

No. 15-1506

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

SMALL JUSTICE LLC; RICHARD A. GOREN; CHRISTIAN DUPONT,
d/b/a ARABIANIGHTS-BOSTON MASSACHUSETTS,
Plaintiffs-Appellants,

v.

XCENTRIC VENTURES LLC,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
NO. 1:13-CV-11701-DJC
BEFORE THE HONORABLE DENISE J. CASPER

BRIEF FOR DEFENDANT-APPELLEE XCENTRIC VENTURES LLC

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Corporate Disclosure Statement

Pursuant to Fed. R. App. P. 26. 1, Appellee Xcentric Ventures LLC states that its parent corporation is Creative Business Investment Concepts, Inc., 2533 North Carson City, NV 89706, which is not publicly traded. No publicly traded company owns any interest in Xcentric Ventures LLC.

Table of Contents

Corporate Disclosure Statement	i
Table of Contents	ii
Table of Authorities	iv
Jurisdictional Statement	1
Statement of the Issues	3
Statement of the Case	4
Summary of Argument	12
Standard of Review	15
Argument	17
A. The Purported Transfer of Copyright from DuPont to Goren Is Void.	17
1. Xcentric has standing to collaterally attack the Superior Court judgment as void.	18
2. 17 U.S.C. § 201(e) voids the involuntary transfer that the Superior Court facilitated.	20
3. Mass. R. Civ. P. 54(c) voids the purported copyright transfer via default judgment.	22
B. DuPont's Valid License to Xcentric Bars Appellants' Copyright Infringement Claim.	24
1. DuPont's license to Xcentric is valid and defeats appellants' infringement claim.	25
2. Xcentric acted within the scope of the license.	27
3. The license is not invalid for lack of consideration.	30
a. A nonexclusive license does not require consideration.	30
b. Consideration supports the license.	31
c. The license is not illusory.	32
4. The license is not unenforceable on public policy grounds.	34
C. Goren Showed No Chapter 93A Injury Caused by Xcentric's Corporate Advocacy Program or VIP Arbitration Program.	37

D. The Order Dismissing the Libel, Intentional Interference, and Chapter 93A Claims Is Outside the Scope of Appeal.	43
E. If the Order Dismissing the Libel, Intentional Interference, and Chapter 93A Claims Is Within the Scope of Appeal, It Should Be Affirmed under the Communications Decency Act.	47
Conclusion	55
Certificate of Compliance with Fed. R. App. P. 32(a)(7)(B)	57
Certificate of Service	57

Table of Authorities

Cases

<i>44 Liquormart, Inc. v. Rhode Island</i> , 517 U.S. 484 (1996)	50
<i>Acevedo-Villalobos v. Hernandez</i> , 22 F.2d 384 (1st Cir. 1994)	45
<i>Advance Magazine Publishers, Inc. v. Leach</i> , 466 F. Supp. 2d 628 (D. Md. 2006)	20
<i>Ahern v. Shinseki</i> , 629 F.3d 49 (1st Cir. 2010)	16
<i>Alday v. Raytheon Co.</i> , 620 F.3d 1219 (9th Cir. 2010)	33
<i>Allen v. Wright</i> , 468 U.S. 737 (1984)	38
<i>Armstrong v. Virgin Records, Ltd.</i> , 91 F. Supp. 2d 628 (S.D.N.Y. 2009)	30
<i>Arthur D. Little, Inc. v. Dooyang Corp.</i> , 147 F.3d 47 (1st Cir. 1998)	14, 39, 40
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	16
<i>Aspinall v. Philip Morris Cos.</i> , 442 Mass. 381 (Mass. 2004)	38
<i>Aspinwall v. Boston</i> , 191 Mass. 441 (Mass. 1906)	32
<i>Authors Guild v. Google, Inc.</i> , 770 F. Supp. 2d 666 (S.D.N.Y. 2011)	19
<i>Automation by Design, Inc. v. Raybestos Prods. Co.</i> , 463 F.3d 749 (7th Cir. 2006)	29
<i>Blanchard v. Cortes-Molina</i> , 453 F.3d 40 (1st Cir. 2006)	23, 24
<i>Blockowicz v. Williams</i> , 630 F.3d 563 (7th Cir. 2010)	49

<i>Boston Med. Ctr. v. SEIU, Local 285</i> , 260 F.3d 16 (1st Cir. 2001)	36
<i>Brandt v. Wand Partners</i> , 242 F.3d 6 (1st Cir. 2001)	3
<i>Brooks v. AIG Sunamerica Life Assurance Co.</i> , 480 F.3d 579 (1st Cir. 2007)	3, 14, 46
<i>Budinich v. Becton Dickinson & Co.</i> , 486 U.S. 186 (1988)	3
<i>Cahoon v. Shelton</i> , 647 F.3d 18 (1st Cir. 2014)	17
<i>Calero-Celezo v. U.S. Dep't of Justice</i> , 335 F.3d 6 (1st Cir. 2004)	16
<i>Callier v. Gray</i> , 167 F.3d 977 (6th Cir. 1999)	20
<i>C&S Acquisitions Corp. v. Nw. Aircraft, Inc.</i> , 153 F.3d 622 (8th Cir. 1998)	46
<i>Chaker v. Mateo</i> , 209 Cal. App. 4th 1138 (Cal. App. Ct. 2012)	49
<i>CMM Cable Rep, Inc. v. Ocean Coast Props., Inc.</i> , 97 F.3d 1504 (1st Cir. 1996)	16
<i>Cofman v. Acton Corp.</i> , 958 F.2d 494 (1st Cir. 1992)	33
<i>Cohen v. United States</i> , 98 Fed. Cl. 156 (2011)	28
<i>Community for Creative Non-Violence v. Reid</i> , 490 U.S. 730 (1989)	54
<i>Consolidated Cigar Corp. v. Reilly</i> , 218 F.3d 30 (1st Cir. 2000)	50
<i>Constructora Andrade Gutierrez, S.A. v. Am. Int'l Ins. Co.</i> , 467 F.3d 38 (1st Cir. 2006)	45, 46
<i>Dawoud v. Holder</i> , 561 F.3d 31 (1st Cir. 2009)	45
<i>Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.</i> , 188 F. Supp. 2d 115 (D. Mass. 2002)	35

<i>De Forest Radio Tel. Co. v. United States</i> , 273 U.S. 236 (1927)	31
<i>Diaz-Reyes v. Fuentes-Ortiz</i> , 471 F.3d 299 (1st Cir. 2006)	1, 46
<i>Dickson v. Countrywide Home Loans (In re Dickson)</i> , 655 F.3d 585 (6th Cir. 2011)	20
<i>DiMarzo v. Am. Mut. Ins. Co.</i> , 389 Mass. 85 (Mass. 1983)	40
<i>Dragulis v. Kappa Map Group, LLC</i> , 128 F.3d 46 (D.D.C. 2015)	27
<i>Eastern Associated Coal Corp. v.</i> <i>United Mine Workers of Am., District 17</i> , 531 U.S. 57 (2000)	36
<i>Estate of Barrett v. United States</i> , 462 F.3d 28 (1st Cir. 2006)	2, 46
<i>Estate of Hevia v. Portrio Corp.</i> , 602 F.3d 34 (1st Cir. 2010)	29
<i>Ferguson v. Host Int'l</i> , 53 Mass. App. Ct. 96 (Mass. App. Ct. 2001)	33
<i>Field v. Google</i> , 412 F. Supp. 2d 1106 (D. Nev. 2006)	29
<i>FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.</i> , 498 U.S. 269 (1991)	2
<i>Focus Inv. Assocs. v. Am. Title Ins. Co.</i> , 992 F.2d 1231 (1st Cir. 1993)	18
<i>Fogerty v. Fantasy</i> , 510 U.S. 517 (1994)	42
<i>Genzyme Corp. v. Fed. Ins. Co.</i> , 622 F.3d 62 (1st Cir. 2010)	35
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)	50
<i>Graham v. James</i> , 144 F.3d 229 (2d Cir. 1998)	27

<i>Guerra-Delgado v. Popular, Inc.</i> , 774 F.3d 776 (1st Cir. 2014)	15, 16
<i>Harker v. Holyoke</i> , 390 Mass. 555 (Mass. 1983)	18
<i>Hendricks & Lewis, PLLC v. Clinton</i> , No. C12-0841-RSL (W.D. Wash. Nov. 27, 2012)	19
<i>Hendricks & Lewis PLLC v. Clinton</i> , 766 F.3d 991 (9th Cir. 2014)	21
<i>Hermanson v. Szafarowicz</i> , 457 Mass. 39 (Mass. 2010)	13, 23
<i>Hochendoner v. Genzyme Corp.</i> , No. 15-1446 (1st Cir. May 23, 2016)	38
<i>Hooper-Haas v. Ziegler Holdings, LLC</i> , 690 F.3d 34 (1st Cir. 2012)	13, 23
<i>Houlton Citizens’ Coal v. Town of Houlton</i> , 175 F.3d 178 (1st Cir. 1999)	17
<i>House of Flavors, Inc. v. TFG-Michigan, L.P.</i> , 700 F.3d 33 (1st Cir. 2012)	2, 3
<i>Hunn v. Dan Wilson Homes, Inc.</i> , 789 F.3d 573 (5th Cir. 2015)	29
<i>I.A.E., Inc. v. Shaver</i> , 74 F.3d 768 (7th Cir. 1996)	26
<i>I. Lan Sys. v. Netscout Serv. Level Corp.</i> , 183 F. Supp. 2d 328 (D. Mass. 2002)	26
<i>International Longshoremen’s Ass’n v. Davis</i> , 476 U.S. 380 (1986)	22
<i>Jane Doe No. 1 v. Backpage.com, LLC</i> , 817 F.3d 12 (1st Cir. 2016)	passim
<i>John G. Danielson, Inc. v. Winchester-Conant Props., Inc.</i> , 322 F.3d 26 (1st Cir. 2003)	27
<i>John’s Insulation, Inc. v. L. Addison & Assocs., Inc.</i> , 156 F.3d 101 (1st Cir. 1998)	46
<i>Jordan v. Kelly</i> , 728 F.2d 1 (1st Cir. 1984)	42

<i>Kalb v. Feuerstein</i> , 308 U.S. 433 (1940)	22
<i>Karak v. Bursaw Oil Corp.</i> , 288 F.3d 15 (1st Cir. 2002)	42
<i>Karlson v. Red Door Homes, LLC</i> , 611 Fed. App'x 566 (11th Cir. 2015)	29
<i>Kirtsaeng v. John Wiley & Sons, Inc.</i> , 568 U.S. ___, 133 S. Ct. 1351 (2013)	49
<i>Kleehammer v. Monroe County</i> , 583 Fed. App'x 18 (2d Cir. 2014)	46
<i>Kotler v. American Tobacco Co.</i> , 981 F.2d 7 (1st Cir. 1992)	45
<i>Lehman v. Revolution Portfolio LLC</i> , 166 F.3d 389 (1st Cir. 1999)	45
<i>Libertad v. Welch</i> , 53 F.3d 428 (1st Cir. 1995)	38
<i>Lombard v. United States</i> , 356 F.3d 151 (1st Cir. 2004)	18
<i>Lorenzana v. S. Am. Rests. Corp.</i> , 799 F.3d 31 (1st Cir. 2015)	16
<i>Lowe v. Loud Records</i> , 126 Fed. App'x 545 (3d Cir. 2005)	26
<i>Lulirama Ltd., Inc. v. Axxess Broadcast Services, Inc.</i> , 128 F.3d 872 (5th Cir. 1997)	22
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	19
<i>Lyle Richards Int'l Ltd. v. Ashworth</i> , 132 F.3d 111 (1st Cir. 1997)	39
<i>MacDonald v. Town of Eastham</i> , 745 F.3d 8 (1st Cir. 2014)	17
<i>Martinez v. Petrenko</i> , 792 F.3d 173 (1st Cir. 2015)	16
<i>Marshall v. Stratus Pharms., Inc.</i> , 51 Mass. App. Ct. 667 (2001)	23

