

Case No. S244157

SUPREME COURT
FILED

MAR 28 2018

Jorge Navarrete Clerk

**IN THE
SUPREME COURT OF CALIFORNIA**

Deputy

FILMON.COM,
Plaintiff and Petitioner,

vs.

DOUBLEVERIFY, INC.
Defendant and Respondent

After Decision By the Court of Appeal, Second
Appellate District, Division Three
Case No. B264074

RESPONDENT'S ANSWERING BRIEF

LINCOLN D. BANDLOW (BAR NO. 170449)
LBANDLOW@FOXROTHSCHILD.COM
ROM BAR-NISSIM (BAR NO. 293356)
RBAR-NISSIM@FOXROTHSCHILD.COM
Fox Rothschild LLP
10250 Constellation Blvd., Suite 900
Los Angeles, CA 90067
Telephone: 310.598.4150
Facsimile: 310.556.9828

**Attorneys for Respondent
DoubleVerify, Inc.**

Case No. S244157

**IN THE
SUPREME COURT OF CALIFORNIA**

FILMON.COM,
Plaintiff and Petitioner,

vs.

DOUBLEVERIFY, INC.
Defendant and Respondent

After Decision By the Court of Appeal, Second
Appellate District, Division Three
Case No. B264074

RESPONDENT'S ANSWERING BRIEF

LINCOLN D. BANDLOW (BAR NO. 170449)
LBANDLOW@FOXROTHSCHILD.COM
ROM BAR-NISSIM (BAR NO. 293356)
RBAR-NISSIM@FOXROTHSCHILD.COM
Fox Rothschild LLP
10250 Constellation Blvd., Suite 900
Los Angeles, CA 90067
Telephone: 310.598.4150
Facsimile: 310.556.9828

**Attorneys for Respondent
DoubleVerify, Inc.**

TABLE OF CONTENTS

| | | |
|------|---|----|
| I. | STATEMENT OF CASE | 12 |
| II. | STATEMENT OF THE FACTS | 15 |
| | A. DoubleVerify | 15 |
| | B. FilmOn | 16 |
| | C. DoubleVerify’s Investigation Of FilmOn And The Impression Quality Report..... | 18 |
| | 1. FilmOn’s Copyright Infringement Classification | 19 |
| | 2. FilmOn’s Adult Content Classification | 20 |
| III. | PROCEDURAL HISTORY..... | 21 |
| | A. FilmOn’s Lawsuit | 21 |
| | B. DoubleVerify’s Anti-SLAPP Motion | 21 |
| | C. The Trial Court Grants The Anti-SLAPP Motion | 22 |
| | D. The Court Of Appeal Affirms The Trial Court’s Decision..... | 23 |
| IV. | STANDARD OF REVIEW | 24 |
| V. | ARGUMENT..... | 24 |
| | A. Principles of Statutory Interpretation..... | 24 |
| | B. FilmOn Impermissibly Seeks To Import The Analysis For Section 425.17(c) Into The Analysis For Section 425.16..... | 26 |
| | 1. FilmOn’s Interpretation Of Section 425.16 Is Unsupported By The Text Of The Statute And The Rules Of Statutory Construction..... | 26 |
| | a. The Text Of Section 425.17(c) Directly Addresses The Issue Presented..... | 26 |
| | b. The Text Of Section 425.16 Does Not Support FilmOn’s Interpretation..... | 27 |
| | c. The Text Of Section 425.17(c) Demonstrates That Section 425.17(c)’s | |

| | | |
|----|--|----|
| | Analytic Framework Is Separate And Distinct From Section 425.16..... | 29 |
| d. | FilmOn’s Interpretation Construes Section 425.17(c) Broadly And Section 425.16 Narrowly..... | 29 |
| | i. FilmOn’s Interpretation Of Section 425.16 Impermissibly Shifts The Burden Of Proof Regarding Section 425.17(c) | 30 |
| | ii. FilmOn’s Interpretation Of Section 425.16 Would Resurrect The Rejected “Delivery Exemption” ... | 30 |
| | iii. FilmOn’s Definition Of Protected Activity Under Section 425.16 Impermissibly Utilizes Constitutional Law Principles | 32 |
| | iv. FilmOn’s Interpretation Of Section 425.16 Impermissibly Imposes New Requirements On Defendants | 33 |
| e. | FilmOn’s Interpretation Of Section 425.16 Would Impermissibly Render Section 425.17(c) Mere Surplusage..... | 34 |
| 2. | FilmOn’s Interpretation Of Section 425.16 Is Contrary To The Legislative History Of Section 425.17(c)..... | 34 |
| | a. The Legislature Intended Section 425.17(c) To Exclusively Define Commercial Speech For Purposes Of The Anti-SLAPP Statute..... | 35 |
| | b. The Legislature Explicitly Considered The Speaker’s And Audience’s Identity, Along With The Commercial Content And Purpose Of The Speech, In Section 425.17(c)..... | 36 |
| 3. | FilmOn Relies On Outdated And Inapposite Case Law To Interpret Section 425.16 | 39 |
| 4. | FilmOn’s Reliance On <i>OASIS</i> Is Misplaced | 40 |
| C. | DoubleVerify’s Reports Do Not Satisfy Section 425.17(c)..... | 42 |

