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# European Court of Human Rules That UK Success Fees Violate Article 10

## *The End of Recoverable Success Fees in UK Media Cases?*

**By Jaron Lewis**

In a ground breaking decision, the European Court of Human Rights has ruled that UK laws allowing the recoverability of success fees in privacy cases violated a newspaper's rights of freedom of expression. [MGN Limited v. United Kingdom](#), Application no. 39401/04 (Jan. 18, 2011). The landmark decision almost certainly means that later this year the Government will scrap recoverable success fees and ATE insurance premiums in defamation and privacy cases.

### **What Are Conditional Fee Agreements?**

CFAs are "no win, no fee" agreements. They were introduced in the 1990s to help provide access to justice following the withdrawal of legal aid, particularly in areas like personal injury. A lawyer acting for a claimant under a CFA is entitled to charge an uplift – called a success fee – if the claimant wins. This success fee can be up to 100% of the lawyer's original charges. Initially, success fees were paid by the claimant, typically from damages. In 2000 the law was changed to allow success fees to be recoverable from an opponent.

### **Reform**

In 2010, one of the UK's most senior judges, Lord Justice Jackson, concluded a comprehensive review of litigation costs, which included an analysis of claims data from media cases. His report recommended that success fees should no longer be recoverable from the losing party and should be paid instead by the claimant. In other words, returning to the pre-2000 situation. In November 2010 the Government announced its intention to implement these recommendations, subject to consultation.

### **The Decision in *Campbell v MGN***

The facts of *Campbell* are well known. In 2001 the Daily Mirror published a front page article headed "Naomi: I am a drug addict". In 2004 the UK's then highest court – the

House of Lords – found on appeal, by a majority of 3 to 2, that the publication of details of her treatment for drug addiction together with covertly taken photographs was a disproportionate interference with her right to privacy. She was awarded £3,500 damages, which included £1,000 for aggravated damages. The decision has gone on to be the cornerstone of the UK's developing law of privacy.

Campbell's total costs for the substantive claim were an eye-watering £1,086,295. Of these, £594,470 were for a two day hearing before the House of Lords, comprising base costs of £288,468 and success fees of £279,981. By contrast, The Mirror's solicitor's costs were just £43,084. The Mirror challenged the success fees. Campbell's costs of dealing with this challenge added a further £255,535 on to the costs, which included a 95% uplift for her solicitors.

### **The Article 10 Argument**

The Human Rights Act 1998 incorporated into UK law a right to freedom of expression in Article 10 of the European Convention on Human Rights. It reads as follows:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Any requirement on defendants to pay costs or damages in media cases will, in theory,

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interfere with Article 10 rights. To be lawful, any such interference must be (a) prescribed by law; (b) pursue a legitimate aim; and (c) be necessary in a democratic society. The requirement of necessity includes a need for the interference to be proportionate, and to go no further than is necessary to accomplish the objective.

### **ECHR Decision in MGN v UK**

On 18 January 2011 – in an unanimous decision – the ECHR ruled that "the requirement that the applicant [newspaper] pay success fees to the claimant [Campbell] was disproportionate having regard to the legitimate aims sought to be achieved and exceeded even the broad margin of appreciation accorded to the Government in such matters".

The ECHR's decision can be summarised as follows:

1. The requirement on the Mirror to pay success fees in breach of confidence proceedings constituted an interference with the newspaper's right to freedom of expression.
2. Recoverable success fees were "prescribed by law" and helped to further a legitimate aim, namely to provide the widest possible access to legal services for civil litigation. The right of effective access to the Court is a right inherent in Article 6 of the Convention.
3. The requirement that the Mirror pay success fees to Campbell was disproportionate having regard to the legitimate aims sought to be achieved and exceeded even the broad margin of appreciation accorded to governments in such matters.

In reaching this decision, the Court focused primarily on the flaws in the CFA system, as well as on the facts of the particular case.

It considered the proportionality of requiring a defendant to pay not only the reasonable and proportionate base costs of a successful claimant, but also to have to contribute to the funding of other litigation and general access to justice

through a success fee.

It considered whether the system struck a fair balance between Article 6 and Article 10.

It noted that states have a wide margin of appreciation, not only in striking a balance between Articles 6 and 10, but also in implementing social and economic policies, such as the one relating to CFAs. It said it would respect a state's judgement "unless that judgment is manifestly without reasonable foundation".

It noted that the UK Government itself had accepted that the current system was in need of reform, and considered in detail the consultations and reviews undertaken in the past few years. The Court concluded that the "depth and nature of the flaws in the system... are such that the Court can conclude that the impugned scheme exceeded even the broad margin of appreciation to be accorded to the State".

As well as ruling that the whole system of recoverable success fees was legally flawed, the Court also criticised the operation of the regime on the facts of this particular case. It found that Campbell was wealthy and not in the category of persons needing assistance with access to justice, and also observed that the success fee would be unlikely to assist Campbell's lawyers in providing access to justice to impecunious claimants because the firm rarely did this type of work.

The decision focused on cases involving rights of freedom of expression, such as defamation and privacy. It is unlikely to affect success fees in other types of case.

### **What Next?**

The Government will now almost certainly implement its proposed reforms, and scrap recoverable success fees and ATE insurance premiums in media cases. Success fees and ATE will survive, but will be paid for by the claimant.

In the meantime, the ECHR decision is not directly binding on the UK Courts. However, the Human Rights Act 1998 makes it unlawful for a Court to act in a way which is incompatible with a Convention right, so the UK Courts will have to take the ECHR decision into account when assessing costs.

*Jaron Lewis is a partner at Reynolds Porter Chamberlain LLP and a former in-house counsel at the BBC. MGN was represented before the ECHR by Kevin Bays, Davenport Lyons, London, and barristers David Pannick QC, Keir Starmer QC and Anthony Hudson.*

# Supreme Court of Canada Addresses Group Libel

**By Paul Schabas and Erin Hoult**

The Supreme Court of Canada continues to actively review defamation law (see, e.g., Paul Schabas and Erin Hoult, “Supreme Court of Canada Creates Defense of Public Interest Responsible Communication”, MLRC MediaLawLetter, pp. 29-32, December 2009).

In its latest decision, *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9 (February 17, 2011), the Court confirmed that group libel cases can rarely be brought, finding that membership in a group about whom “offensive comments” have been made is not a sufficient basis to claim reputational harm. Rather, plaintiffs in a group action for defamation must be able to establish individual personal injury to reputation.

