No. 11-10977

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICK HAIG PRODUCTIONS, E.K.,
Plaintiff

v.

DOES 1-670, ET AL
Defendants – Appellees

v.

EVAN STONE
Appellant

REPLY BRIEF OF APPELLANT EVAN STONE

On Appeal from the United States District Court
for the Northern District of Texas, Dallas Division
CA No. 3:10-cv-01900-N (Godbey, D.)

s/ E. F. Stone
State Bar. State Bar No. 24072371
624 W. University Dr., #386
Denton, Texas 76201
Phone: 469-248-5238
Fax: 310-756-1201
E-mail: lawoffice@wolfe-stone.com
Appellant

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of appeal, No. 11-10977:

1. Evan Stone, Appellant;
2. Does 1 – 670, Appellees;
3. The Electronic Frontier Foundation, Counsel for Appellees (Matthew Zimmerman, Paul Alan Levy).

Respectfully submitted,

s/ E. F. Stone

State Bar. State Bar No. 24072371
624 W. University Dr., #386
Denton, Texas 76201
Phone: 469-248-5238
Fax: 310-756-1201
E-mail: lawoffice@wolfe-stone.com
Appellant

STATEMENT OF THE ISSUES

ISSUE ONE: Can the impropriety of a sanction order be reviewed on appeal even if the sanctioned attorney did not previously introduce the grounds for review in the lower court?

ISSUE TWO: Does communication with a suspected tortfeasor constitute communication with a defendant, if that suspect is never named by the plaintiff as a defendant?

ISSUE THREE: May a plaintiff conduct Rule 45 discovery of electronically stored information to obtain the names of John Doe defendants prior to conducting a Rule 26(f) discovery conference with those unknown defendants?

ARGUMENT

A. Appellate Review of Sanctions

Attorneys for the defense propose that Appellant Evan Stone cannot seek to have the lower court's sanction order reviewed on appeal because he chose not to respond to the sanction motion. The logic underlying this proposition is, itself, quite flawed, and in this particular situation it is more obviously inappropriate.

The flaw in this logic reveals itself when we examine the distinction it creates between court-initiated sanctions and sanctions initiated on motion. Even opposing counsel would agree that an appellant is free to assert whatever arguments she chooses in the appeal of a sanction order initiated by a court alone. In that situation, arguments contesting a sanction are not waived by failure of the sanctioned attorney to have asserted those arguments before the lower court, for such an opportunity likely did not exist in the first place. As with most offenses in and out of court, the bad actor does not promptly supply the authorities with an explanation for why her conduct was acceptable right after she commits the act in question. These

explanations go unheard unless and until the actor is confronted about her conduct.

If this type of waiver applied to sanctions, then a sanction on motion would be significantly stronger than a court's own sanction because it would carry the possibility of being immune from appeal. Placing the greater disciplinary power in attorneys' hands would undermine the authority of the courts and encourage the same vengeful attorney-versus-attorney behavior that gave rise to this Appeal.

The reasons Appellees' proposition is particularly inappropriate to this situation are as follows: first, the act giving rise to the sanctions (Appellant's serving subpoenas prior to a Rule 26(f) conference), occurred prior to Appellee's appointment as attorneys ad-litem in the case. And second, the ad-litem appointment of Appellees had terminated, along with the case, prior to Appellees' filing of their motion for sanctions. Knowing this, Appellant Stone viewed Appellees' act of moving for sanctions as absurd. It appeared to Stone to be just another in a series of vexatious assailments, such as likening Stone's law

practice to extortion[1], referring publicly to Stone as a "troll,"[2] and now having filed an amicus brief in another of Stone's cases.[3]

B. Communication with Non-parties and Plaintiff's Right to name Defendants

In their repeated interventions into copyright infringement cases brought throughout the country, Appellees regularly argue that an internet protocol ("IP") address does not equate to a person. On this point, Appellant agrees. In the records produced by internet service providers in this type of litigation, an IP address is tied only to the account holder who is paying for the internet service associated with that IP address. That account holder is often not the same person who committed the infringement. The infringement is sometimes committed by a child in the home of the account holder, the account holder's roommate or even the account holder's neighbor, who may be using the account holder's internet service through an unsecured wireless connection.[4]

