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MLRC *Media Law Resource Center*
MEDIA LAW LETTER

Reporting Developments Through February 25, 2010

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May 6 - 7, 2010

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Rolling Stone Editorial Content Receives Broad First Amendment Protection

Not Commercial Speech Because of Gatefold Advertisement Context

By Elizabeth McNamara,

Thomas Burke and Rochelle Wilcox

The California Court of Appeal issued its highly-anticipated decision in *Stewart v. Rolling Stone* on January 28, 2010. In a decision that will be welcome news for all who sell advertising in their pages or on their programs, the court ruled in Rolling Stone's favor, broadly affirming the First Amendment's protection of the editorial content at the heart of the lawsuit.

Plaintiffs, two indie rock bands, had sued Rolling Stone and R.J. Reynolds claiming false endorsement misappropriation based on a "butterfly gatefold" magazine insert that included Rolling Stone's editorial feature, "Indie Rock Universe," along with a Camel advertisement. The names of plaintiffs and roughly a hundred other bands were included in Indie Rock Universe, although none were named in the Camel ad.

The trial court denied Rolling Stone's Special Motion to Strike under California's anti-SLAPP statute and Rolling Stone appealed. In a careful analysis, the Court of Appeal reversed the trial court, finding that the editorial content was not converted into commercial speech due to its adjacency to the Camel ad, and that the editorial content was entitled to the full protection of the First Amendment.

Rolling Stone Editorial / Adjacent Camel Ad

In its November 15, 2007, issue, Rolling Stone included

three foldout inserts, known in the industry as "butterfly gatefolds." Gatefolds are inserts consisting of four continuous pages, folded inward, so that the pages must be folded out in order to reveal the editorial content at the center. Gatefolds typically include advertising interspersed with the editorial pages. The four continuous pages of content in the center

are, for Rolling Stone, usually exclusively editorial content, although they may share space with the advertisement. The gatefold at issue in this litigation contained Rolling Stone's editorial content titled "Indie Rock Universe" and a Camel advertisement promoting Camel's "The Farm" website, which is "committed to supporting & promoting independent record labels."

As was its normal practice, Rolling Stone advised R.J. Reynolds ("RJR") what the topic of the editorial content in the gatefold would be – here, "indie rock." However, it provided no additional information to RJR. The editorial content and the advertisement were produced separately, without any input by the other party, and came together only in the final production of the magazine.

Rolling Stone included the typical indicia that Indie Rock Universe was editorial, including listing it in the Table of Contents and adding standard elements such as a border and credits on the introductory page. The Camel ad had the required surgeon general warning and other elements of a typical cigarette advertisement (which were not included on any

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Plaintiffs, two indie rock bands, had sued Rolling Stone and R.J. Reynolds claiming false endorsement misappropriation based on a "butterfly gatefold" magazine insert that included Rolling Stone's editorial feature, "Indie Rock Universe," along with a Camel advertisement.

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of the Indie Rock Universe pages).

Plaintiffs sued Rolling Stone and RJR alleging common law and statutory misappropriation and unfair business practices. Rolling Stone filed a Special Motion to Strike under California's anti-SLAPP statute, Code of Civil Procedure Section 425.16.

The trial court denied the anti-SLAPP motion, concluding that a jury could find that defendants' layout decision had created "an allegedly integrated 9-page advertisement" for Camel cigarettes. Rolling Stone appealed.

Court of Appeal Decision

The Court of Appeal unanimously reversed the trial court. Initially, it rejected plaintiffs' argument that the case was exempt from the anti-SLAPP statute under Code of Civil Procedure Section 425.17(c), which removes certain commercial speech from the anti-SLAPP statute's protection, finding that plaintiffs had not established each of that statute's elements. The court also rejected all of plaintiffs' other attempts to avoid the anti-SLAPP statute, holding that the speech at issue fell comfortably with the statute's broad protections.

The Court next turned to the merits of plaintiffs' claims. It first agreed with numerous other courts that First Amendment requirements as enunciated in *New York Times Co. v. Sullivan* (1964) 376 U.S. 254 apply to misappropriation claims. Explaining that entertainment receives the same protection as factual news reports, the Court held that "a defendant publisher may assert that the actual malice standard applies to claims for commercial misappropriation, whether the claims are brought under the common law or under Civil Code section 3344."

In the heart of the opinion, the Court held that Rolling Stone's editorial feature is "noncommercial speech as a matter of law." It initially held that the trial court erred in deferring the issue to the trier of fact because the parties did not disagree as to the facts of the case.

The Court then turned to the California Supreme Court's decision in *Kasky v. Nike, Inc.* 27 Cal.4th 939 (2002) and the elements for identifying commercial speech – "the speaker, the intended audience, and the content of the message." Addressing the first element, the Court found that it favored Rolling Stone, explaining:

While defendants sell advertising that markets goods and services, they have no direct financial interest in the companies that purchase this advertising or in the products these advertisers sell. Rolling Stone magazine is merely the medium through which commercial messages are delivered by the actual commercial speakers, namely, the advertisers themselves. Rolling Stone magazine is primarily a periodical commentating on events of political and cultural interests of the day. Its articles critically assess these interests. While advertising naturally assists in the financing of the magazine, the publication's editorial purpose is the presentation of written analysis of the contemporary American scene – noncommercial speech.

The Court also held that the remaining elements favored Rolling Stone and supported the conclusion that Indie Rock Universe is "editorial, noncommercial speech." It found strong support for its conclusion in Ninth Circuit law, including the contrasting decisions in *Hoffman v. Capital Cities/ABC, Inc.* (9th Cir. 2001) 255 F.3d 1180 (where editorial speech was protected) and *Downing v. Abercrombie & Fitch* (9th Cir. 2001) 265 F.3d 994 (where speech that helped advertise the publisher's own product was not protected).

Shifting its focus to the feature itself and the evidence in the record, the Court found that no evidence supported plaintiffs' claim that the feature was commercial speech. Initially, the Court rejected the trial court's conclusion that the feature might be characterized as commercial speech based on Indie Rock Universe's unique elements, including the absence of Rolling Stone's standard typeface in the feature and the lack of a border on the interior pages. "The employment by Rolling Stone of whimsical expression in designing informational pages of its magazine should not necessarily be curbed. The union between artistic graphics and written commentary can be a welcomed change to the columnar presentation of many current publications."

Moreover, the undisputed evidence in the record supported the Court's conclusion, particularly Rolling Stone's declarations discussing the "wall" between editorial and advertising that ensured that one group would not influence the other. The Court concluded:

Simply put, there is no legal precedent for

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converting noncommercial speech into commercial speech merely based on its proximity to the latter. There is also no precedent for converting a noncommercial speaker into a commercial speaker in the absence of any direct interest in the product or service being sold. We thus conclude that the Feature is noncommercial speech.

Having so concluded, the Court next asked whether plaintiffs offered any evidence of actual malice to overcome Rolling Stone's First Amendment protection. Because plaintiffs presented no evidence on this issue, Rolling Stone's declarations were undisputed.

They revealed that Rolling Stone advised RJR of the gatefold's topic, indie rock, but "[b]eyond this limited shared knowledge, there was no evidence of any intentional collusion to misappropriate plaintiffs' identities." At the most Rolling Stone was negligent and perhaps it "could have done more 'to ensure that [the Feature] and the Camel advertisement were sufficiently distinct.'" However, negligence cannot suffice to establish actual malice. "Accordingly, plaintiffs cannot surmount the defense raised by defendants and the misappropriation claims are subject to dismissal under section 425.16."

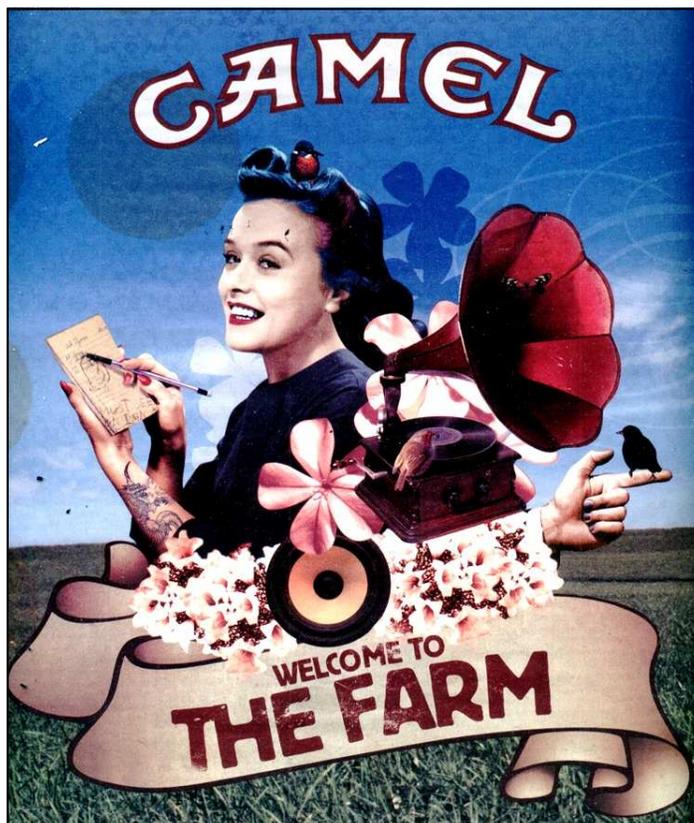
Finally, the Court turned to the "constitutional right guaranteeing freedom of the press," which it found "also serves as a bar to plaintiffs' causes of action." The Court reiterated the broad protection of editorial discretion, which "has been extended to the content and placement of advertisements." Discussing an Eleventh Circuit decision that rejected tort liability for the content of advertisements, the Court reiterated that "if

state tort law places too heavy a burden on publishers with respect to the advertisements they print, the fear of liability might impermissibly impose a form of self-censorship on publishers." Magazines are replete with advertisements; as a result all editorial content "is, in a sense, 'embedded' with advertising. ... But we see no principled legal distinction between a page of editorial content that is preceded and followed by full-page ads, and the gatefold format, in which the ads appear only on the reverse side of a feature's pages."

Interplay with Other Right of Publicity Cases

One question that the Court of Appeal could not answer is where *Stewart v. Rolling Stone* will fit in the myriad of cases addressing right of publicity claims. Some commentators have expressed their belief that the actual malice test does not fit within misappropriation law, which protects rights of publicity and not reputation.

Yet, application of actual malice made perfect sense in this case, where *Rolling Stone* intended to and did create editorial content, with no commercial motive. This is exactly the type of speech that *New York Times v. Sullivan* protects, regardless of the claim alleged based on that



The gatefold at issue in this litigation contained Rolling Stone's editorial content titled "Indie Rock Universe" and a Camel advertisement promoting Camel's "The Farm" website, which is committed to supporting & promoting independent record labels."

speech.

Moreover, plaintiffs' claims were based on an alleged false endorsement – they argued that the juxtaposition of the editorial content and the advertisement created the false impression that they endorsed Camel cigarettes. Where plaintiffs' claims are based on a false implication they allege can be drawn from editorial content, it is in keeping with established law that the plaintiffs must provide evidence that *Roll-*

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ing Stone intended or endorsed the false implication. If *Rolling Stone*'s speech had been commercial – if it had used plaintiffs' names in an advertisement to promote its own product, as in the typical right of publicity claim – the court would not have applied the actual malice test. But that was not this case.

Despite the welcome addition of *Stewart v. Rolling Stone* to the growing body of cases protecting media entities against misappropriation claims, courts continue to struggle to draw lines between protected and unprotected speech. One recent example came in the Northern District of California, where the federal court rejected motions to dismiss and a SLAPP motion in companion cases filed by a former college football player (on behalf of himself and those similarly situated) against Electronic Arts, Inc. (“EA”), and the National Collegiate Athletics Ass’n (“NCAA”), challenging the alleged use of plaintiff's likeness in an EA game, “NCAA Football.” *Keller v. Electronic Arts et al.*, No. C 09-1967 (N.D. Cal. Feb. 8, 2010) (Wilken, J.).

In rejecting EA's First Amendment defense, the court rigidly applied the transformative use test adopted in *Comedy III v. Saderup*, 25 Cal. 4th 387 (2001). Comparing the plainly transformative use in *Winter v. DC Comics*, 30 Cal. 4th 881 (2003), with the literal non-transformative depiction found in *Comedy III*, the *Keller* court found that EA's use was not transformative because the virtual player in the video game was “represented as he was: the starting quarterback for Arizona State University,” which was “far from the transmutation of the Winter brothers” in *Winter*.

Further, the court rejected the argument that the work as a whole was transformative, finding that this “broad view” is not supported by the law and instead the court must only look at whether the depiction of the plaintiff in the video game was transformative.

The *Keller* decision underscores the limited logical reach of the transformative use test to all expressive works beyond the artistic rendering at issue in *Comedy III*. Literal depictions cannot be the defining issue for whether a use of someone's name or likeness is transformative. Nor should the issue of the use be one considered out of the context in which the use appears.

Consider fiction or non-fiction expressive works (like books or documentaries) where individuals are often and necessarily “represented as they are.” The transformative quality of these uses arises in no small part out of the context

in which the name or likeness appears.

These works would most likely enjoy the public interest defense or an exemption under California's statutory right of publicity, but they also unquestionably are “transformative” uses. Case after case has found video games to be expressive works on equal standing with works such as books, movies and television.

There is no logical distinction between video games (which create a highly creative and virtual world further transformed by the player's interaction with the game) and other protected works.

Whether the transformative use test, public interest defense or specific statutory exemptions are applied, the video games should enjoy the same protections and defenses as other expressive works. We suspect that the Ninth Circuit will weigh in to further address this issue.

Conclusion

The Court's holding in *Stewart v. Rolling Stone* and its careful analysis are good news for publishers and creators. Although plaintiffs' emotional appeal to “trust your eyes” held sway with the trial court, the Court of Appeal trusted, instead, settled law.

It followed well-established California law defining commercial speech to find that editorial content cannot be converted into commercial speech by happenstance, as plaintiffs claimed here.

It also embraced the line of California and Ninth Circuit cases that require evidence of actual malice to hold a publisher liable for its noncommercial speech related to public figures, regardless of the claim alleged, and appropriately dismissed the case given the absence of any evidence that *Rolling Stone* intended the false endorsement alleged by plaintiffs.

As media companies become more innovative in the advertisements that they publish in today's competitive environment, they can take some solace from the California court's faithful adherence to the First Amendment principles on which they have always relied.

Elizabeth McNamara, Thomas Burke and Rochelle Wilcox of Davis Wright Tremaine represented Wenner Media, publisher of the Rolling Stone, in the trial court and on appeal. Plaintiffs were represented by Christopher Hunt and Gisu Sadaghiani of Bartko, Zankel, Tarrant & Miller in San Francisco.

Right of Publicity Grabs Legislative Attention

A number of state legislatures are considering bills that would create a right of publicity for deceased persons or amend existing right of publicity statutes. Below is a summary of bills introduced in 2010.

NEW YORK

The New York State Senate again introduced legislation that would amend the state's "right of privacy" statute, Civil Rights Law §§ 50-51, to create a right of publicity for the deceased. Current law limits the right of privacy to living persons.

The bill, [S.6790](#), would prohibit use of a deceased person's name, portrait, voice or picture for advertising or purposes of trade without the consent of the registered rights holder. It would apply retroactively to persons who died within 70 years of the effective date. The bill lists a number of expressive works exempt from the consent requirement, including a catch-all for editorial and artistic expressive works, and exempts advertising for all such works. It also provides an exemption for "non-utitarian expressive works," an undefined term. The existing statute, Civil Rights Law §§ 50-51, does not provide any such exemptions.

