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# Huffington Post Blogger Suit Lacks Merit, Attys Say

By **Allison Grande**

Law360, New York (April 15, 2011) -- A $105 million class action accusing The Huffington Post of failing to pay its bloggers will likely have problems succeeding on its principal theory of unjust enrichment, but it still serves as a reminder to employers to make sure their own bloggers understand their relationship to the company, attorneys say.

Labor activist Jonathan Tasini, who has contributed 216 pieces to The Huffington Post since December 2005, alleged in a suit filed Tuesday in the U.S. District Court for the Southern District of New York that The Huffington Post, which was acquired by AOL Inc. for $315 million in February, has been unjustly enriched by its vetted bloggers' uncompensated contributions.

The suit claims that the content created by the website's unpaid bloggers, who submit their content in exchange for the promise of exposure and not monetary gain, added an estimated $105 million to the sale price, none of which was shared with the writers.

"We intend to prove at trial that the content and services provided by the over 9,000 members of the class created substantial value for The Huffington Post, and we hope to establish a strong precedent that in the digital age content producers must be compensated for the value they create," Jesse Strauss of Kurzon Strauss LLP, who is representing Tasini, said in a statement Tuesday.

But lawyers who spoke with Law360 Friday expressed serious doubts that the suit could last beyond the preliminary stages of litigation. The suit contains traditional "tack on" claims of unjust enrichment and deceptive business practice, but doesn't assert any underlying employment, contract or intellectual property breach, they say.

"My sense is that Mr. Tasini will have an uphill battle in surviving a motion to dismiss," Seyfarth Shaw LLP national wage and hour litigation practice group co-chair Lorie Almon said. "The suit certainly raises a clever theory, but I think that he's going to have difficulty proving certain elements of an unjust enrichment claim."

While the complaint alleges that the defendants were unjustly enriched by the bloggers' contributions, it fails to satisfy the requirement that this enrichment was at the expense of the bloggers, who knowingly submitted their content with no expectation of receiving any type of monetary compensation, according to Almon.

The ultimate success of the suit depends on whether Tasini can prove that the bloggers expected compensation in return for their work, said Davis Wright Tremaine LLP intellectual property partner James Nguyen, who specializes in new media and entertainment issues.

"If the bloggers can't prove that, then they can't prove that it's unfair for The Huffington Post to use the bloggers' work without paying them," Nguyen said, adding that he found the suit on its face to be a "big stretch" legally.

This proof lies in the arrangement that the news service makes with bloggers at the beginning of their relationship, which Michelman & Robinson LLP senior counsel Spencer Hamer categorized as a nonemployment relationship where The Huffington Post merely provides a platform for the bloggers to gain exposure.

Harner compares the parties' actual relationship to a person who calls into a radio station and is given a means to contribute to a conversation and impact an audience without the expectation of monetary compensation in return.

"The bloggers have no responsibilities, duties, deadlines or consequences if they failed to submit an article, and they could basically come and go as they pleased," Harner said. "Being monetarily compensated for their work was never part of the understanding."

Another factor raising uncertainty about the suit is its timing, with Tasini electing to file suit more than five years after he began blogging for the site and on the heels of AOL's acquisition.

"I think The Huffington Post has a good defense not just on the merits but also on laches due to his delay in filing the suit," Nguyen said. "If he asserted the claim before the AOL deal, that would have impacted the value of the transaction."

Even if Tasini were able to overcome these deficiencies at the motion to dismiss stage, his attempt to certify a nationwide class under this unjust enrichment theory faced additional difficulties, according to attorneys.

"In certifying a class action, one of the primary considerations is commonality, and it doesn't appear to me that this requirement is met or that individual factors are not involved," Ogletree Deakins Nash Smoak & Stewart PC shareholder Beth Moeller said.

Specific factors that could potentially block certification of the proposed class of all unpaid Huffington Post bloggers in the U.S. and Canada include each bloggers' unique motivations for contributing to the site and the differing nature of unjust enrichment laws between states, according to attorneys.

Some attorneys speculate that Tasini may have been emboldened to bring the instant action by his success as lead plaintiff in a copyright case against The New York Times Co. in 2001, when the U.S. Supreme Court held that freelance journalists must be compensated when their work for news publications was included in electronic databases.

But the claims in The Huffington Post case don't stack up to those asserted in The New York Times suit, or even Hallissey et al. v. America Online Inc. et al., a 1999 suit filed by nearly 2,000 AOL community leaders who volunteered to moderate chat rooms and answer user questions in exchange for discounts on their monthly AOL connection fees.

The suit alleged that these community leaders were entitled to minimum wage and benefits under the Fair Labor Standards Act because AOL treated them more like employees than volunteers. AOL settled the suit for $15 million in May.

Despite the perceived weakness of Tasini's class action, attorneys still see the suit as a good opportunity for companies to review their own agreements with freelancers, volunteers and

other contributors and make sure that they have a mutual understanding of the nature of those relationships.

"If an employer wants to avoid these type of claims, they need to avoid the appearance of an employer-employee relationship by allowing bloggers to come up with their own ideas and content," Moeller said. "If an employer is making promises of employment, then they would need to pay bloggers for any projects completed for them."

Companies should also make sure that their policies explicitly address their existing employees' obligations when it comes to blogs and other forms of social media used to promote the company, and "to adhere to not only the letter of the law but also the spirit of it," Harner said.

For now, companies should base their policies on federal and state laws governing their relationship with workers, independent contractors and volunteers. But it is not unlikely that evolving relationships such as that between a blogger and a news website could one day be specifically addressed in labor law, attorneys say.

"There's no question that the evolution of technology and of how people work necessarily leads to some rethinking of how traditional law applies in the ever-changing workplace," Almon said. "FLSA law was written for a different type of economy, and the way people work today raises a whole host of legal issues around the traditional employer-employee relationship."

Tasini is represented by Kurzon Strauss LLP.

Counsel information for AOL and The Huffington Post was not immediately available.

The case is Tasini v. AOL Inc. et al., case number 1:11-cv-02472, in the U.S. District Court for the Southern District of New York.

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