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[1] Julie Samuels, EFF, *Courts Call Out Copyright Trolls' Coercive Business Model, Threaten Sanctions,* EFF.org, *available at:* https://www.eff.org/deeplinks/2011/10/courts-call-out-copyright-trolls-coercive-business

[2] *Id.*

[3] *Funimation Entertainment v. Does 1 – 1,427*, (N.D. Tex. 2:11-cv-00269)

[4] *BMG Music v. Doe*, 2004 U.S. Dist. LEXIS 8457 (E.D. Pa. Apr. 2, 2004)

An IP address is much like an automobile's license plate in that an IP address can be used to identify the "owner" of an internet account just as a license plate can be used to identify the owner of an automobile. If an automobile is involved in a tort or even a crime, and the driver of that vehicle is unknown and unable to be identified by any witness or photograph, then the persons investigating the incident invariably look up the registered owner of that vehicle by his or her license plate. No good investigator, on the criminal or civil side, would then jump immediately to the conclusion that the registered owner of the vehicle was also the driver of the vehicle at the time of the incident. But, this registered owner is the only viable starting point for the heart of the investigation.

Likewise, plaintiffs in internet infringement cases must begin their investigations with the account holders associated with the IP addresses through which the infringement occurred. And likewise, plaintiffs do not jump to the conclusion that the account holder was the wrongdoer. Here, Appellant Stone did make contact with a handful of account holders through whose accounts infringement was witnessed. He did not, however, choose to name any of these persons as defendants

in the case, much less serve any of them with a summons and a copy of the complaint. Therefore, and in accord with Appellees' assertions, Appellant Stone could not have, and did not, communicate with any actual *defendant* in the case.

C. Rule 45 Discovery and ESI

It is of utmost importance to remember the underlying act for which the sanctions were awarded: the service of subpoenas on non-party internet service providers for the narrow purpose of obtaining the identities of alleged infringers. Not only is such discovery expressly allowed in The Copyright Act[5], but it is also understood to be accepted in modern discovery practices. The practice of discovering electronically stored information is still young, but certain norms have begun to form. Respected treatises on the practice indicate that service of subpoenas regarding electronically stored information do not necessarily require a discovery conference beforehand. This notion is accepted enough to have even been adopted the O'Connor's Federal Rules book, as edited by

[5] 17 USC § 512(h)

Texas' own Michel C. Smith of Seibman, Burg, Phillips and Smith, L.L.P. in Marshall, Texas.[6]

CONCLUSION

For the additional reasons stated herein, Appellant respectfully requests that the District Court's Order of sanctions against Appellant should be reversed in its entirety, or in part, as this Court deems appropriate.

[6] Michael C. Smith, O'Connor's Federal Rules – Civil Trials, 446 (2010) (*Citing* E.g., Guidelines for Discovery of Electronically Stored Information (ESI) (D. Kan.), ¶5; see Rothstein, Managing Discovery of Electronic Information, at 12; Sedona Principles, Second Edition, at 69)

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), undersigned counsel certifies that this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. Including headings and footnotes, but exclusive of the portions exempted by 5th Cir. R. 32.2.7(b)(3), this brief contains 1,102 words printed in a proportionally spaced typeface.
2. This brief is printed in a proportionally spaced, serif typeface using Century Schoolbook 14 point font in text and Century Schoolbook 12 point font in footnotes, produced by Microsoft Word 2011 for Mac, version 14.1.3.
3. Upon request, undersigned counsel will provide additional electronic versions of this brief and/or copies of the Word printout to the Court.
4. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5th Cir. R. 32.2.7, may result in the Court's striking this brief and imposing sanctions against the person who signed it.

Respectfully submitted,

s/ C. F. Stone
State Bar. State Bar No. 24072371
624 W. University Dr., #386
Denton, Texas 76201
Phone: 469-248-5238
Fax: 310-756-1201
E-mail: lawoffice@wolfe-stone.com
Appellant

CERTIFICATE OF SERVICE

I, Evan Stone, certify that a copy of the reply brief for appellant will be served upon counsel for the Appellees, Matthew Zimmerman and Paul Alan Levy by electronic mail through the Court's electronic notification system on March 2, 2012.

Respectfully submitted,

s/ E. F. Stone

State Bar. State Bar No. 24072371
624 W. University Dr., #386
Denton, Texas 76201
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Fax: 310-756-1201
E-mail: lawoffice@wolfe-stone.com
Appellant