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Speech to Closed Group of Subscribers About Website Content a Matter of Public Concern Under Cal. Anti-SLAPP Law

[FilmOn v. DoubleVerify](#)

By Lincoln D. Bandlow and Rom Bar-Nissim

Background

FilmOn.com is a website that provides the public access to hundreds of television, premium movie and pay-per-view channels, including 45,000 video-on-demand titles. DoubleVerify is an online service that provides advertisers individualized and confidential reports that provide data on the advertisers' digital ad placement. Part of these reports include "tags" classifying a website's content with a legend explaining the tags. In DoubleVerify's confidential reports to its clients, it classified FilmOn.com as containing "Adult Content" and "Copyright Infringement – Streaming or File Sharing."

The Lawsuit

FilmOn.com sued DoubleVerify for a host of business related torts, but the gravamen of its claims was that DoubleVerify's tagging FilmOn.com as having adult content and being associated with copyright infringement constituted trade libel. DoubleVerify responded by filing an anti-SLAPP motion under California's Code of Civil Procedure Section 425.16. Under the statute, a lawsuit will be dismissed when: (a) The defendant demonstrates that "the challenged cause of action is one arising from protected activity made in furtherance of a person's right to petition or free speech under the United States Constitution or the California Constitution in connection with a public issue"; and (b) The plaintiff fails to establish "a probability the plaintiff will prevail on the claim."

The trial court granted DoubleVerify's anti-SLAPP motion. As for the first prong of the anti-SLAPP statute, the trial court found that DoubleVerify's use of tags to classify content arose from protected activity because "the public had a demonstrable interest in knowing what content is available on the Internet, especially with respect to adult content and the illegal distribution of

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copyrighted material.” [Slip Op. 6-7](#). This shifted the burden to FilmOn.com to establish a probability that it would prevail on its claims. FilmOn.com could not meet that burden because DoubleVerify’s statements were “essentially true” (FilmOn.com conceded that it had “R” rated programming and various “bikini babes” channels and that FilmOn.com was the subject of litigation around the country in which it was accused of copyright infringement). *Id.* at 7.

The Appeal

FilmOn.com appealed the trial court’s order, but challenged only the trial court’s findings as to the first prong of the anti-SLAPP analysis (*i.e.*, whether DoubleVerify’s conduct arose from speed made in connection with an issue of public interest). FilmOn.com advanced two arguments on appeal: (1) “the reports contained only basic classifications and certifications decisions with little to no analysis or opinion”; and (2) “the reports were made entirely in private, to individual companies that subscribe to DoubleVerify’s services.” Slip. Op. 7 (internal quotes and brackets omitted).

DoubleVerify’s Tags a Matter of Public Interest

The Court of Appeals found that DoubleVerify’s tags involved “conduct in furtherance of its right of free speech in connection with a public issue.” Slip Op. at 16. FilmOn.com sought to refute this point by analogizing DoubleVerify’s tags to the certifications at issue in *All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc.* (2010) 183 Cal. App. 4th 1186 (“*OASIS*”), in which the court had held that the first prong of the anti-SLAPP analysis had not been met. In *OASIS*, the Court of Appeals held that a trade association’s certification of commercial products with the label “organic” was not conduct in furtherance of its right to free speech on a matter of public interest. *Id.* at 1203. While the trade association sought to argue that the certification constituted its articulation and dissemination of its organic standard and, therefore, satisfied the first prong of the anti-SLAPP analysis, the court disagreed – finding that the articulation of the standard occurred *before* the act of certification.

In *DoubleVerify*, the court found this analogy unpersuasive. As the court explained:

In *OASIS*, the association’s act of placing its seal on a member product communicated nothing about what standards should be used to judge whether a personal care product is organic. [Citation]. In this case, FilmOn’s business tort

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and trade libel claims are based *entirely* upon the message communicated by DoubleVerify's tags.

Slip Op. at 15 (emphasis in the original).

The court went on to explain that:

[I]t is only because advertisers understand that the public is interested in whether adult content or copyright infringing material appears on a website that these companies would modify their advertising strategies based on DoubleVerify's tags. Unlike the unfair business practice claims in *OASIS*, FilmOn's allegations are directly based on the content of DoubleVerify's communications.

Id.

(At first blush, the Court of Appeals distinction may appear a bit unpersuasive because the “organic” certification could be perceived as communicating a message. It may be helpful to characterize the court’s analysis in *OASIS* as focusing on the *conduct* giving rise to the cause of action and whether that conduct contained expression relating to a matter of public interest. In *OASIS*, the challenged conduct involved the trade association only authorizing its members to place the “organic” certification on their products and whether it constituted unfair competition. *OASIS*, 183 Cal. App. 4th at 1202. Non-members were not authorized to use the “organic” certification even if they met the trade association’s standards and, therefore the consuming public might be misled. *Id.* Therefore, the conduct at issue was less about whether a product was “organic” or not, but rather the trade association only authorizing its members to use the certification and not non-members. In contrast, DoubleVerify’s clients were specifically asking for DoubleVerify’s individualized opinion on the content of the websites they advertised on and, therefore, the challenged conduct arose from DoubleVerify providing that opinion, which contained speech relating to a matter of public interest.)

