Universal Tube & Rollform Equipment Corporation, Plaintiff, v. You-Tube, Inc., et al., Defendants.

Case No.: 3:06CV02628

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

504 F. Supp. 2d 260*; *2007 U.S. Dist. LEXIS 40395*; *83 U.S.P.Q.2D (BNA) 1001

June 4, 2007, Filed

JUDGES: James G. Carr, Chief Judge.

OPINION BY: James G. Carr

OPINION

[*263] ORDER

This is a case about two very different types of "tubes." Universal Tube & Rollform Equipment Corporation (Universal), a supplier of used tube and pipe mills and rollform machinery, filed this suit against YouTube, Inc. (YouTube), a well-known provider of online video content, and YouTube's co-founders, Chad Hurley and Steve Chen. According to the complaint, YouTube, which operates a website at www.youtube.com (youtube.com), infringed upon various rights related to Universal's website, www.utube.com (utube.com).

Universal asserts several federal and state causes of action: 1) violation of § 43 of the Lanham Act, *15 U.S.C. § 1125(a)*; 2) trademark dilution under **[**2]** Ohio law; 3) trespass to chattels; 4) nuisance; 5) negligence; 6) violation of the Ohio Deceptive Trade Practices Act, *O.R.C. § 4165.02*; and 7) violation of Ohio RICO *O.R.C. § 2923.32* by Chad Hurley and Steve Chen. Universal seeks money damages, costs and attorneys' fees, as well as injunctive relief seeking, *inter alia,* to cancel trademark applications filed by YouTube under *15 U.S.C. §§ 1064*, *1119*, stop the operation of youtube.com, deliver profits from the operation of youtube.com to Universal, and cause transfer of the youtube.com domain name to Universal.

Pending is defendants' motion to dismiss Universal's second amended complaint for lack of jurisdiction and failure to state a claim. For the reasons that follow, the motion to dismiss shall be granted in part and denied in part.

Background

Universal, which has been in the business of supplying used tube and pipe mills and rollform machinery for over two decades, purchased the www.utube.com domain name in 1996. At some later point not specified in the complaint, Universal applied for federal registration of the UTUBE **[**3]** mark.

The predecessors of YouTube registered the youtube.com domain name in February, 2005. The company was later incorporated in October, 2005, and its website publicly launched in December, 2005.

Universal claims that the presence of youtube.com has caused several problems. Traffic at utube.com's website increased from a "few thousand" visitors per month before youtube.com began operating to approximately 70,000 visitors *per day.* This influx of visitors has caused Universal's web servers to crash on multiple occasions. This, in turn, impedes access to Universal's website by its customers, with a resultant loss in sales.

Universal also contends that its internet hosting fees (fees paid to third parties to host the utube.com website on third party **[*264]** computers) increased from less than $ 100.00 per month to more than $ 2,500 per month. The unintended visitors have also disrupted Universal's business by leaving inappropriate and harassing messages through the utube.com site.

Finally, Universal maintains that confusion between the two websites has tarnished Universal's reputation.

Discussion

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3. Trespass to Chattels

Universal claims relief for trespass to chattels. Plaintiff says it "owns the chattel <utube.com>" and that YouTube's **[*268]** actions have "diminished the value, quality or condition of the chattel." Universal also alleges that it "hosts its website on certain server computers" and that YouTube has caused those computers to "shut down and crash[]."

YouTube seeks to dismiss Universal's claim for trespass to chattels on several grounds. First, YouTube claims that Universal has failed to make the necessary allegation that YouTube intentionally came into physical contact with Universal's property. Instead, mistaken internet visitors are the ones who make contact with Universal's website.

Second, YouTube argues that utube.com is a website, and that websites do not meet the definition of chattel. According to YouTube, "chattel" must be movable, physical, personal property, which a website is not.

Universal argues that both the domain name and the webservers that plaintiff leases are the chattels involved in this case. Plaintiff also challenges whether intentionality is an element of trespass to chattel under Ohio law. Plaintiff urges the court **[**17]** to allow the claim to continue so that its "novel claim" can be fleshed out with facts.