<i>Metropolitan Reg'l Info. Sys., Inc. v. Am. Home Realty Network, Inc.,</i> 722 F.3d 591 (4th Cir. 2013)	26
<i>Mills Music, Inc. v. Arizona,</i> 591 F.2d 1278 (9th Cir. 1979)	22
<i>Motta v. Samuel Weiser, Inc.,</i> 768 F.2d 481 (1st Cir. 1985)	19
<i>Muschany v. United States,</i> 324 U.S. 49 (1945)	35
<i>New England Explosives Corp. v. Maine Ledge Blasting Specialist, Inc.,</i> 542 F. Supp. 1343 (D. Me. 1982)	20, 21
<i>Northampton Inst. for Sav. v. Putnam,</i> 313 Mass. 1 (Mass. 1943)	32
<i>Ocotillo, LLC v. WLB Group, Inc.,</i> 219 Ariz. 200 (Ariz. 2008)	35
<i>Old Colony Trust Co. v. Porter,</i> 324 Mass. 581 (Mass. 1949)	18
<i>Patriot Cinemas v. General Cinemas Corp.,</i> 834 F.2d 208 (1st Cir. 1987)	55
<i>Parker v. Google, Inc.,</i> 422 F. Supp. 2d 492 (E.D. Pa. 2006)	29
<i>Parker v. Google, Inc.,</i> 242 Fed. App'x 833 (3d Cir. 2007)	29
<i>Polygram Int'l Publ'g, Inc. v. Nevada/TIG, Inc.,</i> 855 F. Supp. 1314 (D. Mass. 1994)	30
<i>Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs.,</i> 907 F. Supp. 1361 (N.D. Cal. 1995)	29
<i>Rhodes v. AIG Domestic Claims, Inc.,</i> 461 Mass. 486 (Mass. 2012)	39
<i>Rio Grande Cmty. Health Ctr., Inc. v. Rullan,</i> 397 F.3d 56 (1st Cir. 2005)	47
<i>Rivera v. Méndez & Compañia,</i> 988 F. Supp. 2d 159 (D.P.R. 2013)	31

<i>Roberts v. Enter. Rent-A-Car Co. of Boston</i> , 445 Mass. 811 (Mass. 2006)	40
<i>Sands v. Ridefilm Corp.</i> , 212 F.3d 657 (1st Cir. 2000)	42
<i>Scanelli v. Ed. Ferreirinha & Irmao, Lda.</i> , 401 Mass. 155 (Mass. 1987)	23
<i>Scarano v. Central R. Co.</i> , 203 F.3d 510 (3d Cir. 1953)	55
<i>SEC v. Happ</i> , 392 F.3d 12 (1st Cir. 2004)	42
<i>Shattuck v. Precision-Toyota, Inc.</i> , 115 Ariz. 586 (Ariz. 1977)	33
<i>Skeen v. Ginn (In re Ginn)</i> , No. 09-32221 (Bankr. S.D. Tex. Mar. 6, 2013)	49
<i>Smith v. Barry</i> , 502 U.S. 244 (1992)	45
<i>Snyder v. Collura</i> , 812 F.3d 46 (1st Cir. 2016)	42, 43
<i>Society of the Holy Transfiguration Monastery, Inc. v. Gregory</i> , 689 F.3d 29 (1st Cir. 2012)	20
<i>S.O.S., Inc. v. Payday, Inc.</i> , 886 F.2d 1081 (9th Cir. 1989)	27
<i>Spiegel v. Trustees of Tufts College</i> , 843 F.2d 38 (1st Cir. 1988)	44
<i>Spokeo, Inc. v. Robins</i> , 578 U.S. ___, 194 L.Ed. 2d 635 (2016)	38
<i>Stevens v. G.L. Rugo & Sons, Inc.</i> , 209 F.2d 135 (1st Cir. 1953)	32
<i>Train v. Gold</i> , 22 Mass. 380 (Mass. 1827)	32
<i>Trans-Spec Truck Service, Inc. v. Caterpillar Inc.</i> , 524 F.3d 315 (1st Cir. 2008)	17
<i>Turner Broadcasting System, Inc. v. FCC</i> , 512 U.S. 622 (1994)	50

<i>Underwriters Nat'l Assurance Co. v. N.C. Life & Accident Health Ins. Guar. Ass'n</i> , 455 U.S. 691 (1982)	18
<i>United States v. Cheal</i> , 389 F.3d 35 (1st Cir. 2004)	2
<i>United States v. Garcia-Pastrana</i> , 584 F.3d 351 (1st Cir. 2009)	42
<i>United States v. Ortiz</i> , 741 F.3d 288 (1st Cir. 2014)	2, 45, 47
<i>United States v. Pelle</i> , 263 Fed. App'x 833 (11th Cir. 2008)	49
<i>United States v. Univ. Mgmt. Servs., Inc.</i> , 191 F.3d 750 (6th Cir. 1999)	45
<i>United States v. Velez Carrero</i> , 140 F.3d 327 (1st Cir. 1998)	45
<i>Universal Communication Systems, Inc. v. Lycos</i> , 478 F.3d 413 (1st Cir. 2007)	15, 48, 49, 51, 52
<i>Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts</i> , 727 F.3d 10 (1st Cir. 1978)	32
<i>Veeck v. S. Bldg. Code Cong. Int'l</i> , 293 F.3d 791 (5th Cir. 2002)	19
<i>Vidal v. Philadelphia</i> , 43 U.S. (2 How.) 127 (1844)	35
<i>Wagner v. City of Globe</i> , 150 Ariz. 82, 722 P.2d 250 (Ariz. 1986)	31
<i>White v. Blue Cross & Blue Shield of Mass.</i> , 442 Mass. 64 (Mass. 2004)	35
<i>Whitfield v. Municipality of Fajardo</i> , 564 F.3d 40 (1st Cir. 2009)	44, 45
<i>Yellow Pages Photos, Inc. v. Ziplocal, LP</i> , 795 F.3d 1255 (11th Cir. 2015)	18
<i>Zeran v. Am. Online, Inc.</i> , 129 F.3d 327 (4th Cir. 1997)	37, 48, 52

Statutes

15 U.S.C. § 7001	26
17 U.S.C. § 101	1
17 U.S.C. § 106	54
17 U.S.C. § 201(a)	54
17 U.S.C. § 201(d)	54
17 U.S.C. § 201(d)(1)	20
17 U.S.C. § 201(e)	passim
17 U.S.C. § 204	8, 10, 15
17 U.S.C. § 204(a)	8, 17
17 U.S.C. § 301(a)	21
17 U.S.C. § 501(b)	19
17 U.S.C. § 505	3
28 U.S.C. § 1291	2, 45
28 U.S.C. § 1331	1
28 U.S.C. § 1338(a)	1
28 U.S.C. § 1367(a)	1
47 U.S.C. § 230	passim
47 U.S.C. § 230(a)(3)	37
47 U.S.C. § 230(a)(4)	48
47 U.S.C. § 230(b)(2)	37, 48
47 U.S.C. § 230(b)(3)	51
47 U.S.C. § 230(c)(1)	6, 14, 47, 48, 52
47 U.S.C. § 230(e)(2)	54
47 U.S.C. § 230(e)(3)	47
47 U.S.C. § 230(f)(3)	53
Mass. Gen. L. c. 93A	passim
Mass. Gen. L. c. 93A, § 11	14, 38

Rules

Fed. R. App. P. 3(c)	45
Fed. R. App. P. 3(c)(1)(B)	44
Fed. R. App. P. 4(a)(2)	2, 46
Fed. R. Civ. P. 6(a)(1)(C)	2, 10, 46
Fed. R. Civ. P. 12(b)(6)	15, 16, 17, 45
Fed. R. Civ. P. 15(b)(2)	42
Fed. R. Civ. P. 54(a)	10
Fed. R. Civ. P. 54(c)	23, 24
Fed. R. Civ. P. 56(a)	16
Fed. R. Civ. P. 58(b)(1)(C)	1
Fed. R. Civ. P. 58(c)(2)(B)	2, 10, 46
Mass. R. Civ. P. 54(c)	13, 17, 22, 23, 24

Treatises and Other Authorities

1 Paul Goldstein, <i>Copyright</i> § 6.1, at 705 (1989)	30
Christopher M. Newman, <i>A License Is Not a “Contract Not to Sue”: Disentangling Property and Contract in the Law of Copyright Licenses</i> , 98 Iowa L. Rev. 1101 (Mar. 2013)	30, 31
3 Melville B. Nimmer & David Nimmer, <i>Nimmer on Copyright</i> § 10.04, at 10-56.8 (2010)	20
Raymond T. Nimmer & Jeff Dodd, <i>Modern Licensing Law</i> § 6:19 (2009)	29
10 C.A. Wright, A.R. Miller & M.K. Kane, <i>Federal Practice and Procedure</i> § 2663 (1998)	23
Restatement (Second) of Contracts § 72 (1981)	31
Restatement (Second) of Contracts § 76 cmt. d (1981)	31
Restatement (Second) of Contracts § 179 cmt. b (1981)	35
Restatement (Second) of Contracts § 179 cmt. d (1981)	36

Jurisdictional Statement

The United States District Court for the District of Massachusetts had subject-matter jurisdiction under 28 U.S.C. § 1331 and § 1338(a) because the federal-law claims arose under the Copyright Act, 17 U.S.C. § 101, and supplemental jurisdiction over all state-law claims, which were part of the same case or controversy, under 28 U.S.C. § 1367(a).

This appeal is from an interlocutory March 27, 2015 Memorandum and Order granting summary judgment to defendant Xcentric Ventures LLC (“Xcentric”) as to three claims against it. Add. 19; Br. 2.¹ Appellants designated that Memorandum and Order and the clerk’s March 27, 2015 judgment, Add. 1, in their April 24, 2015 notice of appeal, Add. 34. Defendant’s counterclaim, App. 310-311, was then unresolved, so the clerk’s judgment was premature under Fed. R. Civ. P. 58(b)(1)(C), “without effect,” and void. *Diaz-Reyes v. Fuentes-Ortiz*, 471 F.3d 299, 301 (1st Cir. 2006).

On May 15, 2015, appellants moved for leave to extend the time to file a notice of appeal, Doc. 113,² seeking to amend their filed notice in order to also designate a March 24, 2014 Memorandum and Order, which dismissed

¹ Citations to “Br.” (brief), “Add.” (addendum), and “App.” (appendix) are to Appellants’ filings in this appeal.

² Citations to “Doc. ___” are to docket entries in the district court record not reproduced elsewhere in Appellants’ filings in this appeal.

their other claims. *See* Add. 2. By a September 30, 2015 Memorandum and Order, Add. 38, the district court denied the motion to amend, Add. 42-43, appended a footnote (Add. 36-37) to its March 27, 2015 Memorandum and Order, Add. 39-40 & 48, and dismissed defendant's counterclaim (the last outstanding claim), Add. 44-45. That "was a final judgment because it completely resolved the merits of the underlying dispute." *House of Flavors, Inc. v. TFG-Michigan, L.P.*, 700 F.3d 33, 36 (1st Cir. 2012). Judgment, though not set out in a separate document on September 30, 2015, became final and entered on February 29, 2016. Fed. R. Civ. P. 58(c)(2)(B) & 6(a)(1)(C). At that time, the premature notice of appeal ripened and became effective as to the March 27, 2015 Memorandum and Order designated therein. *Estate of Barrett v. United States*, 462 F.3d 28, 34-36 (1st Cir. 2006); Fed. R. App. P. 4(a)(2). The Court has jurisdiction over that order under 28 U.S.C. § 1291.

