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U.S. Supreme Court Strikes Down Law Regulating "Violent" Video Games

Justice Scalia Writes for a 7-2 Majority in a Stirring Reaffirmation of the First Amendment

By Kurt Wimmer

It took eight months for the Court to issue a decision in *Brown v. Entertainment Merchants Ass'n*, No. 08-1448, but the First Amendment advocates who agonized over the meaning of the long wait were rewarded on June 27 with a stunning victory for the First Amendment.

The reach of the *Brown* decision is likely to extend far past its immediate context of entertainment software. The strength of the *Brown* majority's reasoning will likely make regulation of "violent" content in any medium constitutionally suspect from the outset, and it is highly likely to restrain future efforts by Congress and the Federal Communications Commission to regulate "violent" content in gaming, television or other media. In addition, the decision's views on protection of minors in the First Amendment context are encouraging in light of the Court's parallel decision on June 27 to hear two cases relating to the FCC's broadcast indecency regulatory regime.

It took eight months for the Court to issue a decision, but the First Amendment advocates who agonized over the meaning of the long wait were rewarded on June 27 with a stunning victory for the First Amendment.

Justice Scalia, writing for Justices Kennedy, Ginsburg, Sotomayor, and Kagan, held that a California law restricting the sale or rental of violent video games to minors, and mandating "18" labels for such games, violates the First Amendment. The California law echoed obscenity laws in covering games in which violent acts are "depicted" in a manner that a "reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," that is "patently offensive to prevailing standards in the community as to what is suitable for minors," and that "causes the game, as a whole, to lack serious literary, artistic, political or scientific value for minors." The majority found that this attempt to create, essentially, a new classification of violent obscenity could not withstand constitutional scrutiny. In *United States v. Stevens*, 559 U.S. __ (2010), the Court had held that new categories of unprotected speech could not be added to the familiar list of narrowly limited classes of speech that were outside the protection of the First Amendment — obscenity, fighting words and incitement. It found that the *Stevens* holding controlled *Brown* as well.

The Court unambiguously held that the concept of obscenity is limited to depictions of sexual conduct. Moreover, it found that the "obscenity as to minors" standards of *Ginsburg v. New York*, 390 U.S. 629 (1968), could not justify the California law. "No doubt a State possesses legitimate power to protect children from harm," the Court wrote, "but that does not include a free-floating power to restrict the ideas to which children may be exposed." The Court noted that there was no "longstanding tradition" in the United States of restricting violent content from minors -- in fact, books read even to young children "contain no shortage of gore."

The majority held that, because the law is content-based, it must be subject to strict scrutiny. In language equally applicable to television broadcasting, the Court explained that the "Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try . . . . And whatever the challenges of applying the Constitution to ever-advancing technology, [the First Amendment] . . . do[es] not vary when a new and different medium for communication appears." The Court continued: "Crudely violent video games, tawdry TV shows, and cheap novels and magazines are no less forms of speech than The Divine Comedy, and restrictions upon them must survive strict scrutiny."

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The majority held that the California law did not survive strict scrutiny because the scientific studies on which the legislature relied do not provide "the degree of certitude that strict scrutiny requires." The studies show, at most, a correlation between playing violent video games and some measures of aggression, but "[t]hey do not prove that violent video games *cause* minors to *act* aggressively." These studies are therefore insufficient because, under strict scrutiny, "ambiguous proof will not suffice." The California law is also vastly underinclusive because the studies show that the effects of violent video games are indistinguishable from the effects produced by other media. Yet "California has (wisely) declined to restrict Saturday morning cartoons..."

The majority also pointed out that, in light of the voluntary rating system, the California law has only a marginal impact in helping parents control the video games that their children play. According to the Court, "[t]his system does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home. Filling the remaining modest gap in concerned-parents' control can hardly be a compelling state interest." Importantly to self-regulatory ratings efforts in gaming, film and television, the decision also pointed out that a ratings system does not need 100% coverage to be an effective self-regulatory mechanism. "Some gap in compliance is unavoidable," Justice Scalia said, in determining that it was irrelevant that an estimated 20% of 17-year-olds can still purchase M-rated games meant only for those 18 and older.

In choosing to address the merits rather than finding the law vague or unenforceable on non-First Amendment grounds, the Court made it far less likely that other governmental agencies will again attempt to regulate violent content.

The Court endorsed the primacy of parental involvement, as opposed to state censorship, in determining the content to which children should have access. It noted that because "parents who care about the matter can readily evaluate" their children's content, "filling the remaining modest gap in concerned-parents' control can hardly be a compelling state interest." The majority also responded acerbically to Justice Thomas' suggestion that laws should permit parents to prevent children from receiving content without the parent's prior consent. "Such laws do not enforce *parental* authority over children's speech and religion; they impose *governmental* authority, subject only to a parental veto." This finding should be particularly helpful in supporting television ratings system as an alternative to the heavy-handed indecency regime being challenged in the *Fox* and *NYPD Blue* cases that will be before the Court in the upcoming term.

Justice Alito, joined by the Chief Justice, concurred in the judgment. Justice Alito would not have reached the issue decided by the Court, and instead would have struck down the law as unconstitutionally vague. Justice Alito wrote that the Court was wrong to be quick to decide that interactive video games are not different in kind from other media. Contrary to the majority, Justice Alito would prefer to wait until further scientific studies are done to see how violent video games affect minors. In fact, Justice Alito seemed to have engaged in significant independent research in violent video games, and seemed willing to assume the harm that such games would cause to minors even though no causal link had been established by years of scientific research.

Justices Thomas and Breyer each dissented. Justice Thomas would have held that the First Amendment does not include the right to speak to minors without obtaining the prior consent of their parents or guardians. Justice Thomas posits that this view is based on the "original public understanding" of the First Amendment, but (as the majority points out) Justice Thomas cites no case, state or federal, supporting this view.

Justice Breyer concluded that the California law is not impermissibly vague and that it survives strict scrutiny. According to Justice Breyer, the law imposes only a modest restriction on speech, and the state has a substantial interest in regulating this speech because there is considerable evidence that violent video games can cause violence in youth. Although the evidence is not conclusive, Justice Breyer would defer to the legislature's judgment that there is a causal connection between violent video games and actual violence. Justice Breyer also believed that the voluntary ratings system cannot be viewed as a less restrictive alternative because the system has too many enforcement gaps.

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Overall, the *Brown* decision is a strong addition to the Court's First Amendment jurisprudence. In choosing to address the merits rather than finding the law vague or unenforceable on non-First Amendment grounds, the Court made it far less likely that other governmental agencies will again attempt to regulate violent content. In finding that the scientific research to date could not support the legislative finding of harm required by strict scrutiny, the Court resolved a long-standing dispute about the efficacy of the relevant social science research. And by clarifying that minors could not be "protected" by a law that places impermissible burdens on constitutionally protected speech, the *Brown* decision laid the groundwork for the indecency cases that it now has accepted for review. It is an exceptional end to a Supreme Court term that strongly reaffirmed the core values of the First Amendment.

Paul Smith and Katherine Fallow of Jenner & Block represented the respondent video-game and entertainment software industries. Kurt Wimmer, along with Bob Long, Steve Weiswasser and Mark Mosier, represented the National Association of Broadcasters. Amicus groups in support of respondents included the MPAA (Kannon Shanmugam, Williams & Connolly), Reporters Committee for Freedom of the Press (Lucy Dalglish), American Booksellers Foundation (Michael Bamberger, SNR Denton), and the Comic Book Legal Defense Fund (Bob Corn-Revere, Davis Wright Tremaine).

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Supreme Court Resolves Circuit Split on Publication and Marketing Use of Pharmaceutical Records

Stops Just Short of Tearing Down Barrier Between Core Speech and Commercial Speech

By Henry R. Kaufman and Michael K. Cantwell

On June 23 the U.S. Supreme Court issued an important First Amendment decision striking down state restrictions on the availability, publication and use of prescription-related records and data. The ruling is likely to make it more difficult in the future for states or the federal government to restrict access to, or to bar the publication of, factual data in the hands of private parties, whether for commercial or non-commercial purposes, even in cases where the restrictions are said to advance regulatory, economic or privacy interests, if the purpose of such restrictions is tao censor the content or viewpoint of speech.

In *Sorrell v. IMS Health Inc.* a six-Justice majority affirmed a decision of the Second Circuit U.S. Court of Appeals that had overturned Vermont's Prescription Confidentiality Law on First Amendment "commercial speech" grounds. The Vermont statute sought to restrict the sale, disclosure, and use of private pharmacy records that reveal the prescribing practices of individual doctors. Vt. Stat. Ann., Tit. 18, §4631 (Supp. 2010). The statute's primary focus was on the use of such data for "marketing" purposes by pharmaceutical manufacturers but it also had indirect but potential substantial financial impacts on the publishers of such data.

The ruling is likely to make it more difficult in the future for states or the federal government to restrict access to, or to bar the publication of, factual data in the hands of private parties, whether for commercial or non-commercial purposes.

Two similar statutes, enacted in New Hampshire and Maine, had previously been upheld by the First Circuit Court of Appeals. The First Circuit found that the statutes merely regulated conduct and not speech or, alternatively, that even if deemed to involve "speech" the statutes restricted data that had scant expressive value and could thus be regulated to the same extent as a "commodity" like "beef jerky."

Last week's ruling resolved this "split" in the Circuits, and will thus have a controlling impact on all three existing prescription data statutes, as well as on similar legislative proposals under consideration in some two dozen other states.

Justice Kennedy, speaking for six members of the Court (himself, Roberts, Scalia, Thomas, Alito and Sotomayor) squarely rejected the labeling of facts, data or information as a mere commodity. The majority held that even data-driven marketing messages are "speech" subject to heightened constitutional scrutiny under the First Amendment. The Vermont statute was found to be unconstitutional because it restricts speech based on its content and viewpoint and because Vermont's asserted reasons for the speech restrictions, the majority concluded, did not withstand heightened scrutiny.

The majority found that the Vermont statute did not advance doctors' privacy because it permitted their prescription practices to be disclosed for many purposes other than pharmaceutical marketing. (Patient privacy was not an issue because the data was already stripped of any patient-identifiable information.) Prohibiting pharmaceutical manufacturers from using prescription data to support messages disfavored by the states, and imposing this censorship to promote the state's counter-marketing viewpoint favoring generic drugs, also had no bearing on improving public health. Finally, even the otherwise valid goal of lowering health care costs cannot constitutionally be pursued by requiring that truthful information be withheld from doctors and patients.

It is notable that in a case where the lower courts were starkly divided over whether the prescription restraint statutes

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implicated protected speech at all, the majority cited and relied on a laundry list of classic First Amendment cases and principles in support of its ruling, treating speech for commercial marketing purposes in a fashion almost analogous to core political expression.

It found that the Vermont statute imposed both content and viewpoint discrimination. It emphasized that even dry, health-related data are constitutionally protected, observing that "[f]acts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." It held that "burdening" speech with regulations must be scrutinized to the same degree as an outright "ban" on disfavored expression. It reiterated that commercial information may at times be of greater interest to the public than political debate – especially "in the fields of medicine and public health, where information can save lives." Indeed, it made no attempt to clearly distinguish between commercial and non-commercial speech for purposes of its ruling. Finally, and also quite significantly, it rejected the dangerous argument, advanced by Vermont and the United States (as an amicus in support of the Vermont), that the use of or access to information already in the hands of private parties can constitutionally be restricted as if it were in the hands of the government, simply because the government actively regulates in the field.

The Vermont statute was found to be unconstitutional because it restricts speech based on its content and viewpoint and because Vermont's asserted reasons for the speech restrictions, the majority concluded, did not withstand heightened scrutiny.

Justice Breyer (joined by only Ginsburg and Kagan) presented a starkly contrasting view of the Vermont statute, and the applicability of the First Amendment. For the dissenters, these statutes represent nothing more than "a lawful governmental effort to regulate a commercial enterprise." They would have held that reasonable economic regulation implicated *no* speech interests and should thus be assessed under a merely "rational basis" test. Alternatively, even if judged under the "intermediate scrutiny" test applied to the category of protected "commercial speech," the statute would still be constitutional, according to the dissenters, in light of the state's "direct," "substantial" interest in protecting public health, privacy and reducing healthcare costs.

In conclusion, it is worth noting that *Sorrell v. IMS Health* was the first so-called "commercial speech" case to be decided by the Supreme Court since four of its newest members (Roberts, Alito, Sotomayor and Kagan) joined the Court. In contrast to the regressive First Amendment view of the case propounded by Justice Breyer, which attracted only three votes, including only one of the new four(Kagan), Justice Kennedy's expansive First Amendment views in this area now appear to command a solid majority of six votes, including the votes of the other three new Justices.

And although the majority determined that it did not need to break dramatic new ground by expressly reformulating, if not abandoning, the "commercial speech" doctrine, arguably the majority stopped just short of entirely tearing down the barrier between core speech and commercial speech. The decision thus also opens up a number of other potentially expansive First Amendment implications, to be explored in future cases, such as in the gray area between editorial advertising and commercial speech (e.g., *Nike, Inc. v. Kasky*), while also perhaps portending further important developments regarding governmental vs. private "access," such as issues previously addressed but not also not fully resolved in *LAPD v. United Reporting*, both substantively and in terms of the availability of "facial" challenges under the First Amendment.

