

# MEDIA LAW RESOURCE CENTER

## ANNUAL DINNER

WEDNESDAY, NOVEMBER 10TH, 2010

HONORING MLRC'S 30TH ANNIVERSARY

### *Looking Back, Looking Forward: The Changing Business of News*

**Jill Abramson**

The New York Times

**Michael Kinsley**

The Atlantic

**Jonathan Klein**

CNN

*Moderated by*

**Jonathan Alter**

Newsweek

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***Grand Hyatt New York***

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***RSVP by Monday, October 25, 2010***

**Business Attire**

# MEDIA LAW RESOURCE CENTER

## ANNUAL DINNER — WEDNESDAY, NOVEMBER 10TH, 2010

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\* Guests at the 2010 Annual Dinner purchasing one or more tables receive complimentary ad space.

Please see next page for Dinner Program ad details.

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# *Snyder v. Phelps*: Supreme Court Considers Plea to Limit Protection for Offensive Opinions

By Robert Corn-Revere, Bruce E.H. Johnson,  
Thomas R. Burke, Elizabeth J. Soja and Rory Eastburg

In 1998, the Supreme Court ruled that a caricature of Rev. Jerry Falwell discussing a “drunken incestuous rendezvous with his mother in an outhouse” was immune from tort liability. It did so because the portrayal clearly was fictional, and the justices agreed that public figures should not recover for emotional distress caused by a publication unless it contains a false statement of fact made with actual malice, defined as “knowledge that the statement was false or with reckless disregard as to whether or not it was true.” *Hustler Magazine v. Falwell*, 485 U.S. 46, 48, 56 (1988).

The Court denied Falwell relief despite palpable discomfort with the parody. “There is no doubt that the caricature of [Falwell] and his mother published in *Hustler* is at best a distant cousin of [political cartoons], and a rather poor relation at that,” wrote Chief Justice Rehnquist, an avid collector of political cartoons. “If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm.” *Id.* at 55.

If the justices thought the Falwell ad scraped the bottom of the rhetorical barrel, however, it may be because they never met Fred Phelps and the Westboro Baptist Church. They will do so on October 6, when the Court considers whether the First Amendment allows Phelps and his church to protest near the funeral of a fallen Marine. The protestors obeyed all laws and police instructions, and they were not visible to mourners. But they carried signs with deeply offensive messages such as “Semper fi fags,” “Thank God for dead soldiers,” and “God Hates the USA.”

However, far more is at issue in *Snyder v. Phelps* than the ability of a fringe group to protest near military funerals. The Court is poised to decide whether *Hustler*’s protection for offensive but non-defamatory speech should apply when the plaintiff is a nonpublic figure but the speech involves a matter of public interest. As a coalition of twenty-two media groups recently told the Court, the answer to this question will affect reporters, editorial boards, commentators, and others in the press who must discuss nonpublic figures in the course of their work. The news media often must go beyond

the bounds of good taste in order to perform its constitutionally protected function, the groups told the Court, and journalists cannot safely breach those bounds [without](#) First Amendment protection for non-defamatory statements on matters of public concern.

## “God Hates the USA”

In March 2006, Marine Lance Corporal Matthew A. Snyder of Westminster, Maryland was killed in Iraq. His funeral, held seven days later in his hometown, brought Lance Corporal Snyder’s family face-to-face with another family – the Phelps of Topeka, Kansas.

For more than fifty years, Fred W. Phelps has been the pastor of the tiny [Westboro Baptist Church](#) (“WBC”). The church boasts sixty or seventy members, nearly all related to Phelps. The WBC is best known for its virulent homophobia, with Phelps and his followers preaching the message that God hates homosexuality and punishes America for tolerating it. The military has been a special target lately, with WBC members protesting military funerals in order to spread their message. *Snyder v. Phelps*, 580 F.3d 206, 211 (4th Cir 2009).

Though they were protesting a Marine’s funeral in Westminster in 2006, their messages were eclectic and often arguably nonsensical. Their signs ranged from “God Hates the USA” to “Pope in hell” to “Thank God for 9/11.” Later, a WBC member also posted an “epic poem” on its website, claiming that Lance Corporal Snyder’s parents “taught Matthew to defy his creator,” “raised him for the devil,” and “taught him that God was a liar.” *Id.* at 212, 222.

While the message was undoubtedly offensive, the WBC was careful to obey all time, place and manner restrictions on their protest. Maryland law mandates a buffer of 100 feet between a funeral and any demonstration. The seven WBC demonstrators complied with all police instructions and stood one thousand feet away from the funeral. Indeed, Albert Snyder did not encounter the offensive messages until after his son’s funeral, when he watched a televised news report. As for the “epic poem” published on the church’s website,

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Mr. Snyder saw it only because he searched for it on the Web several weeks after the funeral. *Id.* at 212, 230

### “Essentially ... Religious Opinion”

Albert Snyder sued the WBC and related individuals in 2006 for defamation, publicity given to private life, intrusion upon seclusion, intentional infliction of emotional distress, and civil conspiracy. The district court threw out the first two claims, finding the defamation claim was improper because Defendants’ speech was “essentially ... religious opinion” rather than a statement of fact. But the other claims went to trial, resulting in a jury verdict for \$2.9 million in compensatory damages and a total of \$8 million in punitive damages.

The district court remitted the punitive award to \$2.1 million, but otherwise did not disturb the jury verdict. *Id.* at 211-13. The Fourth Circuit reversed in 2009, finding that “regardless of the specific tort being employed, the First Amendment applies when a plaintiff seeks damages for reputational, mental, or emotional injury allegedly resulting from the defendant’s speech.” *Id.* at 218.

The panel conceded that the Supreme Court has required defamation plaintiffs to prove actual malice *only* if they are public figures or public officials. *Id.* at 218. However, the panel found that the trial court erred when it failed to consider “a separate line of First Amendment precedent that is specifically concerned with the constitutional protections afforded to certain types of speech, and that does not depend upon the public or private status of the speech’s target.” *Id.* at 222 (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990); *Hustler*, 485 U.S. at 50).

The trial court should have assessed “whether the pertinent statements could reasonably be interpreted as asserting ‘actual facts’ about an individual, or whether they instead merely contained rhetorical hyperbole.” *Id.* (citing *Milkovich*, 497 U.S. at 20; *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 293 (4th Cir. 2008)). If mere hyperbole and opinion, the statements were protected regardless of whether the Snyders were public figures.

Considering the signs, the court found that many – such as “America is Doomed,” “God Hates the USA/Thank God for 9/11,” and “Pope in Hell” – involved matters of public concern, including the status of gays in the military and the Catholic Church abuse scandals. Moreover, the signs did

“not assert provable facts about an individual, and they clearly contain[ed] imaginative and hyperbolic rhetoric intended to spark debate about issues with which the Defendants are concerned.” Some signs – such as those declaring “You’re Going to Hell” and “God Hates You” – presented a closer question, but the court concluded that “even if the reasonable reader understood the ‘you’ in these signs to refer to Snyder or his son, no such reader would understand those statements ... to assert provable facts about either of them.” The “epic poem” was the most difficult issue, because the title, “The Burden of Marine Lance Cpl. Matthew A. Snyder,” suggested that the work asserted facts about Snyder specifically. Still, the court concluded that, in context, “the Epic is a recap of the protest and ... would not lead the reasonable reader to expect actual facts about Snyder or his son to be asserted therein.” *Id.* at 222-25.

The court thus concluded that “[n]otwithstanding the distasteful and repugnant nature of the words being challenged in these proceedings, we are constrained to conclude that the Defendants’ signs and Epic are constitutionally protected.” *Id.* at 226. Judge Dennis Shedd, concurring in the judgment, would not have reached the constitutional issue on the grounds that “Snyder failed to prove at trial sufficient evidence to support the jury verdict on any of his tort claims.” Judge Shedd conceded that this ground had not been raised by the WBC on appeal, but urged the court to consider the amicus brief of the Thomas Jefferson Center for the Protection for Free Expression, which argued that “Snyder failed to establish that the Phelps intruded upon his seclusion or that the Phelps’ activities are outrageous under Maryland law.” *Id.* at 227-28 (Shedd, J., concurring in the judgment).

### Applying *Hustler* to Private Plaintiffs

To the surprise of many, the Supreme Court accepted certiorari on March 8, 2010. *Snyder v. Phelps*, 130 S.Ct. 1737 (2010). It listed three questions presented, each quite broad: (1) “Does *Hustler Magazine, Inc. v. Falwell* apply to a private person versus another private person concerning a private matter?”; (2) “Does the First Amendment’s freedom of speech tenet trump the First Amendment’s freedom of religion and peaceful assembly?”; and (3) “Does an individual attending a family member’s funeral constitute a captive audience who is entitled to state protection from

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unwanted communication?”

Snyder’s opening brief argued that the Court “has never granted absolute, categorical protection to speech that cannot ‘reasonably be interpreted as stating actual facts’” and that the Fourth Circuit’s reliance on *Hustler* was misplaced because *Hustler* dealt with a public figure plaintiff. “Where, as here, a private individual has done nothing to attach himself to a public event or controversy, there is no reason for the Court to extend absolute protection to expressive conduct that intentionally harms that individual.” Snyder added that his son’s death and funeral did not present legitimate matters of public concern and that any putative matters of public concern had no rational connection to Snyder. “The Phelps’ should not be protected from tort liability because they unilaterally associated Mr. Snyder with their selected ‘issues,’” his brief argued. See [Brief for Petitioner at 18-19](#).

Snyder also argued that he was entitled to heightened protection against offensive speech because he was a “captive audience” at his son’s funeral and “the First Amendment rights of speakers may be curtailed when the listener’s constitutional right to privacy justifies protection from the unwanted message.” Finally, and perhaps most intriguing, Snyder argued that his First Amendment rights of free exercise were violated when the Fourth Circuit “subordinated Mr. Snyder’s First Amendment rights of free exercise and peaceful assembly.” Mr. Snyder argued that “[t]he Phelps’ freedom of speech should have ended where it conflicted with Mr. Snyder’s freedom to participate in his son’s funeral, which was intended to be a solemn religious gathering.” *Id.* at 20-21.

In response, the WBC claimed that Mr. Snyder’s intentional infliction of emotional distress claim must fail simply because its speech was on a matter of public concern, and had not been proven false. “The Court has historically treated false and not-proven false speech differently, giving more protection to speech not proven false,” it said. It added that Snyder “made himself a limited purpose public figure when he spoke with the media extensively immediately after his son’s death and when he sought out the media for more coverage immediately after his son’s funeral.” As to Snyder’s invasion of privacy claim, the WBC argued it “must fail because he was not a member of a captive audience. Funerals, generally, are public events (unless specifically designated as private). This is especially true with soldiers’

funerals. So the nature of the event does not make Petitioner a captive audience,” particularly because the WBC “did not block, interfere or confront, and they were out of sight and sound.” Brief for Respondents at 18-19.

### Friendly Advice

Mr. Snyder garnered an impressive list of amici, including 42 Senators, 48 states, and the American Legion. The WBC also has several amicus supporters, including the American Civil Liberties Union, Foundation for Individual Rights in Education, the Rutherford Institute, and a group of First Amendment scholars.

A coalition of twenty-two news organizations also filed a brief asking the High Court to uphold the Fourth Circuit’s ruling. See Brief *Amici Curiae* of The Reporters Committee For Freedom of the Press and Twenty-One News Media Organizations in Support of Respondents. The amici are the Reporters Committee for Freedom of the Press, ALM Media, LLC, The American Society of News Editors, The Associated Press, The Association of American Publishers, Inc., Bloomberg L.P., The Citizen Media Law Project, Dow Jones & Company, Inc., The E.W. Scripps Company, The First Amendment Coalition, The First Amendment Project, The Hearst Corporation, The Media Institute, The National Press Club, The National Press Photographers Association, The New York Times Company, Newspaper Association of America, The Newspaper Guild – CWA, NPR, Inc., The Radio Television Digital News Association, The Society of Professional Journalists, and Tribune Company. The brief was filed by Davis Wright Tremaine LLP.

The media groups cautioned that, while the WBC’s speech was certainly offensive, the case reached far beyond the rights of Phelps and the WBC. The coalition reminded the Court that its decision will deal with an issue critical to a wide range of speakers, including members of the news media – whether a plaintiff may recover for intrusion and intentional infliction of emotional distress where the harm is based upon the publication of controversial speech about matters of public concern. After all, the Court has “consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers,” meaning that a decision to permit recovery for offensive but non-defamatory publications threatens to expand the risk of liability for news media coverage and

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commentary. *Id.* at 1-2 (citing *Citizens United v. FEC*, 130 S.Ct. 876, 905 (2010)).

On the merits, the media groups argued that the emotional debate surrounding the case has obscured four crucial facts. First, though Mr. Snyder and his supporting amici discuss time, place, and manner restrictions at length, the WBC obeyed all time, place and manner restrictions when staging their protest. Second, Mr. Snyder described himself as a “captive audience” while at his son’s funeral, but he encountered the WBC’s offensive statements underlying his claims only *later* through the media. Third, Mr. Snyder claimed that the protest of the WBC violated his First Amendment free exercise rights, but he did not identify the state action necessary to give rise to a First Amendment violation. Finally, the District Court ruled that Respondents’ statements were “essentially ... religious opinion” rather than statements of fact, a judgment which the Petitioner did not appeal. *Id.* at 5.

Once those issues are clarified, the press groups argued, it becomes clear that the district court verdict is based upon the content of the WBC’s “religious opinion” and there was therefore no way Phelps and his followers could have avoided liability short of altering the content of their speech. Such a ruling runs afoul of the principle that the First Amendment “protects the ‘prized American privilege to speak one’s mind, although not always with perfect good taste, on all public (issues).’” *Id.* (quoting *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964)). While acknowledging the temptation to search for exceptions to this rule when faced with speech as troubling as the WBC’s funeral protest, the groups urged the Court to resist it, as previous courts have done with speech ranging from Hustler’s Falwell parody to the spectacle of neo-Nazis marching among Holocaust survivors in Skokie, Illinois. *Id.* at 6.

“A ruling to the contrary in this case would have far-reaching effects on the media and other speakers,” media amici argued, because the WBC protests cannot be meaningfully distinguished from a range of offensive but protected speech. For example, Falwell himself explained the terrorist attacks of 9/11 as God’s punishment for the secularization of America. Anti-war activists sold T-shirts that superimposed “Bush Lied-They Died” over the names of fallen soldiers. And Ann Coulter attacked four widows of victims of the 9/11 terrorist attacks as “The Witches of East

Brunswick,” claiming that they were enjoying their husbands’ deaths. *Id.* at 22, 23. Against this backdrop, “[n]o intelligible standard could be devised based on the notion that the church’s activities are especially ‘outrageous’” and unprotected by the First Amendment. Such a test would be inherently subjective and arbitrary, and as the Court has noted, “[a]ny nation which counts the Scopes trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity, or of outrageousness.” *Id.* at 6-7 (quoting *Time Inc. v. Hill*, 385 U.S. 374 (1967))

Finally, a few groups filed *amicus* briefs in support of neither party. For example, the Anti-Defamation League suggested that the court may dismiss the case as improvidently granted, arguing that the case “offer[s] an extremely poor vehicle for rendering the type of expansive ruling the petition for a writ of certiorari and the certified questions appear to invite.” Brief of *Amicus Curiae* the Anti-Defamation League in Support of Neither Party, at 6. Noting that the three questions presented are framed quite broadly, the ADL argued that “the undisputed facts of this case and the decision of the Court of Appeals do not actually raise the certified questions or require this Court to address them.” *Id.*

### Conclusion

More than twenty years ago, the Supreme Court held its collective nose and ruled in favor of *Hustler*’s Falwell caricature, even while proclaiming that “public discourse would probably suffer little or no harm” by being deprived of the image of Jerry Falwell having drunken sex with his mother in an outhouse. *Hustler*, 485 U.S. at 55. Free speech advocates are hoping for a repeat performance. If the Court upholds the decision below, it will not be for lack of outrage. Rather, it will be because the High Court, like the Fourth Circuit, recognizes that “judges defending the Constitution must sometimes share [their] foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply.