| | | |
|-----|---|----|
| 1. | FilmOn Has Waived Its Right To Assert That Section 425.17(c) Applies..... | 42 |
| 2. | FilmOn Cannot Meet Its Burden Under Section 425.17(c)..... | 43 |
| D. | The Analysis Under Section 425.16(e)(4) | 43 |
| E. | Section 425.16(e)(4) Protects So-Called Private Communications | 47 |
| 1. | FilmOn’s Argument Is Unsupported By The Text Of Section 425.16(e)..... | 47 |
| 2. | FilmOn’s Argument Is Unsupported By The Legislative History And Case Law | 48 |
| F. | Section 425.16(e)(4) Does Not Contain A “Contribute To The Debate” Requirement..... | 49 |
| 1. | The <i>Wilbanks</i> ’ Rule Is Not Supported By The Text Of Section 425.16 | 50 |
| 2. | The <i>Wilbanks</i> ’ Rule Relied On Inapposite Cases | 50 |
| 3. | Cases Citing The <i>Wilbanks</i> ’ Rule Are Inapposite..... | 51 |
| G. | FilmOn Misinterprets And Misapplies The Public Interest Requirement..... | 53 |
| 1. | FilmOn Misinterprets The Public Interest Requirement..... | 53 |
| 2. | FilmOn Misapplies The Public Interest Requirement | 55 |
| H. | FilmOn Fails To Refute That DoubleVerify’s Reports Qualify As Activity Falling Under Section 425.16(e)(4) | 56 |
| VI. | CONCLUSION..... | 59 |

TABLE OF AUTHORITIES

| | Page(s) |
|--|----------------|
| Federal Cases | |
| <i>American Broad. Cos. v. Aereo, Inc.</i> (2014) 134 S.Ct. 2498..... | 17 |
| <i>CBS Broad. Inc. v. FilmOn.com, Inc.</i> (2d Cir. 2016) 814 F.3d 91 | 17 |
| <i>CBS Broad. Inc. v. Filmon.com, Inc.</i> (S.D.N.Y. 2010) No. 10-7532 | 17 |
| <i>Filmon X, LLC v. Window to the World Commc'ns, Inc.</i> (N.D. Ill. Mar. 23, 2016) No. 13 C 8451, 2016 WL 1161276..... | 17 |
| <i>Fox Television Station Inc. v. BarryDriller Content Sys., PLC</i> (C.D. Cal. 2013) 915 F.Supp.2d 1138 <i>appeal docketed sub nom, Fox Television Stations, Inc. v. FilmOn X, LLC</i> , No. 13- 55156 (9th Cir. argued August 27, 2013) | 17 |
| <i>Fox Television Stations, Inc. v. Aereokiller, LLC</i> (9th Cir. 2017) 851 F.3d 1002 | 17 |
| <i>Fox Television Stations, Inc. v. FilmOn X LLC</i> (D.D.C. Dec. 2, 2015) No. CV 13-758 (RMC), 2015 WL 7761052 | 17 |
| <i>Fox Television Stations, Inc. v. FilmOn X LLC</i> (D.D.C. Dec. 2, 2015) No. CV 13-758 (RMC), 2015 WL 7761052 | 17 |
| <i>Globetrotter Software, Inc. v. Elan Comput. Grp., Inc.</i> (N.D. Cal. September 1, 1999) 63 F.Supp.2d 1127 | 39, 40 |
| <i>NBCUniversal Media, LLC v. FilmOn X, LLC</i> (C.D. Cal. 2012) No. 12-6950-GW <i>appeal docketed</i> , No. 13-55228 (9th Cir. February 8, 2013)..... | 17 |
| California Cases | |
| <i>Albanese v. Menounos</i> (2013) 218 Cal.App.4th 923 | 54 |

| | |
|---|---------------|
| <i>All One God Faith, Inc. v. Organic And Sustainable Indus. Standards, Inc.</i> (2010) 183 Cal.App.4th 1186 | <i>passim</i> |
| <i>Anderson v. Geist</i> (2015) 236 Cal.App.4th 79 | 53 |
| <i>Annette F. v. Sharon S.</i> (2004) 119 Cal.App.4th 1146 | 57 |
| <i>Averill v. Super. Ct.</i> (1996) 42 Cal.App.4th 1170 | 47, 48 |
| <i>Baughn v. Dep't of Forestry and Fire Protection</i> (2016) 246 Cal.App.4th 328 | 54 |
| <i>Bikkina v. Mahadevan</i> (2015) 241 Cal.App.4th 70 | 52, 54 |
| <i>Briggs v. Eden Council for Hope & Opportunity</i> (1999) 19 Cal.4th 1106 | <i>passim</i> |
| <i>Brodeur v. Atlas Entm't, Inc.</i> (2016) 248 Cal.App.4th 665 | 45 |
| <i>Carver v. Bonds</i> (2005) 135 Cal.App.4th 328 | 58 |
| <i>Century 21 Chamberlain & Ass'n v. Haberman</i> (2009) 173 Cal.App.4th 1 | 54 |
| <i>Chaker v. Mateo</i> (2012) 193 Cal.App.4th 1138 | 45, 58 |
| <i>Church of Scientology v. Wollersheim</i> (1996) 42 Cal.App.4th 628 | 57 |
| <i>City of Costa Mesa v. D'Alessio Inv.</i> (2013) 214 Cal.App.4th 358 | 25 |
| <i>City of Montebello v. Vasquez</i> (2016) 1 Cal.5th 409, 422 | <i>passim</i> |
| <i>Club Members For An Honest Election v. Sierra Club</i> (2008) 45 Cal.4th 309 | 25 |
| <i>Collier v. Harris</i> (2015) 240 Cal.App.4th 41 | 44 |