Henry R. Kaufman and Michael K. Cantwell, practice media, publishing and IP law at Henry R. Kaufman, P.C. in New York City. Kaufman and Cantwell submitted an amicus brief in the IMS Health case on behalf of Amici Curiae Bloomberg L.P., The McGraw-Hill Companies, Inc., Hearst Corporation, Propublica, The Associated Press, The Reporters Committee For Freedom of the Press and the Texas Tribune.

Petitioner Vermont was represented by Vermont Attorney General William H. Sorrell and Assistant Attorneys General Bridget C. Asay, Sarah E.B. London, and David R. Cassetty and David C. Frederick of Scott H. Angstreich (Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, D.C.) Respondent IMS was represented by Thomas R. Julin, Jamie Z. Isani, and Patricia Acosta (Hunton & Williams, LLP, Miami, FL).

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Third Circuit Rules Cropping Photo Credits Violates the DMCA

Defendants Seek Rehearing En Banc

By Toby Butterfield and Joshua Wolkoff

The Third Circuit reversed a decision by the District Court for the District of New Jersey granting summary judgment in favor of the defendant radio station and individual defendant station hosts, and held, among other things, that the mere removal of a photo credit from a digitally uploaded photograph is actionable under § 1202(b) of the Digital Millennium Copyright Act ("DMCA"), *Murphy v. Millennium Radio Group LLC*, No. 10-2163 (3rd Cir., June 14, 2011) (Fuentes, Chagares, Pollak, JJ.).

While § 1202(b) plainly proscribes the intentional removal of "copyright management information," ("CMI") the Third Circuit's broad interpretation exposes publishers to liability any time they publish an image without proper attribution, even if the image is used in a manner that ordinarily qualifies "fair use."

The Third Circuit's broad interpretation exposes publishers to liability any time they publish an image without proper attribution.

Background

In 2006, Murphy, a photographer, was hired by the magazine *New Jersey Monthly* ("NJM") to take a photo of Craig Carton and Ray Rossi, who at the time were hosts of a radio show on the station WKXW, owned by Millennium Radio Group LLC. NJM used the photo in its "Best of New Jersey" issue naming Carton and Rossi "best shock jocks" in the state. The photo depicted Carton and Rossi standing, apparently nude, behind a WKXW sign (the "Image"). Murphy retained the copyright to the Image. No copyright notice appeared on the pages of NJM on which the Image was printed, nor was there a watermark embedded or imprinted in the Image that identified its owner or photographer; rather, a credit in fine print appeared in the gutter of the printed page of NJM where Murphy, along with other photographers, was credited. This gutter credit was inserted onto the page by a NJM employee who composed the page using Adobe InDesign Software.

An unknown employee of WKXW scanned the Image from NJM and posted the electronic copy on the WKXW website and to another website, myspacetv.com. The resulting Image, as scanned and posted to the Internet, cut off part of the original NJM caption referring to the "Best of New Jersey" award and all of NJM's gutter credit identifying Murphy as the author of the Image. The WKXW website invited visitors to alter the Image using photo-manipulation software and submit the resulting versions to WKXW. No one at WKXW received Murphy's permission to make such use of the Image.

In April 2008, Murphy sued the station and the show's hosts (the "Defendants"), in district court for, among other things, violations of §1202(b) of the DMCA. (Murphy also asserted claims for copyright infringement, pursuant to 17 U.S.C. § 101 *et seq*, in addition to a claim for defamation under New Jersey law. This article is limited to a discussion of the Court's analysis with respect to the DMCA claims.) Defendants moved for summary judgment on all claims. The District Court granted the motion and Murphy appealed.

The Decision Below

Section 1202(b) provides in pertinent part that:

> No person shall, without the authority of the copyright owner or the law
>
> (1) intentionally remove or alter any copyright management information, [or]...
>
> (3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has

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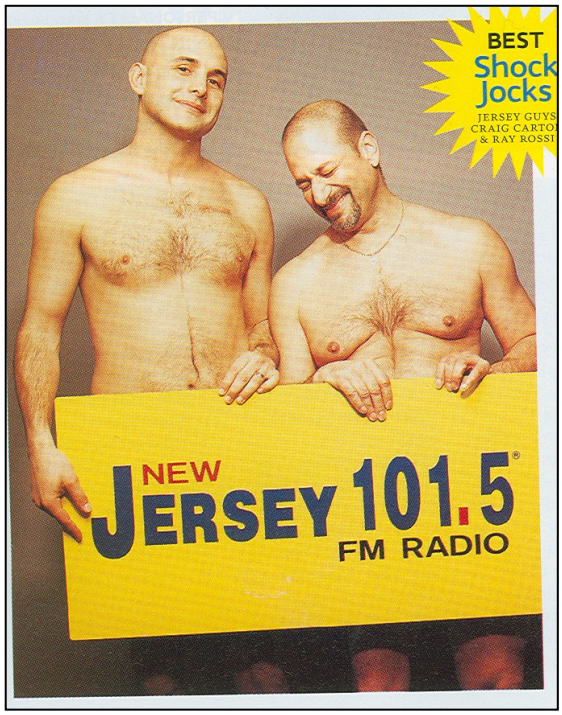
> been removed or altered without authority of the copyright owner or the law, knowing, or with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

In addition, § 1202(c) defines CMI as "certain types of information conveyed in connection with copies . . . of a work . . . including in digital form (2) the name of, and other identifying information about the author of a work".

Murphy argued that the NJM gutter credit identifying him as the author qualifies as CMI within the plain language of the statute because the credit included "the name of . . . the author of the Image" and was "conveyed in connection with copies of the Image." Therefore, Murphy maintained that by posting the Image on the two websites without credit, the Defendants removed or altered CMI and distributed the work knowing the CMI had been removed or altered in violation of § 1202.



The Third Circuit held, among other things, that the mere removal of a photo credit from a digitally uploaded photograph is actionable under § 1202(b) of the Digital Millennium Copyright Act.

The Defendants, on the other hand, argued that § 1202(b) and (c) should not be read in isolation from the entire DMCA statutory scheme. Rather, they urged the Court to consider the DMCA's legislative history, the language of the relevant WIPO treaties, and the DMCA in its entirety. Defendants primarily relied on the District Court's decision in *IQ Group, Ltd. v. Wiesner Publishing, LLC*, 409 F. Supp. 2d 587 (D.N.J. 2006), in which Judge Greenaway ruled that § 1202 "should not be construed to cover copyright management performed by people, which is covered by the Copyright Act, as it preceded the DMCA; it should be construed to protect copyright management performed by the technological measures of automated systems." Id. at 597.

As the Defendants pointed out, to trigger liability under § 1202, the information removed must function as a component part of an "automated copyright protection or management system." Thus, under the DMCA and the *IQ Group* decision, removing a gutter credit created with Adobe InDesign software when cropping the page is not sufficiently *automated* to fall within the ambit of § 1202.

Defendants also warned that a finding for Plaintiff would create a DMCA violation every time a magazine republishes an image without a photo credit, and "virtually all garden-variety copyright infringement claims would be converted to DMCA claims, supplanting the Copyright Act." Observing that the DMCA was intended to supplement, rather than blunt, the Copyright Act, the District Court agreed with Defendants and dismissed Plaintiff's claim under §1202. *Murphy v. Millennium Radio Group LLC, et. al.*, No. 08-1743, 2010 WL 1372408 (D.N.J. Mar. 31, 2010) (Pisano, J.).

The Decision on Appeal

The Court of Appeals disagreed. Reversing the District Court's grant of summary judgment, the Court suggested that the District Court had interpreted the DMCA too narrowly, pointing out that the plain language of § 1202 simply established a cause of action for the removal of (among other things) the name of the author of a work when it has been "conveyed in connection with copies of" the work. The Circuit Court concluded that the section includes no explicit requirement that such information be part of an "automated copyright protection or management system;" instead, it "appears to be extremely broad, with no restrictions on the context in which such information must be used in order to qualify as CMI." Contrary to Defendants' position, the Court noted that nothing in § 1201 restricts the meaning of CMI in § 1202 to information contained in "automated copyright protection or management systems," that § 1201 makes no reference to § 1202, and that the definition of CMI is located squarely

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within § 1202.

The Court conceded that the DMCA's legislative history can support the defendants' interpretation of CMI, but that it does not provide an "extraordinary showing of contrary intentions" compelling the Court to disregard the plain language of the statute and traditional canons of construction. The decision certainly has the capacity to turn "garden variety" copyright claims into DMCA claims, and may pave the way for future lawsuits against publishers for simply removing or altering a photo credit. Defendants have filed a motion for rehearing *en banc*.

Toby Butterfield and Joshua Wolkoff are lawyers with Cowan DeBaets Abrahams & Sheppard, LLP in New York. Defendants were represented by David S. Korzenik, Miller Korzenik Sommers LLP, New York; and Thomas J. Cafferty, Gibbons P.C., Newark, NJ. Plaintiff was represented by Maurice Harmon, Harmon & Seidman, LLC, Northampton, PA.

FCC Releases Report on "The Information Needs of Communities"

"Future of Media" Report Credits Broadcast News, Proposes Modest Regulatory Change

By Kurt Wimmer

In January 2010, the Federal Communications Commission announced that it would begin examining "the future of media and the information needs of communities," and it didn't take long for critics to sound the alarm. Fearing that a proceeding launched by a Democrat-controlled FCC would adopt new regulations from the media-reform movement and propose government subsidies to "save" the news, conservative think tanks such as the Free State Foundation decried the very concept of an FCC inquiry into the future of the media. One analyst said that the inquiry itself could chill speech. The Media Institute, a First Amendment think tank, filed a one-page comment in the FCC proceeding that simply reprinted the text of the First Amendment.

But when the 475-page report was issued on June 10, 2011, the editorial board of the Wall Street Journal praised it. The president of the Media Institute wrote that it "charts a wise course for the media's future." Adam Theirer of the Mercatus Center wrote, "my first reaction after scanning the FCC's final report is one of relief." In contrast, FreePress.org, a leader in the media reform movement, protested that the report "abdicates its responsibility" and "is full of contradictions." Commissioner Michael Copps, a frequent critic of media consolidation, said that the report's "policy prescriptions . . . don't follow from its diagnosis."

The report and its conclusions were, to many, unexpected. The 18-month course of the FCC's study, led by Stephen Waldman, a former reporter and author who founded Beliefnet.org, involved hundreds of interviews, several hearings, and the submission of multiple rounds of written comments. Mr. Waldman and his staff used this extraordinary base of information to document and publish a thoughtful and balanced treatment of the news ecosystem and the role of commercial television in that marketplace.

The report is critical of some elements of the television industry. It asserts, for example, that some 520 television stations (half commercial, half noncommercial) program no news at all. It also is critical of "pay for play" programs, in which sponsors pay to appear in news-like programs when that sponsorship is not disclosed to viewers. The report also criticizes the trend toward "one man band" multimedia journalists who write and photograph stories, and often compile video, blog and tweet; the report sees this trend as potentially weakening the industry's potential for in-depth reporting. It argues that the industry does too little investigative reporting, and chastises the industry for the "if it bleeds, it leads" phenomenon.But the report also clearly and powerfully recognizes the value of local television news. It points out that that the number of hours of news provided by local television stations has risen 35 percent in the past seven

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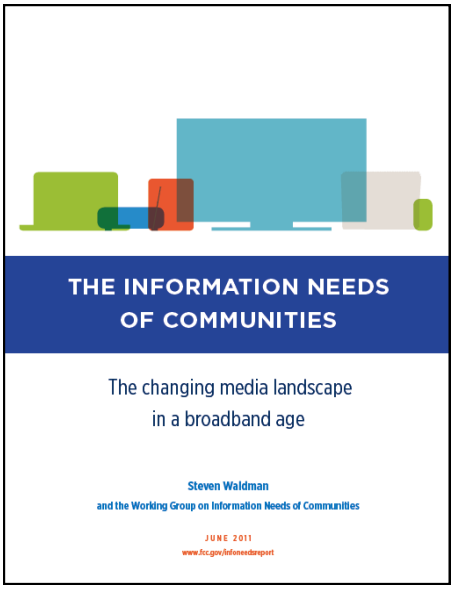
years. It recognizes the importance of television to American communities:

> "Most Americans still get their news from the local TV news team—and many stations do an extraordinary job inform-ing their communities. Increasingly, they are offering news through multiple platforms, giving consumers more ways to get the bread-and-butter news they need. Though local TV stations are not as financially robust as they were five years ago, most are profitable. Indeed, for now, local TV news may have the strongest business model for providing local news."

The report also points to the importance of television, "the most popular source" for local news. It notes that Americans are watching as much television as ever (40 percent of all media consumption is television), and finds that broadcast television maintains "clout" in fragmented media markets. It finds that 28.6 percent of stations actually *added* news hours in a depressed economy. It points out that political revenues are on the rise, as are retransmission consent payments – but notes that these payments come from "highly profitable" cable operations. It also notes that start-up community blogs and other online operations are adding much needed diversity and commentary to local communities, but are not covering or breaking original local news to any meaningful degree. Its conclusion that online and mobile media, including non-profit online start-ups, are not filling the gap left by contracting news coverage by the media.