The bill requires rights holders to register with the Secretary of State before bringing any action for a violation. Although the bill expressly states that uses occurring prior to the bill's effective date would not be subject to liability, the permissibility of existing uses once a rights holder registers is unclear.

S.6790 was introduced by Senators John Sampson (D-Brooklyn), Martin Golden (R-Brooklyn) and Eric Adams (D-Brooklyn) on February 5, 2010. Sen. Golden was the primary sponsor of similar legislation in 2007 and 2008, which a number of media organizations actively opposed. In April 2009, Senator Eric Schneiderman (D-Manhattan/Bronx) introduced similar legislation ([S.5066](#)), but unlike bills sponsored by Sen. Golden, it would only apply prospectively.

The estates of deceased celebrities, including Marilyn Monroe and Arthur Ashe, have been lobbying for creation of a right of publicity for the deceased. S.6790 has been referred to the Codes Committee.

INDIANA

On February 2, 2010, the Indiana House of Representatives passed a bill amending the state's existing right of publicity statute to expressly provide that the statute would apply retroactively "to a cause of action commenced after June 30, 1994, regardless of when the cause of action arose." The bill, [HB.1335](#), further provides that if a deceased person died testate or intestate before July 1, 1994, the rights recognized by the statute are deemed to be in the possession of the current rights holder, and that such rights "are expressly made retroactive, including to those deceased personalities who died before July 2, 1994."

An earlier version of the bill included language stating that the statute applied to a "personality" regardless of the personality's domicile during his/her lifetime or at the time of his/her death and whether the law of the personality's domicile, residence or state of citizenship recognizes a right of publicity (including at the time of the personality's death). The language was removed from the bill that ultimately passed the House, but referred to an interim study committee.

The bill has been referred to the Senate Committee on Rules and Legislative Procedure.

HAWAII

In January 2010, a bill was introduced in the Hawaii Senate that would amend the state's right of publicity statute, which was enacted in July 2009. The bill, [S.2775](#), would provide a means of registering publicity rights with the Department of Commerce and Consumer Affairs. It passed the Senate [Committee on Economic Development and Technology](#) and the Senate [Committee on Judiciary and Government Operations](#) in February 2010.

OTHER

Legislators in Massachusetts and Michigan are also considering introducing bills that would create a right of publicity for the deceased.

Join Us For Our Upcoming Conference at Stanford!

Join MLRC, Stanford Law School's Center for Internet and Society, and the John S. Knight Journalism Fellowships at Stanford University in Palo Alto on May 6th starting at 1:00 p.m. (PST) through noon on May 7th.

Meet up with MLRC members, but also folks who work in this new media space.

Co-Chairs: Steve Tapia and James Chadwick, with Chairs Emeritus: Bruce Johnson and Andy Mar

The conference will explore:

- ◆ banners, beacons, and behavioral targeting
- ◆ legal issues for internet advertising and monetization
- ◆ ethical issues in the new world of journalism and content distribution
 - ◆ government, legislative, and regulatory developments
 - ◆ evolving fair use policies in a digital age
- ◆ emerging issues with user-generated content and online sourcing

. . .with legal experts from entities including. . .

Andrews McNeel Publishing • CBS Interactive • Comcast • Federal Communications Commission • CBS Interactive • Center for Democracy & Technology Center for Investigative Reporting • Electronic Frontier Foundation • Facebook
Google • Hearst Newspapers • John S. Knight Journalism Fellowships at Stanford
KPG Ventures • Microsoft • MySpace, Inc. • Online Publishers Association • NBC Universal
Stanford's Center for Internet & Society • YouTube • Key law firms across the country

**[For more information, or to register, click here](#)
[or visit http://mlrc-digitallaw.stanford.edu](http://mlrc-digitallaw.stanford.edu)**

Conference hotel room bloc only guaranteed through April 7th!

The cost of the Conference is \$285 | 8.5 CLE credits.

>> Full program details on next page >>

**BANNERS, BEACONS, AND BEHAVIORAL TARGETING:
INTERNET ADVERTISING TECHNOLOGY AND BUSINESS MODELS**

The conference begins with an in-depth look at how advertising technology works. We'll talk about ad serving, ad networks, cookies, web beacons, javascript, and flash cookies, consumer profiling, behavioral and contextual targeting, deep packet inspection, and the like. Then we'll have a wide-ranging discussion about current and emerging advertising revenue models with leaders in the digital advertising space (including discussion of hardware, new forms of advertising, and data mining).

Panelists

Jon Hart, Partner, Dow Lohnes PLLC, Moderator

Matthew Carr, General Manager, Microsoft Advertising

Alissa Cooper, Chief Computer Scientist, Center for Democracy & Technology

Dave Hills, General Partner, KPG Ventures

Lincoln Millstein, Senior Vice President for Digital Media, Hearst Newspapers

**ENTER THE LAWYERS: LEGAL ISSUES FOR
INTERNET ADVERTISING TECHNOLOGY AND BUSINESS MODELS**

Increased focus on new business models, data mining, and targeting raise complex legal and policy issues related to privacy, liability, and transparency. Our panel of lawyers and government affairs professionals will highlight the important challenges related to protecting users' privacy while maximizing potential revenue streams. We'll also discuss the industry's efforts at self-regulation and potential government regulation of online advertising and targeting. Finally, we'll look at emerging legal theories that could be used to protect online publisher's content from unauthorized use by third parties.

Panelists

Andy Mar, Senior Attorney, MSN, Moderator

Pam Horan, President, Online Publishers Association

Nicole Ozer, Technology and Civil Liberties Policy Director, ACLU of Northern California

Brian Pass, Partner, Sheppard Mullin

Halimah DeLaine Prado, Product Counsel, Google

ETHICAL ISSUES IN THE NEW WORLD OF JOURNALISM AND CONTENT DISTRIBUTION

This panel will explore a host of ethical dilemmas, including issues raised by the potential paradigm shift in the funding of journalism, as well as the shift from relying on staff reporters to relying on independent journalists/bloggers. Additionally, the panel will explore the long-standing conundrum of reviewing/writing about products/services provided by major advertisers, with new twists in the online world and the blurred line between editorial and advertising content. Finally, we'll explore issues raised by corporate/journalist/blogger interactions with various social networking media.

Panelists**Roger Myers**, Partner, Holme Roberts & Owen LLP**Dawn Garcia**, Deputy Director, John S. Knight Fellowships at Stanford**Evan Hansen**, Editor in Chief, Wired.com**Robert Rosenthal**, Executive Director, Center for Investigative Reporting**Eric Schuldt**, Vice President, International Legal and Compliance at CBS Interactive (fka CNET Networks)**GOVERNMENT POLICY DEVELOPMENTS: WHAT THE GOVERNMENT MAY DO TO YOU**

As traditional media outlets reinvent themselves and new outlets emerge and expand, questions arise about the appropriate direction for regulation and policy. Are current regulations fostering innovation and promoting competition? Is more or less regulation needed to ensure the viability of sources of news, information, and entertainment? In this session, industry and government experts will address new directions in digital media regulation, including those related to:

- ◆ **Advertising:** Panelists will discuss developments in law and regulation governing behavioral advertising, embedded advertising and related privacy issues.
- ◆ **Technical and Infrastructure Issues:** Congress and the FCC are evaluating how to promote and expand broadband availability, affordability, and adoption. How will their decisions affect the business plans of content providers, application developers, device manufacturers, and the wired and wireless infrastructure? Panelists will discuss developments concerning the National Broadband Plan, spectrum allocation, net neutrality, interoperability and related issues.
- ◆ **Future of Journalism:** Citing a potential crisis for traditional forms of journalism, both the FTC and FCC recently commenced comprehensive examinations of the state of media in the US. Panelists will discuss the concerns raised by the agencies and the challenges facing investment in hard journalism today.
- ◆ **Content:** Panelists will discuss how Congress, federal agencies, and international laws and agreements may change the rules for content on the Internet and other platforms.

Panelists**Erin Dozier**, Associate General Counsel, National Association of Broadcasters, Moderator**Sherrese Smith**, Legal Advisor to Chairman Genachowski, Federal Communications Commission**Joe Waz**, Senior Vice President, External Affairs and Public Policy Counsel, Comcast Corporation*Additional panelist(s) TBA***DO I NEED PERMISSION FOR THAT?: COPYRIGHT, FAIR USE, THE DMCA, AND NEW OPEN LICENSING MODELS**

Among the first ultimatums of the Twenty-First Century to content distributors is: Collaborate and connect or commoditize. This terse mandate unpacks to include Copyright, Fair Use, the DMCA, Open Licensing Models as broad topics and more specifically includes, among many others, Veoh, Cablevision, MP3, BitTorrent, class actions as privatized proxy legislation, and gardens of content accessed by pay walls.

As the initial irrational optimism of the internet wanes, we settle into knowing the web as the internetworked constellation of disruptive technologies. This panel will address the issues of 'radical sharing' and discuss how competitive advantage in content distribution is re-aligning with emerging new measures of success and value.

Panelists

Kate Spelman, Partner, Cobalt LLP, Moderator

Anthony Falzone, Executive Director/Fair Use Project, Center for Internet & Society, Stanford Law School

Kirsty Melville, President and Publisher, Andrews McMeel Publishing, Book Division

Steve Tapia, Senior Attorney/Copyright & Trade Secret Group, Microsoft

LEGAL FRONTIERS IN BLOGGING, SOCIAL NETWORKS AND THE INTERNET

This panel will discuss a myriad of topics, including

- ◆ Revisiting consumer criticism and gripe sites in light of new CDA and Lanham Act case law
- ◆ New copyright and DMCA decisions involving BitTorrent and UGC sites and their impact on law and business developments
- ◆ Latest law on preemption of third party IP claims
- ◆ The \$30 Million + jury verdict in Louis Vuitton Malletier v. Akanoc Solutions, Inc. and its impact on secondary trademark liability
- ◆ Potential investor liability
- ◆ Circuit splits and other differences in the law applied in different venues

Panelists

Ian Ballon, Partner, Greenberg Traurig, Moderator

Dan Cooper, Vice President,

Business & Legal Affairs at MySpace, Inc.

Zahavah Levine, General Counsel & VP

Business Affairs, YouTube, Inc.

Fred von Lohmann, Senior Staff Attorney,

Electronic Frontier Foundation

Michael Richter, Deputy General Counsel

for IP, Product and Regulatory, Facebook

Ben Sheffner, Production Counsel at NBC Universal

and author of the blog "Copyrights & Campaigns"

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Wilmer Cutler Pickering Hale & Dorr LLP

Reporter Not Protected by Mass. Anti-SLAPP Law

Quick Dismissal and Attorneys Fees Unavailable

By Sarah Wunsch

The Massachusetts Supreme Judicial Court (SJC) ruled on February 1, 2010 that a journalist for a community newspaper was not entitled to use the protections of the state “anti-SLAPP” law when a Boston real estate developer sued for defamation for statements in news stories she wrote about him and related local government proceedings. The unanimous ruling in [Fustolo v. Hollander](#), 455 Mass. 861(2010), appears to carve news reporters out of the otherwise broad definition of those able to invoke the benefits of the law.

According to the SJC, Fredda Hollander, an employee of *The Regional Review*, a North End neighborhood paper, will now have to defend herself using only doctrines traditionally available to journalists – such as “fair report” – which, while likely to be successful in the lower court, are not as quick at getting a lawsuit dismissed. Nor are attorneys fees generally available if the lawsuit is ultimately dismissed, as would have been true under the anti-SLAPP law. Thus, the news reporter faces burdens from defending against a lawsuit that are much greater without the protections of the statute.

Background on SLAPP Law

The Massachusetts anti-SLAPP statute, [M.G.L. c. 231, § 59H](#), was enacted in 1994 despite two vetoes by then-Governor William Weld, and was intended to provide additional protection for the First Amendment right to petition the government. “SLAPP”, an acronym coined by professors George Pring and Penelope Canan, stands for Strategic Lawsuits Against Public Participation and describes lawsuits, often brought by developers, that are aimed at frightening people away from participating in the public arena over issues of public concern. Many states have enacted legislation to help prevent these lawsuits which deter citizen involvement.

In Massachusetts, a coalition of the ACLU and environmental organizations such as the Audubon Society and Save the Bay led the fight for passage of the anti-SLAPP law. The legislature defined petitioning activity very broadly, including not only direct petitioning to the government but also “any statement reasonably likely to encourage consideration or review of an issue” by a government body and “any state-

ment reasonably likely to enlist public participation in an effort to effect such consideration....”

The statute provides that a party sued because of the party’s “exercise of its right of petition” as broadly defined, can immediately move for dismissal of the lawsuit and, in most cases, discovery should be stayed during the pendency of the motion. While the “slapped” defendant must first show that the claims are based solely on the petitioning activity, the burden then shifts and the court must dismiss the case if the plaintiff cannot demonstrate 1) that the petitioning was devoid of a reasonable factual or legal basis or 2) that the petitioning activity had caused actual injury. If the court grants the anti-SLAPP motion and dismisses the case, the defendant is entitled to have his or her attorneys fees paid for by the plaintiff. These important protections seem to have deterred many of the SLAPP suits that the ACLU and the environmental groups had seen before enactment of the law.

Fustolo v. Hollander Background

Fredda Hollander was a longtime resident of Boston’s historic North End. She was co-founder of a neighborhood organization that acted as a watchdog, actively involved where land use and development matters might have a negative effect in the community. As a member of that group, Hollander submitted articles to *The Regional Review*, a free local newspaper, and later was hired by the paper’s publisher to be a (minimally) paid reporter. While Hollander remained a member of the neighborhood organization, her work for the newspaper consisted of writing news reports, not opinion pieces, a fact that later took on great importance in the minds of the justices on the court.

Steven Fustolo, a real estate owner and developer, sued Hollander in 2006 for statements she wrote in five articles in *The Regional Review* that related to three properties in which he held an interest. The articles included discussion of actions, potential actions, or lack of action by Boston’s Inspectional Services Department, and decisions by community groups to support or oppose Fustolo’s development plans which were subject to action by the City.

In his lawsuit, Fustolo claimed that Hollander falsely re-

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ported certain facts and that the articles caused “[w]idespread opposition” that led him to withdraw his application for variances before the city’s zoning board of appeal. *Fustolo v. Hollander*, 455 Mass. at 863. Hollander responded by filing a “special motion to dismiss” the lawsuit under the anti-SLAPP statute.

Superior Court Denies Anti-SLAPP Motion

A lower court judge denied Hollander’s motion to dismiss under the anti-SLAPP statute, ruling that because she had written the articles as a reporter for a newspaper, she had not been exercising her right to petition “on her own behalf as a citizen” and was not seeking “redress from the government based on those grievances.” Furthermore, the judge reasoned that because Hollander had been paid to write the articles, the “financial benefit she received” from the newspaper constituted a “private reason” for her reporting and thus she had not been sued for her petitioning activities alone. For both reasons, the judge held that Hollander was not protected by the anti-SLAPP statute. This ruling was immediately appealable, a step Hollander then took.

SJC - Reporting Is Not Petitioning

On appeal, the Supreme Judicial Court rejected the lower court’s reasoning that Hollander’s paid status prevented her from being protected under the anti-SLAPP statute. But all seven of the justices joined in an opinion affirming the other reason given by the Superior Court, namely, that because Hollander was not exercising her own right to petition, the statute did not apply to protect her writings for the newspaper, even assuming, as the court did, that the articles were likely to enlist public participation to get government action relating to *Fustolo*.