The notice of appeal did not designate, operate as an appeal from, or confer appellate jurisdiction over, either the later September 30, 2015 final judgment, *Barrett*, 462 F.3d at 34, *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 275-77 (1991), *United States v. Cheal*, 389 F.3d 35, 52 (1st Cir. 2004), *United States v. Ortiz*, 741 F.3d 288, 292 (1st Cir. 2014), or the interlocutory March 24, 2014 Memorandum and Order,

Brooks v. AIG Sunamerica Life Assurance Co., 480 F.3d 579, 585 (1st Cir. 2007); *cf. Brandt v. Wand Partners*, 242 F.3d 6, 14 (1st Cir. 2001).

On December 31, 2015, the district court ordered appellants to pay an award of Xcentric's costs, including attorney's fees, under 17 U.S.C. § 505, and to post a bond for costs on appeal. Doc. 158, 159; *see also* Doc. 178. Appellants are separately appealing from those orders. Doc. 161, 190; appeal no. 16-1085. Xcentric moved for a supplemental award of fees on May 16, 2016. Doc. 182. The pendency of that motion does not limit the finality and appealability of the merits. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 186, 199 (1988); *House of Flavors, Inc.*, 700 F.3d at 36.

Statement of the Issues

1. Were Goren's purported copyright transfers from DuPont invalid?
2. Is the copyright license DuPont granted to Xcentric valid?
3. Did Goren fail to show that Xcentric's Consumer Advocacy Program and VIP Arbitration Program caused him any harm?
4. Are Goren's other tort claims outside the scope of this appeal?
5. If Goren's other tort claims are within the scope of this appeal, then is Xcentric immune from those claims based on the content of DuPont's posts on its website under the Communications Decency Act, 47 U.S.C. § 230?

Statement of the Case

This is an appeal from a district court order granting summary judgment to Xcentric on a claim by Small Justice LLC (“Small Justice”) and its manager, attorney Richard A. Goren (“Goren”) seeking a declaration that Small Justice owns the copyrights in two posts (also called “Reports”) on Xcentric’s website www.ripoffreport.com (“Ripoff Report”) composed by a third party, Christian DuPont (“DuPont”); Small Justice and Goren’s claim alleging Xcentric infringed the copyrights in DuPont’s posts; and Goren’s claim under Chapter 93A of the Massachusetts General Laws. The Ripoff Report is “an online consumer advocacy forum allowing users to post free complaints, called ‘reports,’ about companies and individuals whom they feel have wronged them in some manner.” Add. 20; App. 105. Appellants’ brief also argues against a district court order dismissing Goren’s libel and intentional interference claims and his Chapter 93A claim in part, which is not within the notice of appeal. Add. 2, 34.

The federal action derived from an action Goren filed against DuPont in Massachusetts Superior Court on November 9, 2012, alleging he was defamed in a January 31, 2012 post by DuPont on the Ripoff Report. App. 350-351. Goren’s Superior Court complaint raised claims of libel and intentional interference with prospective contractual relations, prayed for

damages on both counts, and sought injunctive relief “enjoining [the poster] from continuing to publish the January 31, 2012 Ripoff Report.” App. 350-357.

DuPont never appeared in Superior Court and was defaulted. App. 194-195. Goren’s *ex parte* application for default judgment told the Superior Court, “[a]s a matter of federal law, assuming it did not contribute to, or participate in, composing the January 31, 2012 Ripoff Report, under 47 U.S.C. § 230, XCentric [sic] is immune from suit.” App. 364. Xcentric was not a party to that action. *Id.* Goren dismissed his claims for damages and obtained a March 20, 2013 default judgment and permanent injunction that purported to appoint Goren as DuPont’s attorney-in-fact with authority to sue on his behalf to bring about “the removal, retraction, and/or deletion from the Ripoff Report website” of DuPont’s Report. *Id.*; App. 197-199. Goren sought and obtained an amended judgment, entered May 8, 2013, that further purported to transfer to him DuPont’s copyright in the Report and to appoint him as DuPont’s attorney-in-fact to execute a transfer of the copyright, on DuPont’s behalf, to himself. App. 179-184.

On May 14, 2013 Goren sent the Superior Court judgment to Xcentric, demanding removal of the January post. App. 138. Xcentric did not agree to remove it, responding on June 27, 2013, “[c]laims for injunctive relief in

this context are barred by the Communications Decency Act, 47 U.S.C. § 230(c)(1),” and, while “copyright claims are not affected by the CDA,” the default judgment had not “effected a valid transfer of ownership” and Xcentric’s continued display of the post was not an infringement. App. 139.

On July 16, 2013, Goren and Small Justice filed the federal action against Xcentric, raising one count of copyright infringement. App. 16. Xcentric moved to dismiss on August 8, 2013. App. 39.

Back in Superior Court, on August 16, 2013, Goren obtained another amended judgment, purporting to extend the earlier amended judgment’s reach and effect to a second Report posted by DuPont on February 2, 2012. App. 91-94. Goren executed copyright assignments for the two Reports from DuPont to himself on July 3 and August 30, 2013, ostensibly as DuPont’s attorney-in-fact by dint of the Superior Court judgments, and then from himself to Small Justice. App. 78-79 ¶¶ 53, 55-56; Br. 13, 46-47.

On September 2, 2013, in the federal action, Goren filed an amended complaint adding DuPont to the list of plaintiffs in the caption and the signature block, though not in the prayer for relief.³ App. 68, 84, 85. In the

³ References to “appellants” and “plaintiffs” in this brief are to Goren and Small Justice, and include DuPont for convenience only, because Xcentric denies the fiction that the Superior Court validly authorized Goren to act on DuPont’s behalf in this case or in any other matters involving copyright, and DuPont appears only through that purported authority. *See* Doc. 120 pp. 5-7, Doc. 121 pp. 5-6, Doc. 127 pp. 6-17.

amended complaint, Goren and Small Justice sought a declaratory judgment that Small Justice owns the copyrights in the two DuPont reports, and claimed that Xcentric infringed the copyrights. App. 79-81, 84-85. Goren also pleaded claims of libel, intentional interference with prospective contractual relations, and violations of Chapter 93A. App. 81-85. The amended complaint claimed no injury to DuPont and sought no relief for him. *Id.*; see Add. 42 (“The Plaintiffs did not seek a declaration that Dupont owns the copyrights at issue.”); Doc. 120 p. 6.

Xcentric moved to dismiss all claims on September 16, 2013. App. 95. On October 15, 2013, the plaintiffs moved for partial judgment on the pleadings on Xcentric’s copyright ownership and CDA immunity defenses. App. 142. On March 24, 2014, the district court allowed Xcentric’s motion in part and dismissed the libel and intentional interference claims, and two of the three grounds for the Chapter 93A claim, upon concluding “that CDA immunity applies and shields Xcentric from all claims based on the Reports.” Add. 11-17. The district court denied the motion to dismiss the copyright claims without prejudice, without reaching the validity of the Superior Court orders and subsequent transfers among the plaintiffs, and denied plaintiffs’ motion for judgment on the pleadings. Add. 3, 9-10 & n.3. Xcentric answered the complaint on April 7, 2014, raising a breach of

contract counterclaim against DuPont. App. 298, 310-311. Goren filed a reply, purportedly on DuPont's behalf, on April 28, 2014. App. 314.

Xcentric moved for summary judgment on plaintiffs' remaining claims on June 13, 2014. App. 322. On March 27, 2015, the district court granted Xcentric's motion. Add. 19-33.

The district court cited three bases for granting Xcentric judgment on the copyright claims. First, "DuPont transferred copyright ownership to Xcentric by means of an enforceable browsewrap agreement."⁴ Add. 28.

Second, "even if the browsewrap agreement were considered invalid and DuPont retained ownership of the copyrights to the Reports, he nonetheless granted a non-exclusive license to Xcentric and, therefore, he waived his right to sue Xcentric for infringement where its use did not exceed the scope of that license." Add. 28-29. The district court reached this basis for judgment on the copyright claims because to post a Report, a user must first check a checkbox on the website next to "text that provides, in relevant part: 'By posting this report/rebuttal, I attest this report is valid. I

⁴ The district court later amended this basis for judgment on the copyright claims *sua sponte*, adding a footnote to the summary judgment order on September 30, 2015 that "[a]ssuming a written and signed conveyance was required here, the browsewrap agreement was insufficient" under 17 U.S.C. § 204 to convey copyrights from DuPont to Xcentric, while reaffirming its other two bases for judgment on the copyright claims. Add. 36-37, 38-39 & 48.

am giving Rip-Off Report irrevocable rights to post it on the website. I acknowledge that once I post my report, it will not be removed, even at my request.” Add. 21; App. 87. No party denies that DuPont checked the box and accepted those terms. Br. 37.

Third, “[e]ven if DuPont retained ownership of the copyrights, however, the Superior Court’s transfer of rights was barred by 17 U.S.C. § 201(e), which ... precludes any involuntary transfer from the author of his copyright.” Add. 29. “Section 201(e) eliminates any ownership interest in the copyrights claimed by Goren and Small Justice.” Add. 30.

The final ground of Goren’s Chapter 93A claim, premised on Xcentric offering and soliciting programs by which Report subjects can remediate or arbitrate their customers’ complaints, App. 74-75 ¶¶ 33-35, also fell to summary judgment, lacking the causal link Chapter 93A requires between Xcentric’s programs and any harm pleaded or shown. Add. 31-32.

The district court clerk docketed a judgment for Xcentric on March 27, 2015. Add. 1. On April 24, 2015, Appellants filed a notice of appeal from that judgment. Add. 34. On May 15, 2015, they moved to extend the time to notice an appeal, in order to amend their filed notice. Doc. 113.

On May 22, 2015, the district court notified the parties that it was inclined to add a footnote to its March 27, 2015 Memorandum and Order

granting summary judgment, to the effect that, if 17 U.S.C. § 204 applies, a browsewrap agreement was insufficient to transfer DuPont's copyrights to Xcentric, and "[e]ven so, DuPont conveyed a nonexclusive, irrevocable license to Xcentric to display the Reports by means of the check box [on the website]." Add. 36-37. "Under this scenario, Xcentric is not the owner of the copyright to the Reports, but it may display them in perpetuity." *Id.*

Plaintiffs moved to vacate the judgment on June 5, 2015, citing the proposed footnote and noting that Xcentric's counterclaim remained pending. Doc. 118; Add. 44. On June 19, 2015, Xcentric moved to dismiss its counterclaim. Doc. 121; Add. 44. On July 30, 2015, Goren filed a motion to amend the complaint, purportedly on DuPont's behalf. Doc. 129.

On September 30, 2015, the district court denied the plaintiffs' motions to amend the notice of appeal, vacate judgment, and amend the complaint; allowed Xcentric's motion to dismiss the counterclaim; and appended the proposed footnote to its March 27, 2015 Memorandum and Order. Add. 38. That September 30, 2015 order, resolving the last remaining claim, was an appealable judgment under Fed. R. Civ. P. 54(a). Judgment was not set out in a separate document, so it was entered on February 29, 2016 pursuant to Fed. R. Civ. P. 58(c)(2)(B) and 6(a)(1)(C). No party appealed from that final judgment thereafter. Its finality made

ripe this appeal from the March 27, 2015 Memorandum and Order cited in the notice of appeal. Add. 19, 34.

Before entry of final judgment, on October 20, 2015 Xcentric moved the district court for an award of its costs and attorney's fees, and on October 23, 2015, it moved to require a bond for costs on appeal. Doc. 137, 138.

The Court accepted appellants' brief on November 16, 2015. On December 31, 2015, the district court allowed Xcentric's motions for attorney's fees and an appeal bond. Doc. 158, 159. On January 5, 2016, Xcentric moved this Court to limit the scope of this appeal to exclude issues raised in the appellants' brief concerning the district court's March 24, 2014 decision, which the notice of appeal did not designate.