Although *Bou Malhab* is a Québec action, and therefore governed by the *Civil Code of Québec*, not the common law, it will have broad application in Canada. Although there are “major differences” between the two legal systems, the Court observed that each system may look to the other for inspiration as the “two legal communities have the same broad social values. Indeed, there is a striking similarity between the civil law and the common law approaches.”

## Facts and Judicial Background

Farès Bou Malhab commenced a class action against Diffusion Métromédia CMR inc. and André Arthur over comments Mr. Arthur (a ‘shock jock’ radio host and now independent Member of Parliament) made on the radio about taxi drivers in the City of Montréal. Among other things, Mr. Arthur said:

[TRANSLATION] Why is it that there are so many incompetent people and that the language of work is Creole or Arabic in a city that’s French and English? . . . I’m not very good at speaking “nigger” . . . [T]axis have really become the Third World of public transportation in Montreal. . . . [M]y suspicion is that the exams, well, they can be bought. You can’t have such incompetent people driving taxis, people who know so little

about the city, and think that they took actual exams . . . Taxi drivers in Montreal are really arrogant, especially the Arabs. They’re often rude, you can’t be sure at all that they’re competent and their cars don’t look well maintained.

Mr. Bou Malhab brought a class action alleging damage to all Montréal taxi drivers whose mother tongue was Creole or Arabic. The class was estimated at 1,100 members. Certification of the class action was initially refused by the Québec Superior Court. The Court of Appeal reversed, however, certified the class, and sent the action back to the Superior Court for hearing on the merits.

At trial, the Superior Court granted judgment to the plaintiffs and awarded \$220,000.00 in damages, to be paid to a non-profit organization for taxi drivers. A majority of the Court of Appeal allowed the appeal and dismissed the action, finding (among other things) that there was no injury to the reputation of individual taxi drivers as the ordinary person would not have believed the comments. By a 6-1 majority, the Supreme Court upheld the dismissal of the action.

## The Requirement of Personal Injury

In order for a group to sue for libel the Court held that each plaintiff (or class member) must have suffered a ‘direct and personal’ injury. This requirement cannot be circumvented by relying on a “non-personal interest” based on injury to a “group as a group”, or by relying on the collective recovery mechanism available in class actions.

Injury is a required element of the action, as protection of reputation is “an individual right that is intrinsically attached to the person, whether the person is legal or natural. A group without juridical personality does not have a right to the safeguard of its reputation.” However, direct proof of personal injury to each plaintiff/ class member is not required – it can be inferred where there is “an element of damage common to everyone”. While personal injury is required, “unique” injury is not. A statement can injure more than one

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person.

The majority stated that the requirement that there be *personal* injury to each claimant contributes to maintaining the balance between the competing values of freedom of expression and protection of reputation.

### Factors for Determining Injury

The majority set out seven “non-exhaustive” factors that have emerged from both civil and common law cases, which assist in the determination of whether members of a group have sustained personal injury as a result of the impugned comments. No single factor is determinative. The question to be answered is “whether an ordinary person would believe that the remarks, when viewed as a whole, brought discredit on the reputation of the victim. The general context remains the best approach for identifying personal attacks camouflaged behind the generality of an attack on a group.” The seven factors are:

1. *Size of the group* – generally, the larger the group, the more difficult it is to prove that personal injury has accrued to each member. But the size of the group is not decisive, and there is no maximum group size beyond which recovery is not possible;

2. *Nature of the group* – it will be easier to establish personal injury to individual members of a “strictly organized and homogeneous” group than a “highly heterogeneous” one. It may also be easier to establish individual injury where the group is comprised of easily identifiable/ visible members or, in certain circumstances, of persons who have historically been stigmatized;

3. *Plaintiff’s relationship with the group* – a plaintiff with a particular status within, or who is a well-known member of a group may be more likely to suffer damage;

4. *Real target of the defamation* – “The precision or generality of the allegations will influence the analysis of the personal nature of the injury. The more general, evasive and vague the allegations, the more difficult it will be to go behind the screen of the group. For example, attacks on a doctrine, policy, opinion or religion must be distinguished from attacks on the persons supporting it, since proving personal injury will be complicated in the former situation.” Also, it will be more difficult to establish personal injury to all members of a group where the “allegations apply to only one segment of a group” (i.e. statements concerning “some”

or “a few” members);

5. *Seriousness or extravagance of the allegations* – “the more serious or inflammatory the allegation, the wider may be its sting”. But serious allegations that rely on excessive generalizations can have the opposite effect as “the habit of making unfounded generalizations is ingrained in ill-educated or vulgar minds [and] the words are occasionally intended to be a facetious exaggeration”;

6. *Plausibility of the comments and tendency to be accepted* – an allegation that, in context, is plausible or convincing is more likely to be accepted by the ordinary person and therefore, to cause injury; and

7. *Extrinsic factors* – such as the maker of the comments (and his/her credibility), the medium used, the target and the general context, “can cause comments that appear to be general to be attached to certain persons in particular and defame them personally.”

Applying the above factors to the case, the majority noted that the comments were general and vague, subjective in tone, touched on the taxi industry (rather than just drivers) and were made on a sensationalist radio show by a “known polemicist.” Given these facts and the size and heterogeneity of the group targeted, the majority found Mr. Arthur’s comments, while “scornful and racist”, would not have been believed by the ordinary person to apply to each class member personally. As Justice Dechamps cautioned, “[i]ndignation is not a substitute for the requirements of civil proof or, more generally, the law of civil liability.” Accordingly, the majority found for the defendants and dismissed the appeal.

Justice Abella dissented, finding that the plaintiff had sufficiently established injury on the present facts. She emphasized the seriousness of the allegations, the relative ease with which group members could be identified, and the fact that the group was comprised of persons from historically vulnerable communities.

### Defamation and Quebec Law

Justice Abella also took issue with the Court of Appeal’s finding that the ordinary person is someone who, for example, is concerned about protecting freedom of expression and reputation, and is aware of not just overt discrimination or prejudice but also systemic discrimination in society. In her view, such an approach “inappropriately elevates the

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attributed characteristics of an ordinary person to those of an ordinary third-year law student.”

This discussion of the ordinary person was also addressed by the majority due to the unique features of Quebec defamation law.

Under the *Civil Code of Québec*, a plaintiff must establish the general elements of an action for a civil wrong – fault, injury and a causal connection between the fault and the injury. The analysis is three-staged: (1) would a reasonable person have made the impugned remarks in the same context?; (2) if not, would an ordinary person believe that the statements tarnished the plaintiff’s reputation (and, in the case of alleged group libel, the reputation of each member of the group); and (3) if so, is there a causal connection between the fault (#1) and the injury(#2)?

