

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 09-1044

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RONALD J. RILEY,  
Plaintiff-Appellant,

v.

JOHN W. DOZIER, JR. and DOZIER INTERNET LAW, PC  
Defendants-Appellees.

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Appeal from a Judgment of the  
United States District Court  
for the Eastern District of Virginia

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**BRIEF FOR PLAINTIFF-APPELLANT RONALD J. RILEY**

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March 10, 2009

## TABLE OF CONTENTS

Table of Authorities.....	ii
Jurisdiction.....	2
Issues Presented for Review.....	2
STATEMENT OF THE CASE.....	3
A.    Statement of Facts.....	3
1.    Defendants John Dozier and His Law Firm.....	4
2.    Plaintiff Ronald Riley and His Anti-Dozier Web Site.....	6
3.    The Dozier Defendants’ Efforts to Suppress Riley’s Speech. .	8
B.    Proceedings Below.....	14
Summary of Argument.....	20
Standard of Review.....	22
ARGUMENT.....	22
I.    THE TRIAL COURT HAD SUBJECT MATTER JURISDICTION.....	22
A.    The Trial Court Had Federal Question Jurisdiction.....	23
B.    The Court Below Had Diversity Jurisdiction.....	26
II.   THE COURT ERRED BY DISMISSING THIS CASE BASED ON <i>YOUNGER</i> ABSTENTION.....	31
Conclusion.....	42
Certificate of Compliance.....	43

## TABLE OF AUTHORITIES

### CASES

<i>ALS Scan v. Digital Service Consultants</i> , 293 F.3d 707 (4th Cir. 2002). . . . .	22
<i>America's MoneyLine v. Coleman</i> , 360 F.3d 782 (7th Cir. 2004). . . . .	28
<i>Batzel v. Smith</i> , 333 F.3d 1018 (9th Cir. 2003). . . . .	11
<i>Buckley v. Mukasey</i> , 538 F.3d 306 (4th Cir. 2008). . . . .	21
<i>Burford v. Sun Oil Co.</i> , 319 U.S. 315 (1943). . . . .	1, 18, 19, 20, 32, 33
<i>Cale v. City of Covington</i> , 586 F.2d 311 (4th Cir. 1978). . . . .	25
<i>Centennial Life Insurance Co. v. Poston</i> , 88 F.3d 255 (4th Cir. 1996). . . . .	37
<i>Cooter &amp; Gell v. Hartmarx</i> , 496 U.S. 384 (1990). . . . .	21
<i>Dixon v. Edwards</i> , 290 F.3d 699 (4th Cir. 2002). . . . .	28
<i>Dombrowski v. Pfister</i> , 380 U.S. 479 (1965). . . . .	31
<i>Dozier v. Riley</i> , No. 3:08-cv-00642-HEH. . . . .	13, 17, 27

*Employers Resource Management Co. v. Shannon*,  
65 F.3d 1126 (4th Cir. 1995). . . . . 19, 21, 30

*Galt G/S v. JSS Scandinavia*,  
142 F.3d 1150 (9th Cir. 1998). . . . . 26

*Grant v. Chevron Phillips Chemical Co.*,  
309 F.3d 864 (5th Cir. 2002). . . . . 26

*Great American Insurance Co. v. Gross*,  
468 F.3d 199 (4th Cir. 2006). . . . . 35

*Huffman v. Pursue, Ltd.*,  
420 U.S. 592 (1975). . . . . 31

*Incumaa v. Ozmint*,  
507 F.3d 281 (4th Cir. 2007). . . . . 29

*J.K. Harris & Company v. Kassel*,  
253 F. Supp. 2d 1120 (N.D. Cal. 2003). . . . . 10

*Lamparello v. Falwell*,  
420 F.3d 309 (4th Cir. 2005). . . . . 36

*Lovell v. State Farm Mutual Automobile Insurance Co.*,  
466 F.3d 893 (10th Cir. 2006). . . . . 28

*Incumaa v. Ozmint*,  
507 F.3d 281, 288 (4th Cir. 2007). . . . . 29

*In re Lowe*,  
102 F.3d 731 (4th Cir. 1996). . . . . 19, 40

*Lyons Partnership v. Morris Costumes*,  
243 F.3d 789 (4th Cir. 2008). . . . . 29

*Marshak v. Treadwell*,  
240 F.3d 184 (3d Cir. 2001). . . . . 24

*Middlesex County Ethics Committee v. Garden State Bar Association*,  
457 U.S. 423 (1982). . . . . 31

*Miera v. Dairyland Insurance Co.*,  
143 F.3d 1337 (10th Cir. 1998). . . . . 27

*Myles Lumber Co. v. CNA Financial Corp.*,  
233 F.3d 821 (4th Cir. 2000). . . . . 33, 35

*National Association for Healthcare Communications v. Central Arkansas Area  
Agency on Aging*,  
257 F.3d 732 (8th Cir. 2001). . . . . 24

*Nautilus Insurance Co. v. Winchester Homes*,  
15 F.3d 371 (4th Cir.1994). . . . . 34, 35, 38

*New Wellington Finance Corp. v. Flagship Resort Development Corp.*,  
416 F.3d 290 (4th Cir. 2005). . . . . 33, 35, 37, 39

*Ohio Civil Rights Commission v. Dayton Christian School*,  
477 U.S. 619 (1986). . . . . 30

*Old Town Funeral Choices v. Northern Va. Funeral Choices*,  
55 Va. Cir. 459, 2000 WL 33316520, at 6-7 (Va.Cir. 2000). . . . . 36

*Penn-America Insurance Co. v. Coffey*,  
368 F.3d 409 (4th Cir. 2004). . . . . 35

*Perfect 10 v. CC Bill*,  
488 F.3d 1102 (9th Cir. 2007). . . . . 12, 15, 17, 22, 36

*Pitt County v. Hotels.com, L.P.*,  
553 F.3d 308 (4th Cir. 2009). . . . . 21

*Planetary Motion v. Techsplosion*,  
261 F.3d 1188 (11th Cir. 2001). . . . . 24

*Quackenbush v. Allstate Insurance Co.*,  
517 U.S. 706 (1996). . . . . 33

*RF&P R. Co. v. Forst*,  
4 F.3d 244 (4th Cir. 1993).. . . . . 32, 33

*U.S. Search, LLC v. U.S. Search.com*,  
300 F.3d 517 (4th Cir. 2002). . . . . 24

*St. Paul Mercury Indemnity Co. v. Red Cab Co.*,  
303 U.S. 283 (1938). . . . . 25

*Smith v. GTE Corp.*,  
236 F.3d 1292 (11th Cir. 2001). . . . . 26

*Sugar Busters LLC v. Brennan*,  
177 F.3d 258 (5th Cir. 1999). . . . . 24

*Thorn v. Itmann Coal Co.*,  
3 F.3d 713 (4th Cir. 1993).. . . . . 21

*Two Pesos v. Taco Cabana*,  
505 U.S. 763 (1992). . . . . 24

*Ty Inc. v. Softbelly's Inc.*,  
353 F.3d 528 (7th Cir. 2003). . . . . 24

*United Capitol Insurance v. Kapiloff*,  
155 F.3d 488 (4th Cir. 1998). . . . . 14, 20, 33, 34, 35, 38, 40

*United States v. Srivastava*,  
540 F.3d 277 (4th Cir. 2008). . . . . 21

*U.S. Search, LLC v. U.S. Search.com*,  
300 F.3d 517, 522 (4th Cir. 2002). . . . . 24

*Wiggins v. North American Equitable Life Assur. Co.*,  
644 F.2d 1014 (4th Cir. 1981). . . . . 26