It is a fair summary of history to say that the safeguards of liberty have often been forged in controversies involving not very nice people.” *Snyder*, 580 F.3d at 226 (quotation omitted).

*Robert Corn-Revere, Bruce E.H. Johnson, Thomas R. Burke, Elizabeth J. Soja and Rory Eastburg are lawyers with Davis Wright Tremaine LLP.*

# Supreme Court to Test Limits of “First Sale Doctrine” in Import Pricing Dispute

*Watchmaker's use of copyright law in controlling prices alarms resellers and librarians*

**By Itai Maytal**

The Supreme Court will determine whether manufacturers can use copyright laws to control import prices of their foreign-made goods in a case that could impact U.S. resellers of media products and libraries with imported collections, among others.

This Fall, the Court will hear an appeal from a Ninth Circuit Court of Appeals decision that granted a luxury watchmaker the right to use copyright law as a restraint on the discount sales of its imported watches. See [\*Costco Wholesale Corp. v. Omega, S.A.\*](#), 541 F.3d 982 (9th Cir. 2008), *cert. granted*, 77 U.S.L.W. 365 (U.S. April 19, 2010) (No. 08-1423). The issue before the Court is whether copyright owners like Omega – which became a copyright owner by placing a copyrighted globe design on its watches – can assert their distribution and importation rights in the U.S. over their foreign-made goods even after the goods are sold.

If the Court affirms the appellate court's ruling, it could further narrow the scope of a long-standing principle of U.S. copyright law known as the “first sale doctrine.” This doctrine, as defined in 17 U.S.C. §109, denies a copyright owner the ability to enforce his exclusive distribution rights in copies of a work “lawfully made under this title” after the initial sale or gratuitous transfer of ownership of those copies occurs. Many lower courts, relying in part on the Court's past dicta, have already interpreted this doctrine to apply only to goods lawfully made in the United States. Thus, in certain jurisdictions, anyone possessing copies of a copyrighted work made abroad may legally have to negotiate with the copyright owner every time they want to dispose of those copies.

Costco Wholesale Corporation (“Costco”), a large warehouse retailer, and a group of amicus petitioners have argued that a Supreme Court adoption of this narrow interpretation of the first sale doctrine would have negative policy consequences. It could prevent the resale by retailers like *eBay* and *Amazon.com* of gray market goods like music, movies, video games, books or other genuine copyrighted

material manufactured abroad, by giving “copyright holders an unfettered right to eliminate these secondary markets.” It could encourage more companies to move their manufacturing overseas to acquire more control over the distribution of their goods. It could lead to price discrimination against U.S. consumers. It might also leave public libraries unable to lend many books, having to first make costly and difficult determinations over whether any of the books in their collections were foreign-made and whether those books should still be circulated.

However, then Solicitor General Elena Kagan, representing the federal government, argued in her certiorari-stage brief that the concerns raised by Costco and its amici, while serious and legitimate, have not materialized and that the Ninth Circuit decision was consistent with prior findings of the Court and other Circuits. Still, the fact that the Court took the case against the recommendation of the Solicitor General could signal a new interpretation of the Copyright Act of 1976.

## **Factual Events Underlying this Lawsuit**

As outlined in Costco's brief to the Court, Omega manufactures luxury watches in Switzerland and sells them globally through a worldwide network of authorized distributors and retailers. None of these distributors appeared to be restricted by Omega from reselling its watches to anyone else in any geographic region.

For many years, Costco obtained Omega watches from the “gray market” through a series of transactions. Omega first sold its watches to authorized distributors overseas. One or more of these authorized dealers then imported these watches from places like Paraguay into the U.S. and sold them to a stateside importer, who finally sold them to Costco. This stream of commerce enabled Costco to sell “genuine brand name merchandise to its members at prices lower than its competitors,” as it gave the company access to lower

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priced goods from foreign markets.

In 2003, in response to complaints from authorized merchants regarding the alleged arbitrage practices of discount retailers like Costco, Omega began to engrave on the back of its watches a small emblem, less than five millimeters across, allegedly to use the Copyright Act to restrict the resale of its products. The copyrighted emblem consisted of three Greek “Omega” symbols inside a circle. Omega knew for many years of the “gray market” and of Costco’s activities, it did not object, presumably because the watches were authentic goods and U.S. trademark and patent laws would not necessarily block their sales. Omega appeared to develop a copyright strategy for controlling when and where its watches were sold.

The following year after Omega added its emblem to its watches and registered them with the Copyright Office, Costco purchased 117 imported Seamaster watches and sold 43 of them for \$1,299, which was more than a third less than what the brand preferred.

### Procedural History

Omega sued Costco for copyright infringement under its exclusive rights of importation and distribution under Sections 602(a) and 106(3) of the Copyright Act of 1976 respectively, stating that it did not authorize the sale of those watches, which were also “copies” of its copyrighted globe design. Costco filed a motion for summary judgment, arguing that the first-sale doctrine under Section 109(a) denied Omega the ability to enforce its exclusive distribution right and, by extension, its importation right under Section 602(a). Costco’s motion was granted by a district court, but then reversed on appeal on the grounds that Section 109(a) did not apply to foreign-made goods.



**Omega’s copyrighted Globe design.**

In deciding to reverse, a Ninth Circuit panel first determined that a 1998 Supreme Court case, *Quality King Distributors v. L’Anza Research International*, 523 U.S. 135 (1998), was not controlling. There, the Court ruled that U.S. copyright holders could not control the distribution of U.S. copyrighted goods that were imported and resold. However, the Ninth Circuit noted that *Quality King* only concerned goods manufactured in the U.S., not allegedly infringing imports that were manufactured abroad. The appellate court also noted that *Quality King*, in dicta, was consistent with its

Circuit’s position that copies of a work copyrighted under Title 17 are not necessarily “lawfully made under [Title 17]”, the language of Section 109(a), even when made by the owner of a U.S. copyright. The appellate court found that concluding otherwise, and applying the first-sale defense to goods manufactured abroad, would impermissibly extend the Copyright Act extraterritorially.

### Briefs Before the Supreme Court

In its appeal to the Supreme Court, Costco argued that the Ninth Circuit’s ruling was inconsistent with the plain text of Section 109(a) of the Copyright Act. It argued the correct meaning of the phrase “lawfully made under this title” is any copy made with the authorization of the copyright owner as required by Title 17. Here, any copies of its watches made or otherwise authorized by Omega were “lawfully made under this title” because Omega had the right to do so under 17 U.S.C. 106(1), as their copyright owner. Costco also argued that applying the first sale doctrine to goods manufactured abroad would not lead to extraterritorial application of the Copyright Act because “Omega seeks to use the Act to prevent or punish another party’s actions, contending that Costco’s distribution of its watches *in the United States* constitutes copyright infringement.”

(Continued on page 9)

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Costco and supportive amicus briefs from *eBay*, *Amazon.com*, *Google*, and consumer advocate and retail industry associations have further asserted that if the Ninth Circuit decision is affirmed, it would encourage U.S. copyright holders to transfer manufacturing operations overseas so as to prevent lawful resale of their goods at discounted prices. This could have a dramatic impact on the U.S. economy, leading to higher national unemployment. In addition, the potential infringement liability arising from this decision for after-markets of any foreign manufactured goods would deter otherwise lawful importation of authentic products, depriving customers of cheaper goods and disrupting e-commerce and trade in general. The American Library Association also submitted a brief in support of Costco, stating that the Ninth Circuit decision “threatens the ability of libraries to continue to lend materials in their collections.”

In its brief opposing the petition, Omega argued that the lower courts and prior Supreme Court rulings were not in conflict over whether goods manufactured abroad benefited from the first sale doctrine and that the plain meaning of the right of importation under Section 602(a) and the first sale doctrine under Section 109(a) support the Ninth Circuit decision. They also questioned their adversaries’ hypothetical claims that the Ninth Circuit’s decision mandated significant, adverse economic hardship and countered that applying Section 109(a) to foreign manufactured goods would disrupt

long-standing marketing practices based on market-specific distribution rights.

### Conclusion

Courts in various Circuits appear to have been following the 12-year old dicta in the Supreme Court’s *Quality King* case, which stated that goods manufactured overseas and then imported and sold are not protected by the first sale doctrine. Publishers and other content providers who wish to split foreign rights from U.S. rights so as to prevent arbitraging of the price differentials of their works between different markets may not wish to see the statute read differently. Still, the amicus briefs in the *Costco v. Omega* case from a cross-section of the business world and consumer-based community argue that it is time to reject “the place of manufacturing” distinction made by the Supreme Court in its previous analysis of the first sale doctrine. Ultimately, a new set of justices on the Supreme Court bench since the *Quality King* decision was first handed down may agree with this new collective perspective.

*Itai Maytal is an associate attorney at Miller Korzenik Sommers LLP in New York and was the 2009 First Amendment Fellow to the New York Times Company. The petitioner in Costco v. Omega is represented by Englert, Orseck, Untereiner & Sauber LLP. The respondent is represented by Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.*

## **SUPREME COURTS BRIEFS AVAILABLE ONLINE**

### **Merit Briefs in Snyder v. Phelps**

[Brief for Petitioner Albert Snyder](#)

[Brief for Respondent Fred W. Phelps, Sr., Shirley L. Phelps-Roper, Rebekah A. Phelps-Davis, and Westboro Baptist Church, Inc.](#)

[Reply Brief for Petitioner Albert Snyder](#)

### **Amicus Briefs in Snyder v. Phelps**

[Brief for Senators Harry Reid and Mitch McConnell and 40 Other Members of the U.S. Senate in Support of Petitioner](#)

[Brief for the Veterans of Foreign Wars of the United States in Support of Petitioner](#)

[Brief for the American Legion in Support of Petitioner](#)

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[Brief for the John Marshall Law School Veterans Legal Support Center & Clinic and the Chicago School of Professional Psychology in Support of Petitioner](#)

[Brief for State of Kansas and 47 Other States and the District of Columbia in Support of Petitioner](#)

[Brief for Thomas Jefferson Center for the Protection of Free Expression, The Marion B. Brechner First Amendment Project, the National Coalition Against Censorship, and the Pennsylvania Center for the First Amendment in Support of Respondent](#)

[Brief for the Center for Constitutional Jurisprudence in Support of Neither Party Suggesting Reversal](#)

[Brief for the American Center for Law and Justice in Support of Neither Party](#)

[Brief for the Anti-Defamation League in Support of Neither Party](#)

[Brief for Scholars of First Amendment Law in Support of Respondent](#)

[Brief for the Reporters Committee for Freedom of the Press and Twenty-one News Media Organizations in Support of Respondent](#)

[Brief for Liberty Counsel in Support of Respondent](#)

[Brief for American Civil Liberties Union and the American Civil Liberties Union of Maryland in Support of Respondent](#)

[Brief for The Foundation for Individual Rights in Education and Law Professors Ash Bhagwat, David Post, Martin Redish, Nadine Strossen, and Eugene Volokh in Support of Respondent](#)

### **Merits Briefs in Costco v. Omega**

[Brief for Petitioner Costco Wholesale Corp.](#)

### **Amicus Briefs**

[Brief for the Retail Industry Leaders Association, the National Association of Chain Drug Stores, Amazon.com, Inc., Gamestop Corp., Quality King Distributors, Inc., Sam's West, Inc., and Target Corporation in Support of Petitioner](#)

[Brief for Public Citizen in Support of Petitioner](#)

[Brief for the Entertainment Merchants Association, and the National Association of Recording Merchandisers in in Support of Petitioner](#)

[Brief for the the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries in Support of Petitioner](#)

[Brief for the Public Knowledge, American Association of Law Libraries, American Free Trade Association, the Electronic Frontier Foundation, Medical Library Association, and the Special Libraries Association in Support of Petitioner](#)

[Brief for Ebay, Inc., Google, Inc., NetCoalition, the Computer and Communications Industry Association, and the Internet Commerce Coalition in Support of Petitioner](#)

[Brief for Intel Corporation in Support of Petitioner](#)

[Brief for the American Intellectual Property Law Association in Support of Neither Party](#)



# President Obama Signs Federal Libel Tourism Bill

*As the 111th Congress Winds Down, Members Consider the Agenda for Next Year*

**By Kathleen A. Kirby and Shawn A. Bone**

While the communications and media agenda in this Congress going forward may be limited, the House and Senate were able to reach agreement on libel tourism legislation just prior to adjournment for the annual August recess. H.R. 2765, the "[Securing the Protection of our Enduring and Established Constitutional Heritage Act](#)" or "SPEECH Act," meant to combat libel tourism, was signed by the President on August 10, just after the two Chambers reached final agreement on a compromise proposal.

"Libel tourism" suits arise when a plaintiff pursues a defamation case in a foreign court based on activity that largely occurred in the U.S. in an attempt to avoid First Amendment hurdles. Once a judgment has been rendered, that plaintiff may return to U.S. federal court to execute the judgment. As signed by the President, H.R. 2765 would prohibit a domestic court (both state and federal) from enforcing a foreign defamation judgment unless the U.S. court determines (1) that the judgment being enforced comports with the First Amendment; or (2) that the defendant in the case would have been found liable for defamation under U.S. constitutional and state law jurisprudence. The SPEECH Act defines "defamation" as "any action or other proceeding for defamation, libel, slander, or similar claim alleging that forms of speech are false, have caused damage to reputation or emotional distress, have presented any person in a false light, or have resulted in criticism, dishonor, or condemnation of any person."

A domestic court also may refuse to entertain and enforce the judgment if it determines that the exercise of jurisdiction over the defendant by the foreign court does not comport with U.S. due process considerations. Finally, in cases where the defendant in the foreign court was an "interactive service provider" under Section 230 of the Communications Act, the court may not enforce a foreign defamation judgment if such judgment would be barred under Section 230. The plaintiff seeking to enforce the defamation judgment bears the burden of proof both on questions of jurisdiction and substantive validity of the foreign defamation judgment. In addition, a domestic defendant may seek a declaratory judgment rendering a foreign judgment repugnant to U.S. law under any of the foregoing grounds (though in this case the

defendant bears the burden of proof). Nationwide service of process is permitted for the declaratory judgment action.

An appearance by a domestic defendant in a foreign defamation case does not waive any of the foregoing arguments. The domestic defendant also is afforded certain removal powers to move an enforcement case to federal court – namely, removal is permitted where (1) a single plaintiff is from a state different from the defendant; or (2) a plaintiff is a foreign state or a citizen of a foreign state. A foreign defendant may remove an enforcement action to federal court if such defendant is being sued by a domestic plaintiff. A defendant is entitled to seek reasonable attorney's fees and costs from the plaintiff if the defendant prevails in the defamation judgment enforcement action under the grounds established by the SPEECH Act.

## Agenda for Next Year

With the 2010 mid-term elections on the horizon, Congressional legislative activity largely has ground to a halt. While a few major proposals may pass in the few remaining legislative days (including one significant media-related bill), most people on and off Capitol Hill have turned their attention to the 112th Congress and the prospective agenda leading into the presidential election in 2012. Several developments signal a move away from large policy initiatives for the Administration and toward smaller, targeted policy changes. A narrowing of the Democratic majorities also could leave Congressional leaders searching for bipartisan proposals supported by broad coalitions of Members in the House and Senate. These shifts on the Hill could mean that media and communications issues could have prominent role in the next Congress.

## Twenty-First Century Communications and Video Accessibility Act of 2010

July 26, 2010, marked the twentieth anniversary of the passage of the Americans With Disabilities Act. Several Members of Congress have seized upon the milestone to spur Congressional action on updates to make communications

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and media more accessible to persons suffering from visual, auditory, and other impairments. With that impetus, the House and Senate have taken quick action over the last two months on H.R. 3101 and S. 3304, both entitled the “Twenty-First Century Communications and Video Accessibility Act of 2010.” Both Chambers have passed competing measures that differ significantly. Expectations are that the House will use the current Senate bill as the basis for further action when the Congress returns from August recess. Reports have suggested that the House wants to pass several technical amendments to that Senate text, at which time the Senate will accept the House modifications and present a final bill to the President for his signature.

These bills would update certain provisions in the Communications Act related to communications and video accessibility. Under the legislation, communications equipment manufacturers will have to make their products more accessible under regulations to be issued by the Federal Communications Commission. In particular, manufacturers of television set-top boxes and other equipment meant to display video programming will have to comply with new rules on how persons with disabilities utilize that equipment. They also may have to update their user interfaces and on-screen guides to assist persons with visual or auditory impairments.