| | |
|--|---------------|
| <i>Colyear v. Rolling Hills Cmty. Ass'n of Rancho Palos Verdes</i> (2017) 9 Cal.App.5th 119 | 52, 54 |
| <i>Commonwealth Energy Corp. v. Investor Data Exch., Inc.</i> (2003) 110 Cal.App.4th 26 | 39, 40 |
| <i>Consumer Justice Ctr. v. Trimedica Int'l, Inc.</i> (2003) 107 Cal.App.4th 595 | 39, 40, 51 |
| <i>Cross v. Cooper</i> (2011), 197 Cal.App.4th 357 | <i>passim</i> |
| <i>Cross v. Facebook, Inc.</i> (2017) 14 Cal.App.5th 190 | 45 |
| <i>D.C. v. R.R.</i> (2010) 182 Cal.App.4th 1190 | 54 |
| <i>Daniel v. Wayans</i> (2017) 8 Cal.App.5th 367 | 45 |
| <i>Dove Audio, Inc. v. Rosenfeld, Meyer & Susman</i> (1996) 47 Cal.App.4th 777 | 48 |
| <i>Du Charme v. Int'l Brotherhood of Electrical Workers, Local 45</i> (2003) 110 Cal.App.4th 107 | 46, 51, 52 |
| <i>DuPont Merck Pharmaceutical Co. v. Sup. Ct.</i> (2000) 78 Cal.App.4th 562 | 38 |
| <i>Dyer v. Childress</i> (2007) 147 Cal.App.4th 1273 | 53, 54 |
| <i>Equilon Enter., LLC v. Consumer Cause, Inc.</i> (2002) 29 Cal.4th 53 66 | <i>passim</i> |
| <i>FilmOn.com v. DoubleVerify, Inc.</i> (2017) 13 Cal.App.5th 707 | <i>passim</i> |
| <i>Gilbert v. Sykes</i> (2007) 147 Cal.App.4th 13 | 52 |
| <i>Greiner v. Taylor</i> (2015) 234 Cal.App.4th 471 | 54 |

| | |
|--|---------------|
| <i>Grewal v Jammu</i> (2011) 191 Cal.App.4th 977 | 54 |
| <i>Haight Ashbury Free Clinics, Inc. v. Happening House Ventures</i> (2010) 184 Cal.App.4th 1539 | 25 |
| <i>Hailstone v. Martinez</i> (2008) 169 Cal.App.4th 728 | 49, 54 |
| <i>Hall v. Time Warner, Inc.</i> (2007) 153 Cal.App.4th 1337 | 52 |
| <i>Hecimovich v. Encinal Sch. Parent Teacher Org.</i> (2012) 203 Cal.App.4th 450 | 45, 46 |
| <i>Hunter v. CBS Broad., Inc.</i> (2013) 221 Cal.App.4th 1510 | 45 |
| <i>Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty</i> <i>USA, Inc.</i> (2005) 129 Cal.App.4th 1228 | 52 |
| <i>Imperial Merch. Serv., Inc. v. Hunt</i> (2009) 47 Cal.4th 381 | 24, 31 |
| <i>Indus. Waste And Debris Box Ser., Inc. v. Murphy</i> (2016) 4 Cal.App.5th 1135 | 45 |
| <i>Integrated Healthcare Holdings, Inc. v. Fitzgibbons</i> (2006) 140 Cal.App.4th 515 | 49 |
| <i>Jackson v. Mayweather</i> (2017) 10 Cal.App.5th 1240 | 52 |
| <i>Jarrow Formulas, Inc. v. LaMarche</i> (2003) 31 Cal.4th 728 | 25 |
| <i>Kasky v. Nike, Inc.</i> 27 Cal.4th 939 | <i>passim</i> |
| <i>Kronemyer v. IMDB</i> (2007) 150 Cal.App.4th 941 | 52 |
| <i>Lieberman v. KCOP Television, Inc.</i> (2003) 110 Cal.App.4th 156 | 44 |