The question of “whether a statement concerns an issue of public interest depends on the content of the statement, not the statement’s speaker or audience.”

To determine whether the issues of adult content or copyright infringement on the Internet were matters of public interest, the court focused on the following facts:

Press Reports: The Court of Appeals set forth a bright line rule that “[m]atters receiving extensive media coverage through widely distributed news or entertainment outlets are, by definition, matters of which the public has an interest.” Slip Op. at 15-16 (citing *Annette F. v.*

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Sharon S. (2004) 119 Cal. App. 4th 1146, 1162; *Church of Scientology v. Wollersheim* (1996) 42 Cal. App. 4th 628, 651 & 651 fn. 3.

Regulatory Actions: While the court did not cite specific examples, FilmOn.com had unsuccessfully lobbied the United States Copyright Office in an attempt to obtain a compulsory licenses to retransmit broadcast television under 17 U.S.C. § 111. *See e.g.*, U.S. Copyright Office, Satellite Home Viewer Extension and Reauthorization Act § 109 Report 43 & 70 (2008).

Lawsuits: Like the regulatory actions, the court did not cite specific examples, however, numerous cases of copyright infringement against FilmOn.com – and other similar services – have been heavily litigated, including in the Supreme Court of the United States. *See e.g.*, *American Broad. Cos. v. Aereo, Inc.* (2014) 134 S. Ct. 2498; *Fox Television Stations, Inc. v. Aereokiller, LLC* (2017) 851 F.3d 1002; *WPIX, Inc. v. ivi, Inc.* (2d Cir. 2012) 691 F.3d 275; *Fox Television Stations, Inc. v. FilmOn X LLC* (D.D.C. 2015) 150 F. Supp. 3d 1; *Filmon X, LLC v. Window to the World Commc'ns, Inc.* (N.D. Ill. Mar. 23, 2016) No. 13 C 8451, 2016 WL 1161276; *CBS Broad. Inc. v. FilmOn.com, Inc.* (S.D.N.Y. July 24, 2014) No. 10 CIV. 7532 NRB, 2014 WL 3702568.

DoubleVerify's Speech Was Protected Despite Occurring In Private And In A Commercial Context

The Court of Appeals rejected FilmOn.com's argument that DoubleVerify could not satisfy the first prong of the anti-SLAPP analysis because its reports were "private statements made in a commercial context." Slip Op. at 17. This argument had two components (1) the communication was private; and (2) it did not contribute to a public debate.

As to the argument that DoubleVerify's reports were private in nature, the Court of Appeals explicitly stated that "the identity of the speaker" and "the identity of the audience" are "irrelevant" to the inquiry. Slip Op. at 20. Rather, the question of "[w]hether a statement concerns an issue of public interest depends on the *content of the statement*, not the statement's speaker or audience." *Id.*

As to the argument DoubleVerify's reports did not contribute to a public debate, the Court of Appeals rejected this rule, stating "where a statement concerns an issue of widespread public interest, it need *not* also contribute in some manner to a public debate." Slip Op. at 19 (emphasis added). Relying on *Cross v. Cooper* (2011) 197 Cal. App. 4th 381 fn. 15, the court rejected the requirement set forth in *Wilbanks v. Wolk* (2004) 121 Cal. App. 4th 883, 898 that the conduct must contribute to a debate on a matter of public interest. Slip Op. at 19. The Court of Appeals agreed with the *Cross* court that this was a "narrow interpretation" of the anti-

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SLAPP statute and was contrary to the California Legislature's intent that the statute be "broadly construed." *Id.*

Requests For Publication from the Motion Picture Association of America ("MPAA") and Trustworthy Accountability Group ("TAG")

The original opinion was not certified for publication. The MPAA and TAG filed letters with the Court of Appeals requesting it to publish the decision. The MPAA sought publication because the opinion contained language stating that the MPAA's rating system concerned matters of public interest, namely adult content in motion pictures.

As the [trial] court pointed out, the Motion Picture Association of America (MPAA) engages in conduct quite similar to DoubleVerify's activities by rating movies concerning their level of adult content; and the MPAA does so, because the public cares about the issue.

Slip Op. at 16.

TAG sought publication because it works with websites similar to DoubleVerify. TAG is a cross-industry accountability program to create transparency in the digital advertising industry. One of TAG's programs is the "Certified Against Piracy" program, which certifies Digital Advertising Assurance Providers that provide advertisers information about the content of the websites containing their ads to help them make informed decisions about ad placement. As such, the conduct at issue in *DoubleVerify* directly concerned TAG's "Certified Against Piracy" program.

On July 25, 2017, the Court of Appeals certified the opinion for publication. That is an important development because the decision sets forth some very important principles for future anti-SLAPP jurisprudence, not the least of which is the concept that it is the content of the speech, and not the size and make-up of the audience, that determines the issue of whether speech relates to a matter of public concern.

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