Video programmers and distributors also will face new guidelines and requirements for making television programming and emergency information more available to persons with disabilities. First, the FCC will have Congressional authority to reinstate its 2000 video description rules, which were rejected by the D.C. Circuit in 2002. Video descriptions are audio tracks inserted in the dialog for a program that describe key visual elements of a television program that may not be seen by persons suffering from visual impairments. Initially, such video descriptions will be limited to certain television stations and cable networks in the Top 25 designated market areas, though the bills grant the Commission the power to later expand video description requirements to other markets (and eventually to all 210 DMAs nationwide). The FCC also will have the authority to expand the number of hours of video-described programming that stations and networks must

deliver to viewers, though any expansion will be delayed for several years. Waivers from the video description rules on economic hardship grounds will be available.

Second, video programmers for the first time will have to provide closed captions for certain television programming that is delivered to consumers through delivery systems that utilize an Internet protocol backbone. Such a requirement would be imposed no later than six months after an advisory committee report on the technical challenges associated with delivery of closed captions over the Internet. Once the rules (and a concurrent phase-in schedule) are set, however, programmers should be prepared to provide Internet captions for any television programming that (a) appears on television with closed captions (b) after the new rules are in effect. The Commission will have the authority, not unlike with closed captioning on television, to exempt certain programming or video programmers from compliance with the new rules.

Third and finally, the Commission will need to update its rules concerning the delivery of emergency information to consumers. Again, an advisory committee will examine the best approach to make emergency information on television more accessible to persons with visual impairments. Once the committee has completed its work, the FCC will need to update its rules to reflect the advisory committee’s recommendations. This latter proceeding will need to be completed within 1 year of the advisory committee’s report.

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**While the communications and media agenda in this Congress going forward may be limited, the House and Senate were able to reach agreement on libel tourism legislation just prior to adjournment for the annual August recess.**

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### **Update on Other Media Issues in the 111th Congress**

Prospects for passage of most of the remaining media agenda items remain dim in this Congress. When the House and Senate return for work in September, their focus likely will be on a narrow set of items geared toward the upcoming election. While plans continue to circulate for a lame duck session after the November 2 mid-term, there is no clear agenda set for that session at this point. While one or more of the following issues could be tacked onto a larger legislative vehicle, one should expect that the 111th Congress will close without resolution and they will remain ripe for work in the 112th Congress.

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### *Free Flow of Information Act*

The Free Flow of Information Act continues to languish on the Senate calendar as final negotiations over the scope of the legislation continue. While proponents of the Act have engaged in heavy lobbying to spur Senate action, the recent furor over Wikileaks's release of sensitive reports on the Afghanistan war has made confidentiality of information a tricky issue on the Hill. The Act's legislative champions have promised that Wikileaks's activities would not be protected by any final legislation, but whether the Act can garner 60 votes to survive a filibuster is unclear.

### *Performance Rights*

Congressional action on performance rights largely has given way to private sector negotiations between the National Association of Broadcasters and the Recording Industry Association of America. The two sides have been talking all summer, at the behest of House and Senate Members, to come to a compromise on the fees terrestrial radio would pay performers for broadcasting their music. In early August, NAB released a proposed framework for a performance royalty compromise that would provide for standard royalty fees based on the net revenues of a radio station (with stations having lower net revenues paying a flat fee, and those with higher net revenues paying a percentage of their revenue to performers). These royalty rates would be set by Congress, and the Copyright Royalty Board could not alter the rates in future royalty proceedings. The compromise also would lower the rates paid for streaming and other Internet-based services.

Indications are that any compromise would be contingent upon resolution of a separate legislative matter – placement of FM-enabled radio receiver chips in cell phones and other devices. The NAB has long sought a bill that would require personal mobile devices to contain FM chips as a way to promote commercial radio and to distribute timely emergency information to consumers. The consumer electronics world, as well as several public interest groups, have opposed government-mandated FM chips as expensive and of limited utility to consumers. Reports suggest that as part of a negotiated settlement on performance royalties, the recording industry would back legislation mandating FM chips (and possibly digital radio tuners). Some reports have gone so far to suggest that the compromise on performance royalties will be contingent on FM-chip legislation.

Any performance royalty compromise will require

legislative action on the part of Congress. As mentioned in a previous legislative update, both the House and Senate have pending performance royalties bills (H.R. 848/S. 379) that are poised for action. Either bill could become a vehicle for passage of the compromise in the current Congress. At the same time, given the strong bipartisan support for the bills in their respective Committees (and their sponsorship by key Democratic Members), the bills could be added to larger legislation in the waning days of the Congress. This latter move would be strongly opposed, particularly by supporters of the "Local Radio Freedom Act" resolutions in both Chambers (H. Con. Res. 49/S. Con. Res. 14).

### *Spectrum*

While work in Congress on mandating a spectrum inventory has languished, several bills have been introduced to implement more sweeping spectrum management reform. In the Senate, S. 3610 (sponsored by Senators Olympia Snowe and Senate Commerce Committee Communications Subcommittee Chairman John Kerry) and S. 3756 (sponsored by Senate Commerce Committee Chairman Jay Rockefeller) would grant the FCC the power to conduct incentive auctions where spectrum holders who voluntarily turn over their licenses would receive a portion of the proceeds from their auction. Similar legislation has been introduced by House Energy and Commerce Communications Subcommittee Chairman Rick Boucher (H.R. 5947). Both S. 3756 and H.R. 5947 contain language indicating that the power to conduct voluntary incentive auctions does not confer upon the Commission the right to involuntarily take broadcast spectrum (or any other spectrum) for such auctions. While S. 3610 does not contain a similar restriction, it would permit the FCC and NTIA to assess yearly license fees on spectrum holders.

At the same time, several bills have been introduced to resolve the debate over what the Commission should do with the 700 MHz "D Block" public safety spectrum. On one side of the debate are those Members and public interest groups that favor licensing the D Block to public safety for creation of a nationwide broadband data network. On the other side of the debate are those that would rather the FCC auction the D Block spectrum to commercial licensees and use those funds to promote construction of a public safety data network in other public safety spectrum bands. Several bills have been introduced to reserve the D Block for public safety (including

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S. 3756, S. 3625 from Senators Joe Lieberman and John McCain, and H.R. 5081 from Representative Peter King). House Energy and Commerce Committee Chairman Henry Waxman and Representative Boucher have released a draft of a bill that would auction the D Block. Further action on these bills likely will wait until the next Congress.

#### *Other Issues*

Several other media issues that have been debated in the current Congress appear to have fallen off the legislative agenda in the remaining weeks. While some limited action on these matters might occur, passage of final legislation is unlikely. Any work done in the remaining days of the 111th Congress, however, will set the table for work in next year.

- Sunshine in the Courtroom – Both Senate and House legislation to make federal courtrooms more accessible for live broadcasts have failed to advance so far this year. The current Senate proposals await floor time in the full Senate, and companion bills in the House have not advanced out of Committee so far this Congress. It seems unlikely that the Chambers will reach agreement on legislation to permit live broadcasts of Supreme Court, Courts of Appeals, or Federal District Court proceedings this Congress. Senate Judiciary Committee Members, though, did press Associate Justice Elena Kagan on permitting additional live broadcasts on Supreme Court proceedings during her confirmation, and Justice Kagan expressed support for more live coverage of the Court.

- FOIA Reform – Additional attempts to reform the FOIA process this Congress have not advanced past the Committee stage. Senate Judiciary Committee Chairman Patrick Leahy's attempt to create a commission to study FOIA delays (S. 3111) advanced out of the Senate in May, but has yet to have a hearing in the House Committee on Oversight and Government Reform. Representative Mike Conaway's attempts to strengthen FOIA exceptions for detainee military photographs (H.R.2712, H.R.2875, and H.R. 3015) have received little attention in the House of Representatives, although Senator Joe Lieberman was able to advance a bill out of the Senate on the issue in early June (S. 1285, the "Detainee Photographic Records Protection Act of 2009"). As a reminder, S. 1285 would create FOIA exceptions for certain photographs related to detainees captured by the military between September 11, 2001, and January 22, 2009. The Secretary of Defense would have to certify that

disclosure of such photographs would endanger U.S. citizens or members of the Armed Forces or U.S. government employees deployed outside the United States for an exception to apply. Any certification would be valid for 3 years and could be renewed. A certified photograph could not be obtained through a FOIA request, but could be subject to voluntary disclosure by the Department of Defense. The Senate bill, like the House bills, are waiting for action by the House Committees on Oversight and Government Reform and Armed Services.

- Federal Anti-SLAPP Legislation – The Cohen federal anti-SLAPP legislation (H.R. 4364) has not received much attention in the House Judiciary Committee this Congress, and a Senate companion bill has not been introduced. The bill may be revived next year.

H.R. 4364 would establish absolute civil immunity for any act of petitioning the government made "without knowledge of falsity or reckless disregard of falsity." A defendant may seek dismissal of a SLAPP suit filed in federal court provided that the defendant can make a *prima facie* showing that the activity at issue in the case was an act in furtherance of the constitutional right of petition or free speech. To overcome the presumption of immunity, the plaintiff would have to demonstrate that the underlying claim is both legally sufficient and supported by a *prima facie* showing of facts to sustain a favorable judgment. Defendants subject to SLAPP lawsuits in *state* court would be able to remove the case to *federal* court based upon its characterization as a SLAPP lawsuit and seek dismissal of the case in the same manner.

#### **Looking Forward to the 112th Congress**

Any of the foregoing media issues that are left unresolved at the close of the present Congress may be resurrected next year. At the same time, the new Congress could address a number of wide-ranging communications issues that could impact media law and regulation. Of course, it is difficult to predict what Congress may address next week, nonetheless next year. And the outcome of the November mid-term elections could alter dramatically the balance of power in Congress and the legislative priorities for both the Democratic and Republican leadership. It is worthwhile, however, to consider several significant matters "teed up" for Congressional consideration, as follows:

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- A Rewrite of the 1996 Telecommunications Act – While it is common for Members in both Chambers to lament the shortcomings of the '96 Act and call for its reform, the present Congress actually has begun affirmative steps towards development of a proposal to update the Act. Staff discussions with stakeholders began in June, and are expected to continue into the Fall. A rewrite of the '96 Act could be limited in scope (mainly to questions of the FCC's jurisdiction over broadband networks), but it also could quickly expand to questions of spectrum policy, media regulation, and the future of the Commission itself.
- Broadband Regulation – Even if Congress does not begin work on a rewrite of the '96 Act, it likely will turn its attention to what power (if any) the Commission should have over broadband networks. The ongoing discussions at the Commission over re-regulating broadband transmission services as Title II common carrier services has attracted significant Hill attention. And with Chairman Genachowski aiming for a vote on his Title II re-regulation proposal in September, this fall may see Members coalesce around a legislative response to any FCC action. Regardless, debate over broader concepts like net neutrality will continue into the next Congress, and those could implicate media issues, particularly as video delivery systems migrate to online platforms.
- The Comcast/NBC Universal Merger – Although review of the proposed merger between Comcast and NBC Universal has been contained in the Executive Branch, FCC and Department of Justice action on the merger (with any concurrent conditions) could prompt Congressional response. Senator Herb Kohl already has called on both agencies to impose very strict conditions on how a merged Comcast/NBCU can negotiate for program carriage and distribute its content online, and Senator Al Franken has called for an outright rejection of the merger on competitive grounds. Any attempt by either the Commission or DOJ to place limits on content carriage or distribution (including limits on how Comcast can negotiate retransmission consent agreements for NBC owned and operated affiliates) could serve as a model for more general reform for all content owners.

Copyright – Passage of the Satellite Television Extension and Localism Act (STELA) earlier this Congress answered several lingering questions about copyright reform for television for the foreseeable future.

At the same time, however, STELA commissions additional studies on whether Congress should maintain special copyright treatment for broadcast television. Congress has shown some interest in a more general reform of the copyright system to mirror work it has done in the patent realm. Congress also may wish to respond to the recent decision by the Copyright Office to permit device “jailbreaking.” Whether these interests will generate legislation is unclear, but questions about copyright, particularly preservation of copyright on the Internet, will receive attention next year.

*Kathleen A. Kirby is a partner, and Shawn A. Bone a public policy consultant, at Wiley Rein LLP in Washington, D.C.*

## Sponsor MLRC's Annual Southwestern Conference

We would like to invite any MLRC member organization to sign on as a sponsor of our annual conference in Los Angeles, presented with Southwestern Law School's Donald E. Biederman Entertainment and Media Law Institute. The Conference this year will be held at Southwestern Law School on Thursday, January 20, 2011. It will run from 2 p.m. to 7 p.m., with a reception following the end of the last session.

The Conference will have three sessions. The first will focus on clearance issues for motion pictures, TV programs and videogames. The second will examine libel in fiction cases and cover how to vet programs and advise clients in light of disparate court rulings. The third will focus on the development and distribution of video games, looking at the process from the perspective of all involved parties -- developers, publishers, rightsholders and distributors.

We are asking each sponsor to contribute \$1500, which will be used to underwrite the costs of the Conference. Sponsors will be acknowledged in the program brochure and at the Conference. If your company or law firm is interested in possibly being a sponsor, please let us know.

Thank you.

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 212.337.0200 x206

## WikiLeaks Disclosure Affects Federal Shield Law

Supporters of the federal shield law bill announced this month they would revise the legislation after a website, WikiLeaks, disclosed over 75,000 classified documents related to the war in Afghanistan, which military officials said would jeopardize the safety of Afghan informants and undermine the war effort. Sen. Chuck Schumer (D-NY), one of the sponsors of the bill, said the revisions would make it explicit that “WikiLeaks would never qualify for any protection under the media shield legislation.”

The “Free Flow of Information Act of 2009” ([S. 448](#)), which passed the Senate Judiciary Committee in December 2009, provides a qualified privilege against disclosure of confidential sources and information received in confidence. It provides varying degrees of protection – by virtue of the tests and balances applied – for criminal and civil matters, and for cases involving national security materials.

Even though the bill defines the circumstances under

which the privilege for sources must yield to prevent harm to national security, Sen. Schumer said the revisions were necessary to “remove even a scintilla of doubt” that a website like WikiLeaks could claim the privilege.

The WikiLeaks disclosure delays the bill being put to a floor vote in the Senate. The bill that passed the Senate Judiciary Committee reflected compromise language agreed upon by the sponsors and the Obama Administration in October 2009, which ended years of opposition from the Department of Justice on the scope of the bill.

The House of Representatives passed a version of the bill in March 2009 ([H.R. 985](#)), which differs from the Senate bill in that it covers both confidential sources and unpublished information. Rep. Mike Pence (R-IN), the sponsor of the House bill, also expressed outrage at the WikiLeaks disclosure and said the website should not be able to claim protection under the shield law.

## 2010-11 UPCOMING EVENTS

### **California Chapter Luncheon Meeting**

September 16, 2010  
Southwestern Law School, Los Angeles, CA  
[For more, click here](#)

### **NAA/NAB/MLRC Media Law Conference**

September 29 - October 1, 2010  
Chantilly, VA  
[For more, click here](#)

### **MLRC Annual Dinner**

November 10, 2010  
Grand Hyatt, New York, NY  
[For more, click here](#)

### **DCS Annual Meeting**

November 11, 2010  
Proskauer Rose Conference Center, New York, NY

### **California Chapter Luncheon Meeting**

December 15, 2010  
Southwestern Law School, Los Angeles, CA  
[For more, click here](#)

### **MLRC/Southwestern Entertainment Law Conference**

January 20, 2011  
Los Angeles, CA

### **MLRC/Stanford Digital Media Conference**

May 19-20, 2011  
Los Angeles, CA

### **London Conference**

September 19-20, 2011  
(In-house counsel breakfast Sep 21st)  
London, England

# North Carolina Shield Law Ruling Protects Online Commenters

By John Bussian

On August 16, North Carolina Superior Court Judge Calvin Murphy quashed a state court subpoena in a capital murder case, *State v. Mead*, No 10CRS2160 (Gaston Co. Sup. Ct.), that would have forced Freedom Communications, Inc.'s *Gaston Gazette* and its publisher to disclose user data on their online commenters. The ruling, based on North Carolina's state Shield Law, G. S. Section 8-53.11, in the first of its kind in the Old North State.

