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## ANNUAL DINNER

WEDNESDAY, NOVEMBER 9, 2011

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WILLIAM J. BRENNAN, JR. DEFENSE OF FREEDOM AWARD on

## ANTHONY LEWIS

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Two-time Pulitzer Prize Winner

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***RSVP by Monday, October 24, 2011***

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# MEDIA LAW RESOURCE CENTER

## ANNUAL DINNER — WEDNESDAY, NOVEMBER 9, 2011

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

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*For further information please contact Debra Danis Seiden at [dseiden@medialaw.org](mailto:dseiden@medialaw.org) or 212-337-0200 ext. 204*

# **MLRC DEFENSE COUNSEL SECTION 2011 ANNUAL MEETING**

***Thursday, November 10, 2011***

Lunch will be served 12:00 NOON to 2:00 P.M.

Meeting will begin promptly at 12:30 P.M.

**Proskauer Rose (in their NEW location!)  
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Visitor entrance is on the NE corner of 41st Street and Eighth Avenue.

Price per person: \$35.00

*We are required to submit a list of attendees prior to the event for security purposes  
so please send in your reservation as soon as possible!*

**RSVP by October 28, 2011**

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*For further information contact Debra Danis Seiden at [dseiden@medialaw.org](mailto:dseiden@medialaw.org).*

# MLRC DEFENSE COUNSEL SECTION 2011 ANNUAL MEETING

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**MLRC**  
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# MLRC London Conference Explores International Developments in Libel, Privacy, Newsgathering and New Media IP Law

Over 200 delegates from around the world attended MLRC's London Conference on September 19-20 at Stationers' Hall. This was MLRC's seventh and largest conference in London, including lawyers from Argentina, Malaysia, Philippines and the Ukraine.

The Conference began with an update on the Defamation Reform Bill from Lord Lester QC, one of the inspirations for the current Bill, and Keir Hopley, from the Ministry of Justice, a career civil servant who will oversee the drafting of the next version of the Bill.

Day one of the conference included interactive discussion sessions on Navigating Prepublication Issues in the Digital World; Litigating Responsible Journalism & Defending Privacy Claims; and Newsgathering in the Post-Wikileaks World, featuring Alan Rusbridger, editor of The Guardian, and Gaby Darbyshire, COO Gawker Media.

Day two of the conference included a presentation from Peter Hustinx, European Data Protection Supervisor, on the proposed "right to be forgotten"; discussion sessions on App Technologies and Mobile Computing; Privacy and Phone Hacking; and New Media IP Law. The conference concluded with a mock privacy injunction hearing. Leading media law barristers Desmond Browne QC and Gavin Millar QC argued a hypothetical privacy case to Mr. Justice Tugendhat, High Court of England & Wales, and Justice Lucy McCallum, Supreme Court NSW Australia.

On Wednesday morning September 21, approximately 50 in-house lawyers met for breakfast at the offices of the Guardian newspaper for a discussion of in-house practice and management issues.



**Over 200 delegates from around the world attended MLRC's London Conference at Stationers' Hall. This was MLRC's largest London conference, including lawyers from Argentina, Malaysia, Philippines and the Ukraine.**





**Keir Hopley (left), Ministry of Justice, and Lord Lester**



**Alan Rusbridger, editor The Guardian, and Gaby Darbyshire, COO Gawker Media**





**Mr Justice Tugendhat (left) and Justice Lucy McCallum**



**Desmond Browne QC (left) and Gavin Millar QC at the Mock Privacy Injunction Hearing**

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## We Gratefully Acknowledge Our Conference Speakers and Facilitators

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# New Jersey Appellate Division Affirms Summary Judgment Dismissing Donald Trump's Defamation Claim Against Book Author and Publisher

On September 7, 2011, the Superior Court of New Jersey, Appellate Division, affirmed a grant of summary judgment dismissing in full Donald J. Trump's defamation suit against author Timothy L. O'Brien and his publisher, Time Warner Book Group Inc. and Warner Books Inc. [\*Trump v. O'Brien, et al.\*](#), No. A-6141-08T3, 2011 WL 3903013 (N.J. App. Div. Sept. 7, 2011). The crux of the alleged defamation involved O'Brien's discussion, in the book *TrumpNation: The Art of Being the Donald* ("TrumpNation"), of the varying estimates of Trump's net worth, including those of three confidential sources who estimated Trump's net worth as being lower than what Trump claimed. In affirming summary judgment for the defendants, the court held that there was no triable issue of fact as to whether O'Brien acted with actual malice and, consequently, that there could not be respondeat superior liability for O'Brien's publisher.

## Background

O'Brien has reported on the financial world for numerous prestigious publications, including *The New York Times* ("The Times") and *The Wall Street Journal*. In particular, for many years, he has researched and written on Trump's businesses and finances. In a series of articles appearing in *The Times* in 2004, O'Brien reported on financial challenges then faced by Trump's enterprises, as well as difficulties in measuring the value of those enterprises and Trump's net worth. In a September 2004 article, O'Brien detailed Trump's estimates of his own net worth (between \$2 billion and \$5 billion) and the estimates of Trump's net worth provided by three confidential sources (between \$200 million and \$300 million).



**There was no triable issue of fact as to whether the author or publisher acted with actual malice in publishing their book on Trump.**

In December 2004, O'Brien began to research and write *TrumpNation*. The core of Trump's complaint involves Chapter Six, which discusses at length the difficulties of pinpointing Trump's net worth. The Chapter cited numerous estimates of Trump's net worth, including *Forbes* magazine (\$2.6 billion in 2004), interviews with Trump held in 2005 (\$1.7 billion to \$5 billion), and a brochure found on the nightstand at Trump's Palm Beach club (\$9.5 billion). O'Brien stated that the varying estimates had "left [him] confused" and that he returned to the three confidential sources he previously had consulted. These sources independently provided lower estimates of Trump's net worth than they had in 2004, this time estimating Trump's net worth between \$150 million and \$250 million. As reported in *TrumpNation*, when O'Brien asked Trump about these lower estimates, Trump dismissed this as "naysaying," responding "[y]ou can go ahead and speak to guys who have four-hundred-pound wives at home who are jealous of me, but the guys who really know me know I'm a great builder."

Three days before the publication of *TrumpNation*, *The Times* published an excerpt of Chapter Six, including the sources' estimates of Trump's net worth. The excerpt included a qualifying statement (not appearing in the published book), namely that Trump's casino holdings recently had gained value, adding an estimated \$135 million to the confidential sources' estimates of Trump's net worth.

Following the publication of *TrumpNation* on October 26, 2005, Trump sued O'Brien and his publisher for defamation, seeking \$5 billion in damages. During the course of discovery, as reported in the October 2008 issue of the *MediaLaw Letter*, Trump sought disclosure of the identities of O'Brien's three confidential sources and the production of

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O'Brien's notes from these and other interviews. O'Brien objected to these requests, asserting that the sources' identities and other requested materials were protected as privileged. Although the Law Department initially ordered O'Brien to produce this information, the Appellate Division reversed on an interlocutory appeal, invoking the protections afforded by New York's Shield Law and New Jersey's newsperson's privilege. Following this decision, O'Brien continued to protect the sources' identities, but voluntarily produced redacted copies of his notes from interviews of the three confidential sources.

On March 20, 2009, as reported in the July 2009 issue of the *MediaLaw Letter*, the defendants filed two motions for summary judgment, one premised on Trump's inability to raise a genuine issue of fact as to the existence of actual malice, and the other on the lack of any damage caused by the allegedly defamatory statements. On July 15, 2009, Judge Michele M. Fox of the New Jersey Superior Court, Law Department, granted summary judgment to defendants on the ground that Trump had failed to present evidence that would permit a reasonable jury to conclude that O'Brien knew that his confidential sources' estimates were false or that O'Brien doubted those sources' veracity, thereby depriving Trump of any basis on which to establish actual malice by clear and convincing evidence. Because of this ruling, the court did not address defendants' summary judgment motion regarding loss causation and damages. Trump appealed the ruling, advancing largely the same arguments on which he had relied below.

### Decision of the Appellate Division

#### *O'Brien's Proper Reliance on the Confidential Sources*

In its decision, the Appellate Division began by noting that Trump is, undoubtedly, a public figure and that any actionable defamatory statements by O'Brien therefore must have been published with actual malice, as demonstrated by clear and convincing evidence. The court also noted that determinations of actual malice require a subjective inquiry into the defendant's state of mind—an inquiry not easily resolved on summary judgment. Because subjective intent may be proved by circumstantial evidence, the court noted its duty to examine carefully the circumstances surrounding publication of the allegedly defamatory statements, determining whether Trump had raised any genuine issue of fact as to the existence of actual malice.

The Appellate Division, citing the New Jersey Supreme Court's opinion in *Maressa v. New Jersey Monthly*, 89 N.J. 176 (1982), recited the standard for drawing an inference of actual malice from a report based on confidential sources: (1) the content of the report must be defamatory as a matter of law; (2) the defendant must have known, or should have known, of some reasonable means of verifying the accuracy of the report; and (3) the failure to verify the report "rises to the level of a gross violation of the standards of responsible journalism." *Id.* at 200.

Trump argued that the circumstances surrounding O'Brien's reliance on his confidential sources provided the basis for finding a factual dispute as to actual malice. In particular, Trump claimed that the lower estimates of his net worth were false; that O'Brien deliberately ignored information contradicting the sources' estimates of Trump's net worth; and that O'Brien's reliance on those confidential sources constituted recklessness from which a jury reasonably could infer actual malice.

The Appellate Division found that the circumstances of O'Brien's reliance on his confidential sources warranted no such inference. Referring to O'Brien's redacted notes, the court found that the consistency of the estimates provided by the three sources supported the accuracy of the recorded statements. The court also noted that O'Brien had been able to verify several other statements provided by those sources, which again suggested the accuracy of the information provided by those sources—a measure of reliability often employed in gauging the reasonableness of a police officer's reliance on information provided by confidential informants.

The court also ruled that actual malice could not be inferred by O'Brien's decision to protect his sources' identities. Trump argued that a jury could conclude that O'Brien's sources were fictitious and that he had invented the lower estimates himself. The Appellate Division rejected this claim as a matter of law. Under *Maressa*, the fact of confidentiality cannot support an inference that sources do not actually exist. The court further found no permissible inference of actual malice based on O'Brien's reliance on those sources in the face of Trump's denial.

In affirming summary judgment, the court endorsed O'Brien's reliance on another celebrity defamation case, *Sprewell v. NYP Holdings, Inc.*, 841 N.Y.S.2d 7 (App. Div. 2007). The court noted striking similarities between O'Brien's reporting and the reporting challenged unsuccessfully in *Sprewell*. In particular, similar to *Sprewell*, the court noted that O'Brien had not adopted his sources' low

(Continued on page 10)

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estimates of net worth as statements of uncontroverted fact; rather, O'Brien used the estimates to illustrate the difficulties in confidently ascribing a number to Trump's net worth.

Moreover, although *TrumpNation* suggests that O'Brien's personal view is that Trump's net worth is below Trump's estimates, the Appellate Division found that this opinion was absolutely privileged and could not sustain a claim for defamation. Furthermore, as in *Sprewell*, the court noted that O'Brien reported Trump's denial of the confidential sources' estimates; confirmed considerable information provided by the sources; and sought to confirm the sources' estimates of Trump's net worth.

#### *Rejection of Trump's Alleged Material Disputes of Fact*

On appeal, Trump claimed that various disputes of fact were material and precluded summary judgment. The court rejected each of these claims, a number of which are described below.

First, Trump asserted that he had granted O'Brien "unprecedented" access to his finances, including to his 2004 Statement of Financial Condition, presenting a genuine issue of material fact as to O'Brien's alleged disregard of contrary information. The court disagreed, finding that the 2004 Statement was unreliable, based solely on Trump's unaudited claims, and explicitly reflected significant deviations from Generally Accepted Accounting Principles ("GAAP").

Similarly, the court rejected Trump's claim that O'Brien improperly ignored the value of the "Trump brand," reasoning that reputation is not considered a part of a person's net worth under GAAP. Thus, although O'Brien's access to Trump's finances may have been "unprecedented," that access was too limited in substance to have provided O'Brien any reason to doubt the accuracy of his sources' estimates or raise an inference of recklessness. Indeed, the court noted that Trump's own deposition testimony had established the inherent unreliability of Trump's own estimates of his net worth. Among other statements, Trump had testified that his net worth fluctuated based in part on his own feelings.

Second, Trump also claimed a dispute of fact as to whether O'Brien took notes at certain meetings with Trump's staff, a claim that the court dismissed as immaterial to the issue of actual malice. The court similarly rejected Trump's claim that O'Brien had stated, in April 2005, that he was uninterested in reviewing materials prepared by Trump because O'Brien already had completed his book. The court

found that this argument ignored the fact that O'Brien had been researching Trump's finances for years and that O'Brien's failure to conduct certain research, at most, could be considered evidence of negligence, not actual malice.

Third, Trump claimed that the article published in the days leading up to the publication of *TrumpNation*, which had noted that Trump's casino holdings had recently rebounded in value, demonstrated O'Brien's actual malice in proceeding with the publication of his sources' lower estimates. The court rejected this claim, concluding that the article's statement did not in itself provide evidence of actual malice. The court also noted the difficulty in inferring actual malice from the article's revised estimates, given that *TrumpNation* already had been printed and was awaiting release.

Fourth, Trump claimed that he and his attorneys had alerted O'Brien to alleged falsehoods in an advance copy of *TrumpNation*. The Appellate Division found that Trump had provided no "particularized information" that would have placed O'Brien on notice as to the inaccuracy of any statement in *TrumpNation*. As such, Trump's letters amounted to further denials, publication in the face of which cannot raise an inference of actual malice.

Fifth, the court rejected Trump's argument that statements in *TrumpNation* asserting that Trump does not "own" the West Side Yards in Manhattan were false and defamatory. The court characterized Trump's position as semantic, noting that Trump in fact owned only an interest in a limited partnership, which in turn was involved in the development of the West Side Yards. Any factual dispute as to Trump's ownership therefore was insufficient to support a claim for defamation.

\* \* \*

In sum, the Appellate Division found no record evidence that would support a triable issue of fact as to O'Brien's alleged actual malice and therefore affirmed the grant of summary judgment on that ground. Absent actual malice, the court further ruled that Trump's respondeat superior claim as to O'Brien's publisher necessarily failed.

*Timothy L. O'Brien, Time Warner Book Group Inc., and Warner Books Inc. were represented by Mary Jo White, Andrew J. Ceresney, and Andrew M. Levine of Debevoise & Plimpton LLP, and Mark S. Melodia and Kellie A. Lavery of Reed Smith LLP. Donald J. Trump was represented by Karen A. Confoy, Joel H. Sterns, and Erica S. Helms of Sterns & Weinroth, a Professional Corporation.*



# Texas Appeals Court Affirms Jury Finding of Actual Malice

## *Professor Liable for Remarks on Radio Talk Show*

In an interesting non-media libel case, a Texas appellate court affirmed a jury verdict for a public figure plaintiff, holding there was clear and convincing evidence of actual malice to support the verdict. [\*Olson v. Westergren\*](#), No. 13-10-00054-CV (Tex. App. Aug. 18, 2011) (Valdez, Rodriguez, Garza, JJ.).

The finding of actual malice was largely based on a failure to investigate disputed misconduct allegations. The court acknowledged that failure to investigate alone is insufficient to find actual malice, but in potentially troubling language for media defendants, the court faulted the defendant because his failure to investigate was “contrary to his usual practice, which is an indication of reckless disregard.”

### Background

The plaintiff, Michael J. Westergren, is a former district court judge, justice of the peace and county attorney. At the relevant time, Westergren was employed as in-house counsel at Del Mar Community College, a public college in Corpus Christi, Texas. The defendant, Bruce Olson, is a tenured history professor at the college and self-described advocate for faculty, employee and student rights at the college.

In November 2006, Olson appeared on a local talk radio show and discussed employment discrimination and misconduct charges that had been made against Westergren. A former college employee had filed a grievance against Westergren accusing him and the college president of creating a hostile work environment. An outside law firm was hired to investigate and it cleared Westergren of any misconduct.