*Younger v. Harris*,  
401 U.S. 37 (1971). . . . . 1, 2, 3, 19, 30, 31

*Zeran v. America Online*,  
129 F.3d 327 (4th Cir. 1997). . . . . 11

**CONSTITUTION, STATUTES AND RULES**

United States Constitution,  
First Amendment. . . . . 1, 16, 23, 38, 34, 35, 37

28 U.S.C. § 1291. . . . . 2

28 U.S.C. § 1331. . . . . 2, 25

28 U.S.C. § 1332. . . . . 2, 25, 30

28 U.S.C. § 1337. . . . . 2, 25

28 U.S.C. § 1338. . . . . 2, 25

28 U.S.C. § 1367. . . . . 25

28 U.S.C. § 1447(d). . . . . 40

Communications Decency Act,  
47 U.S.C. § 230. . . . . 18, 22

47 U.S.C. § 230(e)(2). . . . . 11, 22

Lanham Act,  
15 U.S.C. § 1051 *et seq.* . . . . . 1, 17, 19, 22, 23, 24, 30, 34, 35, 36, 37, 39  
Section 39, 15 U.S.C. § 1121. . . . . 2, 25  
Section 43(a), 15 U.S.C. § 1125(a). . . . . 24, 25

Federal Rules of Civil Procedure  
Rule 59(e). . . . . 17, 19, 32

Virginia Code § 59.1-92.13. . . . . 26



This action was brought by Michigan resident Ronald Riley seeking to preserve his rights under the Lanham Act and the First Amendment to criticize a Richmond-area lawyer and his law firm. The lawyer and law firm tried to suppress his online criticism by warning Riley's web hosts that his web site defames them and infringes their trademark. They demanded that the web hosts enforce their terms of service (which forbid defamation and trademark infringement) against the critic, while also warning that the hosts faced contributory liability if they fail to accede to these demands. Riley then sought a declaratory judgment of non-infringement so that he could reassure his web hosts that they could not be held liable, an injunction to prevent defendants from falsely claiming trademark infringement, as well as damages caused by the attempted suppression of his web site and an award of attorneys fees because defendants' trademark claims are so groundless.

The district court first held, relying on representations made in a reply brief, that there was no subject matter jurisdiction because the amount in controversy had not been satisfied with respect to the state trademark issues, and in the alternative abstained under *Burford*. When Riley pointed out in a motion for reconsideration that the factual representations in defendants' reply brief were not accurate, and that *Burford* abstention does not apply here, the district court decided to dismiss the case instead based on *Younger* abstention, an argument that

even the defendants had never advanced. Because neither *Younger* abstention, nor any of the other abstention theories that defendants did put forward, applies in this case, and because the court below plainly had both federal question and diversity jurisdiction, the decision below should be reversed.

## **JURISDICTION**

Plaintiff's complaint was filed in the United States District Court for the Eastern District of Virginia on October 2, 2008. JA 4-10. That court had jurisdiction under 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1332, 1337 and 1338. The district court dismissed for lack of subject matter jurisdiction on November 20, 2008. JA 206-208. Plaintiff moved to reconsider that order on December 4, 2008. JA 2, DN 16. The district court denied that motion on December 8, 2009. Plaintiff filed his Notice of Appeal on January 6, 2009. This Court has jurisdiction under 28 U.S.C. § 1291.

## **ISSUES PRESENTED FOR REVIEW**

1. May a trial court abstain under *Younger v. Harris* from deciding an action in which no injunction is sought against judicial proceedings and in which neither the State nor any public official or public body is either involved or has expressed an interest?
2. May a trial court abstain from deciding an action for declaratory and

injunctive relief and damages on the ground that the defendant has filed a state-court action against the plaintiff and posted it on his web site instead of serving it?

3. Did the trial court have subject matter jurisdiction over plaintiff's request for a declaratory judgment that he had not violated defendants' rights under the federal or state trademark laws, nor defamed the individual defendant, and plaintiff's request for injunctive relief, damages and attorney fees occasioned by defendants' attempt to suppress plaintiff's critical web site by making false claims of trademark infringement and defamation?

## **STATEMENT OF THE CASE**

Defendants successfully moved to dismiss the complaint based on the contention that the district court lacked subject matter jurisdiction. In response to a motion to reconsider that order because it was based in substantial part on inaccurate facts set forth in an unsworn reply brief to which plaintiff had not been permitted to respond, the district court ruled that, even if there was subject matter jurisdiction, *Younger* abstention was appropriate.

### **A. Statement of Facts**

It is quite an understatement to say that John Dozier and Ronald Riley dislike and disapprove of each other.

## 1. Defendants John Dozier and His Law Firm

Defendant John Dozier, a Virginia lawyer, is the founder and sole owner of defendant law firm Dozier Internet Law, which specializes in representing small and medium sized businesses in connection with legal issues arising online, as well as more generally with intellectual property issues in the area of copyright and trademark law. *Id.* Mr. Dozier maintains a web site for his law firm at cybertriallawyer.com, along with more than sixty other web sites where he promotes his own and his law firm's work, both directly, by discussing its work, and by including hyperlinks to his firm web site.<sup>1</sup> This technique is calculated to

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<sup>1</sup><http://dozierinternet-law.blogspot.com>, <http://dozier-internetlaw.blogspot.com>, <http://dozier-internet-law.blogspot.com/>, <http://dozierinternetlawpc.blogspot.com/>, <http://dozier-internetlawpc.blogspot.com/>, <http://www.cybertriallawyer.com/>, <http://dozierinternetlaw.cybertriallawyer.com/>, <http://www.dozierinternetlaw.com/>, <http://www.dozierinternet-law.org/>, <http://www.dozier-internetlaw.org/>, <http://dozierinternetlaw.net/>, <http://www.dozier-internetlaw.com/>, <http://www.dozier-internet-law-pc.com/>, <http://internet-law-dozier.biz/>, <http://dozierinternetlaw.cybertriallawyer.com/>, <http://www.internet-law-dozier.com/>, <http://dozier-internetlaw.blogspot.com/>, <http://johndozierjr.typepad.com/>, <http://www.dozierinternetlaw.org/>, <http://dozierinternetlawpc.cybertriallawyer.com/>, <http://dozier-internet-law.cybertriallawyer.com/>, <http://dozierinternetlaw.net/>, <http://www.dozier-internet-law.info/>, <http://dozierinternetlawsuits.blogspirit.com/>, <http://dozierinternetlawpc.blogspot.com/>, <http://defamationlawyers.net/>, <http://www.dozierinternet-law.com/>, <http://wordpress.com/tag/dozier-internet-law/>, <http://internet-lawyers.org>, <http://copyrightlawyer.biz/>, <http://trademarkinfringementattorneys.com/>, <http://defamation-attorneys.com/>, <http://www.technology-lawyer.net/>, <http://slander-attorneys.com/>, <http://spamlawyer.org/>, <http://www.libel-attorney.net/>,

raise the ranking of his various web sites in the search results obtained on search engines such as Google and Yahoo!

Dozier has attracted a fair amount of notoriety on the Internet for some of the outlandish assertions that he and his associates have made, such as that their cease-and-desist letters cannot be published for the purpose of public criticism without infringing the author's copyright, <http://overlawyered.com/2007/10/nastygram-don't-you-dare-post-this-nastygram-on-the-web/>, that the firm can forbid Internet viewers from looking at the source code for its web site, <http://overlawyered.com/2007/10/don't-link-criticize-use-our-name-refer-to-us-view-our-source-code/> and that the firm can forbid others from linking to the firm's web site without its express permission. *Id.* Paradoxically, these critical web sites and their links to Dozier web sites have the effect of increasing the

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<http://www.dozierweblaw.com/>, <http://slander-attorney.com/>,  
<http://copyright-law-firm.net/>, <http://www.trademarklawlawyers.com/>,  
<http://trademarkinfringementattorney.com/>, <http://viginialawyers.com/>,  
<http://dozierinternetlawpc.cybertriallawyer.com/>, <http://www.slander-lawyers.com/>,  
<http://defamation-of-character.com/>, <http://www.net-attorney.net/>,  
<http://www.slander-lawyer.com/>, <http://web-lawyer.net/>,  
<http://entertainment-lawyers.net/>, <http://defamation-attorney.com/>,  
<http://internet-law-lawyer.com/>, <http://internet-law-lawyer.net/>,  
<http://www.defamation-lawyer.com/>, <http://libel-lawyer.com/>,  
<http://internet-law-firm.net/>, <http://internet-attorneys.net/>,  
<http://www.intellectualproperty-lawyer.com/>, <http://www.copyright-attorney.biz/>, and  
<http://internet-law-dozier.biz/>, <http://www.aboutus.org/IpLaywer.com>.