| | |
|--|----------------|
| <i>Mann v. Quality Old Time Serv., Inc.</i> (2004) 120 Cal.App.4th 90 | 39, 40 |
| <i>McGarry v. Univ. of San Diego</i> (2007) 143 Cal.App.4th 97 | 54 |
| <i>N. Coast Bus. Park v. Nielsen Constr. Co.</i> (1993) 17 Cal.App.4th 22 | 43 |
| <i>Nagel v. Twin Lab., Inc.</i> (2003) 139 Cal.App.4th 39 | 39, 40 |
| <i>Navellier v. Sletten</i> (2002) 29 Cal.4th 82 | 33, 50 |
| <i>Nygaard, Inc. v. Uusi-Kerttula</i> (2008) 159 Cal.App.4th 1027 | 45 |
| <i>Park v. Bd. of Trustees of Cal. State Univ.</i> (2017) 2 Cal.5th 1057, 1067 | 24, 44 |
| <i>Price v. Operating Engineers Local Union No. 3</i> (2011) 195 Cal.App.4th 962 | 54 |
| <i>Rand Res., LLC v. City of Carson</i> (2016) 247 Cal.App.4th 1080, review granted, 381 P.3d 229 | 54 |
| <i>Rezec v. Sony Pictures Entm't, Inc.</i> (2004) 116 Cal.App.4th 135 | 36, 39 |
| <i>Rivera v. First DataBank, Inc.</i> (2010) 187 Cal.App.4th 709 | 53, 54 |
| <i>Rivero v. Am. Fed'n Of State, Cty. And Mun. Emp., AFL-CIO</i> (2003) 105 Cal.App.4th 913 | 46, 49, 51, 52 |
| <i>Ruiz v. Harbor View Cmty. Ass'n</i> (2005) 134 Cal.App.4th 1456 | 49, 52 |
| <i>Schaffer v. City and Cty. of S. F.</i> (2008) 168 Cal.App.4th 992 | 25 |
| <i>Simpson Strong-Tie Co. Inc. v. Gore</i> (2010) 49 Cal.4th 12 | <i>passim</i> |
| <i>Stewart v. Rolling Stone LLC</i> (2010) 181 Cal.App.4th 664 | 52 |

| | |
|--|----------------|
| <i>Talega Maint. Corp. v. Standard Pac. Corp</i> (2014) 225 Cal.App.4th 722 | 54 |
| <i>Tamkin v. CBS Broad., Inc.</i> (2011) 193 Cal.App.4th 133 | 45 |
| <i>Taus v. Loftus</i> (2007) 40 Cal.4th 683 | 43 |
| <i>Terry v. Davis Cmty. Church</i> (2005) 131 Cal.App.4th 1534 | 46, 47, 49, 54 |
| <i>Thomas v. Quintero</i> (2005) 126 Cal.App.4th 635 | 54 |
| <i>Torres v. Parkhouse Tire Serv., Inc.</i> (2001) 26 Cal.4th 995 | 34 |
| <i>Vargas v. City of Salinas</i> (2009) 46 Cal.4th 1 | 25 |
| <i>Vogel v. Felice</i> (2005) 127 Cal.App.4th 1006 | 49 |
| <i>In re W.B., Jr.</i> (2012) 55 Cal.4th 30 | 49 |
| <i>W. Sec. Bank v. Super. Ct.</i> (1997) 15 Cal.4th 232 | 35 |
| <i>Weinberg v. Feisel</i> (2003) 110 Cal.App.4th 1122 | <i>passim</i> |
| <i>Wilbanks v. Wolk</i> (2004) 121 Cal.App.4th 993 | 47, 49, 50, 58 |
| <i>Wilcox v. Super. Ct.</i> (1994) 27 Cal.App.4th 809 | 48 |
| <i>Wilson v. Cable News Network, Inc.</i> (2016) 6 Cal.App.5th 822, review granted, 389 P.3d 861 | 52, 54 |
| <i>Wong v. Jing</i> (2010) 189 Cal.App.4th 1354 | 58 |
| <i>World Financial Group, Inc. v. HBW Ins. & Fin. Serv., Inc.</i> (2009) 172 Cal.App.4th 1561 | 39, 40, 54 |

California Statutes

California Code of Civil Procedure

§ 425.16..... *passim*
§ 425.17..... *passim*
§ 1858.....25

Other Authorities

Sen. Rules Com. Off. Of Sen. Floor Analyses, Unfinished
Business analysis of Sen. Bill No. 1296 (1997-1998 Reg. Sess.)
as amended June 23, 1997, dated June 23, 1997.48

Sen. Com. On Judiciary, Analysis of Senate Bill 515 (2003-
2004 Reg. Sess.), dated May 6, 2003.....35, 36

Assem. Com. On Judiciary, Analysis of Sen Bill No. 515
(2003-2004 Reg. Sess.), dated July 1, 2003.....36, 37, 38

Sen. Rules Com., Off. Of Sen. Floor Analyses, 3d reading
analysis of Assem. Bill No. 1158 (2005-2006 Reg. Sess.),
dated Aug. 24, 2005.....36

Respondent DoubleVerify, Inc. (“DoubleVerify”) respectfully submits its Answering Brief in response to Petitioner FilmOn.Com, Inc.’s (“FilmOn”) Opening Brief (“POB”).

I. STATEMENT OF CASE

FilmOn’s position in this appeal, that the speech at issue is commercial speech unprotected by California Code of Civil Procedure (“C.C.P.”) Section 425.16, fails on the law and the facts. First, there is a specific statutory “commercial speech” exemption to anti-SLAPP protection (*i.e.*, Section 425.17(c)) **and FilmOn never asserted it in this case**. Thus, any argument that the speech is “commercial speech” has been waived.