Mr. Waldman and his staff used an extraordinary base of information to document and publish a thoughtful and balanced treatment of the news ecosystem and the role of commercial television in that marketplace.

The policy recommendations made by the report are modest. It finds that our current system of public-interest regulation is broken – that broadcasters collect and produce massive amounts of information on the programming that responds to local issues that neither the FCC nor the public ever read. It also notes that license renewals are routinely granted without scrutiny. Over the course of 75 years, the report notes, the FCC has granted more than 100,000 license renewals. It has denied only four renewals for a licensee's failure to meet public interest obligations, and none in the past 10 years.

But the measures that the report proposes to remedy the failings it perceives are measured and designed to permit viewers to better understand local programming policies. The report recommends that the FCC scuttle the long-dormant "enhanced disclosure" docket that would have expanded dramatically the record-keeping requirements imposed on broadcasters. Rather than proposing a system of intrusive regulation, the report proposes that stations publish online a "sample" week of programming so that communities can be empowered to better understand which stations are producing local programming and which are not. It does not propose that stations be judged by the levels of programming they disclose; it finds that the value of transparency alone will assist local populations in learning about our work and may lead to them supporting stations that do more. That recommendation reads as follows:

> "[T]he FCC should eliminate the long-standing requirement that local TV stations keep, in a paper file on the premises, a list of issues-responsive programming for the year. This should be replaced with a streamlined, web-based form through which broadcasters can provide programming information based on a composite or sample week. Information could include: the amount of community-related programming, news-sharing and partnership arrangements, how multicast channels are being used, sponsorship identification disclo-sures . . . and the level of website accessibility for people with disabilities. Over time, move to an online system for most disclosures, while ensuring that the transition is sensitive to the needs of small

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broadcasters, focusing, for instance on TV rather than radio."

The report also suggests moving the local public inspection file online, and providing online disclosure of pay-for-play, political expenditures, and sponsorship identification generally. It suggests reporting on the uses of multicast channels, and suggests that broadcasters link to online video of news that particularly serves local communities.

The report also suggests a common sense approach to ownership regulation. Although it does not make granular recommendations, it does find that the simplistic views of some that less concentration means more news is not borne out by the facts. It notes, for example, that "it might be better to have nine TV stations in a market than 10, if consolidation leads the remaining stations to be economically healthier and therefore more able to invest in local journalism." It does note that shared-service agreements (arrangements among stations in a market that permit two or more stations to share facilities) have led to layoffs, but also points out that local news sharing can lead to greater amounts of local news being made available to the public.

The report also suggests that federal government advertising spending should be pointed toward local media. It notes that the federal government spends about $1 billion per year on advertising, mostly at the national level. It suggests that this spending could be moved to local media, where it would better support journalism in local communities. It recognizes, of course, that any move of this nature must be entirely content-neutral to avoid claims of political favoritism. But it cites evidence from the Television Bureau of Advertisers that notes that federal advertising dollars spent locally can go further, and can target audiences more effectively, than national expenditures.

The report also contains significant research into public television and radio; the impact of broadband availability; cable, satellite and other video systems; nonprofit media; ethnic diversity in media ownership and employment; and the impact of these changes on people with disabilities. It is an in-depth and well-written study that is likely to be a helpful resource for the Commission and the industry going forward. It also is likely to provoke more discussion in coming weeks and months.

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Florida Judge Grants Directed Verdict to Beasley Broadcasting in Shock Jock Case

Plaintiff Failed to Show Damages

On May 31, 2011, Florida Circuit Court Judge Christine Greider entered a directed verdict in favor of Beasley Broadcasting in a private facts and negligent hiring lawsuit arising out of on-air statements made by a Florida shock jock. *Jane Doe v. Beasley Broadcasting Group Inc., Beasly Broadcasting of Southwest Florida, Inc., and Beasley FM Acquisition, Corp*., No. 05-CA-002417 (Lee County, Fla.).

The plaintiff, Patti Davis, the former longtime girlfriend of the now-deceased radio personality, Joe Scott, alleged that statements about her by Scott on the radio disclosed private facts and that the radio station was negligent in employing and retaining Scott. After the plaintiff presented her case, the court granted a directed verdict for the broadcaster, finding that the plaintiff failed to prove damages.

Background

Patti Davis brought this suit in 2005 as a Jane Doe plaintiff against the Beasley Broadcasting Group, the owners of radio station 96 K-Rock**,** over statements made by her ex-boyfriend, K-Rock's morning show shock jock Joe Scott. Scott was not named as a defendant and died in 2006. During his show, Scott called Davis a prostitute, a thief, and a drug-user, among other names and expletives. Scott had worked on and off as an on-air personality for Beasley Broadcasting for 15 years. He had spoken openly on the radio about his battle with drug addiction, and he frequently featured Davis as an on-air guest to discuss their relationship.

Prior to bringing this suit, Davis had made domestic violence complaints about Scott, and obtained an order of protection against him for hitting their teenage daughter.

The plaintiff sued Beasley Broadcasting for (1) unauthorized use of her name, (2) disclosure of private facts, (3) false light, and (4) negligent hiring and retention. Davis alleged that Beasley negligently hired Scott while he was a patient at a drug and alcohol rehabilitation center because the station was desperate to fill the vacant slot created by the departure of the nationally syndicated Howard Stern Show to satellite radio. Davis alleged that the station knew that Scott would broadcast under the influence of drugs, but negligently failed to take any disciplinary action against him until his suspension and subsequent dismissal after failing to report to work for three days in March 2006. Scott died nine months later after collapsing in his apartment.

Pretrial Motions and Jury Selection

Circuit Court Judge Greider granted partial summary judgment, dismissing Davis' misappropriation and false light claims, but allowed her claims for public disclosure of private facts and negligent hiring and retention to go to trial. In other significant pretrial rulings, the judge dismissed the plaintiff's claim for punitive damages, and barred her from calling an expert witness from the radio industry and referring to the defendant's alleged FCC violations.

The parties selected a jury of five women and one man. Voir dire included questions about whether jurors listened to Howard Stern or other shock jocks, and about their attitudes towards drug addiction and mental illness.

Trial Summary

In his opening statement, the plaintiff's lawyer argued that K-Rock capitalized on Scott's drug addiction, mental problems, and history of domestic violence with Davis by "essentially telling listeners that if they tuned in ...they would hear a mentally unstable person ranting." Defense counsel's opening statement stressed that Davis had previously engaged in on-air discussions with Scott about their personal life, and had disclosed the allegedly private information in her prior court filings.

Plaintiff's witnesses included two radio station employees, including the former program director of 96 K-Rock, who were asked about the circumstances surrounding Scott's hiring, as well as his continued treatment and monitoring by his psychiatrist and random drug tests**.** Brad Beasley told the jury that the station made it a condition of

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Scott's return that he continue treatment after his discharge, have regular visits with its director and his psychiatrist, and undergo random drug tests. Witness Gentry Odom, who was on the broadcasts with Scott, stated that the shock jock did not sound impaired but noted that Scott once told listeners his prescribed medications were making him lethargic or angry.

Plaintiff's lawyer also called Scott's former psychiatrist, Dr. Ralph Ryback, as a witness. He was allowed to testify about certain aspects of his relationship with his patient because he had appeared as an on-air guest on Scott's radio show. Ryback testified that before Scott's treatment in April 2005, he had abused cocaine, opiate painkillers, and drank a case of beer nightly. However, he was extremely uncooperative and responded that could not recall details of Scott's treatment.

Plaintiff testified, and her lawyer played tapes of broadcasts in which Scott called her, among other invectives, a "stark raving bitch," and an "infection" that needs to be "killed." Plaintiff stated she feared for her life and humiliated by Scott's tirades. Plaintiff also disputed that she voluntarily appeared on Scott's radio program, asserting that she often "ended up on the air, thinking [she] was just having a conversation with him." On cross examination the defense played tapes suggesting she was a willing participant on the show and engaged in "raunchy banter" and discussion of her personal life.

Directed Verdict and Jury Assessment

After the fourth day of trial and the conclusion of the plaintiff's case, Judge Greider granted the defendant's motion for a directed verdict. According to local news reports, she ruled that "no evidence or testimony has been offered to establish the Plaintiff is entitled to recover damages."

In a post-trial interview, one juror told a local newspaper that she would have awarded plaintiff $2 million in damages and that the other jurors were leaning towards the plaintiff by a 5-1 or 4-2 margin. Davis' lawyer said that he would appeal the directed verdict.

Plaintiff was represented by William D. Thompson Jr. of Fort Myers, FL. Beasley Broadcasting was represented by Kelley Geraghty Price and David Lupo of Cohen & Grigsby, Bonita Springs, FL.

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New York High Court Adopts Broad Reading of Section 230 Immunity

Website Operators "Are So. Not. Afraid."

By Charles Sims and Jessica Goldenberg

On June 14th, 2011, the New York Court of Appeals addressed, for the first time, § 230 of the Communications Decency Act (CDA), codified as 47 U.S.C. § 230. The Court held that a website operator could not be held liable as a speaker or a publisher of allegedly defamatory statements on its site composed and posted by a third party user. *Shiamili v. Real Estate Grp. of New York, Inc.*, No. 105-11, slip op., (N.Y. June 14, 2011).

With this 4-3 split decision, the Court adopted a broad reading of § 230 immunity. The Court held not only that a website operator who relocated user-generated content to a more prominent position was exercising "a publisher's traditional editorial functions" and was therefore immune from defamation claims under the CDA, but also that immunity was not lost when one of its employees added headings, sub-headings, and illustrations to supplement the statements. *Id.*, *citing Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

Background

In March 2008, Christakis Shiamili, founder and CEO of Ardor Realty Corp. (Ardor), a New York apartment rental and sales company, filed an action for defamation and unfair competition by disparagement against the Real Estate Group of New York, Inc. (TREGNY) its principal and Chief Operating Officer, Daniel Baum, and his assistant, Ryan McCann.

TREGNY, a competitor of Ardor, authored a blog devoted to the real estate market in New York. A guest to the TREGNY site, under the pseudonym "Ardor Realty Sucks," posted a comment to a discussion thread claiming that Shiamili mistreated his employees, was racist and anti-Semitic, and that he referred to a Jewish employee as "his token Jew."

McCann, the website administrator, decided to feature this comment as a stand alone post. He titled the post "Ardor Realty and Those People" with the sub-heading, "and now it's time for your weekly dose of hate, brought to you unedited, once again, by 'Ardor Realty Sucks'. and for the record, we are so. not. afraid." In addition, Shiamili's face was superimposed on an image of Jesus Christ and accompanied by the phrase, "Chris Shiamili: King of the Token Jews." This updated post generated several anonymous comments, which claimed that Ardor was in financial trouble and that Shiamili abused his wife.

McCann refused to remove the post, even after Shiamili requested that he do so. In response, Shiamili brought an action in New York state court, alleging that the defamatory statements were made with the intent to injure his reputation and that defendants either made or published the statements. Shiamili requested damages as well as injunctive relief requiring defendants to stop publication of defamatory statements concerning Ardor and Shiamili.

TREGNY moved to dismiss Shiamili's claim, but the trail court denied the motion, finding it necessary to first conduct discovery into defendants' roles in developing the content. *Shiamili v. The Real Estate Grp. of New York, Inc.*, No. 600460-08, slip op. (N.Y. Sup. Ct., Dec. 26, 2008). The Appellate Division reversed and dismissed the complaint. *Shiamili v. The Real Estate Grp. of New York, Inc.*, 68 A.D.3d 581 (1st Dep't 2009). The Court of Appeals addressed Shiamili's claim on appeal.

Opinion

The New York Court of Appeals affirmed the Appellate Division's dismissal under § 230 of the CDA.

Judge Ciparick noted that the Court of Appeals joined the "national consensus," by reading § 230 to bar "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content."

While TREGNY and McCann were clearly "service providers," the case turned on whether their actions transformed them into "information content providers" as to

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the posting at issue. The statute defines an "information content provider" as "any person or entity that is responsible in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230 (f) (3).

First, the Court rejected Shiamili's argument that defendants should be deemed content providers because the website implicitly encouraged users to post negative comments. Judge Ciparick stressed that "creating an open forum for third-parties to post content – including negative commentary – is at the core of what § 230 protects." Moreover, the site did not initially encourage users to bash Shiamili, rather an anonymous user chose to do so of his own accord.

Next, the Court found that reposting the comment was well within "a publisher's traditional editorial functions." *Id., quoting Zeran v. Am. Online, Inc.,* 129 F.3d 327, 330 (4th Cir. 1997). The Court cited federal case law in support of protection under the CDA for service providers who repost incorrect information. For example, in *Ben Ezra, Weinstein, and Co., Inc. v. Am. Online Inc.*, a service provider published inaccurate securities information supplied by a third party, and the Court affirmed the decision to grant defendant summary judgment, holding that the operator was not a content provider and therefore qualified for immunity under the CDA. 206 F.3d 980 (10th Cir. 2000).

