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MULRC Media
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MEDIA LAW LETTER

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MLRC UPCOMING EVENTS

MLRC London Conference

September 19-20, 2011 | London, England

MLRC Annual Dinner

November 9, 2011 | New York, NY

DCS Meeting & Lunch

November 10, 2011 | New York, NY

MLRC/Southwestern Media and Entertainment Law Conference

January 19, 2012 | Los Angeles, CA

MLRC/Stanford Digital Media Conference

May 21-22, 2012 | Palo Alto, CA

NAA / NAB / MLRC 2010 Media Law Conference

Sept. 12-14, 2012 | Reston, Virginia

MLRC Annual Dinner

November 14, 2012 | New York, NY

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WEDNESDAY, NOVEMBER 9, 2011

MLRC will bestow its
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TERRY MORAN
Co-Anchor of ABC News "Nightline"

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RSVP by Monday, October 24, 2011

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MLRC will be honoring Anthony Lewis with its William J. Brennan, Jr. Defense of Freedom Award at the 2011 Annual Dinner. If you are a former colleague or student of Mr. Lewis, or have some other connection to him, please let us know in the space below.

For further information please contact Debra Danis Seiden at dseiden@medialaw.org or 212-337-0200 ext. 204

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Georgia Court of Appeals Affirms Dismissal of Richard Jewell Libel Suit

Reporting Ruled Accurate and Not Actionable; Confidential Source Protection Reaffirmed

By Peter Canfield

A three-judge panel of the Georgia Court of Appeals has unanimously affirmed the dismissal of Atlanta Olympic bombing suspect Richard Jewell's 14 year old libel lawsuit against the Atlanta Journal-Constitution. [*Estate of Richard Jewell v. The Atlanta Journal-Constitution, et al.*](#), No. A11A0510 (Ga. App., July 13, 2011) (Dillard, J., with Smith and Mikell, JJ., concurring).

Background

The suit arose out of the newspaper's coverage of the FBI's investigation of the Atlanta Olympic bombing, the now-admitted work of domestic terrorist Eric Robert Rudolph.

Rudolph's nail bomb exploded during the early morning hours of July 27, 1996 at a concert venue in Atlanta's Centennial Olympic Park, killing two, injuring scores of others and paralyzing for a time the Olympic Games.

Jewell was a private security guard in the Park and undoubtedly saved lives by alerting authorities to the bomb in time to begin an evacuation. To the world, Jewell became an instant hero. He was the object of international attention and the participant in a whirlwind of personal media appearances.

To the FBI, working from hidden wires, behavioral profiles and the findings of scores of agents combing Jewell's life history, Jewell became a person of increasingly intense investigative interest.

Late on July 30, the Journal-Constitution was the first to report the remarkable news that the FBI now suspected the hero guard of planting the bomb, a suspicion that the United States actively defended in court and that the FBI itself

continued to actively investigate for months.

A highly public and intrusive investigation and international media frenzy followed.

In October 1996, when Jewell's criminal lawyer obtained a not-a-target letter from the FBI, the investigation officially turned away from Jewell.

Meanwhile, Jewell turned to the pursuit of damages. Throughout the fall of 1996, he and a team of civil lawyers made the rounds of 60 Minutes, Vanity Fair and other venues trumpeting their intended pursuit of claims against not the government but the nation's media, repeatedly identifying as their principal target the Journal-Constitution.

In late January 1997, after reportedly negotiating out-of-court settlements with NBC and CNN and a movie deal with Fox, Jewell finally filed with much fanfare his suit against the Atlanta Journal-Constitution.

Much of the Jewell rhetoric preceding the suit decried the international media harassment and intrusion that came on the heels of the Journal-Constitution's first report.

Jewell's complaint against the Journal-Constitution sounded solely in libel.

In what Jewell's lawyers described as "the mother of all libel suits," Jewell accused the newspaper not just of reporting that Jewell was a suspect -- the complaint alleged that any finder of a bomb would of course be a suspect. Rather, Jewell alleged, the Journal-Constitution and a cadre of its editors and reporters had engaged in a calculated and concerted effort in news and commentary published over the course of many days to false portray Jewell as an individual

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"Thus," the Court held, in a conclusion its opinion echoed with respect to all the challenged reporting, "because the articles in their entirety were substantially true at the time they were published – even though investigators' suspicions were ultimately deemed unfounded – they cannot form the basis of a defamation action."

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with a bizarre employment history and aberrant personality who was not just a suspect but likely guilty.

Criticism of Journal-Constitution Reporting “Fundamentally Flaw[ed]”

The July 13 decision of the Georgia Court of Appeals rejected as unreasonable Jewell’s reading of the Journal-Constitution’s reporting and commentary, copies of which the Court appended to its opinion for emphasis.

Lauding Jewell’s heroism but chiding counsel for doing little to expedite resolution of the case, the Court blessed a view advanced by the Journal-Constitution at the case’s very outset in an unsuccessful motion for judgment on the pleadings and held that the Jewell view -- copies of which the Court appended to its opinion for emphasis -- was “fundamentally flaw[ed].”

Considering serially the only two news articles highlighted by Jewell on appeal – an article reporting that investigators believed Jewell planted the bomb and an article reporting that investigators believed Jewell placed the 911 call designed to lure law enforcement to the vicinity of the bomb – the Court concluded with respect to each that “when read in context and given its reasonable and natural meaning” the Court “cannot agree with Jewell that the challenged statements are actionable.”

News Articles “Substantially True”

With respect to reports that investigators believed Jewell planted the bomb, the Court explained that:

[W]e cannot conclude that the statements ... construed in the context of the entirety of those articles and given their reasonable and natural meaning, amounted to an accusation ... that Jewell planted the bomb. Rather, a reasonable reader would have understood the information to be preliminary in nature and published during the very early stages of an ongoing investigation. Moreover, both articles reported not only the suspicion of Jewell’s involvement, but also evidence tending to belie that suspicion. And finally, the record

definitively establishes that at the time of the publications, investigators did, in fact, suspect that Jewell may have planted the bomb and were actively investigating that theory.

“Thus,” the Court held, in a conclusion its opinion echoed with respect to all the challenged reporting, “because the articles in their entirety were substantially true at the time they were published – even though investigators’ suspicions were ultimately deemed unfounded – they cannot form the basis of a defamation action.”

Wayne Williams Comparison Was Opinion

The Court also rejected Jewell’s reading of the commentary he highlighted in his appeal: a column likening Jewell and the search of his residence to that of then suspected and later convicted Atlanta child serial killer Wayne Williams

The Wayne Williams column, the Court held, could not reasonably be interpreted as stating actual facts about Jewell. Rather, the column’s “conjectural comparisons between Jewell and Williams ‘consist[] of the sort of loose, figurative language that no reasonable person would believe presented facts,” particularly since the columnist “did not suggest that he had access to or was otherwise premising his comparison on undisclosed facts beyond those available to the reader.” Indeed, the Court stated, the columnist “expressly acknowledged within the column the scarcity of evidence upon which it would have been reasonable to make such a comparison.”

In a footnote, the Court dismissed as irrelevant the fact the fact that several Journal-Constitution copy editors had expressed concern about the Wayne Williams column and gone so far as to label it “libelous” in discussions with editors. Quoting *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974), the Court “reiterate[d] that, ‘[t]he choice of material to go into a newspaper ... and treatment of public issues ... -whether fair or unfair- constitute the exercise of editorial control and judgment.’”

Georgia Confidential Source Protection Affirmed

In affirming dismissal of Jewell’s claims, the Court of Appeals reaffirmed and reiterated Georgia’s strong protection

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of confidential sources and the denial of Jewell's persistent efforts to compel their identities from the Journal-Constitution in the trial court, efforts that have consumed most of the case's 14 year history.

In 1998 when the Journal-Constitution refused to comply with trial court orders requiring it to identify its confidential sources Jewell seized on that refusal as a basis for bypassing his burdens of proving falsity and fault.

The Journal-Constitution obtained a reversal of the orders in 2001 when the Georgia Court of Appeals, in a decision also finding Jewell to be a public figure, established a stringent test for compelling any such discovery, one that at the time Jewell's counsel called "devastating" and a "worst case scenario."

Under the 2001 test, as now reaffirmed by the Court of Appeals in 2011, a Georgia trial court, prior to considering whether to compel a media libel defendant to identify confidential sources, must first require the libel plaintiff to specifically identify each and every statement for which such discovery is sought and establish not only that there is a viable libel claim with respect to that statement but also that confidential source discovery is the only available avenue by which to pursue it.

The Court grounded this test not on the First Amendment or statute but on Georgia's "strong public policy favoring the

protection of the confidentiality of journalists' sources consistent with that favoring the protection of other types of sensitive information during discovery."

On remand from the 2001 decision, before proceeding to consideration of the Journal-Constitution's 1998 motion for summary judgment, the trial court afforded Jewell for most of a decade the opportunity to make the requisite confidential source discovery showing.

Like the trial court, the Court of Appeals, based on its own analysis of the Journal-Constitution's reporting, held that Jewell had failed to do so.

Jewell "A Tragic Figure"

The Court of Appeals concluded its decision with an expression of sympathy for Jewell, "unquestionably a tragic figure," and his family, who "suffered tremendously as a result of this ordeal." Following the decision, Jewell unsuccessfully moved for reconsideration and has now filed with the Georgia Supreme Court a petition for certiorari.

Peter Canfield and Tom Clyde of Atlanta's Dow Lohnes, PLLC have represented The Atlanta Journal-Constitution and its editors and reporters. L. Lin Wood, Jr. and Stacey Godfrey Evans of Atlanta's Wood, Hernacki & Evans, LLC and Nicole Jennings Wade of Atlanta's Bryan Cave Powell Goldstein LLP have represented the Estate of Richard Jewell.

MLRC ANNUAL DINNER

Wednesday, November 9, 2011 | New York City

MLRC will bestow its William J. Brennan, Jr. Defense of Freedom Award on

Anthony Lewis

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Former *New York Times* Columnist and Supreme Court Reporter
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Interview of Mr. Lewis by **Terry Moran**
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Tenth Circuit Affirms Summary Judgment to A&E in Federal Prisoner's Defamation Suit

Allegation Of Gang Membership Is Substantially True

By Steven D. Zansberg

On July 19, 2011, the Tenth Circuit Court of Appeals affirmed the U.S. District Court's (D. Colo.) order granting summary judgment to A&E Television Networks ("AETN" or "A&E") in a defamation action arising from the cable television show *Gangland: Aryan Brotherhood*. [*Bustos v. A&E Television Networks*](#), 2011 WL 2816869 (10th Cir. 2011) (Gorsuch, Murphy, Matheson, JJ.).

The Court found that the documentary, which depicted federal prisoner Jerry Lee Bustos as a "member" of the violent white supremacist gang the Aryan Brotherhood was substantially true, because it is undisputed that Bustos had participated in a heroin importation scheme in conjunction with members of the Aryan Brotherhood. Because substantially true statements are not actionable in defamation, AETN was entitled to summary judgment.

Flowery Prose and an Erudite, Scholarly Judicial Opinion

Writing for a unanimous three-judge panel, Circuit Judge Neil Gorsuch issued an eloquent, entertaining, and particularly scholarly 18-page opinion. It begins as follows:

Can you win damages in a defamation suit for being called a *member* of the Aryan Brotherhood prison gang on cable television, when, as it happens, you have merely *conspired* with the Brotherhood in a criminal enterprise? The answer is no. While the statement may cause you a world of trouble, while it may not be *precisely* true, it is *substantially* true. And that is enough to call an end to this litigation as a matter of law.

In resolving the case, Judge Gorsuch surveys the evolution of Anglo-American libel law, from its English common-law origins through its constitutionalization in *New York Times v. Sullivan*, 376 U.S. 254 (1964). The opinion specifically traces the development of placing on the libel

plaintiff, in public figure cases (and, in Colorado, in private figure cases where the publication involves a matter of public concern), the burden of establishing not only *technical* falsity, but *material* falsity. Indeed, under Colorado law, the plaintiff bears the burden of proving material falsity by clear and convincing evidence. Applying that standard to the evidence tendered with AETN's summary judgment motion, the Court found that Bustos' claim could not be submitted to a jury. The Court noted that the test for material falsity requires the consideration of how the allegedly defamatory statement(s) will affect the average, "respectable," *right-thinking* viewer of the program (those residing outside of prison), not the perspective of an insular group of convicted felons living within the prisons' walls:

We assess the materiality of a misstatement by comparing the damage it has done to the plaintiff's *public* reputation to the damage the truth would have caused [if it were publicized]. (emphasis added).

Underlying Facts, and Bustos' Multiple Claims

Bustos is serving a 30-year sentence at the federal Supermax facility in Florence, Colorado. In 1998, Bustos was chatting with a couple of fellow inmate on the outdoor recreation yard, including two members of the Aryan Brotherhood, when he was attacked from behind by an African-American prisoner, and the two – Bustos and the African-American prisoner – then engaged in a fistfight. By the time the prison guards broke up the skirmish, Bustos had been left with several injuries. The skirmish was captured on surveillance video by the Bureau of Prisons, and a portion of the fight was used in the *Gangland* program at issue, which focused, primarily, on the activities of the Aryan Brotherhood prison gang.

On January 24, 2008, Bustos filed his federal lawsuit premised on the A&E documentary and also naming several

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federal officials as defendants (allegedly for failing adequately to protect him and to reassign him to another unit within the prison). Initially, Bustos alleged that AETN had violated his federal civil rights in violation of 42 U.S.C. § 1983. The District Court granted AETN's motion to dismiss these claims, on grounds that AETN was not a state actor. *See Bustos v. Lappin*, No. 1:08-CV-153-LTB-MEH, 2008 WL 232885 (D. Colo. June 4, 2008). Bustos next asserted claims for invasion of privacy, through misappropriation of his image or likeness, publicity given to private facts, and intrusion upon seclusion. In August 2009, the U.S. District Court granted AETN's motion to dismiss all of Bustos' invasion of privacy claims for failure to state a claim. *See Bustos v. United States*, 2009 WL 2602640 (D. Colo. Aug. 21, 2009).