### Fault / Injury

Justice Deschamps stated that fault will be found where there is “conduct that departs from the standard of conduct of a reasonable person”. In discussing fault, she highlighted some of the significant differences between defamation under civil and common law – including, significantly, that truth is not a complete defence to an action under civil law. Rather, true statements may be actionable if they “have been made in a wrongful manner”.

Turning to the issue of injury, as at common law, defamation under the civil law is concerned with damage to reputation. The test for whether injury has occurred is objective: would an “ordinary person believe[] that the remarks made, when viewed as a whole, brought discredit on the reputation” of the plaintiff.

Justice Deschamps stated it was preferable to describe the standards applied to the fault (“reasonable person”) and injury (“ordinary person”) inquiries differently. She explained:

...even though the standard is an objective one in both cases, it is preferable to use two different terms — reasonable person and ordinary person — because they are concepts that relate to two distinct situations: assessing the conduct and assessing the effect of that conduct from society’s perspective. The questions asked at these two stages are different.

Defining the “reasonable person” with precision is difficult, as the components are fluid and vary with the context, as they are based on society’s values, beliefs and attitudes. After reviewing the concept of the reasonable person under French law, and the common law standard of the “right-thinking person” taken from the well-known English case of *Sim v. Stretch*, [1936] 2 All E.R. 1237 (H.L.), the majority held that the following characteristics of the “reasonable person” could be emphasized: 1) Acts in an ordinarily informed and diligent manner. 2) Shows concern for others and takes the necessary precautions to avoid causing them reasonably foreseeable injury. 3) Respects fundamental rights and therefore cannot disregard the protection established in the federal and provincial charters of rights. 4) Is careful not to violate the rights of others

It does not seem that the “ordinary person” is significantly (if at all) different from the “reasonable person” in substance. (Rather, the different terms appear intended to reinforce that there are two separate questions to be answered at the fault and injury stages.) The ordinary person standard incorporates the reasonable person standard of conduct. However “care must be taken not to idealize the ordinary person and consider him or her to be impervious to all negligent, racist or discriminatory comments, as the effect of this would be to sterilize the action in defamation.” Further, the ordinary person is “neither an encyclopedist nor an ignoramus.” That said, the “ordinary person is only an expedient used to identify damage to reputation”; the test must be sufficiently flexible that actual damage to reputation, where it occurs, is recognized.

### Conclusion

*Bou Malhab* offers a useful summary of differences between civil and common law libel, and of the factors that should influence a court’s decision as to whether defamatory comments made about a group are sufficiently connected to one or all of the individual members – or, in common law parlance, whether they are ‘of and concerning’ the plaintiff(s) – to be actionable.

*Paul Schabas and Erin Hoult are lawyers with Blake, Cassels & Graydon LLP in Toronto. Their colleague Ryder Gilliland represented the media interveners before the Supreme Court.*



# Other Side of the Pond: Developments in UK and European Media Law

## *Libel Tourism, Phone Hacking, Privacy and More*

**By David Hooper**

After a period in the shadows, libel tourism has recently resurrected its head. The claimant lobby assert that such cases are rare. However, the fact that a low threshold of publication can support an internet-based action certainly does have a chilling effect on publication. With the legal costs potentially so large even with a very small number of internet hits which are not commercially directed at a British audience, it is scarcely surprising that defendants tend to back off when such claims are made so that such claims tend not to find their way into legal statistics.

However, there has recently been a notable success for media defendants in a case brought by a Ukrainian billionaire, Dimitry Firtash – a person wholly unknown to the vast majority of the citizens of this country but someone who apparently had made donations to Cambridge University and had apparently on one occasion dined at an occasion graced by the Queen of England. Anyhow he sued the Kyiv Post over an article which suggested that his gas company, RosUkErgo, was involved in massive corruption.

Having in the past been blasted by a libel claim, the Kyiv Post blocked their website in the United Kingdom, but even so 21 people had downloaded the article including, no doubt, a few cronies of Mr Firtash. Master Leslie (a procedural judge) flung the case out considering that Firtash's links with this jurisdiction were tenuous in the extreme and forming the view that the action amounted almost to an abuse of process.

In the libel tourism field Sheikh Mohammed Hussein Ali Al Moudi who is either of Saudi Arabian or Ethiopian extraction is set to be taking action for unflattering references to his daughter in the US-based Ethiopian Review which is likewise accessible to a minute readership in this country by the internet. Time will tell how he proceeds.

Another quasi - libel tourism case brought by the exotically-named His Holiness Sant Baba Jeet Singh Ji Maharaj questioning the Maharaj's credentials as a leader of a cult and suggesting that he might have been an imposter has bitten the dust when he failed to pay £250,000 as security for costs. He was suing a freelance journalist Hardeep Singh in relation to an article Singh had written for the Sikh Times.

Singh's legal costs are said to exceed £100,000 and he may well have difficulty in obtaining reimbursement of his legal costs as Maharaj is said not to have any assets in this country.

### **Are Things Worse Elsewhere?**

If one says France, Italy and Northern Ireland, the answer is probably yes. In France there has been a libel action before the Tribunal de Grande Instance de Paris where a verdict is awaited on March 3<sup>rd</sup> over, bizarrely, a not particularly hostile review of a law book entitled "*The Trial Proceedings of an International Criminal Court*" written by a Law Profession Karin Calvo Goller who is a French citizen as well as being a law lecturer in Israel. She took exception to a review on a website called Global Law Books which spoke of "*rehashing existing legal set-ups*" and questioned her "*conceptual grasp*" of certain concepts. This led Goller to launch a criminal complaint against the reviewer, a seemingly highly respectable law professor at the University of Cologne, Professor Thomas Weigand, and also against Professor Weiler who published it.

The case would appear to raise two issues, one as to whether there should be claims in respect of what most would perceive as matters of pure comment, and perhaps even more worryingly, why it is necessary to invoke the criminal law in such cases.

In Italy the parents of Amanda Knox who was, after a long controversial trial in Italy, convicted of murder and sentenced to 26 years, now found themselves prosecuted for repeating to an English Sunday newspaper the allegations of their daughter that she was mistreated by the police and subjected to violence and deprived of food and water. Whether or not these allegations are correct, again it is difficult to see what role the law of libel has in such a case.