On January 13, 2016, Xcentric moved the district court for additional findings in support of the attorney's fees order. Doc. 160. On January 14, 2016, this Court ordered that a new briefing schedule would be set in this appeal after the district court resolved Xcentric's motion for additional findings, and after the time for appealing from the attorney's fees order and bond order. Later on January 14, 2016, appellants filed a notice of appeal from the attorney's fees order and bond order. Doc. 161; *see* appeal no. 16-1085. The same day, they moved the district court to stay the attorney's

fees order and vacate the bond order. Doc. 162. On January 28, 2016, they moved the district court to vacate both orders. Doc. 169.

On April 28, 2016 the Court denied Xcentric's motion to limit the scope of this appeal "without prejudice to reconsideration by the panel that decides the merits of the appeal" and ordered that a new briefing schedule would be set after the district court disposed of pending post-judgment motions. The district court disposed of all pending motions on May 2, 2016, entering additional findings in support of the attorney's fees order, and denying the plaintiffs' motions to stay and vacate that order and the bond order. Doc. 177-180. On May 16, 2016, Xcentric filed a motion for a supplemental award of fees, which remains pending. Doc. 182. On June 1, 2016, appellants filed an amended notice of appeal from five postjudgment orders (Doc. 158, 159, 178, 179, 180). Doc. 190.

Summary of Argument

The Court should affirm the order granting summary judgment. Xcentric was entitled to judgment because the case had no basis in law.

Small Justice had no statutory standing to seek a declaration that it owns the copyrights to DuPont's posts on Xcentric's website. "[A]ny rights to copyright ownership claimed by Small Justice were improperly acquired in the course of a Superior Court action that, contrary to 17 U.S.C. § 201(e),

purported to transfer copyright ownership from DuPont to Goren.” Add. 39. The transfer was invalid *per se* under Section 201(e). And the Superior Court default judgment was void to the extent it granted relief broader and “different in kind from that prayed for in the demand for judgment,” which did not mention copyright. Mass. R. Civ. P. 54(c); *Hermanson v. Szafarowicz*, 457 Mass. 39, 51 (Mass. 2010); *Hooper-Haas v. Ziegler Holdings, LLC*, 690 F.3d 34, 41 (1st Cir. 2012). For those reasons, Goren and Small Justice had no valid authority to claim the copyrights in DuPont’s Reports, name him a copyright plaintiff or appellant, or pursue copyright claims on his behalf.

Even if DuPont’s role in the federal action were legitimate, the copyright infringement claims were unsustainable because he gave Xcentric an express, irrevocable license to display his Reports. All parties agree he granted the license. As a nonexclusive license does not require consideration, the license was not void for lack of consideration. Even if it did, Xcentric’s performance sufficed. Plaintiffs’ contention that the license was illusory “because Xcentric reserved the right to change the terms and conditions,” Add. 27 n.3, is groundless. The terms of the checkbox license were not subject to unilateral change, and were not changed. Nor was the license unenforceable on public policy grounds. The district court, following

overwhelming precedent, found that the Communications Decency Act immunizes Xcentric from such claims. Add. 31 n.13; see App. 98-99. The CDA is itself a public policy, and “Plaintiffs cannot invoke public policy to make an end-run around this statutory determination.” *Id.*

The district court also soundly discerned that Goren failed to plead the requisite causal link under Chapter 93A between any injury claimed and Xcentric’s solicitations, which he did not accept, for services he did not use. Mass. Gen. L. c. 93A, § 11; *Arthur D. Little, Inc. v. Dooyang Corp.*, 147 F.3d 47, 56 (1st Cir. 1998). The finding was not clearly erroneous.

Appellants briefed several arguments beyond the scope of appeal. They contend that Xcentric is subject to state claims (libel, intentional interference, and under Chapter 93A) based on the content of DuPont’s posts. Br. 21-32. The contention should be irrelevant because according to the notice of appeal, this appeal is taken only from a March 27, 2015 order entering judgment on the copyright and Chapter 93A solicitation claims. Add. 1, 34. The notice of appeal did not reach the state claims dismissed on CDA grounds on March 24, 2014. Add. 2; see *Brooks*, 480 F.3d at 585. If the Court reaches the state claims, it should affirm because the CDA makes Xcentric immune from those claims, which improperly sought to treat Xcentric “as the publisher or speaker” of DuPont’s posts. 47 U.S.C. § 230(c)

(1); *Universal Communication Systems, Inc. v. Lycos*, 478 F.3d 413, 418-422 (1st Cir. 2007); *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18-22 (1st Cir. 2016). The district court so determined. Add. 11-17.

The Court also need not reach appellants' argument that DuPont's copyright transfer to Xcentric was invalid. Br. 32-41. Xcentric does not contest the issue here, and the appealed-from order did not hinge on it. Amending that order, the district court found that the writing requirement of 17 U.S.C. § 204 makes a browsewrap agreement insufficient to effect a transfer of copyright. Add. 36-37, 38-40. That amendment, from which no party appealed, moots any issue of the transfer to Xcentric. The issue was not material because the copyright claims failed on independent grounds. Even if Section 204 applies to DuPont's transfer to Xcentric, he "conveyed a nonexclusive, irrevocable license to display the reports," and his purported transfer to Goren was "contrary to 17 U.S.C. § 201(e)." Add. 39-40.

Properly limited, the appeal offers no grounds for reversal.

Standard of Review

The Court reviews orders granting summary judgment, and dismissal under Rule 12(b)(6), *de novo*. *Guerra-Delgado v. Popular, Inc.*, 774 F.3d 776, 780 & 782 (1st Cir. 2014).

Summary judgment is required when “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A “‘material’ fact is one that could affect the outcome of the case” and a “‘genuine’ dispute is one that could be resolved in favor of either party.” *Guerra-Popular*, 774 F.3d at 782 (citing *Calero-Celezo v. U.S. Dep’t of Justice*, 335 F.3d 6, 19 (1st Cir. 2004)). To defeat summary judgment for the defendant, the plaintiff “has the burden of proving that a genuine issue of material fact exists that would preclude judgment as a matter of law.” *CMM Cable Rep, Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1514 (1st Cir. 1996).

“A properly supported summary judgment motion cannot be defeated by relying upon conclusory allegations, improbable inferences, acrimonious invective, or rank speculation.” *Ahern v. Shinseki*, 629 F.3d 49, 54 (1st Cir. 2010). Plaintiffs must provide “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Martinez v. Petrenko*, 792 F.3d 173, 179 (1st Cir. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

When reviewing dismissal under Rule 12(b)(6), “[o]ur factual analysis is based upon the relevant allegations contained within the amended complaint.” *Lorenzana v. S. Am. Rests. Corp.*, 799 F.3d 31, 33 (1st Cir.

2015). Absent error, “we review only those documents actually considered by the district court in its Rule 12(b)(6) analysis.” *Trans-Spec Truck Serv. v. Caterpillar Inc.*, 524 F.3d 315, 321-22 (1st Cir. 2008).

The Court is “not married to the trial court’s reasoning, but, rather, may affirm on any independently sufficient ground made manifest by the record.” *Cahoon v. Shelton*, 647 F.3d 18, 22 (1st Cir. 2014) (citing *Houlton Citizens’ Coal v. Town of Houlton*, 175 F.3d 178, 184 (1st Cir. 1999)) (summary judgment); accord *MacDonald v. Town of Eastham*, 745 F.3d 8, 11 (1st Cir. 2014) (Rule 12(b)(6) dismissal).

Argument

A. The Purported Transfer of Copyright from DuPont to Goren Is Void.

The default judgment purporting to convey DuPont’s copyrights to Goren, and to entitle Goren to convey the copyrights to himself as DuPont’s attorney-in-fact, is void. The Superior Court lacked jurisdiction to authorize the expropriation of DuPont’s copyrights, 17 U.S.C. § 201(e); or grant relief to Goren different in kind than he prayed for, Mass. R. Civ. P. 54(c). *See* Doc. 127. It did not make Goren or Small Justice a valid transferee or a “duly authorized agent” entitled to effectuate transfers of DuPont’s copyrights under 17 U.S.C. § 204(a). Their copyright infringement and ownership claims were therefore invalid.

1. Xcentric has standing to collaterally attack the Superior Court judgment as void.

A judgment entered without jurisdiction is void and not entitled to full faith and credit from other courts. *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident Health Ins. Guar. Ass'n*, 455 U.S. 691, 704-05 n.10 (1982); *Lombard v. United States*, 356 F.3d 151, 154 (1st Cir. 2004); *Old Colony Trust Co. v. Porter*, 324 Mass. 581, 586 (Mass. 1949). Xcentric has standing to collaterally attack the judgment as void because it was not a party to the Superior Court action, yet Goren sought to enforce that judgment against Xcentric in the district court. *Lombard*, 356 F.3d at 154-56; *Old Colony Trust Co.*, 324 Mass. at 587; *Harker v. Holyoke*, 390 Mass. 555, 559-60 (Mass. 1983).

Appellants argue that Xcentric lacks “standing to raise the Section 201(e) affirmative defense.” Br. 46. However, “any defendant against whom relief is sought will generally have standing to defend due to its exposure to an adverse judgment, the threat of which is imminent.” *Yellow Pages Photos, Inc. v. Ziplocal, LP*, 795 F.3d 1255, 1265 (11th Cir. 2015); *see id.* at 1266 (copyright defendant’s “chosen defense is not a matter of jurisdictional consequence”); *cf. Focus Inv. Assocs. v. Am. Title Ins. Co.*, 992 F.2d 1231, 1241 (1st Cir. 1993). More particularly, standing to contest an involuntary transfer as void under 17 U.S.C. § 201(e) is not limited to the

author in whom the copyrights initially vested under 17 U.S.C. § 201(a). Non-parties can contest involuntary transfers, even to protect unrelated, non-objecting authors. *See Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 673, 681 (S.D.N.Y. 2011) (denying settlement agreement in part based on objections raised by Amazon and Microsoft, non-party competitors of Google, to protect absent class member authors from involuntary transfers); *Veeck v. S. Bldg. Code Cong. Int'l*, 293 F.3d 791, 802-03 (5th Cir. 2002) (entertaining Section 201(e) argument by amici). It would frustrate Section 201(e)'s "goal of precluding all involuntary transfers of copyrights from an individual author unless specifically excluded" if only that author could raise the defense. Add. 29-30 (*quoting Hendricks & Lewis, PLLC v. Clinton*, No. C12-0841-RSL, 2012 WL 5947638, *3 (W.D. Wash. Nov. 27, 2012)). Xcentric has standing to raise the issue because, as an assignee or licensee, and as a defendant, its legally protected interests were invaded by the specious, involuntary transfer. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Under 17 U.S.C. § 501(b), without owning the copyrights, Goren and Small Justice lacked statutory standing to sue Xcentric for infringement. *See Motta v. Samuel Weiser, Inc.*, 768 F.2d 481, 483-84, 486 (1st Cir. 1985). Xcentric properly raised the issue, citing Section 201(e), and prevailed. Add. 29-30.

2. 17 U.S.C. § 201(e) voids the involuntary transfer that the Superior Court facilitated.

Pursuant to 17 U.S.C. § 201(e), an involuntary copyright transfer via “any governmental body” can be given no effect. In other words, it is void.

The default judgment transfers were not “by operation of law” under 17 U.S.C. § 201(d)(1). “Transfers by operation of law are expressly limited to voluntary transfers, except in bankruptcy proceedings.” *Society of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 40-41 (1st Cir. 2012) (quoting *Advance Magazine Publishers, Inc. v. Leach*, 466 F. Supp. 2d 628, 636 (D. Md. 2006)); accord 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 10.04, at 10-56.8 (2010) (copyright transfers by “operation of law must be triggered by the express or implied consent of the author”). “Here, the judgment was not a consent judgment but a default judgment. Accordingly, the state-court conversion ... was involuntary because it was accomplished by operation of law without consent.” *Dickson v. Countrywide Home Loans (In re Dickson)*, 655 F.3d 585, 592-93 (6th Cir. 2011) (distinguishing voluntary and involuntary transfers in bankruptcy). See *Callier v. Gray*, 167 F.3d 977, 981 (6th Cir. 1999) (comparing involuntary dismissal and default judgment); cf. *New England Explosives Corp. v. Maine Ledge Blasting Specialist, Inc.*, 542 F.