In *DiMeo v. Max*, a case very similar to the one at hand, a defendant who could select which posts to publish and edit was sued for defamation and the Court affirmed the defendant's motion to dismiss finding that he was not the content provider and was immunized under the CDA. 248 Fed. Appx. 280, 282 (3d Cir 2007). Similarly, the Court found here that even if TREGNY reposted defamatory information, if supplied by a third party, they were not liable.

Finally, Judge Ciparick stated that while defendants clearly provided the content of the headings, the sub-headings, and the illustration, these elements were "not defamatory as a matter of law." The Court noted that the complaint failed to allege that the heading or sub-headings were alone actionable, and explained that the statement "Chris Shiamili: King of the Token Jews" was not defamatory since no reasonable reader would have taken this to be a factual statement. The Court found that the additions were obviously satirical, and while offensive, were not alone defamatory.

In sum, the Court found that by adding headings and illustration the defendants did not "materially contribute to the defamatory nature of third-party statements."

Ultimately, defendants were immune under the CDA, since the Court reasoned that all of the potentially defamatory statements were provided by a different "information content provider."

Dissent

Chief Judge Lippman, joined by Judge Pigott and Judge Jones, expressed deep concern over the implications of this decision and would have found the online attacks to be outside the scope of CDA immunity. While stating that the rearrangement of the "scurrilous" statements to a more prominent position might be covered by the act, he found that the large, manipulated photo of Jesus Christ, the heading "King of the Token Jews," the editor's note preceding the post, and the statements "time for your weekly dose of hate" and "we are so. not. afraid." went beyond traditional editorial functions and were far from benign.

In response to the majority's dismissal of the headings as obvious satire, Lippman explained that the reasonable reader would not have found that the plaintiff "was in fact Jesus Christ," but that he might have understood, after viewing the headings and illustration, that the site was endorsing the truth of the statement that the plaintiff was anti-Semetic.

While Lippman noted that he too accepts the "national consensus" on broad immunity, his opinion diverged from the majority on the grounds that defendants had not served simply as passive conduits, and through their additions they took on an active role.

In conclusion, Judge Lippman warned that "an interpretation that immunizes a business's complicity in defaming a direct competitor takes us so far afield from the purpose of the CDA as to make it unrecognizable."

Yet, despite the strong dissent, the Court of Appeals decision provides a safe harbor for website operators to reposition user-generated content, as well as add their own embellishments and be "so. not. afraid."

Charles Sims is a partner, and Jessica Goldenberg, an associate, at Proskauer LLP in New York. Plaintiff was represented by Jonathan S. Shapiro. Defendant was represented by Joseph D'Ambrosio.

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Court Refuses to Order Disclosure of Identity of Emailer

Online Communications: Hyperbole, Rhetoric or Not?

By Jennifer A. Klear

In an interesting decision, a New York appellate court refused to allow pre-action disclosure of the identity of an online speaker given the rhetorical nature of the comments, the failure of petitioner to allege that its business reputation was harmed and the nature of online speech -- where a reader "gives less credence to allegedly defamatory statements." *Sandals Resorts International Limited v. Google, Inc.*, 2011 NY Slip Op 04179 (NY App. May 19, 2011) (Mazzarelli, Saxe, McGuire, Freedman, Abdus-Salaam, JJ.).

Background

Sandals Resorts International ("Sandals") brought a petition for pre-action disclosure pursuant to NY's CPLR 3102(c) to obtain the identity of a Google Gmail account holder who allegedly defamed Sandals in an email.

The email is quite extensive. Its subject line is "THERE (sic) SOMETHING GRAVELY WRONG WITH THIS PICTURE OF JAMAICA ERRRR… SANDALS? (sic) THE NEED FOR [gap]." The body of the email contains comments by the writer "with links to various Web sites that presumably contained information that prompted or support the writer's remarks." The basic premise of the email, according to the Court, is that "the country of Jamaica gives subsidies to the Sandals resorts, paid for by Jamaican taxpayers, while the foreign corporation that owns the resort company hires only foreigners for its senior managerial positions and hires Jamaican nationals only for menial jobs at its Jamaican resorts."

Many of the writer's comments interspersed throughout the email are in question format. For example, after a link to an article about the appointment of a Senior Director of Advertising, the writer states: "I am guesstimating that the salary for this job is over USD$150,000 annually. No Jamaican need apply?" *Id*. at *4.

Sandals contended that the email is defamatory because it asserted "that Sandals is racist and discriminatory in hiring non-Jamaicans for all positions of management and authority, and giving native Jamaicans only low-paying menial jobs."

Google notified the account holder of the order to show cause pursuant to a stipulation reached by the parties. The account holder, in turn, notified the motion court of receipt of the documents and asserted that the publication was not defamatory.

The trial court denied Sandal's petition, holding the email was "nonactionable opinion" and that Sandals could not satisfy the "injury" element of a libel cause of action where it "offered no evidence of the harm the account holder's email had caused." *Id*. at *5.

New York Appellate Court Decision

The First Department affirmed on similar grounds in a lengthy decision that discusses online speech and the protection for opinion. The Court affirmed the trial court ruling "that the failure to allege the nature of the injuries caused by the [defamatory] statement was fatal to the petition." *Id*. at *5. The Court did not accept Sandals Resorts argument that portraying a plaintiff as racist constituted libel per se because petitioner, a corporation, had not established that the publication injured its business reputation or its credit standing. Specifically, the Court found that allegations that the email portrays petitioner as a company whose hiring decisions are informed by the applicant's race, even if defamatory, were not enough to establish a defamation claim where the petition was void of some allegation tending to establish that petitioner's business reputation was harmed. *Id*.

As to the underlying defamation claim, the First Department observed that "nothing in the petition identifies specific assertions of fact as false." *Id*. at 5. Specifically, the First Department found that there was "nothing in the petition contradicting the e-mail's claim that Sandals offers only menial jobs to native Jamaicans of African heritage." *Id*.

Ultimately though, the Court concluded that the email was constitutionally protected opinion. In reaching this conclusion, the Court relied on a range of case law starting

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with the four factor formula enunciated in *Ollman v. Evans*, 750 F.2d 970 (DC Cir. 1984) and adopted by the State of New York in *Immuno AG v. Moor-Jankowski*, 77 NY2d 235, 243 (1991). The four factors of *Ollman* formula are as follows:

> (1) whether the statement at issue has a precise meaning so as to give rise to clear factual implications, (2) the degree to which the statements are verifiable, i.e., "objectively capable of proof or disproof"(3) whether the full context of the communication in which the statement appears signals to the reader its nature as opinion, and (4) whether the broader context of the communication so signals the reader.

Id. at *6 (citing *Ollman*, 750 F.2d at 983) (internal citations omitted).

The Court then relied upon *Immuno AG v. Moor-Jankowski*, which announced that the New York State Constitution provided broader speech protections than the U.S. Constitution. *Immuno AG* relied on the standard articulated in *Steinhilber v. Alphonse*, 68 NY2d 283 (1986) for separating actionable fact from protected opinion, which speaks to the last two factors of the *Ollman* formula as follows:

> A pure opinion is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be pure opinion' if it does not imply that it is based upon undisclosed facts. When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a mixed opinion' and is actionable. The actionable element of a mixed opinion' is not the false opinion itself — it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking.

Id. (citing *Steinhilber*, 68 NY2d at 289-290).

Sandals argued that the email complained of "contain[ed] actionable false statements of fact, or an actionable statement of mixed fact and opinion, in which the anonymous writer created the impression that Sandals engages in racist hiring practices." *Id*. While the First Department found merit to this argument, it found that none of the factual assertions within the complaint established a meritorious defamation claim. In reaching this conclusion, the Court examined "both the words and context of the email as a whole, as well as its broader social context." *Id*. at *7. While the crux of the Court's decision was based on the context of the email, it did examine certain specific statements for a meritorious defamation claim whereupon in concluded:

> Although most of the comments in the e-mail refer to "Jamaicans" and "foreigners" without reference to race or skin color, there is one specific assertion that Sandals "does not even have a single dark-skinned Jamaican on its board," from which it is reasonable to infer that the writer is suggesting that Sandals is biased in its treatment of Jamaicans of color. It is also true, as Sandals states, that assertions of objective fact seem to be contained in the comments that Jamaicans are relegated to menial, low-paying jobs such as making beds, cleaning toilets, and giving massages, while foreigners hold "high profile luxury-style jobs," and that the government is subsidizing tourist empires with the taxes of poverty-stricken Jamaicans.

Id. at *7.

Finding that none of the above statements constituted defamation, the Court examined the context of the email and concluded that

> Considering the e-mail in question here as a whole, we find that it is an exercise in rhetoric, seeking to raise questions in the

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> mind of the reader regarding the role of Jamaican nationals in the Sandals resorts located in Jamaica. It is replete with rhetorical questions, asked either in relation to a link to an article about Sandals' companies or executives or in relation to a link to a photograph from the resorts' on-line public relations materials.

Id. at *8.

The Court analogized the case to *Brian v Richardson*, 87 NY2d 46 (1995), in which the Court considered the defamatory nature of an article by former United States Attorney General Elliot Richardson called "A High-Tech Watergate" that was published on the Op-Ed page of the New York Times on October 21, 1991. In that case, while the Court found that the article contained assertions linking the plaintiff to a scheme to take stolen software and use it to gain an inside track on a $250 million contract to automate the Justice Department litigation divisions, it concluded that plaintiff's defamation claim against the author was properly dismissed. The Court's reasoning in the *Brian* case was that "'the purpose of defendant's article was to advocate an independent governmental investigation into the purported misuse of the software that Inslaw had sold to the Justice Department, … a reasonable reader would understand the statements defendant made about plaintiff as mere allegations to be investigated rather than as facts.'" *Id*. at *7 (citing *Brian*, 87 NY2d at 53).

In comparing the *Sandals* case to *Brian*, the Court concluded that "[to] the extent the e-mail suggests that Sandals' hiring of native Jamaicans is limited to menial and low-paying jobs, a reasonable reader would understand that as an allegation to be investigated, rather than as a fact." *Id*.

The Court further concluded that the email qualified as pure opinion since it did not imply that it was based upon undisclosed facts. Rather, the Court noted that each remark within the email was prompted by or responsive to a hyperlink that was "accompanied by a recitation of facts upon which it is based." *Id*. at *8.

In its final analysis the Court considered the "broader social context into which the statement fits" and concluded that "the e-mail must be treated as an expression of the writer's views and opinions, which he is asking the reader to consider." *Id*. The Court remarkably distinguished between the types of statements made on the Internet versus those in print media. The Court cited a 2002 Fordham Law Review Note which argued that "the defamatory import of communication must be viewed in light of the fact that bulletin boards and chat rooms are often the repository of a wide range of casual, emotive, and imprecise speech,' and that the online 'recipients of [offensive] statements do not necessarily attribute the same level of credence to the statements [that] they would accord to statements made in other contexts." *Id*. (*citing* O'Brien, "Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases," 70 Fordham L Rev 2745, 2774–2775 (2002)). The Court noted that "the observation that readers give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts . . . is equally valid for anonymous Web logs, known as blogs, and it applies as well to the type of widely distributed e-mail commentary under consideration here." *Id*. at 9.

The First Department proceeded then to compare the email to the protections afforded to handbills and pamphlets "whose anonymity is protected when their publication is prompted by the desire to question, challenge and criticize the practices of those in power without incurring adverse consequences such as economic or official retaliation." *Id*. (citations omitted). As a result, the Court concluded that "the anonymity of the e-mail makes it more likely that a reasonable reader would view its assertions with some skepticism and tend to treat its contents as opinion rather than as fact." *Id*.

In reaching this conclusion, the Court cautioned against "[t]he use of subpoenas by corporations and plaintiffs with business interests to enlist the help of ISPs via court orders to silence their online critics[, which] threatens to stifle the free exchange of ideas." *Id*. (citing Calvert, et al., David Doe v. Goliath, Inc.: Judicial Ferment in 2009 for Business Plaintiffs Seeking the Identities of Anonymous Online Speakers, 43 J Marshall L Rev 1, 15 (Fall 2009)).

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Consumer Complaint Website Protected by Section 230

RipoffReport.com Not Liable for User Comments

A California federal court granted summary judgment to the owner of the RipoffReport website on defamation and related claims over third-party user postings. *Asia Economic Institute v. Xcentric Ventures LLC*, No. 10-01360 (C.D. Cal. May 4, 2011) (Wilson, J.). The court found that the majority of the claims were barred by Section 230 of the CDA because the reports were prepared by the site's users and thus defendants were not the "information content providers."

Background

Plaintiff Asia Economic Institute (AEI) publishes online news and information about Asian economic markets. Defendant Xcentric operates the Ripoff Report website, where users can document complaints about companies or individuals. At issue were reports purportedly from former AEI employees accusing its owners of hiring and firing on the basis of race, religion and gender; reducing "pay illegally," "laundering" money; and "having no idea how to run a business." Other more innocuous complaints include that the owners are "boring," "crazy," and "secretly married."

Increasing the visibility of a statement through HTML coding is not tantamount to altering its message, the court concluded.