In reaching this result, the Court had to distinguish Hollander’s work for the newspaper from other decisions in which people sued for their statements made on behalf of others were held to be covered by the anti-SLAPP law. For example, in *Plante v. Wylie*, 63 Mass. App. Ct. 151 (2005), the Massachusetts Appeals Court had held that an attorney sued for asserting positions on behalf of his client was protected by the statute. The reason, the SJC said, is that attorneys expressly represent the client and act as its agent. In addition, organizations “may only be able to speak, and peti-

tion” through its agents, and therefore their employees or agents are covered by the statute.

Here, the Court reveals the distinction it finds key. Hollander was not an agent of an advocacy organization or an attorney advocating for clients. The SJC tells us that “[a] reporter occupies a different position with respect to a petitioning party than does that party’s attorney....There is nothing about the role or function of a staff reporter of an independent newspaper that by its nature renders the reporter a representative or agent of every, or indeed, any community organization that the reporter may cover, particularly where ... the reporter affirmatively denies representing a particular viewpoint.” *Fustolo v. Hollander*, 455 Mass. at 868-69.

The news reporter, the SJC says, is different, for example, from the staff biologist for an environmental organization, who was sued for her allegedly defamatory statements at a legislative hearing, yet was held to be protected by the anti-SLAPP statute, even though there was no evidence she was petitioning on behalf of her own personal interests. *Fustolo*, 455 Mass. at 868, discussing in contrast, *Baker v. Parsons*, 434 Mass. 543, 545-47 (2001).

Finally, the Court rejected Hollander’s argument that the anti-SLAPP statute, with its broad definition of petitioning activity, should extend to reporters and the press because of the important role they “historically have played in our democracy in exposing issues of public concern and encouraging or sparking necessary government scrutiny.” The unanimous court decided that reporters and the press have enough protection through “the common law of defamation, with its constitutional overlay.” *Fustolo*, 455 Mass. at 870, citing, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Issues Remaining

There are questions left open by the Court’s decision. Will an opinion columnist pressing for government action or trying to arouse the public to push for government action still be covered by the anti-SLAPP law, since there is no pretense of objective neutrality? Can the employee for the newspaper be deemed to be petitioning for something the publisher wants government action on? The SJC appears to have considered only whether Hollander was petitioning for third-party organizations and concluded that she was not.

In this era, it is striking to see a court convinced that news

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reporting follows such an objective model that the choices of what stories to cover and the way they are covered cannot constitute advocacy for government action. There is a contrasting view, not addressed by the SJC, in the affidavit (part of the record below) of Dan Kennedy, a journalism professor at Northeastern University, who wrote:

There is another journalistic tradition, though, whose roots extend much farther back in American history, and whose ethos continues to thrive today — that of journalism as a form of community activism. From the case of John Peter Zenger's *New-York Weekly Journal* in the 1730s, which dealt a blow to the notion of seditious libel, to the revolutionary journalism of the *Boston Gazette* and the *Massachusetts Spy* in the 1770s; from the investigative muckrakers of the early 20th century to the alternative press, independent local newspapers, and bloggers of the present day, such advocacy journalism is aimed at goading citizens to take a particular action with respect to the government, or at persuading the government to do (or not do) something. At the very least, such journalism often leads to more thorough investigation or scrutiny.

Unfortunately, for the journalist at the small community newspaper who follows that tradition, unless there is a legislative fix, the added protections of the state anti-SLAPP statute are unlikely to be available to bring about the speedy dismissal of lawsuits against reporters who are crucial to informing the public about important issues and getting government action in response.

Sarah Wunsch is staff attorney at the ACLU of Massachusetts. She was joined by Paul Holtzman of Krokidas and Bluestein, and Christopher Bavitz of the Cyberlaw Clinic at Harvard Law School's Berkman Center for Internet & Society, in filing an amicus brief in support of defendant Fredda Hollander on behalf of the ACLU of Massachusetts, the Citizen Media Law Project, and the Lawyer's Committee for Civil Rights Under Law of the Boston Bar Association. Harvey Shapiro of Boston represented the defendant. The plaintiff was represented by Bruce Edmands of Eckert Seamans LLC.



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Tenth Circuit Affirms Dismissal of Suit Against John Grisham, Random House, and Other Authors and Publishers

By Robert D. Nelson and Jon Epstein

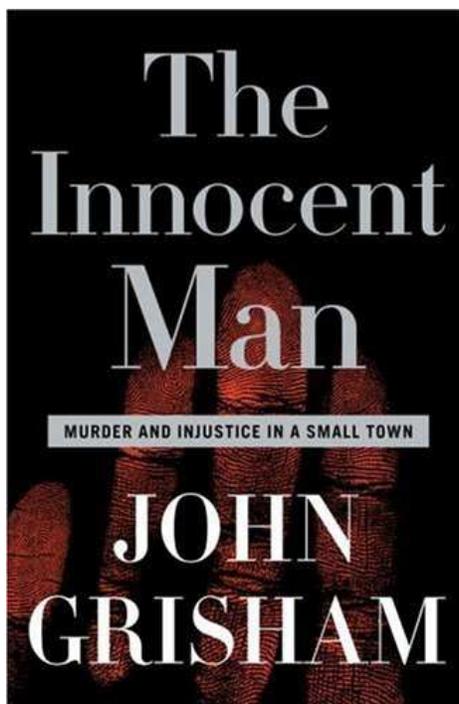
The United States Court of Appeals for the Tenth Circuit affirmed dismissal of defamation, false light invasion of privacy, intentional infliction of emotional distress, and conspiracy claims brought by a former prosecutor, an Oklahoma State Bureau of Investigations agent, and an OSBI criminalist against John Grisham, three other authors, and their publishers. *Peterson et al. v. Grisham, et al.*, No. 08-7100 (10th Cir. Feb. 1, 2010) (Kelly, McCay, Lucero, JJ.).

In September 2008, an Oklahoma federal district court granted the defendants' Rule 12(b)(6) motions holding that the books at the heart of the suit by Grisham (*The Innocent Man*), Robert Mayer (*The Dreams of Ada*), and Dennis Fritz (*Journey Toward Justice*) were core political speech, and that the three public official plaintiffs had failed to make plausible allegations to support any of their claims, including the allegation that the three authors had conspired with the defendant Barry Scheck, the founder of The Innocence Project, to defame them in order to advance the writers' opposition to the death penalty.

Ron Williamson and Dennis Fritz spent nearly twelve years of their lives in an Oklahoma prison—Williamson on death row—after being convicted in Pontotoc County in 1988 for the murder of Debra Sue Carter, a young woman who tended bar at a night club in the small town of Ada, Oklahoma. Shortly before he was to be executed, Williamson's habeas corpus petition was granted by federal judge Frank Seay, on the ground Williamson had been denied effective assistance of counsel. *See Williamson v. Reynolds*, 904 F. Supp. 1529 (E.D. Okla. 1995), *aff'd*, 110 F.3d 1508 (10th Cir. 1997). While Williamson was awaiting retrial, DNA testing exonerated Williamson and Fritz with respect to the Carter

murder and the charges against them were dismissed in 1999. Williamson died five years later, debilitated by mental problems and long use of alcohol and prescription drugs, the victim of cirrhosis of the liver.

The Tenth Circuit synopsised the books in the first two paragraphs of its opinion:



The trial court specifically concluded that the books at issue “concerning our criminal justice system garner the highest federal and state constitutional protection because they are rationally connected to the authors’ quest for political change. They are political speech.”

In 1988, Ronald Williamson and Dennis Fritz were wrongfully convicted of the rape and murder of Debra Sue Carter. Both men were later exonerated after spending over a decade in jail. Their painful story caught the attention of renowned legal fiction author John Grisham who wrote a book about Williamson appropriately titled *The Innocent Man*. Fritz also wrote a book, *Journey Toward Justice*, detailing the horror of his years of unjust confinement.

Each of the plaintiffs in this case – Oklahoma District Attorney William Peterson; former Shawnee police officer Gary Rogers; and former Oklahoma state criminologist Melvin Hett – played a role in the investigation or prosecution

and conviction of Williamson and Fritz. Neither *The Innocent Man* nor *Journey Toward Justice* paints the plaintiffs in a positive light. Following the release of these books, plaintiffs filed suit in Oklahoma district court seeking relief for defamation, false light invasion of privacy, intentional infliction of emo-

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tional distress, and civil conspiracy. They named Grisham, Fritz, anti-death penalty advocate Barry Scheck, and author Robert Mayer—along with their respective publishers—as defendants.

As reported in the [October 2008 MediaLawLetter](#), the trial court reviewed the seventy-one statements in the three books about which the plaintiffs complained in the context of each book in its entirety and determined:

The books themselves are substantially true and the statements alleged when read in context are not libel per se. They are either protected opinion not provably true or false or are factual statements that do not denigrate the reputation of the plaintiffs any more than the substantially true portions of the books. The statements alleged do not reasonably impute crime to the plaintiffs and are therefore constitutionally and statutorily protected political speech and therefore absolutely shielded from liability.

The trial court specifically concluded that the books at issue “concerning our criminal justice system garner the highest federal and state constitutional protection because they are rationally connected to the authors’ quest for political change. They are political speech.”

The Tenth Circuit echoed the conclusion of the trial court in describing the three books:

Grisham published *The Innocent Man* in 2006. It tells Williamson’s life story and explores the circumstances leading to his wrongful conviction, imprisonment, and subsequent exoneration. Grisham depicts Peterson, Rogers, and Hett as particularly responsible for the plight of Williamson and Fritz. He also faults what he describes as a broken

criminal justice system that condones ‘bad police work, junk science, faulty eyewitness identifications, bad defense lawyers, lazy prosecutors, [and] arrogant prosecutors.’

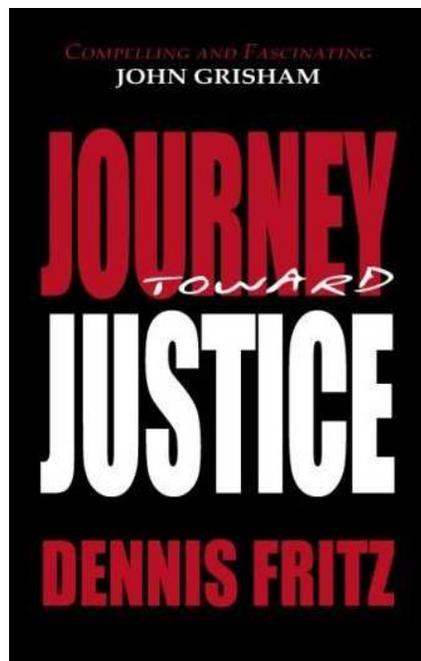
In *Journey Toward Justice*, Fritz speaks in equally harsh tones about the public officials who put him behind bars. As the title suggests, the book describes Fritz’s agonizing trail from wrongful imprisonment to exoneration. Fritz recounts in vivid detail his fears and frustrations as a wrongfully accused murder suspect and convict, and his eventual elation upon release.

* * *

Lastly, Rober Mayer’s book, *The Dreams of Ada*, explores the 1985 convictions of Tommy Ward and Karl Fontenot for the death of Denise Haraway. The Haraway case shared many parallels with the Carter case, including minimal physical evidence, the use of ‘dream’ confessions, and reliance on testimony by jailhouse informants. That case also involved a similar cast of characters: Peterson was the prosecutor and Rogers was the investigator. Grisham used *The Dreams of Ada*—and found it particularly helpful—in his research for *The Innocent Man*.”

In affirming the dismissal, the Tenth Circuit held that none of the plaintiffs’ allegations stated a claim upon which relief can be granted pursuant to the plausibility standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). With respect to the defamation claims, the court noted that the plaintiffs conceded that they alleged no special damages; therefore, they were required to plead and prove libel *per se*, which requires a statement that is “clearly defamatory on its face.” *Miskovsky v. Tulsa Tribune Co.*, 678 P.2d 242, 247 (Okla. 1983). Moreover, because the plaintiffs are public officials, they faced an especially heavy burden in attempting

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to plead libel *per se* because Okla. Stat. tit. 12, §1443.1 provides that all criticisms upon the official acts of public officers are privileged and cannot be considered libelous unless a defendant makes a false allegation that the official engaged in criminal behavior.

The Tenth Circuit determined that several of the statements included in the plaintiffs' Second Amended Complaint were not even of and concerning the plaintiffs and could not be actionable. For those statements that may have been of and concerning the plaintiffs, the court agreed with the district court that the plaintiffs pointed to no statement in which the defendants directly accused any plaintiff of a crime. The Circuit panel stated:

Plaintiffs expect us to scale a mountain of inferences in order to reach the conclusion that defendants' statements impute criminal acts to plaintiffs and render the statutory privilege of §1443.1 inapplicable. We decline to engage in such inferential analysis, or to take a myriad of other analytical leaps plaintiffs ask us to make. Any connection between defendants' statements and an accusation of criminal activity is far too tenuous for us to declare them as unprivileged for purposes of §1443.1.

The Circuit affirmed dismissal of the intentional infliction of emotional distress and false light invasion of privacy claims on similar privilege grounds. It noted, "Plaintiffs fail to allege the necessary nexus between defendants' statements and the proposition that plaintiffs were involved in a crime." For example, the plaintiffs alleged that Grisham cast Hett in a false light as an individual who committed perjury by a passage which said: "The only proof that remotely tied Fritz to the murder was the hair analysis testimony of Melvin Hett... Barney and Greg Saunders knew the hair and fingerprint testimony was suspect." The Tenth Circuit rejected the plaintiffs' argument that this statement imputed perjury to Hett. It determined that it would need to infer from the statement

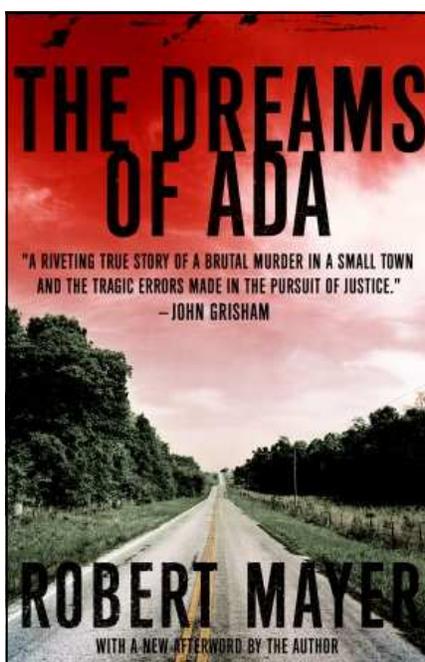
that, in addition to the other individuals named, Hett had personal knowledge the evidence was suspect to a degree that his testimony could be considered perjurious. The court determined that it would be unreasonable to credit so tenuous an inference.

The court affirmed dismissal of the conspiracy claim by stating that the mere publication of the defendants' books in close temporal proximity to one another does not demonstrate there was an illegal agreement to engage in "a massive joint defamatory attack." It then explained that there "may well have been other entirely legitimate motives at play, such as a desire to sell more books or aspirations to foster public support for the abolition of the death penalty. Publishing and endorsing books are perfectly lawful activities." It concluded that "plaintiffs failed to plead either illegal ends or illegal means."

Citing the United States Supreme Court's decisions in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the Tenth Circuit summed up the essence of the affirmed dismissal:

Because Oklahoma law is dispositive in this case, we need not engage in a constitutional analysis. But we note that, at a minimum, allowing the plaintiffs to recover would offend the spirit of the First Amendment. Defendants wrote about a miscarriage of justice and attempted to encourage political and social change. To the extent their perceptions of the affair were erroneous, we depend on the marketplace of ideas—not the whim of the bench – to correct insidious opinions.