Supp. 1343, 1347 n.7 (D. Me. 1982) (“entry of a default judgment is an act of the court, not a voluntary act of the plaintiff”).

The Superior Court never found the default or default judgment to be voluntary, willful, or knowing. The district court correctly found that apprising DuPont of the default judgment did not render the transfer voluntary. Add. 11. Appellants do not contend that DuPont consented to transfer copyrights to Goren, except through Goren’s purported Superior Court authorization to consent on DuPont’s behalf. *See* Br. 13, 47. That does not suffice because Section 201 invalidates any involuntary transfer facilitated by the Superior Court.

Appellants argue that Massachusetts law permitted a court to appoint Goren to transfer DuPont’s copyright (to himself, and then to his LLC). Br. 43-44. But the Copyright Act exclusively governs copyrights and expressly preempts contrary state law. 17 U.S.C. § 301(a). For support, appellants only cite one case decided since Section 201(e) took effect in 1978: *Hendricks & Lewis PLLC v. Clinton*, 766 F.3d 991 (9th Cir. 2014), in which the statutory prohibition of involuntary transfers was found inapplicable to copyrights previously transferred voluntarily by their author. *Id.* at 998. If DuPont had previously voluntarily transferred his copyrights to anyone, it was to Xcentric. Add. 8. If he had not, *see* Add. 37, then Section 201(e)

applies and its statutory exception for prior transfers, cited in *Clinton*, is irrelevant. State law governs only to the extent “not inconsistent with the Copyright Act and its policies,” *Lulirama Ltd., Inc. v. Axxess Broadcast Services, Inc.*, 128 F.3d 872, 880 (5th Cir. 1997), and the law directly conflicts. “The ‘exclusive Rights’ of an author, guaranteed under the Constitution and Copyright Act, would surely be illusory were a state permitted to appropriate with impunity the rights of [a] lawful copyright holder.” *Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1286 (9th Cir. 1979). Because “federal law itself ‘[ousted] the jurisdiction of the state court’ ... The state judgment thus ‘was not merely erroneous but was beyond [the state court’s] power, void, and subject to collateral attack.” *Int’l Longshoremen’s Ass’n v. Davis*, 476 U.S. 380, 393 n.11 (1986) (brackets in original) (*quoting Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940)).

3. Mass. R. Civ. P. 54(c) voids the purported copyright transfer via default judgment.

The Superior Court judgment was via default. *See* App. 27-31. That judgment is void to the extent it granted any broader relief than that sought in Goren’s complaint against DuPont. “A judgment by default shall not be different in kind from that prayed for in the demand for judgment.” Mass. R. Civ. P. 54(c). That rule, by limiting the default judgment to the terms of the demand for judgment, “serves the purpose of enabling a defendant ‘to

weigh the ascertainable cost of losing by default versus the probable costs of going to trial, and then to choose the less expensive option.” *Hermanson v. Szafarowicz*, 457 Mass. 39, 51 (Mass. 2010) (quoting *Scanelli v. Ed. Ferreirinha & Irmao, Lda.*, 401 Mass. 155, 163 (Mass. 1987)) (affirming Mass. R. Civ. P. 54(c)’s “different in kind’ limitation”).

As with the analogous Federal Rule of Civil Procedure 54(c),

It would be fundamentally unfair to have the complaint lead defendant to believe that only a certain type and dimension of relief was being sought and then, should defendant attempt to limit the scope and size of the potential judgment by not appearing or otherwise defaulting, allow the court to give a different type of relief or a larger damage award. ... In sum, then, a default judgment may not extend to matters outside the issues raised by the pleadings or beyond the scope of the relief demanded. A judgment in a default case that awards relief that either is more than or different in kind from that requested originally is null and void and defendant may attack it collaterally in another proceeding.

10 C.A. Wright, A.R. Miller & M.K. Kane, *Federal Practice and Procedure* § 2663 (1998), cited with approval by *Hermanson*, 457 Mass. at 51; accord *Marshall v. Stratus Pharms., Inc.*, 51 Mass. App. Ct. 667, 673-75 (2001); cf. *Hooper-Haas v. Ziegler Holdings, LLC*, 690 F.3d 34, 41 (1st Cir. 2012) (vacating default judgment that “strayed beyond the relief that the appellees had limned in their complaint” and remanding for entry of revised judgment limited to relief sought in complaint); *Blanchard v.*

Cortes-Molina, 453 F.3d 40, 45 (1st Cir. 2006) (relief not requested in complaint unavailable pursuant to Fed. R. Civ. P. 54(c)).

Goren rendered the default judgment void by repeatedly moving to expand the original relief sought and granted. His Superior Court complaint, filed November 9, 2012, made no mention of transferring copyright or making Goren DuPont's attorney-in-fact. App. 350. His prayer for relief demanded damages and injunctive relief, specifically, enjoining DuPont from continuing to publish the first Report. App. 356, 355 ¶ 24. Goren obtained that injunctive relief in a November 26, 2012 preliminary injunction. Br. 11; App. 33-34. The March 20, 2013 default judgment made that injunction permanent. App. 197-199. Goren abandoned his damages claims on February 5, 2013. Br. 11, 42; *see* App. 371. All other relief ultimately granted in the final amended default judgment, App. 91-94, including the purported copyright transfers and attorney-in-fact authorization, exceeded the scope of, and differed in kind from, the relief Goren sought in his complaint. Under Mass. R. Civ. P. 54(c), that default judgment and its augmented relief are void, and can be given no effect.

B. DuPont's Valid License to Xcentric Bars Appellants' Copyright Infringement Claim.

Even if DuPont's assignment of his copyrights in the Reports to Xcentric was not valid, *see* Add. 23-28 & 36-37, Xcentric's license permits it

to continue to publish the Reports. Appellants argue that “[t]he nonexclusive license DuPont granted to Xcentric to post the [Reports] is not enforceable both for lack of consideration and on grounds of public policy.” Br. 20. For reasons given above, Goren’s void default judgment gave him and Small Justice no valid authority to assert any contractual rights against Xcentric in DuPont’s stead. And neither basis of their argument against the license withstands scrutiny. The nonexclusive license required no consideration, had effective consideration because Xcentric performed, and was not rendered illusory by terms outside the license. Public policies Congress has actually adopted and enacted trump appellants’ preference for more private censorship.

1. DuPont’s license to Xcentric is valid and defeats appellants’ infringement claim.

DuPont granted Xcentric an express, irrevocable license to display his Reports by checking a box on the “Submit your Report” page of Xcentric’s website, assenting to the text next to the checkbox, which states in pertinent part:

By posting this report/rebuttal, I attest this report is valid. I am giving Rip-off Report irrevocable rights to post it on the website. I acknowledge that once I post my report, it will not be removed, even at my request.

App. 87; Add. 20. Appellants concede that DuPont checked the box and accepted those terms, which “facially constitute a grant of a nonexclusive license[.]” Br. 37; *see also* App. 622:8-11 (arguing “that checking the box ... as a matter of law ... grant[s] a nonexclusive license”).

The district court agreed: “DuPont conveyed a nonexclusive, irrevocable license to Xcentric to display the Reports by means of the check box.” Add. 37; *accord* Add. 27-28 (“a user’s assent by means of the checkbox granted to Xcentric, at the very least, a non-exclusive license to publish the Reports”). Checking the box online had the effect of a signature, making the license enforceable. *Metropolitan Reg’l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, 722 F.3d 591, 601-02 (4th Cir. 2013); *I. Lan Sys. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002); Add. 8 n.2 (citing the E-Sign Act, 15 U.S.C. § 7001).

This undisputed licensed use provides Xcentric a complete defense to the infringement claim. *See Lowe v. Loud Records*, 126 Fed. App’x 545, 547 (3d Cir. 2005) (affirming summary judgment; plaintiff’s “own testimony establishes the license necessary to defeat his claim”). By a nonexclusive license, “the copyright owner simply permits the use of a copyrighted work in a particular manner.” *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir. 1996) (“a license, exclusive or nonexclusive, creates an affirmative defense

to a claim of copyright infringement”). “Uses of the copyrighted work that stay within the scope of a nonexclusive license are immunized from infringement suits.” *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 40 (1st Cir. 2003) (citing *Graham v. James*, 144 F.3d 229, 236 (2d Cir. 1998)). A copyright defendant ordinarily must prove the existence of a valid license, but when the plaintiff admits its existence “the burden shifts back to plaintiff to show that defendant’s use ... exceeded the license’s scope.” *Dragulis v. Kappa Map Group, LLC*, 128 F.3d 46, 52-53 (D.D.C. 2015) (citing *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085 (9th Cir. 1989)).

2. Xcentric acted within the scope of the license.

Xcentric’s “use did not exceed the scope of the non-exclusive license.” Add. 28-29. Appellants offer no viable argument otherwise. They contend that DuPont’s license did not facially entitle Xcentric to “authorize others to exercise any rights in the” Reports, Br. 37, and that Xcentric “authorized,” licensed, or “directed” Google and other third-party search engines to access the Reports and make, store and display cached copies on their servers. Br. 10, 12-13, 21, 26, 31, 55-56; Add. 14. These disparate arguments do not support a valid infringement claim.

Appellants erroneously claim that Xcentric “chose to re-publish the defamatory work on Google and other search engines,” and “Xcentric instructed Google’s robot crawler periodically to visit the Ripoff Report website and take snapshots of the [Reports, and] ... to keep those snapshots or copies on Google’s servers.” Br. 3, 31. That misstates the summary judgment record. For purposes of its summary judgment motion, Xcentric did not contest that its website coding does not “prevent Google and other search engines from storing ‘cached’ versions of DuPont’s work,” or that Google displays cached copies of the Reports. App. 483-85 ¶¶ 73 & 77; App. 591 ¶¶ 73 & 77. Not instructing Google to not search and cache the website is not the same as affirmatively directing or instructing it to do so, and does not amount to a republication by Xcentric. “Google makes its own cache.” App. 214:1-12; see Add. 14. See *Cohen v. United States*, 98 Fed. Cl. 156, 169-70 (2011) (finding defendant not liable for Google cache absent evidence that Google acted for defendant or with its authorization).

Even if appellants could prove their contentions regarding directions given by Xcentric to Google, Xcentric could not be held liable for search engines caching the Reports. The check-box license facially permits third-party access and use, because it licenses the Reports’ display on a public website, and does not prohibit enlisting third parties to implement any of

its terms. “[T]o limit the grant of a nonexclusive license to a specific use, a copyright owner must expressly convey the limitation when the work is delivered.” *Karlson v. Red Door Homes, LLC*, 611 Fed. App’x 566, 571 (11th Cir. 2015); accord *Hunn v. Dan Wilson Homes, Inc.*, 789 F.3d 573, 589 (5th Cir. 2015) (finding license without any “written or orally communicated restrictions” allowed unlimited use). “When, as in this case, there is no indication that a license-granting copyright owner has restricted the licensee’s ability to use third parties in implementing the license, the license is generally construed to allow such delegation.” *Estate of Hevia v. Portrio Corp.*, 602 F.3d 34, 44-45 (1st Cir. 2010) (citing *Automation by Design, Inc. v. Raybestos Prods. Co.*, 463 F.3d 749, 756-58 (7th Cir. 2006) and Raymond T. Nimmer & Jeff Dodd, *Modern Licensing Law* § 6:19 (2009)).