An [interesting statistic](#) has been produced by a Northern Irish lawyer Olivia O'Kane that in 2010 in Northern Ireland there were no less than 43 libel actions of which 25 were against broadcast or print media defendants. Northern Ireland has a population of 1.8 million which means one libel claim for

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every 42,000 people. The comparable statistics in the UK were 298 libel claim forms issued, that is to say 1 per 184,000 of the population. The problem with Northern Ireland claims is that they tend to be costly. The publication numbers tend to be very low, the juries tend to be rather generous with defendants' money. The pressure therefore to settle such claims regardless of the merits is considerable.

### **Schadenfreude Corner**

Libel litigation has led to the downfall of yet another politician who has followed Jeffrey Archer and Jonathan Aitken to Her Majesty's prisons. Tommy Sheridan, the former head of the Scottish Socialist Party and a member of the Scottish Parliament, is now serving a sentence of three years having been convicted of lying in a libel action he brought against the News of the World when he had recovered £200,000 damages. In that libel action he complained about allegations that he was a serial adulterer given to visiting swingers clubs. What was striking about the case was his gall in bringing the action and in accusing so many people of conspiring to destroy him politically when they recounted not only what they had seen, but also what they had heard of Mr Sheridan's sexual boasts.

### **Reform of the Libel Laws**

The decision of the European Court of Human Rights in the [Campbell](#) case does seem to have marked the death throes of recoverable success fees and After the Event Insurance. In *Campbell*, the wealthy Naomi Campbell sought to recover £1,086,295 in respect of the claim in which she recovered the less than princely sum of £3,500 damages and in respect of the two-day House of Lords hearing £594,470 of which the success fee accounted for £279,281. Lord Justice Jackson has recommended that success fees and ATE premiums should no longer be recoverable from defendants. The Ministry of Justice has indicated that it is considering the ECHR ruling and has indicated that it will take time to change the regime. The consultation period for commenting upon Lord Justice Jackson's recommendations ended on 14 February 2011.

Lord Justice Jackson himself has responded to the earlier comments made on his proposals by the government. Jackson says that the present CFA system generates disproportionate profits for a significant number of lawyers

which impose excessive costs burdens on the public (or one might add in the media field on media defendants). His view - significant in view of the access to justice argument by the claimant lobby - is that solicitors will not cease taking on risky cases if recoverability of success fees and ATE were abolished. He noted that the vast majority of cases which were regarded as unsuccessful were dropped at a very early stage. Some might think that this really means that the game is up.

There is still a good living for claimant lawyers even without recoverable success fees, but the thing that has really emerged out of the process is that claimants' solicitors very rarely take on CFA cases where there is a significant level of risk, and if they do and the case looks like being unsuccessful, they drop them. Jackson also noted that the instances of well-resourced claimants taking out ATE and thereafter conducting risk-free litigation seem to be on the increase. The process will all take time and there are some areas which will require legislative change as opposed to changes in the rules, but the days of obscenely costly libel litigation are numbered.

A salutary reminder of the cost of libel litigation - in this instance a case where there was not a CFA in place - was a spat over the question of whether the claimant had or had not charged for work he should or should not have done for nothing amongst rail enthusiasts devoted to preserving steam engines. Quite what they were doing in the libel courts or why they had to involve themselves in such costly litigation is not clear. In any event, the claimant had won his case and £7,500 damages, the costs had amounted to £335,000, resulting in the much-loved steam engine having to be sold to pay for this indulgence.

### **Phone Hacking**

The whole issue of the alleged phone hacking of celebrities' voicemails is proving to be something of a nightmare for News International. It dates back to the jailing of a freelance investigator, Glen Mulcaire, and News International's then royal correspondent, Clive Goodman, when it was established that they had hacked into the voicemails of Princes William and Harry. News International's defence was that this was the action of a rogue reporter. That defence was weakened when it was reported that the publicist Max Clifford had received £1 million in costs and damages to settle his privacy claim

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followed by a similar settlement reported to be £700,000 to Gordon Taylor, the former chief Executive of the Professional Footballer's Association.

A large number of celebrities and politicians and their lawyers have also made claims. The editor of the News of the World at the time, Andy Coulson, who had resigned his post has likewise now stood down from his next job as Director of Communications at 10 Downing Street. A senior news editor has resigned after having been named in various communications in a way which suggested that he had rather more knowledge than he cared to recollect.

There have also been a number of actions in the High Court of which the latest was [Gray –v- News Group](#) [2011] EWHC 349 where Mr Justice Vos has made a number of swingeing orders whereby the ex-convict Mulcaire has to produce details of how he obtained the various telephone and pin numbers, who was involved in the case, who he gave the information to and who had given him instructions. This all has the potential of being very costly litigation and readers of this column will be pleased to hear that the claimant lawyers who look like facing a lean time with the loss of their conditional fee agreements do have this very profitable sideline.

### Tweeting in Court

On 20 December 2010, the Lord Chief Justice, the appropriately named Lord Judge, has given [guidance](#) allowing the use of Twitter in court proceedings for the purpose of fair and accurate reporting. The posting must be made discreetly and not interfere with the administration of justice. It might be disallowed in criminal cases where there was the risk of a witness being tipped off as to the questions that he might be asked. Tweeting was an important part of the Guardian's coverage in the Assange hearings. Tweeters should ask the court's permission. There are still restrictions which prevent the use of private sound-recordings or the taking of photographs in court and mobile telephones have still to be switched off in court.

### Will Courts Uphold Contracts for Vetting of Content?

The case of *Viscount Monckton –v- BBC* January 31, 2011 suggests that the courts may well be reluctant to do so. Monckton is a slightly batty global warming sceptic. He had

an agreement for a right of reply and for the fair representation of his views when he agreed to take part in a programme. However, he accepted that the BBC had editorial control. The Court ruled that the threshold for granting an injunction in such cases would be a high one. A court would be extremely reluctant to rule on fairness where the balance of justice did not require an injunction. The terms of the obligations of the BBC have been sensibly kept vague by the BBC and it would evidently require very unequivocal words for a court to be willing to become involved in the content of programmes and forming a view as to whether or not the particular part of the media had complied with its obligations.

### Upcoming Cases in the Supreme Court

The Supreme Court has given permission to appeal against the Court of Appeal's decision in [Flood –v- Times Newspapers](#) [2010] EWCA 804 provided that the Times agrees to pay Flood's legal costs whatever the outcome of the case. The case appeared to restrict the operation of the Reynolds defence and to suggest that there could be instances in which there was a duty of verification and that there was insufficient justification for having reported in detail the matters which were being investigated concerning a police officer, Gary Flood.