Thus, Bustos' only remaining claim was for defamation, in which he alleged that the AETN documentary falsely depicted him as a *member* of the Aryan Brotherhood, damaging his reputation among prison inmates and subjecting him to threats to his safety and life. AETN sought to stay all discovery against it, and the production company that produced the *Gangland* program, pending resolution of its motion for summary judgment on substantial truth grounds, but the District Court denied that motion. (*See Bustos v. United States*, 2009 WL 416511 (D. Colo. Feb. 18, 2009).) In that ruling, the magistrate judge expressed initial skepticism at AETN's theory that proof of Bustos' affiliation with a different violent and racist prison gang, the Mexicanemi, would establish the substantial truth of the allegation that he was a member of the Aryan Brotherhood.

After taking the plaintiff's deposition, AETN filed its motion for summary judgment. Because much of Bustos' "central file," obtained from the Bureau of Prisons, is subject to a protective order at the request of the Bureau of Prisons, very few of the details of his extensive prison record may be discussed publicly. The magistrate judge recommended that AETN's motion for summary judgment be granted on grounds that the documentary was substantially true. The entirety of the magistrate judge's ruling was filed under seal.

In a cryptic ruling accepting the magistrate judge's

recommendation, District Judge Lewis Babcock granted AETN's motion for summary judgment on grounds that it was undisputed that Bustos had held himself out as closely affiliated with the Mexicanemi gang, and therefore an allegation that he was a member of a different violent and racist prison gang was substantially true. *See Bustos v. United States*, 2010 WL 2017724, 38 Media L. Rptr. (BNA) 1747 (D. Colo. May 20, 2010).

The Tenth Circuit Affirms, But on a Different Basis

Writing for the Court, Judge Gorsuch affirmed the District Court's granting of summary judgment, but on grounds different than those relied upon by Judge Babcock below. Rather than treating all violent and racist prison gangs as materially indistinguishable, for purposes of defamation law,

Judge Gorsuch focused on the undisputed evidence of Bustos' having participated in a heroin importation scheme while a prisoner at another federal penitentiary, as part of a conspiracy among three prison gangs, one of which was the Aryan Brotherhood:

In a conspiracy ultimately detected and disrupted by prison officials, Mr. Bustos agreed to receive balloons filled with heroin from a prison visitor; insert them into his body; and then pass them along to three prison gangs, including the Aryan Brotherhood. When things

went awry . . . Mr. Bustos sent a handwritten apology to an Aryan Brotherhood leader. The note – which refers to the leader as "Bro" – explains his situation and promises the balloons will soon be on their way.

The Court concludes that the allegation of Bustos' *membership* in the Aryan Brotherhood is not materially false:

Comparing the challenged defamatory statement (*membership* in the Aryan

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Can you win damages in a defamation suit for being called a *member* of the Aryan Brotherhood prison gang on cable television, when, as it happens, you have merely *conspired* with the Brotherhood in a criminal enterprise? The answer is no.

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Brotherhood) to the truth (*conspiring* with and *aiding and abetting* the Aryan Brotherhood), we cannot see how any jury could find the difference to be a material one – that is, likely to cause a reasonable member of the general public to think significantly less favorably of Mr. Bustos. The difference or delta between the defamatory statement and the truth *might* cause some modicum of additional injury to his reputation, that we don't deny, but it is not one a juror could find likely to be significant to a reasonable person.

The Court gives little credence to Bustos' claim that labeling him a member of a white supremacist prison gang carries a significantly different defamatory connotation for him, in particular, because he is Hispanic; Bustos claimed that it suggests "he's someone who has 'renounc[ed] his Hispanic heritage.'" Once again, the Court finds the undisputed truth renders that a hollow claim:

The truth is that he did intentionally aid and abet the Brotherhood. And having willingly helped the Brothers flout prison security measures as part of a criminal conspiracy, it's a few years too late to take a principled stand against their agenda.

Finally, the Court rejects Bustos' additional claim of defamatory meaning when he argued that the A&E documentary depicts the Aryan Brotherhood as a particularly violent and homicidal gang, subscribing to a "blood in, blood out" code (the principle that one must commit a homicide or an attempted homicide to be inducted as a full-fledged member, and once a member one must remain a member until death). While the heroin importation scheme, in which Bustos participated, may not render *that* allegation substantially true, the Court acknowledges that through discovery, "we all know now that Mr. Bustos *has* at least one brutal gang-related attempted homicide in his past. So in this respect, the difference between truth and falsity is not just immaterial – it doesn't exist."

In sum, upon reviewing the undisputed record, the Court finds that there was no material falsity in AETN's allegations

concerning Bustos' affiliation with the Aryan Brotherhood. Thus, Bustos' claim for defamation is not actionable under Colorado law or the First Amendment.

The Court's Narrow Holding

In reaching the above conclusion, Judge Gorsuch's opinion discusses the contours of the substantial truth doctrine in American libel law, and rejects alternative defense theories upon which summary judgment could have been granted. Judge Gorsuch eschews the "libel-proof plaintiff" doctrine as premised on a faulty monolithic view of one's reputation, and he further rejects the "incremental harm" doctrine (while acknowledging that Colorado's Court of Appeals has expressly adopted a narrow version of that doctrine), which protects publications when non-actionable statements contained in the same publication address the same character trait as challenged statements, rendering any harm flowing from the challenged statements of only marginal or "incremental," but no material value. (Notably, A&E had *not* asserted the incremental harm doctrine, as the documentary at issue contained no other statements concerning Bustos' reputation for violence, racism, or gang affiliation.) Instead, the Court based its holding squarely on a narrow application of the "substantial truth" doctrine:

Instead of attempting a far-ranging incremental harm or libel-proof plaintiff analysis – instead of trying to compare the "badness" of A&E's Aryan Brotherhood statement with the "badness" of Mr. Bustos' life story viewed in full – we hold only that the narrow and particular defamatory statement Mr. Bustos chose to challenge (here labeled a member of the Aryan Brotherhood) is *itself* substantially true as a matter of law.

"On August 15, the Tenth Circuit denied Bustos' petition for rehearing and for rehearing en banc."

A&E Television Networks was represented by Tom Kelley and Steve Zansberg of Levine Sullivan Koch & Schulz, and by David Sternbach and Darci Bailey of A&E Television Networks. Mr. Bustos was represented by Paul Kyed, Buck Beltzer, Christopher Larson, Scott Martinez, and J. Kevin Bridston of Holland & Hart LLP.

Tennessee Court Denies Motion to Dismiss Libel and Privacy Claims over Prison Reality Show

Jury Could Find Program Implied Plaintiff Was a Drug Smuggler

A Tennessee federal court denied, in part, the motion of defendants, A&E Television Networks and Wild Eyes Productions, Inc., to dismiss a complaint over an episode of the A&E reality television program, “The Squad: Prison Police.” [*Battle v. A&E Television Networks, LLC*](#), No. 3:11-0013 (M.D. Tenn. July 27, 2011). The court allowed claims for libel and false light to proceed, but granted the motion to dismiss a claim for intentional infliction of emotional distress.

Background

“The Squad: Prison Police” follows the activities of special agents at the Riverbend Maximum Security Prison in Nashville who respond to and investigate major crimes in the prison. Marlorita Battle, the wife of a prisoner at the facility, alleged she and her infant child were filmed without her knowledge or consent while visiting her husband in prison and that the footage was used on the television program in a way that implied she was attempting to smuggle drugs to her incarcerated husband.

Battle sued the producers of the show and A&E cable network for defamation, false light and emotional distress. The defendants moved to dismiss the complaint, arguing that the documentary program was not capable of a defamatory meaning since it accurately portrayed an investigation of suspected drug smuggling.

Defamatory Meaning

In a 15-page opinion, Judge Kevin H. Sharp took judicial notice of the contents of the 25-minute episode, titled “Conspiracy,” and described the depiction of plaintiff and her husband, the comments of the special agent who observed them, and the written on-screen statements included in the program.

At the beginning of the program, a special agent explained that there had been an ongoing security problem with drugs entering the prison, and that he was suspicious of plaintiff, who was identified during the show in a photo from

her driver’s license and shown in video footage of the visitation room with her husband and child. The agent further commented on the movements of the plaintiff, positing his suspicion that plaintiff might be going to the bathroom to hide drugs in her vaginal cavity, and that drugs may have been transferred during a kiss between plaintiff and her husband – during which the agent exclaimed, “some **** just happened. I think we got ‘em, I think we got them.”

However, no contraband was found on the prisoner and the following written statement appeared in the program: “a strip-search of the suspect did not reveal any smuggled drugs.” After the inmate was subject to special screening and no contraband was detected, the officer acknowledged that it was a “false alarm.” During the end credits, the officer opined:

[I]f you are dirty, if you are smuggling in contraband, drugs, cellphones, tobacco, then we’re going to catch you. We might not get you today, maybe next week, next month, next year, but eventually, we’re going to catch up with you , and we’re gonna get you. That’s what we do.

Defendants, in their motion to dismiss, argued that the program was not capable of a defamatory meaning because it “accurately reports the result of an investigation, which was that public officials suspected that Plaintiff might be smuggling drugs, that her observed behavior and information received by those state officers led to further investigative efforts, and that drugs were not found on that visit.”

Judge Sharp disagreed, holding that the program, in its entirety, “is, in fact, capable of a defamatory meaning and could be viewed by a reasonable jury as holding Plaintiff in a false light.” The Court observed that “[e]ven though the Program indicates that a search of Plaintiff revealed no drugs, a jury could conclude from the overall way that the Program is presented that Plaintiff was a drug smuggler who just happened not to get caught on September 12, 2009.”

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In reaching this conclusion, the court rejected defense arguments that the officer's statements were merely matters of opinion and that the broadcast was substantially true. The court held such arguments to be premature on the limited record of the motion to dismiss, and noted that the proper question before the court was "whether the meaning reasonably conveyed" by the program "is reasonably understood in a defamatory sense" and that "expressions of 'opinion' may often imply an assertion of objective fact." The court also found significant the fact that the program had been edited and was not a real-time report of events as they happened.

Separately, the court granted defendants' motion to dismiss the intentional infliction of emotional distress claim, observing that plaintiff's allegations did little more than list the elements of a cause of action for the claim. The court held that even if the broadcast had falsely portrayed plaintiff as a drug dealer to her friends and family, such actions are not "beyond all bounds of decency" and "utterly intolerable in a civilized community" as needed to sustain the a claim under Tennessee law.

Robb S. Harvey, Waller, Lansden, Dortch & Davis, LLP, Nashville, TN, represents the defendants in this matter. Allen Woods, Law Offices of Woods & Woods, Nashville, TN, represents the plaintiff.

Texas Court of Appeals Grants Summary Judgment to Book Author

Authors and Publishers Entitled to Use Interlocutory Appeal Statute

By Thomas J. Williams

One of the most effective tools available for a media defendant in a libel case in Texas state court is the state's interlocutory appeal statute. That statute, enacted in 1993 and codified at [Section 51.014\(a\)\(6\)](#) of the Texas Civil Practice & Remedies Code, permits a "member of the electronic or print media . . . or a person whose communication appears in or is published by the electronic or print media" to take an immediate interlocutory appeal from the denial of a motion for summary judgment "arising under. . . the First Amendment" or under the free speech/free press clause of the Texas Constitution or any of the Texas statutory privileges.

In the eighteen years the statute has been on the books, appellate courts have reversed countless numbers of denials of motions for summary judgment, sparing media defendants the expense and burden of lengthy and unpredictable jury trials.

In an apparent case of first impression, the Dallas Court of Appeals last month held that book authors and publishers are "members of the electronic or print media" and therefore entitled to utilize the interlocutory appeal statute, continuing a trend in Texas appellate courts of interpreting the statute's undefined term "electronic or print media" broadly. [Main v. Royall](#), No. 05-09-01503, 2011 WL 2993158 (Tex. App.—

Dallas July 25, 2011, no pet. hist.)

Main arose out of the publication of *Bulldozed: "Kelo," Eminent Domain and the American Lust for Land*, a book written by Carla Main and published by The Encounter For Culture and Education Inc. The book, which analyzed the history of eminent domain in the United States and particularly the United States Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), was critical of the use of eminent domain for private development. Portions of the book were set in Freeport, Texas, and report the story of that city's plan to condemn waterfront property to build a private yacht marina. The book discussed in detail the city's agreement with commercial real estate developer H. Walker Royall to develop and operate the marina, and was critical of both city officials and Royall.

Royall sued Main and her publisher for libel in Texas state court in Dallas, and the defendants moved for summary judgment, which the trial court denied. Main and her publisher then brought an interlocutory appeal, and Royall contended that the appellate court had no jurisdiction to entertain the interlocutory appeal, arguing that Main and her publisher were not "members of the electronic or print media."

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Somewhat surprisingly, *Main* is apparently the first reported appellate decision analyzing the statute's applicability to a book author and publisher. In *Harvest House Publishers v. Local Church*, 190 S.W.3d 204 (Tex. App.—Houston [1st Dist.] 2006, pet. denied), the authors and publisher of a book brought a successful interlocutory appeal from the denial of a motion for summary judgment in a libel case, but in that case the plaintiffs did not challenge the appellate court's jurisdiction.

Royall argued that the legislature did not intend the statute to apply to book authors and publishers because authors and publishers are not included in its express terms, the legislative history of the statute does not refer to book authors and publishers, and to extend the protection of the statute to Main and her publisher would mean that "anyone with a computer, typewriter or printer will...have the right to file an interlocutory appeal."