Ripoff Report guides users through a process to submit reports. The user must input information about the company, create a "report title" by filing out a series of four boxes into which the user can enter "descriptive words" explaining what the report is about. The page does not instruct users with respect to the substance of their message. Finally, users are asked to review the Terms of Service, which require them to (among other things) refrain from posting anything false or defamatory.

Xcentric's servers automatically combine the unique text supplied by the user with HTML code to create "meta tags" used by search engines to index the contents to the specific page at issue. Members of the Ripoff Report's Corporate Advocacy Program, which AEI was not, receive preferential treatment – for example, negative reports about CAP members are less prominent in Internet searches.

On January 27, 2010, plaintiffs brought suit alleging several causes of action over the posts: civil RICO; unfair business practices; defamation, false light; intentional and negligent interference with economic relations; and fraud and deceit.

Plaintiffs' claims under RICO had previously been dismissed and/or dropped. In this opinion, the court granted summary judgment to defendants on the remaining claims. The fraud and deceit claims failed because the allegations in support were vague and failed to provide evidence of reliance. The bulk of the decision concerns the application of Section 230 to the remaining claims.

Section 230 Applied

Section 230(c)(1) of the CDA provides that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

As explained by the Ninth Circuit in *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003, "Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party." The court noted that the majority of federal circuits have interpreted the CDA to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of a service.

The relevant inquiry for the court in deciding whether defendants are shielded from liability by the CDA is whether they are "information content providers," defined in the statute as "any person or entity that is responsible, in whole or in part, for the creation or development of information

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provided through the Internet or any other interactive computer service."

Because the content of the reports was prepared solely by the user and defendants offered only generic and stylistic advice, the court held that liability could not be imposed absent a change to the substantive content of the postings. Increasing the visibility of a statement through HTML coding is not tantamount to altering its message, the court concluded This holding is bolstered by the Ninth Circuit's en banc opinion in *Rommates.com* where it was stated that "in cases of enhancement by implication or development by interference…section 230 must be interpreted to protect websites."

The court also found that the CDA barred plaintiffs' state unfair business practices claims because Section 230(e)(3) explicitly establishes that "no cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." This restriction includes state law claims under unfair competition law.

Gossip Website Wins Summary Judgment

Private Facts and False Light Claims Dismissed

The Arizona federal district court granted summary judgment to gossip website "TheDirty.com" on private facts and false light claims. *Dyer v. Dirty World, LLC*, No. 11-0074 (D. Ariz. June 2, 2011) (McNamee, J.).

At issue was the website's own comment in response to a third party posting. The court held that Missouri law applied, but that under either Missouri or Arizona law, plaintiff's claims failed. The court held that the private facts claim only applies to disclosure of true information and plaintiff claimed the information about her was false. The false light claim was outside the scope of Missouri law – or alternatively failed because the statements were protected opinion.

The court noted that it could decide the case without reference to § 230 of the Communications Decency Act and it did not discuss whether defendant could be liable for contributing to or soliciting the third party content.

Background

TheDirty.com is a gossip website that solicits user postings about celebrities and private figures. Users can post images and text referred to as "dirt" about themselves, their friends and partners. Users can post under several categories, including one titled "Would You," which defendant explained is a request by the user for website operator to give his opinion whether he would "date the person" depicted in the posted image. The website typically reviews submissions before publication and sometimes redacts some portion of the name of the person depicted.

Plaintiff's ex-boyfriend allegedly submitted a posting to the "Would You" category. The post stated she "gave me and my buddy the clap while she was sleeping around with us." The submission included two photographs of plaintiff posing in a bikini in front of a mirror. The website editor Nic Lamas-Richie added a response stating: "No it looks like she just had a baby, and if a girl is willing to take two guys on then I suggest you use a rubber." The submission was later removed from Defendant's website at Plaintiff's request.

On January 10, 2011, plaintiff sued the website for 1) public disclosure of private facts and (2) false light. On April 15, 2011, defendant filed a motion for summary judgment arguing the statements were non-actionable opinions and/or immune under § 230 of the Communications Decency Act.

Choice of Law Analysis

The court first held that Missouri law would apply to plaintiff's privacy claims under the "most significant relationship test." Arizona follows the Restatement (Second) of Conflict of Laws § 145 which considers the following factors: "(a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered."

The court found that the most important factor in a multi-state invasion of privacy case is "usually the state where the

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plaintiff was domiciled at the time if the matter complained of was published in that state."

Private Facts and False Light Claims

Missouri law defines public disclosure of private facts as "(1) publication or publicity, (2) absent any waiver or privilege, (3) of private matters in which the public has no legitimate concern, (4) so as to bring shame or humiliation to a person of ordinary sensibilities." The court held that the tort only applies to disclosure of true facts. Because plaintiff failed to allege that the statements were false, her claim failed under both Missouri and Arizona law.

TheDirty.com is a gossip website that solicits user postings about celebrities and private figures.

The court then held that Missouri does not generally recognize false light claims where plaintiff seeks to recover for allegedly "untrue statements that cause injury to reputation." It only recognizes two situations to bring a false light claim: (1) when defendant publicly attributes to plaintiff an opinion or utterance that is false and (2) when one uses another's likeness in connection with a story unrelated to plaintiff, such as if a defendant published a picture of a plaintiff next to a news story that had no relation to the plaintiff. Because neither of these scenarios applied to this case, the court granted summary judgment an dismissed the claim.

In addition, under Arizona law, the false light claim because no reasonable reader of the website could conclude that the comments represented anything but the author's highly subjective opinion about the plaintiff. The figurative language of the comments negated any impression that the statements were objectively true. Because the statements were not susceptible to being proven true or false, summary judgment was warranted under Arizona law.

We Thank Our Summer Interns for Their Contributions to the MediaLawLetter

Cristina Esteves-Wolff
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Jeffrey Zalesin
Pomona College

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Court Dismisses Claim against Al Jazeera for Reporting on Hezbollah Missile Strikes

News Reporting Is Not Terrorist Activity

By Andrew Deutsch

A New York federal court dismissed a lawsuit brought by a group of American, Israeli, and Canadian citizens against Al Jazeera, the Qatar-based satellite news network. *Kaplan et al. v. Al Jazeera*, 10 Civ. 5298 (S.D.N.Y. June 7, 2011) (Wood, J.). The case was notable for its assertion that Al Jazeera's news reporting during the 2006 Israel-Lebanon War was in itself international terrorism or aiding and abetting international terrorism, and the court's rejection of these claims for failure to plead adequate supporting facts.

The 2006 War and Its News Coverage

In July 2006, Hezbollah militants fired rockets over the Israel-Lebanon border, killing three Israeli soldiers. Two other Israeli soldiers were kidnapped by Hezbollah and taken to Lebanon. Israel then responded with artillery and airstrikes on Hezbollah and Lebanese army positions, and invaded Southern Lebanon. Hezbollah began to launch a barrage of unguided rockets into northern Israel, which killed 43 Israeli civilians and injured approximately 200 others. The war lasted over a month.

After the war ended, the Shorenstein Center on the Press, Politics, and Public Policy issued a report on media coverage of the war. It described "[n]etwork anchors, representing cable TV operations from Al-Jazeera to Fox, set[ting] up their cameras along the. . .border, like birds on a clothes line, one next to another, so that they could do live and frequent reports from the battlefield." It noted that the networks projected "in real time ... Hezbollah rockets striking Northern Israel and Haifa, forcing 300,000 to evacuate their homes .... all conveyed 'live,' as though the world had a front-row seat on the blood and gore of modern warfare."

The Lawsuit

Almost four years to the day after the conflict broke out, over 80 Israeli citizens (some of whom also held American or Canadian citizenship) or their legal representatives sued Al Jazeera in the Southern District of New York. They claimed to have been injured (or their relatives killed) by Hezbollah rocket attacks. The plaintiffs alleged that Hezbollah had been designated as a terrorist organization by the U.S. government and that its attacks on Israel were also intended to injure the United States. They asserted that because Hezbollah's rockets had no internal guidance system, the only way they could be accurately aimed was for Hezbollah to obtain information regarding the precise location of where earlier rockets had landed, and then adjust the trajectory of later rockets.

During the war, Al Jazeera broadcast real-time reports of where Hezbollah rockets landed within Israel. The complaint asserted that this reporting was done pursuant to the "official organizational policies" of Al-Jazeera. It also asserted that these reports were made "with the specific purpose and with the specific intention of assisting Hezbollah to more accurately aim its rockets, and thereby inflict more and greater harm" on Israel and the United States.

The plaintiffs with United States citizenship asserted two civil damages claims against Al Jazeera under the federal Antiterrorism Act (ATA): a claim that Al Jazeera's news broadcasts of Hezbollah rocket attacks constituted acts of international terrorism under 18 U.S.C. § 2333(a), and that the broadcasts aided and abetted Hezbollah's international acts of terrorism. The non-U.S. citizens asserted a claim that Al Jazeera aided and abetted Hezbollah's war, in violation of the Alien Tort Statute (ATS), 28 U.S.C. § 1350. The complaint sought a minimum of $1.2 billion dollars in damages.

Al Jazeera moved to dismiss the complaint, and the Kaplan plaintiffs amended. They recognized that their ATS claim had now been precluded by the Second Circuit's September 2010 decision in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.2d 111 (2d Cir. 2010), which held that corporations could not be held liable for violations of customary international law. Al Jazeera then moved to dismiss the first amended complaint

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The Court's Decision

Judge Wood's decision dismissed the first amended complaint. However, she did not address most of Al Jazeera's grounds for dismissal (such as failure to state the commission of a predicate federal or state offense, the incompatibility of the claims with the First Amendment, and the provision of the ATA that bars damages claims for injuries incurred as a result of an "act of war"). Dismissal was instead premised on the conclusion that the plaintiffs had failed to plausibly plead a cause of action, as required by the U.S. Supreme Court's recent federal pleading decisions: *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

The *Twombly/Iqbal* standard provides that to survive a Rule 12(b)(6) motion to dismiss a federal complaint, the plaintiff must state a claim that is plausible on its face. Mere conclusory assertions or recitals of the elements of a claim do not suffice. This, in turn, requires that the plaintiff plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. However, where the facts are equally consistent with non-culpable as culpable conduct, the claim is not sufficiently supported with factual matter and must be dismissed.

The case was notable for its assertion that Al Jazeera's reporting was in itself international terrorism or aiding and abetting international terrorism.

The Court found that the civil damages provision of the ATA requires a plaintiff to plead and prove intentional misconduct by the defendant. It found, however, that all the Kaplan plaintiffs had pleaded is that Al Jazeera "broadcast information that may have been helpful to Hezbollah in achieving its organizational goals." This was insufficient to plausibly show wrongful intent. The plaintiffs cited eight statements and three actions made or taken by third copies. The Court concluded that at most, these showed that others believed that Al Jazeera's news reporting favored Hezbollah or was biased against Israel and/or the United States. But none of the statements suggested that Al Jazeera broadcast news of the Hezbollah rocket attacks with the intention of assisting Hezbollah, which was a required element of the claim.

The Court rejected the plaintiffs' argument that if it appeared to others that Al Jazeera's broadcasts were attempting to help Hezbollah, this would meet the pleading requirements for intent. The plaintiffs based this argument on decisions holding that financial contributions to a terrorist organization would be providing material support to the organization with the foreseeable consequences of enabling more terrorist attacks. The Court found that this argument "strains credulity."

While financial contributions may foreseeably further the goals of a terrorist organization or increase its resources, "news coverage of the activities of a terrorist organization can serve an entirely different and acceptable purpose, namely, delivering important information to the public." The Court noted that the Hezbollah attacks had been covered by all three major U.S. networks, CNN, Fox News, and other news organizations. Thus, the plaintiffs failed to plausibly plead the required element of intent.

The Court also found that the plaintiffs had failed to plead proximate cause. The ATA requires civil plaintiffs to demonstrate that they were injured "by reason of an act of international terrorism," which implies a proximate cause requirement. The plaintiffs failed to allege facts suggesting that Hezbollah used Al Jazeera broadcasts to target their rockets and thus injure the plaintiffs. The Court rejected the plaintiffs' ATA claim for aiding and abetting terrorism for the same reasons: the complaint failed to cite facts plausibly suggesting that Al Jazeera intended or knew that its broadcasts would be used to support the Hezbollah rocket attacks.

The Court has given the Kaplan plaintiffs another opportunity to amend their complaint. However, even if the plaintiffs are able to surmount the *Twombly/Iqbal* pleading problem, they will still have to deal with Al Jazeera's other legal defenses. Among other matters, the plaintiffs do not claim that Al Jazeera's broadcasts of war news were false (indeed, their claims are premised on Al Jazeera having truthfully reported the facts) or that the matters reported were not of legitimate public concern. The Kaplan plaintiffs will face a solid wall of adverse precedent holding that the First Amendment bars damage claims based on truthful reporting of news of public concern.

Andrew Deutsch is a partner at DLA Piper in New York and represented Al Jazeera in this matter.