Second, it is obvious why FilmOn did not so contend: DoubleVerify’s speech cannot be deemed “commercial speech” by any stretch of the imagination. Rather, DoubleVerify, not unlike traditional forms of media such as newspapers and other news services, and much like such organizations as Consumer Reports and the Better Business Bureau, conducts extensive investigation and disseminates detailed reports about the content of millions of companies and websites. This is quintessential fully-protected speech that falls squarely under the well-established guidelines for speech that falls under Section 425.16.

FilmOn, however, seeks to muddy the otherwise clear waters of anti-SLAPP law by asking this Court to consider the “commercial nature of the speech, including the identity of the speaker, the identity of the audience and the intended purpose of the speech” in determining whether speech involves protected activity under Section 425.16 (sometimes referred to as the “Issue Presented”). In so doing, FilmOn omits any discussion regarding the commercial speech exemption codified in Section 425.17(c).

This omission is deliberate. FilmOn cannot feign ignorance of Section 425.17(c) because FilmOn cites that section’s legislative history at

the end of its brief under the guise that this legislative history somehow concerns Section 425.16. FilmOn fails to discuss Section 425.17(c) because it is fatal to FilmOn's argument. The text and legislative history of Section 425.17(c) demonstrate that the Legislature enacted Section 425.17(c) to define all of the commercial speech that is exempt from Section 425.16(e).

In contrast, Section 425.16(e) focuses only on the content and/or context of the speech and this Court has repeatedly reiterated that protected activity is defined *solely* by that section. See *City of Montebello v. Vasquez* ("*Montebello*") (2016) 1 Cal.5th 409, 422. As this Court emphasized, it is improper to impose additional requirements to prove protected activity under Section 425.16.

Additionally, this Court in *Simpson Strong-Tie Co. Inc. v. Gore* ("*Simpson*") (2010) 49 Cal.4th 12, 22 explained that Section 425.17(c) is an exemption to Section 425.16 and, therefore, must be construed narrowly. In contrast, the Legislature amended Section 425.16 to explicitly state that the section should be construed broadly.

FilmOn's interpretation of Sections 425.16 and 425.17(c) would invert this rule of construction. FilmOn's definition of unprotected commercial speech is more expansive than the definition of exempt commercial speech in Section 425.17(c). FilmOn's definition of unprotected commercial speech under 425.16 would encompass any speech or conduct by a business to its customers made in the course of delivering its goods and services. This Court, however, specifically refused to interpret Section 425.17(c) in this manner (*see Simpson*, 49 Cal.4th at 26-29) and FilmOn provides no explanation as to why Section 425.16 should be interpreted to exempt such speech when Section 425.17(c) does not.

Additionally, FilmOn's interpretation of Section 425.16 would invert the burden of proof requirement for Section 425.17(c). FilmOn argues that

this Court should begin with the presumption that DoubleVerify's reports are unprotected commercial speech. But this Court has held that, as an exemption, the burden of proof is on the plaintiff to prove that Section 425.17(c) applies. *See Simpson*, 49 Cal.4th at 26.

Nor is FilmOn satisfied confining its brief to the Issue Presented. Instead, FilmOn advocates that Section 425.16(e)(4) does not extend to so-called private communications. Even assuming this case involves "private speech" (which it does not), FilmOn ignores the case law stating that Section 425.16(e)(4) was enacted for the express purpose of covering private communications. Indeed, FilmOn's interpretation would render Section 425.16(e)(4) mere surplusage because to qualify as protected activity, the statement or conduct would have to occur in a public forum (*i.e.*, conduct covered by Section 425.16(e)(3)).

FilmOn also argues that, even when the speech or conduct concerns a matter of widespread public interest under Section 425.16(e)(4), the speech or conduct must also "contribute to the public debate." No such requirement appears in the text of Section 425.16. Furthermore, the cases that cite this contention did not involve a matter of widespread public interest under Section 425.16(e)(4). Rather, those cases involved public forums, public figures, private disputes, homeowners' association disputes or never discussed how the speech or conduct contributed to the public debate at all. They are inapplicable here.

FilmOn also asks this Court to hold that "amorphous public interests" do not qualify for protection under Section 425.16(e)(4). But FilmOn cites this contention completely out of context and the cases only stand for the proposition that an "amorphous public interest" – **standing alone** – is insufficient. Where the speech, as here, has a "closeness" with the public interest asserted (*i.e.*, the "in connection" requirement), it is covered by Section 425.16.

Finally, FilmOn misapplies the “public interest” requirement. FilmOn seeks to shift the focus of the public interest inquiry from the content of DoubleVerify’s reports to the reports themselves. But there is no requirement that the public must be interested in the specific speaker’s speech or conduct. Rather, the focus is on whether the specific speech or conduct concerns a matter of public interest.