While the court agreed that the statute does not refer specifically to book authors and publishers, the court pointed out that the statute also does not refer specifically to newspapers, radio and television stations, or internet publications, yet the statute has been interpreted to apply to all of these types of defendants. Moreover, the court noted that First Amendment standards have consistently been held

applicable when courts decide the merits of libel claims against book authors and publishers, citing *Masson v. New Yorker Magazine Inc.*, 501 U.S. 496 (1991), *Bantam Books Inc. v. Sullivan*, 372 U.S. 58 (1963), and *Doubleday & Co. v. Rogers*, 674 S.W.2d 751 (Tex. 1994).

The court concluded that for purposes of the interlocutory appeal statute, there is "no meaningful distinction between book authors and publishers and other forms of media," and therefore it had jurisdiction to entertain the defendants' interlocutory appeal of the denial of their motion for summary judgment.

Having found jurisdiction to entertain the interlocutory appeal, the court of appeals reversed the trial court's order denying the author and publisher's motion for summary judgment as to all issues except an allegation that the author and publisher "aided, abetted, and ratified" the defamation of others.

The court of appeals did not reach the merits of the claim on that issue, but determined that the author and publisher's motion for summary judgment was insufficiently specific, and remanded the case to the trial court for consideration of that portion of the claim.

Thomas J. Williams is a partner in the Fort Worth office of Haynes and Boone, LLP. He represented the authors and publisher in Harvest House Publishers v. Local Church.

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New York Times Wins Libel Suit Over Coverage of Labor Dispute

Competing Accounts of Dispute Constituted Protected Opinion

By David McCraw and Dana Green

A Brooklyn Supreme Court judge has dismissed a libel claim against The New York Times in a case that highlights the challenges of impartially reporting on the competing sides in a public controversy. [*Gorilla Coffee, Inc. v. New York Times, Co.*](#), 2011 NY Slip Op 51502 (N.Y. Sup. Ct. Aug. 8, 2011) (Saitta, J).

The lawsuit stemmed from a labor dispute in April of 2010 at Gorilla Coffee, a popular independent coffee shop in Park Slope, Brooklyn. Gorilla, along with its owner and manager, sued The Times for publishing the complaints of staff workers who quit *en masse* to protest their treatment by the shop's manager.

In granting The Times's motion to dismiss, Justice Wayne Saitta found that The Times presented the workers' complaints and management's position on the walkout as competing accounts of the dispute and therefore The Times's coverage constituted protected opinion under New York law.

The labor dispute first became public when Gorilla failed to open one morning because its staff refused to show up for work. Several bloggers covered the walkout, including Oliver Strand, a writer for The New York Times.

Writing in the Diner's Journal blog on The Times's website, Strand published comments by the owner of Gorilla Coffee that characterized the walkout as "a complete surprise" and the result of "unreasonable" demands by the workers. But the owner also described the shop's manager as someone who puts employees through "rigorous training," "pushes people," and is "like a drill sergeant."

In response to the owner's comments, the workers released a public statement, clarifying their position. The statement, published in the same Diner's Journal blog entry, included the following paragraph:

The issues brought up with the owners of Gorilla Coffee yesterday are issues that they have been aware of for some time. These issues which have repeatedly been brushed aside and ignored have created a perpetually

malicious, hostile, and demeaning work environment that was not only unhealthy but also, as our actions have clearly shown, unworkable.

That paragraph became the basis of Gorilla's suit, which named as defendants not only The Times and Strand, but also the nine workers who issued the statement. The complaint alleged both defamation and intentional infliction of emotional distress.

The case highlights the problem presented by the common-law doctrine of republication, which holds that a republisher shares equal liability with the original speaker for defamatory statements. A newspaper needs to report the competing allegations in a public dispute, but risks liability under a strict application of the republication doctrine if one side or the other makes false and defamatory claims. New York has rejected the neutral reportage privilege, which in some jurisdictions immunizes impartial accounts of public disputes from liability.

In moving for dismissal, The Times argued that the statements were opinion under the test first set out in *Steinhilber v. Alphonse*, 68 N.Y.2d 283 (1986), which focuses on whether the language has a precise meaning capable of objective verification and considers both the immediate context of the words and the broader social context that may affect the average reader's interpretation of the statement.

The plaintiffs argued that the workers' statement was actionable as "mixed opinion" – a statement of opinion that implies that there are undisclosed, defamatory facts to support the opinion. The mixed-opinion doctrine is rarely applied by New York courts and generally recognized only where the speaker has specialized knowledge or access to confidential information. For example, in *People ex rel. Spitzer v. Grasso*, 21 A.D. 3d 851, 801 N.Y.S. 2d 584 (1st Dep't 2005), the chairman of the New York Stock Exchange stated that if any attorney were to read a confidential report

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available to the chairman, the attorney would find it supported legal action.

Still, the mixed-opinion doctrine is troubling because, if read too broadly, it threatens to undermine the entire protection for opinion. Opinions, by their nature, imply *some* knowledge on the part of the speaker – people do not generally form opinions, good or bad, without any factual basis.

In rejecting the mixed-opinion argument, the court found that “none of the words used imply reliance on any outside or objective source or facts which could be objectively characterized as either true or false.” The workers’ statements reflected “their perception of their work conditions” and that perception was “not capable of being objectively shown to be true or false.”

The court also emphasized that for the mixed-opinion doctrine to apply, any underlying, undisclosed facts must not only be verifiable, but also *defamatory*. In the Gorilla dispute, the workers expressed unhappiness, but they did not accuse management of wrongdoing, illegality, or incompetence. The court noted that mixed opinion might be established if, for example, the workers’ opinions had implied the owners had violated safety codes or labor regulations – facts that are both verifiable and inherently defamatory.

Turning to the *Steinhilber* factors for opinion, the court observed that the words complained of lacked a precise meaning: A manager who “pushes people” and is “like a drill sergeant” (in the words of the owner) can also feel “hostile” and “demeaning” to those workers in her employ. As The Times argued in its brief, the fact that both statements could describe the same management style counsels strongly

in favor of finding opinion.

The court also concluded that the context of the blog favored a finding of opinion. Readers were told there was an ongoing labor dispute and The Times did not “state or imply one side’s position to be factual or more credible than the other.” Although the court did not explicitly consider the wider social context, courts have regularly held that reasonable readers view skeptically comments made in the heat of labor and political disputes, understanding that they are likely to be hyperbole and opinion, not statements of fact. See *600 W. 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d 130 (N.Y. 1992).

Finally, the Court dismissed Gorilla’s claim of intentional infliction of emotional distress, finding that none of the Defendants came close to the kind of outrageous conduct required for that claim.

The court observed that The Times was merely doing its job – “reporting on a story of public interest” – and doing so in a disinterested fashion.

The workers, although not filing a brief, were also granted dismissal on the basis of The Times’s arguments.

While the decision does not break new ground, it is a robust defense of the right of the press to fairly report on a dispute, without fear of liability for giving both sides an opportunity to express their differing points of view. In addition, the decision helps to clarify and narrow the claim of “mixed opinion,” which should rarely be applied and only in special circumstances like those in *Spitzer*.

The New York Times and Oliver Strand were represented by David McCraw and Dana Green of The Times’s legal department. The plaintiffs were represented by Stephen Finkelstein of New York. The worker defendants were represented by Martin Garbus of Eaton & Van Winkle.

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The Ongoing Assault on the Right to Photograph/Record in Public

By Mickey H. Osterreicher

Phil Datz, Jim Epstein and Emily Good may not be household names but they are among a growing list of citizens and journalists who have been arrested for doing nothing more than taking pictures or recording video on a public street or during a public meeting. Photographers are never charged with the crime of “photography” but it is that activity that brings them to the attention of police officers who use a range of catch-all charges to prosecute them.

Mr. Datz, a freelance photojournalist, was arrested by Suffolk County police in Long Island, New York,[1] while attempting to record a police investigation. Datz was standing on a public street when a sergeant approached him while repeatedly yelling at him to “go away, go away now.”[2] When Datz asked where he should go he was told that he needed to leave the area or face arrest. The video of the incident then shows police activity recorded from more than a block away with members of the public, including children, freely moving about near the scene. A police car then roars up and stops inches from the camera and the same sergeant jumps out of the car while shouting at Datz that he was now under arrest. The charge was dropped after letters objecting to the arrest were sent and the story was highly publicized.[3]

Jim Epstein and Peter Tucker, both online journalists, were arrested and removed from a public meeting of the Washington D.C. Taxicab Commission.[4] Both were charged with disorderly conduct and “unlawful entry/remaining” by U.S. Park Police after refusing to stop photographing and recording the meeting which was held at Park Police headquarters in order to better accommodate the large number of taxicab drivers who were there to voice their opposition to a change in licensing rules. The attorney general dismissed the charges almost immediately after the actions were widely criticized in the press.[5]

Ms. Good was arrested for videotaping a traffic stop from the front lawn of her home, charged by Rochester police[6] with violating NYS Penal Law §195.05 – Obstructing governmental administration in the second degree – whereby a “person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act” Obstructing governmental administration is a class A misdemeanor.[7] The charge against Ms. Good was dropped within days after the story received national attention.[8]

These are but a few of the incidents happening throughout the country where citizens and journalists have been stopped, questioned, interfered with, detained and arrested while engaged in free speech/press activities. In some cases it also appears that the right against unreasonable search and seizure was also violated. There have been similar incidents in Baltimore, MD; Miami Beach, Fort Lauderdale and Tampa, Florida; Rochester, Buffalo and Orange County, New York; Spokane, Washington; Los Angeles and Long Beach, California; and Washington, DC. The National Press Photographers Association (NPPA) has been involved in all of these cases, (in some) joining with the ACLU, the Press Club of Long Island and the South Florida Society of Professional Journalists.

The increase in these incidents may be attributed to a number of factors. The first is greater awareness because of the almost instantaneous posting and widespread viewing on such sites as YouTube and the Photography is Not a Crime blog.[9] Many of these postings have then been picked up and broadcast on CNN and other networks as

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part of news stories or topical discussions. A second factor is the worldwide proliferation of cell phone cameras capable of taking high quality photographs and audio-visual recordings along with the ease in which those files may be wirelessly uploaded to the Internet. Other factors include the loss of staff positions by photojournalists from newspapers and television stations who become freelance journalists; and who may now lack the legal support they once had from their employers. This is coupled with an increase in “citizen journalism” -- members of the public “playing an active role in the process of collecting, reporting, analyzing and disseminating news and information.”[10]

Citing National Security

Another piece of the perfect storm contributing to the rise in these confrontations is the post 9/11 attitude by law enforcement in characterizing photography as a “suspicious activity.” An example of this may be seen in the response by one agency to a recent case. In that incident a Long Beach, California police officer detained and questioned a journalist because he was taking pictures of an oil refinery from a public area.[11] In the exchange, the officer was reported to have said that “because of Homeland Security and new laws, [the police] have the authority to ask for [your] driver’s license and run it when they feel that there’s cause.”[12] Although the officer ultimately allowed the journalist to continue taking pictures, in a follow-up article the police chief “confirmed that detaining photographers for taking pictures ‘with no apparent esthetic value’ is within Long Beach Police Department policy.”[13] The chief went on to say that “while there is no police training specific to determining whether a photographer’s subject has ‘apparent esthetic value,’ officers make such judgments ‘based on their overall training and experience’ and will generally approach photographers not engaging in ‘regular tourist behavior.’”[14] NPPA has been made aware of many incidents over the years in which photographers were questioned for taking pictures of oil refineries.

The origins of the Long Beach policy trace from the Los Angeles Police Department's Special Order No. 11, [15] following directives found in the Nationwide Suspicious Activity Reporting (SAR) Initiative (NSI) as called for in the National Strategy for Information Sharing (NSIS).”[16] This is part of a 2009 U.S. Department of Justice (DOJ) strategy “to develop, evaluate, and implement common processes and policies for gathering, documenting, processing, analyzing, and sharing information about terrorism-related suspicious activities.”[17] NSI is a collaborative effort that includes state, local, tribal, and federal law enforcement organizations, as well as private sector entities and allows them to share collected information.[18]

Also connected to SAR, the Spokane County Sheriff’s Office produced an online “Report It Form”[19] as part of the “If You See It Say It” campaign “to collect tips about any suspicious activity within the region.” The area labeled “Incident of Event Description” originally included a checkbox for “photography.” Although that section contained a disclaimer stating that “these activities are generally First Amendment-protected activities and should not be reported absent articulable facts and circumstances that support the suspicion that the behavior observed is not innocent. . . , but rather reasonably indicative of criminal activity associated with terrorism or other crimes, including evidence of pre-operational planning related to terrorism,”[20] NPPA expressed concern that photography had been suggested at all rather than have been included under the category “other.”

In response to press reports the Sheriff’s Office sent a letter of apology “to [NPPA] and everyone of the over 120 people that sent us complaints about the form.” He went on to say that they “copied the form, verbatim, from our Washington State Fusion Center’s web tip form.” The Sheriff’s Office immediately changed the form as did

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the Washington State Fusion Center.[21]

According to NSI “a fusion center is defined as a ‘collaborative effort of two or more agencies that provide resources, expertise, and information to the center with the goal of maximizing their ability to detect, prevent, investigate, and respond to criminal and terrorist activity.’”[22] As part of the Joint Terrorism Task Forces,[23] there are 56 fusion centers located throughout the country to assist law enforcement agencies and the Department of Homeland Security (DHS) “in preventing, protecting against, and responding to crime and terrorism” as stated in the 2010 National Security Strategy document.[24]

Given the widespread dissemination of these policies and guidelines it is not surprising that photography is viewed with such suspicion. NPPA believes that an effective way to counter those misguided views is to contact each agency involved in such incidents in order to make them aware of constitutional violations as well as to offer assistance in developing reasonable and workable policies and practices so as to avoid similar situations.

In that regard NPPA has seen some success. Aside from the incidents described above NPPA has received replies from the LAPD and the Suffolk County Police Department. In response to an NPPA letter after a widely publicized incident that occurred in Florida, the Miami Beach Police Department issued new guidelines on August 1, 20011.[25] NPPA has either met or been in close contact with other law enforcement agencies to discuss similar issues in previous years.