The Gazette's Publisher, Julie Moreno, was subpoenaed by the defense to produce all information related to certain Gazette website users, who are said to have posted comments on Gazette news reports concerning the murder case. One of the comments revealed the results of a lie detector test administered to the defendant which had been verbally sealed by the trial judge. The defendant claimed that he needed the subpoenaed information to defend himself against the potential charge that he leaked the lie detector results and to oppose the prosecution's related request to revoke the defendant's bond.

## Shield Law Protects Commenters

At June 28 and July 27 hearings in the case, the defense argued strenuously that the Shield Law doesn't apply to protect user data and cited a ruling just weeks earlier to that effect in North Carolina's Vance County Superior Court. The defense theory was essentially that state Shield Law protection is unavailable because:

1. Commenters are not journalists and that, in any event,
2. The requested user data could not be obtained from other sources.

While other Freedom Communications operations have secured favorable rulings protecting online commenter identities from disclosure in Florida and Illinois state court civil cases, this was the first test of the North Carolina Shield Law's strength in a criminal case. And it turned out that the breadth of North Carolina's Shield Law, extending to all "confidential and non-confidential" information acquired by anyone "engaged in the business of gathering ... or compiling information... for distribution via a news medium," proved crucial in the court's decision to quash the subpoena.

In a two-page order, Charlotte-based Superior Court Judge Murphy brought the state Shield Law onto new terrain. He made key findings and conclusions, rejecting the defense argument that online news comments are "social-networking" tools, rather than protected information possessed by a news organization. First, Judge Murphy found the Gazette's Publisher to a "journalist" within the meaning of the Shield Law. And he went on to find that the subpoenaed information met the Shield Law's definition of protected "confidential or non-confidential" information acquired as part of the Gazette's newsgathering operations. The Shield Law applied.

That left one more step under the North Carolina law. Judge Murphy had to consider the defendant's argument that he had overcome the Shield Law's protections with proof that the user data is 1) relevant, 2) unobtainable from other sources, and 3) essential to his claims or defenses. Finding a failure of proof on the defendant's part, Judge Murphy correctly concluded that the defendant had not overcome the privilege against forced disclosure embodied in the Shield Law and granted the Gazette's motion to quash.

As of this writing, the defendant has given no indication of his intention to appeal from the order.

*John Bussian of Raleigh, North Carolina argued for The Gazette in the case.*

# Maryland Federal Court Rejects “Hot News” Misappropriation Claim

A recent decision from the District of Maryland, provides an interesting take on the “hot news” misappropriation tort. [\*Agora Financial LLC v. Samler\*](#), No. 09-1200 (D. Md. June 17, 2010). At issue in the case were financial recommendations similar to those at issue in the closely-watched *Barclays v. TheFlyOntheWall* case currently pending before the Second Circuit. In *Agora*, the court denied plaintiffs’ motion for a default judgment and dismissed their “hot news” case because, the magistrate judge found, that plaintiffs’ financial recommendations were likely “original works” within the scope of the Copyright Act, and therefore any misappropriation claim involving them was preempted by Section 301. Magistrate Judge Beth Gesner’s findings were adopted in a summary order on July 15 by Judge William Quarles.

## Background

Plaintiffs Agora Financial, LLC, Oxford Club, LLC, Taipan Publishing Group, LLC, Stansberry and Associates Investment Research, LLC, and Sovereign Offshore, LLC publish financial investment newsletters, featuring the recommendations of financial analysts for investment strategies, specific investments, and summary lists. The newsletters are only sent to paid subscribers.

Plaintiffs brought suit on Nov. 23, 2009 against defendant Martin Samler, who operates the website Tipstraders.com (which is also only available to paid subscribers). Samler’s website lists a number of different analysts; each analyst’s name links to a page that summarizes the analyst’s latest recommended investments as well as statistical information about the stocks’ performance. The website had a disclaimer that noted that “the picks above are, unless otherwise stated, entered by registered members of TipsTraders.com,” and noted that any analyst may have

recommended trades not listed, as well as different entry/exit strategies. The disclaimer also disavowed any affiliation with or endorsement by the analysts.

Samler did not respond to the complaint, and on January 22, 2010, Judge Quarles asked the magistrate to consider entry of default judgment. The magistrate accepted the complaint as true, but questioned whether the plaintiffs had pled a legitimate cause of action.

## “Hot News” Claim

Magistrate Judge Gesner studied the history, as well as the current status of the “hot news” misappropriation tort, from *International News Service v. Associated Press*, 249 U.S. 215 (1918), to the state of the doctrine after the 1976 revisions to the Copyright Act, which explicitly preempted any state cause of action if the state rights are “equivalent to any of the exclusive rights within the general scope of copyright” and the work falls “within the subject matter of copyright.”

She paid particular attention to the 1991 Supreme Court holding that facts are not copyrightable because they are not original to the author. *Feist Publ’n Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991). The *Feist* Court expressly noted that it was not overturning the 1918 *INS* decision. *Feist*, 499 U.S. at 354. She then came to the 1997 Second Circuit decision that held that hot news claims were not preempted by Section

301. *National Basketball Assoc. v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997). (She also noted that the Fourth Circuit had never recognized the *NBA* test, and that it had been explicitly rejected by Judge Quarles in *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 271 F. Supp. 2d 737 (D. Md. 2003)). The magistrate took particular note of two separate passages

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**In *Agora*, the court denied plaintiffs’ motion for a default judgment and dismissed their “hot news” case because, the magistrate judge found, that plaintiffs’ financial recommendations were likely “original works” within the scope of the Copyright Act, and therefore any misappropriation claim involving them was preempted by Section 301.**

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in *NBA*. First, the *NBA* court defined what it considered to be the essential five elements of an *INS* claim:

(i) the plaintiff generates or collects information at some cost or expense, (ii) the value of the information is highly time-sensitive, (iii), the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it, (iv) the defendant's use of the information is in direct competition with a product or service offered by the plaintiff, and (v) the ability of other parties to free ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.

*NBA*, 105 F.3d at 852. The *NBA* court noted that *INS* is not about ethics, but "the protection of property rights in time-sensitive information. The next passage in *NBA* was the one Magistrate Judge Gesner focused on:

We therefore find the extra elements – those in addition to the elements of copyright infringement – that allow a 'hot news' claim to survive preemption are: (i) the time-sensitive value of *factual information*, (ii) the free-riding by a defendant, and (iii) the threat to the very existence of the product or service provided by the plaintiff. *NBA*, 105 F.3d at 853 (emphasis added).

Magistrate Judge Gesner noted that in the three-element test, the work at issue must be facts – and noted that the *Agora* plaintiffs had not set forth any proof or pleading that the material at issue was "factual information." "Instead," she wrote, "this material appears to be 'original' works, which are copyrightable, and, therefore, not subject to protection under the *NBA*'s court formulation of the *INS* doctrine.

She noted that "most courts applying the *NBA* test have

only applied it where the material at issue was 'factual,' and therefore not copyrightable, citing *Scranton Times, L.P. v. Wilkes-Barre Publ'g Co.*, No. 3:08-cv-2135, 2009 U.S. Dist. LEXIS 17278 (M.D. Pa. Mar. 6, 2009) (facts from plaintiff's obituaries), *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974 (E.D. Cal. 2000) (time-sensitive concert information); *Fred Wehrenberg Circuit of Theatres, Inc. v. Moviefone, Inc.*, 73 F. Supp. 2d 1044 (E.D. Mo. 1999) (plaintiff's theaters' movie listings).

Notable exceptions to this reading of *NBA* included the recent *Barclays Capital, Inc. v. TheFlyOnTheWall.com*, No. 06-cv-4908, 2010 U.S. Dist. LEXIS 25728 (S.D.N.Y. Mar. 18, 2010) (stock investment recommendations) and *X17, Inc. v. Lavandeira*, 563 F. Supp. 2d 1102 (C.D. Cal. 2008) (copyrighted photographs).

The magistrate reviewed the pleadings and found that there was no allegation that the work at issue was "factual," and accordingly recommended the court deny the motion for default judgment. She also considered a Lanham Act claim, but held plaintiffs had failed to state a claim there as well because the disclaimers on the defendant's website made clear that the website was in no way affiliated with plaintiffs or their employees, the analysts.

Judge Quarles accepted the magistrate's recommendations in a summary order on July 15. The recent *Barclays* decision only focused on the five-factor *NBA* test, and did not consider the three-prong test. Although many amicus briefs have been filed in the *Barclays* dispute – some arguing that *Feist* overruled *INS* and obliterated any protection for facts -- not one amicus seems to argue that investment recommendations are within the scope of copyright. (Instead, argues the brief of Google and Twitter: "The state law tort of 'hot news' misappropriation is unenforceable because the Copyright Clause has been construed to ban the removal of facts from the public domain, because application of 'hot news' misappropriation obstructs this constitutional mandate, and because states are precluded from implementing laws that interfere with constitutional guarantees." Brief for Amici Curiae Google Inc. and Twitter, Inc. In Support of Reversal at 17, *Barclays Capital, Inc. v. TheFlyOnTheWall.com, Inc.*, No. 10-1372-CV (2d Cir. June 22, 2010).) Oral argument for the *Barclays* case was held on August 6; a decision is still pending.

# Ninth Circuit Reinstates Libel Claim Against ABC Over Out-of-Context Video Clip

## *Masson v. New Yorker Analysis Applied to Use of Clip*

The Ninth Circuit reinstated a libel claim over the use of an out-of-context video clip on ABC's "20/20" news magazine show, holding that the district court erred by granting an anti-SLAPP motion to dismiss on the ground of substantial truth. *Price v. Stossel*, No. 09-55087, 2010 U.S. App. LEXIS 17671 (9<sup>th</sup> Cir. Aug. 24, 2010) (Schroeder, Fisher, Smith, JJ.).

At issue was a video clip that appeared to show a preacher boasting of his wealth. In fact, the preacher was only speaking hypothetically. Relying on *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), and its analysis of altered quotations, the court held that the truth or falsity of the video clip should have been determined by comparing the excerpt used to the whole. The fact that the preacher is actually extremely wealthy did not, according to the court, make the broadcast clip substantially true.



**At issue was a video clip that appeared to show a preacher boasting of his wealth. In fact, the preacher was only speaking hypothetically.**

### Background

A March 2007 "20/20" broadcast – hosted by correspondent John Stossel – highlighted criticisms of wealthy preachers and their use of donations to fund their wealthy life styles. Stossel introduced the broadcast with the exclamation "Enough!" The segment included a short video clip from a sermon given by Dr. Frederick Price, the leader of

the Ever Increasing Faith Ministries, in Crenshaw, California. Price is a self-proclaimed "prophet of prosperity" who preaches that God is generous and wants believers to prosper financially.

At the beginning of the segment, Stossel asked: "They preach the gospel of giving to God. But how much of what you give do they keep for themselves?" It included clips of several televangelists and questions about their use of

donations. It also contained brief interviews with some of Price's congregants who praised him and his use of their donations. Stossel then introduced the clip at issue stating "and yet her pastor, Fred Price, boasts that" (video clip begins) "I live in a 25-room mansion. I have my own \$6 million yacht. I have my own private jet, and I have my own helicopter, and I have seven luxury automobiles." Stossel

then stated: "At least he tells people about it, but many preachers don't advertise how well they live."

The clip, however, was taken from a sermon in which Price was not boasting about his own wealth, but speaking hypothetically about a rich person who is spiritually unfulfilled. In May 2007, ABC broadcast a retraction acknowledging the mistake.

Price sued ABC, John Stossel and the producer of the segment for libel and intentional infliction of emotional distress based on the "20/20" broadcast, as well as promos and a short version of the piece used on Good Morning

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America. Price also named as defendants two critics of his church, the Trinity Foundation and Ole Anthony, alleging they were the sources for the video clip.

### Procedural Skirmishes

Price first sued ABC in Los Angeles, then dismissed and re-filed in New York federal court. That court dismissed and transferred the case back to California, finding that Price was essentially forum-shopping in an attempt to avoid the California anti-SLAPP statute. *Price v. Stossel*, No. 07 CV 11364, 2008 WL 2434137 (S.D.N.Y. June 4, 2008).

ABC then moved to dismiss the complaint under the California anti-SLAPP statute on the basis of substantial truth. The motion was limited to the issue of truth to avoid Price's request to take discovery on actual malice. In an unpublished 2008 decision, a California federal district court granted the motion to strike. According to the Ninth Circuit decision, the district court "compared the assets listed in the Clip (a 25-room mansion, a \$6 million yacht, a private jet, a helicopter, and seven luxury automobiles) with assets that Price actually enjoys, and concluded that the allegedly defamatory Clip was substantially true." The district court also dismissed Price's claim that the broadcast falsely implied that he was engaging in criminal misconduct.

### Ninth Circuit Decision

On appeal, the Ninth Circuit undertook a lengthy analysis of *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), concluding that its analysis of altered quotations should apply to an out-of-context video clip.

Even if a fabricated quotation asserts something that is true as a factual matter, the fabrication may nonetheless "result in injury to reputation because the manner of expression or even the fact that the statement was made indicates a negative personal trait or an attitude the speaker does not hold." [*Masson* at 511.] These observations are particularly relevant here because Price's quotation was published

using a medium in which the viewer actually sees and hears the plaintiff utter the words. 2010 U.S. App. LEXIS 17671 at \*23-24.

Thus according to the court, Price could establish falsity because "the video quotation of Price's statement materially changed the meaning of Price's words. Price did not make any representations about his own wealth when he delivered the sermon that was excerpted in the Clip ...Price is telling a story about someone entirely different."

The court, though, went on to emphasize that its decision was limited to the narrow question of falsity addressed on the anti-SLAPP motion. "We express no opinion as to whether Price, on remand, will be able to meet his burden to show a probability of prevailing on the other elements of his express defamation claim, including damages and intent."

### Dismissal of Implied Defamation Claims Affirmed

The Ninth Circuit, however, affirmed dismissal of plaintiff's claims that the broadcast falsely implied that he was engaged in criminal and dishonest conduct, and that his management of the Church lacked transparency.

Price argued that Stossel's exclamations of "Enough!" and the statement that he was "taking on the case," falsely implied that criminal proceedings had or should be instituted. The Ninth Circuit disagreed, finding it unreasonable to infer any allegations of criminal wrongdoing from those statements. Instead, "taking on the case," simply meant that a reporter "is taking on a newsworthy issue, not exposing a crime."

Finally, the court held that plaintiff's claim that the broadcast falsely implied a lack of transparency was waived because it was not pursued in the district court. However, the court added that it would have affirmed dismissal because allegations of a lack of transparency were based on disclosed facts and therefore protected.

*Plaintiff is represented by Glassman, Browning, Saltsman and Jacobs, Inc., Beverly Hills, CA, and Greines, Martin, Stein & Richland, LLP, Los Angeles, CA. ABC, John Stossel and Glen Ruppel are represented by White O'Connor Fink & Brenner LLP, Los Angeles, CA. The Trinity Foundation, Inc. and Ole Anthony are represented by Lewis Brisbois Bisgaard*



# Perils of Reality TV: Court Refuses to Dismiss State Law Claims

Another federal judge in Chicago has refused to dismiss state-law claims for invasion of privacy and right of publicity against the producers and broadcasters of the reality television series *Female Forces*. In *Best v. Malec*, No. 09-cv-7749 (N.D. Ill.), Judge Matthew Kennelly issued an order on June 11 denying, in large part, the defendants' motion to dismiss; on July 14 he largely denied the defendants' motion for reconsideration of that decision.

The rulings come on the heels of a similar decision by Judge Shadur in the similar case of *Frederick v. City of Naperville*, No. 09-cv-6837 (N.D. Ill.), which was covered in the February 2010 issue of the MediaLawLetter.

## Background

Eran Best was arrested in Naperville, Illinois, in February 2008, for driving with a suspended license, and police found marijuana and drug paraphernalia in a subsequent search of her car. Her arrest was filmed and appeared in an episode of the television series *Female Forces*, which featured female police officers in Naperville and aired on the Biography Channel.

