

Sleeplessness Caused In Seattle

A U.S. District Court in Seattle recently invalidated a unilateral limitation of liability in online terms of use as unconscionable under Washington state consumer protection law.

The case involved an actress who signed up for an account with IMDb (Internet Movie Database). When she initially signed up in 2004 she entered no birth date. Later in 2004 she added a birthday with a false year (i.e., 1978 instead of 1971). In 2007, she decided to have the birth date removed and repeatedly asked IMDb to remove it, but to no avail. At her prompting – saying that 1978 was not her real birth year - IMDb began an investigation seeking records to confirm the birth year, but could not find any using her stage name (Junie Hoang). IMDb then searched an internal database that stores subscriber payment information and found that when setting up her account's payment information, she submitted her legal name, Huong Thu Hoang. With this information, IMDb was able to find her correct birth date in an external public records database and posted the corrected date on the IMDb site. Hoang, however, continued to ask IMDb to remove the birth date, which IMDb failed to do.

Hoang sued IMDb, claiming, among other things, breach of the subscriber agreement, and sought damages. IMDb moved for summary judgment based on its subscriber agreement, which excluded consequential damages and limited any damages to "the total dollar amount actually received from [sic] IMDb for access to the site and any of the services available at the site during the year prior to your claim."

The Court held these liability limitations unconscionable under Washington consumer protection law "because they impose a unilateral restriction that severely impairs a consumer's ability to recover damages" and because "[t]he unilateral damages limitation clause here ... blocks the full recovery of damages for only one party." The Court distinguished cases in the commercial context, which have upheld such limitations on liability.

The take away here is that it may be time to review your web user and subscriber facing terms of use. In many cases, the benefit of a mutual limitation on liability (or arbitration requirement), which is more likely to be upheld in court, may outweigh the risk arising from limiting your own potential damages recoveries from your users and subscribers.

For more information, please contact the authors [Amyt Eckstein](#) or [David Rabinowitz](#), attorneys in [Moses & Singer's Internet Technology](#) and [Privacy and Cybersecurity](#) groups.



[Amyt M. Eckstein](#)
[Internet Technology](#)
[Privacy & Cybersecurity](#)
[aekstein@mosessinger.com](mailto:aeckstein@mosessinger.com)
212.554.7843



[David Rabinowitz](#)
[Internet Technology](#)
[Privacy & Cybersecurity](#)
drabinowitz@mosessinger.com
212.554.7815

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Moses & Singer LLP
The Chrysler Building
405 Lexington Avenue
New York, NY 10174-1299
Tel: 212.554.7800, Fax: 212.554.7700

2200 Fletcher Avenue
Fort Lee, NJ 07024
Tel: 201.363.1210, Fax: 201.363.9210
Abraham Y. Skoff, Esq.
Managing Attorney for New Jersey

10 Cuttermill Road – Suite 201
Great Neck, NY 11021
Tel: 516.498.8828, Fax: 516.498.8810

James Alterbaum, Esq.
Managing Attorney for Long Island

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