After the report was issued, the employee filed discrimination charges with the Equal Employment Opportunity Commission. Those charges added allegations

of sexual misconduct, including that “Westergren had made sexually suggestive comments” and showed “pornography in the workplace.”

On the radio show, after the EEOC charges were filed, Olson stated that Westergren “had a problem with pornography.”

The case was tried under the actual malice standard. Olson testified that he was aware of the law firm report clearing Westergren, but he considered that report a “whitewash.” Olson also testified that he contacted the complainant to verify her allegations and that he took note of the fact that her complaint was notarized.

The jury found that Olson’s statement that plaintiff “had a problem with pornography” was false and made with actual malice and awarded plaintiff \$20,000 in damages.

### Actual Malice Analysis

On appeal, Olson argued that there was insufficient evidence at trial to support the actual malice finding. The court disagreed, faulting Olson for relying on a “confidential and private” complaint that was the subject of an on-going investigation. The court found it probative of actual malice that Olson was aware of the law firm report clearing plaintiff of hostile workplace charges. The court suggested that the allegations of sexual misconduct were inherently unreliable because they were added to the EEOC complaint after plaintiff was cleared by the law firm report. And while Olson testified that he contacted the complainant to verify her allegations, the court faulted Olson for not trying to contact a college administrator who was allegedly present during plaintiff’s inappropriate behavior.

The court noted that failure to investigate standing alone

*(Continued on page 12)*

**In potentially troubling language for media defendants, the court faulted the defendant because his failure to investigate was “contrary to his usual practice, which is an indication of reckless disregard.”**

*(Continued from page 11)*

is insufficient to support actual malice, but in troubling language reasoned that Olson should have more thoroughly investigated the charges given that he was “an advocate for student and employee rights” who generally investigated “complaints fairly.” According to the court, “Olson’s failure to investigate was contrary to his usual practice, which is an indication of reckless disregard.”

The court also stressed that the EEOC complaint was “private and confidential.” The court noted that the complaint was left behind after a board of regents meeting, was discovered by a janitor and then passed on to college faculty members who publicized it. The court described this chain as “suspect” but did not discuss how the acquisition of the complaint related to knowledge of its truth or falsity.

In addition, the court found that the jury’s finding of actual malice could be supported by “credibility issues” with Olson’s testimony. For instance, while Olson described the law firm report as a “whitewash,” he testified that he believed it in so far as it described the complainant as a “stellar” employee. Moreover, at trial Olsen testified that he spoke to the complainant and she confirmed her allegations. But in his pre-trial deposition he stated that he merely told her that her EEOC complaint “was in open circulation.” In light of these discrepancies, the court held the jury was permitted to question Olson’s credibility.

On September 6, Olson filed a motion for rehearing and/or rehearing en banc.

*Plaintiff Michael Westergren was represented by Mark J. Cannan. Defendant Bruce Olsen was represented by Ira Z. Miller.*

## **UPCOMING EVENTS**

### **MLRC Annual Forum**

November 9, 2011 | New York, NY

### **MLRC Annual Dinner**

November 9, 2011 | New York, NY

### **DCS Meeting & Lunch**

November 10, 2011 | New York, NY

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

January 19, 2012 | Los Angeles, CA

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

May 21-22, 2012 | Palo Alto, CA

### **NAA / NAB / MLRC 2010 Media Law Conference**

Sept. 12-14, 2012 | Reston, Virginia

# South Carolina Appeals Court Affirms \$10,000 Libel Verdict Against Newspaper

## *Fair Report Privilege Rejected*

The South Carolina Court of Appeals affirmed a jury verdict against a South Carolina alternative newspaper, holding that 1) the paper was not protected by the fair report privilege and 2) the jury had sufficient evidence of fault to find in favor of the private figure plaintiff. [\*West v. Morehead\*](#), 2011 S.C. App. LEXIS 263 (S.C. App. Sept. 7, 2011).

The court affirmed a modest compensatory damage award of \$10,000 to the lawyer-plaintiff, but reversed a \$30,000 punitive damage award for insufficient proof of actual malice.

### Background

At issue in the case was an October 24, 2007 article published in the *Columbia City Paper* entitled “Adieu M’Armoire: Whit-Ash Co. linked to bizarre divorce case, other prominent figures implicated.” The article discussed the divorce between businessman Whit Black and Stella Black, and a related lawsuit Stella Black filed against Whit’s divorce attorney, Rebecca West. The title, according to the writer, was intended to be a play on the opera “Adieu, M’Amour,” because Stella Black is an aspiring opera star, and Whit Black owns a furniture store.

Attorney Rebecca West represented Whit Black in the divorce case, but had earlier represented Stella Black on matters relating to her music career. Stella Black objected to this perceived conflict and sought to disqualify West in the divorce case and also brought a separate lawsuit against West for breach of fiduciary duty, fraud, negligent misrepresentation, and malpractice. This case was settled in 2008.

The *City Paper* article was based on court filings from the two cases, but was written in a style the paper described as a “literary narrative.” For example, the article described the divorce case as having “all the ingredients of a cheap detective novel,” including “corruptible attorneys” and “two-bit lawyers who’ll even turn on their own clients if the retainer is juicy enough.” West was not mentioned by name.

West sued the paper for libel, alleging that references to “two bit lawyers” and “corruptible attorneys” were about her. The parties agreed that plaintiff was a private figure. And the newspaper agreed that the references in the article were about plaintiff. The trial court held there were disputed issues of fact as to whether the newspaper article was a fair and

accurate report of the court filings. The trial court also instructed the jury that the fault standard was “common law malice,” i.e., whether the newspaper acted with ill will or conscious indifference to the plaintiff’s rights.

In June 2009, after a two-day trial and two hours of deliberation, the jury awarded plaintiff \$10,000 in compensatory damages and \$30,000 in punitive damages.

### Appeals Court Decision

The appeals court first affirmed that the fair report privilege did not shield the newspaper from liability. There was, according to the court, conflicting evidence as to whether the newspaper’s “literary narrative” was a fair and accurate summary of the court filings. Thus, it was proper for the jury to decide whether the newspaper’s “narrative journalism” and choice of words amounted to an abuse of the privilege.

As to fault, the court noted that the parties did not object to the “common law malice” charge. Thus the jury’s finding could only be disturbed if the record contained no evidence to support their finding. The court suggested that the descriptions used by the newspaper could support the jury’s finding of “conscious indifference.”

However, the court found insufficient evidence of actual malice to support the award of punitive damages. The court rejected plaintiff’s argument that failure to investigate the allegations – including not calling plaintiff before publication – amounted to actual malice. The court noted that failure to investigate alone cannot amount to proof of actual malice.

Instead, exercising independent appellate review, the court looked to a series of statements by Stella Black in her court filings accusing plaintiff of conflict of interest, fraud and breach of fiduciary duty. Although the newspaper’s summary of these allegations went beyond the boundaries of the fair report privilege, the allegations supported the newspaper’s defense that their reporters believed the allegations to be accurate.

*Plaintiff was represented by S. Jahue Moore, Sr., of West Columbia, SC. The newspaper defendants were represented by Kirby D. Shealy, III and Evan Brook Bristow, both of Columbia, SC.*

# Redskins Owner Dan Snyder Dismisses Defamation Claim Against Washington City Paper And Sports Columnist Dave McKenna

By Alia L. Smith

Dan Snyder, the owner of the Washington Redskins, dropped his defamation action against Washington City Paper (WCP) and its reporter Dave McKenna this month, after Defendants filed a special motion to dismiss the lawsuit pursuant to D.C.'s newly-enacted anti-SLAPP legislation.

## The Cranky Redskins Fan's Guide to Dan Snyder

On November 19, 2010, WCP (Washington, DC's alternative newsweekly) published [The Cranky Redskins Fan's Guide to Dan Snyder](#), by its sports columnist Dave McKenna. The Guide is "an encyclopedia of [Dan Snyder's] many failings." In its introduction, the Guide urges readers to "look back" at "the Dan Snyder who left his mark, or stain, on more than just a football team," – that is, "the Dan Snyder who got caught forging names as a telemarketer with Snyder Communications, made a great view of the Potomac River for himself by going all Agent Orange on federally protected lands, and lost over \$121 million of Bill Gates' money while selling an 'official mattress' while in charge of Six Flags." It then lists, essentially in bullet-point format, an "A to Z" of things about Dan Snyder that Mr. McKenna finds "hilarious and/or heinous."

## Snyder's Lawsuit

In response to the column, Mr. Snyder dispatched the Redskins' lawyer to fire off a [letter](#) to the ultimate parent company of WCP, Atalaya Capital Management, LP, an

investment fund based in New York. The letter claimed that a long list of statements in the Guide were defamatory, and suggested that defending litigation against Mr. Snyder "would not be a rational strategy for an investment fund such as yours. Indeed, the cost of litigation would presumably quickly outstrip the asset value" of WCP. After WCP declined to retract the column or apologize to Mr. Snyder, he filed a [defamation suit](#) in Washington, D.C. Superior Court against WCP and Dave McKenna (after first filing, and then dismissing, a suit in New York against Atalaya and WCP's Florida-based parent corporation). In the lawsuit, he took issue with only three specific statements.

## Anti-SLAPP Motion

WCP and McKenna then filed a [special motion to dismiss](#) under the District's newly-enacted anti-SLAPP legislation, D.C. Code § 16-5501 *et seq.* The express purpose in passing this broad anti-SLAPP statute was to put an early end to lawsuits aimed at stifling commentary about matters of public concern. Under the Act, if the defendant can show, through its

special motion, that the claim at issue "arises from an act in furtherance of the right of advocacy on issues of public interest," then the court "shall grant the motion unless the responding party demonstrates that the claim is likely to succeed on the merits." The Act provides that discovery is stayed while such a special motion is pending and that the prevailing party "may" be entitled to attorneys fees.

Defendants asserted that their speech, critical of a prominent public figure in Washington, clearly qualified for

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Washington City Paper's cover illustration for its "A to Z" Article on the "owner's many failings."

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Anti-SLAPP protection. As a result, to maintain his case, Snyder would be required to prove that he was “likely to succeed on the merits.” Defendants then argued that Snyder could not meet his burden because, among other reasons, the statements at issue were not defamatory, were non-actionable rhetorical hyperbole, and, in any event, were not materially false.

Defendants’ anti-SLAPP motion was supported by an [amicus brief](#) filed by the ACLU on behalf of itself and numerous others, including D.C. Council Members Mary Cheh and Phil Mendelson and 15 news media and public interest groups. This brief memorably asserted that Dan Snyder’s “ability to demonstrate a *likelihood* of prevailing on the merits appears to be of the same order of magnitude as the likelihood of the Redskins winning this year’s Super Bowl.”

### Snyder’s Opposition

Mr. Snyder [opposed](#) the special motion to dismiss on three broad grounds. First, he claimed that the D.C. Anti-SLAPP Act was invalid because it violated the D.C. Home Rule Act. Under the Home Rule Act, the D.C. Council lacks authority to enact legislation “with respect to” Title 11 of the D.C. Code, the title that relates to the D.C. Courts. Plaintiff argued that the Anti-SLAPP Act impermissibly altered the rules of civil procedure by introducing a new form of motion (the special motion to dismiss, with its burden-shifting procedures) and by suspending discovery practice. Second, he argued that even if the Act was valid, it should not apply in this case because the commentary at issue was a matter of “private” concern. Finally, he claimed that, in any event, he was likely to prevail on the merits, a standard which he argued was akin to the one used to decide motions for summary judgment. Using this theory, he asserted that met his burden with respect to each of the challenged statements.

He also argued that Defendants’ motion was frivolous and that the Court should order Defendants to pay his attorneys fees.

### D.C. Attorney General’s Intervention

In response to Snyder’s challenge to the constitutionality and validity of the Anti-SLAPP Act, the D.C. Attorney General intervened in the case to defend the statute. Pursuant to D.C. rules, the Attorney General is entitled to intervene in any case which challenges D.C. legislation, in order to defend that legislation or otherwise address the questions raised by the challenge.

Faced with the prospect of a dismissal and order to pay the defendants’ attorneys fees and costs, and just two days before the D.C. Attorney General’s brief on the matter was due (and the day before the fall football season began), Mr. Snyder voluntarily dismissed his case with prejudice, with each side to bear its own fees and costs. Other than an exchange of mutual releases, there was no settlement agreement between the parties or requirement that the defendants correct or retract the challenged statements.

*Seth Berlin, Jay Ward Brown, Alia Smith, and Amba Datta of Levine Sullivan Koch & Schulz, LLP (Washington, D.C.), together with David Snyder of The Law Offices of David Snyder (Tampa, FL), represented WCP. Bruce Brown and Mark Bailen of Baker & Hostetler (Washington, D.C.) represented Dave McKenna. Patricia Glaser and Jill Basinger of Glaser, Weil, Fink, Jacobs, Howard, Avchen & Shapiro, LLP (Los Angeles), together with Richard Smith and Jacqueline Browder Chaffee of McDermott, Will & Emery, LLP (Washington, D.C.) represented Plaintiff Daniel Snyder. Floyd Abrams and Brian Markley of Cahill Gordon & Reindel, LLP (New York) represented Atalaya Capital Management, LP and WCP’s parent corporation in connection with the New York litigation.*

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# A&E Wins Anti-SLAPP Motion on Libel Claim Over Gangland Show

## *Photograph of Plaintiff Did Not Imply Gang Membership*

A California federal district court granted an anti-SLAPP motion and dismissed a defamation suit against A&E Television Networks (“A&E”) over the use of a photograph of plaintiff in an episode about a violent motorcycle gang. *Alexander v. A&E Television Networks, LLC*, No. 2:11-cv-00025-GEB-DAD, 2011 U.S. Dist. LEXIS 99913 (E.D. Cal. Sept. 6, 2011) (Burrell, J.).

The court held that the display of the photograph could not reasonably be interpreted as meaning that plaintiff was a member of a criminal biker gang or a law enforcement “snitch.” Moreover, in so far as plaintiff complained that the photograph implied he “associated” with gang members, that implication was true since the photograph depicted him with a known gang leader.

### Background

At issue in the case was an episode of the A&E television documentary series “Gangland.” The series is described as “a gritty, true-life series exposing the world of history’s most notorious and dangerous gangs.” The episode at issue, entitled “Snitch Slaughter,” aired in November 2009 and focused on a gang called the Vagos Outlaw Motorcycle Club. The episode featured an interview with a gang member named “Lonesome” who discussed plans to kill a drug dealer with the help of another gang member named “Yak Yak.”

The episode used a photograph of Yak Yak taken at a motorcycle club picnic. Plaintiff appeared in the photograph standing next to Yak Yak, who had his arm around plaintiff’s shoulder. Plaintiff’s eyes and surrounding areas were blacked out obscuring his identification and plaintiff’s name was never mentioned in the episode.

Plaintiff sued A&E, alleging the episode depicted him as

a member or affiliate of the Vagos, as gang member Lonesome or as a law enforcement snitch. A&E brought a motion to strike the lawsuit under the California anti-SLAPP statute, Cal. Civ. Proc. Code §425.16.

### District Court Decision

Citing *Equilon Enters. v. Consumer Cause, Inc.*, 52 P.3d 685 (Cal. 2002), the district court applied a two-step test to decide the anti-SLAPP motion. The court first held that the episode was in furtherance of the defendant’s right of free speech since the television show was an exercise of free speech and concerned a matter of significant public interest – gang-related criminal activity.

The district court then moved on to the second step of the test and assessed the probability that plaintiff could prevail on the claim. The court held that the episode could not be reasonably interpreted as depicting plaintiff as “Lonesome,” a member of the gang or an informant. The court pointed out that plaintiff’s eyes were covered by a black bar, and the name “Yak Yak”

was mentioned every time the photograph appeared in the episode. The court also found that it could not be reasonably inferred that plaintiff and “Lonesome” were conflated in the broadcast, as their features were not similar and no such implication was made in the episode. In addition, the photograph itself did show that plaintiff “associated” with the Vagos Gang’s since he was together with a gang member when the photograph was taken.