Internet visibility of Dozier's own web sites. Consequently, the majority of the first one hundred search results for the terms "Dozier Internet Law" or "Dozier Internet" on Google – the search engine that attracts the most traffic – lead to one of Dozier's own web sites. JA72-147.

On October 12, 2007, Dozier associate Donald Morris sent cease-and-desist letters on behalf of Inventor Link, a company that purports to help inventors, alleging that statements about Inventor Link on several different web sites were defamatory. Morris threatened to bring suit for defamation and other causes of action both against the posters and against the operators of the web sites that allowed the comments to be posted. JA 5 ¶¶ 5-6; <http://www.inventored.org/caution/inventor-link/Demand-Letter-1.html>; <http://www.inventored.org/caution/inventor-link/Demand-Letter-2.html>.

## **2. Plaintiff Ronald Riley and His Anti-Dozier Web Site**

Plaintiff Ronald Riley received such a letter, Complaint ¶ 5, in his capacity as the head of defendant InventorEd, a non-profit corporation that holds itself out as aiding inventors. <http://www.inventored.org/>. Far from complying with the cease-and-desist demands, Riley reacted on October 15 by registering the domain name [cybertriallawyer-sucks.com](http://www.cybertriallawyer-sucks.com). He erected a new web site at the address where he set forth very caustic criticisms of Dozier personally, as well as Dozier's law

firm and Mr. Morris individually. JA 5 ¶ 6. Copies of the web page at various stages of its existence are set forth at JA 148-156 and JA 180-187. Throughout the web page, there are hyperlinks embedded in the term “Dozier Internet Law.” JA 6 ¶ 8, 209 ¶ 2.

Some of those hyperlinks lead back to the Dozier firm’s main web page, cybertriallawyer.com. Others were intended to lead to a page on the InventorEd web site that criticized Dozier. However, when Riley first created the web page, he mistakenly embedded a “bad link” in the HTML code of his gripe site that did not correctly lead to an actual, existing page. Rather, if Internet users clicked on these links they would be taken to an “error page.” JA 210 ¶ 10, 216. On September 12, when Riley noticed that error, he corrected the link so that Internet users were taken to pages on his web site where they could review the cease-and-desist letters to Riley himself and to others in the inventor community – which had originally impelled him to set up the gripe site — and Riley’s critique of those letters. JA 5 ¶ 8, 210 ¶ 10, 210-211 ¶ 11, 233; <http://www.inventored.org/caution/inventor-link/#letters>. Riley’s web page has achieved the third-ranking position on Google searches for the terms “Dozier Internet Law” or “Dozier Internet.” JA 73.

### **3. The Dozier Defendants' Efforts to Suppress Riley's Speech.**

Instead of explaining why Riley's criticism was wrong, or allowing the hyperbolic tone of the criticism to speak for itself, Dozier tried to suppress it. First, he wrote to the Internet Service Providers ("ISP") in Atlanta, Georgia that were hosting Riley's web page, claiming that the page defamed him and infringed the trademark in his law firm's name, Dozier Internet Law. When the ISP, A Small Orange ("ASO"), refused to take action against Riley's site, Dozier wrote to Global Net Access, or "GNAX," the Internet firm that provided access to the Internet for ASO and all of its customers, making the same claims of defamation and trademark infringement, and offering his personal assistance to GNAX in return for GNAX's forcing the removal of Riley's page. JA 6 ¶ 10, 21. Dozier specifically asked that GNAX ensure that, if Riley succeeded in moving his domain name to a new ISP, Riley not be able to "transfer the 'page rank juice'" of his page as hosted by ASO. *Id.* As a result of Dozier's claims of trademark infringement, GNAX forced ASO to take down Riley's site (by threatening to take down the Internet connections for **all** of ASO's clients if it did not comply). JA 6 ¶¶ 11-12, 219, 221. Riley then moved his web site to a new hosting service, pSek, located in California. JA 7 ¶ 13.

On September 4, 2008, Dozier's law firm, Dozier Internet Law, filed an



action in the Circuit Court for Henrico County, Virginia. Dozier's complaint was brought against Riley personally as well as against several existing and defunct trade names and corporations that Dozier alleges are controlled by Riley. JA 26-27 ¶¶ 2-16. The state complaint sets out two counts of trademark infringement. JA 35-37 ¶¶ 23-32. It alleges that the term "Dozier Internet Law, P.C." is a registered trademark with the Commonwealth of Virginia, JA 35 ¶ 23, and that Riley's businesses compete directly with it for clients, JA 35-36 ¶¶ 25-27, 29. The state court complaint further alleges that Riley's cybertriallawyer-sucks web page has embedded hyperlinks into the trademarked term "Dozier Internet Law," which do not link to Dozier's own web site but rather to "the main web site used by the Riley Businesses that offer services which directly compete with Dozier Internet Law," JA 35 ¶ 25, or to "Defendants' web site, at which solicitation of prospective Dozier Internet Law clients is undertaken," JA 36 ¶ 27. Without ever specifying whether this conduct violates federal or state trademark law, the complaint alleges that the links on cybertriallawyer-sucks.com "ha[ve] caused actual confusion, including initial interest confusion, and ha[ve] been likely to cause consumer confusion, mistake and deception as to the source or origin of the goods or services of Dozier Internet Law," *id.*, and that Riley has engaged in "trademark infringing misconduct." JA 36 ¶ 28.

The state court complaint further alleges more generally that Riley has engaged in “many [other] abuses, and the scheme and strategy . . . in using the trademarks of competitors to hijack prospective business clients,” JA 37 ¶ 29, and that Riley seeks to “defraud consumers and misappropriate the intellectual property and trademarks of competitors.” JA 37 ¶ 30. This conduct, according to the title of Count I, constitutes “Statutory Trademark Infringement”; the state court complaint does not specifically identify the statute. JA 35. Count II, entitled “Common Law Trademark Infringement,” incorporates all the previous allegations and alleges that “Defendants have infringed on the common law trademark of the Plaintiff.” JA 37.

These trademark claims are insubstantial, because they are based on two false assumptions. First, although the Dozier firm claims that Internet users necessarily expect that a hyperlink from anchor text (that is, text on a web page in which a hyperlink is embedded) that identifies an individual or company will take them to that individual or company’s own web site, that is only one place where they may go. They may also go to a page about that person on a reference site such as Wikipedia, or to other pages relating to that person elsewhere in the same web site or collection of web sites. JA 214. Second, although the Dozier firm asserts that the infringement of which he complains results in “this particular web

page” getting unduly prominent display on a major search engine, he does not specify **which** page is unfairly prominent. The search results shown at JA 73-147 reflect that Mr. Dozier’s own web sites dominate the search results, and that **neither** of the pages hyperlinked from the gripe site – either the “error page” originally linked, or the corrected “inventor-link” page later linked – shows up in the first 100 search results. JA 215. In any event, if the Dozier firm’s complaint is that the **gripe site** shows up too prominently, it is hard to understand the claim of unfairness – it is a page about Mr. Dozier and his firm, which **should** show up when Internet users do a search for information about them. *See J.K. Harris & Company v. Kassel*, 253 F. Supp. 2d 1120 (N.D. Cal. 2003) (allowing use of trademark in meta tags to draw search engine traffic to gripe site about trademark holder).

The complaint asks the state court to award \$35,000 in compensatory damages allegedly caused by the supposed trademark infringements on Riley’s web site in the ten months since it had been created, as well as \$10,000 in punitive damages and \$10,000 in attorney fees. In addition, the complaint prays for an injunction against the “trademark infringing misconduct as set forth herein.” JA 37.

