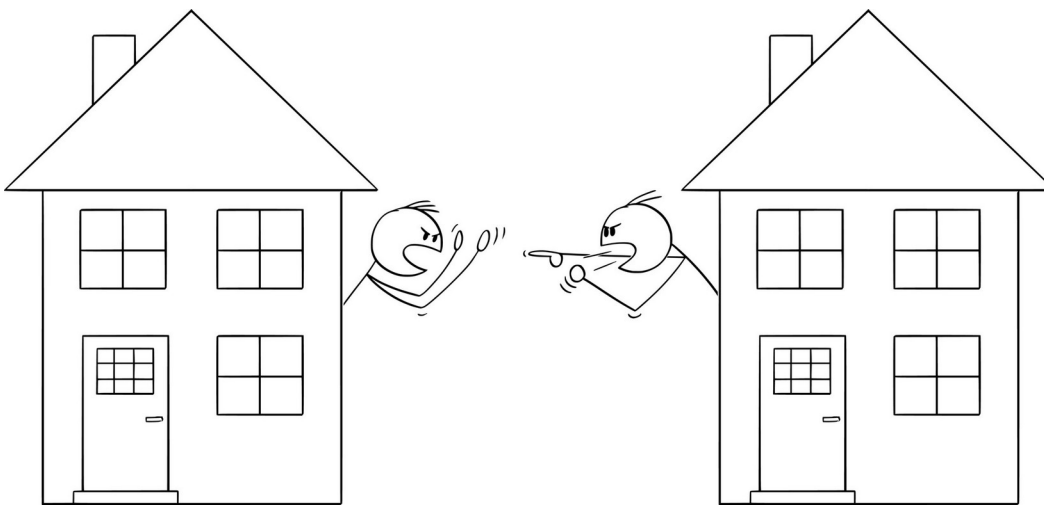


Russia, Neighbors, and a Copyright-protected Social Media Post = Fair Use?

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by Shannon Bjorklund



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What additional value does a copyright registration confer on a run-of-the-mill neighborhood social media post? Not a lot, it appears.

Earlier this year, the First Circuit affirmed the dismissal of a lawsuit brought by one neighbor against another. From 2002-2017, neighbors in the Davis Square area of the 80,000-person Massachusetts city of Somerville used the Russian-owned social networking platform LiveJournal to host a neighborhood online forum. Starting around 2010, anonymous users posted comments accusing the Plaintiff Jonathan Monsarrat of unsavory things. Monserrat made his own social media post, quoting the forum’s “abuse policy” and threatening to report anyone who had not removed the posts. Monserrat then filed for copyright protection of his social media post.

In 2017, LiveJournal changed its user terms related to censorship – consistent with Russian law – and the then-moderator, Defendant Ron Newman, decided to move the group to a different social media platform. Newman copied all existing LiveJournal threads in whole onto the new platform, including Monsarrat’s copyrighted post and the anonymous posts. Monsarrat sued Newman, alleging defamation, with respect to the

anonymous posts, and copyright infringement, with respect to Monsarrat's post.

The federal district court in Massachusetts dismissed the case at the Rule 12 motion-to-dismiss phase, without any discovery. The court dismissed the defamation claims because Newman was within an exemption for re-published information within the Communications Decency Act. The district court also ruled that the publication was fair use "as a matter of law" and the case could be dismissed without discovery.

The First Circuit agreed, noting "[W]e can see no plausible argument that Newman has not established fair use." As many of you know, the fair-use test set forth in the Copyright Act has four factors: (1) the purpose of the use, (2) the nature of the work, (3) the amount of the work used, and (4) the effect of use on the potential market. The First Circuit put it bluntly: "Monsarrat cannot claim with a straight face that Newman's copying – seven years later and on a different platform – was aimed at the same purpose." Monsarrat's purpose was to "encourage users in 2010 to immediately stop harassing him." While the Court noted the district court had "overreached" by finding that Newman's purpose was "solely for historical and preservationist purposes," it noted that Newman's copying was "at least minimally" transformative and was non-commercial, and therefore the first factor favored Newman. The second factor also favored Newman, because the post's "brief workaday prose" threatening action "lies much more on the factual and informational side of the line than near the 'core' of copyright protection." And although Newman copied the entire copyrighted work, which would usually tip the scales in favor of the copyright holder on this factor, the court decided this factor favored neither party, because "it would have made scant sense for Newman to take just part of the copyrighted post" and "would have misrepresented what Monsarrat wrote." The fourth factor – the effect on the market – also favored Newman. The First Circuit agreed with the district court that "there is no plausible market for the copyrighted post," and Monsarrat did not dispute this point. The court rejected Monsarrat's argument that the copyright registration itself demonstrated the post's value. The court logically reasoned that the fact of copyright registration "would be present in every case, and thus be largely beside the point in differentiating one case from another."

The outcome of this case is no surprise, but the procedural disposition is interesting. The court's opinion was more fact-intensive than most at the Rule 12 stage – an outcome that may not be repeated in a case with less stark facts. And, at the end of the day, Monsarrat's quest to suppress the harmful comments about him had the reverse effect: they were published nationwide. Be careful what you wish for.