),)
)
v.)
)
WORLDWIDE INTERNET)
SOLUTIONS, INC., et al.,)
)
Defendant(s).)
_____)

No. C05-5125 SBA (BZ)

**REPORT AND RECOMMENDATION TO
DENY DEFENDANT'S MOTION FOR
ATTORNEYS' FEES**

On September 7, 2006, the Honorable Sandra Brown
Armstrong referred to me for a report and recommendation
defendant's motion for attorneys' fees and costs.

Defendant Worldwide Internet Solutions, Inc. (Worldwide)
requests \$22,105 in attorneys' fees and \$351.95 in costs
pursuant to the Controlling the Assault of Non-Solicited
Pornography and Marketing Act of 2003 (CAN-SPAM Act), 15

///
///
///

1 U.S.C. § 7706(g)(4).¹ Section 7706(g)(4) provides that, in an
2 action brought under the statute, "...the court may, in its
3 discretion, require an undertaking for the payment of the
4 costs of such action, and assess reasonable costs, including
5 reasonable attorneys' fees, against any party."

6 Passed at the end of 2003, the CAN-SPAM Act is, in part,
7 an attempt to guard the "convenience and efficiency of
8 electronic e-mail . . . threatened by the extremely rapid
9 growth of . . . unsolicited commercial electronic mail." 15
10 U.S.C. § 7701(a)(2). The Senate referred to spam as "one of
11 the most pervasive intrusions in the lives of Americans." S.
12 Rep. No. 108-102, at 2 (2003), reprinted in 2004 U.S.C.C.A.N.
13 2348. Bulk spam was found to visit serious time and monetary
14 losses on individuals and internet service providers. See §
15 7701(a)(3), (4), (6); S. Rep. No. 108-102, at 6-7, 2004
16 U.S.C.C.A.N., at 2352-53. In addition, Congress wished to
17 limit intentionally misleading e-mail and the unsolicited
18 disbursement of pornographic messages. § 7701(a)(8), (5).

19 Based on these findings, Congress declared that senders
20 of commercial e-mail should not mislead recipients, and that
21 recipients must have a right to decline receipt of such
22 messages. Sections 7703, 7704, and 7705 create positive and
23 negative duties for senders of commercial spam. And, while a
24 large portion of enforcement of the Act is left to the Federal
25

26 ¹ The CAN-SPAM Act became operative on January 1, 2004.
27 As discussed in greater detail below, Congress passed the Act
28 to further public policy goals relating to problems associated
with unsolicited e-mail traffic. See 15 U.S.C. §§ 7701(a),
(b).

1 Trade Commission and to state attorneys general, see §§
2 7706(a)-(f), a private right of action is also created for
3 providers of internet access who suffer injury cognizable
4 under the Act. § 7706(g).

5 Plaintiff is an internet service provider. Worldwide is
6 a website hosting service. Plaintiff alleged that Worldwide
7 operated under various internet aliases and endeavored in a
8 common scheme with others to send out mass mailings of
9 deceptive and unsolicited e-mails. Plaintiff claimed that
10 said e-mails inundated its computer system and constituted
11 violations of the CAN-SPAM Act, sections 7704(a)(1),(2),(3),
12 and (5),² sections 7704(b)(1) and (2),³ and the California
13 Business and Professions Code section 17529.5.

14 In an Order filed June 20, 2006, Judge Armstrong granted
15 Worldwide's Motion to Dismiss for lack of personal
16 jurisdiction. Judge Armstrong found that "...Plaintiff has
17 utterly failed to meet his 'high' burden of establishing that
18 this Court has general jurisdiction over [Worldwide]," a
19 Canadian corporation with little demonstrated contact with
20 California. Judge Armstrong further concluded that specific
21 jurisdiction was lacking, noting that "...Plaintiff's entire
22

23 ² Sections 7704(a)(1),(2),(3), and (5), respectively,
24 prohibit false or misleading transmission information; prohibit
25 the use of deceptive subject headings; require the inclusion of
26 return address or comparable mechanism in commercial electronic
mail; and require the inclusion of identifier, opt-out, and
mailing information in commercial electronic mails.

27 ³ Sections 7704(b)(1) and (2), respectively, prohibit
28 "address harvesting and dictionary attacks" and bar the
automated creation of multiple electronic mail accounts for
certain, specified purposes.

