

How (Not) to Make a Contract on YouTube

By Clara Flebus



It is often said that “it pays to advertise.” But as social media becomes the lingua franca of business today, lawyers should educate their clients on how to avoid paying *because* they have advertised. In the brave new electronic world, statements posted on the Internet for the purpose of reaching a multitude of people across boundaries with only a few clicks can create unintended binding contracts. The recent decision of *Augstein v. Leslie*¹ is instructive on this point.

In *Augstein*, the Southern District of New York addressed the question of whether an online offer of a reward for the return of a stolen laptop computer containing valuable intellectual property constituted a unilateral contract, which became binding upon the plaintiff’s finding and delivering the computer, or whether the offer was merely an innocuous advertisement, or invitation to negotiate. Another interesting aspect of the decision is the court’s ruling on sanctions for the defendant’s negligent

failure to preserve electronically stored evidence in anticipation of litigation.

The defendant, Ryan Leslie, is a singer-songwriter and musician whose laptop computer, external hard drive, passport, and other personal belongings were stolen from the backseat of a car during an October 2010 concert appearance in Germany. The laptop contained music and videos related to his records and performances. Immediately after the theft, Leslie posted a video on YouTube offering a \$20,000 reward for the return of the laptop.

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A few days later, Leslie posted another YouTube video at the conclusion of which a written message appeared stating:

In the interest of retrieving the invaluable intellectual property contained on his laptop & hard drive, Mr. Leslie has increased the reward offer from \$20,000 to \$1,000,000 U.S.D.²

Leslie also publicized the increased reward on Facebook and Twitter; he included a post on Twitter that read, “I’m absolutely continuing my Euro tour plus raised the reward for my intellectual property to \$1mm.”³ The reward was reported internationally in various newspapers and on Internet postings. Finally, Leslie appeared on MTV, where he reiterated his offer of a million-dollar reward, saying, “I got a million-dollar reward for anybody that can return all my intellectual property to me.”⁴

customers to collect “Pepsi Points” found on its products and then redeem the points for “Pepsi Stuff” contained in a catalog.¹¹ The Pepsi commercial started with a teenager on his way to school wearing some Pepsi merchandise, such as a T-shirt, a leather jacket, and a pair of sunglasses, with subtitles listing the number of points necessary for each item, and concluded with the teen boy landing in a Harrier jet by the side of the school building with a final subtitle: “Harrier Fighter 7,000,000 Pepsi Points.”¹² After watching that commercial, an enterprising teenager obtained a Pepsi Points catalog. Despite noticing that the catalog did not list the military plane, the teenager set out to raise the money necessary to purchase the 7,000,000 points required to claim the jet; he then submitted an order form with a check to PepsiCo, which, in turn, rejected the claim and returned the check, explaining that

Public offers of a reward for performance of a specific act are a special type of unilateral offer that becomes binding upon performance.

In November 2010, the plaintiff, Armin Augstein, found a bag in Germany containing Leslie’s laptop, hard drive, and passport, and brought it to the local police, who returned it to Leslie in New York.⁵ Knowing about the million-dollar reward, Augstein made a demand for payment, but Leslie refused to honor his promise. Subsequently, Augstein retained a law firm in New York and brought suit to enforce the reward. In response to Augstein’s claim, Leslie stated that the intellectual property, which made the laptop valuable to him, was not present on the hard drive when Augstein returned it.⁶ According to Leslie, he tried to access the information on the hard drive, but was unable to do so.⁷ He then sent the hard drive to the manufacturer, which allegedly deleted any material on it prior to issuing a replacement.⁸ For his part, Augstein claimed that Leslie caused the information on the hard drive to be erased in the United States, after receiving correspondence from Augstein asking for the reward.⁹ Eventually, Augstein moved for summary judgment on the issue of the validity of the offer, reward, and acceptance by Augstein in returning the laptop, and for sanctions due to Leslie’s alleged spoliation of evidence on the hard drive.

Was the YouTube Reward Video a Valid Offer?

The crux of Leslie’s argument was that the video was merely an advertisement, and, as such, could not result in a binding contract through unilateral action of Augstein.