Permission to appeal is also being sought in the case of [Clift –v- Slough Borough Council](#) [2010] EWCA Civ 1171 on the question of qualified privilege. The Court of Appeal upheld the decision of Mr Justice Tugendhat that the defence of qualified privilege did not apply where there was publication of material by a public authority in breach of the Claimant's rights under the European Convention to someone who had an insufficient interest in receiving the information such as a trade union official. What the Council had in effect done was to circulate too widely the fact that the Claimant had been put on a Violent Persons Register.

Permission has also been granted in a malicious falsehood case [Sweeteners Europe –v- Asda Stores](#) [2010] EWCA Civ 609 where it was held that the single meaning rule did not apply in malicious falsehood cases.

### Libel Statistics – How Many Cases Are There?

The most recent official judicial statistics show that 298 defamation writs were issued in the High Court in London in

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2009 as opposed to 259 in 2008 – a significant percentage increase. There was a pattern of increase over a three year period. However, in 2010 there were only 4 libel cases which actually reached trial and none of them involved a jury. The earlier decision of Mr Justice Tugendhat in the *Fiddes –v- Channel 4* [2010] EMLR 26 case involving the Michael Jackson industry, has perhaps tipped the balance against jury actions. There the Judge's decision that the case would involve a prolonged examination of documents was upheld by the Court of Appeal and the case settled very shortly thereafter. In 1990 there had been 16 libel actions which reached trial, the overwhelming majority of which were heard before a jury. In 2010 there were 18 hearings in libel actions before a High Court Judge which resulted in the final disposal of libel actions. Media representatives may be interested to know that the defendant succeeded in 15 and in two of the three cases where the claimant succeeded the defendant did not appear and in the third the defendant appeared in person which is normally an unwise thing to do in our arcane libel litigation. Libel statistics available [here](#) and [here](#).

### Claimants Going Nowhere (Mostly)

Unsuccessful claimants among those who have recently failed in their libel claims, include a former MP, Jacqui Lait in *Lait –v- Evening Standard* [2010] EWHC 3239. The Judge ruled that some fairly mild criticisms of her expense claims as a Member of Parliament by the paper were bound to succeed on the question of fair comment. The paper had wrongly stated that she was compelled to pay back the £25,000 she had made on the profit of her house which had been in part funded by the tax payer. She had done so voluntarily, but the court had no doubt that overall the criticism of her conduct on such a controversial matter was bound to succeed as an issue of fair comment.

In *Hayden –v- Charlton* [2010] EWCA 2144, Mrs Justice Sharp struck out a claim where, in her view, there had been deliberate non-compliance and delay in the pursuit of the claim. Mrs Justice Sharp also reached a similar decision in the case of *Apsion –v- Butler* 23 February 2011 (unreported) where the libel claim was struck out on the basis of abuse of process and limitation. Defendants do not, however, have it all their own way. In *McKeown –v- Attheraces Limited* [2011] EWHC 179, however, there was a television interview with a jockey who had previously been found guilty of holding back his horse by the disciplinary panel of the British

Horse-racing Authority. It was suggested in the race that was then being filmed that the jockey had done the same thing again and that this was one more instance of him ensuring that his horse did not win. At that stage the decision of BHA was still being challenged. When he sued for libel there was an attempt to strike out his case as an abuse of process or raise a judicial review. Mr Justice Tugendhat felt, however, that this was aimed at a different audience, it involved different circumstances and different parties and so that jockey will have his day in court.

### Mosley and Privacy

Argument has now been heard before the Fourth Section of the European Court of Human Rights. The issue is whether papers planning to write about matters which engage the law of privacy are bound to contact the subject of the article for their comments. In the Mosley case had the News of the World done so, Mosley would almost certainly have sought and obtained an injunction on the grounds of privacy. Mosley's lawyer, Lord Pannick QC put his argument very graphically depicting the tabloid newspapers as "*journalistic Taliban able to insist on forcing their way into the bedrooms of consenting adults and to frustrate the rule of law by preventing these persons protecting their right to their private life.*"

The claim is based under Article 8 the Right to Private Life and Article 13 the Right to Have Effective Redress. As against that the government are arguing, through James Eadie QC that it should be up to various jurisdictions as to where the balance is struck between freedom of speech and Article 8 rights. Mosley may well be successful in persuading European judges well-versed in privacy that people in his position should have the possibility of preventing such private matters being published, which is the real remedy litigants such as him want.

### Anonymity in Privacy Cases and Super-Injunctions

This has produced a large amount of litigation. The most recent case is *JIH –v- News Group Newspapers Limited* [2011] EWCA 42. The subject has been extensively covered in the [RPC privacy blog](#). In *JIH* the court laid down the principles for anonymizing the parties. It was recognized that this was a derogation from the principle of open justice and that celebrities were not entitled to any preferential treatment.

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However, there would be cases where publishing the litigant's name could undermine the remedy sought and could draw people's attention to the nature of the allegations being made.

In *JIH* the matter was further complicated by the fact that similar allegations had been made against the claimant by another woman and that it would be possible to engage in a form of jigsaw identification. The court thought that on balance it was better to outline the nature of the allegations and the fact that they were made against a well-known sportsman rather than leaving the reporting so vague as to what the allegations were and who was involved that the legal principles might be difficult to follow. Where there is any suggestion that the claimant is seeking improperly to profit from revealing private information either by selling the story to a tabloid newspaper or even in extreme cases by threats of blackmail, the courts will readily grant injunctions.

The principles were outlined in *CDE -v- MGN* [2010] EWHC 3308 and *DFT -v- TFD* [2010] EWHC 2335. The CDE case was rather remarkable in that the anonymity extended not only to the defendant's solicitor and PR advisers and one of the journalists with whom the defendant had had a series of meetings, as this, it was felt by the court, could lead to a jigsaw identification of the claimant's identity.

### **Procedural Changes**

There have been two significant procedural changes. By Practice Direction 51D the Defamation Proceedings Cost Management Scheme is extended for a six month period to 30 September 2011, which requires parties to file estimates of future costs with potential sanctions if the estimates are exceeded, to enable the Ministry of Justice to collect further data. This reflects the wish to control and reduce the costs of libel actions.

By Practice Direction PD53 the existing provisions for Statements in Open Court to be made in cases of libel actions are extended to misuse of private or confidential information claims. This is a new weapon in Claimants' armouries and may become a standard demand, although they will no doubt be worded fairly opaquely to keep the particular private cat in the bag, while warning the media to back off their client. Obviously if their client is anonymised this remedy loses its attraction.