*Plaintiff Richard C. Alexander was represented by Richard A. Frishman of Nevada City, CA. Defendant A&E Television Networks was represented by Rochelle L. Wilcox, Davis Wright Tremaine LLP in Los Angeles, CA.*



**The court held that the display of the photograph could not reasonably be interpreted as meaning that plaintiff was a member of a criminal biker gang or a law enforcement “snitch.”**



## Three Lower Courts Rule on Illinois Anti-SLAPP Statute

By Steve Mandell, Steve Baron, and Shari Albrecht

Three courts have recently ruled on motions to dismiss pursuant to Illinois's anti-SLAPP statute, the Citizen Participation Act (CPA or ICPA). The results are mixed (two motions granted, one denied), but overall the courts have expressed a broad view of the statute's protection.

### Background

The CPA provides immunity for a wide range of activities: "[a]cts in furtherance of the constitutional rights to petition, speech, association, and participation in government . . . , regardless of intent or purpose . . . ." 735 ILCS 110/15. The statute broadly defines "government" to include not only a "branch, department, agency, [or] employee" of a government but also "the electorate." 735 ILCS 110/10.

The CPA does not impose any requirement that the protected activity have some connection to the public interest, nor does it provide for any analysis of the merit of a plaintiff's claim. The only exception to the immunity is for acts "not genuinely aimed at procuring favorable government action, result, or outcome" – language that traces back to U.S. Supreme Court cases applying the Noerr-Pennington doctrine. 735 ILCS 110/15.

When a defendant files a motion under the Act, the court must apply a burden-shifting procedure that requires the plaintiff to establish, by clear and convincing evidence, that the statute's immunity does not apply. 735 ILCS 110/20(c).

The most detailed appellate ruling concerning the CPA is *Sandholm v. Kuecker*, 405 Ill. App. 3d 835 (Ill. 2d Dist. 2010). The three decisions discussed below all cite *Sandholm*'s formulation of the analysis under the CPA. The *Sandholm* court synthesized the statute into a three-part test; the statutory "privilege will apply where: (1) the defendant's acts were in furtherance of his rights to petition, speak, associate, or otherwise participate in government to obtain favorable government action; (2) the plaintiff's claim is based on, related to, or in response to the defendant's 'acts in furtherance'; and (3) the plaintiff fails to produce clear and convincing evidence that the defendant's acts were not genuinely aimed at procuring favorable government action." *Id.* at 856.

The third prong of this test, known as the "sham" exception, is further divided into a two-part inquiry: (1) "whether objective persons could have reasonably expected to procure a favorable government outcome" and (2) "whether defendants' subjective intent was not to achieve a government outcome that may interfere with plaintiff but rather to interfere with plaintiff by using the governmental process itself." *Id.* at 862. If the plaintiff does not establish the first part of this "sham" test, then the court need not evaluate the second, subjective part of the test.

In another case, the Illinois Supreme Court emphasized the breadth of the CPA's protection: "the Act expressly encompasses exercises of political expression directed at the electorate as well as government officials." *Wright Dev. Group, LLC v. Walsh*, 238 Ill. 2d 620, 636 (2010). (The October 2010 MediaLawLetter includes a summary of *Sandholm* and *Wright Development*.)

### Satkar v. Board of Review

In *Satkar Hospitality Inc. v. Cook County Board of Review*, No. 10 cv 6682 (N.D. Ill. Sept. 21, 2011), Judge Matthew Kennelly dismissed claims of defamation and false light invasion of privacy, holding that reports of possible improper influence in property tax appeals were immune under the CPA.

The plaintiffs sued the Cook County Board of Review, which hears appeals of property tax assessments; WFLD, Chicago's Fox television station; the Illinois Review, a conservative blog; and related individuals. The plaintiffs operated a suburban hotel and received a substantial savings by appealing its property tax assessment. The Illinois Review and WFLD both reported on a connection between favorable results in property tax appeals and campaign donations to a state representative, including donations by the plaintiffs. After the reports were published, the Board of Review held additional hearings and rescinded the plaintiffs' tax reduction. The plaintiffs alleged that the government defendants violated their constitutional rights and alleged defamation and false light against the media defendants.

The court rejected the plaintiffs' arguments that the CPA should not apply. The court quickly dispensed with

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arguments that the statute violated the plaintiffs' First Amendment right to petition ("[T]he ICPA limits of plaintiff's prospects of success in court, not its access to the courts in the first instance.") and that the statute was void for vagueness (a doctrine that only applies to penal statutes). The court had previously held that the CPA applies in federal court because its immunity "is a substantive state law defense."

The court quoted Sandholm's three-part test and found that the first two elements were satisfied because the plaintiffs' complaint was clearly based on the reports, which "were directed at the public and addressed possible political corruption, an obvious matter of public concern." The court noted Wright Development's observation that the CPA "expressly encompasses exercises of political expression directed at the electorate as well as government officials" and held that the defendants' "reports were acts 'in furtherance of' their right to speak freely." The court rejected the plaintiffs' argument that the CPA should not protect "major media organizations" or defendants who are motivated by profit, based on the CPA's language and First Amendment principles.

Concerning the third element of the Sandholm test, the sham exception, the court found that the reports were objectively not a sham, because "objective persons in defendants' shoes could have reasonably expected to procure a favorable government outcome by publishing the reports." The court pointed to the fact that the Illinois Review had directly requested an investigation by the Illinois legislature's Inspector General and the plaintiffs' own admissions that the reports had led to further action by the Board of Review (i.e., rescinding the tax reduction). Distinguishing the Trudeau case, which is discussed below, the court rejected the plaintiffs' argument that the CPA requires that the moving party "reached out directly to a government entity."

### **Garrido v. Arena**

In *Garrido v. Arena*, No. 11 L 4012 (Cir. Ct. Cook Cty. Sept. 16, 2011), Judge Michael Panter applied the CPA to dismiss defamation and related claims based on statements by a candidate during a race for a seat on Chicago's city council.

The plaintiff and one defendant were candidates for the same seat, and the defendant won the election by just 28 votes. All the alleged defamatory statements were made during the campaign and allegedly linked the plaintiff to political corruption and an unpopular political issue – the

privatization of Chicago parking meters.

Before deciding the CPA motion, the court also addressed the plaintiff's request for discovery. Pursuant to the CPA, discovery is "suspended" when a motion under the Act is filed. 735 ILCS 110/20(b). The court did not allow the plaintiff to take discovery because he sought information that "pertains solely to the accuracy of the alleged statements," which is "not relevant to the Act and political speech issues before the court."

The court identified and applied the Sandholm three-part test and two-part sham exception. The court held that the challenged statements were "in furtherance of the right to participate in government" because they were all made "as part of [the defendant's] effort to gain office." The court pointed to the plaintiff's own allegations and arguments that the allegedly defamatory statements were made "in order to secure [defendant's] victory in the election." The court held that it had "no need to address the allegation that the statements were inaccurate and defamatory because they were made 'in furtherance' of [defendant's] right to petition, speech, association and participation in government." "[W]hether the statements were accurate or not," they were "geared at procuring favorable government action, namely, winning the election."

The court rejected the plaintiff's argument that the defendant had "ulterior motives for wanting to win the election" – that he "no longer cared about being alderman" and "only that he keep [plaintiff] out of office." The court also held that the CPA should apply even if the defendant did have "some additional, ulterior motives," because "[t]he Act does not say a candidate's only aim must be 'in furtherance.'" The court dismissed the plaintiff's claim not only as to his election opponent but as to all named defendants, including unions that had allegedly published the same information and Comcast, which broadcast television ads.

### **Trudeau v. ConsumerAffairs.com**

Not all news is good news for defamation defendants. In *Trudeau v. ConsumerAffairs.com*, 10 cv 7193 (N.D. Ill. Sept. 6, 2011), the court denied a motion to dismiss because the court held that the statements at issue had not been part of an attempt to influence government action.

Kevin Trudeau, the plaintiff, is an "infomercial king." He, affiliated companies, and the infomercials in which he appeared have been the subject of much litigation, including

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enforcement actions by the Federal Trade Commission. The website ConsumerAffairs.com has covered his various legal troubles and published a summary of a ruling in one such case.

The summary described a ruling by the First Circuit Court of Appeals, affirming a \$54 million judgment in a case involving an infomercial for “coral calcium,” which, the infomercial claimed, is derived from coral skeletons harvested off the coast of Okinawa, Japan, and is capable of preventing a wide range of serious illnesses. Trudeau alleged that the summary was false because Trudeau himself was not a party to that litigation and because the article incorrectly stated that Trudeau was awaiting sentencing for criminal contempt.

The defendants, ConsumerAffairs.com and the writer and editor of the report, moved to dismiss under the CPA and also on the grounds that the report was substantially true and could not cause incremental harm to Trudeau’s reputation. The defendants argued that they publicized consumer concerns in an effort to draw attention to harm caused by activities like Trudeau’s, and Trudeau alleged that ConsumerAffairs.com is “an organization that works with other media outlets and law enforcement entities to expose and prosecute illegal and unfair business activities.” The defendants argued that the report was immune under the CPA because it was “an attempt to provide information and commentary about government efforts to enforce consumer protection laws.”

The court rejected this argument and denied the motion, stating that it “stretches the CPA beyond its intended purpose,

for it is disingenuous to claim that defendants were attempting to influence government action or gain public support by authoring and publishing a purely informative report on an appellate court decision.” The court pointed to the fact that the allegedly defamatory statements were taken from court proceedings and were not “statements made by an individual advocating a certain position.”

*Steve Mandell, Steve Baron, and Shari Albrecht of Mandell Menkes LLP in Chicago represent the WFLD defendants in the Satkar case and all defendants in the Trudeau case.*

*In Satkar, plaintiffs’ attorneys are Jonathan D. Lubin and R. Tamara de Silva. The Illinois Review defendants are represented by Thomas Brejcha and Peter Breen of the Thomas More Society, Chicago, Ill., and Thomas Olp of Aurora, Ill. The Board of Review is represented by Steven Puszis, Jennifer DeBower, and Joel Bertocchi of Hinshaw & Culbertson LLP, Chicago, Ill.*

*In Garrido, the plaintiff is represented by Lawrence Wolf Levin and Michelle Truesdale of Chicago, Ill. The defendants are represented by David Arena of Dimonte & Lizak, LLC, Park Ridge, Ill.; Thomas Jirgal and Stacy Howard of Loeb & Loeb LLP, Chicago; Michael Loftus and Sally Saltzberg of Loftus & Saltzberg, P.C., Chicago; Michael J. Kasper of Chicago, Michael Kreloff of Glenview, Ill.; Wesley Kennedy, Elizabeth Reynolds, and Jason McGaughy of Allison, Slutsky & Kennedy, P.C., Chicago; Laurence Gold of Trister, Ross, Schadler & Gold, PLLC; and William A. Widmer, III, of Carmell Charone Widmer Moss and Barr, Chicago.*

*In Trudeau, the plaintiff is represented by Daniel Hurtado of Oak Park, Ill.*

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# Emphasizing Interactivity, Court Rules that First Amendment Defeats Right of Publicity Claims Targeting EA's *NCAA Football* Video Games

By Samuel Bayard and Elizabeth McNamara

On Sept. 9, 2011, Judge Freda Wolfson of the United States District Court for the District of New Jersey granted summary judgment for Electronic Arts ("EA") on the claims of a putative class of NCAA football players that EA had misappropriated their likeness and identity under New Jersey law by featuring them in its *NCAA Football* video games. *Hart v. Electronic Arts, Inc.*, 2011 WL 4005350 (D.N.J. Sept. 9, 2011)

The Court held that EA's First Amendment right to free expression outweighed the plaintiff's right of publicity under either the "transformative use" test developed by California state courts or the "Rogers" test developed by the Second Circuit in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

Judge Wolfson's thorough and scholarly opinion is a significant contribution to the law on the interplay between the First Amendment and the right of publicity. Of particular note, the decision places great emphasis on the interactivity of EA's video games in finding them protected by the First Amendment. Judge Wolfson's decision is also noteworthy because it stands in sharp contrast to the decision in *Keller v. Electronic Arts, Inc.*, No. C 09-1967, 2010 WL 530108 (N.D. Cal. Feb. 6, 2010), appeal pending (No. 10-15387). Both decisions apply the transformative use test to the same *NCAA Football* game series and reach conflicting results. The *Hart* decision could inform the pending Ninth Circuit appeal of *Keller*.

## Factual Background

Plaintiff Ryan Hart, a former quarterback for Rutgers University, originally brought suit in New Jersey state court on behalf of himself and others similarly situated alleging, *inter alia*, that EA had violated his right of publicity by misappropriating his likeness as a virtual player in four editions of EA's *NCAA Football* video game. After EA removed the case to federal court, it moved to dismiss. Judge Wolfson granted the motion, but gave Hart leave to file an amended complaint to allege additional facts in support of his right of publicity claim.

The amended complaint alleged that EA misappropriated Hart's likeness by including in several editions of the game a virtual Rutgers player from his home state, bearing his jersey number, incorporating his physical attributes (height, weight, hair color and style) and equipment preferences (wrist band, helmet visor), as well as his skills (speed and agility rating and passing accuracy – all derived from his published season statistics). Hart alleged that the games' commercial value derived from

the wholesale appropriation of the individual players' identity and the resulting "realism" of the games. Hart further argued that the use of his photograph in a photo montage inside the 2009 edition of the game constituted an unauthorized promotional use of his image.

Solely for purposes of its summary judgment motion, EA conceded that it used Hart's likeness within certain versions



**Judge Wolfson's opinion places great emphasis on the interactivity of EA's video games in finding them protected by the First Amendment.**

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of *NCAA Football*. It argued, however, that as expressive speech, the games should be afforded full First Amendment protection, which here outweighed the plaintiff's publicity interests. The Court agreed and granted summary judgment dismissing Hart's claims.\

### First Amendment Protection for Video Games

Judge Wolfson began her analysis with the foundational point that video games are entitled to First Amendment protection. Here, the United States Supreme Court's recent decision in *Brown v. Entertainment Merchants Association*, 131 S.Ct. 2729 (2011), provided ready support:

Like the protected books, plays, and movies that preceded them, video games communicate ideas – and even social messages – through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection.

*Hart*, 2011 WL 4005350, at \*7 (quoting *Brown*, 131 S.Ct. at 2733).

Judge Wolfson then analyzed the distinction between commercial and expressive speech, easily concluding the *NCAA Football* games were not commercial speech under the three-part test used in the Third Circuit. *Id.* at \*9. Contrasting EA's video games with the "infomercial" at issue in *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007 (3d Cir. 2008), the court explained: "Here . . . the speech is the video game that is being sold. It is not a separate instance of speech that promotes the purchase of another work." *Id.* (emphasis in original). Judge Wolfson also found that the alleged use of Hart's photograph in a photo montage inside *NCAA Football 2009* did not constitute promotion or advertising "because this photograph is part of the video game itself, the commercial transaction has already taken place." *Id.* at \*10.

To determine whether the First Amendment trumped Hart's New Jersey common law right of publicity, the Court

examined the origin and development of the right of publicity, New Jersey's adoption of the *Restatement (Second) of Torts*, the shift from a right-of-privacy-based tort to a property-based one, and the history of the application of the First Amendment to the right of publicity, leading to the various tests that courts have employed across the country to balance those competing interests. The primary tests, and those examined at length by Judge Wolfson, are the transformative use test, urged by Hart in his papers, and the *Rogers* test, advocated by EA, and it is here that the decision makes its greatest contribution to this area of the law. Although expressing a preference for the transformative test because "it best encapsulates the type of nuanced analysis required to properly balance the competing . . . interest[s]," *Id.* at \*30, the Court found that EA prevailed under either test.

### Transformative Use

The Court explained that the transformative test, which has its origins in the fair use analysis of copyright law, looks to the extent that the likeness has been transformed by expressive changes or additions in the new work, or, in the words of the California Supreme Court, whether "the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction of the celebrity is the very sum and substance of the work in question." *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 406 (2001). Reviewing recent cases applying the transformative use test, including to video games, the Court concluded that EA's use of plaintiff's likeness was sufficiently transformative to enjoy First Amendment protection.