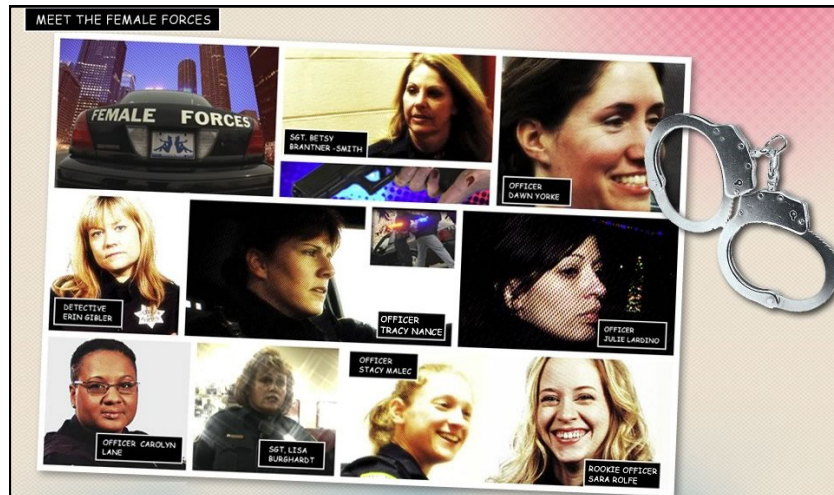
Best alleges that she was held for more than thirty minutes after her initial traffic stop so that a female officer and *Female Forces* film crew could arrive. The *Female Forces* episode, in addition to showing the arrest, also includes a partial shot of a computer screen in one of the police officers' cars, which appears on screen for less than two seconds. The screen displays Best's name (misspelled), phone number, height and weight, driver's license number, and information regarding previous traffic citations.

Additionally, in the episode, after Best's arrest, the female officer, Stacy Malec, tells the camera, "Do I feel sorry for her? No. Pretty little blond girl, 25 years old driving a

Jaguar – Yeah, that's Naperville." Best did not sign any release, and she alleges that she was told by the other police officer that the footage would not be used if she did not sign a release.

Eran Best brought six claims against six defendants: claims for a federal civil rights violation; violation of the Illinois Right of Publicity Act; invasion of privacy by publication of private facts; intentional infliction of emotional distress; violation of an Illinois statute concerning data privacy, the Illinois Personal Information Protection Act (PIPA); and violation of the federal Driver's Privacy

Protection Act. The defendants are the two police officers involved in the arrest, the City of Naperville, the production company (A Day With, Inc. a/k/a the Greif Company), and A&E Television Networks, LLC. The Defendants filed a joint motion to dismiss the state-law claims.



**Best, arrested for driving with a suspended license and drug possession, alleges that she was held for more than thirty minutes after her initial traffic stop so that a female officer and *Female Forces* film crew could arrive.**

## Decision

Judge Kennelly granted the motion to dismiss only as to the PIPA claim and refused to dismiss the remaining claims. As to the PIPA claim, which was only alleged against the City of Naperville, the court agreed with the City's argument that the statute does not provide for a cause of action against a municipality.

As to the right of publicity claim, the defendants argued that *Female Forces*, which shows the actual operations of law enforcement, is not for "commercial purposes" under the Illinois Right of Publicity Act, and they argued that the statute should be interpreted to avoid running afoul of First Amendment protections. The court rejected that argument on two grounds. First, the court ruled that the show was for a

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commercial purpose because it is broadcast by a for-profit enterprise, along with commercial advertisements, on a cable channel for which viewers indirectly pay subscription fees.

The court did not address the remainder of defendants' arguments regarding the interpretation of the statute, stating that they had not been "squarely presented" – although the defendants devoted four pages of briefing to the issue. The court also suggested without explanation that there might be some question whether the principles expressed by the Supreme Court in cases concerning "books and newspapers" would apply to a television show and did not address the Illinois Supreme Court's decision in *Leopold v. Levin*, in which that court first recognizes a common-law right of publicity but refused to find the right violated by a book and movie that were fictionalized accounts of a famous crime and trial.

The court refused to dismiss the private facts claim for two reasons. First, the court incorrectly found – although the plaintiff had never alleged or argued this – that one of the previous arrests that appears on the computer screen in the episode occurred when the plaintiff was a minor. Second, although the court properly held that the individual facts visible on the computer screen – name, age, height and weight, driver's license number, and past traffic violations – are not the sort of intimate and personal details that Illinois

law recognizes as "private" for the purpose of this tort, the court refused to dismiss the claim because of the possibility that the disclosure of the combination of those facts would raise "identity theft risks" for Best. The court did not address the Illinois cases cited by the defendants that specifically reject such a theory in the context of intrusion upon seclusion claims following data breaches.

On the emotional distress claim, the court found sufficient allegations of extreme and outrageous conduct based on the combination of the police officer's statements regarding Best's designer tastes and the allegedly broken promise that the footage of her would not be used.

The court also rejected the defendants' alternative request for a more definite statement of the date on which the episode was broadcast. The plaintiff brought her invasion of privacy and right of publicity claims outside the Illinois's one-year statute of limitations for such claims.

The defendants filed a motion for reconsideration or for interlocutory appeal. On July 14, Judge Kennelly denied that motion except as to the publication of private facts claim, for which he requested that the plaintiff file a response brief. The court has yet to rule as to that count.

*Plaintiff is represented by Thomas A. Zimmerman, Jr. and Adam M. Tamburelli of Zimmerman Law Offices, P.C. Defendants are represented by Steven P. Mandell, Steven L. Baron and Shari R. Albrecht of Mandell Menkes LLC.*

## Madison Square Garden Fouls Out In Tortious Interference Lawsuit Against Sports Publication

By Charles D. Tobin

Unsupported allegations that a journalist induced prospective lenders to reveal Madison Square Garden's bullish revenue projections fail to state a claim for tortious interference with contract, a New York trial court has held. *Madison Square Garden, L.P. v. SportsBusiness Journal, American City Business Journals, Inc. and Daniel Kaplan*, Index No. 603544/09 (N.Y. Sup. Ct. June 24, 2010).

### Background

The corporate owner of Madison Square Garden sued *SportsBusiness Journal* and a reporter following the weekly trade publication's November 16, 2009 report on the

Garden's efforts to secure up to \$500 million in financing. The article did not name the sources of the information about the discussions with lenders. The publication also reported that in seeking the loan for a refurbishment project, the Garden's owners had projected a doubling of cash flow in the year after the renovations – a signal that higher ticket prices may be expected.

At the time of the article and filing of the complaint, the Garden was owned by a subsidiary of Cablevision Systems Corp. In February 2010, while the complaint was pending, the subsidiary was spun off into a separate public company, Madison Square Garden, Inc., with shares trading on the NASDAQ exchange. Also after the complaint was filed, the

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Garden succeeded in obtaining financing.

The Garden sued *SportsBusiness Journal* for tortious interference, not with the loan agreement or the public offering (which successfully closed after the article was published), but for allegedly inducing the employees of potential lending institutions to breach confidentiality agreements. According to the complaint's allegations, prospective lenders signed confidentiality agreements, and, when attending a telephone conference to discuss the financing plans, their employees had to click through another confidentiality agreement on a web portal.

The Garden pleaded a series of unsupported allegations in an effort to establish their central claim that the *SportsBusiness Journal* reporter induced his sources to breach these agreements. The complaint attempted to raise a nefarious inference from what plaintiff characterized as the reporter's "well-documented pattern and practice of relying on confidential information provided by unnamed 'banking sources' and 'finance sources' in publishing articles that disclose sensitive information about proposed financing transactions involving professional sports leagues, teams, and venues."

Based on the reporter's cultivation of his sources, the complaint then jumped to the conclusion that "there is no plausible explanation of these events other than that" the reporter "actively encouraged and induced" the sources "to divulge the information and projections regarding MSG that were discussed" during the conference call with lenders. Finally – although the company was already planning to go public, and the Garden is one of the most historic arenas in the country and affects the daily lives of thousands of New Yorkers – the complaint alleged that the information about the financing "is neither newsworthy nor a matter of public interest."

### **Motion to Dismiss**

The publication and the reporter moved to dismiss for failure to state a claim. They argued that the complaint's allegations were entirely speculative and simply accused the reporter of having cultivated good sources. The motion to dismiss also asserted that gathering information on a matter of unquestionable public concern constituted a "lawful

justification" that vitiates claims of tortious interference with contract in New York. The defendants further argued that the damages claim was entirely unsupported. Finally, the dismissal motion asserted that the complaint was a clear end run around the state's ironclad shield law, which absolutely protects the identity of confidential sources.

At a hearing this past March, Justice Shirley Werner Kornreich repeatedly questioned the Garden's counsel on their damages theory, noting that the article had not interfered with the Garden's ability to obtain the loan and that the article contained information relevant to then-pending spin off. The judge also expressed concerns that the lawsuit may be "just a wolf dressed up in sheep's clothing," and that the Garden's real purpose "is to find out who it was that disclosed this information."

Ultimately, however, her June 24 Decision and Order dismissing the complaint rested on the "conclusory" nature of the allegations of inducement:

MSG's failure to allege facts indicating that Kaplan knew of the confidentiality agreements, when and how the communications took place, what was said or even which lenders Kaplan allegedly prompted to breach the agreement is insufficient to plead its cause of action. Speculation that unnamed parties gave information upon Kaplan's prompting cannot support the complaint's conclusory inference that "[t]here is no plausible explanation . . . other than that Defendant Kaplan actively encouraged and induced [his sources] to divulge the information and projections[.]

Decision and Order at 6. The plaintiff did not appeal the dismissal of the complaint.

*Charles D. Tobin and Thomas J. McIntosh, of Holland & Knight LLP, Washington, D.C. and Sean C. Sheely of Holland & Knight's New York City office, represented defendants SportsBusiness Journal, American City Business Journals, Inc., and Daniel Kaplan. Plaintiff Madison Square Garden, L.P. was represented by Thomas A. Clare, P.C., Eunice H. Eun, and Abigail Diaz-Pedrosa of Kirkland &*

# Missouri And Eighth Circuit Adopt Different Targeting Tests In Internet Jurisdiction Cases

By Michael Nepple

The Appeal

Within the span of one month, the Missouri Court of Appeals and the Eighth Circuit Court of Appeals issued opinions adopting differing interpretations of the *Calder* “express aiming” test applied to Internet activities. In *Baldwin v. Fischer-Smith*, No. SD 30235, 2010 WL 2662977 (Mo. Ct. App., Jul. 6, 2010), a case of first impression in the state, the court adopted a broad, plaintiff-friendly reading of the express aiming prong of the *Calder* jurisdictional test.

After reviewing numerous federal and state court opinions applying the *Calder* test to internet-based defamation claims, the *Baldwin* court selected the formulation recently announced by the Seventh Circuit Court of Appeals in *Tamburo v. Dworkin*, 601 F.3d 693 (7th Cir. 2010). One month after *Baldwin*, however, the Eighth Circuit Court of Appeals, applying *Calder* to a factually similar case, adopted a far more narrow interpretation of the conduct that constitutes express aiming.

## Background

The facts in *Baldwin* are simple. Plaintiffs are Missouri residents who breed and sell Chinese Crested dogs. Plaintiffs do business as the “Whispering Lane Kennel” and claim to have won numerous industry awards, including the “Best of Breed” at the Westminster Dog Show. Defendants are Arizona and Pennsylvania residents who compete against the plaintiffs in the dog-eat-dog world of breeding Chinese Cresteds. Defendants created the website, [www.stop-whisperinglane.com](http://www.stop-whisperinglane.com). Plaintiffs sued, claiming the website defamed them and their business. (The court’s opinion did not describe the content of the website that landed the defendants in the dog house). The website disclosed that plaintiffs’ kennel was located in Ava, Missouri, and that plaintiffs were the owners. Internet users visited the website 2,500 times in a one-year period; at least 25 visits were Missouri residents who worked as dog breeders or exhibitors. The *Baldwin* defendants asked the trial court to call off the dogs and dismiss the plaintiff’s petition for lack of personal jurisdiction under *Calder*. The trial court dismissed and the plaintiffs appealed.

The key issue on appeal involved the application of the express aiming prong of *Calder v. Jones*. *Calder* set out a three-prong test for determining personal jurisdiction: (1) intentional conduct; (2) expressly aimed at the forum state; (3) with the defendant’s knowledge that the effects – the plaintiff’s injury – would be felt in the forum state. Numerous courts have applied the pre-internet *Calder* test to cases involving internet defamation. This has led to inconsistent interpretations of exactly what “expressly aimed” means.

The *Baldwin* court reviewed more than seventy state and federal cases before adopting the Seventh Circuit’s analysis of the express aiming prong set forth in *Tamburo v. Dworkin*, 601 F.3d 693 (7th Cir. 2010), which involved the operator of a software business . . . for dog breeders.

In *Tamburo*, the Seventh Circuit noted circuit splits in the interpretation of both the first and second *Calder* prongs. As to the express aiming prong, the split was between courts that require only that the defendants targeted their conduct at a plaintiff known to reside in the forum as opposed to those courts that require the forum be the focal point of the defendants’ targeted activity. Courts applying a more plaintiff-favorable analysis include *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000). Other courts are more restrictive. See *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1075 n. 9 (10th Cir. 2008). Adopting a broad view, the Seventh Circuit held that “[t]ortious acts aimed at a target in the forum state and undertaken for the express purpose of causing injury there are sufficient to satisfy *Calder*’s express-aiming requirement.” The court remanded the case for further proceedings – apparently because every dog must have his day – in court.

## Of All the Gin Joints . . . Why Tamburo???

The *Baldwin* court set out five reasons why it adopted *Tamburo* as the leading authority:

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1. it rejected the line of cases that view *Calder* as requiring that the state be the targeted forum, viewing them as inconsistent with the Supreme Court's language in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985), that the "'fair warning' requirement [of the Due Process Clause] is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum";
2. even reading *Calder* as to require express targeting of both the plaintiff and the forum state, each was present in the case;
3. the court didn't find the concern that internet activities might expose a defendant to liability in numerous jurisdictions a compelling reason to decline jurisdiction;
4. in a non-internet based intentional tort case, the Missouri Supreme Court had recently adopted a broad jurisdictional view with respect to communications with the forum; and
5. the court suggested that the defendants shouldn't have picked a fight in Missouri if they didn't want the fight settled in Missouri. (Perhaps it really is best to let sleeping dogs lie).

#### The Eighth Circuit Weighs In

Perhaps feeling left out of the great canine debate, in *Johnson v. Arden*, No. 09-2601, 2010 WL 3023660 (8th Cir., Aug. 4, 2010), the Eighth Circuit addressed the *Calder* targeting test in a Missouri case involving . . . cat breeders. Contrary to the state appellate court's opinion in *Baldwin*, the Eighth Circuit applied a narrower interpretation of the *Calder* test to affirm the district court's dismissal for lack of personal jurisdiction. In *Johnson*, the plaintiffs had brought suit based upon allegedly defamatory postings on an interactive website, [www.ComplaintsBoard.com](http://www.ComplaintsBoard.com). The Eighth Circuit concluded that a post that stated the plaintiffs "operated from Unionville, Missouri, where they killed cats, sold infected cats and kittens, brutally killed and tortured unwanted cats and operated a 'kitten mill' in Unionville, Missouri" was aimed at plaintiffs, but was not aimed at Missouri. *Id.* at \*10. Applying the *Calder* test, it held that the defendant had not "uniquely or expressly" aimed her statements at Missouri. According to the court, the inclusion of "Missouri" in the offending post was "incidental" and not for the purpose of

having the consequences felt in Missouri. Further, the Eighth Circuit held that the *Calder* test is not dispositive of the jurisdictional issue, but merely an "additional factor" to consider when evaluating a defendant's relevant contacts with the forum state in cases involving intentional torts.

Given that *Johnson* was decided after *Baldwin*, the Missouri Court of Appeals might be persuaded to adopt a different *Calder* interpretation, particularly in light of its disclaimer that it did not consider *Tamburo* to be "the gold standard for all cases and situations" involving personal jurisdiction in internet cases.