Stripped bare, it is evident that FilmOn’s lawsuit is an attempt to punish DoubleVerify for speaking on a matter of public interest (*i.e.*, adult content on the internet generally and FilmOn’s association with copyright infringement specifically). FilmOn did not even appeal the Trial Court’s holding that FilmOn had no probability of prevailing on its claims, effectively conceding that FilmOn’s website contains adult content and is associated with copyright infringement. Thus, FilmOn’s meritless lawsuit is simply an assault on DoubleVerify’s right to speak on matters of public interest.

Therefore, DoubleVerify requests that this Court affirm the Court of Appeal’s decision that affirmed the Trial Court’s decision to grant DoubleVerify’s Anti-SLAPP Motion.

II. STATEMENT OF THE FACTS

A. DoubleVerify

Put simply, DoubleVerify is hired to appraise its customers of what information is being put out on the internet. Advertising agencies, marketers, publishers and other companies hire DoubleVerify to detect and prevent waste or misuse of advertising budgets and to help take proactive measures to maintain brand reputation. (1:AA:063).¹ DoubleVerify accomplishes this through seven components: impression quality solutions, ad viewability, brand safety, fraud protection, ad prominence, impression

¹ The term “AA” shall refer to Appellant’s Appendix.

delivery, and video impression quality. *Id.*

DoubleVerify monitors the websites that its clients advertise on, or may wish to advertise on, and then determines: (a) if each website has content that a client may consider inappropriate; (b) the regional location of the website's viewers; (c) whether competitor advertising appears on the website; (d) where the website actually places advertisements, and (e) how long the advertisement appears on the website.² (1:AA:064). Based on this information, DoubleVerify provides its 1,200-plus clients, many of which are Fortune 500 companies, with a report that allows the client to make informed choices about where to place its advertising and what websites with which to associate or to avoid. (1:AA:0063-065; RT:18:16-17).³ This process requires DoubleVerify to examine millions of websites and billions of ad impressions each month. (1:AA:063).

B. FilmOn

FilmOn is an Internet-based television provider owned by FilmOn.TV Networks Inc., which was founded in 2006 by controversial figure Alki David. FilmOn claims that advertising and product placement are its primary sources of revenue. (1:AA:003). As part of its service, FilmOn provides free television content from a variety of sources, including the major television networks, CBS, ABC, NBC, and Fox Television. (1:AA:071).

According to lawsuits filed around the country, however, it appears

² DoubleVerify does not "rate" or make value judgments about any websites, nor does it recommend or discourage the use of any websites. DoubleVerify simply provides information for clients to make decisions about which websites best suit their needs and interests. For example, Disney may take issue with running an advertisement on a website that contains "adult content" whereas Red Bull may have no such issue and, in fact, may find such a website desirable. (1:AA:065-066).

³ The term "RT" shall refer to the Reporter's Transcript.

“free television content” should be replaced with “stolen television content.” FilmOn is notorious for its “long history of violating copyright owner’s exclusive rights.” (1:RA:0031-0032).⁴ Thus, it has been sued around the country by those television networks for copyright infringement.⁵ (1:AA:006; 1:AA:071; 2:RA 0096–3:RA:0326). Indeed, even after courts have found that FilmOn engages in copyright infringement, this has not stopped FilmOn and its founder from continuing to stream infringing content, resulting in FilmOn being held in contempt of court. (1:RA:0024-0030; 1:RA:0044-0045).⁶

⁴ The term “RA” shall refer to Respondent’s Appendix.

⁵ See *CBS Broad. Inc. v. Filmon.com, Inc.* (S.D.N.Y. 2010) No. 10-7532; *Fox Television Stations, Inc. v. FilmOn X, LLC* (D.C.C. Sept. 5, 2013) No. 13-758 RMC, 2013 WL 4763414 *appeal docketed*, No. 13-7145 (D.C. Cir. September 17, 2013), *Fox Television Station Inc. v. BarryDriller Content Sys., PLC* (C.D. Cal. 2013) 915 F.Supp.2d 1138 *appeal docketed sub nom, Fox Television Stations, Inc. v. FilmOn X, LLC*, No. 13-55156 (9th Cir. argued August 27, 2013) and No. 13-55157, *NBCUniversal Media, LLC v. FilmOn X, LLC* (C.D. Cal. 2012) No. 12-6950-GW *appeal docketed*, No. 13-55228 (9th Cir. February 8, 2013); see also Request for Judicial Notice (“RJN”), Ex. A-C.

⁶ In 2014, the U.S. Supreme Court held that Aereo, a company which provided identical services to that provided by FilmOn, was engaged in copyright infringement. *American Broad. Cos. v. Aereo, Inc.* (2014) 134 S.Ct. 2498. FilmOn then argued that its online streaming of content was comparable to a cable service provider, entitling FilmOn to the same compulsory licenses that such cable providers get to legally rebroadcast copyrighted works. The Second and Ninth Circuits rejected this argument and found that FilmOn continues to engage in copyright infringement. *CBS Broad. Inc. v. FilmOn.com, Inc.*, (2d Cir. 2016) 814 F.3d 91, 98-99; *Fox Television Stations, Inc. v. Aereokiller, LLC* (9th Cir. 2017) 851 F.3d 1002, 1015. Similar findings were made in Washington D.C. and Illinois. *Fox Television Stations, Inc. v. FilmOn X LLC* (D.D.C. Dec. 2, 2015) No. CV 13-758 (RMC), 2015 WL 7761052, at *16; *Filmon X, LLC v. Window to the World Commc'ns, Inc.* (N.D. Ill. Mar. 23, 2016) No. 13 C 8451, 2016 WL 1161276, at *13.

