

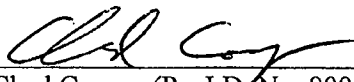
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EXPLOROLOGIST LIMITED,)	Civil Action No. 2:07-cv-01848-LP
)	
Plaintiff,)	
)	
v.)	The Honorable
)	Louis H. Pollak
BRIAN SAPIENT aka BRIAN J. CUTLER,)	
)	
Defendant.)	

**DEFENDANT'S MOTION TO DISMISS
PURSUANT TO FEDERAL RULES OF
CIVIL PROCEDURE 12(b)(1) and 12(b)(6)**

Defendant Brian Sapient hereby respectfully moves this Court to dismiss Plaintiff's Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1), for the reasons set forth in the accompanying memorandum of law.

Respectfully submitted,


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Dated: June 11, 2007

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BRIEF IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS
PURSUANT TO FEDERAL
RULES OF CIVIL PROCEDURE
12(b)(1) AND 12(b)(6)

1. INTRODUCTION

Uri Geller does not like critics. In fact, he dislikes them so much that he will employ almost any means – including sending unlawful copyright takedown notices and filing frivolous lawsuits through his company, Plaintiff Explorologist Ltd. – in order to silence them. This case is one such lawsuit, brought solely to shut down Defendant Brian Sapient's First Amendment-protected efforts to foster public debate about Geller and his claims to paranormal abilities.

Sapient is a member of the Rational Response Squad ("RRS"), a group dedicated to challenging irrational claims, including claims about psychic powers. Through their Internet websites and electronic mailing lists, they stay in touch with thousands of supporters on key issues of the day, such as the ongoing debate between evolution and creationism. As part of their

activities in this area, Sapiient and RRS have also spoken out against beliefs in magic, mysticism, and psychic abilities, arguing that rationality and logic explain these phenomena.

In the course of this work, Sapiient and RRS have sharply criticized Geller, a world-renowned performer who became famous in the 1970s for asserting that he has “mental powers” that allow him to read minds and bend spoons. As part of that criticism, Sapiient uploaded a segment of video from the 1993 PBS program “NOVA: Secrets of the Psychics,” onto YouTube – a well-known Internet video service – as “James Randi exposes Uri Geller and Peter Popoff,”¹ (“NOVA Segment”). In the fourteen-minute segment, skeptic and magician James Randi examines Geller’s performances and proposes a rational explanation for the Geller’s supposed paranormal abilities.

In response, Geller – through his London-based company Explorologist – tried to censor the video by sending a Digital Millennium Copyright Act (“DMCA”) takedown notice to YouTube, claiming the NOVA Segment somehow infringed its copyrights. Recognizing that the company had no cognizable copyright claim, in March 2007 Sapiient counter-noticed pursuant to the DMCA and had the video restored on YouTube. Undeterred, Geller and Explorologist now seek to enlist this Court’s assistance with their improper campaign by filing the instant Complaint, which primarily claims Sapiient has violated British copyright law by posting the NOVA Segment to the United States-based YouTube service.²

¹ <http://www.youtube.com/watch?v=M9w7jHYriFo> (last visited June 11, 2007).

² This is not the first time Geller and Explorologist have tried to use the legal process to silence Geller’s critics. Geller filed at least three lawsuits against James Randi, the skeptic featured in the NOVA Segment; *see Geller v. Randi*, 1993 WL 179293 (D.D.C. 1993), *aff’d*, 40 F.3d 1300, (D.C. Cir. 1994) (affirming dismissal and Rule 11 sanctions); *Geller v. Randi*, No. 7:89-cv-03385-CLB, (S.D.N.Y. dismissed June 18, 1990); *Geller v. Randi*, No 7:89-cv-07143-VLB (S.D.N.Y. dismissed June 1, 1992).

Ironically, the Complaint itself reveals the failures of Plaintiff's copyright allegations. In it, Explorologist admits that its copyright claim rests upon nothing more than the republication of an eight-second clip at the beginning of the NOVA Segment wherein an unnamed person introduces Geller at a public event by stating "his remarkable affinity for metal and his psychic abilities are well documented all over the world." That single sentence sets up Randi's subsequent commentary on Geller's so-called psychic abilities in the rest of the video. Such minimal and critical use is absolutely privileged under bedrock principles of our law, including the fair use doctrine and First Amendment. Explorologist surely knows this: that is why it has asked the Court to apply British law—which has weaker fair use and free speech protections—to the alleged "infringement," even though the NOVA Segment was uploaded by a United States resident, and is hosted on YouTube's United States servers.