Robert D. Nelon and Jon Epstein of Hall Estill, Oklahoma City, Oklahoma represented John Grisham, Robert Mayer, Barry Scheck, and Random House. Defendants Dennis Fritz and Seven Locks Press were represented by Cheryl A. Pilate of Morgan Pilate LLC, Olathe, Kansas. The plaintiffs were represented by Gary L. Richardson and Denise P. James of the Richardson Law Firm, Tulsa, Oklahoma.



D.C. Circuit Reinstates Libel Complaint Against NGO *Rejects Human Rights Group's Fair Report Defense*

By Erik Bierbauer and Joe Murphy

On January 29, 2010, the D.C. Circuit held that an allegedly defamatory report by an international policy research group was unprotected by the fair report, fair comment, or opinion defense because the report was based on what the court found to be a misreading of an official document, namely the 1998 frozen assets list of the U.S. Office of Foreign Asset Control ("OFAC"). [*Jankovic v. International Crisis Group*](#), No. 09-7044, 2010 WL 323187 (D.C. Cir. Jan. 29, 2010) (Ginsburg, Griffith, Williams, JJ.).

The decision is notable for its narrow reading of the fair report privilege, and has particular relevance to media entities and human rights organizations that report on individuals or companies with ties to controversial foreign regimes.

Background

In 2003, the International Crisis Group ("ICG") published a report entitled "Serbian Reform Stalls Again," which discussed and made recommendations about political and economic reforms. The report criticized the government for not doing enough to investigate members of Serbia's financial world with supposed ties to the former Milosevic regime. In 2004, a Serbian businessman named in the report, Milan Jankovic (aka Philip Zepter), brought claims against ICG in the District of Columbia District court for defamation, false light invasion of privacy, and intentional interference with business expectancy.

The roughly 30-page ICG report included three brief mentions of Zepter or Zepter Banka, a Serbian bank affiliated with Zepter. The litigation has focused largely on one passage, which asserted that the Serbian government had failed to fulfill a 2000 campaign promise to force "crony companies and their owners...to answer for past misdeeds":

"The unwillingness to continue the crack-down reflects the power of the Milosevic-era financial structures that - with the rigid oversight once provided by the dictator removed - have transformed themselves into a new Serbian oligarchy.... Some of the companies

were originally formed as fronts by State Security or Army Counterintelligence (KOS), while others operated at the direct pleasure of the ruling couple. Under Milosevic, many of these companies profited from special informal monopolies, as well as the use of privileged exchange rates. In return, many of them financed the regime and its parallel structures."

The report then listed, among sixteen others, "Zepter (Milan Jankovic, aka Philip Zepter)," and noted of those listed that, "[b]ecause of the support they gave to Milosevic and the parallel structures that characterized his regime, many of these individuals or companies have at one time or another been on EU visa ban lists, while others have had their assets frozen in Europe or the US."

An accompanying footnote referenced OFAC's frozen assets list, which in 1998 included Zepter Banka. The report further stated that, "[i]n the popular mind, they and their companies were associated with the Milosevic regime and benefited from it directly."

In 2006, District Judge Reggie Walton held that the report's "mere association of a Serbian company with a Serbian dictator is not defamatory on its face" and dismissed the complaint. Judge Walton also dismissed as untimely claims based on earlier ICG statements, and dismissed the false light and interference with business expectancy claims on the ground that they were based on the same acts as the defamation claims. 429 F.Supp.2d 165, 177 (D.D.C. 2006). The Court of Appeals reversed in part, finding that a reasonable reader could construe the above passage to assert that, "Philip Zepter, personally, was a 'crony' of Milosevic who supported the regime in exchange for favorable treatment," and remanded for consideration of the "applicability and merits of the Opinion and Fair Comment Protection, the Fair Report Privilege, or the Neutral-Reportage Doctrine." 494 F.3d 1080, 1091 (D.C. Cir. 2007).

On remand, the District Court held that the report was "political commentary" on "highly charged" events in Ser-

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bia and clearly signaled to the reader that it would primarily offer commentary, criticism, and opinion. To the extent the report made factual assertions, these were within the relevant privileges. In particular, Judge Walton ruled that because the ICG report referred the reader to the OFAC frozen assets lists on which Zepter Banka was named, the fair report privilege applied. Any implication that Zepter was a Milosevic “crony” was protected commentary, and any suggested link between Zepter and Milosevic “in the popular mind” was unverifiable opinion that did not impute to the passage “additional false meaning.”

Court of Appeals Decision

In its decision last month, the Circuit again reversed and remanded on the defamation and false light claims. The Circuit affirmed dismissal of Zepter’s claim for interference with business expectancy, finding that Zepter had not alleged the loss of any specific business opportunity. *Jankovic*, 2010 WL 323187 at *7-8.

The Circuit began its analysis by reviewing the executive order and regulations that governed inclusion on the 1998 OFAC frozen assets list. The court determined that, at the time, the U.S. government considered all financial institutions organized or located in Serbia to be “agencies, instrumentalities, or controlled entities” of the Serbian government, and OFAC froze their U.S. assets on this basis.

The court reasoned that OFAC “automatically listed” all Serbian financial institutions, and “[n]ot a word [in the OFAC list] suggests that Zepter Banka, let alone Phillip Zepter, supported the Milosevic regime or received advantages in exchange.” *See id.* at *4, *6.

On this basis, the court found that the ICG had not made a “fair and accurate” report of the OFAC list and the fair report privilege therefore did not apply. *See id.* at *5. (The court’s opinion also underscores a risk of relying on Internet links for attribution, stating that the OFAC URL referenced in the report was non-functional.

The court nonetheless assumed that the link would take a reader to the OFAC list.) The court further held that because

the fair comment and opinion defenses apply only where “the facts asserted as predicate of the fair comment [are] true” and the “statement of opinion is based upon true facts that are revealed to the reader,” the ICG could not invoke those defenses. *See id.* at *7.

Unlike the District Court, which distinguished between the accurate report of Zepter Banka’s inclusion on the OFAC list and the “unverifiable” opinion statement that Zepter was “in the popular mind” a Milosevic “crony,” the Court of Appeals believed that ICG’s commentary was inextricable from its misreading of the OFAC list.

Consistent with the Restatement (Second) of Torts § 611 cmt. f and numerous court decisions in other jurisdictions, the D.C. Circuit has not previously demanded that a report of an official proceeding be precisely accurate to benefit from the fair report privilege. *See White v. Fraternal Order of Police*, 909 F.2d 512, 527 (D.C. Cir. 1990) (privilege protects

“fair summaries” of official proceedings); *cf. Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 739 (D.C. Cir. 1985) (privilege is lost where report is “garbled or fragmentary to the point where a false imputation is made about the plaintiff which would not be present had a full and accurate report been made”)

(internal quotation omitted).

It is therefore surprising that in ruling against ICG last month, the panel did not engage in any detailed analysis of whether ICG’s report was *substantially* if not precisely accurate to the extent it suggested that Zepter supported Milosevic “and the parallel structures that characterized his regime,” given that the U.S. government had frozen Zepter Banka’s assets on the ground that it was an “agenc[y], instrumentalit[y] or controlled entit[y]” of the Milosevic-dominated Serbian state.

Erik Bierbauer is a counsel, and Joe Murphy is an associate, at Debevoise & Plimpton LLP in New York. Defendant International Crisis Group was represented by Amy L. Neuhardt of Boies Schiller & Flexner, LLP, and Jonathan L. Greenblatt and Neil H. Koslowe of Shearman & Sterling, LLP. Plaintiff was represented by William T. O’Brien, Lisa M. Norrett, John W. Lomas Jr. and Malcolm I. Lewin of McKenna Long & Aldridge, LLP.

The decision is notable for its narrow reading of the fair report privilege, and has particular relevance to media entities and human rights organizations that report on individuals or companies with ties to controversial foreign regimes.

Third Circuit Affirms Dismissal of Privacy Claims Involving Google's Street View Service, but Reinstates Trespass Claim

By Jennifer A. Klear

On January 28, 2010, the United States Court of Appeals for the Third Circuit affirmed in part and reversed in part the dismissal of Aaron C. Boring and Christine Boring's claims against Google, Inc. stemming from pictures taken by Google's representatives of the Borings' allegedly private property for use on its Street View service. [*Boring v. Google, Inc.*](#), No. 09 Civ. 2350 (January 28, 2010) (Rendell, Jordan, Padova, JJ.). The Third Circuit effectively dismissed the Borings' invasion of privacy, unjust enrichment, punitive damages claims, and request for injunctive relief, but permitted the Borings to proceed against Google for trespass despite their failure to plead nominal damages.

Background

Street View is "a feature on Google Maps that offers free access on the Internet to panoramic, navigable views of streets in and around major cities across the United States." *Boring* at *2. Google obtains its Street Views by attaching panoramic digital cameras to passenger cars of its representatives, who drive along the public roads photographing the areas along the street. Individuals objecting to the content of an image may report that image to Google and have it removed, which surprisingly the Borings never did.

This case arose out of the Borings' discovery that Google's driver had allegedly driven on a private road leading to their house several months earlier, took photographs of their residence, including the swimming pool, turned around in their driveway, and then made these photographs available through its Street View Service "without obtaining any privacy waiver or authorization." The Borings allege that the road leading to their home is unpaved and clearly marked with "Private Road" and "No Trespassing" signs. As a result, they argue that "Google, in taking pictures from their driveway at a point past the signs, and in making those photographs available to the public, 'significantly disregarded their privacy interests.'" *Id.* at * 3.

On April 2, 2008, the Borings filed a Complaint against Google in the Court of Common Pleas of Allegheny County, Pennsylvania asserting claims for (1) invasion of privacy, (2) trespass, (3) injunctive relief, (4) negligence, and (5) conversion. The Borings claimed compensatory, incidental, and

consequential damages in excess of \$25,000 for each claim plus punitive damages and attorney's fees. On May 21, 2008, Google removed the case to the United States District Court for the Western District of Pennsylvania on the basis of diversity jurisdiction and filed a motion to dismiss. The Borings then filed an Amended Complaint, substituting their conversion claim with a claim for unjust enrichment. At that time, Google renewed its motion to dismiss the Borings' claims for failure to state a claim.

On February 17, 2009, the District Court granted Google's motion and dismissed the Amended Complaint in its entirety. With regard to the Borings' invasion of privacy claim, the court limited its analysis to two of the four distinct torts embracing the claim - intrusion of seclusion and publicity given to a private life since appropriation of name or likeness and false light publicity clearly did not apply. In doing so, the court found that the Borings failed to allege facts substantiating its claim that the alleged invasion of privacy would be "highly offensive" to "the ordinary reasonable person." The court also dismissed the Borings' negligence claim because Google owed no duty of care to the Borings.

With regard to the Borings' trespass claim, the court held that the Borings failed to allege facts sufficient to show that they suffered any damages caused by the alleged trespass. On the Borings' unjust enrichment claim, the court concluded that there was no relationship between the parties that could be construed as contractual nor did the Borings confer a benefit upon the Borings.

Lastly, the court dismissed the Borings request for injunctive relief on the grounds that the Borings failed to plead a plausible claim under Pennsylvania's "demanding" standard for mandatory injunction, and dismissed the punitive damages claim because the Borings failed to allege facts sufficient to support the contention that Google engaged in outrageous conduct.

The Borings filed a motion for reconsideration arguing that the court erred in dismissing their trespass and unjust enrichment claims, as well as their request for punitive damages. The District Court denied the Borings' motion. *Boring v. Google*, Civ. A No. 08-694, 2009 WL 931181 (W.D. Pa. Apr. 6, 2009). In its opinion, the court reaffirmed its prior

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decision. Specifically, the court noted that the Borings failed to allege conduct necessary to support a punitive damages claim. The court further declined to reconsider the dismissal of the unjust enrichment claim because the Borings failed to point to any flaw in the court's disposition of that claim.

Lastly and most importantly, the court addressed the Borings' trespass claim to "eliminate any possibility that the language in its opinion might be read to suggest that damages are part of a prima facie case for trespass." *Id.* at * 4-5. In doing so, the court clarified that "it had dismissed the trespass claim because the Borings had 'failed to allege facts sufficient to support a plausible claim that they suffered any damage as a result of the trespass' and because they failed to request nominal damages in their complaint." *Id.*

Third Circuit's Decision

With the exception of the trespass claim, the Third Circuit tracked much of the District Court opinion while adding some of its own gloss to the District Court's decision. With respect to the invasion of privacy claim, the Third Circuit observed that "[n]o person of ordinary sensibilities would be shamed, humiliated, or have suffered mentally as a result of a vehicle entering into his or her ungated driveway and photographing the view from there."

The Court further noted that "the privacy allegedly intruded upon was the external view of the Borings' house, garage, and pool – a view that would be seen by any person who entered onto their driveway, including a visitor or delivery man." *Id.* at *8. Moreover, the Borings did not even allege that they themselves were viewed inside the home – a relevant factor in analyzing an intrusion upon seclusion claim. The Court applied the same reasoning to the claim for publicity given to private life and, thus, held that the Borings failed to establish that the publicity would be highly offensive to a reasonable person.

On the Borings' unjust enrichment claim, the Third Circuit rejected the Borings' attempt to apply an unjust enrichment claim to tortious conduct. Instead, the Third Circuit agreed with the lower court that the Borings provided no basis for the claim. The Court noted that "[a]n unjust enrichment claim makes sense in cases involving a contract or a quasi-contract, but not, as here, where plaintiffs are claiming damages for torts committed against them by the defendant." *Id.* at * 15. Thus, the Court held that "[t]he complaint not

only fails to allege a void or unconsummated contract, it does not allege any benefit conferred upon Google by the Borings, let alone a benefit for which the Boring could reasonably expect to be compensated." *Id.* at * 14.

Turning to the request for injunctive relief, the Third Circuit added that the Borings' complaint "claims nothing more than a single, brief entry by Google onto the Borings' property" and furthermore, the Borings failed "to allege any facts to suggest injury resulting from Google's retention of the photographs at issue, which had long since been removed from the Street View program." *Id.* at * 16. The Borings' request for punitive damages was equally unappealing to the Court since the Borings failed to allege conduct that could be considered outrageous or malicious. The Court indicated that the Borings never alleged that "Google intentionally sent its driver onto their property or that Google was even aware that its driver had entered onto the property" nor were there "facts suggesting that Google acted maliciously or recklessly or that Google intentionally disregarded the Borings' rights." *Id.*

The significance of the case centered on the Third Circuit's ruling on the dismissal of the Borings' trespass claim. The Borings' argued that the District Court erred when it dismissed their trespass claim for failure to plead nominal damages. Google, conversely, argued that (1) that the District Court correctly held that the trespass claim must fail where plaintiffs failed to plead nominal damages; and (2) the compensatory damages were not the natural or proximate result of the trespass.

The Third Circuit rejected both Google's interpretation and the lower court ruling. In doing so, the Court announced that by simply alleging that Google entered upon their property without permission the Borings have pled a trespass – pure and simple. The Court rejected the notion that Pennsylvania required that either nominal or consequential damages be pled. Notably, the Third Circuit remarked that while it was improper for the District Court to dismiss the trespass claim, "it may well be that, when it comes to proving damages from the alleged trespass, the Borings are left to collect one dollar and whatever sense of vindication that may bring." *Id.* at * 13.

Jennifer A. Klear, Law Offices of Jennifer A. Klear, is an attorney in New York. Plaintiffs were represented by Dennis M. Moskal Gregg R. Zegarelli, Tev Law Group, Pittsburgh, PA. Google was represented by Wilson, Sonsini, Goodrich & Rosati, San Francisco, CA; and Keevican, Weiss, Bauerle & Hirsch, Pittsburgh, PA.