These lawsuits have been covered extensively by the press. (1:RA:0008-0067; 1:AA:071). Moreover, FilmOn's CEO and billionaire owner, Mr. David, regularly injects himself in the public spotlight to discuss himself, his companies and the purported legality of FilmOn's services. (1:RA:0066-0095). Mr. David's antics have drawn massive attention to his company. (1:RA:0015-0019; 1:RA:0055-0057). Dubbed "one of Hollywood's biggest trouble makers" and a man who is "not the type to heed the advice of lawyers," (1:RA:0061-0065), Mr. David embraces his maverick label. After being called out for his copyright infringement by CBS, Mr. David set up a website called "cbsyousuck.com" and said "[i]t takes someone like me, who's a bit of an idiot, with money, to go and poke their finger in their eye." (1:RA:0066-0073). As set forth below, this present lawsuit was yet another of David's efforts to poke someone in the eye, this time jabbing DoubleVerify because it dared to point out the controversial nature of FilmOn's content.⁷

C. DoubleVerify's Investigation Of FilmOn And The Impression Quality Report

Typically, a client comes to DoubleVerify and gives DoubleVerify information about the client's media plan (*i.e.*, what websites that company has chosen to associate with and on which it has run advertising). (1:AA:065). In accordance with that plan, DoubleVerify evaluates billions of advertising campaign impressions, prepares a report regarding the websites where those advertisements ran, and then makes the reports available to DoubleVerify's clients. (1:AA:065; 1:AA:072). This verification service allows DoubleVerify's clients to make informed

⁷ After filing this action, David brazenly admitted that the reason he filed it was not because it had any alleged merit, but "to shed light that [the people at DoubleVerify] are d-----bags." (1:RA:0046-0047; RT:23:27-28:6).

choices about where to place their advertising, avoiding such online advertising pitfalls as affiliating with inappropriate content, running advertisements on websites that have malware, etc. *Id.* For instance, DoubleVerify's client reports provide information about what websites have content that the specific client may deem inappropriate, about whether the website targets the audience the company seeks to attract, whether competing products are advertised on the website, and also whether the advertisement is actually noticeable. (1:AA:064).

In the course of preparing these reports, DoubleVerify evaluated FilmOn and its websites. DoubleVerify concluded that FilmOn should be classified with the designations "Copyright Infringement: Streaming or File Sharing" and "Adult Content," and these classifications were made available to DoubleVerify's over 1,200 clients. (1:AA:64; 1:AA:072).

1. FilmOn's Copyright Infringement Classification

Before a website is given a designation that it may be associated with copyright infringing activity, DoubleVerify performs a thorough investigation of the website's content and structure, the website's compliance with the requirements for online service providers mandated by the Digital Millennium Copyright Act (DMCA), and third-party information that is available about the website. (1:AA:066). Such was the case with DoubleVerify's investigation of FilmOn.com.

DoubleVerify defines "Copyright Infringement: Steaming or File Sharing" as "[s]ites presently or historically, associated with access to or distribution of copyrighted material without appropriate controls, licensing, or permission..." (1:AA:006; 1:AA:067). In its investigation, DoubleVerify found several indicators that FilmOn's websites meet this criteria. (1:AA:005). For example, FilmOn has an incomplete DMCA notice, it has no obvious notice of copyright holder permission to display

content, and there are several indicators the sites do not comply with guidelines and best practices policies set forth by the Interactive Advertising Bureau and Mobile Marketing Association Counsel. (1:AA:005).

FilmOn also has been sued for copyright infringement multiple times, planting it firmly within the category of being associated, either presently or historically, with copyright infringement. (1:AA:006). As of the time of the preparation of DoubleVerify's report, the Southern District of New York, the District of Columbia, and the Central District of California all agreed that FilmOn is a copyright infringer. (2:RA:0196-4:RA:0326). That conclusion has since been echoed by the U.S. Supreme Court and other courts. *See* Footnote 6, *supra*.

2. FilmOn's Adult Content Classification

DoubleVerify classifies "Adult Content" as including "[m]ature topics which are inappropriate viewing for children including explicit language, content, sounds and themes." (1:AA:007). By its own terms, this does not expressly or implicitly mean pornography. (1:AA:072). The FilmOn website unquestionably fits this classification. It offers a variety of channels that include adult content. FilmOn's "Most Watched videos" category yields a category called "Bikini Babes," which includes the channels "After Dark TV"; "Hooters' Calendar Girls"; and "Bikini Girls Show" (offering "[s]exy babes in bikini's [sic], all day everyday"). (5:RA 0327-6:RA:530). Indeed, FilmOn admits it has "programming [that] may be properly characterized as R-rated." (1:AA:007).

