

**Modem Was Not Disabled Due to Copyright Infringement Claim
Because Kathleen Parker's Email Was Not A Proper DMCA Notice**

1. Wasn't under penalty of perjury

pg. 31, lines 3-14

Q. You are now -- you now know that Kathleen Parker's e-mail, Exhibit 2, is not an adequate notice of copyright infringement under the DMCA?

A. Yes.

Q. Because why?

A. It's not the appropriate format.

Q. First, it's not under penalty of perjury; correct?

A. I don't know.

Q. Well, is it under penalty of perjury? Is there anything in there, in Exhibit 2, that says, "Under penalty of perjury, I swear such-and-such"?

A. No.

2. Doesn't assert that it was issued under the authority of the copyright holder

pg. 31, lines 15-21

Q. Okay. Is there anything in there that says that, "I am the holder of the copyright or am authorized to act as the agent of the copyright holder"?

A. No.

Q. And is that a requirement under the DMCA, that it say that?

A. I believe it is.

3. Doesn't identify the infringing material

pg. 31, lines 22-pg.32, line 4:

Q. Is it also a requirement of the DMCA that it identify the image by providing the URL for the image?

A. Actually, I believe it says the URL of the material.

Q. So you know that that is a requirement of the DMCA and, of course, you can confirm for us that that doesn't appear for us in Exhibit 2; correct?

A. Correct.

Defendant Knew The Notice Was Defective, And Sought To Remedy It

pg. 6, lines 2-16

Q. So how did you find that picture of Kathleen Parker?

A. I used Google.

Q. Google Search?

A. Yes.

Q. Did you see there on Google image search the allegedly doctored photo?

A. Yes.

Q. Is that where she showed you the doctored photo?

A. She did not show me anything.

Q. Did she send you a link to anywhere?

A. She did not.

Q. Did you in any way independently verify that American-Buddha.com was in fact hosting the image she claimed it was hosting?

A. Yes.

pg. 37, line 20 - pg. 38, line 22.

Okay. You, first of all, for Ms. Parker, you found the image at American-Buddha.com and you put the URL in this Exhibit 3 e-mail; correct?

A. Yes, I did.

Q. All right. You looked at that image and you searched and you found another image of Ms. Parker; correct?

A. Correct.

Q. You made a comparison of the two; correct?

A. I saw that they were similar.

Q. And you then wrote this paragraph that says the web site is American-Buddha.com and the image at issue is, and then there's the URL of the image, "or any other representation of Kathleen Parker that is based upon images published by the Washington Post." Now, why does it say that?

A. I do not recall.

Q. Well, you have got this same thought process available to you, you can just kind of try and remember why.

A. More than likely because I saw that in other things we had received about copyright infringement.

Q. What do you mean, other things you had received?

A. I received numerous e-mails about copyright infringement.

Q. I understand. So -- and what does that have to do with what you wrote here in the second paragraph of Exhibit 3?

A. What it probably means is I cut and pasted from another e-mail.

pg. 39, lines 9 - pg. 40, line 21

Q. Okay, great. Well, then, we can move right ahead to asking why you say that this image is somehow related to other images published by the Washington Post?

A. My recollection at this point, I think, is that I actually went to the Washington Post and found that image on their web site.

Q. And what did that mean to you?

A. And I cut and pasted their copyright off the bottom of their page.

Q. So you concluded that because they had the image -- excuse me -- the Washington Post had the image of Kathleen Parker, that it was their property and that they were the copyright owners?

A. I made no assertions that anyone was the copyright owner, that I'm aware of.

Q. So how could there be copyright infringement if you had no idea whether the image was copyrighted or not?

A. My email says I received an infringement claim.

Q. Uh-huh. You didn't forward that, however; instead, you amplified; correct? You added what was missing, you put in the URL of the image and you attempted to come up with a copyright holder. You filled in two of the blanks that are necessary in a DMCA notice; didn't you?