Illinois Appellate Court Affirms Fair Report Privilege for Newspaper In Holiday Misidentification Mishap

By Debbie L. Berman and Wade A. Thomson

In a ruling beneficial to news gatherers, an Illinois appellate court affirmed dismissal of a defamation complaint based on misidentification, and held that the fair report privilege does not have a timeliness component or obligation to review updated material. [Eubanks v. Northwest Herald Newspapers](#), No. 07-L-205 (Ill. App. 2nd Dist., Jan. 22, 2010) (Schostok, Jorgensen, Hudson, JJ.).

In the afternoon of December 29, 2006 the *Northwest Herald* received an email “bulletin” from a local police department that contained information about a recent retail theft arrest, naming plaintiff as the arrestee. That same afternoon, a reporter prepared a one sentence article based on the email and placed that article in line for the upcoming issue of the newspaper, which was eventually printed on January 2, 2007.

In the evening of December 29 – after the reporter received the first email and after she prepared and submitted her article -- the local police department sent a second email to the newspaper stating, “Please remove” the plaintiff from the retail theft arrest and “replace” her name with that of a different individual. Unfortunately, the reporter and others at the newspaper had left the office for a three-day New Year’s holiday weekend before that second email was sent. The second email was not read until after the newspaper article naming the plaintiff had been printed on January 2. The newspaper promptly ran a retraction on January 3, 2007 when it realized what happened, but plaintiff sued for defamation and false light invasion of privacy.

The newspaper moved for summary judgment based on the fair report privilege and submitted an affidavit from the reporter stating that she did not open the second email until after the January 2 publication of the article. The trial judge initially denied the newspaper’s motion for summary judgment reasoning that there was no evidence of whether any employee other than the reporter opened the second email prior to publication. After the newspaper renewed its motion for summary judgment and included an affidavit from the newspaper’s information technology director (declaring that computer records confirmed that no newspaper employee had read the second email prior to publication), the court granted summary judgment.

On appeal, the plaintiff claimed that the article was not protected by the fair report privilege because it was not a complete report in light of the second email. The court rejected that argument holding that the first email was an official report in itself and, because defendants did not read the second email, the article was an accurate report of the first email/report.

The plaintiff next argued that the newspaper was reckless in not checking its email over the holiday weekend. The court rejected that argument based on a fairly recent Illinois Supreme Court decision, *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill.2d 558, 588 (2006), which held that the fair report privilege, once established, overcomes allegations of actual malice (i.e., abuse of privilege), although that may “permit[] a defendant to publish a report of an official proceeding even though the defendant knows that the report contains a false and defamatory statement.” *Eubanks*, at 7.

The court expressed sympathy for the plaintiff in this matter, but noted that “the state of the law at this time does not include a timeliness component, or an obligation to review updated information, in determining the fairness and accuracy of a published report.” The court also noted that the newspaper published a retraction the day after it realized the misidentification of plaintiff.

Debbie L. Berman is a partner in the Chicago office of Jenner & Block LLP and co-chair of the firm’s Media and First Amendment Practice Group. Wade A. Thomson is an associate in the Chicago office and a member of the group.

Ex-Con Loses Libel Case Against Book Author and Publisher

Plaintiff a Public Figure for Discussion of His Criminal Past

A New Jersey appellate court affirmed summary judgment in favor of the author and publisher of a book discussing plaintiff's criminal past. *Berkery v. Estate of Lyle Stuart, et al.*, No. A-5105-07 (N.J. App. Feb. 19, 2010) (Carchman, Lihotz, Ashrafi, JJ.). The court held that plaintiff was a public figure with respect to his criminal past and that he failed to produce sufficient evidence of actual malice. In addition, several of the statements complained of were either substantially true, opinion or privileged.

This was the second time a libel case brought by the plaintiff over disclosures from the book ended in summary judgment. Earlier a New Jersey appellate court affirmed summary judgment in favor of the *Philadelphia Inquirer* and a reporter on libel and privacy claims stemming from news articles about the book and plaintiff's efforts to stop its publication. See *Berkery v. Kinney*, 936 A.2d 1010 (N.J. App. Dec. 17, 2007) (*Berkerky I*).

At issue in both cases are statements about plaintiff in the book *Confessions of a Second Story Man: Junior Kripplebauer and the K & A Gang*, by Allen M. Hornblum, a Temple University Professor. The book recounts the history of a notorious robbery gang that operated on the East Coast from the 1950s to the 1970s and includes updates on some of the members of the gang. The book was initially published by Temple University Press in 2005, but was re-

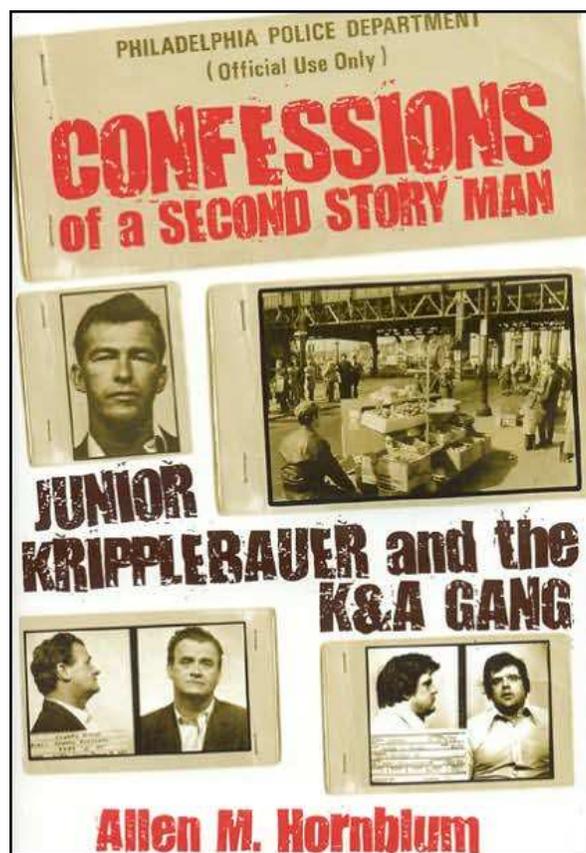
called by the publisher after plaintiff threatened legal action. The book was then picked up and published in 2006 by Barricade Press, which according to its website has prided itself on providing books to readers that other publishers would shy away from.

Plaintiff sued the author, Barricade Books and several distributors for libel. Among other things, plaintiff complained about statements in the book reporting that in 1960 he was investigated for assault and murder but released because police could not "make the charges stick"; was the most likely "candidate" for a 1961 car bombing murder; was the "main nexus between Irish mobsters and the mafia"; was not retried for robbery after reversal on appeal because local police "had had enough" of him.

The trial court granted summary judgment to all defendants over statements from the book, holding that plaintiff was a public figure for claims over his criminal past.

The trial court denied summary judgment to the publisher over statements about the book on its website and in newsletters. The parties settled these claims and they formed no part of the appeal. On appeal, plaintiff argued that he was not a public figure.

Alternatively, he argued that he produced sufficient evidence of actual malice and that the book author was not part of the "traditional media" entitled to rely on an actual malice de-



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fense.

Public Figure Analysis

The appellate court affirmed that plaintiff was a public figure, following the analysis of the court's 2007 decision in *Berkery I*. There the court noted that while past criminal conduct does not *automatically* make a libel plaintiff a public figure for purposes of discussing those acts (see *Wolston v. Reader's Digest Assoc.*, 443 U.S. 157, 168 (1979)) here plaintiff's lengthy criminal career, publicized crimes and associations with organized crime made him a limited purpose public figure. Citing *e.g. Rosanova v. Playboy Enterprises, Inc.*, 411 F.Supp. 440 (S.D.Ga.1976), *aff'd*, 580 F.2d 859 (5th Cir.1978). In addition, in *Berkery I* the court noted that "once a person becomes a public figure in connection with a particular controversy, that person remains a public figure thereafter for purposes of later commentary or treatment of that controversy." Citing *e.g. White v. Berkshire-Hathaway*, 759 N.Y.S.2d 638, 640 (Sup.Ct. Erie County 2003), *aff'd*, 773 N.Y.S.2d 664 (4th Dep't 2004) ("a public figure, once established, remains a public figure for later comment on that controversy or subject matter").

Moreover, in the instant decision and in *Berkery I*, the court noted that under New Jersey law the actual malice standard applies to alleged defamatory statements on any matter of legitimate public interest. See *Dairy Stores, Inc. v. Sentinel Publishing Company, Inc.*, 104 N.J. 125, 152-53 (1986). Thus plaintiff would have to prove actual malice even if a private figure.

In this regard, the court swept aside plaintiff's argument that the book author was not a member of the traditional media entitled to the actual malice defense.

The investigative function an author performs is not substantively different from an investigative journalist. The dispositive element is not the form of the investigative process. In an era marked by a diminution of the classic news media and the print investigative journalist and the proliferation of investigative reporting in media such as cable television, documentary journalism – both television and movies – internet reporting and blogging, the need for protection remains the same.

No Evidence of Actual Malice

As for evidence of malice, among other things plaintiff contended that the author lied in his deposition about the timings of their meetings when researching the book; gave erroneous dates during his deposition for plaintiff's arrests and of meetings with other sources; failed to tell Barricade about the threats of legal action; and falsely denied knowing that plaintiff had gone on to obtain a college degree.

In addition, plaintiff contended that the author lied about his research skills, bolstered by an affidavit from the author's ex-girlfriend, a former university librarian. Plaintiff also claimed that the author's admission in deposition that he had affairs with students constituted evidence of actual malice.

None of these, however, showed actual malice with convincing clarity, the court decided. Many were irrelevant because they occurred after publication of the book. Statements made in deposition about the timing of arrests and meetings with sources were unrelated to the author's knowledge of falsity of the statement in his book; as were the affairs with students.

Moreover, even if the author intentionally lied about how he researched the book "such a lie does not establish knowledge of the research's falsity." The court gave no weight to the ex-girlfriend's affidavit which it dismissed as obviously biased.

Other Grounds for Summary Judgment

Finally the court found that other complained of statements were barred on separate grounds. A statement in the book that police investigated plaintiff for attempted murder but "couldn't make the charges stick" was substantially true where plaintiff was released without charge -- even if "carelessly" worded in the book. The assertion that prosecutors did not retry plaintiff after an acquittal because they "had had enough" of him was a clear statement of opinion. Lastly, statements based on a prosecutor's sentencing memorandum were protected by the fair report privilege.

The court also cited the extensive materials submitted by the media defendants about plaintiff's criminal past, concluding that defendants demonstrated that the author relied on substantial, credible sources in writing the book.

Defendants were represented by Gregory M. Harvey and Kristen E. Polovey, Montgomery, McCracken, Walker & Rhoads, LLP, Philadelphia, PA. Plaintiff acted pro se.

*Perils of Reality TV***Court Refuses to Dismiss Section 1983 Claim***Media Could Be “State Actor” For Complaint Over Coverage of Arrest*

The perils of media ride-alongs and reality television were demonstrated again this month when an Illinois federal district court refused to dismiss a Section 1983 claim against A & E Television and related defendants over the filming and broadcast of an arrest as part of a documentary series. [*Frederick v. The Biography Channel*](#), No. 09 C 6837 (N.D. Ill. Feb. 4, 2007) (Shadur, J.). The court held that plaintiffs pled sufficient facts to allege that the media acted in concert with the police and could be jointly liable for an a violation of the Fourth Amendment.

At issue was an episode of the reality documentary series “Female Forces” broadcast on The Biography Chanel. The show focuses on the work of female law enforcement officers. According to the [complaint](#), the media defendants entered into a contract with the City of Naperville for cooperation in filming of local law enforcement operations. The complaint alleges that in 2008 a male police officer went to the plaintiffs’ residence to arrest 20 year old Chelsea Frederick on a warrant for failing

to appear at a traffic court hearing. The officer, who had confronted plaintiffs on the street, allegedly delayed arresting Frederick and instead called for a female officer and the camera crew to make and film the arrest. Frederick and her older sister allege they were detained for the express purpose of being filmed for the reality show.

The plaintiffs further alleged that they told the crew they did not want to be filmed, refused to sign release agreements and were embarrassed because they were wearing pajama bottoms. The arrest was included in an episode of the series broadcast in 2008.

Refusing to dismiss the complaint, the court first found

that the contract between the city and the media defendants was sufficient to bring the media into the scope of Section 1983 as a state actor. Without much analysis of the contract the court simply described it as establishing more than “a symbiotic relationship.” In a footnote the court referenced one section of the contract which required the media to obtain the consent of city police officers before being filmed – and the court found it significant that the same solicitude was not extended to citizens of the city.

As for the alleged Fourth Amendment violation, the court stated that the circumstances of the case were “eerily similar” to the Second Circuit’s decision in *Lauro v. Charles*, 219 F.3d 202 (2d Cir. 2000). In *Lauro*, the Second Circuit held that a “perp walk” staged for the benefit of the media constituted an illegal seizure. Although the news station that filmed the perp walk was not named as a defendant, the Second Circuit in dicta noted that the media could have been jointly liable for participating in an event with no legitimate law enforcement purpose.

Similarly here the court found the media involvement had been artificially created for no law enforcement purposes but to create a camera opportunity.

Moreover the court added that *Lauro* is not an “outlier” case but rests on the firm basis of the Supreme Court’s decisions in *Hanlon v. Berger*, 526 U.S. 808 (1999) and *Wilson v. Layne*, 526 U.S. 603 (1999).

The media defendants are represented by Mandell Menkes LLC, Chicago; the City of Naperville is represented by Mark Antonio Scarlato, Naperville, IL; plaintiffs are represented by Donald F. Spak, Law Office of Donald F. Spak, Chicago.



The court held that plaintiffs pled sufficient facts to allege that the media acted in concert with the police and could be jointly liable for an a violation of the Fourth Amendment. At issue was an episode of the reality documentary series “Female Forces” broadcast on The Biography Chanel.

“Tweet” About Moldy Apartment Held Non-actionable in Illinois Defamation Case

By **Debbie L. Berman and Wade A. Thomson**

In a non-media case involving Twitter, a state trial court in Chicago dismissed a defamation complaint brought by a real estate company against a tenant who “tweeted” about mold in her apartment. [*Horizon Group Management, LLC v. Bonnen*](#), No. 09 L 8675 (Ill. Cir. Ct. Cook Co., Ill. Jan. 20, 2010). While the briefing included intriguing discussion on both sides about the significance of tweets in society and how Twitter fits into the defamation framework, the court simply ruled without elaboration that the tweet was “non-actionable.”

Background

Twitter is a free social network that allows users to send and read messages known as “tweets,” which tend to be short and informal. The tweets are posted on the account holder’s Twitter page, which can be set to private (only people approved by account holder can view) or public.

The initial dispute between the parties stemmed from a class action suit brought by tenants of an apartment building in Chicago that was managed by the plaintiff in the defamation action, Horizon Group Management (“Horizon”). The class action concerned a leak in the apartment building that affected several units. All of the tenants settled their grievances except one, the defendant in the defamation action, Bonnen. During the pendency of the class action, Horizon discovered a “tweet” by Bonnen and sued her for defamation. The tweet at issue stated in relevant part, “Who said sleeping in a moldy apartment was bad for you? Horizon realty thinks it’s ok.” Horizon claimed this statement injured its reputation as a landlord in Chicago and was therefore defamatory *per se*.

Do You Really Mean It If You Tweet It?

In her motion to dismiss, Bonnen argued, among other things, that her tweet was non-actionable opinion that lacked verifiable facts, and could be innocently construed. (Under Illinois law, statements that are reasonably capable of a non-defamatory *per se* or “innocent” meaning are not actionable *per se*.) In advancing these arguments, Bonnen focused on the flightiness of Twitter, essentially arguing that her own tweets were “drivel” and were therefore not to be taken as

verifiable fact or construed as defamatory.