Notably, the Court did not focus on the *NCAA Football*'s representation of Hart in isolation. The Court concluded that, "viewed as a whole," EA's video games contain "sufficient elements of EA's own expression . . . [to] justify the conclusion that its use of Hart's image is transformative." *Id.* at 21. Here, Judge Wolfson cited the multitude of creative elements in the video games beyond Hart's image, including "virtual stadiums, athletes, coaches, fans, sound effects, music, and commentary, all of which are created or compiled by the games' designers." *Id.* (quoting *Brown v. Electronic Arts, Inc.*, No. 2-09-cv-01598, slip op. at 7 (C.D. Cal. Sept. 23, 2009)).

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Judge Wolfson then determined that, even focusing on Hart's virtual image alone, *NCAA Football* is transformative. Here, the court emphasized the interactive features of the game. For instance, Judge Wolfson noted that the "the game permits users to alter Hart's virtual player, control the player's throw distance and accuracy, change the team of which the player is a part . . . , or engage in 'Dynasty' mode, in which the user incorporates players from historical teams into game play." *Id.* at \*22. Amusingly, the Court noted that its own review of the game revealed eight hairstyle options that can be morphed onto a player's image: "fade 1, fade 2, close crop, buzzout 1, buzzout 2, afro, balding 1, and balding 2." *Id.* (Who knew you needed two variations on bald?) Speaking more generally, the court explained:

To be clear, it is not the user's alteration of Hart's image that is critical. What matters for my analysis of EA's First Amendment right is that EA created the mechanism by which the virtual player may be altered, as well as the multiple permutations available for each virtual player image. *Id.* at \*22.

The Court rejected the notion that using Hart's unaltered image as the starting point for the virtual player rendered the use non-transformative, indicating that this argument "fails to fully take into account the distinctive interactive nature of video games." *Id.* Harkening back to the above-quoted language from *Brown v. Entertainment Merchants Association*, the Court explained that "[t]his language from *Brown* recognizes that a user's interaction with a video game is one of the means by which video games communicate ideas and social messages" and added that denying EA protection "would not give due accord to this expressive aspect of video games." *Id.*

It was the strong interactive element in EA's games that enabled the Court to distinguish a recent California decision, *No Doubt v. Activision, Inc.*, 192 Cal. App.4<sup>th</sup> 1018 (2011), which held that the *Band Hero* video game was not sufficiently transformative because it included computer-generated avatars designed to look identical to the members of the band No Doubt and did not permit players to alter the avatars. *Id.* at 20.

In contrast to its distinguishing of *No Doubt*, Judge Wolfson confronted directly a federal district court's contrary

holding in *Keller v. Electronic Arts, Inc.*, *supra*, a putative class action involving the same series of EA video games. There, denying EA's motion to dismiss under California's anti-SLAPP statute, the district court for the Northern District of California held that *NCAA Football* was not sufficiently transformative because it did not "depict [the plaintiff] in a different form" and "the game's setting is identical to where the public found [the plaintiff] during his collegiate career: on the football field." *Keller*, 2010 WL 530108, at \*5. Judge Wolfson criticized the *Keller* court's failure to take into account the expressive nature of the interactive features of the game and its overly narrow focus on the alleged likeness alone instead of the game as a whole. "[I]n my view, it is logically inconsistent to consider the setting in which the character sits, which *Keller* does in its analysis, yet ignore the remainder of the game." *Id.* at 24.

### The Rogers Test

Finally, Judge Wolfson turned to the "Rogers" test, developed by the Second Circuit and adopted by numerous courts across the country in both Lanham Act "false endorsement" and right of publicity claims. Under *Rogers*, the First Amendment bars right of publicity claims arising from the use of a plaintiff's name or likeness in an expressive work, unless the use is "wholly unrelated" to the work or is "simply a disguised commercial advertisement for the sale of goods or services." 875 F.2d at 1004. Although Judge Wolfson praised the clarity of its application, she questioned whether a test derived from trademark law was properly applicable to a right of publicity claim and whether it struck the right balance between the competing interests. *See Hart*, 2011 WL 4005350, at \*26-29. Nonetheless, applying the test to the facts at issue, the Court easily concluded that Hart's image was not wholly unrelated to *NCAA Football*, nor was its incorporation into the game a "disguised commercial advertisement" indicating his endorsement or creative input. Summary judgment was therefore appropriate under this test as well.

### Key Takeaways

As noted, Judge Wolfson's thorough and scholarly opinion will likely have a significant impact on future cases involving the intersection between the First Amendment and

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rights of publicity.

First, this is a big victory for video game developers. Close on the heels of the Supreme Court's decision in *Brown v. Entertainment Merchants Association*, a federal district court has extended robust First Amendment protection for video games beyond the specific context of statutes targeting violent video games. While the Court did not apply strict scrutiny as in *Brown*, the basic recognition that video games are expressive works entitled to protection comes through clearly in this opinion. The court's emphasis on the interactive features of EA's games is also good news for video game developers and others interested working in "new media," where user interaction and incorporation of user-generated content is becoming more-and-more the norm.

Second, Judge Wolfson's may be influential in convincing future courts outside of California to adopt the transformative use test. While the Court analyzed the facts under both tests, the Court's clear preference was for the transformative use test and its skepticism about the link between trademark law and rights of publicity could discourage future courts from adopting the *Rogers* test. This preference appears based on the assumptions that there are "common underlying principles shared by the right of publicity and copyright doctrine," *Hart*, 2011 WL 4005350, at \*14, and that "right of publicity claims do not embody the same likelihood-of-confusion concerns" that the Lanham Act is designed to address, *id.* at \*28. While fully addressing this point is beyond the scope of this short article, it is worth noting that these assumptions are very much open to question. In the *Keller* appeal, a coalition of media organizations submitted an *amicus* brief that argues persuasively that rights of publicity and copyright law are not actually analogous, that borrowing from copyright law is premised on a misreading of *Zacchini v. Scripps-Howard Broad.*, 433 U.S. 562 (1977), and that trademark law and right of publicity are in fact closer cousins in the field of intellectual property because they both are concerned with the misuse of names, titles, and brands. See generally Brief *Amicus Curiae* in Support of Appellants by Advance Publications et al., No. 10-15387, Docket # 26-2 (Sept. 7, 2010).

Third, it is important to remember that the transformative use test is one of a series of First Amendment-related tests used by California courts in right of publicity cases, and was developed specifically to deal with visual depictions of

celebrities. As such, it does not necessarily provide a good across-the-board test for balancing First Amendment rights against rights of publicity. In particular, the transformative use test makes an awkward fit for other types of expressive works like biographies, docudramas, and reality TV, where interactivity is not an option and where the creator's intention may well be to represent a famous person in his or her real-life context. Despite Judge Wolfson's helpful determination that courts should look at the creative expression in a work as a whole rather than the celebrity's image in isolation, there remains a risk that courts will continue to impose a requirement of physical transformation of the celebrity's image or placement of the celebrity in a counter-factual setting, based on a reading of cases like *Kirby v. Sega of America, Inc.*, 144 Cal. App. 4th 47 (Cal. App. 2006), and *No Doubt v. Activision, Inc.*, 192 Cal. App. 4th 1018 (2011).

Judge Wolfson herself felt obliged to thread a needle between these two cases, stating that this case presented a "closer call" than either of them. *Hart*, 2011 WL 4005350, at \*20. In the same vein, Judge Wolfson expressly warned future game developers in *dicta*: "a game developer that bases its work on *real players in the context of the games that bring them notoriety* . . . may walk a fine line between using reality as a building block for the developer's own creative work and exploiting the hard-earned reputation of college players for its own profit," *Id.* at \*20 (emphasis added).

Any across-the-board test for balancing First Amendment and publicity rights has to take into account the strong First Amendment and public interests in creation of expressive works that depict real-life individuals in their real-life contexts, something current readings of the transformative use test – at least in the context of video games – still fail to accomplish. This is one of the strengths of the *Rogers* test, in that it looks primarily to artistic relevance and does not get caught up in the need to "transform" the celebrity's name or likeness, something that may continue to trip up future courts applying the transformative use test.

*In the New Jersey action, Electronic Arts is represented by Elizabeth McNamara, Chris Robinson, and Sam Bayard from Davis Wright Tremaine LLP, and Bruce Rosen from McCusker, Anselmi, Rosen & Carvelli, P.C. EA is represented in the 9<sup>th</sup> Circuit appeal of the Keller decision by Davis Wright Tremaine's Kelli Sager, Al Wickers, Karen Henry, and Lisa Kohn, and Robert A. Van Nest, Steven A. Hirsch, and R. James Slaughter of Keker & Van Nest, LLP.*

# CBS Awarded Summary Judgment in Illinois Newsgathering Action

## *No Legitimate Expectation of Privacy for Objects in Plain View*

By Katharine Larsen

An Illinois district judge granted summary judgment in favor of CBS Broadcasting Inc. in an action involving intrusion upon seclusion and intentional infliction of emotional distress claims. *Webb v. CBS Broadcasting Inc.*, No. 1:08-cv-06241, 2011 WL 4062488 (N.D. Ill. Sept. 13, 2011) (St. Eve, J.). This lawsuit stemmed from the videotaping of adults and children interacting around a backyard swimming pool. The court's ruling reinforces the principle that, under Illinois law, "when objects are in plain view, there is no legitimate expectation of privacy," even when a zoom lens is used during the recording.

### Background

In 2007, a woman named Lisa Stebic went missing from her home in Plainfield, Illinois, at a time when she and her husband, Craig Stebic, were in the process of divorcing. Law enforcement later named Craig Stebic a "person of interest" in the investigation. Both before and after this designation, the Stebic home was monitored by members of the public, law enforcement, and the news media.

A few months after the disappearance, relatives of Craig Stebic – plaintiffs Jill Webb, Robert Webb, and their three children – were visiting the Stebic home. They invited a news reporter from another Chicago station to come to the house to discuss the investigation into Lisa Stebic's disappearance. The reporter came, bringing her two children with her. That day, the reporter, her children, the Webbs, and Craig Stebic, all in swimming attire, spent time in and around the swimming pool in the backyard.

The material facts regarding the topography of the neighborhood were undisputed. The Stebic backyard, although enclosed by a fence that is just under six feet tall, sits at the bottom of a hill that rises up behind it from

approximately three to more than five feet. Atop the hill is the home of a neighbor as well as an open grassy space. Given the elevation, a person in the neighbor's home or walking on the public sidewalk or in the public street adjoining the open, grassy space can see into the majority of the Stebic backyard.

A reporter from CBS's Chicago station, while visiting the neighbors whose home looks into the Stebic backyard, saw the other reporter together with Craig Stebic and the Webbs. With the neighbors' permission, the CBS reporter brought in his photographer to record, from the first-floor window, the events in the yard. The photographer's camera had a zoom function, which was sometimes used during the taping.

### The Decision

In dismissing the plaintiffs' intrusion claim, the court found the evidence undisputed that plaintiffs' "activities at the Stebics' swimming pool and backyard were in plain view, the Webbs' conduct was openly displayed, and a passerby on the street or in the grassy area behind Stebics' yard could observe what [the CBS crew] saw."

The court accorded no weight to the occasional use of the camera's zoom lens. Instead, the court relied on *Schiller v. Mitchell*, 357 Ill. App. 3d 435, 441 (2d Dist. 2005), another action in which the plaintiff's property was recorded from the home of a neighbor, to emphasize that the plaintiff must "explain why" others "could not see what the camera saw, only from a different angle." The court found plaintiffs had not established any genuine dispute as to any material fact relevant to two elements of the claim: whether plaintiffs "were in a place a reasonable person would believe to be secluded" and whether they "attempted to keep private facts private."

In dismissing the intentional infliction of emotional

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distress claim, the court found plaintiffs “failed to present any evidence that CBS’s conduct in videotaping them ... caused them distress that was so severe that no reasonable person could expect to endure it.” The court reasoned that it was insufficient that the taping was “unwelcome” or that Jill Webb was “upset about the broadcast of the Videotape,” particularly when law enforcement was also closely monitoring the Stebic home. The court also found no evidence that CBS intended to inflict severe emotional distress, where the only relevant testimony was that the CBS crew videotaped the backyard because of the presence of Craig Stebic and the other reporter.

Plaintiffs previously asserted claims for false light and publication for private facts based on the broadcast of the videotape, but these causes of action were dismissed after plaintiffs conceded they were filed after the applicable one-year statute of limitations applicable to “libel, slander, and publication of matter violating the right of privacy.” 735 ILCS 5/13-201.

*CBS Broadcasting Inc. was represented by Anthony Bongiorno and Naomi Waltman of the CBS Law Department, Lee Levine, Jay Ward Brown, Ashley Kissinger, and Katharine Larsen of Levine Sullivan Koch & Schulz LLP, and Brian Sher of Bryan Cave L.L.P. Plaintiffs were represented by John P. DeRose of John P. DeRose & Associates.*

## Newspaper Column About Radicalization of Inmates Is Protected Opinion

By Collin J. Peng-Sue

Last month, a New York state court judge emphasized the broad protection for a commentator’s personal views in the context of a column in the “opinion section” of a newspaper. In [\*Rashada v. The New York Post\*](#), Index. No. 100776/11 (Sup. Ct. N.Y. Cnty. Aug. 11, 2011), Justice Saliann Scarpulla found that that an allegedly libelous column (the “Column”) written by Patrick Dunleavy (“Dunleavy”) and published in the *New York Post* (the “*Post*”) constituted non-actionable opinion as to the plaintiff Melody Rashada (“Rashada”). The Court further noted that even if the Column were not non-actionable opinion, the Court lacked personal jurisdiction over Dunleavy under New York’s long arm statute.

### Background

The Column appeared in the September 2, 2010 issue of the *Post*. In the Column, Dunleavy discussed four individuals (then on trial in federal court in New York) who were accused of plotting to bomb synagogues in the Bronx. He raised the question of “how the four accused were radicalized to the point where they’d even consider plotting to bomb synagogues in The Bronx and shoot down aircraft with missiles.” Dunleavy then noted that the four criminal defendants had ties to a mosque in Newburgh, New York, and that three others who work at the mosque—including

Rashada—were chaplains in the New York State prison system. Dunleavy further discussed the dominance of a particular Islamic theology in the prison system and the radicalization of inmates while they are in prison, and posed the question, “[w]here and when were these seeds of hatred planted—and where was the prison chaplain when all this was going on?”

Rashada sued Dunleavy and NYP Holdings, Inc. (“NYP”) the publisher of the *Post*, claiming that the Column either stated or implied that she engages in the radicalization of prison inmates and encourages them to engage in acts of terrorism. On March 25, 2011, NYP and Dunleavy moved to dismiss the complaint on the grounds that the Column was non-actionable opinion. Dunleavy also moved on the separate ground that he had done nothing more than grant NYP the permission to publish the Column (a previous version of which had already appeared on another website), and that as a resident of the State of Washington, the Court lacked personal jurisdiction over him.

### The Decision

In a Decision and Order dated August 11, 2011, Justice Scarpulla granted the motion to dismiss in full. In her decision, she focused on the New York Court of Appeals’

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instruction that determining whether a statement is opinion requires an examination of whether “either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to ‘signal’ . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.” *Gross v. New York Times Co.*, 82 N.Y.2d 146, 153, 603 N.Y.S.2d 813, 817 (1993).

In this case, the Court held that both the full context of the Column and its “broader social context indicate that it should be treated as non-actionable opinion.” Specifically, she observed that the Column “was printed under the multicolored and bolded heading ‘POST OPINION,’ which alerted all readers that the article they were about to read was the opinion of Dunleavy. Moreover, the broader social context of the article – the radicalization of prison inmates, leading them to engage in terrorist activity – is a topic which is intended to create much discussion and debate, and a topic on which a verifiable conclusion is neither expected nor delivered.” (citations omitted). The Court further held that the Column was “plainly intended to raise issues, rather than convey specific objective facts about Rashada’s role in the radicalization of inmates,” and that its tone “is inquiring, not conclusory and shows that Dunleavy is presenting a plausible theory and not a proven fact.”

In addition, the Court also agreed that Dunleavy was not

subject to jurisdiction under New York’s long arm statute, section 302(a) of the Civil Practice Law and Rules. CPLR 302(a)(2) and (3) specifically exclude defamation claims from their scope. Accordingly, the Court could have jurisdiction over Dunleavy only if the conditions of CPLR 302(a)(1) were satisfied. In order to establish jurisdiction over Dunleavy under CPLR 302(a)(1), the cause of action against Dunleavy must have arisen from his “transact[ing] any business within the state or contracts anywhere to supply goods or services in the state.”

