

FILED

NOT FOR PUBLICATION

MAR 20 2013

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH M. STERN,

Plaintiff - Appellant,

v.

ROBERT WEINSTEIN; SARA ANN
WEINSTEIN,

Defendants - Appellees.

No. 11-55436

D.C. No. 2:09-cv-01986-DMG-
PLA

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted March 7, 2013
Pasadena, California

Before: WARDLAW and GOULD, Circuit Judges, and WOLF, Senior District
Judge.**

Kenneth Stern appeals the district court's (1) grant in part of defendants

Robert Weinstein and Sara Weinstein's Rule 12(b)(6) motions to dismiss;

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

** The Honorable Mark L. Wolf, Senior District Judge for the U.S.
District Court for the District of Massachusetts, sitting by designation.

(2) denial of Stern's motion to amend the complaint; (3) grant of summary judgment to the defendants on the remaining copyright claims; (4) award of attorneys' fees under the Copyright Act; and (5) denial of Stern's application to recuse District Court Judge Gee. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.¹

1. The district court did not err in granting defendants' Rule 12(b)(6) motions to dismiss with respect to Stern's invasion of privacy claim under article I, section 1 of the California Constitution. To be actionable under the California Constitution, "invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 655 (Cal. 1994). There is no factual or legal support for Stern's contention that the disclosure of his listserv post rises to this high standard.

2. The district court also properly granted defendants' motions to dismiss with respect to Stern's claims under the Computer Fraud and Abuse Act (CFAA), the Stored Communications Act (SCA), and California Penal Code § 502(c)(3). Because Stern alleged that Robert Weinstein had permission to access

¹Stern's motions to certify a question to the California Supreme Court and to strike Robert Weinstein's excerpts of record are denied.

the listserv, Robert Weinstein did not access a computer “without authorization” or “exceed[] authorized access” in violation of 18 U.S.C. § 1030(a) (CFAA), nor did he “access[] without authorization” or “exceed[] an authorization to access” a computer in violation of 18 U.S.C. § 2701(a) (SCA). This is true even if Robert Weinstein violated restrictions on the use of the information he accessed by forwarding the post to Sara Weinstein. *See United States v. Nosal*, 676 F.3d 854, 863-64 (9th Cir. 2012) (en banc); *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1135 (9th Cir. 2009). Stern does not contend that California Penal Code § 502(c)(3), which prohibits “[k]nowingly and without permission us[ing] or caus[ing] to be used computer services,” should be construed any differently than the CFAA and the SCA.

Because Robert Weinstein did not commit an underlying violation, Sara Weinstein cannot be liable under any theory of derivative liability. With respect to direct liability, Stern’s unadorned allegations that Sara Weinstein gained, was given, was permitted, or was provided with unauthorized access to the listserv server “amount to nothing more than a ‘formulaic recitation of the elements,’” of the causes of action at issue here. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). They are thus insufficient to survive a motion to dismiss. *Id.*

3. The district court did not abuse its discretion in denying Stern's motion to further amend his complaint to add claims for theft, receiving stolen property, and violations of California Business and Professions Code § 17200. Stern had twice previously amended the complaint, his requests to amend were procedurally improper, and his proposed amendments would have been futile. *See Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990).

4. The district court did not err in granting summary judgment on Stern's copyright claims. Stern's post is not copyrightable because it lacks the "modicum of creativity" necessary to satisfy the originality requirement of the Copyright Act. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) ("[O]riginality requires independent creation plus a modicum of creativity."); *see also* 17 U.S.C. § 102(a) ("Copyright protection subsists . . . in original works of authorship . . ."). Because we conclude that Stern's post is not copyrightable, we do not reach the district court's alternative holding that the defendants' use was fair.

5. The district court did not abuse its discretion in awarding attorneys' fees under the Copyright Act. *See* 17 U.S.C. § 505. The defendants' success was total, Stern's claims were not objectively reasonable, and an award of attorneys' fees in this case would deter unjustified lawsuits without undermining the value of

copyright protection. *See Love v. Associated Newspapers, Ltd.*, 611 F.3d 601, 614-15 (9th Cir. 2010).

6. Nor did the district court abuse its discretion in denying Stern's application to recuse Judge Gee. The conduct complained of did not stem from an extrajudicial source and falls far short of "display[ing] such a deep-seated favoritism or antagonism . . . as to make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994).

7. Stern contends on appeal that his complaint states a claim for breach of confidentiality under California law. Because Stern did not adequately raise this argument before the district court and the district court did not decide it, we decline to resolve the question for the first time on appeal. *See Cruz v. Int'l Collection Corp.*, 673 F.3d 991, 998-99 (9th Cir. 2012).

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

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	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
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Opening Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
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* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

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("s/" plus attorney's name if submitted electronically)

Date

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Costs are taxed in the amount of \$

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