Unfortunately there are situations in which letters and discussions fail to bring about positive change. In some of those cases lawsuits (or the threat of a lawsuit) have led to favorable decisions or desired results. This was the case in Ft. Lauderdale where photojournalists were barred from taking pictures on a public street[26] and in Baltimore where the local chapter of the ACLU was successful in bringing about a positive outcome.[27]

Wiretapping Laws and Public Recordings

Another weapon against videotaping police activity on the street are state laws that criminalize such recordings as illegal wiretaps. In a number of cases citizens have been arrested when they admitted to recording the incident or when police later learned that such recordings had been made. Illinois[28] and Massachusetts[29] have such statutes but the law in the latter state requires that there be a reasonable expectation of privacy on the part of the party being recorded for it to be applicable.[30] In a recent case a Massachusetts court rejected an officer’s criminal complaint making such allegations.[31]

This past June the United States Court of Appeals for the First Circuit heard arguments in a case brought by a man against a police officer and the City of Boston with the help of the Massachusetts ACLU.[32] The case involves Simon Glik, who was arrested after openly videotaping police arresting another man. Although all charges against Glik were later dismissed he has brought a suit for false arrest along with a First Amendment infringement upon his right to record the actions of government officials. He is also suing the city for failing to properly train its officers about the law and the Constitution.[33] At press time, the [First Circuit ruled](#) in favor of Glik, holding he “was exercising clearly-established First Amendment rights in filming the officers in a public space, and that his clearly-established Fourth Amendment rights were violated by his arrest without probable cause.”

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A Maryland judge decided a similar case[34] in favor of a motorcyclist who recorded his own traffic stop, stating “those of us who are public officials and are entrusted with the power of the state are ultimately accountable to the public.”[35] The judge also wrote “when we exercise that power in public fora, we should not expect our actions to be shielded from public observation.”[36]

In a time of technology and terrorism, citizens and photojournalists throughout the world have risked and in some cases given their lives to provide visual proof of governmental activities. Yet what is viewed as heroic abroad is often considered as suspicious or illegal at home. That is why organizations dedicated to protecting these liberties face a formidable and ongoing battle in their efforts to counter constitutional abridgments through intervention, education and training.

Mickey H. Osterreicher is the general counsel for the National Press Photographers Association (NPPA) and drafted letters to law enforcement agencies in all of the above listed incidents. He recently helped draft the new Miami Beach Police General Order concerning the “Seizure & Search Of Portable Video And Photo Recording Devices” as well as guidelines related to photography and videotaping for the Niagara Frontier Transit Authority Police.

Notes

[1] See: <http://www.rcfp.org/newsitems/index.php?i=11980>

[2] See: http://www.youtube.com/watch?v=ol38MnpAlW4&feature=player_embedded

[3] See: <http://online.wsj.com/article/AP19ca5ba9a42b47c8a23c52deef77346b.html>

[4] See: <http://www.nbcwashington.com/news/politics/Journalists-Handcuffed-Removed-From-Taxi-Commission-Meeting-124384719.html>

[5] See: <http://www.wjla.com/articles/2011/06/journalists-won-t-face-charges-62814.html>

[6] See: http://www.huffingtonpost.com/2011/06/22/emily-good-arrested-videotaping-police-rochester_n_882122.html

[7] <http://ypdcrime.com/penal.law/article195.htm>

[8] See: http://rochester.ynn.com/content/top_stories/548242/charges-against-emily-good-dropped/

[9] See: <http://www.pixiq.com/>

[10] Bowman, S. and Willis, C. "We Media: How Audiences are Shaping the Future of News and Information." 2003, The Media Center at the American Press Institute.

[11] See: <http://www.pixiq.com/article/long-beach-police-trained-to-detain-photographers>

[12] See: <http://www.lbpost.com/life/greggory/12188>

[13] Id.

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[14] Id.

[15] <http://www.aclu-wa.org/sites/default/files/attachments/LAPD%20SAR%20Program.pdf>

[16] <http://nsi.ncirc.gov/>

[17] Id.

[18] http://nsi.ncirc.gov/nsi_partners.aspx

[19] <http://www.spokanecounty.org/Sheriff/tips/default.aspx>

[20] Id.

[21] Also see photography listed under: Department of Justice ISE-SAR Criteria Guidance Part B

[22] See: http://www.dhs.gov/files/programs/gc_1156877184684.shtm

[23] http://www.dhs.gov/files/programs/gc_1298911926746.shtm

[24] http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf

[25] See: <http://www.pixiq.com/article/miami-beach-police-issue-new-policy>

[26] See: <http://www.pixiq.com/article/judge-determines-photography-still-legal-in-fort-lauderdale>

[27] See: <http://www.baltimoresun.com/news/maryland/bs-md-mta-policy-20110601,0,2129369.story>

[28] See: <http://www.ilga.gov/legislation/ilcs/ilcs4.asp?DocName=072000050HArt.+14&ActID=1876&ChapAct=720%26nbsp;ILCS%26nbsp;5/&ChapterID=53&ChapterName=CRIMINAL+OFFENSES&SectionID=60651&SeqStart=26600000&SeqEnd=27800000&ActName=Criminal+Code+of+1961>

[29] See: <http://www.malegislature.gov/Laws/GeneralLaws/PartIV/TitleI/Chapter272/Section99>

[30] For a state-by-state Guide to Taping Phone Calls and In-Person Conversations see: <http://www.rcfp.org/taping/states.html>

[31] http://www.masslive.com/news/index.ssf/2011/08/officer_michael_sedergren_fall.html

[32] See: <http://www.menwithfoilhats.com/2011/06/first-amendment-tested-wiretapping-law-hears-arguments-in-mass-us-appeals-court/>

[33] Id.

[34] http://weblogs.baltimoresun.com/news/crime/blog/2010/09/motorcyclist_wins_taping_case.html

[35] See: http://www.aclu-md.org/aPress/Press2010/Court_Opinion_092710.pdf at 18.

[36] Id.

Court Grants Motion to Dismiss Copyright Claims Targeting *South Park*'s Parody of Inane Viral Music Video

By Alonzo Wickers IV

"Federal lawsuits seldom touch on such riveting subjects and regard so many colorful parties as the present matter." So began U.S. District Court Judge James Stadtmueller's July 6 order holding that Brownmark Films' copyright-infringement claims against Comedy Partners (Comedy Central), South Park Digital Studios, MTV Networks, and related defendants were barred by the fair-use defense. *Brownmark Films v. Comedy Partners, et al.* (E.D. Wis. July 6, 2011)

What riveting subjects and colorful parties? Start with the Internet viral music video "What What (in the Butt)" ("WWITB"), which has been viewed *more than 40 million* times on the web. See, e.g., <http://www.youtube.com/watch?v=XKE3dIrR1bg>. The original WWITB video features an African-American male singer wearing tight pants who vamps through choruses of "I said, what what, in the butt" and "you want to do it in my butt, in my butt?" and lyrics such as "I will give you what you need; all I want is your big fat seed; give it to me, if you please," while highly sexualized imagery appears in the background. Two of the video's three creators assigned their copyright in the work to plaintiff Brownmark Films.

Enter the creators of the *South Park*, long known for its pop-culture parody, scatological humor, and satirical commentary on current events, and the "foul-mouthed fourth graders in a small mountain town in Colorado" – to quote Judge Stadtmueller – who are the animated show's protagonists. In a 2008 episode of *South Park* entitled "Canada on Strike," the show skewered viral videos in general and WWITB in particular. As the court summarized:

The South Park "take" on the WWITB video is truly transformative, in that it takes the original work and uses parts of the video to not only poke fun at the original, but also to comment on a bizarre social trend, solidifying the work as a classic parody.

[i]n that episode, one of the characters – the naïve "Butters Stotch" – is coaxed by his fellow classmates to record an internet video in the hopes of "making money on the Internet." The video – which lasts for fifty-eight seconds of the approximately twenty-five minute episode – replicates parts of the WWITB video, with the nine-year old Butters singing the central lines of the original video, while dressed as a teddy bear, an astronaut, and even as a daisy. In the episode, Butters' video, much like the original WWITB video, goes "viral," with millions watching the clip. However, after their attempts to collect "internet money" prove fruitless, the South Park fourth graders learn that their video, much like other inane viral YouTube clips, has very little value to those who create the work.

The *South Park* episode at issue also featured caricatures of the real-life stars of several other viral videos that have captured the public's attention, including Tay Zonday of "Chocolate Rain," the Numa Numa Guy, the Tron Guy, the Star Wars Kid, the Dramatic Gopher, the Laughing Baby, the Sneezing Panda, and Afro Ninja.

Brownmark filed a copyright-infringement lawsuit against the South Park Defendants on November 12, 2010 in the federal district court for the Eastern District of Wisconsin. After Brownmark filed an amended complaint in January 2011, the South Park Defendants moved to dismiss on two independent grounds. First, relying on the Ninth Circuit's decision in *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137 (9th Cir. 2008), they argued that Brownmark was a non-exclusive licensee that did not have standing to sue. Second,

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the South Park Defendants argued that Brownmark's claims were barred by the fair-use defense.

The court began by rejecting the South Park Defendants' invitation to follow *Sybersound*. Noting that the Ninth Circuit's decision has "widely lampooned in several respected treatises," and "is most definitively authoritative" but "far from persuasive," Judge Stadtmueller found that Brownmark had standing to prosecute its copyright-infringement claims even though not all of the original copyright owners had assigned their rights to Brownmark. Brownmark elected not to address the merits of the fair-use defense in its opposition, a choice that the court questioned in its order. Instead, Brownmark merely insisted that the court could not decide fair use at the pleading stage, even if both the WWITB video and the allegedly infringing *South Park* episode properly were before the court under the doctrine of incorporation by reference.

The court disagreed. The court held that "[c]onstrued with the incorporation by reference doctrine ..., an affirmative defense can be the basis for a dismissal under Fed. R. Civ P. 12(b)(6) when the allegations of the complaint and material that is expressly referenced in the complaint and is central to the plaintiff's claim 'set forth everything necessary to satisfy the affirmative defense.'" The court emphasized that the amended complaint made clear that the alleged infringement arose solely from the South Park Defendants' use of WWITB in the single episode at issue. The court then observed that "[i]f a viewing of the episode and the original work warrants a determination that the use of the WWITB video was 'fair,' as defined by 17 U.S.C. § 107, the allegations of the complaint and material that are expressly referenced in the complaint have 'set forth everything necessary to satisfy the affirmative defense[.]'" In that circumstance, "dismissal is warranted[.]"

Turning to the merits of the defense, the court "easily conclude[d] that South Park's parody of the WWITB video falls squarely within the fair use protections afforded by the Copyright Act." The court explained that:

One only needs to take a fleeting glance at the South Park episode to gather the "purpose and character" of the use of the WWITB video in the episode in question. The defendants used parts of the WWITB video to lampoon the recent craze in our society of watching video

clips on the internet that are – to be kind – of rather low artistic sophistication and quality. The South Park episode "transforms" the original piece by doing the seemingly impossible – making the WWITB video even more absurd by replacing the African American male singer with a naive and innocent nine-year old boy dressed in adorable outfits. The episode then showcases the inanity of the "viral video" craze, by having the South Park fourth graders' version of the WWITB video "go viral," seemingly the natural consequence of merely posting a video on the internet. More broadly, the South Park episode, with its use of the WWITB video, becomes a means to comment on the ultimate value of viral YouTube clips, as the main characters discover that while society is willing to watch absurd video clips on the internet, our society simultaneously assigns little monetary value to such works. The South Park "take" on the WWITB video is truly transformative, in that it takes the original work and uses parts of the video to not only poke fun at the original, but also to comment on a bizarre social trend, solidifying the work as a classic parody. [Citations omitted.] Such use of a copyrighted work, which uses the work and transforms it for another purpose, lends this court to conclude that the defendants' use is fair.

Briefly addressing the fourth fair-use factor, the court also observed that "there is little risk that the derivative work in question would somehow usurp the market demand for the original: the South Park episode lampoons viral video crazes, while the WWITB video is the epitome of a clip that fuels such crazes."

Brownmark has filed a notice of appeal to the Seventh Circuit. The South Park Defendants' fee motion is pending.

The South Park Defendants are represented by Al Wickers and Jeff Glasser of Davis Wright Tremaine's Los Angeles office and Robyn Aronson of MTV Networks in Santa Monica, and have been assisted in the case by James Peterson and Jennifer Gregor of Godfrey & Kahn's Madison office.

The Other Side of the Pond: Updates on UK Media Law

Phone Hacking, Libel and Privacy Decisions, Open Justice and IP Developments

By David Hooper

These have been difficult months for News International and the scandal has acquired a momentum of its own stoked by inordinate amount of press coverage which it has received. 14 people have been arrested - usually by appointment but nearly always involving a spell in the cells while their computers and homes are searched - and questioned relating to various alleged offences including under the Prevention of Corruption Act 1906 and conspiring to intercept telecommunications unlawfully. No-one has been charged as yet as a result of these latest investigations, but only one to date has been formally exonerated by the police and that person worked not for News International but the Press Association and should not have been arrested in the first place.

The evidence will have to be sifted and the Crown Prosecution Service will almost certainly take advice as to who is to be charged from an independent Queen's Counsel. Charges there almost certainly will be. In a sense the investigation has been made easier for the prosecutors by virtue of the discovery of widespread payments to the police by newspaper executives. This seems to have been so routine that Rebekah Wade, a former editor of The Sun, unwisely appeared to admit to a House of Commons Committee that such payments were almost routine at her newspaper, although understandably she has back-tracked on this.

So far as one can judge, the British public were not overly concerned by the intercepting of the voicemails of celebrities as the information thereby obtained tended to be fairly trivial and although people would have disapproved about the intrusion, there was to some extent a feeling that celebrities who exploited the media for their own publicity were in some

measure fair game. The public tut-tutted but enjoyed reading about such shenanigans.