First, Leslie relied on *Leonard v. PepsiCo*,¹⁰ where a teenager attempted to redeem a Harrier jet featured in a television commercial run in the ‘90s by PepsiCo, the producer and distributor of soft drinks. The ads invited

the jet could not be redeemed because it was not included in the catalog.¹³

In *PepsiCo*, the court relied on the general rule that an advertisement does not constitute an offer, but an invitation to enter into negotiations or a solicitation for offers.¹⁴ As such, an advertisement requires a further manifestation of assent by the advertising party to become a binding contract, and an offeree’s willingness to accept the offer by filling out an order form is not enough. The court went on to explain that, by contrast, public offers of a reward for performance of a specific act are a special type of unilateral offer that becomes binding upon performance, without requiring a reciprocal promise.¹⁵

The rationale of *PepsiCo* was derived from the leading British case of *Carlill v. Carbolic Smoke Ball Co.*,¹⁶ in which the purchaser and user of a mysterious “smoke ball” remedy against influenza was stricken with that illness. The purchaser was awarded a £100 reward pursuant to the company’s advertisement that it would pay such a sum to any person who contracted influenza after having used the ball according to the instructions.¹⁷ *Carbolic Smoke Ball* held that an advertisement may be construed as an offer for a reward where it seeks to induce performance, rather than calling for a reciprocal promise.¹⁸

Applying these principles to the statements made in the YouTube video, the court in *Augstein* distinguished *PepsiCo*, explaining that, unlike the Pepsi commercial, the video was intended to induce performance – that is, the actual return of the stolen laptop – and not just a promise from someone to deliver, or help him find, his property.¹⁹ Thus, returning the laptop constituted an acceptance of the reward offer resulting in an enforceable contract.

Next, Leslie contended that, in any event, the offer was not legitimate because it was conveyed through YouTube, a social media site generally used to broadcast advertisements and promotional videos, along with several other kinds of videos. The court found this argument unpersuasive and noted that several courts have held that an offer was legitimate even if made via television or the radio.²⁰ In this regard, the court specifically stated:

The forum for conveying the offer is not determinative, but rather, the question is whether a reasonable person would have understood that Leslie made an offer of a reward.²¹

The reasonable person standard was also used in *Pepsico*, where the court stated that when evaluating the Pepsi commercial, it “must not consider defendant’s subjective intent in making the commercial, or plaintiff’s subjective view of what the commercial offered, but what an objective, reasonable person would have understood the commercial to convey.”²² Thus, if an offer is “evidently in jest,” or done without intent to create a legal relationship, there may not be a valid contract.²³ In *Pepsico*, the court concluded that the idea of flying to school in a Harrier jet represented an “exaggerated adolescent fantasy” and could not be understood as a serious offer by any reasonable person.²⁴

Conversely, in the laptop case the court implicitly held that the offer of a million-dollar reward by Leslie, a popular musician, could objectively be construed as a serious one considering the potential commercial value of the intellectual property allegedly stored on the hard drive, despite the fact that it was conveyed through social media and amplified over the Internet.

Were Sanctions Warranted for Failure to Preserve the Data?

The court stated that a party seeking imposition of sanctions for spoliation of evidence must show that: (1) the party with control over the evidence had an obligation to preserve it when it was destroyed; (2) the evidence was destroyed with a culpable state of mind; and (3) the evidence destroyed was relevant to the party’s claim or defense.²⁵ An obligation to preserve evidence arises when “the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.”²⁶ Here, the court readily found that Leslie was on notice that information on the hard drive may be relevant to future litigation because he was contacted by Augstein about the reward before sending the hard drive to the manufacturer.²⁷ He thus had an obligation to preserve that evidence, which, undoubtedly, was relevant to the reward claim.²⁸

A more complex question was determining the level of Leslie’s culpability, and, consequently, the severity of the sanctions. The court noted:

The law is not clear in [the Second Circuit] on what state of mind a party must have when destroying [the

evidence]. In *Reilly v. Natwest Markets Group Inc.*, we noted that at times we have required a party to have intentionally destroyed evidence; at other times we have required action in bad faith; and at still other times we have allowed an adverse inference based on gross negligence. In light of this, we concluded a case by case approach was appropriate.²⁹

The court went on to cite precedent from the Second Circuit holding that ordinary negligence, and not only gross negligence or bad faith, may constitute a culpable state of mind warranting an adverse inference as a sanction, based on the rationale that each party should bear the risk of its own negligence.³⁰