The Trial Court held that there was no real dispute about the propriety of these two classifications, stating that FilmOn essentially admitted that DoubleVerify was "right when they said it was adult content and [DoubleVerify] is right when they said [FilmOn] has this issue with copyright." (RT:7:7-9). Indeed, the Trial Court noted a number of times

that FilmOn did not “push back” in any substantial way on that showing. (RT:4:1-2; RT:5:10-11; RT:22:2-3). On appeal, FilmOn did not push back *at all* on this issue.

III. PROCEDURAL HISTORY

A. FilmOn’s Lawsuit

After the classifications for the FilmOn website (among thousands of other websites) were made available to DoubleVerify’s clients in the report, counsel for FilmOn sent DoubleVerify a cease and desist letter.

(1:AA:007; 1:AA:072). In response, DoubleVerify conducted a full investigation into the classification of FilmOn and confirmed its findings. *Id.* Having been provided with such confirmation, FilmOn did nothing for over a year, ultimately deciding in October of 2014 to lash out at DoubleVerify’s speech by filing the action that is the subject of this appeal.

B. DoubleVerify’s Anti-SLAPP Motion

DoubleVerify filed a motion to strike all of FilmOn’s causes of action pursuant to the Anti-SLAPP Statute on the grounds that DoubleVerify’s review and categorizations were made in furtherance of its right to free speech and were connected with an issue of public interest – the public’s interest in being aware about the content of websites, including such matters as what content is suitable for children or whether websites are believed to contain infringing material (referred to herein as “content awareness” or “content transparency”). The motion was supported by over 700 pages of exhibits, which FilmOn deceptively (and tellingly) omitted from its Appendix, including articles about the public’s interest in FilmOn, issues pertaining to copyright infringement, and federal reports about keeping inappropriate content away from children. (*See generally* Respondent’s Appendix).

In opposing the motion, FilmOn concentrated its arguments almost entirely on the fact that DoubleVerify’s categorizations are only made

available to paid subscribers. It neglected to refute whether content awareness or content transparency are themselves matters of public concern. Moreover, FilmOn ignored the reams of evidence showing the great public interest in FilmOn, its founder and the nationwide litigation regarding FilmOn's rampant copyright infringement. Finally, as the Trial Court noted, FilmOn offered virtually no "push back" on the Anti-SLAPP second prong – FilmOn's burden to show there was a likelihood it could prevail on its claims. *Importantly, FilmOn did not even plead (much less prove) that the "commercial speech" exemption of Section 425.17(c) applied in this case.*

C. The Trial Court Grants The Anti-SLAPP Motion

The Trial Court agreed that DoubleVerify's speech was in connection with important issues of content awareness and content transparency, especially when the areas concern material not suitable for children and infringing content. (1:AA:223). The Trial Court found that DoubleVerify's review and classification of websites was "not any different, really, than the Motion Picture Association putting ratings on movies." (RT:3:12-16). By commenting on FilmOn's adult-themed content and being associated with copyright infringement, DoubleVerify was serving "a legitimate and important public function." (RT:3:18-19).⁸ By alerting people about websites that might have adult content, DoubleVerify was performing a "very legitimate function." (RT:4:4-5). Indeed, after noting that DoubleVerify's speech serves "a very valuable public function, and I think we are better for it" (RT:4:11-13), the Trial

⁸ For example, "if you are Disney and you're looking where to put advertising or programming or whatever, you're going to want to know a little about the place that you're placing this." (RT:6:13-16); (*see also* 1:AA:073) ("Many organizations have consulted DoubleVerify in developing their own guidelines for safe online advertising").

Court held that:

there is no way that this kind of speech about these kind of interests -- and when you look at the massive amount of attention being paid to FilmOn and its founder for what it is doing and what its site entails, *it's hard to imagine a good faith argument that this isn't in the public's interest* as it stands.

(RT:19:3-12) (emphasis added).

D. The Court Of Appeal Affirms The Trial Court's Decision

FilmOn appealed the Trial Court's decision, but only as to the first prong (*i.e.*, whether DoubleVerify's report constitutes protected activity under Section 425.16(e)(4)). It did not dispute the Trial Court's findings that FilmOn did not have a probability of prevailing on its claims. Nor did FilmOn contend that Section 425.17(c) applied.

First, the Court of Appeal found that DoubleVerify's reports arose from an act in furtherance of protected speech under Section 425.16(e)(4) because:

FilmOn's business tort and trade libel claims are based *entirely* upon the message communicated by DoubleVerify's "tags." Indeed, it is only because advertisers understand the message within DoubleVerify's tags that FilmOn can claim the tags caused "advertising partners to pull advertising from FilmOn's websites." And, it is only because advertisers understand that the public is interested in whether adult content or copyright infringing material appears on a website that these companies would modify their advertising strategies based on DoubleVerify's tags.

FilmOn.com v. DoubleVerify, Inc. (2017) 13 Cal.App.5th 707, 719 (emphasis in the original).

Moreover, the Court of Appeal rejected FilmOn's arguments that (1) Section 425.16(e)(4) does not extend to private communications; and (2) a matter of "widespread public interest" under Section 425.16(e)(4)