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# French Court Dismisses Criminal Libel Case Between Academics

## *Using Criminal Proceedings in a Defamation Case Is Not Without Risk*

By Jean-Frédéric Gaultier & Emmanuelle Levy

A French criminal court dismissed a criminal defamation case brought against a New York University law professor, holding that it lacked jurisdiction to hear the case over an online book review and, moreover, that the review was not defamatory. *France v. Weiler* (Tribunal de Grand Instance de Paris March 3, 2011). The court also fined the complaining professor for abuse of process. An unofficial English translation of the decision is available [here](#).

### Background

Mrs. Karine Calvo-Goller, a French-Israeli citizen residing in Israel, author of the book “*The Trial Proceedings of the International Criminal Court – ICTY and ICTR Precedents*” brought an action for criminal defamation in Paris against Mr. Joseph Weiler, an NYU law professor and editor of the New York website [www.globallawbooks.org](http://www.globallawbooks.org), because he posted a critical [book review](#) written in English by German Professor Thomas Weigend.

The Criminal Court of Paris before which the action was brought held that it lacked territorial jurisdiction and ordered the plaintiff to pay 8,000 Euro for abuse of process. This judgment has become final and conclusive in the absence of appeal. The case highlights the issue of jurisdiction over online defamation cases and the potential dangers of forum shopping.

### Jurisdiction over Internet Defamation Claims

In France, the plaintiff has the choice to bring a defamation action in criminal or civil court. Yet, the question of jurisdiction is not assessed in the same way before these courts.

In civil court, pursuant to Articles 42 and 46 of the Code of Civil procedure, the plaintiff may bring his or her case where the defendant is domiciled or “*the place of the event causing liability*” or “*where the damage was suffered*.”

The prevailing case law in France is that that the mere accessibility of a website from France is not sufficient to

justify the jurisdiction of French civil courts. Instead the plaintiff must establish evidence of a “sufficient, substantial or significant link” between the incriminated facts and the French territory. In order to establish such link, courts take into consideration a set of factors, such as the language of the website, the citizenship of the person editing the website, the “country code” of the website, etc. (see for example: High Court of Paris, 27 October 2010, RG no. 09/13559; Court of Appeal of Paris, 3 September 2010, three decisions, RG no.08/12820, RG no. 08/12821, RG no. 08/12822; Supreme Court of Appeal, Commercial Division, 23 November 2010, appeal no. 07-19543; Court of Appeal of Paris, 6 June 2007, RG no. 06/14890; Court of Appeal of Paris, 9 November 2007, RG no. 06/16286).

In criminal matters, French Courts have jurisdiction notably as long as one of the constituent elements of the offence occurred on French territory (Articles 113-2 et seq. of the Criminal Code and Article 689 of the Code of Criminal procedure). As for defamation, it is deemed to have been committed in any place where the written statements were made available to the public.

According to a prevailing case law, as long as the written statements are accessible in France, which is the case whenever statements are posted on the internet, French Courts have jurisdiction (See for example: High Court of Paris, 13 November 1999, Unadif v. Faurisson; High Court of Paris, 26 February 2002, Juris-Data no. 2002-169041; Court of Appeal of Paris, 17 March 2004, RG no. 03/01520; Court of Appeal of Limoges, 8 June 2000, Juris-Data no. 2000-180260). There are however some conflicting decisions where evidence of a sufficient, substantial and significant link was required between the publication and France. (See, e.g., Court of Appeal of Paris, 10 November 1999, Juris-Data no. 1999-103622; High Court of Paris, 6 July 2010, RG no. 0919808021).

In the present case, the Criminal Court ruled it lacked jurisdiction because the plaintiff had not established evidence that the online book review was actually accessed or read

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from French territory within three months of the date it was posted online. This unprecedented rule adds a supplementary condition to the mere accessibility to justify jurisdiction of French Courts: the effective access of the alleged defamatory statements from France within three months of publication. This new criterion does not reflect dominant case law and seems to result from confusion with the statute of limitation: the action for defamation on the basis of statements published on the internet must be brought within a three-month time period from the date the statements were first posted online, otherwise the action will be time-barred.

In any event, we are of the opinion that the effective access of the defamatory statement in France – instead of mere accessibility – would be a sensible limit on French criminal court jurisdiction. Websites are, by definition, accessible from everywhere, save for potential geo-blocking measures which were not discussed in this matter. Effective access should not, however, be the only condition. It is too easy for a plaintiff to take the initiative of said access and create an artificial link with the French territory. As in civil court, a “sufficient, substantial or significant link” between the facts and France should be demonstrated.

#### **Abuse of Process**

The court also ordered the plaintiff to pay damages of 8,000 Euros for abuse of process finding (1) she admitted complaining in France, rather than Israel or the U.S. for economic reasons (i.e. forum shopping); (2) she was familiar with French laws having studied law in this country; and (3) there was no defamation as the statements did not exceed the limits of the academic criticism.

It is surprising that the court first declared it lacked jurisdiction, and then nonetheless gave an opinion on the merits regarding the lack of defamation.

More interestingly, it is extremely rare that an action for defamation gives rise to pecuniary compensation for abuse of process. Bringing an action may degenerate into abuse only if it constitutes an act of bad faith or at least a glaring mistake equivalent to fraud (See for example Supreme Court of Appeal, 9 march 2000, appeal no. 98-10070; Supreme Court of Appeal, 13 November 2003, appeal no. 01-13648).

The result is likely limited to the particular circumstances of the case, notably that plaintiff had apparently openly admitted forum shopping. It nevertheless deserves to be kept

in mind. Indeed, because of the opprobrium that may result from criminal conviction, French criminal procedure is often used by plaintiffs as a means of pressure in cases where there are only marginal links if any with France.

*Jean-Frédéric Gaultier and Emmanuelle Levy are lawyers with Clifford Chance in Paris.*

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# It's All Over But The Shouting: Despite Early Mixed Signals, Eight Justices Vote to Protect Funeral Protests

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

By the time *Snyder v. Phelps* reached the Supreme Court last October, it was making free speech enthusiasts nervous. Its facts were profoundly unsympathetic, pitting the grieving father of a fallen Marine against the right of the tiny cult-like Westboro Baptist Church (“Westboro”) to protest military funerals with signs reading “Semper fi fags” and “Thank God for dead soldiers.” The Fourth Circuit ruling that the protests were protected speech hewed closely to Supreme Court precedent, but the justices nonetheless decided to hear the case. Few recent cases have arrived at the Court with such potential to turn repellant facts into bad First Amendment law.