Furthermore, search engines’ automatic caching of web pages is not direct copyright infringement. *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 497-98 (E.D. Pa. 2006) (citing *Field v. Google*, 412 F. Supp. 2d 1106 (D. Nev. 2006) and *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs.*, 907 F. Supp. 1361, 1368-70 (N.D. Cal. 1995)), *aff’d*, 242 Fed. App’x 833 (3d Cir. 2007). Xcentric cannot be held liable for their non-infringing activity. “It is definitional that, for a defendant to be held contributorily or

vicariously liable, a direct infringement must have occurred.” *Polygram Int’l Publ’g, Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1321 (D. Mass. 1994) (quoting 1 Paul Goldstein, *Copyright* § 6.1, at 705 (1989)). “[I]t is now generally accepted that there can be no liability under the Copyright Act for authorizing an act that itself could not constitute infringement of rights secured by United States law.” *Armstrong v. Virgin Records, Ltd.*, 91 F. Supp. 2d 628, 634 (S.D.N.Y. 2009). Xcentric acted within the scope of its license.

3. The license is not invalid for lack of consideration.

Appellants’ contention that DuPont’s nonexclusive license is illusory or otherwise invalid for lack of consideration is mistaken. A nonexclusive license is unilateral. If it requires consideration, performance suffices.

a. A nonexclusive license does not require consideration.

Neither consideration nor mutual assent is required for “the creation of a bare copyright license.” Christopher M. Newman, *A License Is Not a “Contract Not to Sue”: Disentangling Property and Contract in the Law of Copyright Licenses*, 98 Iowa L. Rev. 1101, 1141 (Mar. 2013).

The question whether some party has been given a nonexclusive license has nothing to do with contract formation or interpretation, and does not depend upon any “mutual intent of the parties.” The grant of a license (like any transfer of a property interest) is a unilateral act of the property owner. The

only person whose intent we care about is the licensor's, and the only question is whether she has used any language or exhibited any conduct to the other party "from which that other may properly infer that the owner consents to his use"

Id. at 1142 (quoting *De Forest Radio Tel. Co. v. United States*, 273 U.S. 236, 241 (1927)). True, an implied non-exclusive copyright license does require consideration to be irrevocable. *See Rivera v. Méndez & Compañía*, 988 F. Supp. 2d 159, 169 (D.P.R. 2013). But DuPont's checkbox license to Xcentric was not implied. It is irrevocable by its express terms. *See App.* 87.

b. Consideration supports the license.

If required, consideration was given. The checkbox license provides that Xcentric may display the Reports, and that they will not be removed. Xcentric displayed and did not remove the Reports. That is valid consideration. "[A]ny performance which is bargained for is consideration." Restatement (Second) of Contracts § 72 (1981); *id.* § 76 cmt. d (a promise conditional on an event within promisor's control may be consideration where promisor has also promised that the condition will occur).

In the parties' home states of Arizona and Massachusetts (*see Br.* 4, *App.* 70), the licensee's performance supplies the necessary consideration in a unilateral contract. "[A] unilateral contract does not require mutuality of obligation; but there is sufficient consideration in the form of services rendered." *Wagner v. City of Globe*, 150 Ariz. 82, 85, 722 P.2d 250, 253

(Ariz. 1986); accord *Train v. Gold*, 22 Mass. 380, 384-85 (Mass. 1827); *Aspinwall v. Boston*, 191 Mass. 441, 445 (Mass. 1906), *Universal Trading & Inv. Co. v. Bureau for Representing Ukranian Interests in Int'l & Foreign Courts*, 727 F.3d 10, 18 (1st Cir. 1978) (“Under Massachusetts law, ... ‘[t]hat an offer for a unilateral contract is accepted by the act or acts of the offeree in accordance with the offer is not questioned.’”) (quoting *Northampton Inst. for Sav. v. Putnam*, 3113 Mass. 1, 7 (1943)); *Stevens v. G.L. Rugo & Sons, Inc.*, 209 F.2d 135, 142 (1st Cir. 1953) (Magruder, C.J., dissenting) (“so long as the service is given, and received, the agreement of the parties controls”). Appellants do not allege that Xcentric failed to perform or that DuPont did not receive the benefit of the bargain. By allowing DuPont to create and publish Reports and displaying them online, Xcentric immediately performed, making the unilateral license effective and binding on DuPont.

c. The license is not illusory.

Appellants identify nothing in the checkbox license that could make it illusory. Instead they point elsewhere, to a clause in the website’s Terms of Service that provides that those terms “are subject to change by Xcentric ... without notice.” Br. 47; Add. 49; App. 121. That clause is inconsequential.

The Terms of Service are not illusory. Appellants did not allege any relevant change in their terms, so the district court properly rejected their “cursory argument that ... any contract between DuPont and Xcentric was illusory because Xcentric reserved the right to change the terms and conditions.” Add. 27 n.3 (citing Doc. 64 at 16).

Whether the Terms of Service are illusory is also beside the point. The checkbox license that DuPont granted is outside the Terms of Service. *See* Add. 24 (distinguishing the license accepted by checkbox from the Terms of Service, “which constitute a browsewrap agreement”); Add. 36-37 (same). The checkbox license does not provide for any unilateral changes, reserve a right to amend its terms, or otherwise contain an illusory promise. Br. 33; App. 87. The discrete Terms of Service could not make DuPont’s license illusory. *See Alday v. Raytheon Co.*, 620 F.3d 1219, 1224-26 (9th Cir. 2010) (agreement not rendered illusory by other agreements between the parties allowing unilateral termination). Appellants argue that DuPont did not agree to the Terms of Service because they were in a scroll box, not adequately disclosed, including the clause making the Terms of Service subject to change. Br. 5-6, 20, 35, 40-41. If so, they could never affect the validity of the separate checkbox license. *Cf. Ferguson v. Host Int’l*, 53 Mass. App. Ct. 96, 101, 103 (Mass. App. Ct. 2001) (“buried” clause reserving

right to change or cancel manual's contents, "the functional equivalent of fine print," insufficient to make other terms in manual illusory or unenforceable).

Arizona and Massachusetts both disfavor finding contracts illusory. "It is a long-standing policy of the law to interpret a contract whenever reasonable and possible in such a way as to uphold the contract." *Shattuck v. Precision-Toyota, Inc.*, 115 Ariz. 586, 589 (Ariz. 1977). "It is a fundamental principle that a contract is to be construed as meaningful and not illusory." *Cofman v. Acton Corp.*, 958 F.2d 494, 497 (1st Cir. 1992) ("saving from unenforceability ranks as a necessity") (applying Massachusetts law). Nothing in the checkbox license, or in appellants' brief, supports that disfavored finding.

4. The license is not unenforceable on public policy grounds.

Appellants argue that "the Court should hold that the non-exclusive license agreement is unenforceable on public policy grounds," specifically this provision: "once I post my report, it will not be removed, even at my request." Br. 48. That provision simply acknowledges Xcentric's nonremoval policy, which they agree is "facially valid." *Id.* Appellants contend the license is unenforceable since "[t]here is a strong public policy against *per se* libel." *Id.* Their true target is not the provision disclosing

Xcentric's nonremoval policy but the policy itself, which is squarely protected by the Communications Decency Act. Appellants' subjective view of public policy does not trump the policies Congress actually adopted and implemented in the CDA granting immunity to internet service providers.

“Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.” *Muschany v. United States*, 324 U.S. 49, 66 (1945) (citing *Vidal v. Philadelphia*, 43 U.S. (2 How.) 127, 197-98 (1844)). “The declaration of public policy has now become largely the province of legislators rather than judges.” Restatement (Second) of Contracts § 179 cmt. b (1981). Courts in Arizona and Massachusetts “are hesitant to declare contractual provisions invalid on public policy grounds.” *Ocotillo, LLC v. WLB Group, Inc.*, 219 Ariz. 200, 202 (Ariz. 2008) (citations omitted); *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 188 F. Supp. 2d 115, 124-25 (D. Mass. 2002); *Genzyme Corp. v. Fed. Ins. Co.*, 622 F.3d 62, 70 (1st Cir. 2010).

The license did not make DuPont immune from libel claims. “If defamation law is to provide a remedy for [Goren], the correct party to be charged with culpability must be, as it always has been, the originator of the defamatory statement communicated to a third party.” *White v. Blue Cross & Blue Shield of Mass.*, 442 Mass. 64, 72 (Mass. 2004). For purposes of the

public policy exception, the question is not whether DuPont's Reports violated Massachusetts defamation law; if they did, Goren's remedy lay in the Superior Court action against DuPont, which he abandoned to pursue Xcentric instead in the district court. Doc. 130 pp. 1-2. The question is whether the checkbox license, by which DuPont attested that his Reports were valid and permitted Xcentric to post them, violated a specific public policy. *See Boston Med. Ctr. v. SEIU, Local 285*, 260 F.3d 16, 23 (1st Cir. 2001) (citing *Eastern Associated Coal Corp. v. United Mine Workers of Am., District 17*, 531 U.S. 57, 62-63 (2000)).

Neither the publication of consumer complaints, nor a license allowing their publication, is contrary to public policy. Unenforceability "is determined as of the time that the promise is made." Restatement (Second) of Contracts § 179 cmt. d (1981); Add. 79. Appellants did not allege that Xcentric knew what the Reports said when the license issued, and concede Xcentric was "presumably" not aware of any falsity in the Reports at the time. Br. 52. Enforcement of the checkbox license is consistent with policies against libel because it required DuPont to attest to the Reports' validity. Br. 50.

Refusing to enforce Xcentric's nonremoval policy would frustrate the public policy adopted in the CDA. When enacting the CDA, "Congress

recognized the Internet and interactive computer services as offering ‘a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity’ ... [and] stated that it is ‘the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.’ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (quoting 47 U.S.C. § 230(a)(3) & (b)(2)). The CDA embodies federal policies that defeat Goren’s policy-based “end-run around this statutory determination.” Add. 31 n. 13.

C. Goren Showed No Chapter 93A Injury Caused by Xcentric’s Corporate Advocacy Program or VIP Arbitration Program.

The appeal brief addresses only the ground of Goren’s Chapter 93A claim that survived Xcentric’s motion to dismiss. Br. 52-61; Add. 15-18. He alleged that Xcentric offers the subjects of Reports a Corporate Advocacy Program to “restore their reputation” and a VIP Arbitration Program by which Reports may be redacted (the “Programs”). App. 74-75 ¶¶ 33-35; see Doc. 64 p. 26 (“Goren’s 93A claim arises out of Xcentric’s solicitations and advertisements for its CAP program.”). The district court rightly dispensed with that ground at summary judgment because appellants had not paid for

either Program and failed to allege a loss traceable to the Programs, or to advertisements or solicitations for the Programs.⁵ Add. 30-32.

“A plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” *Allen v. Wright*, 468 U.S. 737, 751 (1984). “An injury in fact must ... be ‘concrete.’ ... A ‘concrete’ injury must be ‘*de facto*’; that is, it must actually exist.” *Spokeo, Inc. v. Robins*, 578 U.S. ___, ___, 194 L.Ed. 2d 635, 644 (2016); accord *Hochendoner v. Genzyme Corp.*, No. 15-1446, slip op. at 12 (1st Cir. May 23, 2016) (plaintiff “must not only assert injurious conduct attributable to the defendant but also must allege that he, himself, is among the persons injured by that conduct”). Plaintiffs must “show that they were directly affected by the conduct complained of, and therefore have a personal stake in the suit.” *Libertad v. Welch*, 53 F.3d 428, 439 (1st Cir. 1995). To bring an action under Chapter 93A, plaintiffs must show that they “suffer[ed] any loss of money or property, real or personal, as a result of” the alleged wrongful acts. Mass. Gen. L. c. 93A, § 11. Accordingly, “causation is a required element of a successful G. L. c. 93A claim.” *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 401 (Mass. 2004).