A. (Witness shrugs shoulders.)

Q. You improved on Ms. Parker's infringement notice; didn't you?

A. No.

Q. Well, you provided the URL. It was defective in that regard, so you improved it in that regard; correct?

A. At the time, I was not aware that it was defective.

Q. Okay. But you -- in retrospect, you clearly did improve it by deleting one defect; right?

A. I wanted to make it easy for InfoStructure to find the image.

Q. You improved the notice; correct?

A. Correct.

Q. You also attempted to identify a copyright holder, a matter that was not done by Ms. Parker; correct?

A. Correct.

Q. And that was the Washington Post; right?

A. Correct.

Content-Based and Other Reasons Given For Turning Off Modem Besides Copyright Infringement

1. Copyright infringement claim

Exhibit 3:

From: "Richard Holbo" holbor@ashlandfiber.net.

Subject: Copyright infringement claim against one of your customers

Date: Wed, August 2, 2006 6:54 am

To: abuse@mind.net

"I have received a copyright infringement claim against a business customer of yours. The MAC of the modem is 00:90:83:68:f6:39, and the DNS name is 17794.

The website is www.american-buddha.com and the image at issue is http://www.american-buddha.com/kathleenparkbigchoicemondo2_small.jpg, or any other

representation of Kathleen Parker that is based upon images published by the Washington Post.

Please let me know as soon as possible what the resolution to this issue is. Copyright infringement is listed in AFN's Acceptable Use policy and can result in the service being turned off.

<http://www.ashlandfiber.net/acceptable.htm>

Richard Holbo
AFN Network Operations

2. Image Was Pornographic

pg. 42, lines 6-21

Q. Who called you?

A. No one.

Q. You called him?

A. I called him.

Q. Okay. Because -- why did you call him?

A. Because that is what we try to do in our policy.

Q. All right. And what did you tell him. Did you check and make sure he'd gotten your e-mail?

A. Yes, I did.

Q. And then what did you tell him, in addition to what was in the e-mail, in the phone call, to say more?

A. I said that I had spoken to Kathleen Parker.

Q. Okay.

A. And that she was upset because her kids were looking at the image on the Internet.

3. Modem on Infostructure's Disconnect List

pg. 32, lines 17 - pg. 33, line 8

Q. What did you do on August 2? On August 2, did you turn off the modem for American-Buddha.com?

A. Right.

Q. And why did you do that?

A. Because, in conversation with Mr. Dowd, he had said that American Buddha was on a disconnect list.

Q. On a disconnect list?

A. Correct.

Q. And what did that mean to you?

A. That they were on a disconnect list.

Q. Help me out here. What is a disconnect list?

A. You'd have to ask Mr. Dowd.

Q. Based on a statement that you did not understand, you disconnected the modem?

A. Based upon Mr. Dowd's assertion that we could turn the modem off, I turned off the modem.

4. Combination Disconnect List/Copyright Infringement Claim

Pg. 45-, lines 16 - pg. 46, line 3

Q. The two of you made the decision; correct?

A. We made the decision to --

Q. -- disable the modem.

A. Yes.

Q. And the reason for that was Kathleen Parker's call and email; correct?

A. The reason for that was because Jon Dowd said that the customer was on a disconnect list and that when the customer called, he would talk to them about both issues.

Q. What are the two issues?

A. To the best of my knowledge, the customer being on a disconnect list and the copyright infringement claim.

5. Rebuttal to Claim that Modem Disabled Because It Was on Disconnect List

pg. 58, lines 3-15

Q. So City of Ashland Fiber Net has direct control over all of the modems that are servicing InfoStructure customers?

A. Yes.

Q. InfoStructure does not have that control itself, it does not have the power to turn off the modem?

A. They do.

Q. They do? So did you tell Mr. Dowd to go ahead and turn it off himself?

A. No.

Q. Why not?

A. Because that is not how we manage abuse issues at the time.