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Negligence Claim Over Google Map Directions Dismissed

A Utah state court dismissed negligence and failure to warn claims against Google over allegedly faulty map directions. *Rosenberg v. Harwood, Google, and John Does I-X*, No. 100916536 (Utah Dist. May 27, 2011) (Himonas, J.). The court found that Google did not owe a duty to plaintiff who was hit by a car while allegedly following Google Maps walking directions. The decision hinged on the court's findings that no legal relationship existed between the parties, the injury was not likely to occur and policy considerations weighed against finding a publisher like Google liable.

Background

The plaintiff Lauren Rosenberg was struck by an automobile driven by defendant Patrick Harwood. Rosenberg alleged that Google Maps negligently provided walking directions to cross State Route 224, a dangerous rural road that lacks sidewalks and is frequently used by vehicles traveling at a high rate of speed. The complaint asserted four causes of action against Google: (1) general negligence, (2) failure to warn, (3) strict liability – defective design, and (4) strict liability – failure to warn. Plaintiff consented to the dismissal of the third and fourth claims.

Google argued that the negligence and failure to warn claims were barred by the First Amendment and basic tort law principles. The court held that the case could be dismissed on general duty of care grounds and it did not need to address the constitutional issue – though this came into consideration in the court's policy analysis.

Duty of Care

In considering whether Google owed plaintiff a duty of care, the court considered 1) the legal relationship between the parties, 2) the foreseeabiliy of the injury, 3) the likelihood of the injury, and 4) public policy considerations.

The first factor weighed against imposing a duty of care. There was no contractual, fiduciary or special relationship between the parties that would impose a duty on Google to protect plaintiff from the negligence of a third party. The second factor, though, weighed in favor of plaintiff. Google's direction to walk along SR 224 was sufficient to establish that it was foreseeable that plaintiff could be harmed.

With respect to the third factor, the court found it unlikely that a pedestrian would be injured while crossing a road unless he or she breached their own duty and disregarded the risks of oncoming traffic. Thus, Google was not required to anticipate that a user of Google Maps would negligently cross without looking for cars.

Turning to the policy questions, the court found that these considerations weighed heavily in favor of Google. The court agreed that Google is clearly a publisher. Thus, the same policy considerations applied as in other cases that rejected imposing a duty on publishers for providing inaccurate information. Foremost among these is the possibility that a publisher may be subject to liability to an unlimited number of individuals who may read or receive the information. Likewise, requiring Google to investigate its routes to ensure that every portion of the walking routes is safe would impose an onerous burden. The court, citing to *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 340 (1974), noted that "some errors are inevitable in the publishing business."

Plaintiff also argued that Google should have included a warning about the danger of the walking route. The court disagreed, stating:

> [U]nder such a broad duty, Google might have to investigate and warn about any foreseeable risks along every route, which might include negligent drivers, drunk drivers, dangerous wildlife, sidewalks or roads in disrepair, lack of lighting, and other risks that may only exist during certain times of day. Such a duty would impose a burden that would clearly be difficult, if not impossible for Google to bear.

Although some harm may have been foreseeable, the actual likelihood of injury was low, the relationship between the parties was greatly attenuated, and policy considerations weighed strongly against burdening the high value of Google's services as a publisher.

Thus, the court granted Google's motion to dismiss the claims in their entirety.

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Pima Community College Ordered to Disclose Hundreds of Email Records Relating to Tucson Shooter over FERPA Objection

By David J. Bodney and Aaron J. Lockwood

On May 17, 2011, an Arizona trial judge ordered Pima Community College to produce hundreds of email records relating to the accused "Tucson shooter," Jared Loughner, and his troubled history at the Community College, despite the College's claim that the records were protected from disclosure by the federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"). In response to that order, the College produced the requested records, and agreed to settle the public records lawsuit brought by Phoenix Newspapers, Inc., which publishes *The Arizona Republic*. Pursuant to the settlement, the Community College relinquished its right to appeal, agreed to produce additional documents for *in camera* review, and paid *The Republic* $25,000.00 in attorneys' fees and costs.

In his ruling, Judge Stephen Villarreal rejected the College's assertion that FERPA trumped the Arizona Public Records Law, A.R.S. § 39-121 *et seq*., and justified a blanket closure of school records. *Phoenix Newspapers, Inc. v. Pima Cmty. Coll.*, No. C20111954 (May 17, 2011 Ariz. Super. Ct., Pima County) (the "Order"). Judge Villarreal's Order emphasized the narrow reach of FERPA, and clarified that the U.S. Supreme Court's decision in *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426 (2002), stands for the proposition that "education records" must be maintained in a permanent, centrally-located student file. The mere existence of emails on a computer server or in faculty inboxes is insufficient to invoke FERPA.

In so holding, Judge Villarreal provided a potentially useful precedent for journalists fighting widespread abuses of FERPA's confidentiality provisions. *See, e.g.*, Student Press Law Center White Paper, *FERPA and Access to Public Records* (2011) ("It has become routine for some schools and colleges to cry 'FERPA' in response to virtually any open-records request, putting requesters in the position of having to wage a costly, time-consuming public-records lawsuit to get answers.").

Background

On January 8, 2011, at a "Congress on Your Corner" event near Tucson, Jared Loughner shot and killed six people, including U.S. District Court Judge John Roll, and wounded 13 others, including Rep. Gabrielle Giffords. Two days later, *The Arizona Republic* submitted its first in a series of requests to Pima Community College seeking records relating to Loughner's mental stability and the safety risks that he posed while a student. The newspaper's requests focused on three broad categories of records: (1) communications among College faculty and staff; (2) communications between faculty and staff and any outside agency (*e.g.*, law enforcement or mental health organizations); and (3) documents relating to Loughner's suspension from campus in September, 2010 and the terms on which he could return.

In response, the College searched all of its electronic files, including faculty email, for the word "Loughner," and identified nearly three hundred pages of responsive records. Although the College produced a handful of documents, including those maintained by campus police exempt from FERPA (*see* 20 U.S.C. § 1232g(a)(4)(B)(ii)), it refused to disclose the remainder on the ground that the records related to Loughner's status as a student. Yet in the weeks following the Tucson shootings, the College had selectively released other information about Loughner's final months at the school. Among other things, the College had revealed that Loughner had been suspended for Code of Conduct violations, that he could not return to campus without a mental-health opinion declaring that he posed no risk to himself or others, and that Loughner had expressed his intent to withdraw as a student.

To evaluate the College's handling of Loughner's apparent mental-health problems, on March 15, 2011, *The Republic* filed a statutory special action – Arizona's name for a petition for writ of mandamus or prohibition – to enforce

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the Arizona Public Records Law. In its papers, *The Republic* cited the strong, presumptive right of access to public records under the law, and explained that the College carried a heavy burden of demonstrating that disclosure would violate rights of privacy or harm the best interests of the state. *E.g.*, *Cox Ariz. Publ'ns, Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993).

The newspaper also emphasized that it did not seek Loughner's transcripts or other records traditionally maintained by the school registrar. Nor did *The Republic* desire any conventionally protected personal information, such as social security numbers or financial data.

Although the College admitted that the records were subject to the Arizona Public Records Law, it cited no privacy or state interest that might justify withholding them. Rather, it argued only that FERPA prohibited it from complying with PNI's requests. Specifically, the College asserted that FERPA applied to *any* record within its possession or control concerning a current or former student, and that the College could not release those records without the student's consent, which Loughner had not given.

The Community College submitted the records at issue for *in camera* review, and the court heard oral argument on April 29, 2011.

The Disclosure Order

Looking to FERPA's text, Judge Villarreal observed that "education records" are defined broadly to include "records, files, documents, and other materials" that "contain information directly related to a student." Order at 2 (quoting 20 U.S.C. § 1232g(a)(4)(A)). The dispositive issue, therefore, was whether the records were "maintained" by the College within the meaning of FERPA. If not, he wrote, the documents must be disclosed pursuant to the Arizona Public Records Law. *Id*.

Judge Villarreal found instructive the Supreme Court's statement in *Owasso* that FERPA records "will be kept in a filing cabinet . . . or on a permanent secure database . . . in the same way the registrar maintains a student's folder in a permanent file." *Id*. at 3 (quoting *Owasso*, 534 U.S. at 433). Judge Villarreal also found persuasive the federal district court's decision in *S.A. v. Tulare County Office of Education*, which holds that an educational institution "maintains" email records only after they are deliberately placed in a student's permanent file. *Id*. (citing *Tulare*, No. CVF08-1215, 2009 WL 3126322, *7 (E.D.Cal. Sept. 24, 2009)).

Relying on these precedents, Judge Villarreal concluded that an institution does not "maintain" documents unless the institution has control over their access and retention. If email can be removed from a database simply by the user deleting it, he reasoned, then email that happens to remain on a server by no action of the institution is not "maintained" by that institution.

Turning to the facts of this case, Judge Villarreal explained that "[a] key-word search that returns an unknown quantity and quality of documents, does not comport with the idea of records kept by a central custodian or records kept in a central location or database, and does not conform to the idea of records kept in a filing cabinet in the records room." *Id*. Hence, Judge Villarreal held that the College did not "maintain" records that it could only identify by a key-word search for Loughner's name, and that the email messages at issue were not "education records" protected by FERPA.

Judge Villarreal ordered the College to release immediately all responsive email, and within days, *The Arizona Republic* ran a front-page article discussing the school's struggles with its now-infamous student. *See* Robert Anglen & Dennis Wagner, *College unsure how to handle Loughner's behavior, e-mails show*, Ariz. Republic, May 20, 2011.

Case Resolution

The May 17 Order did not fully resolve *The Republic*'s public records requests because a small number of non-email documents identified by the College as responsive still needed to be addressed. To that end, the court ordered the College to resubmit the records for further review and justify any proposed redactions. The College also resubmitted other email records that it claimed were "maintained" in a single student file within the meaning of FERPA. As of this writing, that issue remains under advisement. Insofar as *The Republic* had substantially prevailed in its special action under the Arizona Public Records Law, the College agreed to pay $25,000.00 to resolve the newspaper's statutory right to seek attorneys' fees and costs.

David J. Bodney and Aaron Lockwood, together with Peter S. Kozinets, of Steptoe & Johnson LLP in Phoenix, Arizona, represented Phoenix Newspapers, Inc. in this access litigation.

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California Court of Appeal Rules in Favor of Public Access

Common Law Right of Access Applies to State Bar Data

By Evgenia N. Fkiaras

In a unanimous decision set to be published in the official reports, the California Court of Appeal ruled that admissions records held by the State Bar of California are subject to the common law right of access. *Sander v. State Bar of California*, 2011 Cal. App. LEXIS 717 (2011). The appeals court overturned the lower court's decision exempting the records from access laws. In so doing, it reinvigorated the right to access government records based on a common law tradition dating back centuries. It will now be up to the trial court to decide whether the State Bar must produce the requested information after balancing the strong public policy in favor of disclosure against confidentiality interests and the burden of the request on the State Bar .

Background

Richard Sander, an economist and professor of law at the University of California Los Angeles, heads a project created to study the scale and effects of admissions preferences in higher education. The State Bar collects and maintains information regarding bar applicants, including bar exam results and scores, undergraduate and law school records, standardized test scores, ethnic background, and gender. The State Bar's compendium of information regarding bar applicants is unique in its scope and detail. Sander approached the State Bar to use the information it collects for a collaborative study regarding the large and persistent gap in bar exam passage rates among racial and ethnic groups. Citing concerns about applicants' confidentiality, the State Bar rejected the proposal.

In response to this rejection, Sander submitted a formal request to the State Bar to inspect and receive copies of data pertaining to persons who took the bar exam between February 1973 and July 2007. The State Bar denied this and a later, similar request Sander had designed to eliminate any privacy concerns. Sander was joined in his second request by Joe Hicks, a former governor of the State Bar and currently Vice President of a nonprofit organization advocating innovative approaches to human and race relations, Community Advocates, Inc.

The California First Amendment Coalition ("CFAC"), an organization engaged in advocating for open government, submitted its own separate request for the same information Sander and Hicks sought. It too was rejected.

Sander, Hicks, and CFAC thereafter brought an action seeking to compel the State Bar to disclose to the public the requested records. They asserted that they were entitled to the records under the right of access under Article I, Section 3 (b) of the California Constitution (enacted in 2004 by the passage of Proposition 59) and under the common law. The parties agreed to bifurcate the proceedings into two phases, the first phase primarily concerning whether either of the asserted rights of access applied to the requested records. If the trial court ruled in the affirmative, the trial court would address in the second phase whether the State Bar had to disclose the requested records, after considering Bar applicants' privacy rights and any burdens on the State Bar in complying with the request.

Judge Curtis E. A. Karnow of the San Francisco Superior Court held that there was no right of access under the California Constitution or the common law. He first noted that the First Amendment right of access is limited to records used in adjudicatory proceedings. There was no dispute that the requested records were not used in any such proceedings. Although, he acknowledged that the common law right to access records predates the First Amendment, he held that the "common law of access has in effect been absorbed by the constitutional rule."

He further held that Proposition 59 did not change the substantive law to create a broader right of access to government records than had previously existed. Rather, Proposition 59 simply "constitutionalized" existing law and could not be used as an independent basis for access.