Universal also argues that to satisfy the requirements of its claim, the "intermeddling" with its chattel need not be performed by YouTube itself, but instead could be performed indirectly by third parties, so long as the harm is still attributable to YouTube's use of its domain name.

Even if a domain name does not qualify as chattel, Universal argues in its briefs that it has a "personal property interest" in the computer system that hosts the utube.com website. Universal represents through its briefs that it has a contractual agreement that is "essentially" a "lease for the use of a specific portion of the computer system."

Despite being a well-aged cause of action, trespass to chattels has been applied in the context of the internet. In *CompuServe, Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1022 (S.D. Ohio 1997)*, the court held that a "spammer" (sender of unsolicited email) could be held liable to an internet service provider for sending unsolicited emails to the provider's clients. The court found that "[e]lectronic signals generated and sent by computer" were "sufficiently **[**18]** physically tangible to support a trespass cause of action." *Id. at 1021*.

What *Compuserve* makes clear is that the focus of a trespass to chattel claim, although it involves something as amorphous as "the internet," must still maintain some link to a physical object -- in that case, a computer. *Id.* (discussing necessity of "physical contact" with the chattel); *Restatement (Second) of Torts § 217 cmt. e* (defining "intermeddling" as "intentionally bringing about a *physical contact* with the chattel"). A domain name is an intangible object, much like a street address or a telephone number, which, though it may ultimately point to an approximate or precise physical location, is without physical substance, and it is therefore impossible to make "physical contact" with it. Universal's only hope of succeeding on its trespass to chattels claim, therefore, rests on its ability to show a link to a physical object. *See, e.g., Inventory Locator Service, LLC v. Partsbase, Inc., 2005 U.S. Dist. LEXIS 32680, 2005 WL 2179185, at *11-12 (W.D. Tenn.)* (finding that, under Florida law, trespass to chattel claim "must involve movable personal property"); **[**19]** *see also Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 404 (2d Cir. 2004)* (finding trespass to chattels for interference with plaintiff's computer systems rather than its website or domain name); *America Online, Inc. v. LCGM, Inc., 46 F.Supp.2d 444, 451-52 (E.D. Va. 1998)* **[*269]** (same); *Green v. Green, 221 N.E.2d 388, 394 (Ohio Prob. 1966)* ("chattel" limited to property that is visible, tangible and movable). In this case, the only such physical object is the computer [or computers] hosting Universal's website.

To make a claim for trespass, one must have a possessory interest in the property in question. *Radvansky v. City of Olmsted Falls, 395 F.3d 291, 302-03 (6th Cir. 2005)* (analyzing Ohio law of trespass); *State v. Lilly, 87 Ohio St.3d 97, 102-03, 1999 Ohio 251, 717 N.E.2d 322 (1999)* (same); *Restatement (Second) of Torts § 217* (trespass to chattel occurs through either through "dispossession" of chattel or intermeddling with chattel "in the possession of another"). Universal represented that it entered into a contract with a third party to host the utube.com website on the third party's **[**20]** computers. Universal therefore has not alleged that it has a possessory interest in the host's computers, and no inference can be drawn from its allegations that Universal has a possessory interest.

Universal's claim for trespass to chattels also fails because YouTube did not make physical contact with the computers hosting the website. In *Compuserve,* the defendant trespasser clearly

initiated contact. In this case, those making contact with Universal's website were thousands of mistaken visitors, but not YouTube itself.

Section 217 of the Restatement (Second) of Torts (which is followed in Ohio) discusses indirect physical contact ("intermeddling"):

> "Intermeddling" means intentionally bringing about a physical contact with the chattel. The actor may commit a trespass by an act which brings him into an intended physical contact with a chattel in the possession of another, as when he beats another's horse or dog, or by intentionally directing an object or missile against it, as when the actor throws a stone at another's automobile or intentionally drives his own car against it. So too, *a trespass may be committed by causing a third* **[**21]** *person through duress or fraud to intermeddle with another's chattel.*

[Emphasis supplied].