This Court need not assist Plaintiff in its improper effort to punish Geller's critics. Instead, it may end this litigation now by dismissing Plaintiff's Complaint with prejudice for several reasons. First, Explorologist's foreign intellectual property and state misappropriation claims are preempted under Section 230 of the Communications Decency Act. Second, any judgment based on these foreign claims would be unenforceable as repugnant to well-established United States public policies. Third, this Court need not assert subject matter jurisdiction over the foreign copyright claims because copyright infringement is not a transitory tort and foreign copyright law cannot be invoked for actions that take place solely within the United States. Fourth, even if jurisdiction were appropriate, Plaintiff's copyright cause of action fails to state a claim for relief under basic tenets of both foreign and U.S. laws. Finally, Plaintiff's disparagement and appropriation claims fail to allege essential elements of these causes of action.

2. BACKGROUND FACTS

On October 19, 1993, the U.S. Public Broadcasting Service (“PBS”) television series NOVA aired a program entitled “Secrets of the Psychics” (the “NOVA Documentary”). *See* Defendant’s Request for Judicial Notice (“RJN”), Ex. A (NOVA: Secrets of the Psychics); Ex. B (NOVA, Secrets of the Psychics: Program Overview).³ The hour-long program included the NOVA Segment, an almost fourteen-minute segment in which magician and skeptic James Randi first explains how Uri Geller’s allegedly supernatural feats might have been accomplished through trickery, then exposes faith healer Peter Popoff. *Compare* RJN, Ex. A (“NOVA Documentary”) *with* <http://www.youtube.com/watch?v=M9w7jHYriFo> (“NOVA Segment”) (last visited June 11, 2007). The NOVA Segment includes a few seconds of footage in which a Dr. C.J. Hughes introduces Uri Geller to an audience, stating that Geller’s “remarkable affinity for metal and his psychic abilities are well documented all over the world.” (“Hughes Excerpt”). *See* NOVA Documentary at 5:15-5:23; NOVA Segment at 0:50 to 0:58.

In January 2007, Defendant Brian Sapient uploaded the NOVA Segment to YouTube. *See* NOVA Segment; Am. Compl. ¶ 10. Sapient is a United States citizen residing in Philadelphia, Pennsylvania and a member of the Rational Response Squad (“RRS”), an activist group dedicated to challenging what they see as irrational claims. Am. Compl. ¶ 2. YouTube is a video-sharing website where millions of Internet users post videos and make them available to others for viewing. *See generally* <http://www.youtube.com> (last visited June 11, 2007). Sapient and the RRS rely on YouTube to reach thousands of audience members and promote their activist messages and campaigns online.

³ http://www.pbs.org/wgbh/nova/teachers/programs/2012_psychics.html (last visited June 11, 2007).

On March 23, 2007, an agent of Plaintiff Explorologist and Geller demanded that YouTube take down the NOVA Segment pursuant to the DMCA, 17 U.S.C. § 512. As a result of Plaintiff's DMCA copyright infringement notice, Sapient's YouTube account was suspended. Sapient quickly submitted a counter-notification of noninfringement to YouTube under the DMCA, on March 27, 2007. However, as a result of Plaintiff's conduct, Sapient's account and all of his video postings (including, but not limited to, the NOVA Segment) remained unavailable for more than two weeks. On May 8, 2007, Sapient sued Explorologist and Geller in the Northern District of California, seeking damages for misrepresentation and a declaratory judgment of noninfringement. *See John Doe a/k/a Brian Sapient v. Uri Geller a/k/a Uri Geller-Freud and Explorologist Ltd.*, N.D.C.A. Case No. 3:07-cv-02478-BZ.

Explorologist filed the instant case on May 7, 2007—just before Sapient filed his suit in California—and filed its Amended Complaint on May 23, 2007. Relying on British copyright law, Explorologist claims Sapient has infringed its United Kingdom copyright in an alleged video recording of a 1987 public Geller performance (including introductory remarks by C.J. Hughes) by posting the NOVA Segment (including the Hughes Excerpt) on YouTube. *See* Am. Compl. ¶ 10; NOVA Segment at 0:50 to 0:58. Explorologist also alleges Sapient has infringed Geller's publicity rights (of which it is the purported assignee) and commercially disparaged Explorologist by uploading another video (in March 2007) in which Sapient allegedly "accused Plaintiff of being a dummy or sham corporation and accused Uri Geller of being a professional con man and fraud and other criminal or immoral acts." Am. Compl. ¶¶ 15-21. Explorologist has not pled special damages. Am. Compl. ¶¶ 13-18.