1 argument with respect to specific jurisdiction rests on
2 Plaintiff's understandably mistaken belief...that [Worldwide]
3 is the owner and operator of Cashring."⁴ Although plaintiff
4 had established a possible connection between one defendant,
5 Trevor Hayson, and Cashring, the fact that Worldwide did not
6 own Cashring was fatal to plaintiff's claim against Worldwide.
7 Judge Armstrong granted plaintiff leave to amend his complaint
8 to add the true owner of Cashring and to continue his action
9 against Hayson.

10 The parties disagree as to the proper standard this Court
11 should apply in determining whether a prevailing defendant,
12 such as Worldwide, should be awarded attorneys fees and costs
13 pursuant to the CAN-SPAM Act.⁵ The issue appears to be one of
14 first impression.

15 Plaintiff argues that the proper test is that set forth
16 in Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 422
17 (1978). There, the Supreme Court determined that prevailing
18 defendants to civil rights actions may be awarded attorneys
19 fees and costs only by demonstrating that the plaintiff's
20 claims are frivolous, unreasonable, or groundless.

22 ⁴ It appears from the Order that Cashring is another
23 corporate entity with clearer connections to California.

24 ⁵ As a threshold issue, plaintiff argues that
25 Worldwide's Motion for Attorneys' Fees was untimely filed.
26 Pursuant to both federal and local rules, such a motion must be
27 filed within fourteen days of the entry of judgment in the
28 matter. See Fed. R. Civ. P. 54(d)(2)(B); Civil Local Rule 54-
6. Although Judge Armstrong issued her Order in this matter on
June 20, 2006, she has not yet entered final judgment. See,
e.g., In re Application of Gerard Mqndichian, 312 F. Supp. 2d
1250, 1256-58 (C.D. Cal. 2003). Accordingly, Worldwide's
motion is not untimely.

1 Worldwide asserts that there is no frivolousness
2 requirement under the statute, emphasizing the broad language
3 of section 7706(g)(4) and noting that courts may require the
4 posting of security for attorneys' fees and costs incurred in
5 litigation under the statute. See Asis Internet Services v.
6 Optin Global, Inc., 2006 WL 1820902, at *8 (N.D. Cal. June 30,
7 2006) (discussing the availability of security pursuant to §
8 7706(g)(4) and Civil Local Rule 65.1-1). Worldwide, however,
9 fails to articulate an alternative standard.

10 Neither the statute nor its legislative history clarify
11 how Congress intended attorneys fees to be awarded. A plain
12 reading of section 7706(g)(4) leaves the decision to the
13 discretion of the court. Nothing in the legislative history
14 suggests otherwise. See S. Rep. No. 108-102, at 21, 2004
15 U.S.C.C.A.N., at 2365 (in describing the right of action for
16 internet providers, stating "[t]he court would be permitted to
17 assess the costs of such action, including reasonable
18 attorneys' fees, against any party.").

19 Nor is any particular interpretation of the text mandated
20 by case law. Language similar to that contained in section
21 7706(g)(4) was at issue in Christiansburg. See 42 U.S.C. §
22 2000e-5(k) (stating that the court, "in its discretion, may
23 allow the prevailing party . . . a reasonable attorney's fee
24 as part of the costs . . .").⁶ In Fogerty v. Fantasy, Inc.,

25
26 ⁶ Since Christiansburg, similar statutory language has
27 been held to require the frivolousness analysis. See, e.g.,
28 Marbled Murrelet v. Babbitt, 182 F.3d 1091, 1094 (9th Cir.
1999) (interpreting language contained in the Endangered
Species Act, allowing the award of attorney's fees to "any
party" when deemed "appropriate," as requiring the

1 however, the Supreme Court found that nearly identical
2 language contained in the Copyright Act does not require
3 application of the Christiansburg test.⁷ 510 U.S. 517, 534
4 (1994). Instead, the Court endorsed the use of an
5 "evenhanded" approach which might include the consideration of
6 factors including, but not limited to, "frivolousness,
7 motivation, objective unreasonableness . . . and the need in
8 particular circumstances to advance considerations of
9 compensation and deterrence."⁸ Id. at 534 n.19 (internal
10 quotations and citation omitted). The court explained that a
11 "dual" standard was appropriate to advance "the important
12 policy objectives of the Civil Rights statutes, and the intent
13 of Congress to achieve such objectives through the use of
14 plaintiffs as private attorney[s] general." Id. at 523
15 (internal quotation marks and citations omitted). In
16 contrast, the policies underlying the Copyright Act could be
17 achieved without treating plaintiffs and defendants

18
19 _____
20 Christiansburg analysis); Maag v. Wessler, 993 F.2d 718, 719
21 (9th Cir.1993) (applying Christiansburg to language contained
in 42 U.S.C. § 1988, allowing the court discretion to award
attorneys' fees to "the prevailing party").

