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United States District Court,
S.D. New York.

Peter **HALL** and Big Bad Productions, Inc.
Plaintiffs,
v.
EARTHLINK NETWORK, INC. Defendant.

No. 98 Civ. 5489(RO).

Dec. 19, 2003.

MEMORANDUM & ORDER

OWEN, J.

*1 Plaintiff Peter **Hall**, from 1992 to 1999, independently wrote and filmed his first movie called "Delinquent", which he was endeavoring to market through his corporation, Big Bad Productions. According to **Hall's** complaint, ¶ 21, "Delinquent was scheduled for its commercial premieres on September 12, 1997, in both Los Angeles and New York City.... Subsequent engagements for the film, and the revenue generated from such engagements, depended substantially upon the number of customers and film industry professionals attending the L.A. and New York premieres." At that time, **Hall** had a contract with defendant **Earthlink**, an internet service provider, pursuant to which he paid \$19.95 per month for *personal* use of e-mail and internet services, rather than *business* use for which **Earthlink** charges a higher monthly rate. **Hall's** e-mail address was lot99@earthlink.net and he alleges that he was known in the independent film community by that e-mail name. Notwithstanding that business use of his **Earthlink** e-mail account was prohibited, **Hall** concededly did use his **Earthlink** e-mail services to directly contact people in the film and media community to inform them of Delinquent's New York and L.A. premieres, and to endeavor to obtain a showing at the earlier Chicago Underground Film Festival.

On August 5, 1997, UUNet, a third-party that provided "backbone" services to **Earthlink**, notified **Earthlink** that lot99 was a "spammer," [FN1] a term for e-mail users who send mass junk e-mail (called "spam" in computer jargon). **Earthlink**, attempting to deal with growing internetwide concerns about spam, immediately cut off the lot99 e-mail account and posted "lot99" on a web list of e-mail abusers called a

Net Abuse Report. The list did not mention **Hall's** name. On August 11, 1997, six days later, after a series of phone calls between **Hall**, Harris Schwartz of **Earthlink**, and reporter Dan Mitchell of internet industry magazine Wired News (whom **Hall** had contacted about the matter), **Earthlink** learned from UUNet that UUNet had made a mistake and lot99 was not a source of spam. UUNet sent a letter to **Hall** confirming that it had misidentified lot99 as a source of spam, and **Earthlink** apologized, posted a retraction on the board where it had previously identified lot99 as a spammer, and offered free service. **Earthlink** also forwarded 16 e-mails to a new non- **Earthlink** e-mail account **Hall** had set up between August 5 and August 11. **Hall** declined to accept the free service and apparently made no effort to mitigate the alleged damages, instead suing **Earthlink** for \$1,000,000 in lost profits from Delinquent.

[FN1]. In 1997, while the growing subject of disapproval, "spam" was not the subject of the major opposition it is today (2003). See how **Hall** describes it in his 1998 complaint, quoted *infra*.

Hall's subscriber agreement is governed by California law. *Kids' Universe v. In2Labs*, 95 Cal.App. 4th 870, 883 (Cal.App.2002) (emphasis in original) states that:

where the operation of *an unestablished business* is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative. But although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent on future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability.

*2 Simply put, lost profits of this nature are entirely too speculative to support **Hall's** breach of contract claim. Summary judgment is therefore appropriate and would limit **Hall's** contract damages to actual losses suffered from the alleged breach, such as telephone and new stationery costs. [FN2]

[FN2]. For the same reasons, summary judgment is also granted as to the breach of the implied covenants of good faith and fair dealing claim, limiting recovery under those theories, if any, to provable actual losses.

Hall next asserts damage to reputation. This libel claim comes under New York law. He alleges that **Earthlink** defamed *him* by posting *lot99* on its Net Abuse Report. Under New York law, the elements of a libel claim are a false and defamatory statement about the *plaintiff*, publication to a third party, fault, and special harm or *per se* actionability. **Hall**, in his own complaint, ¶¶ 13 and 14, defines "spam" as "electronic communications transmitted over the Internet, to persons at their Internet addresses, without prior authorization, request, or permission of the users of such addresses to transmit such communication to them." He defines "spamming" as "the practice of transmitting spam to large numbers of persons, often for a commercial or financial purpose, such as advertising." His complaint further states that spamming is considered "undesirable and harmful to the Internet, and detrimental to the full use and enjoyment of the Internet." While this is hardly complimentary to *lot99*, it is not a defamation of **Hall**, which our courts define as causing injury to a person's reputation. See *Albert v. Loksen*, 239 F.3d 256, fn. 13 (2d Cir.2001). [FN3] Under these circumstances, **Hall** can not claim that the impairment to *lot99*'s use of his *personal* internet account damaged his business, which is required to establish libel *per se*.