In its decision, the Court agreed with other precedent that held that “[t]he ‘transacts business’ standard set forth in CPLR 302(a)(1) is more strictly interpreted in defamation cases,” and that “[t]he single act of distributing a defamatory statement is insufficient to establish personal jurisdiction.” The court noted that other interviews Dunleavy had given in New York were not in connection with the Column and did not give rise to the claim at issue, and that the only act of business relating to this action was the Column itself. Accordingly, the Court held that the “transaction of business” standard of CPLR 302(a)(1) was not met, and long arm jurisdiction under CPLR 302(a) was impermissible.

*Defendants NYP Holdings, Inc. and Patrick Dunleavy were represented by Slade R. Metcalf and Collin J. Peng-Sue of Hogan Lovells US LLP, New York City. Plaintiff Melody Rashada was represented by John R. Lewis, Sleepy Hollow, New York.*

**2011 MLRC Forum**  
**Combating Online Piracy: The Protect IP Act and Alternatives**  
**Wednesday, November 9, 2011, 3:45-5:45 p.m.**  
*(preceding the MLRC Reception and Annual Dinner)*  
**New York Marriott Marquis**

MLRC Forum 2011 will focus on the serious problem of online piracy in all forms of content, including movies, videos, books, magazines, and software. The session will look at big picture copyright infringement challenges that are threatening content creators and distributors – and what the existing remedies and proposals may do for them.

One proposal working its way through Congress, the Protect IP Act, would provide the Government and copyright owners with a set of tools, some of which are controversial, for dealing with rogue sites, particularly those based outside the United States. Other enforcement methods and remedies, some of which have already been employed, have recently entered the picture.

The Forum will present a panel to introduce the pros and cons of the Protect IP Act and alternative enforcement mechanisms, and then open it up to discussion.

To RSVP, email [dseiden \(at\) medialaw.org](mailto:dseiden@medialaw.org).

# Seventh Circuit Upholds Exclusive Media Policies for Public High School Athletics

## *Rejects First Amendment Challenge to Licensing Scheme*

**By Robert Dreps**

The U.S. Court of Appeals for the Seventh Circuit has rejected a First Amendment challenge to the exclusive media rights and licensing policies of the Wisconsin Interscholastic Athletic Association at public high school athletics tournaments. *Wisconsin Interscholastic Athletic Association v. Gannett Co., Inc.*, No. 10-2627. The August 24, 2011 opinion by Judge Diane Wood concluded “that WIAA’s exclusive broadcasting agreements for Internet streaming [of high school sports] are consistent with the First Amendment.”

### Background

The WIAA in 2005 granted a private company, American Hi-Fi, the exclusive right, for ten years, to produce, sell and distribute video by any medium for all public high school tournament events except football and hockey state finals and the entire state level basketball tournaments, the rights to which were already held by others. WIAA sued Gannett Company and the Wisconsin Newspaper Association in 2008 for declaratory relief after several Gannett newspapers streamed live video coverage of four regional-level football games without WIAA’s permission.

The newspapers argued the First Amendment required WIAA to provide equal access for all credentialed media to stream tournament events. Under the 14th Amendment, WIAA is a state actor and its tournaments involve mostly taxpayer-funded public schools. The WIAA’s Media Guide states that “[a]ll permission granted, policies enforced and fees required will be at the sole discretion of the WIAA and” its exclusive streaming partner. The newspapers objected in particular to the requirement that licensees pay a fee to American Hi-Fi, rather than the WIAA, and surrender the right to market their own work product in exchange for permission to stream events not shown by American Hi-Fi.

**The panel’s opinion distinguished the media’s right to report on government events, which the First Amendment protects, from broadcasting entire performances, which it held is not protected.**

The district court adopted the WIAA’s public forum analysis of the dispute, holding that Internet streaming at tournament events is a non-public forum and that WIAA’s interest in raising revenue justified its exclusive-rights media policies. *WIAA v. Gannett*, 716 F.Supp. 2d 773 (W.D. Wis. 2010). That court characterized the dispute as a “case about commerce, not the right to a free press,” and endorsed the WIAA’s argument that “sports reporting lies on the periphery of protected speech” and, remarkably, “deserves less protection than reporting on political events.”

### Seventh Circuit Decision

The newspapers protested on appeal that their commercial interests were irrelevant under any First Amendment analysis and that, by treating a communications medium as the relevant forum, the district court’s analysis would enable the WIAA to designate an exclusive partner for public high school events for every medium, including newsprint. No First Amendment precedent authorizes a state actor to exercise such control over speech at and about government-sponsored events, the newspapers argued. WIAA’s assertion of “sole discretion” over licensing streaming coverage, moreover, defied a long line of Supreme Court decisions holding licensing schemes in other circumstances unconstitutional as a prior restraint on speech.

The Seventh Circuit agreed with the newspapers that “[t]he fact that, to some, sports might be ‘mere’ entertainment does not change the [First Amendment] analysis.... There is no basis for a rule that makes the press’s right to coverage depend on the purported value of the object of their coverage.” The good news from the decision, however, ended there. The court did not address the commercial interest issue and pointedly disagreed with the newspapers’

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remaining arguments – but not for any of the reasons catalogued in the district court’s 51-page opinion.

Judge Wood side-stepped public forum principles, finding the analysis “unhelpful.” The panel instead ruled “that [public high school] tournament games are a performance product of WIAA that it has a right to control.” Stopping short of equating WIAA’s media policies with government speech, in the sense described in *Pleasant Grove v. Summum*, 129 S.Ct. 1125 (2009), which could immunize them from First Amendment scrutiny altogether, the panel leaned strongly in that direction.

What is important for purposes of the First Amendment is that the government is sending a message, which can come by funding a group or project, sponsoring an event or performance, or by selecting and editing content.... It makes no difference whether the state conveys this message directly or instead chooses to employ private speakers [here, American Hi-Fi] to transmit its message.

The panel’s opinion distinguished the media’s right to report on government events, which the First Amendment protects, from broadcasting entire performances, which it held is not protected. The court ruled that newspapers cannot “appropriate the entertainment product that the WIAA has created without paying for it,” by using more than the two minutes of video coverage the WIAA allows credentialed media without requiring a license or fee.

The court found guidance in *Zacchini v. Scripps-Howard Broadcasting*, 433 U.S. 562 (1977), which held the news media had no First Amendment right to broadcast the entire (15-second) act of a private entertainer (“the human cannonball”) as news coverage. The sponsor’s right “to capture the economic value of a performance,” the court held, “appl[ies] to state actors as well as private actors,” even those co-ordinating public high school sports in taxpayer-funded facilities. The court was not concerned that WIAA promotes high school sports as educational activities, rather than entertainment, when seeking taxpayer support.

This distinction also proved fatal to the newspapers’ argument that WIAA’s streaming license policies gave it unbridled discretion to influence or control content. Since it

found the newspapers had no First Amendment right to stream a public athletic event, the panel concluded that “cases addressing licensing or permitting regimes for speakers and performers or public park-goers are inapposite as well.” As a result, permit requirements for the placement of newsracks on public property receive greater First Amendment scrutiny than government restrictions on video coverage of public school athletics.

The decision leaves public high school sports associations free to adopt the for-profit media policies of professional sports leagues as long as they permit at least two minutes of video news coverage of the event.

*Robert Dreps and Monica Santa Maria, Godfrey & Kahn, S.C., in Madison, WI, represented the Wisconsin Newspaper Association and Gannett Co., Inc. The WIAA and American Hi-Fi were represented by John S. Skilton, Jeff J. Bowen and Autumn N. Nero, Perkins Coie LLP, by Gerald O’Brien, Anderson, O’Brien, Bertz, Skerene & Golla, and by Jennifer S. Walther, Mawicke & Goisman, S.C.*

## Defense Counsel Section 2011 Annual Meeting

**Thursday, November 10, 2011**

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Meeting will begin promptly at 12:30 p.m.

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# First Circuit Upholds Basic Newsgathering Rights While Embracing Modern Newsgathering Technologies

By Carol E. Head

In the recent decision, *Glik v. Cunniff*, 2011 WL 3769092 (1st Cir. Aug. 26, 2011), the First Circuit reinforced the constitutional right to make video and audio recordings of public officials discharging public duties, even if recorded by a non-traditional journalist (a passerby) using non-traditional media (a cell phone). As such, *Glik* provides important guidance for newsgathering in the digital age.

The facts of the case are straightforward: In 2007, a law student walking by the Boston Common, the oldest public park in America, witnessed three police officers arresting a man with what appeared to be excessive force. Using his cell phone, Simon Glik took a video and audio recording of the arrest. Noticing Glik holding out his cell phone, an officer asked if he was recording audio. When Glik said yes, the officer arrested him for violating the Massachusetts Wiretap Statute, M.G.L. ch. 272, § 99(C)(1), which prohibits secretly making audio recordings. The police confiscated the cell phone. *Glik*, 2011 WL 3769092, at \*1.

Although the charges later were dismissed, Glik brought suit under 42 U.S.C. § 1983 against the City of Boston and three Boston police officers, alleging that the arrest violated his First and Fourth Amendment rights. The police officers argued they were entitled to qualified immunity because (1) the First Amendment did not create a “clearly established right” to record police officers carrying out their public duties and (2) a reasonable police officer would believe he had probable cause to arrest Glik under the Massachusetts Wiretap Statute, and thus would not understand the arrest to violate the Fourth Amendment. *See id.* at \*3. On interlocutory appeal, the First Circuit affirmed the denial of the officers’ motion to dismiss the claims

based on qualified immunity.

Glik was not a member of the media, but the First Circuit obviously was aware that its decision would have implications for both traditional and non-traditional newsgathering. While unabashedly supporting core constitutional rights to gather news, the decision is styled to be applicable in a world where modern technologies are rapidly altering both *who* gathers news and *how* news is gathered. A brief discussion of *Glik*’s two key holdings, and some thoughts on the First Circuit’s approach in the face of changing technology, follows.

1. *The First Amendment Protects Videotaping Government Officials in Public Spaces.* The First Circuit held that basic First Amendment principles “unambiguously” establish that members of the public have “a constitutionally protected right to videotape the police carrying out their duties in public.” *Glik*, 2011 WL 3769092, at \*3. Acknowledging that the right to film is subject to reasonable time, place and manner restrictions, the Court did not hesitate to say that no such restrictions applied to Glik: The filming occurred in the Boston Common -- “the apotheosis of a public forum” -- with Glik standing a distance

away, without speaking or interfering with the officers’ actions. “Such peaceful recording of an arrest in a public space that does not interfere with the police officers’ performance of their duties is not reasonably subject to limitation.” *Id.* at \*5.

Dismissing the officers’ arguments that the right to film government officials was not clearly established, the First Circuit ruled that the “brevity” of discussions about the issue in various judicial decisions attests to the fact that First

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**Not only was the Court unfazed that, for example, a video recording was made by a cell phone, it suggested that, by providing “a form that [information] can readily be disseminated to others,” modern technology promotes “a cardinal First Amendment interest in protecting and promoting ‘the free discussion of governmental affairs.’”**

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Amendment protection of videotaping is “fundamental and virtually self-evident.” *Id.* at \*6. The Court refused to follow a Third Circuit decision, *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010), which held that there was no clearly established right to film a traffic stop. In *Kelly*, the stop was described as “an inherently dangerous situation.” It is not clear whether the First Circuit disagreed with that conclusion or simply considered a traffic stop distinguishable from the case before it. In any event, the Court held that, in the First Circuit at least, filming government officials discharging their duty in public spaces is “a basic, vital, and well-established liberty safeguarded by the First Amendment.” See *Glik*, 2011 WL 3769092, at \*7.

2. *An Audio Recording Made in Plain View -- even with a Cell Phone -- Does Not Violate the Massachusetts Wiretap Statute.* *Glik* also provides further clarity to news-gatherers about the reach of the Massachusetts Wiretap Statute by establishing that an officer (or anyone else) is charged with the knowledge that cell phones record audio, just like a tape recorder. With that knowledge, the Court held, *Glik* should not have been arrested under a statute that prohibits secret recordings. *Id.* at \*8-9.

Briefly, the Massachusetts Wiretap Statute makes it a crime to “willfully commit[] an interception ... of any wire or oral communication.” M.G.L. ch. 272, § 99(C)(1). Because the statute applies even if the recorded party has no reasonable expectation of privacy in the communication at issue, it is considered one of the broadest statutes of its kind in the country. (No court, including the *Glik* court, has squarely addressed whether the First Amendment mandates such “a reasonable expectation of privacy” limitation in cases involving, for example, public officials or public speech.) See *Glik*, 2011 WL 3769092, at \*7; *Commonwealth v. Hyde*, 750 N.E.2d 963, 967-68 & n.5 (Mass. 2001). The statute strictly prohibits all “secret” audio recordings made without the actual knowledge of the subject of the recording -- even if the subject is a police officer interacting with a member of the public in the discharge of his duties. See *id.* at 967. Generally, this means all parties need to consent to being recorded.

Thankfully for news-gatherers, Massachusetts courts have not gone so far as to construe “actual knowledge” to require subjective knowledge that one is being recorded. See, e.g.,

*Glik*, 2011 WL 3769092, at \*7-8 (discussing, inter alia, *Commonwealth v. Rivera*, 833 N.E.2d 1113 (Mass. 2005)). One can only imagine the difficulty of obtaining consent of every attendee of a public demonstration. Rather, actual knowledge “turns on notice, i.e., whether based on objective indicators, such as the presence of recording device in plain view, one can infer that the subject was aware that she might be recorded.” *Id.* at 7.

Nothing in *Glik* alters the rule established by Massachusetts courts that recording a police officer discharging his public duties with a recording device *hidden from view* violates the statute. See *Hyde*, 750 N.E.2d at 971. But one need not carry a 15-foot boom microphone to notify the public that audio is being recorded. In *Glik*, the officers argued that a cell phone did not notify them that they were being recorded because a cell phone can be used for a host of unrelated tasks; for example, *Glik* could have been taking photos. *Glik*, 2011 WL 3769092, at \*8. The First Circuit disagreed, noting that the officers themselves were aware that the phone could record audio -- one had asked *Glik* if he was recording sound. *Id.* at \*9. Here, by holding a cell phone in front of him, *Glik* was not secretly recording audio in violation of the statute. Thus, the lesson of *Glik* is that one may record audio using a device known to be capable of recording conversations that is held in “plain sight.”

3. *The Glik Decision Is Protective of Modern Technology’s Impact on Newsgathering.* The First Circuit expressly acknowledged -- and protected -- the role modern technology plays in newsgathering. In several places, the Court seemed to articulate rules that would remain relevant in the future, regardless of how technology might change newsgathering methods.

With respect to *who* gathers news, technological advances have made it clear that “the news-gathering protections of the First Amendment cannot turn on professional credentials or status.” *Glik*, 2011 WL 3769092, at \*5. As the Court explained,

The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a

(Continued on page 31)

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traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper.

*Id.* Although “changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw,” the Court made clear, that First Amendment rights do not turn on such distinctions. *Id.*

With respect to *how* news is gathered, the Court embraced the prospect that new technologies will advance First Amendment principles. Not only was the Court unfazed that, for example, a video recording was made by a cell phone, *see id.*, it suggested that, by providing “a form that [information] can readily be disseminated to others,” modern technology promotes “a cardinal First Amendment interest in protecting and promoting ‘the free discussion of governmental affairs.’” *Id.* at \*4 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)) (emphasis added).

One aspect of the Court’s decision is of particular relevance to laws like the Massachusetts Wiretap Act that prohibit “secret” recordings. Because of the widespread use of technology in today’s society, the Court found it appropriate to charge the public with knowledge of how those devices work, and its reasoning is not limited to cell phones. Rather, the decision swept more broadly to encompass “the use in plain view of a device commonly known to record audio ....” *Id.* at 9. Today, that includes a cell phone. Tomorrow, it could be some other device.

In short, the *Glik* decision recognizes that whatever the future may bring, modern information-sharing and gathering technologies promote First Amendment principles, and the application of those core principles should not be limited by technological advances.