22 ⁷ The Copyright Act provides that ". . . the court in
23 its discretion may allow the recovery of full costs by or
against any party other than the United States or an officer
24 thereof. Except as otherwise provided by this title, the court
may also award a reasonable attorney's fee to the prevailing
25 party as part of the costs." 17 U.S.C. § 505.

26 ⁸ Specifically, the Court agreed that such factors
27 could be used to guide a discretionary award of attorneys fees,
so long as the factors were applied evenhandedly to plaintiffs
and defendants alike and so long as "the factors are faithful
28 to the purposes" of the law. Fogerty, 510 U.S. at 534 n.19.

1 dissimilarly.⁹ See id. at 524, 527.

2 Given the policies and goals underlying passage of the
3 CAN-SPAM Act, and given the enforcement structure included
4 therein, it is debatable which standard should be applied in
5 granting attorneys' fees. I need not, however, decide between
6 the two. Applying the less stringent, multi-part test
7 discussed in Fogerty, I conclude that Worldwide's request
8 should be denied.

9 I begin by noting that plaintiff's case as to Worldwide
10 was adjudicated only on the basis of jurisdiction. Whether
11 the substance of plaintiff's claim is meritorious has yet to
12 be determined. Indeed, Judge Armstrong specifically concluded
13 that plaintiff's belief that Worldwide owned Cashring was
14 "understandably mistaken," and allowed plaintiff to amend its
15 complaint to allege the proper defendants. These factors
16 strongly indicate that plaintiff's suit was neither frivolous
17 nor objectively unreasonable. Nor is there any evidence that
18 the suit was motivated by anything other than legitimate
19 concerns over the e-mails plaintiff had received.¹⁰

20
21 ⁹ Implementation of the dual standard, the Court
22 explained, maximized the impact of the Civil Rights laws by
23 giving aid to "impecunious" private plaintiffs. Fogerty, 510
24 U.S. at 524. In contrast, copyright plaintiffs "run the gamut
25 from corporate behemoths to starving artists," Id. (internal
26 quotations and citation omitted). Moreover, "[t]he primary
objective of the Copyright Act is to encourage the production
of original literary, artistic, and musical expression for the
good of the public." Id. Insofar as successful litigation on
either side of the bar could advance the arts, an evenhanded
approach to plaintiffs and defendants was deemed appropriate.
Id. at 527.

27 ¹⁰ In their Reply, Worldwide makes vague accusations
28 that plaintiff and his counsel filed the instant suit merely as
a means of profit. Plaintiff, in turn, filed a Motion to

1 Regarding the balance between compensation and
2 deterrence, there is some indication that members of Congress
3 were concerned that private actions under the statute may be
4 abused. See 150 Cong. Rec. E72-02, 2004 WL 170208, at E73
5 (January 28, 2004) (extension of remarks by Rep. Dingell) ("It
6 is our intention that [cases brought by internet providers] be
7 based on bona fide violations and not used as tools for
8 anti-competitive behavior among competitors."]. As already
9 noted, however, there is no evidence that plaintiff's claims
10 against Worldwide were ill-motivated or anti-competitive.
11 Moreover, while Worldwide may feel wronged by plaintiff's
12 action, it is the general rule in this country that "parties
13 are to bear their own attorney's fees." Fogerty, 510 U.S. at
14 533. The American Rule cautions restraint.

15 Finally, I note that the CAN-SPAM Act is a relatively new
16 piece of legislation confronting novel, complex issues. As
17 another member of this court recently noted in denying
18 defendant's motion to order plaintiff to post security for
19 costs, "this is a new area of law in which the scope of
20 liability is not clear." Asis Internet Services, 2006 WL
21 1820902, at *8. Like security, the award of attorneys' fees
22 may serve as a strong disincentive to litigating violations of
23 the Act. In turn, the development of this important area of
24 law will likely be stunted. This is certainly not what

25 _____
26 Strike these portions of defendant's Reply. Because I agree
27 with plaintiff that defendant's request for attorney's fees
28 should be rejected, I **DENY** plaintiff's Motion to Strike as
moot. I note in addition, however, that defendant submitted no
evidence to support these accusations.

1 Congress intended.

2 For the reasons discussed above, I recommend that
3 Worldwide's Motion for Attorneys' Fees and Costs be **DENIED**.

4 Dated: October 19, 2006

5

6



Bernard Zimmerman
United States Magistrate Judge

7

8

G:\BZALL\REFS\PHILLIPS V SOCIALNET\ORDERDENYATRNYFEES.wpd

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28