The public view however fundamentally changed when it appeared that not only had the mobile voice messages of the 14 year old murder victim, Milly Dowler, been intercepted, but the journalist had deleted various of the messages as the voicemail was full so that they could hack later messages, which had the effect of misleading her family into believing that she might still be alive. The public were totally shocked and the moral bankruptcy of certain tabloid journalists was exposed for all to see.

Newspaper editors may prove to have been reasonably good at avoiding leaving their fingerprints on these nefarious hacking practices and may be able to demonstrate to a dubious public that surprisingly they had no knowledge or curiosity as to where the stories were coming from or how they were being obtained. Things however may prove to be significantly different when it comes to payments made by newspapers to the press. That would involve a paper trail as expenses have to be vouched for.

It seems that the practice was sufficiently wholesale that some editors or senior executives were – quite possibly without realising the implications of doing

so – signing off for apparently corrupt payments to the Police. Editors may perhaps not have known, as they claim, about telephones being hacked and may have been too intrinsically idle or uncurious to ask where these stories were coming from and how they were sourced but on the whole they do know a thing or two about expenses and the payment of their employers' money. The likelihood is that there will be charges. Some will say that they were not aware that such

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The Government has indicated that one of the matters which is under serious consideration is the replacement of the PCC by a body with much tougher regulatory powers, which is something viewed with some concern by the press as encroaching on the freedom of the press.

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payments were illegal, but running a defence of ignorance of the law which Latin students will recollect "*haud excusat*" may prove an uphill task.

What is clear is that what had been hitherto successfully contained as a manageable if costly piece of wrongdoing in that the privacy of various celebrities had been infringed by phone hacking has now significantly escalated. At least three of the claims have been settled, one by the actress Sienna Miller for £100,000 plus costs, and another by a footballer Andy Gray for £20,000 plus costs, plus more recently a claim by Lee Chapman, a footballer and his wife, an actress called Leslie Ash.

Those figures reflected the fact that even in the Mosley case which – once a breach of privacy was established – was at the most serious end of the scale, had only resulted in a damages award of £65,000. The recent revelations seem firstly greatly to increase the likely number of claims, and secondly they may incline a judge to award higher sums than originally he might have had in mind. There are said to be 28 claims in course against News International arising out of phone hacking, but equally there seem to be a number in the pipeline.

The cases are assigned to Mr Justice Vos and there will be a specimen group of cases to be heard in the autumn which should lead to the resolution of the other cases, once he has laid down the appropriate principles. It seems that the claimants have so far had the better of the interlocutory skirmishes and have in the face of opposition secured access to the police documents, which include all the notes kept by the jailed private investigator seemingly showing who he had hacked and who he was reporting to.

The hacking affair led directly to the closure of Britain's best-selling Sunday newspaper the News of the World. Countless senior executives at News International have left the company. Some of them, such as Tom Crone, a senior lawyer at News International, and Colin Myler, the former editor of the News of the World, appear to be disputing the evidence of James Murdoch given to an investigating House of Commons Media Sports and Culture Committee as to what he and other senior executives knew and when about the extent of phone hacking.

There are very senior police officers in the London Metropolitan Police who have also resigned because of injudiciously cosy links with the News of the World and the police public relations man is busily tending his garden after

details of the hiring by Scotland Yard of a former News of the World editor as a supernumerary PR adviser emerged. In one instance a police officer had accepted free treatments at a spa facility valued at £12,000 to help him recover from a serious illness. The spa was connected with a former editor at News International (he says he was merely a friend of the owner), and in another instance a close relative of an editor obtained a job at Scotland Yard.

There was no evidence that these arrangements were corrupt, but they were very unwise and they were symptomatic of a far too cosy relationship between the newspaper and the police, and a situation whereby payments seem to have been received on a very large scale and in circumstances which may very well give rise to a series of prosecutions.

Another casualty had been Baroness Buscombe, the unmentioned head of the Press Complaints Commission who has announced that she will not be seeking an extension of her term as chairman when it runs out in January 2012. The PCC and the Baroness' handling of the hacking saga have been widely criticised as ineffectual and inept and the failure to investigate the phone hacking scandal properly was widely criticised. PCC's defence is that it did not have the facilities to carry out such an investigation, but unfortunately they did give the impression that they had investigated the matter and found nothing amiss.

The Government has indicated that one of the matters which is under serious consideration is the replacement of the PCC by a body with much tougher regulatory powers, which is something viewed with some concern by the press as encroaching on the freedom of the press, whereas the Government argues that the tougher regulatory regime that broadcasters face under Ofcom operates satisfactorily without interfering with freedom of expression.

The whole saga has been a disaster for most of those it has touched – the more so as Andy Coulson, a former editor of the News of the World, who denies any knowledge of wrongdoing, became a press adviser to Prime Minister David Cameron after his resignation as editor in the wake of the jailing of the paper's former royal correspondent – giving the scandal a distinctly political dimension. This has been compounded for the shifting of blame and falling out between the parties of which the correspondence recently released by the Media, Sports and Culture Committee is a very recent example.

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For example, Clive Goodman, the jailed former royal correspondent of the News of the World, claimed in an earlier letter that at editorial committee meetings, senior editorial staff were well aware of the phone hacking and that instructions had to be given to ban phone hacking being discussed. Nor will the gallows humour in an email where Mr. Goodman said that he did not want to go into detail about cash payments because everyone involved could “go to prison for this” play well in the cold light of hindsight.

Even the well-known media firm of lawyers Harbottle & Lewis has found itself having to justify its opinion on the extent of the knowledge of wrongdoing and to defend itself against an accusation of a white-wash. They had to correspond extensively with the Committee as to precisely what they meant and what they were hired to do when they rather helpfully apparently concluded in a carefully manicured report: *"I can confirm that we did not find anything in those emails which appeared to us to be reasonable evidence that Clive Goodman's illegal actions were known about and supported by both or either of Andy Coulson, the editor, and Neil Wallis, the deputy editor, and/or that Ian Edmondson, the news editor, and others were carrying out similar illegal procedures."*

The issue they have to address is whether this was, as one would expect, a suitably qualified opinion by experienced lawyers, answering a narrow question or whether it was injudiciously or ineptly widely expressed if they were in fact reviewing the correspondence later seen by the former Director of Prosecutions Lord MacDonald QC. The answer may lie in the precise nature of their assignment, but it must in any event have been an unwelcome development for the law firm when the former DPP hired by News International concluded that it was almost immediately apparent that there was evidence of criminality in the relevant papers.

Harbottles reacted ferociously to the attempt of James Murdoch to blame them for failing to investigate the debacle properly and for wrongly giving the Company a clean bill of health after reviewing some 2,500 emails. In a very lengthy riposte delivered to the House of Commons Committee in a report which must have cost tens of thousands of pounds to produce, they demonstrated convincingly that they were not hired to give a "Good Conduct Certificate" to News International. In doing so, they bit the hand that fed them – to the tune of, we are told, £10,294 – a sum which they apparently viewed as underscoring the modesty of the extent

of their services, as it does not seem to buy much at Harbottles. Murdoch is attacked for conduct castigated as *"self-serving, very misleading, confused and mistaken."*

However, their overall conclusion is puzzling. Their very terms of reference had, after all, started with a letter from Clive Goodman, the disgraced Royal Correspondent, who said that hacking was regularly discussed at editorial meetings until instructions were given not to talk about it. Is it likely therefore there would have been an incriminating trail of emails? Was such a fulsome exoneration appropriate or wise? It also seems unwise to have spoken of their being no evidence of knowledge of Clive Goodman's illegal actions in such terms, when evidence of corrupt payments to the police (for example, a discussion as to whether £750 or £1,000 was the going rate for procuring from the police the Green Directory of private phone numbers of members of the Royal Family and Household) jump out of the emails, or so Lord MacDonald tells us.

With hindsight Harbottles must bitterly regret ever having become involved in the assignment, engaging for the most part very junior lawyers in their team (all of whom seem to have now left the firm), producing a very short letter which went through multiple drafts seemingly to produce something satisfactory for News International and which may inadvertently have in fact misled James Murdoch into believing that more investigation had been done by their company than was in fact the case. Certainly they must wish that they had known more about the criminal law and that troubling features such as the fact that Goodman who received a salary £90,000 had nevertheless received a payoff of no less than £244,000 and according to him the promise of continued employment after his spell in jail did not lead them to be a little more proactive and a little less comatose in their investigations.

The Committee is likely to take more evidence to decide where the truth lies, but their conclusions will almost certainly reject some of the evidence they have heard and leave some of the warring parties unhappy. The Committee now wants to find out if News International had been advised by its other lawyers about the extent of wrongdoing and criminality by its other lawyers Farrer & Co on the civil side and Burton Copeland on the criminal. In all probability News International will feel compelled to waive legal privilege and their legal files will be further trawled over in public.

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The Leveson Inquiry

A bi-product of the hacking scandal has been the setting up of an inquiry under a Court of Appeal judge, Lord Justice Leveson. His inquiry is divided into two parts, the first is to look at the state of the press generally, and the second will be to investigate specific acts of wrongdoing on the part of the press. The plan is for Leveson to report within 12 months, although if there are criminal proceedings the second part of the inquiry will almost certainly be delayed pending the resolution of those criminal proceedings.

Leveson will operate under the Inquiry Rules 2006 which enable him to summon witnesses and documents and he will be assisted by a panel of experts. Witnesses will give evidence under oath. It is envisaged that he will make recommendations for a more effective regulatory regime for the press and his terms of reference include ensuring that this regime will support the integrity of the press, the plurality of ownership of the media and its independence from the Government. It will also seek to encourage the highest ethical standards in the media and will look in particular at contact between the press and the police, and it will review the relationship that has developed between politicians and certain sections of the press. It is also to consider the extent to which the current regulatory regime has failed. It will be, therefore, a very wide-ranging review of the ethics of the press, the culture of the media, press regulation and general corporate governance of the press.

The second half of the inquiry will focus particularly on allegations about phone hacking and illegal payments allegedly made to the police by News International and possibly also by other sections of the media. Part of that inquiry will be as to how the police investigated allegations of unlawful conduct by persons within or connected to News International at the outset of the phone hacking scandal and the extent to which the police received corrupt payments.

Unguarded comments made by Piers Morgan – now of CNN – at the time the editor of the Daily Mirror – about

having listened to a deeply personal message left by Paul McCartney for Heather Mills on – it would appear – her mobile phone has underscored the fact that News International are not the only parts of the media in the frame. Morgan must regret his light-hearted candour delivered in his normal genial manner, as does Rebekah Wade who may regret her comment made to a House of Commons Select Committee about payments made by News International to police officers. There has been a bit of back tracking on that.

The problem seems to be that these methods of obtaining stories seem to have become so common place that there was a failure to appreciate the criminal implications. In any event, the press looks as if it could be in for a rough ride from the Leveson Inquiry, just as it has been from politicians – themselves smarting from the working over that they had from the press over their creative expenses.

Another House of Commons committee, the Home Affairs Select Committee, published a report on 20 July 2011 entitled "*The Unauthorised Tapping into or Hacking of Telephonic Communications*" and that underscored the deep rooted antipathy to the errant sections of the tabloid press and police. It concluded that News International was trying to thwart the criminal process.

Members of Parliament Sent Packing in the Libel Courts

[*Lait v Evening Standard \[2011\] EWCA 859*](#)

One might have thought that members of Parliament would have realised that, so far as they were concerned, the libel gravy train had left the station. Not so Jaqui Lait MP. She was criticised for excessive mortgage interest claims on her two homes. In fact, the article overstated the extent of her claims in that she was accused of profiting on the sale of her second home, whereas the criticism ought to have been limited to the amount of interest she had claimed on her second home. At first instance, a robust view had been taken by Mr Justice Eady as to how to deal with claims of this sort. He concluded that the words plainly meant that people could

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legitimately get angry at her behaviour. As such, this case was evidently a matter of fair comment and her claim would, in the absence of her being able to prove malice on the part of a newspaper, be bound to fail.

Of added interest was the fact that there were two other arguable defamatory meanings which the MP sought to attribute to the article; one was that she had acted in a hypocritical manner and the other was that her whole handling of her expense claims had been underhanded and involved concealment. Mr Justice Eady felt that the articles could possibly bear that meaning. The single meaning rule does not apply in fair comment cases, but he concluded that the possible imputation of hypocrisy or concealment should not consume further time or money and did not merit this matter going to trial after the conclusion he had reached on the principal meaning (above).

In effect, he applied the abuse of process arguments in *Jameel*, namely that proceedings which did not secure the legitimate purpose of protecting a person's reputation should be brought to an end, rather than, as seemed all too often to have happened in the past, for cases to continue so that a theoretical meaning could be adjudicated upon in the court. A balance had to be struck between freedom of speech and the right of reputation. This approach was upheld by the Court of Appeal and his judgement is to be welcomed. It will encourage courts to go to the heart of the alleged libel and decide whether there is a triable issue without being distracted by theoretical meanings which, as here, were somewhat ingeniously advanced some time after the initial complaint

[Cook v Telegraph Media Group Limited](#)
[\[2011\] EWHC 2011](#)

This was another optimistic claim by a discredited MP. On this occasion it was Mr Justice Tugendhat who slung out the claim on the basis that the defence of fair comment was bound to succeed. Mr Cook having discovered that his assistant had donated £5 to a Battle of Britain Charity felt that he was entitled to reclaim it as a business expense. This did not play well with the newspaper who criticised him as an MP who was not giving value for money. Mr Justice Tugendhat felt that this was clearly a comment which could have been made by an honest person and as Cook could not establish that the newspaper lacked an honest

belief in what they had written or were malicious, the claim was bound to fail and therefore should be struck out.