Presumably, the Restatement creates exceptions for duress and fraud because, in those circumstances, the one making physical contact is deprived of accurate information or free will and becomes the mere instrumentality of another -- the trespasser.

Neither concept applies here. Universal makes no allegations whatsoever of duress or fraud as to visitors who mistakenly access its website. Thus, it cannot argue that YouTube intermeddled with the site. Web visitors who arrived at utube.com may have been mistaken, and YouTube may have realized that many made the same mistake; but Universal makes no allegations that site visitors were coerced or defrauded by YouTube. Universal's claim for trespass to chattel must be dismissed.

4. Nuisance

Universal alleges that YouTube operates a site that is "adjacent" to utube.com on the internet. Plaintiff asserts that YouTube's allegedly "lewd, indecent, lascivious, copyright-infringing, pornographic or obscene" videos "wrongfully interfere[] with or annoy[] plaintiff in the enjoyment of its legal rights," and that such actions **[**22]** constitute a nuisance.

YouTube moves to dismiss the nuisance claim on the grounds that nuisance is limited to interferences with land. Universal contends that, under Ohio law, private nuisance claims are not limited to interferences with land.

[*270] Universal cites only one case, *Taylor v. City of Cincinnati, 143 Ohio St 426, 431, 55 N.E.2d 724 (1944)*, in support of its contention. Plaintiff's use of language from *Taylor,* however, is taken out of context. That case, which determined whether a tree on the city's property constituted a nuisance with regard to an adjacent public road, undoubtedly involved an interference with land.

The *Restatement (Second) of Torts § 821D* and other cases clearly state that nuisance involves interference with "the private use and enjoyment of *land.*" (emphasis supplied); *see, e.g., Nuckols v. National Heat Exch. Cleaning Corp., 2000 U.S. Dist. LEXIS 18693, *19 (N.D. Ohio)*.

Universal has provided virtually no legal support for its contention that a private nuisance can exist when no land is involved. Nor has Universal shown any support for the proposition that a domain name, a website, or a computer **[**23]** that hosts a website somehow constitutes real property. There being no such support or other basis for its nuisance claim, that claim will be dismissed.

5. Negligence

YouTube moves to dismiss Universal's claim for negligence on the grounds that the allegations are conclusory and that Universal has not specified how or why a duty of care arises, or of what that duty may consist.

To prevail on a claim for negligence, a plaintiff must show that "defendant owed plaintiff a duty of care; defendant breached that duty of care; and plaintiff's injury was proximately caused by defendant's breach." *MCI Worldcom Network Servs. v. W. M. Brode Co., 411 F. Supp. 2d 804, 809 (N.D. Ohio 2006)*. Such duty often arises by statute or ordinance, but it may also arise from the common law. *Stark County Agricultural Society v. Brenner, 122 Ohio St. 560, 566-67, 8 Ohio Law Abs. 385, 172 N.E. 659 (1930)*, *overruled on other grounds Meyer v. Cincinnati Street Ry. Co., 157 Ohio St. 38, 104 N.E.2d 173 (1952)*.

YouTube criticizes Universal for merely reciting the elements of a negligence claim, a characterization that is mostly accurate. In addition to its recitation of the elements, Universal refers generally **[**24]** to all preceding sections of its complaint, including the "Factual Background" that contains more specific allegations. Universal, however, leaves it to YouTube to sift through the numerous general factual allegations to determine the basis of Universal's nebulous negligence claim.

Unlike other portions of its complaint, in which Universal gives at least some basis for its claims, or where the basis for such claims is self-evident on perusal of the general factual allegations, YouTube has little notice of the basis for Universal's generalized allegations of negligence. Pleading a cause of action in federal court "require[s] more than the bare assertion of legal conclusions." *Empire Home Services, L.L.C. v. Empire Iron Works, Inc., 2006 U.S. Dist. LEXIS 55176, 2006 WL 2269507, *4 (E.D. Mich.)* (citing *Andrews v. Ohio, 104 F.3d 803, 806 (6th Cir.1997))*. Universal's claim for negligence will be dismissed. . . .