She also highlighted various other tweets on her page, including “Dunkin D’s you are so good to me” and “Whoever designed the train with the bi-fold doors was a duche,” and argued that followers of her Twitter page “can see immediately that her statements are rambling hyperbole.” Bonnen even cited a study that found that approximately 40% of tweets are “pointless babble,” which Bonnen claimed provided a context where readers will not construe statements as asserting actual facts.

In response to Bonnen’s motion to dismiss, Horizon sought to highlight the significance of Twitter for serious communications. Horizon noted that, among others, the President of the United States, the National Archives, rabbis, and the Centers for Disease Control (CDC) use Twitter to post information. For example, the CDC posted a tweet involving a recall of the H1N1 vaccine - “hardly drivel.” Horizon also noted that Twitter is a “legitimate medium used by reporters to report up-to-the-minute updates on legal actions,” citing examples of reporters who tweet from courtrooms (when allowed, of course).

Thus, according to Horizon, tweets should be taken as seriously and treated no different than other publications. Horizon also pointed out that the arguments made in Bonnen’s motion to dismiss were the same arguments that were unsuccessful for Courtney Love in her motion to dismiss a libel suit based on Love’s tweets about a fashion designer with whom Love had a dispute. See *Simorangkir v. Love*, No. BC 410593 (Cal. Sup. Ct. Los Angeles, filed March 26, 2009).

The court dismissed Horizon’s complaint with prejudice in a two-sentence opinion that simply stated that the Tweet was not actionable. Because the court did not elaborate on why it found the tweet non-actionable, we are left to wonder how the decision was influenced by the medium of the publication, if at all.

Debbie L. Berman is a partner in the Chicago office of Jenner & Block LLP and co-chair of the firm’s Media and First Amendment Practice Group. Wade A. Thomson is an associate in the Chicago office and a member of the group. Plaintiff was represented Bret A. Rappaport, Hardt Stern & Kayne. Defendant was represented by Richard C. Balough, Balough Law Offices LLC; and Leslie Ann Reis, Center for Information Technology & Privacy Law.

Libel Tourism Bills Introduced in Arizona and Utah

Bills Appear Headed for Passage

The Arizona State Senate this month passed a libel tourism bill that would codify the unenforceability of foreign libel judgments unless compliant with the First Amendment. On February 22 the bill passed by a vote of 30-0.

[SB 1268](#) provides that

“A court of this state shall not recognize a foreign country judgment if the cause of action was based on a claim of defamation unless the court first determines that the defamation law applied by the foreign court provided at least as much protection for freedom of speech and the press as provided by both the United States and Arizona Constitutions.”

The bill was introduced in January by Sen. Jonathan Paton, R-Tucson, who recently resigned from the state senate to run for the U.S. House of Representatives.

Another libel tourism bill introduced in the state senate yet to be acted upon combines the limitation on foreign judgments with limitations on the use of foreign jurisprudence in Arizona courts. [SB 1396](#), introduced by Sen. Chuck Gray, R-Mesa, would bar state courts from citing or relying on the laws or policies of foreign nations, international courts, any international criminal courts and the United Nations.

Utah Bill Passes State House

In Utah, a libel tourism bill unanimously passed in the state house on February 9 by a vote 73-0. The bill was approved by the state senate's Judiciary, Law Enforcement, and Criminal Justice Committee on Feb. 22 and was been put on the senate's consent calendar. The bill was introduced in January by state representative Julie Fisher, R-Fruit Heights, a former television broadcaster.

[HB 96](#) provides:

A judgment obtained in a foreign jurisdiction may be considered nonrecognizable and unenforceable by the courts of this state if:

1. the judgment was obtained in a jurisdiction outside the United States;
2. the judgment resulted in a libel judgment for damages; and
3. the court sitting in this state before which the matter is brought determines that the libel law applied in the foreign court's adjudication process did not provide at least as much protection for freedom of speech and press as would be provided by the United States Constitution and the Utah Constitution.

For the purposes of applying Title 78B, Chapter 5, Part 3, Utah Foreign Judgment Act, to this part, the courts of this state may not make the determination in Section 78B-5-320 unless the person attempting to enforce the judgment submits to personal jurisdiction and the person against whom the judgment is being enforced: (1) is a resident of this state; (2) is a person or entity amenable to the jurisdiction of this state; (3) has assets in this state; or (4) may be required to take action in this state to comply with the judgment.

Defamation Lawsuits and the Religion Clauses

Limitations on Libel Suits Involving Matters of Religion

The relationship between defamation law and the First Amendment's freedom of religion guarantees was explored recently by state appellate courts in New Jersey and Oregon. Both cases required courts to explore the extent to which the First Amendment provision: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," limits the ability of courts to hear certain types of defamation claims.

The New Jersey case, *Abdelhak v. The Jewish Press*, 2009 WL 5149909 (Dec. 21, 2009), involved a defamation claim brought by an orthodox Jewish doctor against a weekly Jewish newspaper, *The Jewish Press*. In that case, the court concluded that the Establishment Clause – the first half of the First Amendment's freedom of religion provision – prohibited the plaintiff's defamation claim from being adjudicated in a civil court.

The Oregon case, *Tubra v. Cooke*, 233 Or. App. 339 (2010), involved statements about a pastor made by two church officials to the pastor's congregation. In that case, the Oregon Court of Appeals reversed the lower court's dismissal of the plaintiff's defamation claim, holding that the Free Exercise Clause – the second half of the First Amendment's freedom of religion provision – did not absolutely bar the court from hearing the case.

Abdelhak v. The Jewish Press

Plaintiff Yaakov Abdelhak is an orthodox Jewish obstetrician whose practice caters primarily to orthodox Jewish women. His wife, Gabriele Tito, filed for civil divorce in 2004, at which time she requested that Abdelhak grant her a *Get*, a religious divorce without which an observant Jewish woman may not remarry. When Abdelhak refused to grant Tito the *Get*, she brought the issue before a rabbinical court, the *Bais Din* of America (BDA). The BDA ordered Abdelhak to "give a *Get* immediately" and "without delay." Shortly thereafter, Tito notified *The Jewish Press* that the BDA had issued an order of contempt, called a *Seruv*, against Abdelhak for refusing to grant her a *Get*. In fact, no such order had been issued – the court had simply directed Abdelhak to grant the *Get*.

The Jewish Press regularly publishes a list of those in

contempt of the BDA for refusing to provide their wives with a *Get*. The purpose of this *Seruv* list is to publicly shame men into compliance with the rabbinical court's orders. When *The Jewish Press* called the BDA to confirm that a contempt order had been issued against Abdelhak, the staff member who answered the phone declared, in error, that it had. As a result, the plaintiff's name, along with his professional title, was included on the *Seruv* list in the paper's September 6, 2006 print edition.

After Abdelhak informed *The Jewish Press* of its error, the paper printed a retraction. Abdelhak nevertheless sued *The Jewish Press* for defamation, and his ex-wife and two members of his congregation for invasion of privacy and intentional infliction of emotional distress. In response, another *Bais Din*, the Mechon L'Hoyroa (MLH), issued a *Seruv* against Abdelhak for pursuing a remedy against one of the orthodox congregants in a secular court.

A New Jersey trial court dismissed Abdelhak's complaint in its entirety for lack of subject matter jurisdiction on the grounds that adjudication of the case "would require excessive procedural or substantive interference with church operations." The judge found that, to reach a resolution, the court and jury would have to make numerous determinations about matters religious in nature, and that to do so would violate the Establishment Clause of the First Amendment.

In particular, the court noted that in order to adjudicate the defamation claim it would have to analyze the relative impacts of the MLH *Seruv* and the *Jewish Press Seruv* on Abdelhak's reputation. That analysis would necessitate an understanding of the reception of those pronouncements in the Orthodox Jewish community, which itself would require a consideration of the nature of a *Seruv* and the significance of a husband withholding or giving a *Get*, among other things. Further, the court would have to determine whether the injury to plaintiff's obstetrics practice was caused by the newspaper's *Seruv*, or other factors particular to the orthodox community, such as the potential unwillingness of an Orthodox Jewish woman to use the services of an unmarried male obstetrician.

On appeal, Abdelhak argued that his claim could be adjudicated without excessive entanglement in religious doc-

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trines and practices. He insisted that the lower court erroneously focused on irrelevant religious matters, and that the defamatory nature of the newspaper listing was a factual inquiry that could be resolved through the application of neutral principles of law.

The appellate court rejected Abdelhak's argument. The Establishment Clause, stated the court, "prohibits states from promoting religion or becoming too entangled in religious affairs." If the dispute is at heart a secular one, it may be adjudicated by a secular court. If, however, resolution of the dispute would require a court to interpret or understand tenets of religious doctrine or practice, it must abstain for lack of subject matter jurisdiction. As the trial court below had noted, in order to evaluate the reputational harm to plaintiff caused by *The Jewish Press Seruv* listing, a jury would have to understand how the listing would be perceived in the plaintiff's Jewish community. This would require a deep understanding of the intricacies of Jewish doctrine and Orthodox Jewish tradition. Neither could monetary damages flowing from this harm be assessed through the application of neutral principles alone.

Thus, the appellate court affirmed that the Establishment Clause prevented a secular court from adjudicating Abdelhak's claim. The court remarked, however, that it was "not unmindful of the consequences of such a dismissal." It recognized the importance of defamation law for those seeking to clear their names, and deemed the consequence of not being able to bring such a claim in circumstances like this "harsh."

Turba v. Cooke

Plaintiff Tim Turba had served a number of congregations within the International Church of the Foursquare Gospel as pastor for over twenty years by the time the events leading up to this case occurred. Defendant Cooke, a senior pastor for a branch of the church, and defendant Swor, the district supervisor, convinced Turba to take a job as interim pastor at a Foursquare Church in Veronia, Oregon. As an added incentive, Cooke and Swor promised to give Turba an additional \$1,100 per month for the first three months, as well as health coverage for up to six months.

After starting at Veronia, Turba withdrew \$3000 from the church's account, explaining to the Veronia church council that the money had been earmarked for him as a gift. The council approved the withdrawal, and after depositing the money in his personal account, Turba spent over half of it on

health insurance premiums. Some months later, when Turba was to end his term as pastor, the Veronia council's bookkeeper brought the \$3000 withdrawal to the attention of Swor and Cooke. The defendants accused plaintiff of a misappropriation of church funds, at which point Turba left his role as pastor at Veronia.

Swor and Cooke then wrote a letter, which Swor read aloud to the Veronia congregation. The letter explained that "[t]hrough communication between the district staff and the church council, and a review of the church books and council minutes, it is now evident that there has been, to some extent, a financial misappropriation by the former pastor [plaintiff]." Turba learned of the letter from two congregants, who confronted him about it separately. At the request of Turba, neutral church leadership held a meeting to resolve the misappropriation issue. Ultimately, Swor agreed that Turba only needed to return that portion of the \$3000 which he had not spent on health insurance. Neither defendant, however, took any steps to clear Turba's name in the Foursquare community.

Turba filed a complaint against Cooke, Swor, and the church for defamation based on the letter and a disparaging email from Cooke to Swor's secretary. Turba claimed that after the reading of the letter he was unable to secure steady work as a pastor in any church, and was subsequently forced to sell his house and move into a trailer. An Oregon circuit court jury awarded Turba \$355,000 finding that the defendants had defamed him and abused the qualified privilege that otherwise would have shielded them from Turba's claim. The trial court, however, granted a post-verdict motion for judgment notwithstanding the verdict, agreeing that the Free Exercise Clause served as an *absolute* privilege to Turba's claim. Turba appealed.

The appellate court reversed and reinstated the jury award, explaining that the Free Exercise Clause provides an absolute privilege to statements alleged to be defamatory if "the organization [to which the statements can be attributed] is of a religious character, and the alleged defamatory statements relate to the organization's religious beliefs and practices and are of a kind that can only be classified as religious." Those statements which do not concern religious belief and practices, or are made for a nonreligious purpose, may at best be eligible for protection under a qualified privilege. The court decided that the statements at issue, which concerned the misappropriation of money and untrustworthiness of a pastor, would not "always and in every context" be religious in nature. Thus, they were not absolutely privileged.

Update:

Eastern District of Michigan Judge Upholds Reporter's Source Protection Under 5th Amendment

Detroit Free Press Reporter David Ashenfelter can continue to shield the identity of a confidential source who provided information for a story about an investigation of a federal prosecutor for misconduct during a high profile terrorism prosecution, an Eastern District of Michigan judge ruled on February 9, 2010. [*Convertino v United States Department of Justice*, 07-CV-13842.](#)

U. S. District Judge Robert H. Cleland issued his opinion upholding Ashenfelter's Fifth Amendment privilege against the disclosure during an April 21, 2009 deposition in former federal prosecutor Richard Convertino's Privacy Act lawsuit against the Department of Justice. Ashenfelter invoked the Fifth Amendment privilege after Convertino claimed in his lawsuit and on his fundraising website that Ashenfelter was a "criminal" who had conspired with other "criminals" in the Department of Justice to defame him. The court had earlier rejected Ashenfelter's First Amendment privilege, finding that a reporter's privilege is not recognized in the Sixth Circuit.

The path to Ashenfelter's deposition was tortuous, with the judge at first rejecting the Fifth Amendment privilege in February, 2009, and directing Ashenfelter to appear for deposition in the court's presence. At that deposition, the court reversed course and upheld Ashenfelter's Fifth Amendment privilege. Convertino moved for reconsideration on May 5, 2009. The February 9, 2010 ruling was in response to that reconsideration motion.

In his latest opinion, Judge Cleland rejected Convertino's claim that Ashenfelter had waived his privilege by earlier filing an affidavit in support of his claim of First Amendment privilege in which he stated that his January, 2004 story about Convertino was accurate and that it was based on information from Justice Department sources.

Cleland ruled that Convertino's lawyer, Stephen M. Kohn, should have raised the issue about Ashenfelter's affidavit earlier.

"The court has no duty to correct what has – in hindsight – turned out to be plaintiff's poor strategic decision," Judge Cleland said in his ruling.

Convertino is expected to now appeal the ruling to the

Sixth Circuit U. S. Court of Appeals. Meanwhile, Convertino's underlying 2004 Privacy Act action remains pending in the D.C. District Court before Chief Judge Royce C. Lamberth. *See also* "Michigan Federal Court Rules Reporter Must Reveal Sources in Privacy Act Case," [MLRC MediaLawLetter Sept. 2008 at 28.](#)

While the latest ruling is a relief to Ashenfelter it serves only to emphasize the need for passage of the federal reporters' shield law pending in Congress.

Herschel P. Fink of Honigman Miller Schwartz and Cohn LLP, Detroit, represents David Ashenfelter in this matter. Prior rulings in the case are available on the MLRC website [here.](#)



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The Public Right of Access “Unmoored” in the Southern District of New York

By Corrine A. Irish

A federal district court in New York ruled that there exists a First Amendment public right of access to administrative adjudicatory proceedings conducted by New York City’s Transit Adjudication Bureau (“TAB”), thereby expanding the right of access beyond the Second Circuit’s jurisprudence, which has not yet addressed whether such a right applies in the context of an administrative proceeding. The court then granted the New York Civil Liberties Union’s request for a preliminary injunction preventing enforcement of TAB’s public access policy at its proceedings. [*New York Civil Liberties Union v. New York City Transit Authority*](#), No. 09 Civ 3595, 2009 U.S. Dist. LEXIS 120470 (S.D.N.Y. Dec. 23, 2009) (Sullivan, J.).