*Carol E. Head is counsel at Bingham McCutchen LLP in Boston, Massachusetts. Simon Glik was represented by David Milton and Howard Friedman of the Law Offices of Howard Friedman, P.C. and Sarah Wunsch of the ACLU of Massachusetts. The defendants were represented by Ian D. Prior, William F. Sinnott and Lisa Skehill Maki of the City of Boston Law Department.*



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# Illinois Court Rules Eavesdropping Law Is Unconstitutional

## *Citizens Have a First Amendment Right to Record Public Officials Carrying Out Their Duties in Public Places*

By Richard J. O'Brien,

Linda R. Friedlieb & Matthew D. Taksin

The growing prevalence of cell phones with audio and video recording capabilities has raised First Amendment issues in light of a handful of states' eavesdropping statutes. The issue is whether there is a First Amendment right to audio record public officials carrying out their official duties in public places. A small number of states criminalize such behavior under the authority of eavesdropping statutes. But these statutes have been coming under attack for charges of violating the First Amendment. Addressing application of the Massachusetts statute, the First Circuit Court of Appeals ruled on August 26, 2011 that the First Amendment afforded protection to record (both audibly and visually) a police officer making an arrest on Boston Common, reasoning that the First Amendment protects gathering information about public officials in public places, absent a reasonable time, place, and manner restriction. *See Glik v. Cunniffe*, No. 10-1764, 2011 WL 3769092 (1st Cir. 2011). On September 13, 2011, the Seventh Circuit heard oral argument on an appeal of essentially the same issue after a Chicago district court ruled that the Illinois statute criminalizing audio recording of police in public engaged in their public duties raises no First Amendment implications. *See ACLU of Illinois v. Alvarez*, No. 10 C 5235, 2011 WL 66030 (N.D. Ill. Jan. 10, 2011); Case No. 11-1286 (7th Cir.) (pending).

### *Illinois v. Allison*

On September 15, 2011, an Illinois circuit court held that Illinois' eavesdropping statute violates a broad First Amendment right to audio record public officials performing their duties in public places. *See Illinois v. Allison*, No. 2009-CF-50 (2nd Cir., Crawford County). Michael Allison kept

unregistered vehicles in his mother's yard in Oblong, Illinois.

Allison periodically worked on the cars, but was not using them to operate on any public roads. When police paid a visit to Allison to investigate the possible violation of an ordinance requiring all vehicles to be registered if not stored in a garage, Allison audio recorded the conversation. Allison was cited for violating the vehicle ordinance and at the hearing on the violation, Allison audio recorded those proceedings too. After the hearing, he was arrested for violating the Illinois eavesdropping statute, having recorded the police, city attorney, circuit clerk's office, and the judge.

The Illinois statute, 720 ILCS 5/14, criminalizes the use of recording devices to record any conversation, even if the conversation is not private, without the express consent of all parties to the conversation. The statute defines "conversation" to mean "any oral communication between 2 or more persons regardless of whether one or more of the parties intended their communication to be of a private nature

under circumstances justifying that expectation." 720 ILCS 5/14-1(d). Recording the conversation of a private citizen in violation of the statute is a Class 4 felony punishable by up to 3 years. Recording of a police officer in violation of the statute is a Class 1 felony punishable by up to 15 years.

Nearly all states and the federal government have some form of eavesdropping statute. But Illinois' statute is an outlier. The vast majority of state bans against eavesdropping allow recording of conversations if one party consents, and all but three do not prohibit recording if there is no reasonable expectation of privacy. And as to the two states other than Illinois that extend their eavesdropping statutes where there is no reasonable expectation of privacy (Massachusetts and

*(Continued on page 33)*

**"Law officials have no constitutionally cognizable or legitimate expectation that their actions remain unrecorded; on the contrary, the actions of public officials are by definition a matter of public concern."**

(Continued from page 32)

Oregon), they do not extend prohibition to open and obvious recording (as opposed to surreptitious recording). The Illinois statute, however, requires all-party consent, applies to the recording of conversations where there is no expectation of privacy, and applies to open and obvious recording.

Allison moved to dismiss the eavesdropping charges against him arguing, among other things, that the statute violated his First Amendment right to gather information by audio recording police officers and public servants engaged in their public duties. Given the challenge to the statute's constitutionality, the Illinois Attorney General intervened in the proceedings. The State opposed Allison's motion to dismiss, arguing that the prohibition on recording conversations without the consent of the public officials does not restrict Allison's ability to speak or express himself – that he could say anything he wants about his encounter with public officials so long as he does not record the conversations between two or more persons without the consent of all parties.

In its September 15 ruling, the Illinois circuit court noted that there was little case law on point. The circuit court recognized the district court decision in *ACLU v. Alvarez*. But the circuit court deemed persuasive the First Circuit's *Glik* decision holding that “[a]lthough not unqualified, a citizen’s right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.” The circuit court also quoted at length from a University of Pennsylvania law review article, including the following passage explaining why eavesdropping statutes should not override a First Amendment right to record public officials engaged in their public duties:

A police officer investigating a crime can assert no comparable right to intimacy [the right to be protected from theft of private information] with her suspects; still less can a public official engaged in her duties on a public street. Certainly, law officials have no constitutionally cognizable or legitimate expectation that their actions remain unrecorded; on the contrary, the actions of public officials are by definition a matter of public concern.

The Illinois circuit court similarly reasoned that “[a] statute intended to prevent unwarranted intrusions into a citizen’s privacy cannot be used as a shield for public officials who cannot assert a comparable right of privacy in their public duties. Such action impedes the free flow of information concerning public officials and violates the First Amendment right to gather such information.” The court recognized that the right to record was not absolute as it is subject to reasonable time, place, and manner restrictions. But the court found that the statute was a blanket rule that contained no time, place, and manner restrictions.

The court therefore granted Allison’s motion to dismiss. Since the circuit court found a state statute unconstitutional, the state has a right of direct appeal to the Illinois Supreme Court.

*Richard J. O’Brien, Linda R. Friedlieb, and Matthew D. Taksin of Sidley Austin LLP are among the attorneys representing ACLU of Illinois in the above-mentioned ACLU of Illinois v. Alvarez, which currently is on appeal in the Seventh Circuit.*

## 2011 MLRC ANNUAL DINNER

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# Missouri Federal Court Enforces Section 230's Immunity Provision Despite Plaintiff's Creative Attempts To "Plead Around" The Statute

By Michael Nepple

A sympathetic plaintiff's creative attempts to avoid Section 230's immunity provision in an action against backpage.com, LLC ("Backpage") was unsuccessful in *M.A. ex rel P.K. v. Village Voice Media Holdings, LLC*, 2011 WL 3607660 (E.D. Mo. Aug. 15, 2011). The court, following controlling § 230 precedents, dismissed plaintiff's complaint that sought to hold Backpage liable for advertisements placed on its website.

## Background

Plaintiff M.A., through her mother P.K., brought suit against Backpage for advertisements placed by Latasha Jewell McFarland. According to the complaint, in 2009, McFarland befriended M.A., a 14 year old runaway at the time. McFarland allegedly took photographs of M.A. and placed the photographs in advertisements on backpage.com, advertising M.A.'s availability as an escort. McFarland was indicted for sex trafficking and use of interstate transportation in aid of racketeering, and eventually sentenced to several years in federal prison.

After McFarland pled guilty, M.A.'s mother filed suit in district court against Backpage under 18 U.S.C. § 2255, which provides a civil action for minors who have been victims of sex trafficking, and 18 U.S.C. § 1595, which provides a civil action against both the perpetrator of child trafficking and "whoever knowingly benefits, financially or by receiving anything of value from participation in the venture . . . ."

## Plaintiff's Plethora of Legal Theories

Anticipating Backpage's Section 230 defense, M.A.'s amended complaint alleged Backpage was "responsible in

part for the development and/or creation of information" because Backpage created adult-focused categories and provided a search engine that allowed keyword searches of advertisements. Plaintiff further alleged that Backpage was aware that other minors had appeared in advertisements for escorts.

In addition to these predictable allegations, Plaintiff alleged that Section 230 immunity was not available here because: (1) Backpage aided and abetted McFarland's criminal actions, which made Backpage criminally liable "as a principal" under 18 U.S.C. § 2, and, therefore, civilly liable under 18 U.S.C. § 2255; (2) Section 230(e) (1) provides that Section 230 is not to be construed to "impair the enforcement of . . . chapter 110 of Title 18 . . ."; and (3) the United States is a signatory to an [international child protection treaty](#), the terms of which take Constitutional precedence over Section 230 immunity found in federal statutory law.

Backpage moved to dismiss plaintiff's amended complaint under Rule 12(b)(6).

## The District Court's Opinion

The district court began its analysis with a recitation of Congressional intent in enacting Section 230. The court quickly determined that Backpage was an internet service provider, and rejected M.A.'s serial contentions that the presence of a search engine, adult categories, and the for-profit nature of the site defeated Section 230 immunity.

The district court also rejected the argument that Backpage should lose Section 230 immunity because – as alleged by plaintiff – Backpage was aware of prior cases of minors being trafficked on the website. According to the district court, "[i]t is, by now, well established that notice of

(Continued on page 35)

**The court, following controlling § 230 precedents, dismissed plaintiff's complaint that sought to hold Backpage liable for advertisements placed on its website.**

(Continued from page 34)

the unlawful nature of the information provided is not enough to make it the service provider's own speech." *Id.* at \*8.

M.A. also alleged that Backpage aided and abetted McFarland's criminal acts so as to be liable as a principal under criminal law – and thus subject to a civil claim under 18 U.S.C. §2255. The district court relied upon *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009), for the general proposition that intermediaries are not liable for customers who misuse their services to commit unlawful acts. The district court also found that, in "[r]eading M.A.'s amended complaint as a whole, her allegations of Backpage aiding and abetting McFarland do not describe the specific intent required for aiding and abetting under [18 U.S.C.] § 2." *Id.* at \*11.

Plaintiff further alleged that Section 230 immunity could not be applied to her § 2255 civil claim because that cause of action is located within Chapter 110 of Title 18, *i.e.* Section 230 immunity would "impair" her enforcement of "chapter 110 of Title 18" contrary to Section 230(e)(1). The district court, relying upon *Doe v. Bates*, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006), found that Section 230(e)(1) is only applicable to federal criminal law, and that a claim for a civil remedy under § 2255 is not a federal criminal law, no matter where it is codified. The court noted that this interpretation "does not leave M.A. without a remedy under § 2255. She may still pursue a civil remedy against McFarland." *Id.* at \*13.

Finally, the district court rejected M.A.'s argument that an international treaty, the Optional Protocol, took precedence over Section 230's immunity provision. The district court found that because the Optional Protocol was not self-executing, it did not function as binding federal law. For support, the district court cited to the U.S. Senate's finding that the United States' obligations under the Optional Protocol "were fulfilled by existing law and no new legislation was intended." *Id.* at \*14.

The district court concluded, "existing law includes statutes making child prostitution . . . a felony, statutes providing for a private right of action for violations of that law, and a statute immunizing internet service providers from suits arising from the content of postings on the internet. The latter statute, § 230, does not make the other statutes chimerical." *Id.*

*Mark Sableman and Michael Nepple of Thompson Coburn, LLP represented Backpage in the litigation. Plaintiff was represented by Robert H. Pedroli, Jr. of Pedroli & Gauthier.*



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# Inter-American Court of Human Rights Hears Arguments in First Case Involving Privacy Claim for Reporting on Matters of Public Concern

By Natalie Reid and Ivona Josipovic

In late August 2011, the Inter-American Court of Human Rights held a hearing in the case of [Fontevecchia & D'Amico v. Argentina](#), in which two Argentine journalists contend that Argentine courts breached their right to freedom of expression by upholding an invasion of privacy suit President Carlos Menem brought in 1995.

The Inter-American Court interprets and applies the [American Convention on Human Rights](#), which protects the rights to free expression and privacy, among other rights. This is the first case in which the Court will consider whether journalists reporting on matters of public concern may be held liable for violating the privacy of a public official. The Court's judgment is expected in early 2012. The use of civil litigation by government officials to intimidate the press is a serious problem in Latin America, so the Court's decision will be of significant interest to journalists, news organizations, and media practitioners throughout the region.

**This is the first case in which the Court will consider whether journalists reporting on matters of public concern may be held liable for violating the privacy of a public official.**

## Background

Carlos Menem was President of Argentina between 1989 and 1999. His two terms in office were marked by endemic government corruption. The Argentine press investigated and disclosed many instances of misconduct by government officials. In retaliation, journalists were often threatened, physically attacked, or penalized with legal sanctions. Menem and other officials also mounted a sustained campaign of civil litigation against news organizations. For example, while in office, Menem brought nearly two dozen lawsuits against Editorial Perfil, the parent company of leading news magazine *Noticias*, known for its investigative reporting.

In November 1995, *Noticias* published two articles about Menem that discussed his former mistress Martha Meza and their son, Carlos Nair, who was then fourteen years

old. At the time of publication, Meza had been an elected representative for Menem's political party for several years. The articles described extravagant gifts and large sums of money President Menem gave to Congresswoman Meza and their son, and discussed Meza's lavish spending far in excess of her official salary.

The articles also reported that in 1994, Menem asked the Paraguayan president to grant asylum to Meza and Nair after Meza publicly claimed that Nair had been threatened. In reporting the articles, the journalists relied on prior public statements by Meza, interviews with individuals close to

Meza and her son, judicial records, and a bestselling book on Menem's life. The articles were accompanied by photographs of Menem, Meza, and Nair, which were pixilated to protect the child's image, and which had been distributed to the press by presidential staff.

Before publication, *Noticias* obtained confirmation from Congresswoman Meza that all the statements in the articles were accurate, and consulted with legal counsel to confirm that the stories covered matters of public concern.

Without contesting the articles' accuracy, Menem brought a lawsuit for invasion of privacy against Jorge Fontevecchia, founder and then-Director of *Noticias*; Hector D'Amico, the magazine's Managing Editor at the time; and Editorial Perfil, its parent company.

Although Menem lost in the trial court, this decision was reversed on appeal. In September 2001 the National Supreme Court of Justice affirmed the appellate decision and ordered the defendants to pay Menem 60,000 pesos in damages, plus interest, court costs, and fees for a total of 244,323 pesos (equivalent to \$84,000 in 2005, when the final installment of was paid). Of the nine Supreme Court judges who heard the case, six had been appointed by President Menem. Argentina has conceded in its submissions to the Inter-American Court

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that the highly questionable performance of these judges showed they were too close to Menem to be impartial. The damages were two to three times higher than any the Supreme Court had previously ordered in similar suits. The award was satisfied by garnishing a substantial portion of D'Amico's salary for 21 months, and until it was paid, D'Amico could not leave the country without prior judicial authorization.

### Proceedings in the Inter-American System

In November 2001, Fontevecchia and D'Amico filed a complaint before the Inter-American Commission on Human Rights, arguing that the judgment against them violated their right to free expression under the American Convention. The Commission agreed. It issued a report in July 2010 recommending that Argentina revoke the judgment against Fontevecchia and D'Amico, compensate the two journalists, and distribute the Commission's report to prevent future

similar violations of the right to freedom of expression by Argentine courts.

Argentina failed to comply with these recommendations, and in December 2010, the Commission submitted the case to the Inter-American Court. The Court held a public hearing on August 24 and 25, 2011, in which it heard witness testimony and arguments from the parties and the Commission. Besides the parties' written submissions, the Court will have the opportunity to review *amicus* briefs submitted by the [Committee to Protect Journalists](#) and [Article 19](#), arguing that Menem's privacy claims cannot override the special protection afforded under the Convention to reporting on matters of public concern.

*Natalie Reid and Ivona Josipovic are attorneys in the New York office of Debevoise & Plimpton LLP, counsel to the Committee to Protect Journalists as amicus in this case. Petitioners are represented by Eduardo Bertoni of the Centro de Estudios en Libertad de Expresión y Acceso a la Información at Palermo University School of Law (CELE) and by Centro de Estudios Legales y Sociales (CELS).*

## Florida Court Says "Aloha" to Copyright Suit Against Hawaii Publisher Over *Obamaland* Book

By Drew E. Shenkman & Charles D. Tobin

A Florida federal court has dismissed a copyright infringement lawsuit brought by a Florida woman against the Hawaiian publisher of *Obamaland: Who is Barack Obama?*, a book about President Barack Obama's formative years in his native Hawaii.

