

V I R G I N I A :

IN THE CIRCUIT COURT OF ARLINGTON COUNTY  
Civil Division

U.S. NEWS & WORLD REPORT, INC.  
2400 N Street, N.W.  
Washington, D.C. 20037,

Plaintiff,

v.

At Law No. 95-1318

RAM AVRAHAMI  
Apartment 110  
1001 North Randolph Street  
Arlington, Virginia 22201,

Defendant.

MOTION FOR DECLARATORY JUDGEMENT

COMES NOW the plaintiff, U.S. News & World Report, Inc. ("U.S. News"), by counsel, and for its Motion for Declaratory Judgement states as follows:

PARTIES

1. Plaintiff U.S. News is a corporation organized under the laws of the State of Delaware with its principal place of business located at 2400 N Street, N.W., Washington, D.C. 20037.

2. Defendant Ram Avrahami is a resident of the commonwealth of Virginia and resides at Apartment 110, 1001 N. Randolph Street, Arlington, Virginia 22201.

JURISDICTION

3. This Court has jurisdiction to hear this matter and grant the requested relief pursuant to Virginia Code # 8.01-184.

4. There is a justiciable controversy as to whether the sale, rental, or exchange by U.S. News of a mailing list containing the name of Mr. Avrahami violates Virginia Code # 8.01-40.

5. That an actual controversy exists is further demonstrated by the filing of *Ram Avrahami v. U.S. News & World Report, Inc.*, Civil Action No. 95-7479 now pending in the General District Court of Arlington County, Civil Division, submitted herewith and incorporated by reference as Exhibit A.

6. A Motion to Stay *Avrahami v. U.S. News & World Report, Inc.*, pending the outcome of this action, has been filed in the General District Court as set forth as Exhibit B hereto.

#### BACKGROUND

7. The sale, rental or exchange of mailing lists is a common, standard business practice in the Commonwealth of Virginia and throughout the United States. There are no federal or state laws or regulations which directly prohibit or regulate the sale, rental or exchange of mailing lists.

8. Direct mail, which includes catalogue merchandising, magazine subscription solicitations, and other forms of direct mail solicitations, accounts for approximately \$333.1 billion in sales in the United States in 1994 alone. 18.2 million workers are employed throughout the U.S. economy as a result of direct marketing activities.

9. The United States Government Printing Office routinely engages in the sale or rental of its mailing lists of over 75 publications of the federal government, including the Federal Register, the Code of Federal Regulations, the EPA Journal, and the Federal Aviation Administration's Aviation News. Individuals and businesses may purchase names and addresses from these subscriber lists from the federal government at the rate of approximately \$85.00 per 1,000 names.

10. Various departments and agencies of the Commonwealth of Virginia government, including the State Board of Bar Examiners, make their mailing lists available to businesses and individuals for sale or rental.

11. There is a procedure whereby consumers can elect not to

receive direct mail solicitations. The Mail Preference Service ("MPS"), established by the Direct Marketing Association ("DMA"), is a free service which enables customers to "opt out" of the direct mail marketing process by writing to the MPS. Direct mailers are able to compare their lists against the names on the MPS list and avoid mailing to consumers who have "opted out." The DMA updates the MPS list quarterly, and regularly publicizes its availability through press releases, advertisements and DMA's action reports which are published six times a year and distributed to consumer advocates and reporters.

12. As of 1989, there were approximately 988,000 individuals on the DMA's MPS list. By 1995, there were approximately 3.2 million individuals on the DMA's MPS list. Mr. Avrahami has not registered his name with the MPS service.

#### FACTS

13. In or about December of 1994, U.S. News, through its agent, received a mailing list from Consumers Union, the publisher of Consumer Reports, pursuant to a list exchange arrangement between U.S. News and Consumers Union. Mr. Avrahami's name and address were among the 92,500 names and addresses on the list provided by Consumers Union and received by U.S. News' agent. U.S. News did not receive any other information concerning Mr. Avrahami other than his name and address.

14. Before exchanging its lists with other organizations, Consumers Union compares its list with the DMA's MPS list in order to avoid disclosing names of subscribers who have elected to "opt out" of list exchanges or rentals. Consumers Union also includes a section in each issue of Consumer Reports that describes its policies relating to mailing lists and invites subscribers to call or write to the magazine to have their names deleted from mailing lists that are exchanged. Mr. Avrahami neither contacted Consumer Union nor requested that his name be deleted from mailing lists that are exchanged.

15. U.S. News received the Consumers Union mailing list in connection with a direct mail campaign developed by U.S. News at or around the beginning of 1995 to solicit subscriptions to the magazine U.S. News & World Report (the "Campaign"). In developing a mailing list for the Campaign, U.S. News obtained mailing lists from a number of sources in addition to the Consumers Union mailing

list. In fact, approximately fifty-five different mailing lists were used in developing the mailing list for the Campaign. Consistent with customary practices, U.S. News' agent, Commerce Register, conducted a process commonly referred to as "merge-purge" as part of developing the mailing list for the Campaign.