⁵ Appellants erroneously contend that the district court “dismiss[ed] the 93A claim based on a lack of reliance damages.” Br. 61. But reliance played no role in the judgment. Addressing the district court, they recognized that Goren’s “Chapter 93A claim failed for lack of causation.” Doc. 169 p. 9.

“To prevail on a Chapter 93A claim of this sort, the ‘plaintiff must prove causation – that is, the plaintiff is required to prove that the defendant’s unfair or deceptive act caused an adverse consequence or loss.’” *Jane Doe No. 1*, 817 F.3d at 24 (quoting *Rhodes v. AIG Domestic Claims, Inc.*, 461 Mass. 486, 496 (Mass. 2012)). The “loss of money or property required under § 11 must stem from [the unfair or] deceptive act.” *Arthur D. Little, Inc. v. Dooyang Corp.*, 147 F.3d 47, 56 (1st Cir. 1998) (citing *Lyle Richards Int’l Ltd. v. Ashworth*, 132 F.3d 111, 114-15 (1st Cir. 1997)).

The district court recognized that Chapter 93A requires this causal link. Add. 32. It could not find the link sufficiently pleaded. The closest appellants came was to argue, “[t]here is evidence of continuing injury to Goren’s reputation as well as the loss of money connected to the undisputed solicitations and advertisements.” *Id.* (quoting Doc. 64 at 27). That was insufficient to show connection, much less causation, because Xcentric’s Programs “are not the source of Goren’s reputational injury” and “Goren has failed to demonstrate how he lost money as a result of the solicitations[.]” *Id.* Goren was unaffected by solicitations he did not accept for Programs he did not use, so the district court rightly found no causation for Chapter 93A purposes.

The question “[w]hether the requisite causal connection has been proven is one of fact’ that will not be set aside unless clearly erroneous.” *Arthur D. Little, Inc.*, 147 F.3d at 56 (quoting *DiMarzo v. Am. Mut. Ins. Co.*, 389 Mass. 85, 101 (Mass. 1983)). There was no error in finding appellants’ allegations entirely omitted the required causal nexus. Appellants argue that Goren’s alleged injuries (loss of goodwill from DuPont’s defamation, and out-of-pocket expenses in legal fees) “stem from’ the unfair practice” and therefore “constitute section 11 damages.” Br. 61 (quoting *Arthur D. Little, Inc.*, 147 F.3d at 56). But the only alleged unfair practices at issue were Programs Goren did not employ, and solicitations for those Programs that cost him nothing to view. *See* Doc. 75 pp. 11-12 (“Goren has only alleged a reputational injury that arose from the author’s posts. Goren has not and cannot demonstrate any injury proximately caused by any purported unfair/deceptive act.”). He was “claiming a G.L. c. 93A violation with respect to a product he did not even purchase.” *Roberts v. Enter. Rent-A-Car Co. of Boston*, 445 Mass. 811, 814 (Mass. 2006).

Appellants’ argument that “bad faith conduct in litigation coupled with pre-suit unfair or deceptive acts constitutes a [Chapter 93A] violation,” Br. 61, fails on both fronts. First, none of Xcentric’s pre-suit activity

supported Goren's Chapter 93A claim.⁶ Goren pleaded no injury caused by Xcentric's Programs, unlike DuPont's Reports, which he alleged damaged his reputation and law practice. App. 73 ¶¶ 21-24; Br. 55. He might have pursued DuPont on those grounds, but not Xcentric. *See* Add. 32-33. Goren told the Superior Court as much: "As a matter of federal law, assuming it did not contribute to, or participate in, composing the January 31, 2012 Ripoff Report, under 47 U.S.C. § 230, XCentric [sic] is immune from suit." App. 364. Xcentric's pre-suit email to Goren explaining its immunity was not "knowingly false" but, as Goren explained to the Superior Court, accurate. App. 139, Add. 17.

And Xcentric litigated in good faith. Appellants would impute bad faith to an inadvertent misstatement by counsel that Xcentric quickly corrected. Br. 53-55; *see* Doc. 126 pp. 17-18. The district court never found the misstatement material or in bad faith, despite appellants' repeated urgings. *See* Add. 503-06 ¶¶ 108-11, Add. 594-95 ¶¶ 108-11, Doc. 111 pp. 3-4 & 15-16, Doc. 135 p. 6 n.4, Doc. 150 pp. 14-17; Doc. 157 pp. 4-8; Doc. 170 pp. 13-14; Doc. 171 pp. 17-18. Instead, it awarded Xcentric attorney's fees under the Copyright Act, applying a discretionary standard that considers the

⁶ The only pre-suit activity that the district court impugned was by Goren and Small Justice, who "improperly acquired" claims to copyright in violation of Section 201(e). Add. 39.

parties' motivations. Doc. 158, 178 ¶ 1 (citing *Fogerty v. Fantasy*, 510 U.S. 517, 534 n.19 (1994)). The district court is entitled to deference regarding the misstatement, absent an abuse of discretion or prejudice. *SEC v. Happ*, 392 F.3d 12, 26-27 (1st Cir. 2004). There was no prejudice or abuse of discretion. Xcentric rectified the misstatement by affidavit without any ruling on the issue. App. 293-296; Add. 2.

The misstatement was not material to the sufficiency of the pleadings. See *Karak v. Bursaw Oil Corp.*, 288 F.3d 15, 21-22 (1st Cir. 2002); *United States v. Garcia-Pastrana*, 584 F.3d 351, 389-90 (1st Cir. 2009). Appellants never argued in the district court that the misstatement amounted to a Chapter 93A violation, waiving the argument. *Jordan v. Kelly*, 728 F.2d 1, 4 (1st Cir. 1984); *Sands v. Ridefilm Corp.*, 212 F.3d 657, 663 (1st Cir. 2000); *Snyder v. Collura*, 812 F.3d 46, 51 (1st Cir. 2016). Appellants concede that “the District Court did not have to address” their unpleaded allegation. Br. 53. Their passing argument that Xcentric violated Chapter 93A by offering DuPont terms of service that it could change, Br. 41, likewise not pleaded below, App. 68, is also waived on appeal. Even appellants' proposed amended complaint, filed after summary judgment “to raise an unpleaded issue” pursuant to Fed. R. Civ. P. 15(b)(2), omitted these newly identified Chapter 93A grounds. Doc. 129-1; see Add. 45-46. They

should be disregarded. *See* Add. 32-33 n.5 (finding allegations of Chapter 93A violations, not in complaint, insufficient to withstand summary judgment); *Snyder*, 812 F.3d at 51-52.

Appellants contend: “It is undisputed that as a result of Xcentric’s operation and advertisement in Massachusetts of its reputation restoration business Goren has suffered a loss of property and money.” Br. 20. Just as erroneously they claim, again without citation: “It is the law of the case that the FAC states a cause of action under 93A for Goren’s undisputed injury to his business goodwill and his alleged loss of money both as a result of Xcentric’s advertising and operation of its reputation restoration business.” Br. 60. That misstates the record. Xcentric did not dispute, for purposes of its summary judgment motion, that Goren “expended money for legal fees and other expenses as a result of Xcentric’s policies.” Br. 52 (*citing* Ap. 502, ¶ 105; Ap. 594, ¶ 105). But Xcentric’s arbitration and advocacy Programs did not cause any expenses Goren incurred in mounting his doomed attack on Xcentric’s nonremoval policy. Goren alleged no such injury. Causation was not undisputed, it was unpleaded.

D. The Order Dismissing the Libel, Intentional Interference, and Chapter 93A Claims Is Outside the Scope of Appeal.

Appellants’ brief disputes Xcentric’s CDA immunity. *See* Br. 14-15, 19-20, 21-32, 48-52. The issue is beyond the scope of appeal because it is

not within the notice of appeal. Add. 34. The April 24, 2015 notice of appeal did not designate the March 24, 2014 order dismissing, on CDA grounds, Goren's claims of libel and intentional interference, and dismissing his Chapter 93A claim in part. Add. 10-16. Appellants designated only a March 27, 2015 judgment for Xcentric and a simultaneous order granting Xcentric summary judgment on other claims entered for Xcentric while its counterclaim was still pending. Add. 1, 19. The appeal is limited to the partial judgment cited in the notice.

On January 5, 2016, Xcentric moved the Court to limit the scope of this appeal. By an Order of Court entered April 28, 2016, the Court declined to limit the scope of the appeal "at this juncture", denying Xcentric's motion without prejudice "to reconsideration by the panel that decides the merits of the appeal." On reconsideration, the Court should find that it lacks jurisdiction to consider the CDA issues resolved in the undesignated order.

Before evaluating the merits, the Court must determine which issues are properly before it. *Whitfield v. Municipality of Fajardo*, 564 F.3d 40, 44 (1st Cir. 2009); *Spiegel v. Trustees of Tufts College*, 843 F.2d 38, 43 (1st Cir. 1988). "The notice of appeal must ... designate the judgment, order, or part thereof being appealed." Fed. R. App. P. 3(c)(1)(B). "It is common ground that our review of a district court's order is circumscribed by the

filed notice of appeal.” *United States v. Ortiz*, 741 F.3d 288, 292 (1st Cir. 2014); see also *Dawoud v. Holder*, 561 F.3d 31, 36 (1st Cir. 2009); *Whitfield*, 564 F.3d at 45. “It is black-letter law that a notice of appeal must specify the order or judgment to which the appeal is addressed.” *Lehman v. Revolution Portfolio LLC*, 166 F.3d 389, 395 (1st Cir. 1999) (citing Fed. R. App. P. 3(c)). “Failure to make a sufficient specification ordinarily debars the appellant from arguing the propriety of an unspecified ruling on appeal.” *Id.* (citing *Smith v. Barry*, 502 U.S. 244, 248 (1992); *United States v. Velez Carrero*, 140 F.3d 327, 330 (1st Cir. 1998); and *Kotler v. American Tobacco Co.*, 981 F.2d 7, 10-11 (1st Cir. 1992)). “[T]he general rule is that ‘[i]f an appellant ... chooses to designate specific determinations in his notice of appeal—rather than simply appealing from the entire judgment—only the specified issues may be raised on appeal.’” *Constructora Andrade Gutierrez, S.A. v. Am. Int’l Ins. Co.*, 467 F.3d 38, 43 (1st Cir. 2006) (quoting with approval *United States v. Univ. Mgmt. Servs., Inc.*, 191 F.3d 750, 756 (6th Cir. 1999) (internal quotations omitted)).

Under 28 U.S.C. § 1291, this Court’s jurisdiction only reaches the designated order. *Acevedo-Villalobos v. Hernandez*, 22 F.2d 384, 384-85 (1st Cir. 1994). The Court lacks appellate jurisdiction to consider claims disposed under Rule 12(b)(6) when the notice of appeal designates only a

later summary judgment order. *Brooks v. AIG SunAmerica Life Assur. Co.*, 480 F.3d 579, 585 (1st Cir. 2007); *see also Kleehammer v. Monroe County*, 583 Fed. App'x 18, 19-20 (2d Cir. 2014); *Constructora Andrade Gutierrez*, 467 F.3d at 44-45 (citing *C&S Acquisitions Corp. v. Nw. Aircraft, Inc.*, 153 F.3d 622, 625 (8th Cir. 1998)).

Appellants' designation of the March 27, 2015 judgment entered by the clerk does not alter the analysis. The clerk's judgment was "without effect" and void because Xcentric's counterclaim was still pending. *Diaz-Reyes v. Fuentes-Ortiz*, 471 F.3d 299, 301 (1st Cir. 2006). The counterclaim was not dismissed until September 30, 2015. Add. 38; *see* Add. 44-45. When judgment on the merits entered on February 29, 2016 pursuant to Fed. R. Civ. P. 58(c)(2)(B) & 6(a)(1)(C), the notice of appeal ripened. Fed. R. App. P. 4(a)(2). It created jurisdiction only over the order it designated. *Estate of Barrett v. United States*, 462 F.3d 28, 34-36 (1st Cir. 2006).