As of the date the complaint in this case was filed in the federal court below,

and also as of the conclusion of the proceedings in the court below, the state complaint had never been served on any of the defendants. JA 7 ¶ 14, 211 ¶ 14. Instead, Mr. Dozier posted the complaint to his web site and issued press releases about it. JA 225-228. In addition, Mr. Dozier attached the complaint to a letter to pSek, dated September 10, 2008, threatening pSek with liability for “contributory trademark infringement, aiding and abetting, and conspiracy,” if it did not accede to his demand that it take down Riley’s web site. JA 23. By specifically threatening to hold pSek liable for trademark infringement, Dozier was taking advantage of the fact that, although a federal law, the Communications Decency Act, holds ISPs immune from liability for most of the content provided by others on web sites they host, *e.g.*, *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997), that immunity does not extend to “intellectual property” claims. 47 U.S.C. § 230(e)(2).<sup>2</sup> pSek responded by asking whether Dozier was threatening to hold it liable under state or federal trademark law, noting that the United States Court of Appeals for the

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<sup>2</sup>Mr. Dozier’s awareness of this exception is shown by one of his blog posts about CDA immunity: “There is a specific carve-out for intellectual property claims. The DMCA establishes a process by which a website, or web business, with third party content could be liable. Yes, they can be liable under many circumstances for ‘contributory copyright infringement.’” <http://johndozierjr.typepad.com/dozierinternetlaw/2008/10/dozier-internet-law-section-230-immunity.html>.

Ninth Circuit has held that the intellectual property exception includes only **federal** intellectual property claims. *Perfect 10 v. CC Bill*, 488 F.3d 1102 (9th Cir. 2007). JA 239-240. Dozier refused to respond directly to this question, simply reiterating his threat to sue for contributory infringement and threatening to “escalate this matter to your upstream provider [hence] putting at risk all of your ‘clients.’” JA 7 ¶ 15, 238. pSek then complied with Dozier’s demand. JA 7 ¶ 16, 243, 245.<sup>3</sup>

Next, Riley found yet another ISP, Hostgator; on September 27, 2008, Dozier contacted Hostgator with yet another warning that he had brought a “trademark infringement” claim against Riley. This demand bore fruit immediately, as Hostgator shut down Riley’s web site without any notice to Riley. JA 7 ¶ 17, 247, 249. Only when Riley found yet another web host and filed suit in the court below against Dozier, seeking damages and injunctive relief, did Dozier stop invoking trademark law to try to get Riley’s web site taken down. JA 209-210, ¶¶ 14-15.

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<sup>3</sup>On a blog that claims to set forth his personal opinions, Mr. Dozier gloats about the likely reasons why Riley’s ISPs have taken down his site, saying, among other reasons, “Perhaps the hosts simply don’t want to risk being tied up in litigation and risk potential ‘aiding and abetting’, ‘conspiracy’, and ‘contributory trademark infringement’ claims.” <http://johndozierjr.typepad.com/dozierinternetlaw/2008/09/dozier-internet-law-v-ronald-j-riley-et-al.html>.

Although the state court complaint has never been served on Riley or any of the defendants, pSek furnished to Riley a copy of Dozier's demand letter and the complaint which was attached to it. JA 208 ¶ 9.<sup>4</sup>

### **B. Proceedings Below**

On October 2, 2008, Riley removed the Dozier firm's state court complaint from Virginia state court to this Court, alleging both federal question and diversity jurisdiction. No. 3:08-cv-00643-HEH, DN 1. Riley also filed a complaint for declaratory and injunctive relief and damages, seeking to prevent both John W. Dozier, Jr., individually, and his law firm Dozier Internet Law, from invoking phony trademark and defamation claims to get his web site taken down, as well as seeking damages for any loss of visibility for his web site that defendants might achieve through their baseless claims. The complaint does not seek any relief to prevent defendants from making whatever public statements they wish about Riley, whether critical of Riley himself or rebutting Riley's assertions about them. The complaint alleged both federal question jurisdiction and diversity jurisdiction, specifically alleging that the amount in controversy exceeded \$75,000. JA 4 -5 ¶ 2.

Defendants moved to dismiss Riley's complaint, JA 11-19; by separate

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<sup>4</sup>Service of the state court complaint has since been waived.

motion, his firm sought remand of the removed case. They argued that there was no diversity jurisdiction in this case because, although the complaint alleged that the amount in controversy exceeded \$75,000, the only specific amount of damages stated in Riley's complaint was a demand for \$1000 in punitive damages, and that, to the extent that plaintiff was relying on the contention that the value of the trademark claims to defendants exceeded \$75,000, the monetary amounts demanded in the state court complaint totaled only \$55,000. JA 12-13. Defendants further argued that the court should abstain from hearing Riley's complaint based on a line of authority providing for abstention when a state court defendant seeks a declaratory judgment absolving himself of liability for the very cause of action that has been invoked in a pending, parallel state court proceeding. *United Capitol Ins. v. Kapiloff*, 155 F.3d 488 (4th Cir. 1998). JA 13-16.

Riley opposed the motion to dismiss on subject matter jurisdiction grounds, arguing that his claim was not only for lack of liability for trademark infringement under state law, but also for lack of liability under federal law, and that the latter issue was particularly important because in California, where his ISP (pSek) was located, ISP's had been held immune from liability for state trademark claims. JA 59-61, *Perfect 10 v. CC Bill*, 488 F.3d 1102 (9th Cir. 2007). Riley also argued that there was diversity jurisdiction, noting that the courts apply a very strong

presumption that, when the amount in controversy is specifically pleaded, the plaintiff's claim for jurisdiction is upheld unless recovery of more than \$75,000 is a "legal impossibility." Riley noted that his complaint sought an award of compensatory damages in an amount to be determined and also sought attorney fees, that trademark cases are typically very expensive, that his counsel had already run up \$25,000 in attorney fees and that the amount of fees claimed would far exceed \$75,000. He also argued that the value of the injunctive relief that he was seeking helped carry the amount in controversy over \$75,000. JA 62. Finally, he argued that if the amount in controversy were viewed from the perspective of the value to defendants, the Dozier firm had deliberately understated the amount of monetary relief, and was seeking an injunction against further trademark infringement whose value had to be included in the amount in controversy. JA 61. Riley made similar arguments against remand of the complaint that had been removed from state court.

Riley also argued that the abstention argument should be rejected for several reasons. First, he argued that the state case was not truly pending in state court, both because the complaint had never been served, and because the case had been properly removed. Second, he argued that the cases were not truly parallel, because Riley's federal complaint was directed at Mr. Dozier's conduct in



suppressing his web site by making phony threats of trademark infringement liability against Riley's ISP's and his action was brought to stop that misconduct. Third, he argued that the *Kapiloff* doctrine applies only to claims brought exclusively for declaratory relief, and he was seeking damages. Fourth, Riley noted that he had sued John W. Dozier Jr. personally, and Mr. Dozier was not a party to the state court action.

In an unsworn reply brief that attached exhibits without any attestation to the relevant facts, defendants argued that Riley had misrepresented his web site by pointing to the hyperlinks as they appeared after he fixed them in September. JA 173-176. As reconfigured, they argued, Riley's web site was a "poster child for a First Amendment protected gripe site," JA 175. Consequently, they claim that it was no longer infringing; that there was no continuing controversy between the parties about whether Riley's web site was infringing; and that, therefore, Mr. Dozier's communications to web hosts objecting to Riley's web site had only been directed to the old version of the web site. JA 176. By the same token, the Dozier firm relied on these contentions to argue for remand of the removed case, because its own requested injunction had become moot since the case had been removed and hence should no longer be added to the amount in controversy.