Court of Appeal Decision

The California Court of Appeal reversed, holding that the common law right of access attaches to the requested records. Justice Peter J. Siggins wrote the opinion, with Justices William R. McGuiness and Stuart R. Pollak concurring. The

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opinion began its analysis by reviewing the long history of public access to government records, noting that "the policies underlying the common law right are deeply rooted in our democratic form of government." This right, it held, arose and existed before and independently of the right of access to adjudicatory proceedings and records based on the First Amendment, and is not subject to the constraints on the scope of the First Amendment right of access. It held that California has recognized a common law right of access to records of all three branches of the government.

The Court held that the State Bar's records were not an exception to the rule. It rejected the State Bar's arguments that it is subject to the same considerations shaping the boundaries of access to court documents:

> [T]he Bar claims that because it is part of the judicial branch its records are immune from the common law presumption of access unless they are 'adjudicatory' documents. As the argument goes, since the Bar is not in the business of adjudication, its records are not adjudicatory and need not be disclosed.
>
> * * *
>
> [A]pplying the adjudicatory/nonadjudicatory test here, as the Bar urges us to do, would seemingly exempt all records of any administrative arm of the judicial branch of government from the longstanding common law presumption of access to public records without the justification that exists for the particular protections afforded to nonadjudicative records produced by the courts.

The Court held, instead, that the records sought related to the official functions of the State Bar, a public corporation, in administering the bar exam, "a matter of legitimate public interest." They were thus subject to the common law right of access.

The opinion further recognized criteria that govern the application of the common law right:

> [W]here there is no contrary statute or countervailing public policy, the right to public records must be freely allowed. In this regard the term 'public policy' means anything which tends to undermine that sense of security for individual rights, whether of personal liberty or private property, which any citizen ought to feel has a tendency to be injurious to the public or public good.

According to the Court, it was error for the trial court not to apply these criteria to the requested records and make an assessment. It therefore remanded the case and ordered the trial court to address whether countervailing policy considerations outweigh the presumptive right of access.

Having ruled on the common law, the Court declined to address the applicability of Proposition 59 to the requested records.

Looking Forward

Although the history of common law access to government records is long and well-established, there have been relatively few California state cases applying this doctrine. *Sander v. State Bar* rejuvenates this right in California just as the pivotal *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978)—which applied the common law right of access to the infamous Nixon tapes—rejuvenated the Federal common law right of access. *Sander v. State Bar* demonstrates the continued applicability of the common law right of access to government entities and records. It further articulates and reaffirms a clear standard of access for subsequent cases to follow.

The meanings and contours of Proposition 59, on the other hand, are left for another day.

The California First Amendment Coalition was represented by James M. Chadwick of Sheppard Mullin Richter & Hampton LLP, together with Guylyn R. Cummins, Evgenia N. Fkiaras and David E. Snyder of the same firm.

Richard Sander and Joe Hicks were represented by Jane R. Yakowitz, and later by Jean-Paul Jassy of Bostwick & Jassy LLP, together with Gary L. Bostwick and Kevin L. Vick of the same firm.

The State Bar of California and the Board of Governors of the State Bar of California were represented by Michael J.Von Loewenfeldt of Kerr & Wagstaffe, together with James M. Wagstaffe of the same firm, and by Starr Babcock, Lawrence C. Yee and Rachel S. Grunberg of the California State Bar.

Various other individuals and entities submitted briefs as Amici Curiae in support of Plaintiffs.

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Colorado Governor's Cell Phone Calls Not Public Under State Open Records Law

By Christopher P. Beall & Steven D. Zansberg

In a 4-2 decision, the Colorado Supreme Court has ruled that the Colorado Open Records Act ("CORA"), the state's public access statute, does not cover the cell phone bills kept by then-Governor Bill Ritter even though those records document the governor's official conduct.

In *Denver Post Corp. v. Ritter*, No. 10-SC-94, 2011 WL 2449325 (Colo. June 20, 2011), the court's majority held that because Governor Ritter obtained the cell phone at issue in the case himself, paying for the cell phone service personally and without reimbursement from the state, and did not share the billing statements with any other state employee, the fact that Ritter used that device to conduct *all* of his official business via cellphone was immaterial. Rather, according to the court, the records of such official business calls were beyond the reach of the CORA's definition of "public records" and the court was without discretion to construe the statute to reach them.

In a blistering dissent, the two-justice minority challenged the majority's rationale and predicted the outcome of the court's decision would be to encourage public officials throughout Colorado to conduct official business via personal cell phones to prevent the public from gaining access to information regarding such official conduct.

Newspaper's Open Records Request

In early 2008, one of the *Denver Post*'s political reporters made a request under CORA to inspect all of the governor's cell phone records for the first two months of his administration, limited to calls in which the governor had discussed "anything relating to state business and state employees." A subsequent request, for a longer period of time, similarly was expressly limited to encompass only the records of "official business" calls, *i.e.*, not calls to family or personal friends, and only those calls that were made or received during normal working hours (M-F, 8 a.m. to 6 p.m.).

The specific requested records at issue in the case – that is, the monthly invoices from the governor's cell phone carrier – covered more than 10,000 phone calls, and listed the date, time, and duration of the call, the phone number that was called or received, and location for the number to which the governor was connected. Of course, the bills do not contain any indication of the actual content of the phone conversations themselves.

The governor's office refused to release the requested records – although it did release records from the governor's separate government-issued BlackBerry email service – on the grounds that the governor's cell phone was his personal property for which he paid personally and the records of which were not "public records" under the statute.

CORA's Definition of "Public Record"

Unlike other states where the definition of a "public record" is keyed to the question of whether public funds are expended in connection with record, the CORA's definition of "public record" – and hence its scope – is instead primarily focused on a functional analysis of how the record is used by the government (although the expenditure of public funds is a separate and independent trigger for "public records" status).

Thus, under the statute, "public record" means:

> [A]ll writings made, maintained, or kept by the state, any agency, institution . . . or political subdivision of the state . . . *for use* in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds.

Colo. Rev. Stat. § 24-72-204(2)(6)(a)(I) (emphasis added).

In an important gloss on this definition, the Colorado Supreme Court previously has interpreted the CORA's definition of "public record" as not encompassing sexually explicit text messages exchanged between two county employees on a county-owned text-messaging system because such messages – even though they were "kept" by the county's computer servers – did not involve the exercise

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of "functions required or authorized by law," because on-the-job sexual relations between county employees were, of course, not "demonstrably connected" to official business. *See Denver Publ'g Co. v. Bd. of County Comm'rs*, 121 P.3d 190 (Colo. 2005). The Colorado Supreme Court also has held that the CORA's definition of "public record" does not encompass a county manager's personal diary in which he infrequently recorded information about his official conduct because the statute "was not intended to cover information held by a government official in his private capacity." *Wick Comm'ns v. Montrose Cnty. Bd. of Cnty. Comm'rs*, 81 P.3d 360, 364 (Colo. 2003).

Lower Court Proceedings

Following the governor's denial of the newspaper's public records request, the *Denver Post* brought suit under the CORA's special procedure for an application for an order to show cause for release of the requested records. The governor's office responded to that application with a motion to dismiss on alternative theories that the requested cell phone records were not "public records" under the statute.

During the pendency of the governor's motion to dismiss, the parties proceeded with preparations for the show cause hearing. In that context, the parties filed set of factual stipulations for use at the anticipated show cause hearing. Among those stipulations were the admissions that (1) substantially ***all*** of the cell phone calls that the governor places in connection with his official conduct as governor during business hours were listed on the requested records; (2) the governor's only use of the requested records to date was to determine the amount he owed the phone company and pay that amount, for which he received no reimbursement; and, (3) no other state official or department has had access to those cell phone records other than the governor.

Prior to the scheduled show cause hearing, the trial court issued an order granting the governor's motion to dismiss. The trial court subsequently denied a motion for leave to amend the initial application with additional allegations intended to further buttress the Denver Post's contentions that the governor's cell phone records did indeed fall within the scope of the CORA's definition of "public records."

On appeal to the Colorado Court of Appeals, a unanimous panel agreed with the governor that the allegations of the *Denver Post's* amended complaint were insufficient to establish that the requested cell phone invoices were "public records" under the CORA. *See Denver Post Corp. v. Ritter*, 230 P.3d 1238 (Colo. Ct. App. 2009).

The Majority's Decision

For the Colorado Supreme Court's four-justice majority, in the opinion written by Justice Hobbs, the crucial issues were two-fold: First, the majority rejected the view that the governor "makes" a particular cell phone record when the call information for an official business call is recorded for billing purposes on the governor's monthly phone bill: "In common parlance, one does not 'make' a 'writing' merely by performing acts that a private third party memorializes in a writing it makes. According to the Post's theory, any writing memorializing an event in which a public official participates would constitute a 'writing made ... by the state.'" *Denver Post*, 2011 WL 2449325, at *8.

The most obvious practical repercussion of the court's decision is the maneuver that Justice Rice's dissent predicts, that is, a growing practice by public officials to conduct their official business through personal cell phones.

Adopting a very narrow view of the term "make," the majority found the Post's pleaded allegations did not "state a claim" that the Governor had played a significant role in generating the call logs at issue. The Court found the following pleaded allegations were legally insufficient: "Every time the Governor uses his "personal cell phone" to initiate or receive a call *in his official capacity as Governor* and uses the phone to *conduct the public's business*, he does so *with both knowledge and intent that the phone company will automatically generate a record* indicating the time the call begins and ends, as well as the phone number of the party on the other end of the conversation; thereby the Governor actively participates in *making* the record of the phone calls . . . " (emphasis in original).

Second, the majority also rejected the Post's view that the Governor had "kept" the cell phone records in is official

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capacity because, the majority found, the Post's pleaded allegations failed to establish that the governor intended to *use* the cell phone records in the future for any official purpose. The court majority concluded that it was not sufficient under the statute that the governor *might* use such records in the future to identify who he might have spoken with on a particular date, or to identify whether he had ever had contact with a particular telephone number: "[T]o show that a requested record was kept in an official capacity, CORA requires more than an alleged potential future official use." *Denver Post*, 2011 WL 2449325, at *10. (quotation omitted).

At oral argument, the Post had likened the governor's "keeping" the phone bills *after* he had paid them to the reason one "keeps" a fire extinguisher in the house; because of its *intrinsic use*, if needed, for a particular purpose – to determine with whom the governor spoke (or did not speak) on a particular occasion. The Post has also pleaded that the governor's cell phone was operated under a flat rate plan, so he had not monetary reason to "keep" the individual call logs, and must have "kept" them for some other purpose, including to consult them, should the need arise to do so.

The four justice majority concluded that the Post's pleadings failed to allege facts sufficient to establish the phone logs kept by the governor came within CORA's definition of a "public record," and the now-former governor's cell phone records were therefore beyond the reach of the statute.

The Dissents

In the primary dissent written by Justice Nancy Rice, she and Justice Eid excoriated the majority's decision to "cast[] aside the legislature's attempt to ensure transparency in Colorado government," observing that the majority's decision would "creates an incentive for public officials to shield records of phone conversations about official business by intermingling them with records of personal calls, essentially affording the opportunity to purchase an unwritten exception to CORA for the price of a monthly cell phone plan." *Denver Post*, 2011 WL 2449325, at *12 (Rice, J., dissenting).

The dissenting justices concluded that the Colorado legislature had indeed intended to broadly reach the kind of records at issue in this case – records that exist entirely because of a government official's official conduct – precisely because the records reveal the official conduct of a public official: "[W]here a public official knowingly causes a record to be made in his official capacity about his official acts, that record becomes the public's business." *Denver Post*, 2011 WL 2449325, at *14 (Rice, J., dissenting).

Justice Rice's dissent also pointed out that the majority's interpretation of the "kept" element of the CORA definition would work extensive mischief on the public's right to know:

> [T]he majority's "more than . . . an alleged potential future official use" requirement effectively eliminates the possibility that any CORA plaintiff could sufficiently allege that a public official likely "kept" records in his official capacity, unless the official manifests an obvious intent to keep them in that capacity. This requirement, in conjunction with the majority's narrow construction of "made" records, permits a public official to: (a) generate mixed records of his personal and official conduct; (b) store them at home and deny his colleagues access to them; (c) prevent CORA disclosure of the records simply by asserting a plausible reason to keep the records in his personal capacity; and (d) retain the right to someday assert the records in his official capacity if they have exculpatory value.

Denver Post, 2011 WL 2449325, at *17 (Rice, J., dissenting).

As Justice Rice concluded, the majority's decision "could not be more plainly contrary to the legislature's intent." *Denver Post*, 2011 WL 2449325, at *17 (Rice, J., dissenting).

In her separate, single paragraph dissent, Justice Eid succinctly stated where the majority's reasoning had gone astray: "[T]his case involves the records of phone calls made by a public official conducting official business. Those records may be 'kept' . . . for a variety of reasons, including as the official asserts in this case, as proof of payment of the bill. However, common sense tells us that the phone records may also be kept for the purpose of maintaining a call log, so that it can be determined – perhaps at a date far into the future

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– who the official called. The fact that the official in this case stored the records at home does not change the result."