An appeal from the September 30, 2015 order disposing of the merits would have reached all earlier interlocutory orders. *John's Insulation, Inc. v. L. Addison & Assocs., Inc.*, 156 F.3d 101, 105 (1st Cir. 1998). Appellants recognize that this is not such an appeal: "No party filed a notice of appeal of any of the district court's September 30th Orders." Appellants' Response to Appellee's Motion for Stay of Appeal p. 6 (1st Cir. filed Dec. 30, 2015).

The later entry of judgment does not expand the notice of appeal's scope. Appellate jurisdiction is limited to the orders specifically designated in the notice of appeal when no new or amended notice of appeal is filed designating additional orders entered after the notice of appeal. *Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 67-68 (1st Cir. 2005); *Ortiz*, 741 F.3d at 292. The notice of appeal excludes the order dismissing claims on the grounds of Xcentric's CDA immunity, so the Court lacks jurisdiction to consider those claims.

E. If the Order Dismissing the Libel, Intentional Interference, and Chapter 93A Claims Is Within the Scope of Appeal, It Should Be Affirmed under the Communications Decency Act.

If the Court determines that the district court's March 24, 2014 order is within the scope of this appeal, it should affirm the dismissal of Goren's tort claims as barred by 47 U.S.C. § 230, the Communications Decency Act ("CDA"). The CDA protects operators of websites such as the Ripoff Report from tort claims arising out of the publication of content written by others. "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3).

This Court “hold[s] that claims that a website facilitates illegal conduct through its posting rules necessarily treat the website as a publisher or speaker of content provided by third parties and, thus, are precluded by section 230(c)(1).” *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 22 (1st Cir. 2016). Section 230 reflects “a legislative judgment that it is best to avoid the potential chilling effects that private civil actions might have on internet free speech.” *Id.* at 23. This “hands-off approach is fully consistent with Congress’s avowed desire to permit the continued development of the internet with minimal regulatory interference.” *Id.* at 19 (*citing* 47 U.S.C. § 230(a)(4), (b)(2)).

The CDA immunizes Xcentric’s “exercise of a publisher’s traditional editorial functions -- such as deciding whether to publish, withdraw, postpone or alter content.” *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 422 (1st Cir. 2007) (*quoting Zeran*, 129 F.3d at 330). “Section 230 immunity does not depend on the form that decision takes.” *Id.* Congress established as public policy that internet service providers cannot be held liable for content contributed by third parties, even if false. *Id.* at 420 (“conduct [that] may have made it marginally easier for others to develop and disseminate misinformation ... is not enough to overcome Section 230 immunity”). The CDA specifically protects Xcentric’s

right to adopt policies against removal. *Id.* at 422. Choosing to not remove third-party posts on demand does not alter the Section 230 analysis. *See Jane Doe No. 1*, 817 F.3d at 17 n.3. Xcentric’s “decisions about how to treat postings,” manifest in website features that “reflect choices about what content can appear on the website and in what form, are editorial choices that fall within the purview of traditional publisher functions.” *Id.* at 21. One of a publisher’s traditional functions is to obtain “from its authors ... copyright assignments, licenses and permissions.” *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. ___, ___, 133 S. Ct. 1351, 1356 (2013). The CDA protects Xcentric for publishing, and obtaining the right to publish, third-party consumer complaints.

Xcentric’s nonremoval policy is a bulwark against ham-fisted attempts at private censorship like Goren’s. Xcentric operates “a website on which users post comments about bad business practices.” *Blockowicz v. Williams*, 630 F.3d 563, 565 (7th Cir. 2010). This online forum enables consumers to counteract deceptive and misleading practices by businesses. Doc. 126 p. 13. *See, e.g., United States v. Pelle*, 263 Fed. App’x 833, 835-36 (11th Cir. 2008); *Skeen v. Ginn (In re Ginn)*, No. 09-32221, 2013 Bankr. LEXIS 837, *3 (Bankr. S.D. Tex. Mar. 6, 2013); *Chaker v. Mateo*, 209 Cal. App. 4th 1138, 1146 (Cal. App. Ct. 2012). “Because most complaints on

Ripoff Report are about businesses, which generally have more financial resources than consumer complainants, Ripoff Report has adopted a non-removal policy so complaint subjects cannot throw their weight around to silence critics.” App. 393-394. Yet subjects of these Reports can post free rebuttals, App. 391, which are also not removed.⁷ “Maintaining and protecting a public record of consumer reports on businesses, and businesses’ replies to those Reports, Xcentric trusts and empowers readers to judge the merits of the reports and replies themselves.”⁸ Doc. 126 p. 12. This approach actuates the policies underlying the CDA by maximizing users’ control over information they receive online. “It is the policy of the United States ... to encourage the development of technologies which maximize user control over what information is received by individuals,

⁷ Goren chose not to post a rebuttal to the Reports, though other users posted responses. See App. 127-129. “The first remedy of any victim of defamation is self-help -- using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 & n.9 (1974) (affirming judgment against plaintiff attorney on defamation claims).

⁸ Not incidentally, this approach embodies core First Amendment values. “[T]he First Amendment mandates that the consumer, rather than the government, judge the value of the information being communicated.” *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 44 (1st Cir. 2000) (citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503-04 (1996)). “At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political and cultural life rest upon this ideal.” *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994).

families, and schools who use the Internet and other interactive computer services.” 47 U.S.C. § 230(b), (3). Appellants seek to impinge on that user control.

As appellants recognize, the CDA protects internet service providers’ traditional editorial functions and decisions related to third-party publications. Br. 50 (*citing Lycos*, 478 F.3d at 422); *see also Jane Doe No. 1*, 817 F.3d at 18-19. They recite several of Xcentric’s discretionary measures to that end: requiring users to represent that their Reports are truthful and accurate, not defamatory or illegal, and offering services to assist businesses in redressing Reports they consider inaccurate. Br. 49. Yet they argue for “enforcement of state libel law” against Xcentric, not DuPont. Br. 50. The CDA prohibits that misdirected relief.

In the CDA, “Congress has granted broad immunity to entities ... that facilitate the speech of others on the Internet.” *Lycos*, 478 F.3d at 415. That immunity precludes Goren’s claims of libel and intentional interference with prospective business relations, and most of his Chapter 93A claim. “On the facts alleged, Congress intended that, within broad limits, message board operators would not be held responsible for the postings made by others on that board. No amount of artful pleading can avoid that result.” *Id.* at 418.

The CDA immunizes Xcentric from claims that would treat Xcentric “as the publisher or speaker” of DuPont’s posts. 47 U.S.C. § 230(c)(1). “Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher’s role.” *Zeran*, 129 F.3d at 330. As a result, “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional functions -- such as deciding whether to publish, withdraw, postpone or alter content -- are barred.” *Jane Doe No. 1*, 817 F.3d at 18 (*quoting Zeran*, 129 F.3d at 330). The CDA

shields conduct if the defendant (1) “is a ‘provider or user of an interactive computer service’; (2) the claim is based on ‘information provided by another information content provider’; and (3) the claim would treat [the defendant] ‘as the publisher or speaker’ of that information.”

Id. at 19 (*quoting Lycos*, 478 F.3d at 418 (*quoting* 47 U.S.C. § 230(c)(1))).

Those three conditions apply to bar Goren’s non-copyright claims. First, it is uncontested that Xcentric is a provider of an interactive computer service. *See* Br. 4 (Xcentric “owns and operates the Ripoff Report, an interactive website”). Each court to reach the issue has so found. *See* Add. 98-99 (collecting cases). Second, it is uncontested that DuPont wrote the Reports and that Xcentric did not. *See* Br. 7 (DuPont “created a writing” ... “the work that DuPont created”). DuPont is an “information content provider” under the CDA because he was responsible for creating

the Reports. *See* 47 U.S.C. § 230(f)(3). Goren’s state-law claims against Xcentric were based on its publication or display of content that DuPont provided. *See* Add. 82-83 ¶¶ 72, 78 & 85 (alleging Xcentric published or publicly displayed DuPont’s Reports). Third, those claims sought to make Xcentric liable as the “publisher” of the Reports. *Id.* Goren’s libel and intentional interference claims were predicated entirely on Xcentric’s publication or display of the Reports. *Id.* ¶¶ 72-74 & 78. The Chapter 93A was predicated on those acts in part. *Id.* ¶ 85. To that extent, the CDA barred those claims. *See* Add. 11 (finding “CDA immunity applies and shields Xcentric from all claims based on the Reports”).

Appellants contend that Xcentric was an “information content provider” because Xcentric published the Reports while claiming copyright ownership, and because Xcentric let Google and other search engines publish copies of the Reports bearing an Xcentric copyright notice. Br. 21, 26. The district court rightly rejected those contentions and found that Xcentric did not *post hoc* adopt Reports composed by DuPont as its own speech acts. Add. 13-15. The district court accordingly dismissed two grounds it identified as alleged in support of Goren’s Chapter 93A claim: that Xcentric published or displayed the Reports “under color of its exclusive ownership of each,” and that it held itself out as immune from tort

claims under 47 U.S.C. § 230.⁹ App. 83 ¶¶ 85-86. Xcentric’s assertion of its right to publish third-party Reports does not make it liable as the creator of the Reports. “Xcentric is merely the ISP here, not the information content provider, regardless of whether it holds the copyrights in the Reports. Its meritorious assertion of CDA immunity cannot form the basis for a c. 93A claim.” Add. 17; *see also id.* (“The Plaintiffs cannot attempt an end run around the CDA through the use of c. 93A.”).

Appellants’ proposed exception to the CDA conflates the distinct issues of authorship and copyright ownership. Copyright ownership vests initially in the author, who may voluntarily assign or license the copyright. 17 U.S.C. §§ 106, 201(a), 201(d); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989) (“As a general rule, the author is the party who actually creates the work[.]”). Accepting appellants’ argument would turn the CDA into a limitation on the copyright owner’s freedom to license. The CDA bars that interpretation: “Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.” 47 U.S.C. § 230(e)(2).

⁹ The third ground of the Chapter 93A claim, Xcentric’s advertisements for its arbitration and corporate advocacy programs, was not dismissed based on CDA immunity but for failure to show causation, as discussed above.

Goren recognized and argued in Superior Court that, “assuming it did not contribute to, or participate in, composing the ... Report, under 47 U.S.C. § 230, XCentric [sic] is immune from suit.” App. 364. Goren is judicially estopped from contradicting that fair statement of the law because he used it to help obtain his judgment against DuPont. He cannot maintain claims against Xcentric for the content of Reports that he acknowledges Xcentric did not play any role in composing. *See* Br. 27 (“but for DuPont’s ... keystrokes no ‘content’ could have been created”). Judicial estoppel “precludes a party from asserting a position in one legal proceeding which is contrary to a position it has already asserted in another.” *Patriot Cinemas v. General Cinemas Corp.*, 834 F.2d 208, 212 (1st Cir. 1987). It should be applied to keep Goren from playing fast and loose with the courts and using self-contradiction to obtain an unfair advantage. *Id.* (citing *Scarano v. Central R. Co.*, 203 F.3d 510, 513 (3d Cir. 1953)). As Goren noted, Xcentric did not intervene in the Superior Court case in which he proclaimed Xcentric’s immunity. Doc. 136 p. 3. He may not deny its immunity now.

Conclusion

For all the above reasons, appellee Xcentric Ventures LLC requests that the Court affirm the district court order granting summary judgment

and, if the Court deems it within the scope of appeal, also affirm the district court order dismissing claims against Xcentric.

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Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,192 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
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/s/ Dan Booth

Certificate of Service

I hereby certify that on June 2, 2016, I electronically filed the foregoing brief by using the CM/ECF system, which will accomplish service upon Richard A. Goren at rgoren@richardgorenlaw.com.

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