Background

The New York City Transit Authority (“NYCTA”) is a municipal board responsible for the operations, maintenance and control of the public mass transportation system in New York City. TAB is a bureau within the NYCTA that, since 1986 has adjudicated transit violations (vandalism, fare evasion, riding between cars, etc). Prior to 1986, these violations were adjudicated in criminal court. Since then, the criminal court has retained concurrent jurisdiction over these violations. When a police officer or transit officer issues a transit violation, that officer has the discretion to return violations either to criminal court or TAB. Though violations are returnable to either forum, each forum has a different penalty structure - with criminal court allowing a fine of up to \$25 or imprisonment of up to 10 days and TAB allowing a significantly greater fine (up to \$100) - and a \$50 fine for failure to appear or timely respond - but no exposure to imprisonment.

Access to TAB’s adjudicatory hearings are governed by a “respondent controls” policy - observers can attend hearings if the person being accused of a transit violation consents to their attendance. The respondent’s decision is final; there is no separate determination made by TAB about the appropriateness of the third party observing the hearing and the respondent is not required to articulate any basis for his

objection. This policy appears to have been first placed in writing sometime in 2009 during the course of this litigation, though TAB represented that the underlying policy has been in place since TAB’s inception.

Current Litigation

The NYCLU filed this lawsuit in 2009 claiming that the organization’s First and Fourteenth Amendment rights were violated by TAB’s public access policy. Shortly thereafter, the NYCLU moved for a preliminary injunction and the NYCTA responded with a motion to dismiss arguing that 1) the NYCLU lacked Article III standing to bring suit and 2) as matter law, there is no First Amendment right of access to TAB hearings.

District Court’s Decision

1. Standing and Injury Intertwined

First, the district court ruled that the NYCLU had standing to bring suit based on the organization’s direct injury - the NYCLU was not raising a claim of associational standing based on injury of its members. The court found that the NYCLU had demonstrated an “injury in fact” as a result of TAB’s public access policy, based on evidence that NYCLU representatives had been denied access to TAB hearings in the past and that NYCLU will promptly start to monitor hearings if the preliminary injunction is granted.

The court also relied on this same evidence to determine that the NYCLU established the “irreparable harm” required for a preliminary injunction. The court noted that the Second Circuit does not presume irreparable harm of First Amendment rights where a regulation does not directly limit speech, requiring instead that a causal link be established between the injunction and the alleged injury. Assuming this presumption did not attach, the court found that the NYCLU established the required causal link based on its evidence that representatives had been denied access in the past and will continue to be denied in the future.

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2. Experience and Logic Trumps the Nature of the Proceeding

In considering whether the NYCLU had a substantial likelihood of success on the merits, the court first rejected any per se immunity for administrative proceedings, finding that the public right of access does not stem from the Sixth Amendment right to a speedy and public trial but from the First Amendment and, “[o]nce unmoored from the Sixth Amendment there is no principle that limits the First Amendment right of access to any one particular type of government process.” *NYCLU*, 2009 U.S. Dist. LEXIS 120470,*58. The court, therefore, applied the “experience” and “logic” test – most clearly articulated in *Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (“*Press Enterprise II*”) to determine whether a qualified right of access attached to the TAB proceedings. This requires an inquiry into whether 1) there exists a tradition of public access to a type of proceeding that carries “the favorable judgment of experience” and 2) whether public access plays a significant positive role in the functioning of the proceeding at issue. *Id.* at 8.

The court found the “experience” at TAB proceedings to be one of presumptive public access. In so ruling, the court considered that the written policy was created only recently and that, before this litigation there was no uniform understanding of what the public access policy was among TAB employees.

The court also relied on the NYCTA’s own representation that TAB hearings are presumptively open to the public. As to the Criminal Court’s prior exclusive jurisdiction and subsequent concurrent jurisdiction, the court observed that “not only is the experience of TAB hearings one of presumptive public access, but the experience of the enforcement of the [NYCTA] Rules of Conduct is, at least for the most part, one of actual public access.” *NYCLU*, 2009 U.S. Dist. LEXIS 120470, *67.

The court also found that the “logic” prong was satisfied, ruling that because of the functional and structural similarities between formal civil and criminal trials and TAB hearings,

public access at TAB hearings would serve all of the same values as in trial proceedings. The court detailed the rules and procedures of the TAB hearings that were akin to trials, including the right to counsel, the burden of proof standard, the right to present evidence, object and cross-examine. The court concluded that a qualified right of public access attached.

Finally, the court determined that the NYCTA had not met its burden of showing that irrespective of this qualified right, the TAB proceeding should be closed after applying what the court deemed a “strict scrutiny” analysis – that closure is narrowly tailored and essential to serving certain higher values.

The NYCTA’s justification for its respondent controls policy was its concern that modifying the policy *may* have the effect of chilling the appearance of some percentage of respondents, who under the TAB guidelines have the option of adjudicating their violations by mail.

A TAB officer further articulated privacy concerns where respondents are minors, or committed the violation due to a mental illness or medical problem; or has a medical disease that renders then unable to pay the fine.

The NYCTA, however, admitted that there is no empirical support to what the court regarded as speculative assertions of a chilling effect. Moreover the court found no narrow tailoring where a respondent is allowed to object for any reason - not just privacy or chilling concerns - and is not required to explain his reasoning.

In mandating the end of the NYCTA’s current access policy, the court also recognized that a particular respondent’s legitimate privacy and chilling concern may warrant closure, but that such closure, must be determined after specific on-the-record findings are made by the Hearing Officer consistent with the narrow tailoring requirement.

The court has since issued a permanent injunction in favor of the NYCLU and the NYCTA has filed its notice of appeal - so it is likely that the Second Circuit will be addressing this issue in the near future.

Corrine Irish is an associate in the New York office of Squire Sanders & Dempsey.

The court first rejected any per se immunity for administrative proceedings, finding that the public right of access does not stem from the Sixth Amendment right to a speedy and public trial but from the First Amendment and, “[o]nce unmoored from the Sixth Amendment there is no principle that limits the First Amendment right of access to any one particular type of government process.”

Tenth Circuit Remands Issue of First Impression Concerning Bar Organization's Right to Interview Jurors

By Lisa Bowlin Hobbs

The Tenth Circuit recently considered an appeal involving an issue of first impression concerning the First Amendment right to interview jurors but declined to decide the issue. *Clyma v. Sunoco Inc.*, No. 08-5153, 2010 WL 367540 (10th Cir. Feb. 3, 2010) (Baldock, Holmes, Siler, JJ.).

The case arose when the Oklahoma Employment Lawyers Association ("OELA"), a plaintiffs' bar organization, asked a district court for permission to interview the jury in an employment discrimination dispute to which it was not a party. OELA sought leave to contact the jurors for the purpose of providing educational information to members of the bar regarding jury dynamics in employment law cases. Without explanation, the district court denied OELA's request in a minute order. Though the underlying lawsuit itself ultimately settled, OELA sought review of the district court's order by direct appeal under 28 U.S.C. § 1291.

The Tenth Circuit determined that the issue presented in the appeal—whether the First Amendment requires that attorneys who did not participate in the underlying litigation be given access to jurors to assist them in the preparation of an educational program for the use and benefit of members of a professional organization—was one of first impression. Yet there were several procedural issues for the Court to determine initially.

First, the Court considered whether OELA had standing to bring the appeal. OELA asserted standing on its own behalf and on behalf of its members because the district court's application of its local rule prohibiting contact with jurors absent authorization by the Court violated OELA's and its members' First Amendment rights. The Court noted that OELA's right of access "may not be entirely devoid of First Amendment implications," *id.* (emphasis in original), and thus held that OELA "has standing because it asserts an actual particularized injury as a result of an alleged constitutional violation traceable to the district court's order and redressable by a favorable ruling here."

OELA also had standing to pursue the appeal on behalf of its members. OELA's members would have standing to sue in their own right under the same theory, the Court reasoned, and the First Amendment right to information is directly relevant to OELA's purpose of providing training for employment lawyers.

Having decided the standing issue, the Tenth Circuit next turned to whether it should treat OELA's direct appeal as a petition for writ of mandamus. While a non-party may not directly appeal an adverse ruling, the Tenth Circuit has allowed a non-party media entity review by mandamus of a lower court ruling on juror access. (citing *Journal Publishing Co. v. Mechem*, 801 F.2d 1233 (10th Cir. 1986)). The Tenth Circuit also has construed a media entity's direct appeal challenging the sealing of documents as a petition for writ of mandamus. (citing *United States v. McVeigh*, 119 F.3d 806 (10th Cir. 1997)). Based on this precedent, the Tenth Circuit held that OELA had "substantially complied" with Federal Rule of Appellate Procedure 21, concerning petitions for writ of mandamus, and thus construed its direct appeal as a petition for writ of mandamus.

Having answered both procedural questions in the affirmative, the Court finally turned to the First Amendment issue. Rather than decide the merits, however, the Court concluded simply that "the novel issue presented certainly requires the district court to exercise some discretion in ruling upon OELA's application." The district court's "terse denial" failed to do so. Thus, the Court directed the district court to vacate its order denying OELA's application and to reconsider the issue.

Lisa Bowlin Hobbs is an appellate attorney at Vinson & Elkins LLP. She is former General Counsel to the Supreme Court of Texas. Her former colleague, James Lebeck, now an associate at Davis Graham & Stubbs, LLP, participated in the Clyma appeal as court-appointed amici curiae, along with John Partridge of Gibson, Dunn & Crutcher LLP. James and John clerked together for The Honorable David M. Ebel of the Tenth Circuit in 2007-2008.

French Court Rules in Favor of Roman Polanski on Photo Privacy Complaints

By Clara Steinitz and Jean-Frédéric Gaultier

Arrested on September 26, 2009 at the Zurich airport, the film director Roman Polanski is currently on bail in his chalet, after more than two months spent in a Swiss prison. He is waiting for Switzerland's response to a US extradition request over his guilty plea over a sexual relationship with a 13 year old dating back more than 30 years.

Claiming that he and his family had been harassed by the press in his ski resort retreat, Polanski filed a series of complaints against several magazines in France. Notwithstanding his arrest, release on bail and the admission of a relationship with a teenager, Polanski claimed that the press photographs violated his right to privacy. In defense, the magazines argued in substance that the pictures were harmless and directly linked to current news as they illustrated the reunion of Polanski and his family after the film director's incarceration.

For a start, the judge found that the disputed publications related to news of legitimate interest for the public, firstly because they refer to an uncommon judicial matter, i.e. *"Criminal lawsuits initiated by the US justice Department for facts dating back to 1977 and related to (...) an extremely famous film director."* Secondly, they are *"in the heart of current affairs,"* since Roman Polanski was arrested in September 2009, placed in custody then released on bail in November 2009. Lastly, the media have broadly covered the matter, its developments, the public reactions to the film maker's incarceration, etc. Thus, it is legitimate to publish photos of Roman Polanski to illustrate the judicial scenario he is entangled into.

The judge undertook a thorough analysis of each of the disputed photographs to determine whether their publication was justified in view of the legitimate interest of the public to be informed of the matter. As a result, some of the disputed pictures, taken in public places and not revealing anything intimate about the complainants, were found not to damage their right to privacy.

Others, however, were found by the court to be unrelated to the current matter (e.g. a picture of the Polanski couple attending a public event) or taken without Polanski or his family knowing it, in the course of private moments *"insufficiently linked to the related news event"* (e.g. lunch,

time shared by mother and child) or inside the private chalet. The judge found that their publication was *"neither necessary nor useful to the legitimate information of the public."*

The court's reasoning on the use of photographs to legitimately illustrate a news event was of particular interest with respect to two of the published pictures. The first photograph depicts Polanski's wife standing by the window of the chalet. For the judge, this violated the right to privacy because the public interest does not extend to the entire family circle for the mere reason that Polanski's bail necessary affects the personal life of his family. Moreover, to the extent the photograph illustrated the Polanski family's sense of confinement, such confinement was a constraint created by the press itself in gathering outside the chalet rather than from the judicial bail measure. In other words, the press could not illustrate a news fact caused by its own behaviour.

The second interesting demonstration relates to a picture of Roman Polanski seated at the back of the car bringing him from his place of custody back to his chalet in Gstaad. There is no question that the picture is directly linked to the news event. However, the court considered the car to be a private place, noting that the car had tinted windows. For the judge, the widespread habit of publishing this type of picture in criminal cases is not justifiable when the targeted person is *"in a private place where he/she should be able to legitimately hope to be protected from all indiscretions, including when he/she is involved in a news event which legitimacy to relate is not questioned."*

That being said, in view of the many court decisions to the contrary produced by the defense, the judge, sitting in emergency proceedings, referred the matter to be discussed within the course of a procedure on the merits.

Beside the publication of extracts of the decisions, the judge ordered the payment of 5,500 € (\$7,490 U.S.) of damages for the magazine with the most extensive pictures publication and 3,000 € (\$4,085 U.S.) to cover the legal costs incurred. Although damages are not meant to be punitive nor should they be based on the profits made by the defendant, claimants often complain about compensations being inferior to costs of proceedings.

Clara Steinitz and Jean-Frédéric Gaultier are lawyers in Paris with Clifford Chance Europe LLP.

Supreme Court of Canada Decision in *Quan v. Cusson*

Media Entitled to Rely on the Responsible Communication Defense Which Their Appeal Was Responsible for Developing

By Wendy Wagner and Richard Dearden

The Supreme Court of Canada's landmark decisions in *Grant v. Torstar Corp.* 2009 SCC 61 and *Quan v. Cusson* 2009 SCC 62 have brought Canadian law into the 21st Century by creating the "Public Interest Responsible Communication Defense," which provides protection for false and defamatory facts in circumstances where the publication is a matter of public interest and the defendant shows diligence in attempting to verify the allegations having regard to all the relevant circumstances.

Decisions rendered by the Supreme Court of Canada in the 1950's and 1960s denied the media use of the traditional qualified privilege defense for publications to the world at large. The Court signaled its willingness to reconsider these decisions when it granted leave to appeal from the Court of Appeal for Ontario's decision in *Quan v. Cusson*, on April 3, 2008. In *Quan v. Cusson*, the Court of Appeal for Ontario had recognized a public interest responsible journalism defence based on the House of Lords' decisions in *Reynolds v Times Newspapers Ltd.* and *Jameel v. Wall Street Journal Sprrl*, but denied the defendants the opportunity to benefit from the new defense.

The Supreme Court's decision in *Quan v. Cusson* was issued concurrently with its decision in *Grant v. Torstar*, a case in which the Reynolds privilege had been advanced at trial. (Leave to appeal was granted on an expedited basis in *Grant v. Torstar* on February 19, 2009, shortly after *Cusson v. Quan* was argued before the Supreme Court of Canada on February 17, 2009.)

The Court set out the contours of the new Public Interest Responsible Communication defence in *Grant v. Torstar*. See "Supreme Court of Canada Creates Defence of Public Interest Responsible Communication," [MLRC MediaLawLetter December 2009](#) at 29.

In *Quan v. Cusson*, the Court held that it would be contrary to the interests of justice to deprive the defendants the opportunity to avail themselves of the responsible communication defense which their appeal was responsible for developing.

The Court answered the question raised in *Quan v. Cus-*

son as to whether traditional qualified privilege could co-exist with the new defence in the affirmative within the *Grant* decision, but characterized the circumstances under which the traditional defense could be used for publication to the world at large as restrictive.

Background

Quan v. Cusson involved three *Ottawa Citizen* articles reporting on the conduct and performance of the plaintiff, Ontario Provincial Police Constable Danno Cusson, in Ottawa and New York City during the two weeks following the events of September 11, 2001. The articles were headlined "Renegade OPP Officer Under Fire," September 25, 2001; "OPP Apologizes for Cusson Fiasco," September 26, 2001; "OPP's Cusson Faces Internal Investigation," October 11, 2001.