The district court dismissed the federal action for lack of subject matter

jurisdiction (and remanded the removed case). In remanding, the court relied in part on defendants' representations that there was no continuing controversy about Riley's web site as it then existed and hence that any injunctive relief was no longer necessary. Case. No. 08-cv-00643-HEH, Document No. 16, at 3. In finding no subject matter jurisdiction in the case originally filed in federal court, the district court ignored the issue of injunctive relief, and ruled that the \$25,000 in fees already incurred, when added to the \$1,000 in punitive damages, was not enough to reach the amount in controversy. JA 207. The court decided that there was no federal jurisdiction because, it believed, neither the Lanham Act claims nor Riley's invocation of the First Amendment were a sufficient basis for federal question jurisdiction because they were only federal defenses to the state court complaint. *Id.* The court's order did not adopt defendants' claimed basis for abstention. In a footnote, however, the court indicated that it was declining to adjudicate the case under *Burford* abstention because "federal review of the question in the case . . . would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." JA 208 n.1.

Plaintiff moved for reconsideration under Rule 59(e). First, he pointed out the factual inaccuracy of defendants' contentions that they did not object to Riley's web site as updated in September, that there was no need for injunctive

relief, and that there was no continuing controversy between the parties. These assertions were belied by the fact that, **after** Riley changed his web site on September 12, defendants had continued to claim trademark infringement and to threaten to sue the companies hosting Riley's web site from trademark infringement – an intellectual property claim which, if genuine, avoids immunity under 47 U.S.C. § 230. Moreover, Riley noted, claims for injunctive relief are not mooted by the defendants' alleged voluntary cessation. Second, Riley explained that even though only \$25,000 in fees had accrued through the date of his opposition to the motion for dismissal, subject matter jurisdiction was based on the amount in controversy **claimed**, and fees in trademark cases commonly run into the hundreds of thousands (hence the assertion that the amount in controversy exceeded \$75,000 was certainly made in good faith). As for *Burford* abstention, Riley pointed out that the *Burford* doctrine applies only when the plaintiff has sued to block **state officials** from conducting a complex administrative proceeding, but that no state official had evinced the slightest interest in Dozier's trademark claims.<sup>5</sup>

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<sup>5</sup>Riley did not seek relief from the order remanding the removed case to state court, even though defendants' misrepresentations were material to the lower court's decision on that issue, because he recognized that this Court has held that a remand order cannot be made the subject of a motion to reconsider. *In re Lowe*, 102 F.3d 731 (4th Cir. 1996). The propriety of the remand may be contested only by seeking

The district court denied the Rule 59(e) motion on the ground that it was appropriate to abstain under this Court's decision in *Employers Resource Management Co. v. Shannon*, 65 F.3d 1126, 1134-1135 (4th Cir. 1995), a case that upheld a district court's decision to abstain under *Younger v. Harris*, 401 U.S. 37 (1971). The court below did not address the issue of *Burford* abstention, and its only reference to subject matter jurisdiction was as follows: "Even assuming that the amount in controversy in this case exceeds \$75,000, the Court must abstain from exercising jurisdiction over Plaintiff's claims." JA 261.

### **SUMMARY OF ARGUMENT**

Because federal courts must always consider subject matter jurisdiction, and because we anticipate that defendants will raise subject matter jurisdiction as an alternate ground for affirmance, we begin with that issue. The court below had federal question jurisdiction because Riley sought a declaration that he had not infringed defendants' trademark rights under the Lanham Act. The court also had diversity jurisdiction, because a plaintiff's allegation that the amount in controversy is satisfied must be respected unless it is legally impossible for the

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Supreme Court review at the end of the state litigation.

Following remand, the Dozier firm still failed to serve the complaint, although Riley agreed to waive service. Under a schedule established by the state court, Riley is to file his answer by April 15, and then the parties are to conduct discovery limited to the issue of personal jurisdiction.

plaintiff to recover that amount. Put another way, defendants must show “to a legal certainty” that the relief that can be obtained is less than \$75,000.01 in value. Defendants did not even purport to meet this test. Moreover, Riley’s claims for declaratory relief, injunctive relief, damages and attorney fees easily bring his claims above \$75,000 in value.

Turning to the ground for dismissal that the trial court finally adopted, the *Younger* abstention doctrine is inapplicable here. *Younger* is designed to stop plaintiffs from invoking federal court jurisdiction to interfere with an ongoing state **prosecution**. Not only is there no prosecution here, but no state officials are involved and there is no indication that any state officials cared about whether defendants could suppress Riley’s criticisms by falsely representing to Internet Service Providers that hyperlinks on Riley’s web site infringed his trademarks. Nor do any of the other grounds for abstention that were raised below apply here. *Burford* abstention, cited by the trial court in a footnote but not mentioned in the order on reconsideration, applies only when a plaintiff seeks to interfere with a complex state administrative proceeding in which public officials are trying to enforce state law. And *Kapiloff* abstention, which the trial court never invoked but which defendants will doubtless put forward as an alternative ground for affirmance, does not apply to actions for damages, not to speak of the fact that the

two proceedings are not parallel even though both involve Dozier's baseless assertions of trademark infringement.

### **STANDARD OF REVIEW**

A district court's decision to abstain is reviewed for abuse of discretion. *Employers Resource Management Co. v. Shannon*, 65 F.3d 1126, 1134 (4th Cir. 1995). A district court necessarily abuses its discretion when it makes an error of law, *Cooter & Gell v. Hartmarx*, 496 U.S. 384, 405 (1990); *United States v. Srivastava*, 540 F.3d 277, 287 (4th Cir. 2008); *Buckley v. Mukasey*, 538 F.3d 306, 322 (4th Cir. 2008), and errors of law are reviewed de novo. *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718 (4th Cir. 1993). Dismissal for lack of subject matter jurisdiction is reviewed de novo. *Pitt County v. Hotels.com, L.P.*, 553 F.3d 308, 311 (4th Cir. 2009).

### **ARGUMENT**

#### **I. THE TRIAL COURT HAD SUBJECT MATTER JURISDICTION.**

Defendants argued below, and the district court agreed in its initial decision, that there was no subject matter jurisdiction because their state law complaint, which Riley had removed, arose only under state law and because, although the parties' citizenship is diverse, the amount in controversy is less than \$75,000. Defendants also contested federal question jurisdiction, and the district court

initially agreed, on the ground that Riley's federal law arguments were only a defense to his state-law claims. Neither argument was sound.

**A. The Trial Court Had Federal Question Jurisdiction.**

The complaint here pleads a dispute about whether Riley's anti-Dozier web site has infringed Dozier's trademark in violation of the Lanham Act, a federal statute. The issue arose because Dozier repeatedly threatened to sue the Internet Service Providers hosting Riley's web site for trademark infringement. In making those threats, Dozier did not specify that he was claiming only trademark infringement under Virginia law, and indeed it would have been very odd for a trademark holder to claim entitlement to sue a web host located in Georgia (where A Small Orange and GNAX were located), California (where pSek is located), or Texas (where Hostgator is located), on the theory that Virginia law applies to them at all. *See ALS Scan v. Digital Service Consultants*, 293 F.3d 707 (4th Cir. 2002).

Defendants' communications to pSek, the ISP in California, implicitly invoked a federal statute when they threatened to seek relief for contributory trademark infringement. Although a provider of an interactive computer service (like pSek) is immune from liability under 47 U.S.C. § 230 for content provided by its customers, there is an exception for "any law pertaining to intellectual property." § 230(e)(2). But in California, that liability could be imposed only if

the claims were for **federal** trademark infringement and not just state trademark infringement. *Perfect 10 v. CC Bill*, 488 F.3d 1102 (9th Cir. 2007). Although some courts have taken issue with the Ninth Circuit's holding in *Perfect 10*, it remains crucial to Riley's interest to obtain a clear declaration that his web site is not actionable for infringement under federal law. In the Ninth Circuit, at least, an ISP could not be held liable for hosting Riley's web site so long as that site does not violate the Lanham Act, and defendants' intimidation tactics were directed at a California company, pSek, which would have continued to host Riley's web site but for defendants' threats. Hence, even if Mr. Dozier's subjective intent were to assert only a state-law trademark claim (which we dispute), Riley seeks and needs a declaration of his rights under the Lanham Act.