*Michael L. Nepple is a partner at Thompson Coburn, LLP in St. Louis, Missouri.*

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# ESPN Scores Knockout Punch in Defamation Suit Brought by Don King

By Yehudah L. Buchweitz

On June 30, 2010, the Fourth District Court of Appeals in Florida unanimously affirmed the summary judgment granted to ESPN in a \$2.5 billion action for defamation brought by boxing promoter Don King and his company Don King Productions, Inc. The action was based on several statements made in a program about King, which aired in 2004 as part of ESPN Classic's *SportsCentury* series. The court held that the plaintiffs failed to raise a triable issue of fact that the challenged statements were published with actual malice. [\*Don King Productions, Inc. and Don King v. ESPN, Inc., et al.\*](#), No. 4D08-3704 (Fla. 4th DCA June 30, 2010) *aff'g* No. 05-000524(02) (Fla. 17th Jud. Cir. July 28, 2008). (King originally also sued The Walt Disney Company, ABC Cable Networks Group, and Advocate Communications, Inc., but dropped those entities after they filed a separate motion for summary judgment.)

On July 28, 2008, after discovery that included depositions of ESPN's producers and King, the trial court granted summary judgment to the defendants. On appeal, King brought several challenges, attempting to show that there was an issue of fact which required a trial on actual malice. The lawsuit also originally included a claim for false light invasion of privacy, and the Circuit Court granted summary judgment on that claim as well, but King did not appeal that ruling in light of the Florida Supreme Court's holding that Florida does not recognize that cause of action. However, after reviewing the summary judgment order *de novo*, and applying United States Supreme Court and Florida authority to the summary judgment evidence, the Court of Appeals rejected each of King's arguments.

## Court of Appeals Decision

The court first rejected King's argument that ESPN acted with actual malice because it "harbored ill will towards him and intended to portray him in a negative light." At the center of King's case were a series of emails in which ESPN producers discussed portraying King as a "greedy conniver," a "huckster," a "thug," and an "evil mob-connected guy," which King argued showed that ESPN intended to create a

negative theme about him. The court, however, concluded that these emails did not establish actual malice, as they were not evidence of deliberate or reckless falsification.

The court concluded that "ill will" is not synonymous with actual malice. The court determined that even if a media defendant appeared to intend to create a negative theme, as long as the media defendant did not know the statements were false or act in reckless disregard for their truth or falsity, there was no actual malice.

The court held: "An intention to portray a public figure in a negative light, even when motivated by ill will or evil intent, is not sufficient to show actual malice unless the publisher intended to inflict harm through knowing or reckless falsehood." The court further held that ESPN was not required to present positive statements about King to "balance" any negative statements, or to "search until it found someone" to defend King.

The court next addressed King's argument that ESPN's sources were so incredible that ESPN acted in reckless disregard for the truth in relying on them. The Program contained interview excerpts from dozens of individuals, but King challenged statements from just two interviewees: Don Elbaum and Jack Newfield. Don Elbaum is a boxing promoter who has known King for decades. Jack Newfield, who died shortly before the Complaint was filed, was a writer who covered King for several years and whose works on King included numerous newspaper articles, a biography, and a documentary in PBS's *Frontline* series.

As to Elbaum, the court rejected King's evidence as "neither clear nor convincing." Elbaum was the source for four statements: two concerning events in which he partnered with King in the 1970s, and two concerning a private conversation he had with a boxer concerning King. The court held that Elbaum was not incredible simply because he had once been convicted of tax evasion: "a single criminal conviction more than a decade before publication does not require a publisher to question a source's credibility on all matters." The court also rejected King's claim that he and Elbaum had a "contentious relationship." King had pointed to an event that occurred in 1973, but presented no evidence

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to suggest that this event created a “long lasting tension between himself and Elbaum.”

In his interview with ESPN, Newfield had described an encounter he had with King at a press conference in which Newfield said that King threatened to kill him. King argued that the press conference was captured on video in Newfield’s PBS documentary, and while the video depicted a tirade in which King called Newfield “dirt” and a “scumbag,” no threat was included in the video. However, the court concluded that ESPN was reasonable in believing Newfield’s account, and believing that the threat may have been made off camera.

The court also concluded that it was not unreasonable for Newfield to have perceived a threat, especially given his other consistent statements in prior publications, including that one of King’s associates told him “better watch your back, Jack. This is Don’s town.” The court also pointed out that because King declined ESPN’s efforts to interview him, the fact that ESPN did not have access to King “is a factor in support of ESPN’s reliance on Newfield’s account.”

Finally, King argued that ESPN acted with actual malice because it should have done more to investigate the challenged statements. However, the court held “the failure to investigate, without more, does not constitute actual malice” and that actual malice “requires more than a departure from reasonable standards of journalism.”

Nevertheless, the court concluded that ESPN interviewed people with direct knowledge of the events in question and “tried to interview King to no avail.” The undisputed summary judgment evidence showed that ESPN had interviewed 45 individuals, including King’s friends, his former employees, boxers he had promoted, law enforcement officials who had investigated him, fellow boxing promoters, and sports journalists who had covered him for years.

The undisputed evidence also showed that ESPN made numerous and repeated efforts to interview King, but King never agreed to sit for an interview. The court concluded that because there were no obvious reasons to doubt the challenged statements, there was no actual malice. King did not seek further review from the Florida Supreme Court.

*Yehudah Buchweitz is a senior associate at Weil, Gotshal & Manges LLP. Along with partners James W. Quinn, David J. Lender, R. Bruce Rich, Edward Soto and Christopher R.J. Pace, he represented ESPN both at the trial court and on appeal.*



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# Illinois Trial Court Applies Anti-SLAPP Statute To Comments on Internet Message Board

By Steve Mandell, Steve Baron, and Shari Albrecht

The Circuit Court of Cook County recently granted a motion to dismiss under Illinois's anti-SLAPP statute, the Citizen Participation Act (CPA), 735 ILCS 110, in a case involving comments on an Internet message board. *Hammons v. Society of Permanent Cosmetic Professions, et al., No. 10-1638 (Ill. Cir. Ct.)*

The case involves the field of "permanent cosmetics," or tattoo make-up. The plaintiffs, Sandi Hammons and her company Premier Pigments, first filed suit in Florida against the Society of Permanent Cosmetic Professionals (SPCP) and five of its members, alleging defamation based on comments on Internet message boards and statements at industry conferences. When the defendants objected on jurisdictional grounds, the plaintiffs filed essentially the same claims in state court in Illinois, where the SPCP is headquartered and its executive director, one of the individual defendants, resides.

The Illinois complaint alleged over forty separate statements in various different contexts by many different people. The alleged statements ranged from assertions of fact (e.g., "Premier Pigments has training classes with 200 students") to the more abstract (e.g. "Sandi Hammons is the anti-Christ," and "Karma is going to get Sandi Hammons and her redneck demons"). The statements were alleged to have been posted on Internet message boards and blogs and stated in training classes and by attendees at SPCP conferences.

The complaint suffered from many deficiencies – all the alleged statements were barred by Illinois's one-year statute of limitations, the vast majority of the alleged statements were not attributed to any of the defendants, the allegations did not satisfy Illinois's fact pleading requirement, and many of the alleged statements were opinion or were subject to an innocent construction. Four of the individual defendants are not Illinois residents and would not be subject to personal jurisdiction in the state. The defendants filed motions to

dismiss on those grounds and also filed a motion to dismiss pursuant to the CPA.

The CPA provides immunity for "[a]cts in furtherance of the constitutional rights to petition, speech, association, and participation in government . . . , regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome." 735 ILCS 110/15. "Government" includes not only government bodies and their employees but also "the electorate." 735 ILCS 110/10. Once a defendant asserts this immunity, the CPA requires dismissal unless the plaintiff "produce[s] clear and

convincing evidence that the acts of the moving party are not immunized from, or are not in furtherance of acts immunized from, liability by [the CPA]." 735 ILCS 110/20(c).

In the CPA motion, the defendants argued that the plaintiffs' claims are barred because the alleged statements relate to issues of public health and safety. The SPCP is a membership organization that works to set standards for technicians, trainers, and product suppliers in the permanent cosmetic industry. The plaintiffs are involved in manufacturing pigments and training technicians. The defendants provided evidence that the plaintiffs had previously manufactured and distributed pigments that caused disfiguring allergic reactions and led to

a widespread produce recall and they argued that the statements alleged in the plaintiffs' complaint concerned safety practices in the industry, the adequacy of training programs, and compliance with governmental standards. For example, among the complaint's allegations were statements about the allergic reactions and the plaintiffs' cooperation with the FDA.

The CPA requires that the court decide a CPA motion within 90 days after the motion is filed. Six weeks after defendants filed their motions to dismiss – perhaps realizing

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**The plaintiffs first filed suit in Florida against the Society of Permanent Cosmetic Professionals (SPCP) and five of its members, alleging defamation based on comments on Internet message boards and statements at industry conferences. When the defendants objected on jurisdictional grounds, the plaintiffs filed essentially the same claims in state court in Illinois, where the SPCP is headquartered and its executive director, one of the individual defendants, resides.**

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that the CPA and Illinois's one-year statute of limitations made a bad forum for their claims – the plaintiffs moved to stay the case or to voluntarily dismiss. The defendants successfully resisted those motions, and the court set a short briefing and hearing schedule on the CPA motion with less than three weeks remaining in the 90-day period. The court (Judge Martin Agran) allowed the plaintiffs to take the deposition of the SPCP's executive director, in which the plaintiffs attempted to establish that none of the statements alleged in the complaint had been communicated directly to a governmental body. The plaintiffs' response brief focused on that fact and also asked the court to rule that the defendants had failed to make a "prima facie" showing that the CPA

should apply.

In reply, the defendants argued that the CPA imposes no "prima facie" requirement and that the plaintiffs had failed to provide the required "clear and convincing evidence," particularly in their disregard for the CPA's inclusion of the "electorate" in its definition of "government." In a brief two-page order, the court accepted the defendants' second argument, and granted the CPA motion based solely on the ground that the plaintiffs had failed to meet their evidentiary burden. The court did not rule on any of the defendants' other motions to dismiss, which had not been fully briefed.

*Steve Mandell, Steve Baron, Rebecca Edwards, and Shari Albrecht of Mandell Menkes LLC represented the defendants. George Vurdelja and Jeffrey Halldin of Harrison and Held,*

## New York Trial Court Dismisses Libel and Negligence Suit Over Facebook Insults

A New York trial court dismissed defamation and negligence claims over insulting Facebook comments created by a group of high school students about one of their classmates. [\*Finkel v. Dauber\*](#), No. 02414/09, 2010 WL 2872874, at \*3 (N.Y. Sup. July 22, 2010) (Marber, J.). The court held that the tasteless comments were merely "puerile attempts by adolescents to outdo each other" and did not constitute defamation.

The court also rejected plaintiff's attempt to hold the students' parents responsible for the postings. Under New York law, a negligent supervision of a child claim requires an allegation that the parent entrusted the child with a dangerous instrument. The court declined to declare a computer "in the hands of teenagers" a dangerous instrument.

### Background

In February 2009, Plaintiff Denise E. Finkel sued five former high school classmates, their parents and Facebook. At issue were postings to a private 10-member Facebook group called "90 Cents Short of a Dollar," whose listed purpose is "just for fun" and "inside jokes." The group is a "secret" Facebook group, meaning it is not accessible to other Facebook members without invitation and the group does not appear on a Facebook member's profile.

The plaintiff was not mentioned by name, but referred to as "11<sup>th</sup> Cent" in postings and in a photograph altered to give her devil horns. Among the statements at issue were that "11<sup>th</sup> Cent" acquired AIDS while on a cruise to Africa after having sex with a horse; acquired AIDS after sharing needles with different heroin addicts and having sex with a baboon; acquired AIDS, crabs, and syphilis after sex with a male prostitute. One posting claimed that "11<sup>th</sup> Cent" morphed into the devil after acquiring STDs.

The claims against Facebook were dismissed under Section 230 of the Communications Decency Act. [\*Finkel v. Facebook, et al.\*](#), No. 102578/09 (N.Y. Sup. Ct. Sept. 16, 2009). Plaintiff acknowledged that Facebook was an interactive computer service provider within the meaning of Section 230, but argued that Facebook was the creator of the content because its terms of use give it ownership of content posted by users. The trial court dismissed this argument as "meritless."

### Defamation and Negligence Claims

In July, the trial court granted summary judgment to the students and their parents. The court began by pointing out that to be actionable, a statement of fact is required and

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“rhetorical hyperbole” or “vigorous epithet” will not suffice. Citing *Greenbelt Cooperative Publishing Assn. v. Bressler*, 398 U.S. 6, 14 (1970). Moreover, determining whether the statements at issue are fact or opinion is the job of the court and the “dispositive inquiry...is ‘whether a reasonable [reader] could have concluded that [the articles were] conveying facts about the plaintiff.’” *Finkel* at \*3 (quoting *Gross v. New York Times Co.*, 623 N.E. 2d 1163, 152 (N.Y. 1993)).

Considering the context of the postings, the court concluded that:

“a reasonable reader, given the overall context of the posts, simply would not believe that the Plaintiff contracted AIDS by having sex with a horse or a baboon or that she contracted AIDS from a male prostitute who also gave her crabs and syphilis, or that having contracted sexually transmitted diseases in such manner she morphed into the devil. Taken together, the statements can only be read as puerile attempts by adolescents to outdo each other. ...The entire context and tone of the posts constitute evidence of adolescent insecurities and indulgences, and a vulgar attempt at humor. What they do not contain are statements of fact.” *Finkel* at \*3.

Moreover, the court found that there was no cause of action against the parents for negligent supervision, absent an allegation that they entrusted their children with a dangerous instrument which caused harm to a third party. The court found that “to declare a computer a dangerous instrument in the hands of teenagers in an age of ubiquitous computer ownership would create an exception that would engulf the rule against parental liability.” *Finkel* at \*3

Finally, to the extent the postings constituted “cyber bullying,” the court found that New York does not recognize cyber or internet bullying as a cognizable tort action.

*Plaintiff was represented by Altschul & Altschul in New York. Defendants were represented the firms Savona, D’Erasmus & Hyer, LLP in New York; Morris, Duffy, Alonso & Faley in New York; Ketover & Assoc. in Garden City, NY; and Acito, Klein Candiloros, P.C. in New York.*



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# Court Refuses to Apply Discovery Rule to Libel Suit Against Website

## *Lawyer's Claim Barred by Statute of Limitations*

A Pennsylvania federal district court dismissed as time-barred a lawyer's libel and related claims against a popular law website, refusing to apply the discovery rule to toll the statute of limitations. [\*Wolk v. Olson\*](#), No. 09-4001, 2010 Lexis 77694 (E.D.Pa. Aug. 2, 2010) (McLaughlin, J.).

### Background

The plaintiff Arthur Alan Wolk is a well-known aviation attorney. The defendants, Walter K. Olson, Theodore H. Frank and David M. Nieporent, are authors and editors for the website [www.overlawyered.com](http://www.overlawyered.com), which highlights litigation cost issues. The website was started in 1999 and is thought to be the oldest law website.

At issue was an April 2007 posting that criticized Wolk's role in an air crash litigation where he was the subject of a contempt hearing. See [\*Taylor v. Teledyne\*](#), 338 F. Supp. 2d 1323 (N. Ga. 2004). The article stated in relevant part:

Did Wolk's client suffer from a reduced settlement so that his attorney could avoid having the order used against him in other litigation? [I]f, as seems to be the case, the N.D. Ga. failed to [disclose a potential conflict of interest], one really wishes courts would do more to protect fiduciaries of plaintiffs' attorneys before signing off on settlements.

Wolk alleged that he discovered the article two years later in April 2009. After his demand for a retraction was refused he sued defendants in state court for defamation, false light, and intentional interference with prospective contractual relations. The case was removed to federal court and the defendants moved to dismiss the case arguing that Pennsylvania's one-year statute of limitations for defamation applied to all three claims.

### Claims Are Time-barred

On the motion to dismiss, the court found that plaintiff had too broadly read and interpreted key Pennsylvania case law regarding the discovery principle. While *Fine v. Checcio*, 870 A.2d 850 (Pa. 2005), and *Wilson v. El-Daief*, 964 A.2d 354 (Pa. 2009), allowed for tolling in certain situations, these situations are limited to hard-to-discern injuries. "If the rule is intended for hard-to-discern injuries, it would be at odds with a cause of action based upon a defamatory statement disseminated through a mass medium, like a website, and received by tens of thousands of readers. ...applying the discovery rule here would undermine the purpose of the statute of limitations." *Wolk*, 2010 Lexis 77694, at \*7.