3. STANDARD OF REVIEW

A court may grant a motion to dismiss if it is clear that the court cannot provide relief under any set of facts that Plaintiff could prove consistent with those allegations. *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994); *see also Dimeo v. Max*, 433 F. Supp. 2d 523, 527 (E.D. Pa. 2006). "Factual allegations must be enough to raise a right to relief above the speculative level...on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964 (2007). Thus, the Court must accept all well-pleaded allegations in the complaint as true and draw all inferences in the plaintiff's favor, *Angelaastro v. Prudential-Bache Sec., Inc.*, 764 F.2d 939, 944 (3d Cir. 1985), but need not accept "bald assertions or legal conclusions." *Morse v. Lower Merion School Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (internal quotation marks omitted); *see also Nadig v. Nagel*, 272 F. Supp. 2d 509, 511 (E.D. Pa. 2003) ("The court need not, however, accept conclusory allegations or legal conclusions.").

To assist the Court's determination, Sapient submits herewith a Request for Judicial Notice ("RJN") of the NOVA Segment that forms the basis for Plaintiff's principal allegations, of the fact that the NOVA Segment is an excerpt from the original NOVA documentary, and of the NOVA website and U.S. Copyright Office website describing the original documentary, and an appendix of relevant foreign law. While a district court generally may consider only allegations set forth in the pleadings, *Angelaastro*, 764 F.2d at 944, a "document integral to or explicitly relied upon in the complaint may be considered without converting the motion [to dismiss] into one for summary judgment." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (internal quotation marks omitted) (quoting *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1220 (1st Cir. 1996)). The rationale underlying this exception is simple:

“The primary problem raised by looking to documents outside the complaint—lack of notice to the plaintiff—is dissipated [w]here plaintiff has actual notice . . . and has relied upon these documents in framing the complaint.” *Id.* at 1426 (internal quotation marks omitted); *see also Brown ex rel. Marasco v. Wiener*, 2005 WL 2989748 (E.D. Pa. 2005) (“the court may consider matters of public record, and authentic documents upon which the complaint is based...”).

This Court may also consider foreign law sources; once an issue of foreign law has been properly raised, a federal court may make a determination of that law as a matter of law, and in making that determination “may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.” Fed. R. Civ. P. 44.1. “The Court has great discretion in choosing source materials when the application of foreign law is necessary.” *Zurich Capital Mkts., Inc. v. Coglianese*, 383 F.Supp.2d 1041, 1052 (N.D. Ill. 2005) (examining Bahamian law in context of motion to dismiss).

4. ARGUMENT

Plaintiff’s Amended Complaint is fatally flawed. As an initial matter, all of Plaintiff’s claims based on Defendant’s republication of the NOVA Segment are barred by Section 230 of the federal Communications Decency Act (“Section 230”), which explicitly immunizes users of online services from claims based on their publication of previously published materials. Further, Plaintiff’s claims under British copyright law are unenforceable (and therefore should be dismissed) because any judgment this Court could render on them would be repugnant to the First Amendment and the Fair Use Doctrine. Moreover, Plaintiff has failed to establish adequate jurisdiction over its copyright claims. Finally, even if Plaintiff were somehow able to overcome all of these obstacles, Plaintiff’s Complaint must still be dismissed because it fails successfully to plead essential elements of its British copyright and state causes of action.

a. **Section 230 of the Communications Decency Act Bars Plaintiff's Claims for Violations of British Copyright Law and Appropriation of Name or Likeness.**

Plaintiff's Complaint is primarily based on a single activity by Defendant: the republication of the NOVA Segment in the United States to the YouTube video website.⁴ Section 230 of the Communications Decency Act requires that all claims based on that republication be dismissed with prejudice.⁵

▪ Background on Section 230 of the Communications Decency Act

Section 230 of the Communications Decency Act represents Congress's effort to balance two deeply rooted American values: our commitment to vibrant public discourse and our desire to hold individuals accountable for genuinely harmful speech. These values have long been in tension: Claims for torts like defamation and intentional infliction of emotional distress have strong roots in our legal system, but, because they target speech, such claims may also have a chilling effect on legitimate public discourse. Not surprisingly, the rapid growth of the Internet prompted an intense Congressional debate over the right approach to mediating this tension in this new and potentially powerful forum for free speech. Section 230 was the result.