Adopting the reasoning of a magistrate judge's Report and Recommendation -- but ordering outright dismissal of the case, rather than affirming the magistrate's recommendation of a transfer -- Orlando federal Judge Gregory A. Presnell held that the Florida court lacked personal jurisdiction over the defendant, Honolulu-based Trade Publishing Company. Order, *Edwards v. Trade Publishing Company*, Case No. 6:10-cv-1883-Orl-31KRS (M.D. Fla. August 18, 2011), adopting Report and Recommendation (M.D. Fla. July 20, 2011).

The case arose in late 2008 after President Obama's election, when a freelance Hawaiian writer and radio personality, Ron Jacobs, approached Trade Publishing to publish his book about President Obama's relationship with Hawaii. Trade Publishing agreed to print the book on an

independent contract basis. In January 2009, Trade Publishing printed 8,800 copies of *Obamaland*, the majority of which were sold in Hawaii through a Hawaiian book distributor. Books were also available for purchase over the Internet through a distributor and through Trade Publishing's website. Trade Publishing did not market or advertise the book in Florida, but three Florida residents bought a total of six books through the Internet.

The 150-page book consisted of a compilation of chapters published under the bylines of people who knew President Obama in his Hawaii days. A four-page chapter appeared under the byline of the plaintiff, Joella Marie Edwards, who attended the same high school as Obama. In the lawsuit, Edwards claimed that the *Obamaland* infringed her copyright in an essay she claimed to have written, "Black in a Buff 'n Blue World." Edwards had registered the essay with the Copyright Office nine months after the publication of the book.

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In particular, Edwards claimed that Jacobs had promised to pay her for the use of her story, and that Trade Publishing was required to honor that alleged promise. She sought damages for statutory and common law copyright violations against both Trade Publishing and Jacobs. Jacobs never appeared in the case.

Trade Publishing moved to dismiss on grounds that a court in Florida could not exercise personal jurisdiction over a Hawaiian defendant. Although the Florida Supreme Court recently extended the reach of the state's long-arm statute to include information made accessible, and actually accessed in Florida, *Internet Solutions Corp. v. Marshall*, 39 So.3d 1201 (Fla. 2010), the exercise of personal jurisdiction under the statute must still comport with constitutional due process. For purposes of testing the long-arm statute under due process, copyright infringement claims are treated as intentional torts, and courts apply the three prongs of the "effects test" established in *Calder v. Jones*, 465 U.S. 783 (1984). This requires a showing that the defendant (1) committed an intentional tort, (2) that was expressly aimed at the forum, (3) causing an injury within the forum that the defendant should have reasonably anticipated. See *Id.* at 785-89.

Applying the test, the magistrate judge found -- and the district judge adopted over the plaintiff's objections -- that Trade Publishing did not meet any of the three elements. First, the court held that at the time Trade Publishing printed the 8,800 copies of *Obamaland*, Jacobs -- who the court agreed was an independent contractor and lacked authority to bind the publisher -- had assured Trade Publishing that all rights had been obtained for material in his book, including the four-page article concerning Edwards. Moreover, the court found, Jacobs had not asked Trade Publishing to approve Edwards as

a sub-contractor, as Jacobs' agreement with Trade Publishing required. In addition, Trade Publishing had limited knowledge of Edwards' status as a Florida resident, and had no pre-publication conversations with her. Accordingly, the court held that any alleged copyright infringement by Trade Publishing "was, at best, only negligent," and not willful or intentional, and that the first prong of the *Calder* test therefore had not been met.

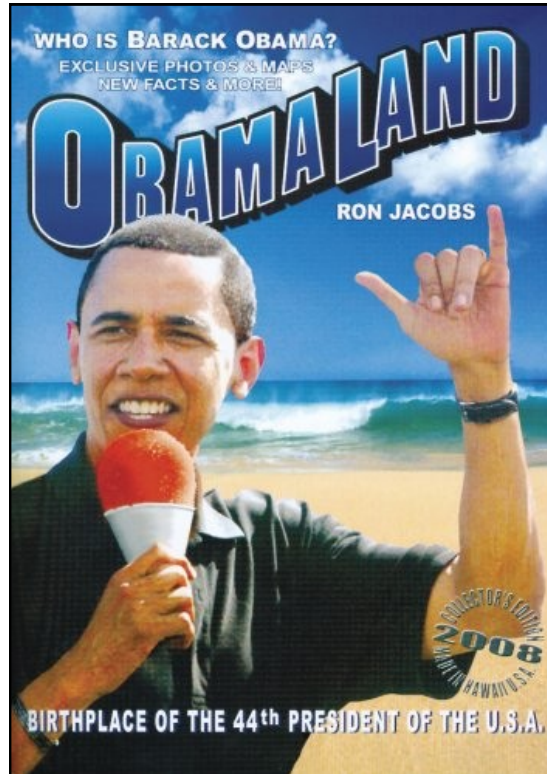
As to the second and third prongs of *Calder*, the court found that *Obamaland* was not "expressly aimed" at Edwards or Florida, as the majority of the book was instead about President Obama and Hawaii. Similarly, because neither the publication nor distribution of the book was directed towards Edwards, it could not have caused her injury in Florida that Trade Publishing should have reasonably anticipated. Significantly, the court noted that Trade Publishing's knowledge that Edwards was a Florida resident was not sufficient, standing alone, to satisfy the second or third prong of the effects test because the express aim of the book was not Edwards or Florida.

The magistrate judge, while finding that the exercise of personal jurisdiction would not comport with due process, had recommended transfer to the to the U.S. District Court for the District of Hawaii under the doctrine of *forum non-conveniens*. When the plaintiff filed an objection to the Report and Recommendation, Trade Publishing urged the district

court to adopt the magistrate judge's findings, but instead of a transfer, order dismissal outright.

The district judge agreed, and in his order, found that "the interests of justice" require dismissal.

*Charles D. Tobin and Drew E. Shenkman, of Holland & Knight LLP in Washington, D.C., represented defendant Trade Publishing Company in this matter. Brian R. Gilchrist, Allen, Dyer, Doppelt, Milbrath & Gilchrist, P.A., Orlando, FL, represented plaintiff Joella Marie Edwards.*



**Florida federal court has dismissed a copyright infringement lawsuit brought by a Florida woman against the Hawaiian publisher of *Obamaland: Who is Barack Obama?*, a book about President Barack Obama's formative years in his native Hawaii.**



# Copyright Claim against Book Publisher Dismissed Without Discovery

## *Drawings of Tree Houses Not Substantially Similar*

By Slade R. Metcalf and Rachel F. Strom

A federal judge in New York followed the Second Circuit's novel ruling in *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57 (2d Cir. 2010) that, in copyright infringement actions, a District Court *can* dismiss the case outright – prior to any discovery – based on a finding that the works at issue are not substantially similar. In *Stiles v. HarperCollins Publishers LLC*, No. 10 Civ. 2605(SHS), 2011 WL 3426673 (S.D.N.Y. Aug. 5, 2011), Judge Sidney H. Stein did just that – finding that two books that included the subject of how to build a “basic” tree house were not substantially similar as a matter of law. The court found that the plaintiffs were attempting to protect non-copyrightable ideas and functional design elements and that the protectible expression in the works was not substantially similar.

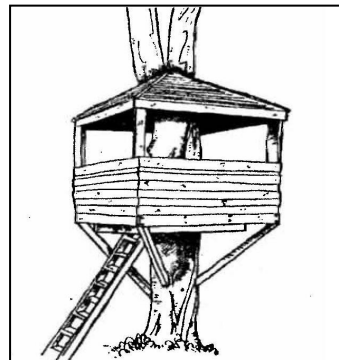
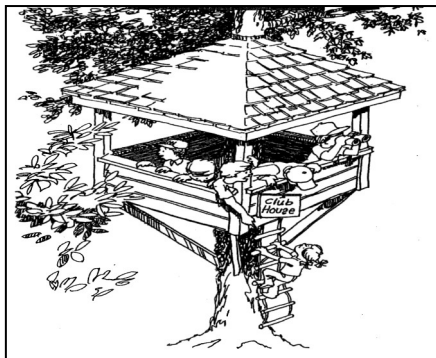
### The Works

Plaintiff David Stiles is the author of a book entitled *The Tree House Book*, which was published in 1979 and he is the co-author, with his wife plaintiff Jeanie Stiles, of the *Tree Houses You Can Actually Build*, which was published in 1998. Both books, which are solely dedicated to explaining how to build tree houses, contain a chapter on how to build a “basic” tree house (“Plaintiffs’ Work”). Plaintiffs’ Work contains thirteen illustrations that demonstrate how to construct a tree house in one tree. The illustrations are whimsical, in a cartoon style that appear to be geared towards children. They depict scenes of children playing in a tree house or a man building the tree house. There is hardly any text on the pages of the chapter, except for a few short instructions in a hand-written cartoonish style font.

Conn and Hall Iggulden are the authors of *The Dangerous Book for Boys* and *The Pocket Dangerous Book for Boys* (“Defendants’ Books”), the United States editions of which were published by HarperCollins Publishers, LLC in 2007 and 2008, respectively. Unlike plaintiffs’ books, which are dedicated to making tree houses, Defendants’ Books contain dozens of activities fathers and sons can do together – such as making batteries, making a Go-Cart, learning about dinosaurs or understanding grammar. One of the many activities in Defendants’ Books is a chapter entitled “Building a Tree House” (the “Chapter”).

Unlike Plaintiffs’ Work, the Chapter consists mostly of typed text. Alongside the text, there are a number of small illustrations. Unlike the cartoon-like illustrations in Plaintiffs’ Work, these illustrations are simple and more realistic in nature, which is in line with the serious nature of the Books. There are no illustrations of children in the tree house or men building the tree house. There are no cartoon-like instructions next to the drawings and no text in a hand written-style. There are not even leaves on the trees.

The illustrations of the completed tree houses from the works are below, with plaintiffs’ version on the left and the defendants’ version on the right.



*(Continued from page 39)***Complaint and Motion to Dismiss**

On March 23, 2010, plaintiffs filed a complaint asserting two causes of action for copyright infringement, one based on the Chapter in *The Dangerous Book for Boys*; the other, on the same chapter in *The Pocket Dangerous Book for Boys*. Plaintiffs also brought two causes of action for contributory infringement against Conn and Hal Iggulden. Plaintiffs claimed that the Chapter infringes on the copyrights in Plaintiffs' Books because the illustrations in the works are similar in "point of view, layout and perspective." They also claimed that, in writing the Defendants' Books, defendants used "David Stiles's specialized joint cut," which is a "unique feature designed by David Stiles." Finally, plaintiffs detailed a number of alleged similarities in the works, including that both use "one tree," have "platforms that measure seven by seven feet"; warn tree house builders "not to stand on the platform before installing the support braces"; have a "trapdoor entrance in the floor"; and have "framed walls with clapboard approximately halfway up."

On May 21, 2010, defendants moved to dismiss the complaint because, even assuming that plaintiffs had a valid copyright in their books and that actual copying had occurred, the works were not substantially similar as a matter of law. The motion pointed out that plaintiffs were, in effect, attempting to copyright their idea – their process – for building a tree house. For example, while it is true that both works begin construction "by attaching two 2x6 boards to the tree" and use a "specialized joint cut," plaintiffs cannot base their copyright claim on these unprotectible design elements. Defendants argued that when applying the "more discerning observer" test to focus on the *protectible elements* of the works, it was clear that the works were vastly different.

After filing the motion to dismiss, defendants moved for a stay of discovery (over plaintiffs' objection that they needed to take

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**"The question of substantial similarity in copyright cases is generally not determined through expert testimony." Rather, the Court based its decision on its own comparison of the works.**

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discovery to respond to the motion to dismiss). The court granted the motion to stay, agreeing that to decide the motion, it only had to compare the two works at issue and thus discovery was unnecessary.

In response to the motion to dismiss, plaintiffs not only opposed the motion but also filed a cross-motion for summary judgment for a finding that the works at issue were substantially similar. In so doing, plaintiffs relied on declarations from two "experts" that detailed ways that the works were similar. Plaintiffs again focused on the process of building a tree house, which they claim defendants copied as well as the similarity of the wooden supports, joints and walls.

**The Decision**

On August 5, 2011, Judge Stein, of the Southern District of New York, granted the defendants' motion to dismiss, finding that the works at issue were not substantially similar as a matter of law. In so holding, the court refused to consider the "expert" declarations plaintiffs submitted because "[t]he question of substantial similarity in copyright cases is generally not determined through expert testimony." Rather, the Court based its decision on its own comparison of the works.

The Court then, considering plaintiffs' list of alleged similarities, found that "no more was taken [by Defendants] than ideas and concepts," which are not protectible. For example, the court found, "[t]he concept of a tree house built in a single tree is not protectible. . . . And the basic idea for a tree house with four short walls, a pyramid-shaped roof, and a trapdoor is hardly original."

The court went on to note that "[o]ther instances of substantial similarity cited by plaintiffs—the use of three nails to connect planks to a tree, a platform nailed to diagonal support beams, braces that are cut to fit into the corners of a frame—simply represent generalized ideas and concepts pertaining to the placement of elements.... Moreover, the warning in both sets of works that builders

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should not stand on an unsupported frame is a caveat that surely belongs in the domain of commonsense, not copyright.” (Internal citations and quotations omitted.)

The court then addressed plaintiffs’ claim that both works use a “similar process for building a tree house in one tree.” The court found that “[t]he similar order of construction presented in the two works—platform, followed by braces, followed by frame for walls and roof—is dictated by utilitarian concerns.... It would be difficult, if not impossible, to erect a wall prior to building the platform on which it stands or to lay a roof prior to erecting the frame that supports it. What results from this construction process is, in plaintiffs’ own words, a ‘basic’ tree house design.” (Internal citations and quotations omitted.)

Finally, focusing on the illustrations in the works, the court found that “[t]o the extent that both plaintiffs’ and defendants’ images of a completed tree house contain the common, nonprotectible elements previously addressed—four short walls, pyramid-shaped roof, diagonal braces—they certainly are similar.”

The court then detailed the numerous differences in the works and ended by finding that “on top of all the individual dissimilarities between plaintiffs’ and defendants’ illustrations, the overall feel varies, namely in that plaintiffs’ illustrations—with leaves and children and action scenes—are much more animated than defendants’, which come across as more utilitarian. Accordingly, the two sets of illustrations lack the substantial similarity required to support a copyright infringement claim.” The plaintiffs have filed a Notice of Appeal.

*Slade R. Metcalf and Rachel F. Strom of Hogan Lovells US LLP, New York City, represented defendants HarperCollins LLC and Conn Iggulden. Plaintiffs David and Jeanie Stiles were represented by Pasquale A. Razzano, Donald Joseph Curry and Victoria S. Molenda of Fitzpatrick, Cella, Harper & Scinto, New York City.*

## **UPCOMING EVENTS**

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November 9, 2011 | New York, NY

### **DCS Meeting & Lunch**

November 10, 2011 | New York, NY

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

January 19, 2012 | Los Angeles, CA

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

May 21-22, 2012 | Palo Alto, CA

### **NAA / NAB / MLRC 2010 Media Law Conference**

Sept. 12-14, 2012 | Reston, Virginia

# Second Circuit Rejects Settlement of Electronic Database Copyright Class Action

## *Holds Interests of All Class Members Inadequately Represented in Settlement*

On August 17, 2011, a three-judge panel of the Second Circuit Court of Appeals, by a 2-1 margin, again vacated a district court order approving an \$18 million settlement (“Settlement”) in a long running copyright dispute over the republication of freelancers’ work in electronic databases. [\*In re: Literary Works in Electronic Databases Copyright Litigation\*](#), No. 05-5943-cv, 2011 U.S. App. LEXIS 17026 (2d Cir. Aug. 17, 2011). Judges Winter and Walker reversed the certification of the settlement class and the approval of the Settlement, while Judge Straub dissented.

On August 31, 2011, the plaintiffs and the defendants both filed petitions for reconsideration or alternatively rehearing en banc. The parties’ petitions are available online: [Plaintiff's Petition](#) / [Defendant's Petition](#).