The court thoroughly surveyed other decisions rejecting the discovery rule in media libel cases. See, e.g., *Shively v. Bozanich*, 80 P.3d 676, 688-89 (Ca. 2003) ("[A]pplication of the discovery rule to statements contained in books and newspapers would undermine the single publication rule and reinstate the indefinite tolling of the statute of limitations).

The court also quickly dismissed plaintiff's claim that "fraudulent concealment" tolled the statute. The court found that

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# Tenth Circuit Holds That Section of Uruguay Round Agreements Act Which Restored Certain Foreign Copyrights in the U.S. Does Not Violate First Amendment

By Al J. Daniel, Jr.

In the appeal by the government, the United States Court of Appeals for the Tenth Circuit somewhat surprisingly reversed the district court's holding that Section 514 of the Uruguay Round Agreements Act, 17 U.S.C. § 104A ("URAA"), violated the First Amendment rights of the plaintiffs. *Golan v. Holder*, 609 F.3d 1076 (10th Cir. 2010), decided June 21, 2010 ("*Golan II*"). The Court also rejected plaintiff's cross-appeal which asserted that Section 514 was unconstitutional on its face because, in plaintiffs' view, once in the public domain, always in the public domain.

This decision is surprising because the Court's prior remand decision on this question seemed to almost direct the

district court to find Section 514 unconstitutional. On remand, the district court did just that. *Golan v. Gonzalez*, 501 F.3d 1179 (10th Cir. 2007) ("*Golan I*"). The Court's prior decision also affirmed the district court's holding that the Sonny Bono Copyright Term Extension Act ("CTEA"), Pub. L. No. 105-298, §§ 102(b) and (d), 112 Stat. 2827-28 (1998) (amending 17 U.S.C. §§ 302, 304), violated the "limited Times" portion of the Copyright Clause, U.S. Const. Art. I, § 8, cl. 8, relying upon *Eldred v. Ashcroft*, 537 U.S. 186 (2003); *Kahle v. Gonzales*, 487 F.3d 697 (9th Cir. 2007), which rejected similar claims. The Tenth Circuit's decision in *Golan I* was previously reviewed in the MediaLawLetter.

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that plaintiff alleged no facts that would demonstrate that the defendant actively or passively misled the plaintiff or hid from him the existence of the article.

Finally, in a footnote, the court noted that plaintiff's claim for intentional interference was entirely based on his defamation claim. Thus, the one-year statute of limitations applied to the contract claim, even though it would otherwise be subject to a two-year limitations period. *Citing Evans v. Philadelphia Newspaper*, 601 A.2d 330, 333-34 (Pa. Super. Ct. 1991) ("[T]he one year statute of limitation for defamation cannot be circumvented by cloaking such a cause of action in other legal raiment.").

*Defendants were represented by Siobahn Katherine Cole and Michael N. Onufrak of White & Williams LLP in Philadelphia. Plaintiff was represented by Andrew J. Defalco and Paul R. Rosen of Spector Gadon & Rosen, P.C. in Philadelphia.*

Overlawyered.com is thought to be the oldest legal website.

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See Toby Butterfield and Lisa Digernes, *Tenth Circuit Imposes Constitutional Scrutiny on Copyright Restoration Act*, MLRC MediaLawLetter Sept. 2007 at 33.

However, in the Tenth Circuit's second decision, it largely adopts the government's analysis of the conflicting interests of the parties and the appropriate application of the governing principles and cases.

Plaintiffs are individuals and entities in various fields whose businesses entail using artistic public domain works, including the performance, distribution, and sale of such works. They claimed that once foreign works entered the public domain, the plaintiffs had First Amendment rights to use these public domain works which were violated by restoration of copyright in the works under Section 514 of the URAA.

Congress enacted Section 514 to implement the United States' obligations under the Berne Convention and the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPs"). Section 514 restores U.S. copyrights for foreign works which had entered the public domain for specific reasons: (1) non-compliance with U.S. formalities; (2) unprotected subject matter; and (3) ineligible nationality. Copyrights were not restored for works whose terms of protection had expired. Congress also provided some protection for "reliance parties," like plaintiffs, who had exploited foreign works covered by Section 514 prior to restoration of their copyrights. Owners of restored copyrights must file a notice with the Copyright Office within twenty-four months of restoration or serve notice on reliance parties of their restored rights.

Reliance parties can continue to use the works and sell or dispose of them for twelve months after such notice without liability, but they cannot make new copies during that time. Reliance parties who have created derivative works based on a restored work can continue to exploit the derivative work if they pay the owner of the restored work "reasonable compensation" and can obtain a court determination of reasonable compensation if the parties cannot agree. The plaintiffs argue that these protections for reliance parties are

insufficient to trump their claimed First Amendment rights.

The Tenth Circuit, the lower court, and the parties all agreed that Section 514 was a "content-neutral regulation" of speech because Congress enacted this provision to satisfy international obligations of the United States under the Berne Convention and TRIPs and to protect U.S. authors' rights abroad.

For a content-neutral provision like Section 514, the Court held it must apply an "intermediate scrutiny" test of constitutionality: the statute "'will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.'" *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) ("*Turner II*"). *Golan II*, 609 F.3d at 1083.

Applying the intermediate scrutiny test, the Court held that "the government has demonstrated a substantial interest in protecting American copyright holders' interests abroad, and Section 514 is narrowly tailored to advance that interest ..." *Golan II*, 609 F.3d at 1083-1084. (The Court expressly stated that it was not reaching the government's other asserted governmental interests, *i.e.*, compliance with the Berne Convention and remedying "historic inequities of foreign authors who lost or never obtained copyrights in the United States." *Golan II*, 609 F.3d at 1083

n. 6). The Court reversed the lower court's conclusion that the statute was unconstitutional.

In balancing plaintiffs' claimed First Amendment rights against the government's interests, the Tenth Circuit acknowledged the Supreme Court's statement that "not all First Amendment interests are equal. See *Eldred*, 537 U.S. at 221." *Golan II*, 609 F.3d at 1083 n. 6. Here, plaintiffs asserted the unlimited right to use other people's expression, not to protect their own.

In upholding the constitutionality of Section 514, the Court held that: (1) the government's interest in protecting the rights of American copyright owners abroad is a substantial interest; (2) the political branches' judgment that Section 514 would remedy a real harm involves a judgment

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**This decision is surprising because the Court's prior remand decision on this question seemed to almost direct the district court to find Section 514 unconstitutional. On remand, the district court did just that.**

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concerning foreign affairs and is entitled to special deference from the courts; (3) substantial evidence supports the government's conclusion that enactment of Section 514 would remedy the potential harms, even if the Court might have reached a different conclusion; and (4) Section 514 "does not burden substantially more speech than necessary ...," recognizing that it does not have to be the least-restrictive option in order to pass constitutional muster. *Id.* at 1090.

Plaintiff's cross-appeal presented a facial attack on the constitutionality of Section 514, asserting that the government could never remove a work from the public domain, regardless of the importance of the government's interest. *Golan II*, 609 F.3d at 1094. The Court pointed out that it had already rejected this argument in *Golan I*, relying upon the Supreme Court's decision in *Eldred*. *Id.* at 1095. The Court noted that plaintiffs provided no support for their contention that the First Amendment or any other provision "draws such absolute, bright lines around the public domain,

and we are aware of no such authority." *Id.* at 1095.

\* \* \*

**Prediction.** The courts have not heard the last of *Golan et al.* They surely cannot resist filing a petition for a writ of certiorari, seeking a final word from the Supreme Court on the fate of Section 514 and a ruling on whether the public domain, once entered, is forever sacrosanct.

*Al J. Daniel, Jr. is a partner at Cowan, DeBaets, Abrahams & Sheppard LLP, New York, New York. The Attorney General and the Register of Copyrights were represented by John S. Koppel, Tony West, David M. Gaouette, and William Kanter, Department of Justice, Washington, D.C.; plaintiffs were represented by Anthony T. Falzone and Julie A. Ahrens at the Center for Internet and Society, Stanford Law School, Stanford, California; Hugh Q. Gottschalk and Carolyn J. Fairless of Wheeler Trigg O'Donnell LLP, Denver, Colorado; and Lawrence Lessig, Harvard Law School, Cambridge Massachusetts. A number of amici curiae filed briefs in the case.*

## Tenth Circuit: Colorado's Criminal Libel Law Cannot Be Applied To Parody Or Satire

By Steven D. Zansberg

The United States Court of Appeals for the Tenth Circuit recently held that a Colorado district attorney who authorized a search warrant in pursuit of evidence for a criminal libel prosecution was not entitled to qualified immunity because the law was clearly established that satire and parody are not actionable as libel under civil or criminal law. [\*Mink v. Knox\*](#), No. 08-1250 (10<sup>th</sup> Cir. July 19, 2010) (Seymour, Gorsuch, O'Brien, JJ.).

The decision in *Mink v. Knox* marked the second time this case was before the Tenth Circuit. Previously, the MLRC and several other organizations had asked the Tenth Circuit to find Colorado's criminal libel statute unconstitutional, but in 2008 the court affirmed the district court's finding that Thomas Mink, a student at the University of Northern Colorado who authored "*The Howling Pig*" satirical website, did not have standing to challenge the statute. *See Mink v. Suthers*, 482 F.3d 1244 (10<sup>th</sup> Cir. 2007), *cert. denied*, 128 S. Ct. 1122 (2008).

### Student's Parody Website Offends The Professor

Mink's website, *The Howling Pig*, was operated out of his home, using a computer that Mink shared with his mother. The website featured a regular column "from the editor," who was a fictional character named "Junius Puke." The column displayed obviously doctored photos of an actual UNC professor, Junius Peake, wearing dark sunglasses and a Hitler-like mustache. After learning of the parody, Professor Peake contacted the local District Attorney and swore out a complaint alleging that he was a victim of criminal libel. A police detective opened an investigation, reviewed the website, and concluded that Mink was its editor.

Based upon this information, the detective prepared a search warrant affidavit and presented it to Deputy District Attorney Susan Knox, who reviewed and approved the search warrant affidavit. After a magistrate judge approved the

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search warrant, Greeley, Colorado police searched the home where Mink lived and confiscated his personal computer and additional written materials referencing *The Howling Pig*.

After the search, Mink obtained counsel and demanded return of his computer and papers, arguing that the criminal libel statute could not be applied against him under these circumstances. Having received no response, Mink sought assistance of the ACLU of Colorado, and filed the present civil rights action in federal court, demanding the return of his seized materials, a declaration that Colorado's criminal libel statute is unconstitutional, and asserting additional civil rights claims for violation of his Fourth Amendment rights by the District Attorney and Assistant District Attorney Knox.

### **Computer Returned; DA Promises Not to Prosecute**

After the civil rights complaint was filed, on January 9, 2004, the U.S. District Court issued a Temporary Restraining Order precluding the D.A. from initiating prosecution of Mr. Mink under Colorado's criminal libel statute and commanding the forthwith return of Mink's computer and all contents thereof that were seized from his home. Shortly thereafter, the District Attorney issued a "No File" letter in which he declared he would not file any charges against Mink, and by agreement of the parties the district court vacated the TRO.

In its earlier ruling, the U.S. District Court found that the No File letter from the D.A. mooted Mink's challenge to the constitutionality of Colorado's criminal libel statute (or, alternatively, caused him to lack standing). The Tenth Circuit Court of Appeals' earlier decision reversed the District Court's finding that Assistant District Attorney Knox was entitled to absolute immunity for conduct as a judicial officer, and remanded for a determination whether she was entitled, nevertheless, to qualified immunity for her actions in authorizing the search of Mink's home. See *Mink v. Suthers*, 482 F.3d 1244, 1258- 63 (10<sup>th</sup> Cir. 2007).

### **Trial Court: DA Entitled to Qualified Immunity**

On remand, the District Court Judge Lewis T. Babcock found that Knox was entitled to qualified immunity because a reasonable prosecutor could have determined that the statements published in *The Howling Pig*, though couched as parody and satire, implied verifiable facts and were therefore actionable. *Mink v. Knox*, 566 F. Supp.2d 1217, 1226-27 (D. Colo. 2008). Judge Babcock ruled that it was also not clearly established law that statements of satire or parody concerning a private figure on a matter of private concern are immune from liability as defamation. *Id.* Judge Babcock also found that although the search warrant violated the Fourth Amendment's particularity requirement, it was not clearly established that Knox's authorization of the affidavit lacking particularity violated the Fourth Amendment. *Id.* at 1228-29.

### **Parody of Private Figures is Immune from Liability or Prosecution**

The Tenth Circuit reversed the District Court's finding that Knox was entitled to qualified immunity. The court first determined that Knox was a "causative factor" in the violation of Mink's Fourth Amendment rights, by having reviewed and authorized the warrant for the search of his computer and premises.

The Court next determined that Mink's constitutional rights were violated by the issuance of a search warrant that lacked probable cause. The Court determined that there was no "probable cause to believe that Mr. Mink's publication of *The Howling Pig* violated the Colorado criminal libel statute."

The court stated that "[i]t goes without saying that a government official may not base her probable cause determination on an 'unjustifiable standard,' such as speech protected by the First Amendment."

The court then turned to the question whether Mink's speech was protected by the First Amendment. Citing the well-known series of Supreme Court rulings beginning with *New York Times v. Sullivan*, 376 U.S. 254 (1964), and continuing on through *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), the Court recognized that the First Amendment imposes significant limitations upon sanctioning

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**The Court held, "[n]o reasonable prosecutor could believe it was probable that publishing such statements constituted a crime warranting search and seizure of Mr. Mink's property."**

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of speech that is alleged to cause harm to the reputation of individuals.

Notably, the court declared (in a footnote) that “[c]ivil and criminal libel cases ‘are subject to the same constitutional limitations,’” citing *Herbert v. Lando*, 441 U.S. 153, 157, n.1 (1979) (citing *Garrison v. Louisiana*, 379 U.S. 64 (1964)). Among those precedents is the doctrine recognizing that “parody, fantasy, rhetorical hyperbole, and imaginative expressions ‘that cannot reasonably [be] interpreted as stating actual facts about an individual,’” are not actionable, citing the *Bresler-Letter Carriers-Falwell* line of cases. Thus, the court declared “[e]ven false statements of fact are protected from a defamation claim [or, as held here, a prosecution for criminal libel] if any reasonable person would recognize the statements as parody.”

Before turning to the text of Mink’s writings to determine whether it constituted “parody,” the Tenth Circuit noted that “[a]lthough the Supreme Court has not yet squarely addressed whether fantasy, parody, rhetorical hyperbole, or imaginative expression is actionable in a case where a plaintiff is neither a public figure nor the speech on the matter of public concern, this Circuit and at least one other Circuit have done so.” The court cited its prior holding in *Pring v. Penthouse Int’l Ltd.*, 695 F.2d 438 (10th Cir. 1982), and the First Circuit’s ruling in *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122 (1st Cir. 1997).

The court held that “[w]hether a statement could be reasonably understood as a fact is a question of law.” Examining the statements in the context of *The Howling Pig* publication, the court next determined that the publication was “a satirical spoof.” The court noted that *The Howling Pig* humorously altered Mr. Peake’s photograph to create the character of Junius Puke, its “editor,” and that another photo was altered to depict the professor made up as a character in the rock band KISS. Another column allegedly attributed to Mr. Puke stated:

This will be a regular bitch sheet that will speak truth to power, obscenities to clergy, and advice to all stoners sitting around watching Scooby Doo. This will be a forum for the pissed off and disenfranchised in northern Colorado, basically everybody. I made it to where I

am through hard work, luck, and connections, all without a college degree.

The Court noted that the *Howling Pig* editorials even contained an express disclaimer that Junius Puke was not to be confused with the UNC Monfort Distinguished Professor of Finance, Mr. Junius “Jay” Peake.