Contempt of Court – The Courts Get Tough
[Attorney General v MGN \[2011\] EWHC 2074](#)

Normally contempt cases arise out of prejudicial material published about a Defendant in a criminal trial. Section 2(2) Contempt of Court Act 1981 introduced a test of strict liability which permitted contempt of Court to be found where the Court was of the view that there was a substantial risk that the course of justice in the proceedings in question would be seriously impeded or prejudiced. In this case, however, the contempt arose out of what the Court characterised as a campaign of vilification of a retired schoolmaster called Christopher Jeffries who was the landlord of a murder victim. He had been arrested by the police as one of the early suspects, but after questioning he was cleared of suspicion and ultimately another man admitted the killing.

The tabloid press, however, had had something of a field day suggesting that Jeffries might be linked to paedophile offences and an earlier murder and was generally a deeply suspicious character with apparently, for good measure, blue hair. As he had been completely exonerated, there was no question of his trial being prejudiced. However, the Court felt that matters should be considered at the time of publication and the fact that there was ultimately no prosecution was irrelevant. The pattern of vilification, in the court's view, potentially impeded the course of justice. Had Jeffries remained under suspicion or indeed been charged, what the newspapers wrote could have, in the view of the Court, prevented witnesses coming forward or hindered him in developing his defence.

In the UK there are statutory restrictions on what can be published after a person has been charged, so British Courts might feel less uncomfortable about acting against prejudicial material published against someone who is not charged than would be the case in the United States. One of the matters that was discussed in the case was the case of *Attorney General v Unger [1998] 1 Cr App Rep 308* which had held that the publication need only create a seriously arguable ground of appeal on the ground of prejudice, not one that would necessarily allow an appeal on the grounds that the

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conviction would be unsafe due to that prejudice. In other words, a stricter standard is applied to the Press so that a newspaper can be guilty of contempt even though (in circumstances different from the fact of the Jeffries case itself) the Defendant might not be able to persuade the Court of Appeal to quash the conviction on the grounds that a fair trial was impossible.

It is a question of a *potential* substantial risk of serious prejudice rather than *actual* risk and newspapers in the United Kingdom publish such material at their peril. After an evaluation of what had been published by the papers, one had to pay a fine of £50,000 and the other £18,000, plus costs. The decision may be appealed to the Supreme Court. Permission to appeal has to be sought by 16 September.

The Press found themselves the subject of considerable criticism in that there had been something of a feeding frenzy, it was felt, in this particularly horrific murder of a University student. Jeffries in fact commenced libel proceedings against eight newspapers (six English and two Scottish) complaining of a total of forty articles which he claimed had subjected him to a witch-hunt and character assassination. The case was settled and he received a substantial undisclosed sum of damages.

In [*Attorney General v Associated Newspapers \[2011\] EWHC 1894*](#) two newspapers had inadvertently on their on-line service published a photograph of the Defendant in a murder case holding a gun which it was said was prejudicial to his defence. What had happened was that the picture in one paper had been insufficiently cropped so as to remove the offending weapon and was visible online for 22 hours. The mistake was noticed almost immediately. In the other paper the photograph had not been cropped but had been on-line only for five hours, but that was during the currency of the case as opposed to most contempt cases which arise out of reporting at the time of the arrest. Both newspapers were fined £15,000 and had to pay a total of £28,000 costs.

It has been recognised by the Law Commission that additional issues relating to contempt arise as regards publication on the internet and in social media and the Law Commission proposes to start reviewing the matter in the Autumn of 2012.

Open Justice

The law on the anonymisation of proceedings which has been brought into particularly sharp focus in privacy actions has been the subject of a report by a committee chaired by

Lord Neuberger, Master of the Rolls (the Senior Judge of a Court of Appeal) entitled *Super Injunctions, Anonymised Injunctions and Open Justice* which was published on 20 May 2011. This was followed by [New Guidance](#) which was issued on 1 August 2011 by Lord Neuberger.

This in effect required applicants to show that they had taken all reasonable and practicable steps to provide advance notice of applications for injunctions. Only in the rarest case would super injunctions be permissible, that is to say in cases of strict necessity where there was a very real danger of some miscreant being tipped off or where there were serious blackmail issues. Lord Neuberger also stressed that it was not up to the parties to agree anonymity between them. They could not waive the public's right of publicity. It was a matter for the Court to decide.

Any application for non-disclosure would be subjected to intense scrutiny by the Courts and those on whom any such Order was served should be kept informed of developments. One of the matters which the Judge has directed should take place is that statistics should be kept about non-disclosure orders on which at present there is surprisingly little reliable information. There is therefore to be a pilot scheme to run for a year until 31 July 2012.

Any applicant seeking anonymity have to establish under section 12(3) Human Rights Act 1998 that it is likely that the publication will not be allowed and under section 12(4) the Court must take account of the right of freedom of expression under Article 10 of the European Convention of Human Rights. Applications will only be heard in private if the Court is satisfied that nothing short of the exclusion of the Press will enable justice to be done. Notice must normally be given to the Press of such applications for cases to be heard anonymously and only rarely will it be appropriate not to give advance notice to the Press of such applications. The Court will require an irrevocable written undertaking from the legal advisor of the media organisation to respect the confidentiality of proceedings.

What is therefore envisaged is that the Press will be allowed to attend privacy hearings in all but the most extreme case where it can be established whether there are real anxieties about tipping off the parties or unusual considerations of particular urgency. The press will be required to comply with all Orders of the Court as to anonymising the proceedings and will, to that extent, be restricted in how the case can be reported so that matters of

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protectable privacy are not reported in the Press. What is most unlikely to happen henceforward is for super injunctions to be granted, the effect of which is to prevent even the very fact of the litigation being reported. Lord Neuberger did, however, point out that a different approach to advance notification of such hearing may be appropriate as regards internet organisations or Bloggers.

Damages

***Al Amoudi v Kifle* HH Judge Parkes QC**

In an uncontested case confirming the US-based online publication the *Ethiopian Review* damages of £175,000 was awarded in a case which the judge viewed as at the upper end of the scale of seriousness. The Claimant was said to have been accused of offering his daughter to an elderly prince in Saudi Arabia and to have murdered her lover and to be searching for his daughter in order to enable her to be executed by stoning and for good measure he was accused of financing international terrorism. Not surprisingly, the judge viewed this as one of the more serious libels encountered by the courts notwithstanding the limited publication. The award is unlikely to be enforced and the Judge may very well have had that in mind in making a very high award against a publication which was little read in the United Kingdom.

What is therefore envisaged is that the Press will be allowed to attend privacy hearings in all but the most extreme case where it can be established whether there are real anxieties about tipping off the parties or unusual considerations of particular urgency.

Honesty Opinion, Malice and a Failed Offer of Amends

[Thornton v Telegraph Media Group \(2011\) EWHC 1884](#)

This was a case which arose out of a review of a book by Sarah Thornton called *"Seven Days in the Art World"*. It was a particularly waspish piece by a columnist called Lynn Barber. Amongst other things, she dismissed the author as "*a decorative Canadian with a limitless capacity to write pompous nonsense*." The case spawned much interlocutory litigation including the test laid down by Mr Justice Tugendhat which has now found its way into the new Defamation Bill that libel cases should breach a threshold of

seriousness and that courts should strike out trivial actions for libel. The attempt to apply for a jury trial had failed because the claimant had failed to apply for a jury trial within 28 days of the service of the defence. Equally the Defamation Bill proposes to restrict the availability of jury trials in libel actions.

The case was heard by Mr Justice Tugendhat in a hearing that lasted 4 days. He disbelieved Ms Barber's evidence that she had not been interviewed by Ms Thornton. As she had claimed in the book, and that she (Ms Barber) had been offered copy approval. He concluded that she was at the least reckless as to the truth of her claim that she had not been interviewed, finding that there had in fact been a lengthy interview. With these shades of a *Sullivan v New York Times* test, the judge held that the offer of amends which the paper had made did not succeed as a defence to the claim by virtue of section 4(3) Defamation Act 1996, as the defence of an

offer of amends which is normally conclusive in a defamation action can be defeated if it can be proved that the Defendant knew or had reason to believe that the statement complained of was false and defamatory. Ms Thornton was awarded damages of £50,000 for libel plus £15,000 for malicious falsehood plus the very substantial costs of the action.

Conditional Fee Agreements

The first steps have been taken towards the abolition of the recovery from defendants of CFAs and After The Event insurance taken out by claimants. Curiously this is being done in the Legal Aid Sentencing and Punishing of

Offenders Bill introduced in Parliament on 21 June 2011. Part two of the bill abolishes the recoverability of CFAs and ATEs and creates a new acronym - the DBA – Damaged Based Agreements. Just how attractive this will be to media claimant lawyers remains to be seen, as damages are relatively low in media cases and claimant lawyers are relatively avaricious.

Costs Management

The pilot scheme requiring parties to produce cost budgets has been extended to 30 September 2012. This will

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enable the Courts to case manage costs, which it will do in relation to the value of the litigation, reputational issues and the public interest. Essentially the Court will look at the last approved budget and will not depart from it unless it is reasonable to do so. More information on the how the pilot scheme will work is available [online here](#).

Mosley Appeal

Max Mosley has appealed to the Grand Council of the European Court of Human Rights following the rejection by the Chamber of the Fourth Section of his argument that the media needed to notify a claimant when they were publishing a story which might breach the claimant's privacy rights. Were he successful it would be a severe restriction on the press and result in the grant of many prior restraint injunctions.

Privacy and "Spent" Criminal Convictions **[KJO v XIM \(2011\) EWHC 1768](#)**

This is an interesting decision by Mr Justice Eady which shows how relatively easy it is to obtain an injunction at the interlocutory stage when a libel injunction could not have been obtained. Bizarrely this was a family dispute where a member of the family rather belatedly wanted to tell the relevant financial authorities that their relative, who ironically by now was an investment banker in Hong Kong, had in 1992 been sentenced in England to 9 months jail after admitting forging his grandmother's will. Under the Rehabilitation of Offenders Act of 1994 the conviction would have been deemed to have been spent and with granny dead he had resisted the temptation to reoffend. The banker could only sue for libel if he could establish that the publication was malicious.

There probably was a degree of malice, but as against that there were obvious public interest arguments. And a libel injunction would have been very difficult to obtain. Eady J considered that an injunction should be granted on the grounds of privacy as the banker had an arguable case that his privacy had been infringed.

Libel Statistics

A recent survey by Sweet & Maxwell, although based on

small figures, confirms what many suspected about the law of libel. In the year end 31 May 2011 libel cases brought by celebrities dropped from 22 to 9, but this was probably because they found the privacy laws provided them with a better remedy. Their figures showed that the number of defamation cases on which they based their survey rose by 4% over the previous year from 83 to 86. They found that business cases had trebled from 5 to 16 and that there was an increase from 2 social media cases in 2006 to 16 in 2010/2011. Another survey reported on by Jaron Lewis of RPC showed that defamation writs issued in London in 2010 declined to 158 from 298 in 2009. It is difficult to draw any very firm conclusions on such small figures, but there are no significant increases in the number of libel actions and the number of cases are still very small.

Misery Memoires

Amanda Smith v Headline Publishing Corporation plc.

The difficulties faced by publishers who decline to publish a book they have commissioned were illustrated by this decision of Judge Bernard Livesey QC. On the advice of Counsel this history of childhood abuse could not be published for defamation reasons, but the judge found that the publishers were nevertheless in breach of contract because they had given inadequate warnings and advice to the author. Publishers normally try to encourage their authors with soothing words about the quality and viability of the book and in such cases it proves difficult to justify non-publication in court. He did however find that the publishers had acted in good faith and because the author had made a number of unsubstantiated allegations against the publishers, her victory was somewhat pyrrhic as she had to bear 65% of the costs.

Intellectual Property

There have been a number of interesting developments over the last few months. The [Hargreaves Report](#) has been published with its recommendations for the updating of copyright law in the digital age. Amongst its proposals are the establishment of a digital copyright exchange for licensing the use of copyright works with an appropriate fee system and code of practice, a regime for orphan works, proposals for a system of Pan-European licensing and a review of the copyright exceptions or defences to update

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them in the digital era.

The government has broadly welcomed these proposals in its [response to the Hargreaves Review](#) and one now needs to see what action is taken to implement them. Professor Hargreaves also recommended creating a small claims jurisdiction where intellectual property claims valued at up to £5,000 could be brought and where legal costs would not be awarded to either party, which is likely to be advantageous to claimants and there was a proposal for changing the name of the patent county court to the Intellectual Property County Court, again aimed at simplifying and making less costly small claims.

[Allen v Bloomsbury Publishing plc \(2011\) EWCA Civ 943](#)

A very dubious claim for breach of copyright was thrown out by the Court of Appeal in *Allen v Bloomsbury Publishing* on 14 July 2011. This had been an attempt to cash in on the success of the Harry Potter books through a miserable little book written by a crooked financier who had ended up in jail with a literary agent whose only notable achievement turned out to be that he had earned more jail time (5 years) than the author (6 months). The case had been thrown out in the US District Court, in the Southern District of New York by Judge Scheindlin, who robustly rejected the alleged similarities between the two books.

In London the Court of Appeal upheld a ruling of Mr Justice Kitchen that although the action could have been

continued, the claimant had, as a condition of being able to do so, to lodge £1.6 million security for the costs of the defendants. The Judgement of the Court of Appeal lays down the principles under part 24 Rule 6 of the Civil Procedure Rules for making such conditional orders and it should be an added weapon in any defendant's armoury to dispose of claim or at any rate obtain security for costs, where weak but short of being fanciful claims with little prospect of success just scrape past the summary judgement criteria.

In [20th Century Fox v BT \(2011\) EWHC 1981](#) (28 July 2011) Mr Justice Arnold made a blocking order under section 97A Copyright Patents Designs Act 1988 (which implements the EU Information Society Directive), which required BT to prevent its subscribers accessing a website which was making available pirate films. The offending company had gone into voluntary liquidation but with the risk that other companies would spring up in its place. The film company was able to get an effective order from the ISP to prevent the film s being illegally accessed.