16. The "merge-purge" process compared the mailing lists obtained by U.S. News through sale, rental or exchange, including the Consumers Union list, against each other to avoid duplicate mailings. Also, as part of the "merge-purge" process, the list was compared against the DMA's MPS list and U.S. News' own list of individuals who do not wish to receive promotions in order to ensure that consumers who had "opted out" of direct mail marketing did not receive any mail. As a result of the "merge-purge" process, U.S. News eliminated more than 8,800, or approximately ten percent, of the 92,500 names obtained from Consumers Union. Mr Avrahami's name was not eliminated in the "merge-purge" process since he did not request his name be included on any of the "opt out" lists.

17. On or about February 15, 1995, Mr. Avrahami received a direct mail promotion from U.S. News which included an offer to subscribe to the magazine U.S. News & World Report as part of the Campaign.

18. On or about March 10, 1995, Mr. Avrahami accepted U.S. News' offer pursuant to the Campaign to subscribe to U.S. News & World Report and mailed his acceptance to U.S. News.

19. On or about March 21, 1995, Mr. Avrahami was billed by U.S. News for the subscription and mailed his payment in the form of a \$15.00 check payable to U.S. News.

20. On or about March 24, 1995, the Smithsonian Magazine ordered a mailing list of 100,000 names and addresses from U.S. News pursuant to a list exchange agreement between U.S. News and the Smithsonian dated March 5, 1995.

21. On or about April 12, 1995, U.S. News caused a mailing list of 100,000 names and addresses to be shipped to the Smithsonian Magazine or its agent, which list included Mr. Avrahami's name and address. There was no other information concerning Mr. Avrahami on the list provided to the Smithsonian. other than his name and address.

22. On or about May 22, 1995, Mr. Avrahami alleges he received promotional literature from the Smithsonian Magazine. Based on information and belief, prior to mailing such literature, the Smithsonian Magazine compared or caused to be compared the list received from U.S. News against the DMA's MPS list in order to eliminate consumers who had elected to "opt out" of such direct mail campaigns.

23. Based on information and belief, the Smithsonian Magazine obtained multiple lists in order to engage in the direct mail promotion of which defendant complains. There is a factual issue as to whether the defendant's name was added to the Smithsonian as a result of being on the U.S. News list or one of the other lists used for the Smithsonian mailing.

24. Mr. Avrahami has not alleged that U.S. News improperly obtained his name and address. Mr. Avrahami subscribed to U.S. News & World Report pursuant to a direct mail solicitation similar to the one of which he now complains. Since the filing of his lawsuit, Mr. Avrahami renewed his subscription to U.S. News & World Report. At no time prior to the institution of this lawsuit did Mr. Avrahami request or demand that U.S. News refrain from disclosing his name and address to third parties. Furthermore, U.S. News could have contacted the defendant simply by locating his name in the phone book.

25. When Mr. Avrahami receives a direct mail solicitation he likes, he subscribes. When he receives one he doesn't like, rather than deposit it in the trash can, he files suit.

26. On or about August 21, 1995, Mr. Avrahami filed a Motion for Judgement in the General District Court of Arlington County, Civil Division, alleging that the "rental" of the U.S. News mailing list violated Virginia Code # 8.01-40.

#### RELIEF

27. Virginia Code # 8.01-40 was not intended to prevent the sale, rental or exchange of mailing lists. The Virginia privacy statute was intended to protect individuals whose names and likeness are used in advertising without their consent by providing them with a cause of action.

28. The mere sale, rental or exchange of mailing lists does

not violate or state a claim under Virginia Code # 8.01-40.

29. The sale, rental or exchange of mailing lists for use in mail solicitations does not give rise to a claim based on invasion of privacy.

WHEREFORE, Plaintiff U.S. News & World Report, Inc. asks that this Court issue an Order granting its request for declaratory relief specifying that (1) the selling, renting and exchanging of mailing list containing the Defendant Ram Avrahami's name does not violate Virginia Code 8.01-40; (2) that the inclusion of Defendant Ram Avrahami's name in a mailing list for direct mail solicitation is not an appropriation of one's name or likeness that gives rise to a claim under Virginia Code 8.01-40 or the common law; and (3) order the General District Court of Arlington County, Civil Division to dismiss the stayed case of Ram Avrahami v. U.S. News & World Report, Inc. on the grounds of res judicata.

DATED: October 24, 1995

Respectfully submitted,  
U.S. NEWS & WORLD REPORT, INC.  
By Counsel

SHAW, PITTMAN, POTTS & TROWBRIDGE

/S/

David G. Fiske  
Michael J. Wendorf  
115 South Union Street  
Alexandria, Virginia 22314  
(703) 739-6650

Attorneys for Plaintiff  
U.S. News & World Report

□