Because the complaint, on its face, pleaded a federal question, that should have been the end of the issue of subject matter jurisdiction, but the district court rejected federal question jurisdiction on the ground that the federal law issues were simply invoked as a **defense** to defendants' state-law claims. The district court's characterization of the complaint was incorrect. Riley made an affirmative claim of his rights under the Lanham Act, and that Act does not preempt state law claims. Consequently, that statute was never put forward as a defense to state trademark claims. To be sure, the complaint identified the First Amendment as an



obstacle to the application of defendants' trademark claims to suppress Riley's non-commercial web site, but plaintiff never argued that there was subject matter jurisdiction to enforce his First Amendment rights.

Defendants argued below that the Lanham Act is not at issue because the trademark in the name of their law firm, Dozier Internet Law, is registered with the State of Virginia and not the United States Patent and Trademark Office. However, defendants' implicit factual disagreement with plaintiff's contention that the parties dispute their rights under the Lanham Act was not a proper basis for denial of jurisdiction. Indeed, infringement of state-registered trademarks is actionable under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). *Two Pesos v. Taco Cabana*, 505 U.S. 763, 768 (1992); *U.S. Search, LLC v. U.S. Search.com*, 300 F.3d 517, 522 (4th Cir. 2002); *National Ass'n for Healthcare Communications v. Central Arkansas Area Agency on Aging*, 257 F.3d 732, 737 (8th Cir. 2001). Plaintiffs in section 43(a) cases commonly cite their state registrations as evidence that their trademarks, albeit not federally registered, have sufficient secondary meaning to warrant trademark protection under section 43(a). *Id.* Moreover, the protection under section 43(a) for a mark that lacks federal registration is frequently identified in shorthand as federal "common-law trademark rights," either because the trademark itself is a "common-law

trademark,” or because section 43(a) federalized the common law of federally unregistered trademarks. *Id.*; *Ty Inc. v. Softbelly’s Inc.*, 353 F.3d 528, 530 (7th Cir. 2003); *Planetary Motion v. Techsplosion*, 261 F.3d 1188, 1198 (11th Cir. 2001); *Marshak v. Treadwell*, 240 F.3d 184, 198 (3d Cir. 2001); *Sugar Busters LLC v. Brennan*, 177 F.3d 258, 269 (5th Cir. 1999).

Because the complaint states a claim under 15 U.S.C. § 1125(a), the court below had federal question jurisdiction under 15 U.S.C. § 1121 (trademark infringement), 28 U.S.C. § 1331 (general federal question jurisdiction), 28 U.S.C. § 1337 (jurisdiction over claims “under any Act of Congress regulating Commerce”), and 28 U.S.C. § 1338 (civil action “under any Act of Congress relating to . . . trademarks”). In addition, the Court had supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367.

**B. The Court Below Had Diversity Jurisdiction.**

The district court also had diversity jurisdiction under 28 U.S.C. § 1332. As the complaint alleges and defendants admitted, plaintiff is a Michigan citizen, and both John W. Dozier Jr. and his law firm are citizens of Virginia. However, defendants argued that the amount in controversy in controversy did not exceed \$75,000. (The district court initially agreed, although its order on reconsideration seemed to acknowledge error.) This argument was wrong.

Because Riley is the plaintiff in this case, the Court should defer to the allegation in paragraph 2 of his complaint that the jurisdictional amount is present here. Indeed, the Court cannot reject jurisdiction unless it appears “to a legal certainty” that the jurisdictional amount cannot be reached. *Cale v. City of Covington*, 586 F.2d 311, 313 (4th Cir. 1978). “[T]he legal impossibility of recovery must be so certain as virtually to negative the plaintiff’s good faith in asserting the claim.” *Wiggins v. North American Equitable Life Assur. Co.*, 644 F.2d 1014, 1017 (4th Cir. 1981), citing *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938). The district court did not purport to apply this test, and on the record here that test was not satisfied.<sup>6</sup>

First, Riley’s complaint seeks compensatory damages (in the form of corrective advertising to the extent that defendants’ threats to ISP’s managed to eliminate what Mr. Dozier referred to as “page rank juice”, JA 21, and hence forced Riley’s page lower in the search engine rankings), punitive damages, and an award of attorney fees under both the federal and state trademark statutes. Virginia’s trademark infringement statute, § 59.1-92.13, expressly provides for

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<sup>6</sup>The district court’s refusal to accept Riley’s pleaded amount in controversy is particularly ironic in light of the court’s steadfast refusal to second-guess the amounts of damages and attorney fees pleaded in the Dozier firm’s state court complaint when deciding whether to remand.

discretionary awards of attorney's fees to the prevailing party, and claims for statutory attorney fees must be included when calculating the jurisdictional amount. *Grant v. Chevron Phillips Chemical Co.*, 309 F.3d 864, 873-74 (5th Cir. 2002); *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1155-56 (9th Cir. 1998). See also *Smith v. GTE Corp.*, 236 F.3d 1292, 1305 (11th Cir. 2001) (fees included when common law makes award discretionary). Trademark cases are notoriously expensive for both parties, as a standard survey of intellectual property litigation shows, JA 158-169, and the evidence submitted below shows why, based on experience in past cases, it was reasonable for Riley to estimate that attorney fees alone would bring the amount in controversy over \$75,000. JA 171, 259-260. Judged by the "legal certainty test," because the amount of attorney fees awardable to Riley alone will exceed \$75,000, the court below was wrong to conclude that the required amount in controversy was not present.<sup>7</sup>

Because Riley sought a declaratory judgment of non-liability to defendants, the amount in controversy in *Dozier v. Riley*, No. 3:08-cv-00642-HEH, is also in

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<sup>7</sup>The district court noted plaintiff's assertion, in his brief opposing dismissal, that, even at that point, the amount of fees awardable to Riley had reached \$25,000, and found that this was so much less than \$75,000 that fees could not support diversity jurisdiction. However, the amount in controversy cannot be based on the amount of fees incurred at an early stage in the case, but must include a "reasonable estimate" of the fees that will be awardable in the case. *Miera v. Dairyland Ins. Co.*, 143 F.3d 1337, 1340 (10th Cir. 1998).

controversy here. In his opposition to the motion for remand, Riley explained that the value of the controversy in *Dozier v. Riley*, No. 3:08-cv-00642-HEH, exceeds \$75,000 for several reasons. For example, the Dozier firm's own attorney fee claim, which counts toward the jurisdictional amount, *see* cases cited *supra* at 27, will likely be much higher than the \$10,000 set forth in his complaint; moreover, the value of the injunction that the Dozier firm was seeking against Riley exceeds the \$35,000 in compensatory damages that it demanded in its complaint, insofar as it seeks to prevent the accrual of future damages. *Lovell v. State Farm Mut. Auto. Ins. Co.*, 466 F.3d 893, 897 (10th Cir. 2006); *America's MoneyLine v. Coleman*, 360 F.3d 782, 787 (7th Cir. 2004); *Dixon v. Edwards*, 290 F.3d 699, 710-711 (4th Cir. 2002). The total value to the Dozier firm of the monetary and injunctive relief its complaint seeks – and which Riley would avoid through his declaratory judgment action – thus exceeds \$75,000.