Reviewing the statements in their context, the Court concluded that “[n]o reasonable reader would believe that the statements in that context were said by Professor Peake in the guise of Junius Puke, nor would any reasonable person believe they were statements of facts as opposed to hyperbole or parody.” Accordingly, the Court held, “[n]o reasonable prosecutor could believe it was probable that publishing such statements constituted a crime warranting search and seizure of Mr. Mink’s property.” Because the *Pring* (and *Levinsky’s*) rulings were published decisions, the law at the time Ms. Knox approved the search warrant affidavit was clearly established, and she is therefore not entitled to qualified immunity. (The Court also found that Ms. Knox violated Mr. Mink’s rights by authorizing an overly broad search, not bounded by the requisite particularity requirement of the Fourth Amendment.)

### Judge Gorsuch Concurs, on More Limited Grounds

Circuit Judge Neil M. Gorsuch filed a separate concurring opinion in which he stated that the District Court’s finding of qualified immunity must be reversed because *Pring v. Penthouse Int’l Ltd.*, 695 F.2d 438 (10th Cir. 1982), clearly established that “[t]he First Amendment precludes defamation actions into parody, even parody causing injury to individuals who are not public figures or involved in a public controversy.” According to Judge Gorsuch, that holding, binding on all officials operating within the Tenth Circuit, “answers the probable cause question at issue, and is thus the beginning and end of my inquiry on that question.” Judge Gorsuch would avoid any discussions whether *Pring* was correctly decided or would be embraced by the Supreme Court.

### Analysis: Differing Judicial Opinions Serve to Limit the Scope of Colorado’s Criminal Libel Statute

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### and Demonstrate Its Unconstitutionality

An interesting law review article (or articles) will undoubtedly be written addressing what is left of Colorado's criminal libel statute in the wake of two Tenth Circuit opinions which, at least on their face, declined to reach the constitutional validity of that statute. In its more recent ruling, the Tenth Circuit engrafted an "assertion of provably false fact" element onto the criminal libel statute. In fact, there is nothing textually or historically in the statute that lends itself to that interpretation (or judicial amendment).

To the contrary, Colorado's statute, enacted in 1883, criminalizes the publication of any "written instrument, sign, pictures, or the like, any statement or object tending to blacken the memory of the one who is dead, or to impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive . . .," and does not contain any requirement that a statement be false. Indeed, subsection (2) of the statute makes clear that truth "shall be an affirmative defense . . . *except* [in cases of] libels tending to blacken the memory of the dead and libels tending to expose the natural defects of the living." (emphasis added).

Thus, Justice Quinn, dissenting in *People v. Ryan*, 806 P.2d 935, 942 (Colo. 1991) (Quinn, J., dissenting), pointed out, correctly, that "[a] person arguably would be subject to criminal prosecution for the knowing publication or dissemination of a defamatory statement even though the statement was true and the person making the statement knew it to be true." Because Colorado's criminal libel statute contains no element of falsity (and explicitly rejects truth as an affirmative defense in some cases), arguably, it was not unreasonable for a district attorney to conclude that statements of pure opinion, parody, or satire are actionable under that statute (though not under the First Amendment). Indeed, that (among several other things) is what renders the statute unconstitutional.

It is also curious that this Tenth Circuit panel relied upon the protection for parody in the context of a private figure "victim" on a matter purportedly of purely private concern. (The District Court had determined that the facts pleaded in the Complaint did not establish, as a matter of law, that Professor Peake was a public official or public figure or that *The Howling Pig* addressed matters of public concern). The

prior Tenth Circuit panel expressly stated that "[t]he parties concede on appeal that Supreme Court precedent makes enforcement of the Colorado criminal libel statute unconstitutional under the facts as alleged here. *The parties have conceded Professor Peake is a public figure. . . .*" See *Mink v. Suthers*, 482 F.3d at 1257 (emphasis added).

Because Colorado's Supreme Court had previously "partially invalidated" the criminal libel statute – holding it could not be applied against a public official or public figure on a matter of public concern, see *People v. Ryan*, 806 P.2d 935 (Colo. 1991) – no prosecution could be brought for Mink's publication concerning a professor at a publicly funded university (who had also published several columns in the local newspaper, prior to Mink's satirical attacks upon him).

Thus, arguably, even unquestionably verifiably false assertions of fact, e.g., that Professor Peake was guilty of actual crimes, would not be subject to prosecution under clearly established Colorado law.

All in all, the more recent Tenth Circuit ruling, like the earlier ruling which dodged the question of the statute's constitutionality, are helpful published opinions that should prompt any district attorney or police detective to have serious reservations before proceeding in furtherance of *any* criminal libel prosecution.

Unfortunately, however, there remains in place a statute providing for up to two years imprisonment for publishing information on matters of public concern that precludes the assertion of truth as an affirmative defense in certain identified prosecutions (and makes truth an affirmative defense in all other cases).

Moreover, the continuing ambiguity about the reach and scope of this statute, as evidenced by the conflicting, confusing, and internally inconsistent rulings of several federal and state court judges, demonstrates rather forcefully that the statute is hopelessly vague; perhaps someday in the future judges will acknowledge that inevitable truth, and strike this antiquated and speech-chilling statute from the books once and for all.

*Steven D. Zansberg is a partner with Levine Sullivan Koch & Schulz, L.L.P. in Denver, CO. Thomas Mink was represented by Marcy G. Glen and A. Bruce Jones of Holland & Hart LLP, Denver, CO; and Mark Silverstein of the American Civil Liberties Union Foundation of Colorado.*

# Divided Ninth Circuit Panel Rules “Stolen Valor Act” Unconstitutional

## *False Statements Can Be Remedied By More Speech Instead of Punishment*

The Ninth Circuit, in an interesting 2-1 decision this month, struck down as unconstitutional a federal statute making it crime to falsely claim to be a military service medal winner. [\*U.S. v. Alvarez\*](#), No. 08-50345, slip op. 11849, 11850 (9th Cir. Aug. 17, 2010). (Nelson, Smith, Bybee, JJ). The majority reasoned that false statements of fact are not categorically outside the protection of the First Amendment – and the statute was not akin to a law against defamation. Instead, the court reviewed the Stolen Valor Act, 18 U.S.C. § 704 (b), (c)(1) (2006), under a strict scrutiny standard, holding that it was a content-based regulation of speech, albeit false speech, that was not narrowly tailored to the government’s interest in deterring false claims about military service awards. While the majority accepted that the government has a compelling interest to deter such claims, it found that “more speech” rather than criminal punishment could achieve that goal.

In a detailed dissent, Judge Bybee argued that false statements of fact do not enjoy constitutional protection and he accused the majority of rewriting established First Amendment law.

### **Background**

At a July 2007 board meeting of the Three Valley Water District Board of Directors in Pomona, CA., newly seated Director Xavier Alvarez stood to introduce himself, stating “I’m a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I’m still around.”

In fact, Alvarez had never been in the Marines and was not awarded a Congressional Medal of Honor. Instead, he had a long history of lying about his background, including claiming he was a helicopter pilot during the Vietnam War, had rescued the U.S. Ambassador in Iran during the Iranian hostage crisis, was a professional hockey player, and was married to a Mexican movie starlet. *Alvarez*, slip op. at 11851-11852. The district court noted that Alvarez lives in

“a make-believe world where [he] just make[s] up stories all the time.”

After complaints to the FBI, Alvarez was indicted on two counts of violating the Stolen Valor Act for falsely claiming to be a Medal of Honor winner. Alvarez was the first person to be charged and convicted under the current version of the Act.

The Act provides that “Whoever falsely represents himself or herself verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces ... shall be fined under this title, imprisoned not more than six months, or both.” 18 U.S.C. § 704(b) (2006). The prison term is enhanced to one year if the decoration involved the Congressional Medal of Honor, among others. U.S.C. § 704 (c) (2006).

The district court denied Alvarez’s motion to dismiss the indictment on claims that the Act is unconstitutional both on its face and as applied to him. Alvarez pleaded guilty to the first count, reserving his right to appeal the First Amendment question. He was sentenced to pay a \$100 special assessment, a \$5,000 fine, to serve three years of probation and to perform 416 hours of community service. Alvarez appealed to the Ninth Circuit, bringing both facial and as-applied challenges to the validity of the Act under the First Amendment.

### **False Statements of Fact Protected**

The court first addressed the government’s contention that “Congress may prohibit false statements of fact unless immunity has been carved out or should be carved out because the First Amendment requires protection of some falsehood in order to protect speech that matters.” *Alvarez*, slip op. at 11857.

The court countered this, stating:

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“the right to speak and write whatever one chooses — including, to some degree, worthless, offensive, and demonstrable untruths — without cowering in fear of a powerful government is, in our view, an essential component of the protection afforded by the First Amendment ... we presumptively protect all speech against government interference, leaving it to the government to demonstrate, either through a well-crafted statute or case-specific application, the historical basis for or a compelling need to remove some speech from protection (in this case, for some reason other than the mere fact that it is a lie.)” *Id.* at 11860.

The court then found that the Act does not fall within any of the categorical exceptions to the First Amendment, such as defamation or fraud. The government relied heavily on the statement from *Gertz v. Welch*, 418 U.S. 323, 339-340 (1974) that “there is no constitutional value in false statements of fact.” The court pointed out that this exception applies to false and *defamatory* statements of fact.

In the instant case, there was no intent to harm another individual. Rather, the court found that the most obvious reason people lie about receiving military honors is to bring themselves honor and acclaim. *Alvarez*, slip op. at 11867. And while the government claimed the integrity of the awards are harmed by false statements about military honors, the court pointed out that “the right against defamation belongs to natural persons, not government institutions or symbols. *Id.* at 1868.

Moreover, the harm caused by the false speech could be fixed with more speech, such as publicizing the names of false claimants. Similarly, the Act could not be viewed as targeting fraud or impersonation since it lacked elements of materiality, intent to defraud, and injury. “We are aware of no authority,” the court stated, “holding that the government may, through a criminal law, prohibit speech *simply* because it is knowingly factually false.”

The majority also stressed that there is an affirmative constitutional value in at least some knowingly false statements, such as satirical commentary – citing by name The Onion, The Daily Show, and The Colbert Report as

contributing to the public debate on political and social issues.

### Strict Scrutiny Test

Having found that false statements of fact are presumptively protected by the First Amendment, the court applied the strict scrutiny test to determine if the Act was narrowly tailored to meet a compelling government interest. While the court found that Congress has a compelling interest in preserving the integrity of military honors, the Act was not narrowly tailored to serve this interest. “More speech” could repair the harm caused by false claims. *Id.* at 11880. Thus, as presently drafted, “the Act is facially invalid under the First Amendment, and was unconstitutionally applied to make a criminal out of a man who was proven to be nothing more than a liar, without more.” *Id.* at 11881.

### Dissent

In a detailed dissent, Judge Bybee argued that the court was bound to follow *Gertz* and its broad language on “false statements of fact” as categorically outside of the First Amendment. *Id.* at 11884.

We do not have the authority as a lower court to limit the Court’s statements to what we believe they mean rather than what they actually say. *Gertz* could have used the terms “defamation” or “libel” rather than “false statements of fact” to describe the unprotected category of speech—it presumably knew what these terms mean—but it did not. Because the Court has told us unambiguously that “false statements of fact” are generally unprotected by the First Amendment, this principle should be the starting point for our analysis, not the point for the majority’s departure from the principle.

*Defendant-appellant was represented by Jonathan D. Libby, Deputy Federal Public Defender in Los Angeles. Plaintiff-Appellee was represented by Craig H. Missakian, Assistant U.S. Attorney, Cyber and Intellectual Property Section in Los Angeles.*

# Ethics Corner: Gucci, Guess, and the Risks of an “Inactive” Bar License

By Bruce E. H. Johnson

A recent federal court decision prompts a warning to in-house lawyers: Are you licensed? Is your license current? Is it effective in the state where you are providing services? What about the other in-house lawyers employed by your company?

In *Gucci America, Inc. v. Guess?, Inc. et al.*, S.D.N.Y. Case No. 09 Civ. 4373 (June 29, 2010), a Magistrate Judge in the Southern District of New York considered what to do with privilege claims made by Gucci in a trademark infringement suit that it had filed against Guess.

The problem was Gucci's in-house lawyer Jonathan Moss.

Moss had graduated from law school in 1993 and was admitted to the California State Bar later that year. In 2002, Gucci hired Moss to work on corporate real-estate matters in its Secaucus, NJ, office. He was referred to Gucci by two of its outside counsel from Patton Boggs in Washington, D.C.

Moss rose through the Gucci in-house ranks over the next several years. In 2003, Gucci promoted Moss to in-house counsel. In that position, Moss filed trademark applications in which he was labeled an “attorney-at-law and member of the Bar of California,” represented Gucci in employment matters, and appeared before courts and administrative agencies. In 2005, Gucci once again promoted Moss, this time appointing him director of legal services. Three years later, Moss was made vice president and director of legal and real estate.

Unfortunately, Moss had become an “inactive” member of the California State Bar in 1996, a problem that Gucci suddenly discovered in December 2009, after the Guess litigation had arisen. (Moss reactivated his “active” status a few months later, but was fired on March 1, 2010.)

In declarations submitted in connection with Gucci's motion for a protective order concerning its privilege claims, Gucci executives asserted that they had “perceived” that Moss was a lawyer. Moss said, “I did not believe that my inactive status in California limited my ability to practice law in any other jurisdiction where such practice was permissible.”

The record also contained six declarations from Gucci executives that they never confirmed his bar status. As Gucci's director of human resources admitted, she never

thought to confirm Moss's qualifications since “he was already perceived by senior management as the company's lawyer.”

In response, Guess argued that “Gucci could have readily learned that Jonathan Moss was not authorized to practice law simply by asking him whether he was an active member of the California Bar.” Guess also said that the company could have learned this with “a few clicks of the mouse.”

Southern District Magistrate Judge James L. Cott agreed, holding that Gucci could not justify its “mistaken belief” since the company “was plainly in a position to confirm the extent of [Moss's] qualifications as a legal professional and failed to do so.” Thus, he rejected Gucci's privilege claims as an effort to “cloak itself under a veil of ignorance to avoid its discovery obligations.”

“Had Gucci visited the California State Bar website and conducted an attorney search for ‘Jonathan Moss,’ it would have discovered that Moss had been an inactive member since 1995,” he wrote. Despite repeated promotions, the court found “the record devoid of evidence that, during Moss's eight years of employment with the company, Gucci had made any effort to ascertain his qualifications as an attorney.” An attorney is one who is “admitted to the bar of a state or federal court,” and the bar membership must be of a type that “licenses one to practice law,” something that an inactive California State Bar membership does not.

The court also said that Gucci could not justify its “mistaken belief” on the fact that Patton Boggs had recommended Moss, since he never worked at the firm and was merely “the son of a friend of the firm.”

Finally, the court ruled that corporations that hire in-house counsel must exercise due diligence or forfeit their privilege protections. In earlier cases involving clients claiming privilege after unknowingly communicating with unlicensed lawyers, New York courts had fashioned a rule allowing the client's reasonable perceptions to control. The court ruled that the company could not avail itself of this rule because, in the corporate hiring context, such an investigation would not be burdensome, and “Gucci itself bears responsibility for allowing its counsel to represent its interests without ensuring that he was authorized to do so.”

*Bruce E. H. Johnson is a partner at Davis Wright Tremaine LLP in Seattle, WA.*



## **2010-11 UPCOMING EVENTS**

### **California Chapter Luncheon Meeting**

September 16, 2010  
Southwestern Law School, Los Angeles, CA

[For more, click here](#)

### **NAA/NAB/MLRC Media Law Conference**

September 29 - October 1, 2010  
Chantilly, VA

[For more, click here](#)

### **MLRC Annual Dinner**

November 10, 2010  
Grand Hyatt, New York, NY

[For more, click here](#)

### **DCS Annual Meeting**

November 11, 2010  
Proskauer Rose Conference Center, New York, NY

### **California Chapter Luncheon Meeting**

December 15, 2010  
Southwestern Law School, Los Angeles, CA

[For more, click here](#)

### **MLRC/Southwestern Entertainment Law Conference**

January 20, 2011  
Los Angeles, CA

### **MLRC/Stanford Digital Media Conference**

May 19-20, 2011  
Los Angeles, CA

### **London Conference**

September 19-20, 2011  
(In-house counsel breakfast Sep 21st)  
London, England