But the waiting turned out to be the hardest part. On March 2, the Court ruled 8-1 that the protest was protected by the First Amendment. Only Justice Samuel Alito dissented from the Court’s opinion, written by Chief Justice John Roberts, which declared that “[a]s a Nation we have chosen ... to protect even hurtful speech on public issues to ensure that we do not stifle public debate.” [Snyder v. Phelps](#), 131 S. Ct. 1207, 2011 U.S. LEXIS 1903 \*30-31 (2011).

## A \$10.9 Million Verdict

In 2006, Marine Lance Corporal Matthew A. Snyder of Maryland was killed in Iraq. Westboro members, who preach that God is punishing America for tolerating homosexuality, protested on a public street near Snyder’s funeral, just as their fellow congregants have done at various events for twenty years. Westboro was careful to obey all time, place and manner restrictions on its protest, and Snyder saw its messages only later through the mass media. *Id.* \*9-10.

Snyder sued Westboro and related individuals for torts including intrusion upon seclusion and intentional infliction of emotional distress. These two claims resulted in a \$10.9 million jury verdict, later reduced to \$5 million. But the Fourth Circuit reversed in 2009, finding that Westboro’s hyperbole and opinion on matters of public concern were clearly protected, regardless of the specific tort being employed or whether the Snyders were public figures. *Snyder v. Phelps*, 580 F.3d 206, 221 (4th Cir. 2009). It relied on *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), which held that public figures cannot recover for emotional distress caused by a publication unless it contains a false statement of fact made with actual malice.

To the surprise of many, the Supreme Court accepted the case for review. Snyder’s opening brief argued that the Court “has never granted absolute, categorical protection to speech that cannot reasonably be interpreted as stating actual facts” and that the Fourth Circuit’s reliance on *Hustler* was misplaced because the plaintiff in that case, Jerry Falwell, was a public figure. Snyder added that his son’s death and funeral did not present legitimate matters of public concern, and that he was a “captive audience” at the funeral. Brief for Petitioner at 18-19. (The briefs of the parties and *amici*

are available at [www.abanet.org/publiced/preview/briefs/oct2010.shtml#snyder](http://www.abanet.org/publiced/preview/briefs/oct2010.shtml#snyder) )

In response, Westboro claimed that Snyder’s emotional distress claim must fail under *Hustler* simply because its speech was on a matter of public concern and had not been proven false. Brief for Respondents at 18. A coalition of news media *amici* added that a ruling for Snyder on these facts “would have far-reaching effects on the media and other

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**Snyder’s arrival at the Court was greeted with alarm, but the case proved to be one of the most resounding victories for speech in recent years.**



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speakers, because the [Westboro] protests are not unique in any constitutionally meaningful sense.” Brief *Amici Curiae* of The Reporters Committee For Freedom of the Press and Twenty-One News Media Organizations in Support of Respondents at 6.

### A Lopsided Decision

Despite the concerns when certiorari was granted, the Court in March issued a stirring vindication of the First Amendment. Though it did not explicitly address the Fourth Circuit’s broad holding extending *Hustler*’s protections to private-figure plaintiffs, the Court concluded that speech on a matter of public concern is entitled to “special protection” under the First Amendment and “cannot be restricted simply because it is upsetting or arouses contempt.” Westboro’s protest was protected because even if some signs related to the Snyders personally, the “dominant theme of Westboro’s demonstration spoke to broader public issues.” *Snyder*, 131 S. Ct. 1207, 2011 U.S. LEXIS 1903 \*20, 26.

The Court also rejected the claim that the proximity to the funeral changed the analysis. While the picketing could be limited by reasonable time, place, or manner restrictions, the seven Westboro protestors followed all laws and police instructions. “Simply put,” the Court said, “the church members had the right to be where they were.” The majority also rejected the claim that Snyder was a captive audience at the funeral, noting that the captive audience doctrine has been applied “only sparingly” in the past and Westboro kept its distance from the funeral. *Id.* \*25, 29.

Finally, the Court refused to rule on an “epic poem” that a Westboro member posted on its website, claiming that Lance Corporal Snyder’s parents “raised him for the devil.” The Court disposed of the “epic” in a footnote, finding that it had not been properly raised by Snyder and “may raise distinct issues in this context.” *Id.* \*10 n.1.

Justice Alito was the lone dissenter, just as he was when the Court recently struck down a law criminalizing videos depicting animal cruelty in *U.S. v. Stevens*, 130 S.Ct. 1577 (2010). Alito wrote that “funerals are unique events at which special protection against emotional assaults is in order.” He rejected the conclusion that the protests were immune because they dealt mostly with matters of public concern, writing that “actionable speech should [not] be immunized simply because it is interspersed with speech that is protected.” Alito also rejected the conclusion that *Hustler* should apply to private-figure plaintiffs, writing that the

*Hustler* Court “did not suggest that its holding would also apply in a case involving a private figure.” *Snyder*, 131 S. Ct. 1207, 2011 U.S. LEXIS 1903 \*48, 51, 53 (Alito, J., dissenting).

### What About Online Speech?

Despite the ruling’s strong reaffirmation of First Amendment protection for offensive speech on public issues, the Court stressed that its holding was limited. It said that it was addressing only the protest on the day of the Snyder funeral, and that claims arising from the Westboro website were not properly before it. This limiting language might have been a concession to Justice Stephen Breyer, who wrote a concurring opinion to emphasize that the decision did not examine the potential effects of television broadcasting or Internet postings. Justice Breyer had observed at oral argument that he was “very bothered about” whether statements in the mass media could be so offensive as to give rise to liability.

Potential liability for hurtful and offensive speech transmitted by mass media or via the Internet also concerned Justice Alito. He chastised the majority for declining to consider whether Westboro’s online “epic” should give rise to liability, and his dissent also suggested a willingness to apply the emotional distress tort to speech encountered in the media. *Id.* \*31. Given his and Justice Breyer’s feelings and the majority opinion’s limiting language, the extent to which such speech may give rise to liability in other circumstances awaits resolution another day.

### Conclusion

*Snyder*’s arrival at the Court was greeted with alarm, but the case proved to be one of the most resounding victories for speech in recent years. It showed that nearly all current members of the Court remain profoundly committed to the robust exchange of even deeply offensive ideas, and signaled a broad consensus for the fundamental principle that, while speech can “inflict great pain ... we cannot react to that pain by punishing the speaker.” *Id.* \*30.