In [Newspaper Licensing Agency Ltd v Meltwater Holding BV \(2011\) EWCA Civ 890](#) the decision of Proudman J was upheld. This concerned a media monitoring service with a hyperlink to relevant newspaper articles and an extract from the headline. The headline was held to be a literary work and the extracts were substantial parts. The upshot is that end users of commercial online media monitoring services require an end-user licence from the publishers.

David Hooper is a partner with Reynolds Porter Chamberlain in London.

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Scraping and Aggregation: The Legal Issues Explored

By Niri Shan and Lorna Caddy

In late July 2011, the Court of Appeal of England & Wales gave its decision in the case of *The Newspaper Licensing Agency Limited and others v Meltwater Holding BV and others* [2011] EWCA Civ 890. This case is the first in which British courts have considered the practice of scraping and aggregation in any detail. For this reason, the decision has been much awaited by all UK media practitioners

Lessons Learnt So Far from The NLA v Meltwater Dispute

The Newspaper Licensing Agency (the NLA) is in the midst of a legal dispute with a news aggregator and monitoring agency, Meltwater. The Public Relations Consultants Association Limited (PRCA), which represents the interests of its UK public relations provider members, is supporting Meltwater in the dispute.

The dispute surrounds Meltwater's provision of online media monitoring services to its customers. Customers select search terms and Meltwater sends them reports of articles containing those search terms. The reports include the headline of an article (which hyperlinks to the article), the opening words of the article and an extract showing the context in which the search term appears. It does this by monitoring a wide range of websites using "spider" or "bot" programs to "scrape" or "read" the content. It then creates an index which records the position of every word in every article on every website monitored.

The current dispute arose when the NLA introduced two licensing schemes: one imposing a charge on media monitoring organisations (such as Meltwater) and the other for end users (such as PR agencies) of those monitoring services. So far, there have been three forums for the dispute:

- ◆ Meltwater and PRCA referred the NLA's two licensing schemes to the Copyright Tribunal, arguing that the

terms were unfair. The Tribunal will hear the dispute in September 2011. The Tribunal will determine the terms of the licence to Meltwater and also the terms of the end user licence.

- ◆ In the meantime, the NLA commenced High Court litigation against Meltwater and PRCA. The issue in the case was whether Meltwater's end users, such as PR agencies, need a licence from the NLA. In relation to its own NLA licence, Meltwater did not dispute in that litigation that it has to take a licence but took the position that the terms are unreasonable. The High Court gave its ruling in November 2010. The conclusion reached was that without an end user licence, end users are infringing the relevant publishers' copyright through their use of Meltwater's services. Therefore, members of PRCA (i.e. end users) require a licence in order to avoid copyright infringement. PRCA appealed the decision.

- ◆ On 27 July 2011, the Court of Appeal confirmed the High Court decision, dismissing the appeal.

We now have some guidance from the Court of Appeal on which parts of a news aggregation service require a licence:

Headlines are capable of being literary works, whether independently or as part

of the articles to which they relate and are often protected by copyright. Therefore, a licence is likely to be required when reproducing headlines. Mrs Justice Proudman and the Court of Appeal were impressed by the Chief Operating Officer of the Daily Mail's evidence that: "*The ability to compose a headline is a valuable and discrete skill and courses exist to teach it. Headlines require skill in order to fulfil the objective of capturing the reader's attention and inducing them to read the article.*"

Equally, copying extracts could amount to copyright infringement. Extracts are capable of being a substantial part

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**Headlines are capable of
being literary works,
whether independently or
as part of the articles to
which they relate and are
often protected by
copyright.**

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of the literary work. This is consistent with the Court of Justice of the European Union's (CJEU) recent decision that 11 words of copying may amount to copyright infringement if what is copied represents *"an element of the work which expressed the author's own intellectual creation."* See *Infopaq International v Danske Dagblades Forening* [2010] FSR 495. *In this case, the ECJ concluded that copying of an extract of 11 consecutive words from an article constitutes reproduction in part for the purposes of Article 2 of the InfoSoc Directive, provided that those words had the necessary quality of originality. In that case the monitoring report contained only the search term and the five preceding and five subsequent words, the equivalent of the hit extract in the present case with no headline and no opening text.*

In the current situation, Meltwater reproduces extracts of 256 characters. The Court of Appeal found that each time Meltwater produced an edition of its news for a client, a large number of extracts were taken from a variety of publications such that it was inevitable that some of them would constitute a substantial part of the original.

By receiving and reading the report from Meltwater, the end user will be making a copy of the relevant publisher's headline and part of the article. The end user will also be in possession of an infringing copy. By forwarding on copies of the report to other people, the customer will be issuing further copies. These are all potentially infringing acts. The situation is not comparable with the old press cuttings business model where there was only one copy inherent in the process which had to be licensed. The electronic business model involves the creation of multiple copies, all of which must be licensed. The copies created in the process are not permitted by section 28A of the Copyright, Designs and Patents Act 1988 (dealing with temporary copies (copies which are transient or are incidental to some other use of the work and having no independent economic significance)). The Court of Appeal adopted Proudman J's finding on section 28A: *"A person making a copy of a webpage on his computer screen will not have a defence under section 28A simply because he has been browsing. He must first show that it was lawful for him to have made the copy. The copy is not part of the technological process; it is generated by his own volition."*

The copies created in the process are not permitted by the fair dealing provisions within section 30 of the Copyright, Designs and Patents Act 1988. The Court of Appeal found the PRCA's arguments "absurd". They argued that Meltwater

reports current events to its clients and the clients report current events to their end users: *"The underlying article may have nothing to do with current events. Even if it did, the scraped extracts are not made for the purpose of reporting current events but so that the end-user may see when, where and in what context the agent or search term was used."* This is unsurprising. In addition, the Court of Appeal pointed out that Meltwater's dealings could not be described as "fair." The dealings are for commercial purposes and encourage end users to infringe copyright.

The copies created in the process are not permitted by the Database Regulations 1997 (which state that the maker of a database cannot prevent a lawful user from extracting and or re-utilising insubstantial parts of its contents). The Court of Appeal agreed with Proudman J that all the acts of infringement relied on against PRCA's members relate to the contents of the articles rather than infringement of the arrangement or structure of the website as a database.

The Court of Appeal rejected PRCA's argument that, as Meltwater is licensed to send Meltwater News, by necessary implication, the act of receiving must be licensed: sending and receipt are not two sides of the same coin. This was because on receipt, the recipient makes further copies of the material on his or her computer.

The terms and conditions of some of the publishers' websites stipulate that paid for media monitoring services and their customers require a licence to use the content. The publishers' argument was that without a licence, use of the content is infringing and in breach of contract (on the basis of the terms and conditions of the website). Proudman J commented that she had not been taken to any authority on the effect of incorporation of terms and conditions through small type. Unfortunately, neither Proudman J nor the Court of Appeal come to a decision on whether the publishers' terms and conditions were binding on Meltwater, such that a contract existed between them. However, it seems unlikely that there would be a contract unless users of the website are required to actively confirm they have read the terms and conditions before accessing material on the relevant website. We discuss this point further below.

Frustratingly, the Court of Appeal did not give its opinion on one of Proudman J's most controversial first instance rulings, relating to the act of linking. When an end user clicks on a link included in a Meltwater report, a copy of the article appears on his or her computer. Proudman J commented "it

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seems to me that in principle copying by an End User without a licence through a direct Link is more likely than not to infringe copyright.” This is a particularly interesting finding, suggesting that users of the internet can find themselves inadvertently infringing copyright by clicking on links to websites which they do not have express or implied permission to access. In the majority of cases, it is likely that a publisher of a website grants the public an implied licence to access its content. Where there is likely to be an issue is where a link bypasses a paywall or registration process. The

judges did not explore Meltwater's liability for providing the link. However, there would seem to be an argument here that if clicking on a link can amount to copyright infringement, Meltwater authorises that infringement by providing the link. We now await the next stage of this dispute: this Autumn, the Copyright Tribunal has to determine the terms of the end user licence as well as the standard licence that the NLA issues to news aggregators themselves.

Niri Shan and Lorna Caddy are lawyers with Taylor Wessing in London.

Facebook User's ADA Lawsuit Dismissed

Plaintiff Failed to State a Claim for Federal or State Law Relief

A California federal district court recently dismissed a lawsuit against Facebook, Inc. alleging that it violated the Americans with Disabilities Act and related state law claims. *Young v. Facebook, Inc.*, No. 10-3579 (N.D. Cal. May 17, 2011) (Fogel, J.). The court found that plaintiff, a Facebook user whose account was deactivated, failed to state any facts upon which relief may be granted under both federal and state disability laws, as well as state contract and negligence law.

Background

Plaintiff Karen Beth Young is a Maryland resident and Facebook user with over 4,000 Facebook friends. In 2010, her account was permanently deactivated after Facebook's security systems determined that she had been sending potentially harassing “friend” requests to people she did not know in violation of Facebook's terms of use.

Plaintiff drove from Maryland to California seeking a face to face meeting and an opportunity to appeal both of which were rejected. She then sued Facebook for a variety of claims: violation of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101, *et. seq.*, violation of the Unruh Civil Rights Act, Ca. Civ. Code § 51, *et seq.*, violation of the California Disabled Persons Act, Cal.

Civ. Code § 54, *et. seq.*, and breach of contract and negligence.

The basis of her complaint was the allegation that she suffers from bipolar disorder and that Facebook unlawfully discriminated against her by failing to provide reasonable customer services to assist individuals with mental disabilities.

ADA and Related Claims Dismissed

The court dismissed the complaint for failure to state a claim. To prevail on an ADA discrimination claim, a plaintiff must show that: (1) she is disabled within the meaning of the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; and (3) the plaintiff was denied public accommodations by the defendant because of her disability. Under controlling Ninth Circuit authority, “places of public accommodation” under the ADA are limited to actual physical spaces.

The court held that while Facebook's physical headquarters are obviously a physical space, it is not a place where the online services to which plaintiff Young claims she was denied access are offered to the public. Furthermore,

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The court found that plaintiff, a Facebook user whose account was deactivated, failed to state any facts upon which relief may be granted under both federal and state disability laws, as well as state contract and

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while retail stores that sell Facebook gift cards may be places of accommodation, plaintiff did not allege that Facebook “owns, leases (or leases to), or operates” those stores. Thus, Facebook’s internet services do not have a nexus to a physical place or public accommodation for which Facebook may be liable under the statute.

Turning to the claims for violation of the Unruh Civil Rights Act and California’s Disabled Persons Act, the court clarified that the Unruh Civil Rights Act – providing for full and equal accommodations, advantages, facilities, privileges, and services in all business establishments regardless of disability – may only be maintained independent of an ADA claim where the plaintiff pleads “intentional discrimination in public accommodations in violation of the terms of the Act.” This must be more than just disparate impact of a facially neutral policy on a particular group. Plaintiff similarly failed to state a claim under California’s Disabled Persons Act

which generally tracks the requirements of the federal ADA.

The breach of contract claims failed because plaintiff was unable to identify with any particularity how Facebook breached any obligation under its terms of use. Facebook’s “Statement of Rights and Responsibilities” provides that it will give email notification of account termination and plaintiff received such notice. “Given this express language,” the court noted, “Facebook could not have an implied obligation to provide a different termination process.”

The court noted that although “[i]t is at least conceivable that arbitrary or bad faith termination of user accounts, or even termination of user accounts with no explanation at all, could implicate the implied covenant of good faith and fair dealing,” no facts supported the suggestion that Facebook terminated her in bad faith.

Finally, the court dismissed the negligence claims because plaintiff failed to allege any legal duty owed or legal authority for a non-contractual duty to support a tort claim.

MLRC UPCOMING EVENTS

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September 19-20, 2011 | London, England

MLRC Annual Dinner

November 9, 2011 | New York, NY

DCS Meeting & Lunch

November 10, 2011 | New York, NY

2012

MLRC/Southwestern Media and Entertainment Law Conference

January 19, 2012 | Los Angeles, CA

MLRC/Stanford Digital Media Conference

May 21-22, 2012 | Palo Alto, CA

NAA / NAB / MLRC 2010 Media Law Conference

Sept. 12-14, 2012 | Reston, Virginia

MLRC Annual Dinner

November 14, 2012 | New York, NY

Divided Ninth Circuit Finds Anti-Obama Postings Constitutionally Protected

Statements Not “True Threats”

Recounting a list of scathing and offensive statements about former Presidents, a divided Ninth Circuit panel recently reversed the conviction of a man convicted of threatening Barack Obama during the 2008 presidential campaign. [*United States v. Bagdasarian*](#), No 09-50529 (9th Cir. July 19, 2011) (Reinhardt, Kozinski, Wardlaw (dissenting) JJ.).

The court held that the prosecution failed to present sufficient evidence that a reasonable person reading defendant’s online postings would have understood them as “true threats” or that defendant had the subjective intent to threaten a presidential candidate in violation of 18 U.S.C. § 879.

Background

At issue in the case were October 2008 postings to a “Yahoo! Finance – American International Group” message board by Walter Edward Bagdasarian. He wrote about then candidate Barack Obama: “Re: Obama fk the niggas, he will have a 50 cal in the head soon.” About twenty minutes later, he posted another: “shoot the nig country fkd for another 4 years+. what nig has done ANYTHING right???? long term???? never in history, except sambos.”

Another participant on the message board reported Bagdasarian to the Los Angeles Field Office of the United States Secret Service. A month later two agents interviewed Bagdasarian, who admitted to the postings and to keeping weapons in his home, including a .50 caliber rifle. They also searched his hard drive, recovering several e-mails of the same nature as the postings. He was later charged and found guilty of violating 18 U.S.C. § 879(a)(3), a federal statute that criminalizes threats to kill and inflict bodily harm upon a major presidential candidate.