Defendants argued below that the prayer for an injunction in the removed (and then remanded) complaint, and the injunction for which Riley prayed in his federal court complaint, should be disregarded in computing the amount in controversy because Mr. Dozier was, allegedly, not claiming that the web site was infringing as Riley re-configured it after Riley learned that the trademark complaint was based entirely on the broken hyperlinks. This argument was false

factually, because Mr. Dozier continued to claim trademark infringement even after Riley changed the hyperlinks and otherwise reconfigured the site in a way that defendants acknowledged made it fully protected by the First Amendment. JA 211-212. The argument was also wrong legally, for several reasons. Although defendants stopped making threats and claims of infringement once this action was filed against them, “voluntary cessation of allegedly illegal activity does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.” *Incumaa v. Ozmint*, 507 F.3d 281, 288 (4th Cir. 2007). It is a question of fact whether an injunction remains necessary on the theory that the wrongful conduct is unlikely to be repeated if the litigation is dismissed, and “defendants face a heavy burden to establish mootness in such cases because otherwise they would simply be free to return to their old ways after the threat of a lawsuit has passed.” *Lyons Partnership v. Morris Costumes*, 243 F.3d 789, 800 (4th Cir. 2008). This factual determination cannot be made in a vacuum, and certainly should not have been made based on unilateral claims about alleged changes advanced by the Dozier defendants in a reply brief – with no supporting affidavit – to which Riley had no chance to respond. Moreover, apart from whether defendants are going to continue to make meritless claims of trademark infringement to additional hosts, there remains a live controversy between the

parties about whether Riley's site as hosted by his previous hosts infringed the Dozier trademarks or defamed Mr. Dozier. Riley remains unable to bring his site back to those hosts because defendants have never retracted their threats of legal action against them.

Finally, in addition to a declaration of non-liability for trademark infringement, this action seeks a declaration of non-liability for defamation (because Mr. Dozier's demand letter to GNAX asserted that Riley's web site "contains vast quantities of false, defamatory statements," JA 21). The value of the controversy in this case includes Riley's non-liability for defamation.<sup>8</sup>

In sum, the Court has jurisdiction under 28 U.S.C. § 1332.

## **II. THE COURT ERRED BY DISMISSING THIS CASE BASED ON *YOUNGER* ABSTENTION.**

The trial court dismissed the action on abstention grounds, citing *Employers Resource Management Co. v. Shannon*, 65 F.3d 1126, 1134-1135 (4th Cir. 1995). At the cited pages of that opinion, this Court cited *Younger v. Harris*, 401 U.S. 37 (1971), to uphold a trial court's decision to abstain from deciding an action for declaratory and injunctive relief that sought to enjoin Virginia's State

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<sup>8</sup>It is fair to assume that his professional reputation is alone worth much more than \$75,000; admittedly, Mr. Dozier did not quantify the impact of Riley's alleged defamation on that reputation.

Corporations and Insurance Commissioners from applying state licensing laws to employee welfare benefit plans maintained by the plaintiff. The abstention ruling below was wrong because *Younger*, like *Younger's* progeny cited in *Shannon*, involved attempts to enjoin public officials or public bodies, whose authority stems from the state or the state courts, from prosecuting judicial or quasi-judicial proceedings.<sup>9</sup> The rule in those cases is limited to federal suits that seek to enjoin, not just a state proceeding, but a proceeding initiated by public authorities. For example, in *Younger* the Supreme Court described its holding this way: “We hold that the *Dombrowski* decision should not be regarded as having upset the settled doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions.” 411 U.S. at 53, citing *Dombrowski v. Pfister*, 380 U.S. 479 (1965)

No such proceedings exist in this case. Defendants are private parties, and not only is there no public official involved in prosecuting this case, but there is no reason to believe that any public official cares one whit about this case.

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<sup>9</sup> *E.g.*, *Ohio Civil Rights Comm'n v. Dayton Christian Sch.*, 477 U.S. 619 (1986) (civil rights enforcement proceeding brought by state civil rights commission); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982) (bar disciplinary proceedings initiated by official ethics committee); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (obscenity proceeding initiated by sheriff and county prosecuting attorney).



Indeed, Riley is not seeking to enjoin any state proceedings; he simply seeks a declaration of his rights against the defendants, damages for their extra-judicial interference with his free speech rights, and an injunction against further extra-judicial interference with his speech. Not surprisingly, defendants never argued for *Younger*-type abstention, and the first time the concept was mentioned in the case was in the trial court's opinion. The decision to abstain on that basis was legal error, and hence was an abuse of discretion.

Nor should the abstention be upheld on any of the alternative grounds mentioned below. In its initial order dismissing the case, the trial court indicated that it would abstain under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and cited *RF&P R. Co. v. Forst*, 4 F.3d 244, 253 (4th Cir. 1993), for the proposition that *Burford* abstention is proper when “the exercise of federal review . . . would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.” JA 208 n.1. This alternate ground for dismissal did not appear in the order on reconsideration, and for good reason: As Riley showed in his Rule 59(e) motion, there is no basis for *Burford* abstention here. Even apart from the fact that the Dozier firm had done nothing to prosecute its state court action, but used it only as a basis for issuing press releases and threatening to sue Riley's web hosts, there are no “state efforts” here. The state court action is a

private lawsuit in which the Commonwealth of Virginia has evinced no interest whatsoever; there is no reason to believe that Virginia is trying to “establish a coherent policy” with respect to hyperlinking practices on the World Wide Web; and although the public should be concerned about Mr. Dozier’s abuse of trademark law to try to suppress Riley’s critical speech, we do not agree that hyperlinking practices constitute “a matter of substantial public concern” within the meaning of the *Burford* abstention doctrine. In *Forst*, the plaintiff sued government bodies and their taxing officials seeking adjudication of certain disputes about taxation. Even there, the defendants’ abstention argument was rejected. Neither *Burford* nor *Forst* supports abstention here.

Finally, we anticipate that defendants will seek affirmance on the alternate ground argued below — that the trial court should have abstained in favor of a parallel proceeding pending in state court. JA 13-16, citing *New Wellington Fin. Corp. v. Flagship Resort Dev. Corp.*, 416 F.3d 290, 296 (4th Cir. 2005); *United Capitol Ins. v. Kapiloff*, 155 F.3d 488 (4th Cir. 1998). The court below was right not to abstain on that ground for several reasons.<sup>10</sup>

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<sup>10</sup>*Kapiloff* abstention is not a alternate ground for affirmance in part because it does not support dismissal for lack of subject matter jurisdiction. The *Kapiloff* court reached the issue of discretion to refuse to consider a declaratory judgment action only **after** ruling that the district court **had** subject matter jurisdiction. *Id.* at 493.

First, Riley seeks damages and an injunction as well as declaratory relief. Although this Court has recognized under the Declaratory Judgment Act a narrow exception to the general rule that district courts “have a strict duty to exercise the jurisdiction that is conferred on them by Congress,” *Myles Lumber Co. v. CNA Financial Corp.*, 233 F.3d 821, 823 (4th Cir. 2000), citing *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996), that discretion does not extend to actions for damages. *Id.* At most, then, abstention on this ground could have extended only to Riley’s request for declaratory relief.

Second, *Kapiloff* and *New Wellington* do not support dismissal even of the claim for a declaratory judgment. Both of those cases involved suits brought in federal court solely under diversity jurisdiction to litigate purely state-law issues, unlike this case in which Riley seeks to vindicate his rights under the First Amendment and the fair use protections of the Lanham Act, which allow him to use the Dozier name on his web site to criticize Mr. Dozier, and which provide the basis for Riley’s defenses against Mr. Dozier’s assertions of defamation. Moreover, the factors that govern the discretion to dismiss a declaratory judgment action do not favor such action here:

- (1) whether the state has a strong interest in having the issues decided in its courts;
- (2) whether the state courts could resolve the issues more efficiently than the federal courts;
- (3) whether the presence of

“overlapping issues of fact or law” might create unnecessary “entanglement” between the state and federal courts; and (4) whether the federal action is mere “procedural fencing,” in the sense that the action is merely the product of forum-shopping.

*Kapiloff, supra*, 155 F.3d at 493-494, citing *Nautilus Ins. Co. v. Winchester Homes*, 15 F.3d 371, 377 (4th Cir.1994).