Here, several disputed facts emerged at deposition as to the extent of Leslie’s efforts to retrieve and preserve the data from the hard drive. Leslie himself stated that he never talked with his team about hiring an outside vendor or computer company to attempt to recover the information, while one of his assistants stated that he consulted a technician who examined the hard drive and concluded it could not be repaired.³¹ That assistant also stated that he contacted the manufacturer and requested data retrieval, but was later told the information could not be recovered.³²

However, the manufacturer, subpoenaed by Augstein, produced an employee, and records, indicating that a request for data recovery was never made by Leslie or his team.³³ In light of this contradictory proof, the court concluded that Leslie was at least negligent in his handling of the hard drive.³⁴ It further held that Augstein was entitled to an adverse inference jury instruction, meaning the jury can infer that the intellectual property was present on the hard drive when the plaintiff returned it to the police.³⁵

Augstein v. Leslie was tried at the end of November 2012. At the conclusion of the trial, the jury rendered a verdict in favor of Augstein in the amount of \$1 million for the return of Leslie’s laptop.³⁶ A lesson to be learned from this case is to be careful about what you say on the Internet. The old adage “buyer beware” (*caveat emptor*) might be expanded to include “beware of the buyer.” If a client uses social media and makes an extravagant reward offer, he or she may be bound by it if a reasonable person would have deemed the offer to be a real one.

In all events, clients should be advised not to worsen a problematic situation by negligently handling evidence relevant to the claim for a reward; a court may instruct the jury to infer that the prized property was actually delivered. ■

1. 2012 WL 4928914 (S.D.N.Y. Oct. 17, 2012).

2. *Id.* at *2. This video is available at <http://www.youtube.com/watch?v=F8jf0huEyNU>.

3. *Id.*

4. *Id.*

5. See *Augstein v. Leslie*, 2012 WL 77880 at *1 (S.D.N.Y. Jan. 10, 2012).

6. *See id.*
7. *See Augstein*, 2012 WL4928914 at *1.
8. *See id.*
9. *See id.*
10. 88 F. Supp. 2d 116 (S.D.N.Y. 1999).
11. *See id.* at 118.
12. *Id.* at 118–19. The PepsiCo commercial is available at: <http://www.youtube.com/watch?v=ZdackF2H7Qc>.
13. *See id.* at 119–20.
14. *See id.* at 122–23.
15. *See id.* at 125.
16. *See id.* (citing *Carlill v. Carbolic Smoke Ball Co.*, 1 Q.B. 256 (Court of Appeal 1892)).
17. *See id.* (citing *Carlill*, 1 Q.B. at 256–57).
18. *See id.* (citing *Carlill*, 1 Q.B. at 262).
19. *See Augstein*, 2012 WL 4928914 at *3.
20. *See id.* n.2 (citing *Newman v. Shiff*, 778 F.2d 460, 466 (8th Cir. 1985); *James v. Turilli*, 473 S.W.2d 757, 760 (Mo. Ct. App. 1971)).
21. *Id.* at *3.
22. *Leonard*, 88 F. Supp. 2d at 127.
23. *Id.*
24. *Id.* at 129.
25. *See Augstein*, 2012 WL 4928914 at *3.
26. *Id.*
27. *See id.*
28. *See id.*
29. *Id.* at *4 (internal citations omitted).
30. *See id.* (citing *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002); *see also Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003) (“Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent.”)).
31. *See id.* at *5.
32. *See id.*
33. *See id.*
34. *See id.* at *6.
35. *See id.*
36. *See Augstein*, 2012 WL 7008147.

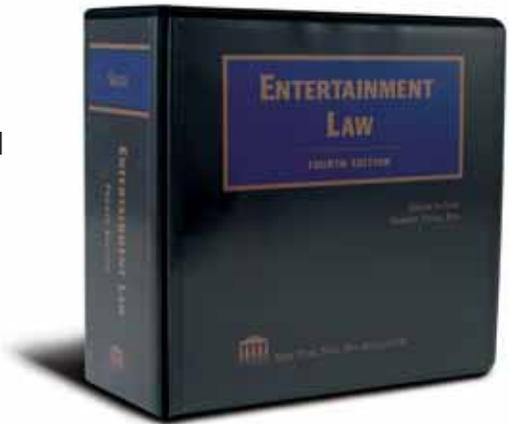
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