Ninth Circuit Reverses

Writing for the majority Judge Reinhardt began by

recounting harsh comments about past Presidents.

In the country’s first contested presidential election of 1800, supporters of Thomas Jefferson claimed that incumbent John Adams wanted to marry off his son to the daughter of King George III to create an American dynasty under British rule; Adams supporters called Jefferson “a mean-spirited, low-lived fellow, the son of a half-breed Indian squaw, sired by a Virginia mulatto father.” Abraham Lincoln was derided as an ape, ghoul, lunatic, and savage, while Andrew Jackson was accused of adultery and murder, and opponents of Grover Cleveland chanted slogans that he had fathered a child out-of-wedlock.

He then acknowledged that the First Amendment does not immunize “true threats” where the “speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” Two elements must be met for a statement to constitute an offense under § 879(a)(3): (1) the objective element, requiring that the statement would be understood in context as a serious expression of an intent to kill or injure a major presidential candidate, and (2) the subjective element, requiring that the defendant intended that the statement be understood as a threat.

Beginning with the objective element, the majority opinion addressed the question of whether a reasonable person who heard the statement would have interpreted it as a threat. This analysis requires the fact-finder to “look at the entire factual context of the statements.” The court held that neither statement was a threat, the first being a mere prediction and the second an imperative intended to encourage others to action. The threat statute does not

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criminalize predictions or exhortations to others to injure or kill the president.

The majority also examined the surrounding circumstances to discern the meaning of the messages. The court found dispositive that the messages were posted on a “non-violent” financial discussion forum, that only one reader found them sufficiently threatening to alert authorities, and that nobody who read the message board postings knew that defendant had a weapon or would subsequently send e-mails with similar content.

Turning to the subjective element, the majority stressed that under the Supreme Court’s decision in *Virginia v. Black*, 538 U.S. 343 (2003), the State may punish only those threats in which the “speaker means to communicate a serious expression of an intent to commit an act of unlawful violence.” Furthermore, the majority noted that Congress had construed the “knowingly and willfully” language of § 879 as requiring subjective proof to make a threat.

Dissent

In dissent Judge Wardlaw argued that the statements should not be dismissed as mere imperatives or predictions. “We do not require that the speaker in a threats case explicitly threaten that he himself is going to injure or kill the intended victim; rather, we examine the surrounding circumstances to determine whether a reasonable person in the speaker’s shoes would foresee that his statements would be perceived as threats.”

Citing the Columbine and Virginia Tech killings, Judge Wardlaw noted:

[O]ur country’s collective experience with internet threats and postings that presaged tragic events made it all the more likely that a reasonable person would foresee that even anonymous internet postings would be perceived as threats.

Defendant was represented by Ezekiel E. Cortez, San Diego, CA. Kyle W. Hoffman, Assistant United States Attorney argued the case to the Ninth Circuit on behalf of the government.



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Congressional Update: The Opening Months of the 112th Congress

By Kathleen Kirby and Shawn Bone

As anticipated when the Republicans took control of the House last November, the 112th Congress has been characterized by partisan battles, rancor, and gridlock. While the House, Senate, and White House focused on government spending, the debt ceiling, and deficit reduction, media and communications issues largely were left on the sidelines. The agenda in the Commerce and Judiciary Committees has been quite limited, but even those issues that have been addressed by one Chamber or the other have resulted in political disputes. Spectrum reform, however, is the one communications policy area that has been the subject of broad bipartisan discussion and agreement, primarily because of the potential for the billions of dollars raised from spectrum auctions to alleviate budgetary pressures and reduce the federal deficit. Even there, the devil is in the details, and those details have flummoxed House and Senate Members.

The deficit and the economy will continue to dominate the headlines and to drive the Congressional agenda throughout the coming months, especially as work crafting additional budget cuts continues under the guidance of the Joint Select Committee on Deficit Reduction. Divided government already has constrained legislative efforts, and with a Presidential election looming, major policy changes are not likely to pass before work in the House and Senate effectively grinds to a halt in late Spring 2012.

What follows is a recap of the work Congress has done in the communications and media arena since the start of the year. Many of these issues have been on the table for multiple Congresses, but broad agreement on the specific policy proposals under consideration has not been reached. The communications agenda looks to become even more crowded with concerns about data security, consumer privacy, universal service, cell phone cramming, and others. Aside from spectrum reform and auctions, we believe that it will be difficult for Congress to address any of these discrete issues

in the coming months.

Spectrum

Spectrum has been the single telecommunications issue receiving wide attention in the 112th Congress, with action in both the House and the Senate. The year began with consideration of spectrum in the context of public safety communications and the upcoming 10th anniversary of the September 11th terrorist attacks. In recent months, however, attention to spectrum has had less to do with public safety and more to do with the prospect that spectrum auctions could raise billions of dollars for the Treasury. In a time of budget austerity and drastic deficit reduction, spectrum auctions offer one of the few ways for Congress to raise revenue without touching the tax code. Given the additional work that will be done this Fall on deficit reduction, spectrum will remain on the legislative front burner for the remainder of the year.

Numerous bills have been introduced this Congress relating to spectrum reform and spectrum auctions. The most important of these are S. 911, the Public Safety Spectrum and Wireless Innovation Act (which was voted out of the Senate Commerce Committee on a 21-4 bipartisan vote in June), and the Spectrum Innovation Act of 2011, a draft bill released in July by the Republican leadership of the House Energy and Commerce Committee. Both bills are designed to implement significant and sweeping reforms to the way the Federal Communications Commission (FCC) and the National Telecommunications and Information Administration (NTIA) govern public and private use of spectrum. Each would endeavor to create a nationwide public safety mobile broadband data network, though S. 911 would accomplish that goal through reallocation of a swath of 700 MHz spectrum known as the D Block for public safety use. The House Republicans, in contrast, would preserve current law

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The communications agenda looks to become even more crowded with concerns about data security, consumer privacy, universal service, cell phone cramming, and others.

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providing for auction of the D Block to commercial users, while promoting development of the nationwide network in 24 MHz of existing public safety spectrum in the 700 MHz band.

Both bills recognize the need for the Federal government to provide some fiscal support for deployment of this public safety broadband network. The bills secure that funding through a series of spectrum auctions. First, they designate certain spectrum bands for commercial auction, including a number of bands currently used by Federal agencies. Second, the bills would authorize the FCC to conduct incentive auctions, where an existing spectrum license holder could choose to relinquish its license in return for an incentive payment from the FCC derived from the proceeds of the auction of that license to a new user.

The expectation is that, at a minimum, the FCC would use this new voluntary incentive auction authority to begin auctions of spectrum given up by broadcast television licensees. Stations that choose continued operation would be “repacked,” or moved into a smaller slice of spectrum in order to create contiguous spectrum bands for auction. As a result, broadcasters have engaged in concerted lobbying concerning the scope and impact of such auctions on television stations that do not participate in the incentive auction. Among their concerns is a fear that the FCC will repack the bands too tightly, increasing interference and reducing signal coverage. Additionally, broadcasters are skeptical that the FCC may try to coerce participation in what has been advertised as a voluntary process.

The Congressional Budget Office has projected that the spectrum auctions authorized by S. 911, including voluntary incentive auctions, could raise over \$24 billion over the next 10 years. This potential revenue gain persuaded Senate Majority Leader Harry Reid (D-NV) to include spectrum in his deficit reduction proposal floated in late July, although spectrum was not included in the final compromise negotiated between the House and Senate. The Joint Select Committee on Deficit Reduction was tasked with drafting a proposal to cut at least \$1.2 trillion from the deficit over the next 10 years in order to avoid a series of mandatory spending cuts to defense and non-defense government services. Given the size of the package that the Committee must develop, the belief is that spectrum reform and spectrum auctions will be included in their deliberations. At the same time, S. 911 may receive time on the Senate floor as a way

for that body to commemorate the September 11 anniversary and provide public safety with next-generation communications capabilities.

Intellectual Property

Aside from spectrum, two other major media issues have received significant Congressional attention this year. The first is intellectual property, particularly with respect to the Internet. As outlined in last month’s MediaLawLetter, the Senate Judiciary Committee has acted on the Protect IP Act, designed to combat websites engaged in copyright infringement. Since that article was published, House Judiciary IP Subcommittee Chairman Bob Goodlatte (R-VA) revealed that he intends to introduce a House companion to the Senate measure when Congress returns in September. No details have been made public about the similarities or differences between the House and Senate measures.

The Senate Judiciary Committee also completed work on S. 978, designed to combat online copyright infringement. This measure, introduced by Senator Amy Klobuchar (D-MN), would make it a felony to stream large amounts of content online without permission from the copyright holder. That legislation was advanced out of the Committee along with the Protect IP Act, and awaits further Senate action.

FOIA Reform

The second issue that has received some Congressional action is FOIA reform. S. 627, the Faster FOIA Act of 2011, was voted out of the Senate Judiciary Committee on April 8 and was approved by the full Senate on May 26. The measure would create a Commission on Freedom of Information Act Processing Delays to conduct a study to:

- (1) identify methods that will help reduce delays in processing Freedom of Information Act (FOIA) requests submitted to federal agencies;
- (2) ensure the efficient and equitable administration of FOIA throughout the federal government;
- (3) examine whether the system for charging fees for such requests and granting waivers of such fees needs to be reformed;
- (4) determine why the government’s use of FOIA

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exemptions increased during FY2009, whether the increase contributed to delays, what efforts were made by federal agencies to comply with President Obama's January 21, 2009, Presidential Memorandum on Freedom of Information Act Requests, whether those efforts were successful, and how the use of exemptions may be limited; and

- (5) determine whether any disparities in processing, processing times, and completeness of responses to FOIA requestors have occurred based upon political considerations, ideological viewpoints, the identity of the requestors, affiliation with the media, or affiliation with advocacy groups, why such disparities occurred, and the extent to which political appointees have been involved in the FOIA process.

The Commission would consist of 12 members, including representatives from the Federal government and private sector individuals appointed by the House and Senate.

S. 627 was eventually used by the House and Senate as the vehicle to pass the Budget Control Act of 2011, the deficit reduction compromise. The Faster FOIA Act text was reintroduced by Senate Judiciary Chairman Patrick Leahy (D-VT) as S. 1466, and that bill was passed by the Senate on August 2. A House companion measure, H.R. 1564, has been introduced and was referred to the House Committee on Oversight and Government Reform for further action.

Other Significant Congressional Developments

The Senate Judiciary Committee has advanced legislation once again to permit television cameras in federal courtrooms. S. 410, the Sunshine in the Courtroom Act of 2011, was approved by the Committee on April 7, and awaits further Senate action. The bill, like similar ones from previous Congresses, would permit the Supreme Court, and Federal appellate and district courts, to permit electronic recording, broadcasting, or televising of court proceedings, except when such action would constitute a violation of the due process rights of any party. The authority to open district court proceedings to cameras would expire after 3 years. A House companion measure, H.R. 2802, has been introduced. A measure on litigation openness also has been approved by the Senate Judiciary Committee. S. 623, the Sunshine in Litigation Act of 2011, would limit the ability of a Federal

court to enter into protective orders sealing certain types of cases. According to the bill:

[I]n any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, a court shall not enter, by stipulation or otherwise, an order otherwise authorized under rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of information obtained through discovery, an order approving a settlement agreement that would restrict the disclosure of such information, or an order restricting access to court records unless in connection with such order the court has first made independent findings of fact that—

(A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or

(B) the public interest in the disclosure of past, present, or potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and

(C) the requested order is no broader than necessary to protect the confidentiality interest asserted.

Federal courts also would be prohibited from enforcing certain agreements in cases “in which the pleadings state facts that are relevant to the protection of public health or safety” that restrict a party to a case from disclosing information to any federal or state agency with authority to enforce laws regulating an activity relating to such information. Finally, courts could not enforce certain confidentiality provisions in settlement unless the court finds that the public interest in the disclosure of past, present, or potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question, and the requested protective order is no broader than necessary to protect the confidentiality interest asserted.

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S. 623 was approved by the Committee on May 19, and a House companion bill, H.R. 592, has been introduced.

Senator Ben Cardin (D-MD) has introduced S. 355, the Espionage Statutes Modernization Act of 2011. The legislation would make it a federal crime, subject to a fine and imprisonment of up to five years, for a “covered official” to intentionally disclose, deliver, communicate, or transmit classified information, without authorization, with knowledge, or having reason to know, that those actions violate the classified information nondisclosure agreement entered into by such individual. “Covered individual” is defined as “an officer, employee, contractor, or consultant of an agency of the Federal Government who, by virtue of the office, employment, position, or contract held by the individual, knowingly and intentionally agrees to be legally bound by the terms of a classified information nondisclosure agreement.” Certain disclosures made in accordance with a federal whistleblower protection statute or regulation are exempt from this prohibition.

Several key posts in the Administration with authority over communications and media issues will need to be filled in the coming months. At present, the Senate is waiting on the White House to nominate a replacement for Christine Varney, who served as the Assistant Attorney General for the Antitrust Division (which has responsibility for merger approvals). Additionally, the Administration needs to name a replacement for FCC Commissioner Meredith Baker, who relinquished her post in June to join the Washington, D.C. office of Comcast. Finally, FCC Commissioner Michael Copps is required by statute to leave the Commission when Congress adjourns in December (his term on the FCC expired last June). Speculation has centered on Ajit Pai, a former Senate staffer and current attorney at Jenner and Block, as the replacement for Commissioner Baker, and Jessica Rosenworcel, a former Copps staffer and current Senior Communications Counsel for the Senate Commerce Committee, as the replacement for Commissioner Copps.

The House Energy and Commerce Committee held a series of hearings on FCC process reform, and has released draft legislation that would make a number of changes to how the Commission operates. With Republicans continuing to express concerns about the deliberative process used by the FCC to reach decisions, expect this issue to continue to receive attention in the House. The likelihood of any true reforms passing this Congress, however, is minimal.

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