FN3. And what is that here? **Hall**'s reputation where he does not have a contract to use **Earthlink** for business purposes and therefore is using their services for purposes for which he has not paid, and then complains when it is terminated for six days, even for the wrong reason?

Having failed to establish libel *per se*, **Hall** would have to show special damages in order to make a libel claim, but he has failed to do so. "Special damages must be alleged with sufficient particularity to identify actual losses and be related causally to the alleged tortious act." *Beck v. General Tire and Rubber Co.*, 469 N.Y.S.2d 785, 787 (2d Dep't.1983). Actual losses, if properly alleged and causally linked to the defamatory statement, constitute "special damages". Speculative damages in the form of alleged lost profits on a debut to-be-shown independent film do not constitute special damages, and **Hall** himself, in his deposition, acknowledged that any damages suffered on account of having his e-mail address listed on the Net Abuse Report "would be speculation." Summary judgment is granted

dismissing the libel claim.

Hall asserts a statutory claim under the Federal Wiretap Act as codified at Title I of the Electronic Communications Privacy Act 18 U.S.C. §§ 2511(1)(a) and 2520, claiming that **Earthlink** illegally intercepted his e-mail after terminating his service rather than "bouncing" e-mails back to senders so they would be on notice that *lot99* was not receiving mail any longer, or forwarding e-mail to **Hall**'s new address. **Hall** alleges that this is an intentional interception of electronic communications in contravention of the ECPA. However, **Earthlink** did not intentionally intercept anything, but merely received and stored e-mails precisely where they were sent--to an address on the **Earthlink** system. *Crowley v. Cybserource Corp.*, 166 F.Supp.2d 1263, 1269 (N.D.Cal.2001). Summary judgment is granted dismissing this claim.

*3 Finally, **Hall** brings three separate tort claims with \$1,000,000 claims as to each. First, he seeks creation of two new torts: negligent appropriation of electronic communications, and intentional appropriation of electronic communications. Whether a time may come for torts of this nature to be recognized in an increasingly electronic communication-reliant world, under the facts of this case, I decline to do so. Even if such torts were properly recognized, the fact remains that the damages sought by **Hall** are entirely too speculative to sustain a claim: "The damages recoverable in tort actions cannot be contingent, uncertain, or speculative." *BD ex rel. Jean Doe v. DeBuono*, 193 F.R.D. 117, 139 (S.D.N.Y.2000) (quoting 36 N.Y.Jur.2d Damages § 17). Here, as already noted, any attempt to assess the damage to **Hall** from **Earthlink**'s failure to bounce or forward his e-mail would be an exercise in speculation. Summary judgment is granted dismissing these tort claims.

As an alternative, **Hall** claims *prima facie* tort. As with libel, *prima facie* tort requires special damages. Where damages are speculative, no *prima facie* tort claim can lie. In *Vigoda v. DCA Productions Plus Inc.*, 741 N.Y.S.2d 20, 23 (1st Dep't 2002), the court held that "[a]ll that plaintiffs have alleged is lost future income, conjectural in identity and speculative in amount. As such, this is an insufficient allegation of damages to support a cause of action for *prima facie* tort." Here, **Hall**'s losses are conjectural in identity and speculative in amount. Summary judgment is granted dismissing this claim.

Given the speculative nature of almost all of **Hall**'s damage claims, all that is now left before me are

claims that encompass his alleged actual losses, such as telephone calls, stationery, and costs for securing a new internet provider. The amount in controversy obviously falls well below the \$75,000 threshold for diversity jurisdiction, and there is no longer a federal question since the ECPA claim was dismissed. Accordingly, there is no basis for federal jurisdiction over **Hall's** claims and this action is dismissed with prejudice.

So ordered.

2003 WL 22990064 (S.D.N.Y.)

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