

## Alerts

### Client's E-Mails and Blog Postings Regarding Conversations With Counsel Waive Attorney-Client Privilege

January 26, 2011

*Lawyers for the Profession® Alert*

*Lenz v. Universal Music Corp., et al.*, Case 5:07-cv-03783-JF (N.D. Cal. Nov. 17, 2010)

#### Brief Summary

Defendants moved to compel discovery regarding communications between plaintiff and her lawyers on the basis that plaintiff waived attorney-client privilege by discussing those communications in a public forum. In an order that is not designated for publication in the official reports, the magistrate and district court concluded that plaintiff waived privilege when she entered several electronic chat rooms and made comments on her blog and to reporters regarding facts, conversations and decisions with her counsel.

#### Complete Summary

In June 2007, Stephanie Lenz videotaped her toddler dancing to the musical artist Prince's song, "Let's Go Crazy," and posted the video to YouTube.com. Universal Music Corporation sent a take down notice to YouTube and alleged that the video infringed Universal's copyright. Lenz then obtained counsel through the Electronic Frontier Foundation and sued Universal, bringing federal and state claims. Lenz claimed that Universal knowingly and materially misrepresented that the video had infringed the copyright.

Before and after filing her claims, Lenz had visited several online chat rooms and blogs and discussed conversations with her counsel regarding the motivations for filing and amending or dismissing some of her claims. She also made comments to reporters and her own family members regarding the substance of the claims and why certain strategic decisions had been pursued. Universal discovered these electronic postings and argued that they were evidence that Lenz had waived her attorney-client privilege as to the subject matter of the communications by breaching the confidentiality of communications with her counsel.

In an unpublished decision, the U.S. District Court for the Northern District of California affirmed the decision of the magistrate judge to compel discovery. Although the affirmance is under a "clear error" standard of review, it appears

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evident that the district court agreed with the reasoning and result of the magistrate judge's decision.

The court first considered plaintiff's communications regarding her motivations for pursuing the action. The court concluded that Lenz's public statements constituted a subject matter waiver and that they were relevant to whether and to what extent Lenz actually had been injured by Universal's actions. Weighing the circumstances involved, the nature of the legal advice, and the prejudice to the respective parties, the court further held that statements regarding legal strategy and certain factual issues also waived privilege in those subject areas. For example, Lenz's statement to a reporter that "[i]n discussing the situation with one of [my] lawyers, we came to the conclusion that I did not infringe the copyright and eventually we decided to file this lawsuit," was found to have waived the privilege because it reflected Lenz's knowledge regarding whether Universal knew or should have known that the video was non-infringing.

### **Significance of Opinion**

This decision was selected for a *Lawyers for the Profession Alert* even though it reports on an order that is not designated for publication in the official reports because the subject matter of the decision has broader relevance than the case itself, and the court's reasoning is based on application of standard principles of law to the facts.

This matter vividly highlights the fact that electronic media presents parties with potentially rich veins of both evidence and discovery, and that communications by a party in a public digital environment can run a serious risk of compromising the attorney-client privilege with respect to key issues in a case.

*This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.*