Ramifications of Decision

Needless to say, the majority's rejection of the *Post*'s pleaded allegations, in favor of the governor's contradictory assertions, *in the context of a motion to dismiss*, is terribly troubling and could foretell similar treatment of future open records complaints.

The most obvious practical repercussion of the court's decision is the maneuver that Justice Rice's dissent predicts, that is, a growing practice by public officials to conduct their official business through personal cell phones for which they choose not to receive reimbursement from their government agencies. [Indeed, earlier this year, the mayor of Miami, Florida, used his $300 monthly phone stipend as the basis to claim his "private" cell phone records were not subject to that state's open records law, until he was sued by the *Miami Herald*, and agreed to turn over a subset of those records to the paper.]

The broader and more pernicious effect of the *Ritter* decision, however, will be the materially higher burden that it imposes on citizens who challenge the denials of their public records requests in Colorado. Under the court's ruling, a requester must now affirmatively plead a specific factual basis for concluding that the requested record was either made or kept for an official governmental purpose, and it will not be sufficient for the requester to postulate a potential future governmental use for the requested record.

In so doing, the *Ritter* decision topples the long-standing jurisprudence in Colorado – which had been similar to that in many other states – that a plaintiff in a public records lawsuit bears only a very light burden to establish a prima facie right of access, and that upon making such a showing, the burden necessarily shifts to the government to establish why the requested record should not be released.

By imposing a substantially more onerous burden on citizens who request and are denied access to public records, the *Ritter* case is likely to generate far more litigation and many more motions to dismiss, further undercutting the Colorado legislature's intent to create a streamlined, efficient process to resolve open records disputes.

The plaintiff Denver Post Corporation was represented by Thomas Kelley, Steven Zansberg, and Christopher Beall, with Mr. Zansberg arguing the matter before the Colorado Supreme Court. The defendant Governor Bill Ritter was represented by Colorado Attorney General John Suthers, Solicitor General Daniel Domenico, and Deputy Attorney General Maurice Knaizer, with Mr. Domenico arguing the case at the Colorado Supreme Court.

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Third Circuit Holds Students' Off-Campus Web Posts Protected Speech

Student Discipline, Social Networking and the First Amendment

The Third Circuit this month issued two lengthy en banc decisions on whether public school students could be disciplined for rude and offensive MySpace profiles created outside of school. Layschock v. Hermitage School District , No. 07-4465 (3d Cir. June 13, 2011); J.S. v. Blue Mountain School District, 08-4138 (3d Cir. June 13, 2011).

Undertaking a thorough analysis of Supreme Court jurisprudence on First Amendment protections for student speech, the Court held that the students' online speech was protected where there was no evidence that it caused any in-school disruption.

Background: Layshock

In 2005, Justin Layshock, then a senior at Hickory High School in Hermitage, Pennsylvania, used his grandmother's computer to create a fake MySpace profile in the name of Eric Trosch, the principal of Hickory High. On the profile, Layshock wrote that Trosch was a member of "Steroids International" who had smoked a "big blunt," shoplifted a "big bag of kmart" and been called a "big whore," among other "big" faux-biographical details. Layshock also copied Trosch's official photograph from the school district website onto the MySpace profile. Layshock later showed the profile to some students in a Spanish classroom, without revealing that he had created it.

Layshock admitted he created the profile and apologized to Trosch the next day. The school later found Layshock guilty of six violations of the district's discipline code, including "harassment of a school administrator via computer/internet with remarks that have demeaning implications" and "obscene, vulgar and profane language." Layshock was suspended from school for ten days, banned from all extracurricular activities and placed in a special education program for students with behavioral disabilities.

Justin's parents sued the school district in a Pennsylvania district court, alleging that the school had violated Justin's First Amendment and due process rights. The court granted summary judgment in favor of the Layshocks on the First Amendment claim and dismissed the due process claims. A three-judge Third Circuit panel affirmed on February 4, 2010. The Third Circuit then granted a petition for rehearing en banc and vacated the three-judge panel's opinion on April 9, 2010.

Undertaking a thorough analysis of Supreme Court jurisprudence on First Amendment protections for student speech, the Court held that the students' online speech was protected where there was no evidence that it caused any in school disruption.

Background: J.S.

The minor referred to in court papers as "J.S." was an eighth grader at Blue Mountain Middle School. On March 18, 2007, she and a friend ("K.L.") used her parents' home computer to create a MySpace profile mocking her principal, James McGonigle. J.S. used McGonigle's official school photograph for the profile, but instead of using McGonigle's name she invented a middle school principal in Alabama named "M-Hoe." The profile used profane language and made M-Hoe out to be guilty of sexual misconduct. For instance, J.S. wrote that M-Hoe's general interests were:

> "detention, being a tight ass, riding the fraintrain, spending time with my child (who looks like a gorilla), baseball, my golden pen, fucking in my office, hitting on students and their parents."

The profile was publicly accessible at first, but J.S. switched it to a private setting one day after creating it. Thereafter, the profile could be viewed only by the 22 or so Blue Mountain School District students whom J.S. and K.L. invited to be M-Hoe's friends on MySpace.

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On March 20, a student at Blue Mountain Middle School told McGonigle about the profile and reported that J.S. was the creator. At McGonigle's request, this student printed out a copy of the profile and brought it to McGonigle at the school. J.S. and K.L. were punished with a ten-day suspension, which the district's superintendent declined to overrule when J.S.'s mother protested. McGonigle considered pressing charges but decided against it.

J.S.'s parents sued the school district in Pennsylvania federal district court for violating her First Amendment and due process rights. The district court granted summary judgment to the school district. The district court held that although the MySpace profile did not cause the sort of "substantial and material disruption" that would warrant punishment of student speech under Tinker v. Des Moines Independent Community School District, it could be punished as "vulgar, lewd, and potentially illegal speech that had an effect on campus."

The district court also distinguished the result in Layshock, writing:

> The [Layshock] court found that the school district did not have authority to punish the plaintiff for creating the profile. In making this decision, however, the court indicated that it was a "close call." Id. at 601. We find that the facts of our case include a much more vulgar and offensive profile, and we come out on the other side of what the court deemed to be a "close call."

A three-judge panel of the Third Circuit Court of Appeals affirmed the district court's decision and the Court later granted en banc review.

Third Circuit's En Banc Decision in Layshock

In an opinion issued June 13, 2011, the Third Circuit en banc unanimously affirmed that the student's First Amendment rights were violated. Chief Judge Theodore McKee wrote for the court:

> It would be an unseemly and dangerous precedent to allow the state in the guise of school authorities to reach into a child's home and control his/her actions there to the same extent that they can control that child when he/she participates in school sponsored activities. Allowing the District to punish Justin for conduct he engaged in using his grandmother's computer while at his grandmother's house would create just such a precedent and we therefore conclude that the district court correctly ruled that the District's response to Justin's expressive conduct violated the First Amendment guarantee of free expression. (*Layshock* at 27)

The district court had already held that Justin's profile did not create the "substantial and material disruption" (or grounds to expect such a disruption) referred to in Tinker. The school district did not challenge this holding on appeal, but it did offer a new defense of its disciplinary action against Justin:

> [A] sufficient nexus exists between Justin's creation and distribution of the vulgar and defamatory profile of Principal Trosch and the School District to permit the School District to regulate this conduct. The "speech" initially began on- campus: Justin entered school property, the School District web site, and misappropriated a picture of the Principal. The "speech" was aimed at the School District community and the Principal and was accessed on campus by Justin. It was reasonably foreseeable that the profile would come to the attention of the School District and the Principal. (*Layshock* at 27)

The school district asked the court to treat Justin's profile as de facto on-campus speech and to apply the standard established by the Supreme Court in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), which allows schools to punish lewd and vulgar on-campus speech. The school district cited several cases in which schools were allowed to punish off-campus speech as though it had occurred on campus, but the Third Circuit declined to place *Layshock* in the same category:

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> We believe the cases relied upon by the School District stand for nothing more than the rather unremarkable proposition that schools may punish expressive conduct that occurs outside of school, as if it occurred inside the "schoolhouse gate," under certain very limited circumstances, none of which are present here. (*Layshock* at 34)

Third Circuit's En Banc Decision: J.S.

In J.S., the court similarly held that the students offensive off-campus speech could not be subjected to disciplinary action – but the Court split 8-6 on the matter. The majority reasoned that since the speech did not cause any disruption in school there was no basis to punish it merely because of its offensive nature.

> Under these circumstances, to apply the *Fraser* standard to justify the School District's punishment of J.S.'s speech would be to adopt a rule that allows school officials to punish any speech by a student that takes place anywhere, at any time, as long as it is about the school or a school official, is brought to the attention of a school official, and is deemed "offensive" by the prevailing authority. Under this standard, two students can be punished for using a vulgar remark to speak about their teacher at a private party, if another student overhears the remark, reports it to the school authorities, and the school authorities find the remark "offensive." There is no principled way to distinguish this hypothetical from the facts of the instant case. (*J.S.* at 24)

Writing in dissent and joined by six judges, Judge Fisher argued that the student could be disciplined under *Tinker* because of the offensive nature of her statements. The Supreme Court, he argued, "has never addressed whether students have the right to make off-campus speech that targets school officials with malicious, obscene, and vulgar accusations." Judge Fisher concluded "with near-constant student access to social networking sites on and off campus, when offensive and malicious speech is directed at school officials and disseminated online to the student body, it is reasonable to anticipate an impact on the classroom environment. I fear that our Court has adopted a rule that will prove untenable."

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Whistleblower Provision of Sarbanes-Oxley Does Not Cover Leaks to Media

Act Protects Only Disclosure to Specifically Enumerated Recipients

The Ninth Circuit affirmed summary judgment for Boeing in a suit brought by two former employees who claimed to have been terminated in contravention of 18 U.S.C. § 1514(a)(1) for reporting violations of Sarbanes-Oxley (SOX) and other securities laws to the news media. *Tides v. The Boeing Company,* No. 10-35238 (9th Cir. May 3, 2011) (Silverman, J.).

The Court held that whistleblower protection under the statute applies only to the three categories of recipients specifically enumerated in the Act – federal regulatory and law enforcement agencies, Congress, and employee supervisors.

Background

Plaintiffs worked as auditors in Boeing's IT Sarbanes-Oxley Audit group. They were sources for a July 17, 2007 article in the *Seattle Post-Intelligencer* titled "Computer security faults put Boeing at risk." The article reported, among other things, that "[f]or the past three years, The Boeing Co. has failed, in both internal and external audits, to prove it can properly protect its computer systems against manipulation, theft, and fraud." The article also reported that audit results were being manipulated.

Plaintiffs were terminated by Boeing for releasing company information. Following their terminations, plaintiffs filed SOX whistleblower complaints with the Occupation Safety and Health Administration. The agency issued letters acknowledging their right to proceed in federal court. They filed separate complaints in district court, alleging that they were terminated in violation of 18 U.S.C. § 1514A(a)(1) for reporting violations of SOX and other securities laws. Their cases were later consolidated. Boeing moved for summary judgment, which was granted by the district court on February 9, 2010.

Opinion

The Ninth Circuit held that the plain language of §1524A(a)(1) protects employees of public companies from retaliation only when they "provide information, cause information to be provided, or otherwise assist in an investigation" concerning specified types of fraud or securities violations "when the information or assistance is provided to or the investigation is conducted by" one of three individuals or entities: (1) a federal regulatory or law enforcement agency, (2) a member or committee of Congress, or (3) a supervisor or other individual who has the authority to investigate, discover, or terminate such misconduct.

Members of the media are not included. The court reasoned that if Congress wanted to protect reports to the media under § 1514A(a)(1), it could have listed the media as one of the entities to which protected reports may be made or it could have protected "any disclosure" of specified information, as it did with the Whistleblower Protection Act, 5 U.S.C. § 2302.

The court rejected the plaintiffs' contention that their disclosures of perceived SOX violations to the *Post-Intelligencer* were protected under §1514A(a)(1) because reports to the media may eventually "cause information to be provided" to members of Congress of federal law enforcement or regulatory agencies. Construing the Act in the manner urged by the plaintiffs would essentially read the terms "a Federal regulatory agency or law enforcement agency and "any Member of Congress or any committee of Congress" out of the statute, a result the court must avoid.

Moreover, Section 1514A was passed in response to "a culture, supported by law, that discourage[d] employees from reporting fraudulent behavior" to the proper authorities, as well as internally. In its report discussing the scope of SOX's protections for whistleblowers, the Senate Judiciary Committee explained that the provision was intended to protect employees reporting fraud to officials with the authority to remedy the wrongdoing. Thus, the court found it clear that Congress intended to protect disclosures only to individuals and entities with the capacity and authority to act effectively on the information provided.

Because the court found that the plaintiffs' disclosures did not fall within the scope of the Act's protection, it did not address whether the disclosures "definitively and specifically" related to one of the listed categories of fraud or securities violations or whether there was any triable issue of fact as to whether Boeing's reason for terminating the plaintiffs was pretextual.

John T. Tollefsen of Tollefsen Law PLLC in Lynwood, Washington represented plaintiffs. Jonathan P. Harmon and Eric B. Martin of McGuire-Woods, LLP in Richmond, Virginia represented Boeing.

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