On the first factor, *Kapiloff* itself shows that the state of Virginia does not have a particularly strong interest in having the issues presented in this federal action decided in its courts. In *Kapiloff*, the court found that the first factor favored maintenance of the federal action because, even though the case involved only state law, “the issues involved are standard ones of agency and contract interpretation. A federal court would be unlikely to break new ground or be faced with novel issues of state interest.” 155 F.3d at 494. *Accord Great American Ins. Co. v. Gross*, 468 F.3d 199, 211 (4th Cir. 2006) (first factor favors dismissal of declaratory judgment action only when issues of state law are “difficult, complex or unsettled”); *Penn-America Ins. Co. v. Coffey*, 368 F.3d 409, 414 (4th Cir. 2004) (first factor favors entertaining declaratory judgment action when state-law issues are not novel); *Myles Lumber, supra*, 233 F.3d at 827 (same); *Nautilus Ins. Co. v. Winchester Homes*, 15 F.3d 371, 378 (4th Cir. 1994) (same). In *New Wellington*, the first factor favored dismissal because the issues in the New Jersey state court case “can fairly be called complex.” 416 F.3d at 297. Yet defendants expressly

admitted below that “the legal issue presented is not novel and the need to resolve the issue is not pressing.” JA 16. Moreover, although Riley presents state-law issues as well as federal ones, his basic contention is that the First Amendment and the Lanham Act justify his actions, matters in which the federal courts have a superior interest. In *New Wellington*, the court found that the plaintiff’s **failure** to raise any federal law issues in its declaratory judgment action weighed in favor of dismissal under the first factor. 416 F.3d at 297-298.

Moreover, Virginia courts rely on federal decisions in construing its state trademark statute and ruling on state trademark claims. *E.g.*, *Old Town Funeral Choices v. Northern Va. Funeral Choices*, 55 Va. Cir. 459, 2000 WL 33316520, at \*6-\*7 (Va.Cir. 2000). Similarly, when, as commonly occurs, a trademark complaint in federal court asserts a trademark claim under Virginia law as well, the two claims are so similar that, once the federal issues are decided, the state-law claims need not be discussed separately. *Lamparello v. Falwell*, 420 F.3d 309, 312 n.4 (4th Cir. 2005). Consequently, litigation of this case in federal court will not needlessly trammel state interests.

As for the second factor, Virginia courts cannot resolve the controversy between the parties more efficiently. At the very least, the plaintiff in the state court case chose not to include the defamation claims in its complaint, so Riley’s

potential liability for defamation will remain entirely undecided if this action is dismissed. And, in light of the fact that the court below remanded the Dozier firm's state court lawsuit, in part, on the ground that the Virginia complaint did not allege a claim under the Lanham Act, the litigation restricted to state court will leave Riley without a judgment on whether he has violated the Lanham Act (and hence, for ISPs within the Ninth Circuit, who are protected by *Perfect 10 v. CC Bill*, 488 F.3d 1102 (9th Cir. 2007), it will be undecided whether they can safely host his web site within the protections of CDA immunity). The main reason the *New Wellington* court found that the second factor weighed in favor of dismissal was that the parties needed to resolve the state action fully could not be joined in the federal action without destroying complete diversity. 416 F.3d at 298. *See also Centennial Life Ins. Co. v. Poston*, 88 F.3d 255, 258 (4th Cir. 1996) (salient factor was that "state court action contains a defendant and a number of issues not present in the federal action"). In this case, by contrast, John Dozier did not join himself as a plaintiff on the state court complaint (which involves only his law firm), yet it is Mr. Dozier who has personally been campaigning to get Riley's web site shut down, and it is against Mr. Dozier personally that Riley most needs an injunction.

Third, in *Kapiloff*, the court noted that, because both actions raised the same

core issues of law and fact, the third factor weighed in favor of dismissal of the action. Here, however, the federal complaint presents two core issues not present in the state case – the facts related to the defamation issue, and the Lanham Act issues. Although the factual issues whether Riley violated state trademark law may also be present here, this federal case presents issues pertaining to defendants’ efforts to shut down Riley’s web sites that are not present at all in the removed (and now remanded) state case. Moreover, the Fourth Circuit finds greater likelihood of entanglement between the state and federal courts when the state case has progressed beyond the preliminary stages of litigation. But here, the Dozier firm had not served its state complaint on Riley at the time this federal case was filed in this Court – indeed, service was waived only weeks ago, and only personal jurisdiction issues are being litigated in state court. *See Nautilus Ins. Co.*, 15 F.3d at 379-280 (no danger of entanglement where issues in federal case “are [not] already being litigated between the same parties in the related state court actions”). There is, therefore, little danger of entanglement here.

The fourth factor, whether there are indications of procedural “fencing,” cuts strongly in Riley’s favor. Like the plaintiff in *Kapiloff*, “[Riley] filed this [federal] action to resolve questions that are traditionally resolved in declaratory judgment actions, and [he] did so under standard [federal question and] diversity

jurisdiction.” 155 F.3d at 494. As soon as Riley learned about defendants’ contacts with A Small Orange and Global Net Access in Georgia to get his anti-Dozier web site shut down based on spurious claims of trademark infringement and defamation, Riley contacted undersigned counsel, who agreed to represent Riley and began preparing the complaint in this case and looking for local counsel. Although the Dozier firm filed a complaint in Virginia state court before Riley could get to federal court to seek an injunction and declaration of rights, the firm never served its state court complaint, but used it only as a basis for threatening other ISPs with liability for contributory infringement if they continued to host Riley’s web site. Indeed, the state complaint had still not been served when this case was dismissed more than eleven weeks after the state complaint was filed – it was as if defendants wanted the action to exist as a threat, but not to be prosecuted lest they lose.

Nor is there, as in *New Wellington*, a conflict about whether the action will be litigated in the jurisdiction where the state plaintiff lives. In that case, Flagship Resort, the federal defendant / state plaintiff, had sued in New Jersey; New Wellington, the declaratory judgment plaintiff, filed in its home federal court in Virginia. 416 F.3d at 292-293. Although Riley questions his amenability to personal jurisdiction in Virginia, because he is a Michigan resident without



sufficient contacts with Virginia, Riley deliberately brought his declaratory judgment action in the Virginia district court to avoid claims of forum-shopping, because Riley's principal interest is in securing a declaration of his rights so that defendants cannot continue to use spurious legal claims to induce ISPs to shut down his web site. Riley sued in federal court rather than state court because he needs a decision with respect to the Lanham Act, and because his basic claims rest on issues of fair use and the First Amendment on which federal courts should have the final word.

One final fact bears on the "procedural fencing" issue: The Dozier firm procured remand of the removed case, in part, by making a representation about the mootness of the dispute between the parties that was not entirely accurate. Although defendants represented that they had no trademark infringement objection to Riley's web site as it is currently configured, Riley's affidavit in support of reconsideration of the dismissal below reveals that defendants **continued** to claim trademark infringement and to threaten trademark litigation against Riley's ISP's – based on the state court complaint whose demand for an injunction was allegedly moot – even **after** Riley made those changes. Had the case not been remanded, there would be no state proceeding to be parallel to this one. Yet the case was remanded within days after that memorandum was filed,

before Riley had an opportunity to correct the record, and this Court has held that motions for reconsideration of an order of remand are barred by 28 U.S.C. § 1447(d). *In re Lowe*, 102 F.3d 731 (4th Cir. 1996). Because *Kapiloff* abstention is an equitable doctrine, it would be exceptionally inequitable for the Court to affirm abstention based on a parallel state-court proceeding where the very fact that the proceeding is now in state court was procured by inequitable means.

### CONCLUSION

The order dismissing this case should be reversed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that the foregoing brief was prepared in Word Perfect using Times Roman fourteen point font, and that Word Perfect counted 9720 words in the brief.

/s/ Paul Alan Levy

Paul Alan Levy

March 10, 2009

### CERTIFICATE OF SERVICE

I hereby certify that, on this date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF user. In addition, I caused two copies of the foregoing Brief to be served by first-class mail, postage prepaid, on counsel for defendants-appellees as follows:

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March 10, 2009