### Background

The original lawsuit was filed in 2000 by freelance authors who sold their works to print publishers. The print publishers then had made these works available in electronic format in their own databases and licensed them to third-party databases as well. The authors sued both the print publishers and subsequent electronic publishers in three independent class actions, claiming that the unauthorized electronic publication violated their copyrights.

The case was stayed pending a ruling by the Supreme Court in the *Tasini* litigation which raised similar copyright issues. After the Supreme Court’s decision in favor of the plaintiffs in that case, *N.Y. Times Co. v. Tasini* 533 U.S. 483 (2001), the three class actions were consolidated with a fourth action. This consolidated class action had 21 named plaintiffs and three associational plaintiffs. Defendants included publishers such as The New York Times Company and Dow Jones, Inc. and electronic database operators such as Reed Elsevier Inc. (owner of LexisNexis). The parties were referred to mediation and finally reached the Settlement in March 2005.

### Settlement Details

The Settlement divided the freelance works into categories A, B, and C and applied separate damage formulas for each category. “Category A covers works that authors registered with the U.S. Copyright Office in time to be eligible for statutory damages and attorney’s fees under the Copyright Act. See *17 U.S.C. § 412*.” Being eligible for statutory damages, Category A works are considered the most valuable and damages are calculated in the following way: \$1,500 for the first fifteen works written for any one publisher, \$1,200 for the second fifteen works, and \$875 for all remaining works.

“Category B includes works that authors registered before December 31, 2002, but too late to be eligible for statutory damages. These claims are eligible to recover only actual damages suffered by the author and any profits of the infringer that are not duplicative of the actual damages. *17 U.S.C. § 504(b)*.” Category B damages are calculated by taking the greater of \$150 or 12.5% of the original sale price of the work.

“All other claims fall into Category C and cannot be litigated for damages purposes unless they are registered with the Copyright Office. *17 U.S.C. § 411(a)*.” Category C damages are calculated by taking the “greater of \$5 or 10% of the original price” of the work, except for works sold for more than \$249. If the work was sold for more than \$249, then the author receives \$25 per each work sold for an amount between \$250 and \$999; \$40 per each work sold for an amount between \$1,000 and \$1,999; and \$50 per each work sold for an amount between \$2,000 and \$2,999; and \$60 per each work sold for \$3,000 or more.

Many authors hold claims in more than one category, but 99% of the total claims were estimated to be of unregistered works. The Settlement caps the publishers’ total liability to \$18 million, and if the total of all valid claims exceeded that amount the C claims would have been reduced pro rata to the

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extent necessary. The Settlement also afforded publishers and databases future use rights, unless the claimant specifically denied such rights.

On motion, the district court certified the class and approved the Settlement as “fair, reasonable, and adequate”, despite the objection of ten class members. The objectors then appealed in October 2005.

The Second Circuit initially vacated the settlement on a jurisdictional ground not asserted by the objectors. The Supreme Court unanimously reversed in a 2010 decision by Justice Thomas. The appeal then returned to the Second Circuit, for resolution on its merits.

### **Adequacy of Representation**

One of the objections raised in opposition to settlement approval was that the class certification was improper because subgroups within the class have conflicting interests, and that “the named plaintiffs failed to adequately represent the interests of class members who hold only Category C claims.”

Citing *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006), the Court held that there are two prongs to assessing whether representation was adequate: “the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members.” If a fundamental conflict exists, then representation cannot be adequate without subclasses.

The Second Circuit turned to two different Supreme Court cases to assess whether class certification was correct in this case and held that it was not.

In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the Court affirmed a Third Circuit’s decision to vacate a class certification that was meant to settle current and future asbestos-related claims. In that case, the Supreme Court found that the interests within the single class were not aligned, as present-claim holders desired immediate payments, while future-claim holders wanted a fund for the future. The second case, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), also involved class members who were divided into present-claim holders and future-claim holders as well as holders who had more valuable claims than other members.

The Second Circuit majority held that even though some members hold Category C claims in addition to Category A and B claims, there is a fundamental conflict, as holders of Category A and B claims do not care about the allocation of their compensation or about maximizing Category C compensation. Since there is an \$18 million cap to the settlement and Categories A and B comprise about 1% of the total number of claims, named plaintiffs who have claims outside of Category C may even be inclined to favor Categories A and B, as they would “receive a greater share of a given amount of compensation allocated to Categories A and B, compared to what they would receive if that compensation were spread over the far greater quantity of Category C claims.”

The majority also determined that it does not matter that some named plaintiffs hold only Category C claims, as all the class representatives were “obligated to advance the collective interests of the class” but only some, it concluded, were adequately situated to do so. The Court concluded that only subclasses and an advocate to represent each subclass could ensure adequate representation.

The majority pointed to what it deems as being unfavorable Settlement terms to Category C as indication that representation was not adequate: it noted the difference between the damages received by Category B and Category C works.

The majority pointed out that registration of the copyright is necessary to bring a lawsuit, which may explain the difference in compensation structures. However, it saw “no basis for assessing whether the discount applied to Category C’s recovery appropriately reflects that weakness” and that it could not know this “in the absence of independent representation.”

Thus, the majority concluded it could not hold that there was adequate representation for Category C-only plaintiffs in the Settlement. Moreover, the ‘C reduction’ provision of the Settlement was taken as proof of inadequate representation as well, since it placed the risk of exceeding the \$18 million solely on Category C plaintiffs instead of sharing it across the three categories.

The majority suggested but did not mandate creating three subclasses – one for each category of claim as a way of showing that it is not impossible to structure appropriate subclasses.

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### The Dissent

In a 17 page dissent, Judge Straub found that the named plaintiffs adequately represented all class members, thus satisfying FRCP 23(a)(4). He found that the conflict identified by the objectors was not fundamental, because the named plaintiffs had the “same basic relationship” with the defendants as the rest of the class members, as they suffered similar injuries.

The differences across the categories are only found in the “comparative strengths and weaknesses of the asserted claims.” So, even the problematic “C-reduction” provision of the Settlement is merely a reflection of the weakness of the Category C claims. He concluded:

Today’s opinion may seriously hamper settlement negotiations in complex class action lawsuits, as parties that participate in “intense, protracted, adversarial mediation” with proceedings “free of collusion and undue pressure,” will fear being told by our Court at the conclusion of their work that they have not done “enough,” to satisfy Rule 23(a)(4)’s requirement that the “representative parties . . . fairly and adequately protect the interests of the class,” Fed. R. Civ. P. 23(a).

After today’s opinion, plaintiffs may proceed by breaking into numerous and unnecessary subclasses that could stall mediation proceedings and lead to protracted litigation.

### Petitions for Reconsideration / Rehearing

The defendants-appellees and plaintiffs-appellees have since filed petitions for panel rehearing or alternatively rehearing *in banc*. In their brief, the defendants argued that the Court’s insistence on creating sub-classes was an impossibility, since “no civil action for infringement of the copyright in any United States work shall be instituted until . . . registration of the copyright claim has been made in accordance with this title” 17 U. C. § 411(a). Thus, the defendants reasoned, the law does not allow the certification

of a subclass that would be represented by an unregistered copyright-holder.

The defendants also contended that the panel read the term “fundamental conflict” too broadly and that the panel’s interpretation was not supported by precedent. Plaintiff-Appellees noted that there was no “fundamental conflict” and that all class members were in fact served by adequate representation. They cited evidence like the fact that associational plaintiffs such as The Authors Guild had great incentive to advocate for Category C claim-holders, since only a minority of its member-authors had registered their works.

The Plaintiff-Appelles made the additional suggestion in their petition that the panel should not have vacated the entire order and judgment, as their primary concern is with the fairness of the settlement allocation. They contended that, at most, the Opinion should be amended to affirm the Settlement and remand only the allocation plan and ratchet down procedure. This way, the Settlement and its hard cap would be preserved and the parties would not have to start anew.

*The objecting appellants were represented by Charles D. Chalmers of Fairfax, CA. Defendants-Appellees were represented by Charles S. Sims, Proskauer Rose LLP in New York, NY. Plaintiffs-Appellees were represented by Michael J. Boni, Kohn Swift & Graf, P.C. in Philadelphia, PA.*

## 2011 MLRC ANNUAL DINNER Wednesday, November 9, 2011 Marriott Marquis, New York City

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

**ANTHONY LEWIS**

**Reservations / Invitation**

# New California Law Prohibits Jurors' Social Media Use

By Eric P. Robinson

On Aug. 5, California Governor Jerry Brown approved a new statute which clarifies that jurors may not use social media and the Internet – such as texting, Twitter, Facebook, and Internet searches – to research or disseminate information about cases, and can be held in criminal or civil contempt for violating these restrictions.

The new statute, 2011 Cal. Laws chap. 181, expands the state's existing jury instructions, which already admonish jurors not to conduct electronic research or communications. See Jud. Council of Cal., Civ. Jury Instrs. [CACI] Nos. 100 and 5000 (2011), *available at* <http://www.courts.ca.gov/partners/311.htm>; and Jud. Council of Cal., Crim. Jury Instr. [CALCRIM], Nos. 101 and 201 (2011), *available at* <http://www.courts.ca.gov/partners/312.htm>. The new law also requires court officers to bar jurors from communicating outside the jury room, by electronic or other means, during deliberations.

Under the new statute, “willful disobedience by a juror of a court admonishment related to the prohibition on any form of communication or research about the case, including all forms of electronic or wireless communication or research” can be punished as contempt of court, a misdemeanor punishable by imprisonment in county jail not exceeding six months and/or a fine not exceeding \$1,000. See Cal. Penal Code §19 (2011) (providing for punishment for misdemeanor when not otherwise prescribed).

## Rules Already in Place

The Judicial Council of California Civil Jury Instructions include a preliminary instruction that specifically addresses Internet and new media usage as part of its admonition against discussing the case:

This prohibition is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not

use any electronic device or media, such as a cell phone or smart phone, PDA, computer, the Internet, any Internet service, any text or instant-messaging service, any Internet chat room, blog, or Web site, including social networking websites or online diaries, to send or receive any information to or from anyone about this case or your experience as a juror until after you have been discharged from your jury duty.

\* \* \*

**The new statute states that jurors may not use social media and the Internet to research or disseminate information about cases, and can be held in criminal or civil contempt for violating these restrictions.**

During the trial, do not read, listen to, or watch any news reports about this case. [I have no information that there will be news reports concerning this case.] This prohibition extends to the use of the Internet in any way, including reading any blog about the case or about anyone involved with it or using Internet maps or mapping programs or any other program or device to search for or to view any place discussed in the testimony.

\* \* \*

Do not do any research on your own or as a group. Do not use dictionaries, the Internet, or other reference materials.

Jud. Council of Cal., Civ. Jury Instrs. [CACI], No. 100 (2011), *available at* <http://www.courts.ca.gov/partners/311.htm>. See also CACI 5000 (2010) (admonition at conclusion of case).

These passages of this instruction regarding electronic communications were added in the past few years. The criminal jury instructions include a similar provision –

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required by Cal. Penal Code § 1122(a) – in the cautionary admonitions instruction:

During the trial, do not talk about the case or about any of the people or any subject involved in the case with anyone, not even your family, friends, spiritual advisors, or therapists. Do not share information about the case in writing, by email, by telephone, on the Internet, or by any other means of communication. You must not talk about these things with the other jurors either, until you begin deliberating.

\* \* \*

You must not allow anything that happens outside of the courtroom to affect your decision [unless I tell you otherwise]. During the trial, do not read, listen to, or watch any news report or commentary about the case from any source.

Do not do any research on your own or as a group regarding this case. Do not use a dictionary(./or) the Internet(./)[, or <insert other relevant means of communication>]. Do not investigate the facts or law. Do not conduct any tests or experiments, or visit the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate.

[If you have a cell phone or other electronic device, keep it turned off while you are in the courtroom and during jury deliberations. An electronic device includes any data storage device. If someone needs to contact you in an emergency, the court can receive messages that it will deliver to you without delay.]

Jud. Council of Cal., Crim. Jury Instr. [CALCRIM], No. 101 (2011), available at <http://www.courts.ca.gov/partners/312.htm>.

The research admonition is reiterated in Criminal Instruction 201.

California is one of 31 states that have modern civil jury instructions which at least mention the Internet in their admonitions to jurors about outside communications and research. On the criminal side, it is one of 35 states which such modern instructions.

Besides the jury instructions, individual courts have also taken their own actions on the issue.

After a jury pool of 600 had to be excused after it became clear that several of them had researched the case on the internet, and claimed that such research was not covered by the oral admonition that they had been given, the Superior Court in San Francisco now requires that all juror questionnaires include a cover sheet containing the following statement: “You may not do research about any issues involved in the case. You may not blog, Tweet, or use the Internet to obtain or share information.”

The Superior Court in San Diego asks jurors to sign declarations saying that they will not use personal electronic and media devices to research or communicate about a case.

### **Rationale for the Bill**

Assembly Member Felipe Fuentes, who sponsored the newly-adopted legislation, explained the need for the changes in his statement of support. “Although current [statutory] law arguably prohibits the use of electronic/wireless communication devices to improperly communicate, disseminate information or research,” he wrote, “the fact that this kind of communication is not expressly included in current law has resulted in increased problems in courts across the county.”

Several of these problems have been in California courts.

- In 2007, a California appellate court reversed a trial court’s refusal to grant a motion by a convicted burglary defendant to contact the jurors in his trial, after the jury foreman discussed the jury’s deliberations in the case on his blog. *People v. McNeely*, No. D048692, 2007 WL 1723711 (Cal. App., 4th Dist., Div. 1 June 14, 2007) (unpublished), reh’g denied (Cal. App., 4th Dist., Div. 1 July 3, 2007), *rev. denied*, No. S154577 (Cal. Sept. 12, 2007).

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- In 2008, a juror who posted a picture of the weapon in a murder trial to his blog was held in contempt by a Superior Court judge, but no penalty was imposed after the judge determined that the blogging did not result in an unfair trial. *See* Raul Hernandez, *Juror held in contempt for blog of murder trial*, Ventura County (Cal.) Daily Star, Jan. 23, 2008.
- In 2009, a California appeals court denied an appeal by a man convicted of torture and other crimes, including spousal and child abuse offenses, who alleged that the jury was tainted by a juror's online search for a definition of the term "great bodily injury." *People v. Hamlin*, 170 Cal. App. 4th 1412, 89 Cal.Rptr.3d 402 (2009).
- Another appellate decision in 2009 affirmed a trial court's denial of a new trial motion in a murder case, even though a juror was found to have blogged extensively about the case during the trial. *People v. Ortiz*, Crim. No. B205674, 2009 WL 3211030 (Cal. App., 2d Dist. 2009) (unreported).

In February 2011, a trial court judge, after determining that a jury foreman had been posting updates to Facebook during a criminal gang beating trial, ordered the foreman to

authorize Facebook to make the postings available to the judge for his review. The foreman appealed, and the California Supreme Court vacated the appellate court's refusal to act on the trial court's order. The case is now fully briefed and pending before the California Court of Appeals. *See Juror No. 1 v. Super. Ct. of Sacramento County*, No. C067309 (Cal. App., 3d Dist. filed Feb. 8, 2011) (appeal of *Juror No. 1 v. Super. Ct. of Sacramento County*, No. C067309 [Cal. App., 3d Dist. Feb. 10, 2011] [denying petition], *vacated*, No. S190544 [Cal. Mar. 30, 2011].)

Then-Governor Arnold Schwarzenegger vetoed a similar bill last year, explaining that "[e]xisting law already sufficiently deals with communications among jurors," and that "this type of admonishment is better handled through court rules rather than by statute." *See* Veto Message, AB 2217 (Sept. 24, 2010), *available at* [http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab\\_2201-2250/ab\\_2217\\_vt\\_20100924.html](http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_2201-2250/ab_2217_vt_20100924.html).

The new law will go into effect on January 1, 2012.

*Eric P. Robinson is the deputy director of the Donald W. Reynolds Center for Courts and Media at the University of Nevada, Reno. Some of the information here comes from his recent article, "Jury Instructions for the Modern Age," published in the Reynolds Courts & Media Law Journal.*

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