

## ADDITIONAL DEVELOPMENTS— CYBERLAW

### *DUDNIKOV V. CHALK & VERMILION*

*514 F.3d 1063 (10th Cir. 2008)*

In a case involving a copyright dispute over an eBay auction, the Tenth Circuit overturned the District Court of Colorado's grant of a motion to dismiss due to lack of personal jurisdiction. The Tenth Circuit held that Colorado had specific jurisdiction over the defendant because of his interactions with the Colorado plaintiff via eBay. The plaintiff's eBay auction item substituted Betty Boop and her dog "Pudgy" for the elegant woman walking a regal dog in the famous work owned by the defendant copyright holder. The defendant issued a notice of claimed infringement (NOCI) to eBay in California, prompting eBay to remove the auction listing. The plaintiff offered to refrain from selling the disputed fabric in exchange for a withdrawal of the NOCI, to which defendant responded by threatening a federal suit. Plaintiffs filed suit in the United States District Court of Colorado, seeking declaratory judgment that their eBay auction item did not infringe defendant's copyright. The district court granted the defendant's motion to dismiss for lack of personal jurisdiction, and the plaintiff appealed to the Tenth Circuit.

To determine whether Colorado had personal jurisdiction over the defendant, the Tenth Circuit formulated and applied a five-part test based on Supreme Court law—the defendant must have (1) committed an intentional action, (2) expressly aimed at the forum state, (3) with knowledge that the brunt of the injury would be felt in the forum state, (4) the plaintiff's injuries arose out of the defendant's forum-related activities, and (5) the traditional notions of fair play and substantial justice are not offended.

The court held that the defendant's NOCI filing was an intentional act aimed at the plaintiff in Colorado, as was his threat to bring suit within ten days if the plaintiff did not take down the item from action. Furthermore, the court aligned itself with a ruling by the Ninth Circuit by holding that the intentional act did not need to be wrongful, since such a requirement would be tantamount to an assessment of the merits of a case. Though the defendant argued that he sent the NOCI to eBay in California, the court reasoned that the defendant did so with the intent to remove the auction listed by the plaintiff's business in Colorado. From this, the court determined that the defendant's actions were expressly aimed at Colorado,

and that he knew that the injury would be felt in the forum state. The Court further reasoned that the defendant knew that plaintiff was located in Colorado since such notice was provided on his eBay listing. The Tenth Circuit then concluded that sending a NOCI to eBay and threatening lawsuit via email—the forum-related activities of the defendant—were both but-for and proximate causes of the plaintiff’s alleged injury because the merits of the plaintiff’s declaratory judgment suit dealt directly with the same issue of copyright infringement. Accordingly, the first four factors of the test for Colorado’s personal jurisdiction over the defendant were satisfied.

Finally, the court evaluated whether Colorado’s jurisdiction over the defendant would offend notions of fair play and substantial justice by considering (1) the defendant’s burden, (2) the forum state’s interests in the dispute, (3) the plaintiff’s interest in receiving convenient and effectual relief, (4) the judicial system’s interest in efficiently resolving controversies, and (5) the shared interest of the several states in furthering social policy. The court decided that none of these factors weighed definitively in favor of the defendant. Thus, the Tenth Circuit found that personal jurisdiction was proper, and reversed the decision of the lower court.

## CYBERBULLYING

On June 30, 2008, Missouri updated the state's harassment law to criminalize online harassment, known as "cyberbullying." More than a dozen states prohibit cyberbullying, but Missouri is the first state to authorize imprisonment for infractions.

The revised law redefines "harassment" in section 565.090 of the Revised Statutes of Missouri to include electronic communication that "frightens, intimidates, or causes emotional distress to [another] person." Previously the state considered only telephonic and written communication to be modes of harassment. The penalty for harassment is imprisonment for up to one year, unless the act is committed by a person older than twenty upon a person younger than seventeen, which carries a sentence of up to four years.

Missouri adopted the new law following public outcry after the infamous 2006 suicide of thirteen year old Megan Meier. Meier received nasty messages through myspace.com, a popular social networking site, supposedly from a boy named Josh. "Josh," in fact, did not exist, but was a fake profile created by a fellow classmate and the classmate's mother, Lori Drew, who communicated with Megan through the fake account for over a month. The communications culminated in Megan's death.

Missouri prosecutors determined that they were unable to use the state harassment statute as it existed in 2006 to prosecute Lori Drew, but there was significant public pressure to find a way to hold Drew accountable. Federal prosecutors stepped in and charged Drew, using an unconventional application of the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030. The CFAA is typically used to prosecute hackers and electronic information theft. Prosecutors charged Drew with violating the MySpace terms of service (TOS), which required truthful and accurate registration, refraining from using information from MySpace to harass others, refraining from solicitation of information from a minor, and refraining from promoting false or misleading information.

In an amicus brief supporting the defendant's motion to dismiss, the Electronic Frontier Foundation criticized the Justice Department for applying the CFAA this way, particularly for using TOS violations for criminal prosecutions. Websites typically use TOS agreements to maintain a contractual right to remove troublesome users, not to prosecute criminal matters.

Law professor and former federal prosecutor Orin Kerr also objected to this application of the CFAA and joined Drew's defense team pro bono in October 2008. Kerr cautioned that a successful prosecution in the Drew

case would allow the federal government to “bring charges against anybody who uses the internet. And Congress never intended that.” Drew was charged with one felony count of conspiracy and three felony counts of unauthorized computer access. The jury acquitted Drew of the three charges regarding unauthorized computer access because they felt the prosecution’s evidence did not meet the maliciousness required for a conviction, and instead convicted Drew of three misdemeanor counts of unauthorized computer access. However, the jury was deadlocked with regard to the conspiracy charge, leaving an opportunity for a retrial upon that issue. The defense filed a Rule 29 motion for directed acquittal that remains undecided.

Missouri’s revised state harassment law is intended to simplify prosecution of acts such as those of Lori Drew.