Section 230 immunizes users and providers of "interactive computer services" from liability for content originally published by third parties, 47 U.S.C. § 230, in order to encourage

⁴ Am. Compl. Count I (¶¶6-12) and III (¶¶ 19-21).

⁵ Courts regularly grant Rule 12(b)(6) motions when it is clear that Section 230 bars the claims alleged in the plaintiff's complaint. *See, e.g., Green v. Am. Online*, 318 F.3d at 472; *Dimeo*, 433 F. Supp. 2d at 527; *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 504 (E.D. Pa. 2006).

both large and small online intermediaries to open their forums for discussion, free from fear of liability for another speaker's words. As the Fourth Circuit found in the seminal case interpreting Section 230, such liability was, "for Congress, simply another form of intrusive government regulation of speech." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) ("Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum."). Recognizing that the Internet and other interactive computer services "have flourished, to the benefit of all Americans, with a minimum of government regulation," *see* 47 U.S.C. § 230(a)(4), Congress expressly sought to limit the impact on the Internet of federal or state regulation via statutory or common law causes of action. Congress thus recognized in Section 230 what the U.S. Supreme Court later confirmed in extending the highest level of First Amendment protection to the Internet: "governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it." *Reno v. ACLU*, 521 U.S. 844, 885 (1997).

In keeping with these principles, Congress crafted an expansive immunity, covering both commercial entities and individual intermediaries – including users of online forums like YouTube—and encompassing a broad range of speech-related torts, subject only to specified narrow exceptions. Thus, under the cloak of federal immunity, individuals such as Sapient are protected from being held liable for exchanging others' videos, articles or observations as part of the dialog carried on through newsgroups, blogs, email lists, or through the simple action of posting an interesting video on a video hosting service.

Courts across the country, including Pennsylvania courts and the Third Circuit, have upheld Section 230 immunity and its policy of regulatory forbearance for both providers and

users of interactive computer services. See *Dimeo v. Max*, 433 F. Supp. 2d at 528-29; *Green v. Am. Online*, 318 F.3d 465, 471 (3d Cir. 2003); *D'Alonzo v. Truscello*, 2006 WL 1768091, 2006 Phila. Ct. Com. Pl. LEXIS 244 (Phila. Ct. Common Pleas May 31, 2006). As explained below, that immunity easily encompasses Sapien's alleged activities.

▪ The Text and Application of Section 230

Section 230 of the Communications Decency Act provides:

TREATMENT OF PUBLISHER OR SPEAKER. No provider *or user* of an interactive computer service shall be treated as the publisher or speaker of *any* information provided by another information content provider.

47 U.S.C. §§ 230(c)(1) (emphasis added). As this Court has recognized, the statute could hardly be more clear on this point: “[T]he text of the CDA itself tells all parties . . . not to treat a provider *or user* of an interactive computer service as the publisher of information posted by someone else. Moreover, it does so in mandatory terms.” *Voicenet Comms., Inc. v. Corbett*, 2006 WL 2506318, 2006 U.S. Dist. LEXIS 61916 at *10 (E.D. Pa. Aug. 30, 2006) (emphasis added). Congress’ mandate bars, in turn, any cause of action against a user based on such publication, because “[b]y declaring that no ‘user’ may be treated as a ‘publisher’ of third party content, Congress has comprehensively immunized republication by individual Internet users.” *Barrett v. Rosenthal*, 40 Cal.4th 33, 62 (Cal. 2006). Thus, the plain “language of § 230(c)(1) confers immunity not just on ‘providers’ of such services, but also on ‘users’ of such services.” *Batzel v. Smith*, 333 F.3d 1018, 1030 (9th Cir. 2003), *cert. denied*, 124 S.Ct. 2812 (2004); *Corbett*, 2006 WL 2506318 at *10.

As noted above, Congress enacted Section 230 “to promote the free exchange of information and ideas over the Internet. In specific statutory findings, Congress stressed that ‘[t]he Internet and other interactive computer services offer a forum for a true diversity of