Following the September 11 attacks, the Ontario Provincial Police ("O.P.P") had volunteered its assistance to New York authorities through official channels, but the offer had been declined. Without the permission of his employer, Constable Cusson left his post and travelled from Ottawa to Manhattan with his pet dog Ranger, presenting himself as an R.C.M.P. trained search and rescue volunteer to the police authorities at Ground Zero. When the OPP ordered Constable Cusson to return to his post, he tendered his resignation to the force.

Cusson had given numerous interviews to the local and national media. Prior to the publication of the *Ottawa Citizen* articles, he was hailed as a hero for his canine search and rescue efforts at Ground Zero, while the O.P.P. were publicly assailed for ordering him to return to duty in Ottawa. The three *Ottawa Citizen* articles in issue reported information obtained from Cusson's commanding officer and from N.Y. police officers that differed drastically from the information conveyed prior to the publication of the *Ottawa Citizen* articles, including that Cusson had misrepresented himself to the authorities in New York and possibly interfered with the rescue operation.

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Trial Decision

At trial, the defendants pleaded traditional qualified privilege, but did not rely on the separate defense known in England as “responsible journalism” or Reynolds privilege, which, at the time, had not been recognized as a distinct defense by any Canadian court. The trial judge agreed that an article reporting that Cusson’s superior planned to file a complaint over disciplinary proceedings was within the scope of the traditional qualified privilege for reports of pending court proceedings recognized by the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130. With respect to the two other articles, the trial judge denied the qualified privilege defence on the basis that there was no “compelling” moral or social duty to publish the articles in question, and through they were “certainly of public interest,” he could not “say with sufficient confidence that they were in the public interest to the extent they needed to be heard.”

The jury was asked to rule on the meaning, defamatory content, status as fact or opinion, and truth of over 50 impugned statements in the two articles. The jury found that some of the statements were fair comment, and that many, but not all, of the factual imputations in the articles had been proven true. Among the true facts found by the jury were that the plaintiff had failed in his duties as an O.P.P officer and abandoned his responsibilities without justification, that neither he nor his dog had received formal training in search and rescue operations; that the plaintiff had mislead N.Y. police into thinking he was an R.C.M.P. Officer, and the N.Y. police intended to arrest him. Conversely, the jury rejected that it was true that the plaintiff deliberately mislead N.Y. police by representing himself as a trained R.C.M.P. K-9 officer, that he had concealed his true identity, and that he may have compromised the rescue effort at Ground Zero. The Supreme Court of Canada described these findings as “difficult to reconcile with one another.”

The jury awarded Cusson \$100,000 in general damages against the media defendants.

Court of Appeal

The appellant media defendants argued before the Court of Appeal for Ontario that the trial judge had erred in reject-

ing the defense of qualified privilege with respect to the two articles. Specifically, they submitted that the trial judge set too high a standard by requiring a “compelling” duty to publish, and erred in not finding that the articles were on a matter of public interest. The appellants argued in the alternative that if the traditional qualified privilege were not available on the facts, they were entitled to rely on the Reynolds privilege as recently restated by the House of Lords in *Jameel*, in that the articles in issue reported on a matter of public interests and met the standard of responsible journalism.

The Court of Appeal never directly answered the appellants’ primary issue on appeal, *i.e.*, whether traditional qualified privilege applied in the circumstances of the case. After examining lower court decisions which had applied traditional qualified privilege to publications to the world at large in the post-*Charter* context, as well as developments in the law in other jurisdictions, the Court of Appeal determined that it was appropriate to develop the common law by adopting a public interest responsible journalism defence along the lines of the House of Lord’s decisions in *Reynolds v. Times Newspapers Limited* and *Jameel v. Wall Street Journal*.

The Court of Appeal acknowledged that the articles in issue were on a matter of public interest, but held that the appellants were not entitled to the benefit of the newly created public interest responsible journalism defense because they had not advanced this new defense at trial.

Supreme Court of Canada

Before the Supreme Court of Canada, the appellants in *Quan v. Cusson* advanced the position that the Court could bring the laws of defamation into accord with section 2(b) *Charter* values by allowing the media to rely on both the “*Reynolds-Jameel* public interest responsible journalism” defense and traditional qualified privilege. The appellants urged the Court to find that the articles at issue were protected by traditional qualified privilege (a legal issue), or alternatively, that the appellants were entitled to benefit from the change in the law that created the new defense of responsible journalism.

On the first issue, the Court held that, as explained in the companion case *Grant v. Torstar*, the time had come to recognize a new defense – the defense of responsible communication on matters of public interest. The Court further held

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that the publications at issue in *Quan v. Cusson* were clearly in the public interest:

The Canadian public has a vital interest in knowing about the professional misdeeds of those who are entrusted by the state with protecting public safety. While the subject of the *Ottawa Citizen* articles was not political in the narrow sense, the articles touched on matters close to the core of the public's legitimate concern with the integrity of its public service. When Cst. Cusson represented himself to the New York authorities and the media as an OPP or RCMP officer, he sacrificed any claim to be engaged in a purely private matter. News of his heroism was already a matter of public record; there is no reason that legitimate questions about the validity of this impression should not have been publicized too.

Quan v. Cusson, *supra*, para. 31 (whether a publication is in the public interest is a matter of law to be determined by the trial judge).

On the second issue, the Court disagreed that the appellants could not benefit from the new defense in that this would contravene the principle against raising "new issues" on appeal. The Court noted that the Court of Appeal did in fact allow the "new issue" of responsible journalism to be raised on appeal, and "broke new jurisprudential ground on precisely this issue." *Id.* at para. 34.

The Court also questioned how "new" the issue was in the sense of being legally and factually distinct from the issues litigated at trial, since much of the evidence that had been adduced to demonstrate qualified privilege and malice would also be relevant to responsible communication. For example, the defendants led evidence from the journalist of the steps he took to verify the allegations: "Importantly, he talked to Cst. Cusson and gave him the opportunity to tell his side of the story. Cusson's denials were included in the article." *Id.* para. 39 (whether the diligence factors are met is a matter of fact to be determined by the jury - or trial judge in its role as trier of fact).

The Court held that the interests of justice favored allowing the appellants the opportunity to avail themselves of the change of the law brought about by their litigation on a new trial. The standard for ordering a new civil trial, i.e., that a "substantial wrong or miscarriage of justice has occurred" had been met in that the appellant would be "seriously disadvantaged by being deprived the opportunity to avail themselves of the responsible communication defence which their

appeal was responsible for developing" and "if it turns out the defence is found to apply to the articles in question, such a deprivation would amount to an injustice". A new trial was ordered.

Co-existence of Traditional Defense

In the *Grant v. Torstar* decision, the Supreme Court explained that it was creating the new defense of public interest responsible communication, "leaving the traditional defence of qualified privilege intact." *Grant v. Torstar*, *supra* para. 95.

The Court noted that the traditional defense of qualified privilege had seldom assisted the media in defending libel actions in that it was grounded in special relationships characterized by "duty" to communicate the information and a reciprocal "interest" in receiving it. The press communicates information not to identified individuals with whom it has a personal relationship, but to the public at large.

The Court also held that many forms of qualified privilege would not be well served by opening up the privilege to media publications. For example, the duties and interests of people communicating and receiving job references or police reports are definable with some precision and involve a genuine reciprocity. By contrast, the reciprocal duty and interest involved in a journalistic publication to the world at large, by contrast, is largely notional. *Id.* para. 93.

The Court nonetheless noted that in the last decade, the traditional defense of qualified privilege had sometimes been extended to media defendants provided they can show a social or moral duty to publish the information and a corresponding public interest in receiving it citing *Grenier v. Southam Inc.*; *Leenen v. Canadian Broadcasting Corporation*; *Young v. Toronto Star Newspapers*. (Grant, para. 36). The Court concluded:

Despite these tentative forays, the "threshold" for privilege remains high and the criteria for reciprocal duty and interest required to establish it unclear. It remains uncertain when, if ever, a media outlet can avail itself of the defence of qualified privilege. *Id.* para. 37.

Wendy Wagner and Richard Dearden, partners at Gowlings in Ottawa, Canada, represented the media defendants before the Supreme Court of Canada in Quan v. Cusson.

Ethics Corner

Technology-Based Ethical Challenges: Practical Advice For Dealing With The Disclosure Of Metadata

By Richard M. Goehler

There is no denying it. There is no way of getting around it. Technology is rapidly evolving and developing every day and lawyers continue to find ways to utilize enhancements in technology to assist them in their everyday practices. As a result, new ethical issues and potential pitfalls are also continuing to arise and presenting new challenges for lawyers utilizing these developing technologies. Now, more than ever before, lawyers must keep current to meet these new technology-based ethical challenges.

One such technology-based ethical challenge arises when hidden “metadata” embedded in electronic documents is inadvertently disclosed. Metadata is often defined as “data about data” and may reveal confidential information. For example, metadata can contain authors’ names, the names of previous document authors, document revisions (including content previously deleted from a document), document versions, template information, hidden texts and comments. Savvy recipients are even able to “reverse edit” documents using metadata created in some word processing programs. Although disclosure of most metadata is harmless, lawyers unfamiliar with the concept of metadata run the risk of inadvertently disclosing “information that is either privileged or the disclosure of which would be detrimental or embarrassing to the client” such as “editorial comments, strategy considerations, legal issues raised by the client or the lawyer [and] legal advice provided by the lawyer.” NY Op. 782.

In recent years, attorneys have bombarded state bar associations with inquiries about what duties, if any, exist to disclose metadata in discovery. Other attorneys question whether they may ethically search for, review, or use metadata embedded within documents they have received. Most jurisdictions apply a different analysis to documents produced during discovery than to those sent outside of discovery. As a general rule, attorneys may not “scrub” (or remove) metadata from documents they produce as part of discovery. In fact, in many jurisdictions, courts may even impose sanctions against a party or attorney that intentionally removes or alters metadata before producing discovery documents. Conversely, when transmitting documents *out-*

side of discovery, lawyers usually have an ethical duty to remove any confidential metadata the documents may contain. In many jurisdictions, attorneys receiving documents containing metadata must be careful about how they search for and use that metadata embedded in documents received outside the discovery context.

States generally agree that, “outside of a discovery/subpoena context,” attorneys sending electronic documents have an ethical duty to take reasonable care not to disclose their clients’ secrets and confidences. *See e.g.* D.C. Op. 341; Alabama Formal Op. 2007-02; Maryland Ethics Dkt. No. 2007-09; N.H. Ethics Opinion 2008-2009/4. Although the degree of care required depends heavily on the nature and sensitivity of the particular information, lawyers must take “practical measures” to purge metadata “where appropriate to prevent the disclosure of confidential information.” Maine Op. #196; Arizona Ethics Op. 07-03. Lawyers should also take reasonable steps to purge metadata when sending electronic documents, including “scrubbing the documents to ensure they are free of metadata.” N.Y. County Lawyers’ Acc’n Op. 738. In some jurisdictions, lawyers who are “ignorant of technology relating to metadata” are required to “obtain competent computer support” in order to comply with their ethical obligations. Colorado Ethics Op. 119.

So, assume you receive an e-mail from a condescending opposing counsel with a detailed settlement letter attached. You open the attachment and notice that the document identification number located at the bottom of the attachment indicates that it was the fifth version of the letter. You know that, with just a few clicks of the mouse, you can uncover prior versions and any comments made during the editing process. Does your duty to zealously represent your client permit you to uncover the metadata? If you discover metadata that reveals settlement or litigation strategy, may you use it? The answer to these questions is “it depends.”

At one end of the spectrum, some jurisdictions have ruled that attorneys receiving documents outside of discovery may electronically scour for metadata unless they know the metadata was inadvertently disclosed. In September

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2007, for example, the District of Columbia Bar issued an opinion succinctly explaining that “[a] receiving lawyer is prohibited from reviewing metadata sent by an adversary only where he has *actual knowledge* that the metadata was inadvertently sent.” Under the D.C. approach, “mere uncertainty” about whether metadata was intentionally sent does not trigger an ethical obligation on the part of a receiving lawyer to refrain from reviewing the metadata. DC Opinion 341.

If the documents are sent *within* a discovery context, the D.C. Bar even goes a step further, explaining that “a receiving lawyer is generally justified in assuming that metadata was provided intentionally.” In fact, where an electronic document may constitute tangible evidence, “the recipient has an obligation to competently and diligently review, use and preserve the evidence.”

In such situations, the receiving lawyer “may consult with a computer expert to determine the means by which the metadata can be most fully revealed and reviewed, much as a lawyer does with a fingerprint expert.” Even under this approach, however, if a lawyer has “actual knowledge” that an adversary inadvertently provided metadata, the receiving lawyer should not review the metadata without first consulting and abiding by the sender’s instructions. But “in all other circumstances, a receiving lawyer is free to review the metadata contained within electronic files provided by and adversary.” *Id.*

The Colorado Bar follows a similarly permissive doctrine, finding that “a [r]eceiving [l]awyer generally may ethically search for and review metadata embedded in an electronic document” unless the sending lawyer expressly notifies the receiving lawyer that confidential information was inadvertently included in the metadata *before* the recipient has examined it. Colorado Ethics Op. 119. However, where the recipient “knows or reasonably should know that the metadata contain or constitute [c]onfidential [i]nformation[,]” that lawyer must contact the sending attorney and attempt to resolve the matter.

If the attorneys are unable to do so, the receiving lawyer may request that the court rule whether or not waiver of privilege or confidentiality has occurred. Colorado Ethics Op. 119. Maryland’s Bar Association also found that, absent a legal restriction to the contrary, “there is no ethical violation if the recipient (or those working under the attorney’s direction) reviews or makes use of the metadata without first as-

certaining whether the sender intended to include such metadata.” Maryland Ethics Docket No. 2007-09.

In contrast to the D.C. approach, the New York Bar found that a receiving lawyer “may not ethically take advantage of a breach in [an opposing] attorney’s care by intentionally searching the metadata.” N.Y. County Lawyers’ Acc’n Op. 738. Specifically, in New York a receiving attorney may not search metadata “with the intent to find privileged material *or if finding privileged material is likely to occur from the search.*” *Id.* (emphasis added). The New York Bar reasoned that “in light of the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship,” mining for certain metadata “would violate the letter and spirit of these disciplinary rules.” The Alabama and Arizona Bars followed New York’s lead in finding that, generally, a “receiving lawyer also has an obligation to refrain from mining an electronic document” and “a lawyer who receives an electronic communication may not examine it for the purpose of discovering the metadata embedded within it.” Al. Formal Op. 2007-02; Az. Ethics Opinion 07-03. Both Maine and Florida are slightly less restrictive, but still prohibit a recipient from reviewing metadata in an effort to obtain confidential information that the recipient should reasonably know was not intentionally communicated. Me. Op. #196; Fl. Ethics Op. 06-02.

Taking a few simple steps at the outset of a case could save a massive headache in the long run. To avoid the embarrassment, prejudice to clients, and allegations of malpractice that often accompany inadvertent disclosure of metadata, litigators should consider the following:

- ◆ Confidentiality agreements and protective orders that include specific sections about inadvertent metadata disclosure;
- ◆ Free or inexpensive metadata “scrubbing” programs that can reduce or remove metadata from outgoing files;
- ◆ Programs that prompt a “pop-up box” before the outgoing file is sent that enable users to “scrub” metadata from outgoing e-mail attachments with just a simple click;
- ◆ Sending attachments as “pdf” documents or facsimiles, which may also eliminate or significantly reduce the risk of inadvertent metadata disclosure.

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