*Robert Corn-Revere, Bruce E.H. Johnson, Thomas R. Burke, and Rory Eastburg are lawyers with Davis Wright Tremaine LLP. The authors submitted a friend-of-the-Court brief for the Reporters Committee for Freedom of the Press and Twenty-One News Media Organizations in Support of Respondents.*

# U.S. Supreme Court Limits Two Federal Freedom of Information Act Exemptions

## *In Separate Opinions, Grammar and Ordinary Meaning Rule as High Court Rejects Corporate “Personal Privacy” and “High 2”*

By Mark R. Caramanica

The U.S. Supreme Court issued two opinions narrowing the scope of federal Freedom of Information Act (“FOIA”) exemptions 7(C) and 2 in [\*Federal Communications Commission v. AT&T Inc.\*](#), 131 S. Ct. 1177, (“AT&T”) and [\*Milner v. Department of the Navy\*](#), 2011 U.S. Lexis 2101, (“Milner”), respectively.

In what turned out to be a relatively closely watched case—inaptly labeled by some as “Citizens United II” as it follows last term’s decision in *Citizens United v. FEC* that struck down certain corporate speech restrictions on federal constitutional grounds—the Supreme Court reversed a 2009 decision of the United States Court of Appeals for the Third Circuit and held in *AT&T* that corporations cannot assert a statutory right to “personal privacy” under FOIA exemption 7 (C) to prevent the disclosure of federal agency records.

While not garnering similar popular attention as *AT&T*, the *Milner* case is arguably the more important of the two decisions in that it negates a 30-year history of FOIA jurisprudence, upsets long standing agency reliance on Exemption 2, and potentially leaves certain classes of sensitive records that previously found shelter from disclosure under the exemption with no fallback exemption on which to rely.

In *Milner*, the Court resolved a split among the federal circuits by wholly rejecting the “High 2” reading of Exemption 2 in favor of the “Low 2” interpretation. Exemption 2 exempts from mandatory disclosure under FOIA records “related solely to the internal personnel rules and practices of an agency.” This exemption was for many years understood to relieve agencies of the burden of producing trivial, internal agency records for which the public presumably had no interest. Records detailing, e.g., employee parking rules, sick leave policies or workday break/lunch policies fit into this class of records.

However, beginning with the Court of Appeals for the District of Columbia’s decision in *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F. 2d 1051 (D.C. Cir.

1981), certain circuits gradually expanded the scope of what was covered under Exemption 2 to also provide protection for records that were deemed “predominantly internal” whose disclosure would aid individuals in circumventing agency regulation or statute. Records such as ATF training manuals, records regarding U.S. port vulnerabilities and government building blueprints have been withheld under this more expansive reading. Over time, the trivial materials conceived by the plain language of the amendment were referred to as “Low 2” records while records covered under the broad, judicially-glossed *Crooker* interpretation became known as “High 2” records.

The years following 9/11 saw a proliferation of “High 2” exemptions cited to cover records that could in some way aid terrorist activity. The Bush administration approved of using “High 2” in such a manner with then Chief of Staff Andrew Card issuing a 2002 memo to all federal agencies affirmatively encouraging its use. It was against this legal and policy backdrop that the Supreme Court had to consider whether the U.S. Navy could withhold records from Glen Scott Milner describing explosives storage practices and blast zone maps under an exemption that protects against the disclosure of records “related solely to the internal personnel rules and practices of an agency.”

### **AT&T Background**

In *AT&T*, the telecommunications firm sought to prevent the disclosure of certain documents it provided to the FCC relating to an Enforcement Bureau investigation into potential overbilling resulting from AT&T’s participation in an FCC-administered program known as “E-Rate.” E-Rate, or Education-Rate, was a program designed to provide enhanced telecommunications and information services to schools and libraries. AT&T had in 2004 self-reported the potential overbilling and in December of that year signed a consent decree with the FCC whereby it admitted no liability but

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agreed to pay the government \$500,000 and institute a monitoring plan to ensure better program compliance going forward.

Months later, CompTel, a trade association that represented a number of AT&T's competitors, filed a FOIA request seeking all "pleadings and correspondence" relating to the FCC's investigation. AT&T opposed the disclosure and the Enforcement Bureau issued a letter-ruling finding that much of the information provided by AT&T was protected from disclosure under Exemptions 4 and 7(C). Particularly, information regarding, e.g., cost/pricing data and billing-related data was properly withheld under Exemption 4 which protects against the disclosure of information relating to "trade secrets and commercial or financial information." Further, the FCC concluded that information identifying individuals was properly withheld under Exemption 7(C) which protects from disclosure any law enforcement record whose release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." The Bureau did not, however, apply 7(C)'s personal privacy protections to documents relating to the corporation generally finding that the exemption simply was not intended to cover such entities. This determination was upheld by the FCC on appeal and eventually appealed further to the Third Circuit. The Third Circuit reversed the FCC's decision.

### ***AT&T in the Third Circuit***

Writing for a unanimous three-judge panel, Judge Michael A. Chagares agreed with AT&T that the plain language of FOIA Exemption 7(C) permits a corporate entity to assert the same privacy rights as individuals. The court found that because Congress defined "person" in the Administrative Procedure Act at 5 U.S.C. § 551(2) to include "an individual, partnership, corporation, association, or public or private organization other than an agency" and that "personal" as found in Exemption 7(C) is the adjectival form of the defined word "person," it follows that under the FOIA a corporation may assert "personal" privacy rights. As the issue was not before the court for review, it did not go further to determine whether the disclosure of the records at issue could constitute an "unwarranted" invasion of such rights as the statute demands. Hence, the court did not review nor engage in any balancing of the public's right to know against AT&T's corporate personal privacy rights.

### ***AT&T at the Supreme Court***

In an 8-0 opinion written by the Chief Justice (Justice Kagan took no part in the decision), the Supreme Court reversed the decision of the court below. The Court began by noting that while typically an adjective will have some relation to a corresponding noun, that is not always the case. Echoing examples the Chief Justice Roberts raised during oral arguments, the Court highlighted that words such as "crabbed," "corny" and "cranky" generally have distinct meaning from their roots, "crab," "corn" and "crank," noting that "in ordinary usage, a noun and its adjective form may have meanings as disparate as any two unrelated words."

Hence, the Court concluded words such as "personal" have developed a distinct, common understanding relating to individuals only. "We do not usually speak of personal characteristics, personal effects, personal correspondence, personal influence, or personal tragedy as referring to corporations or other artificial entities." The Court also cited dictionary definitions of the word "personal" that reinforced its view that the term relates only to individuals.

The Court went on to note that the construction of statutory language will often depend on context and despite AT&T's arguments to the contrary, it cannot treat the phrase "personal privacy" simply as the "sum of its two words: the privacy of a person." Two words taken together often have a distinct meaning beyond a literal interpretation, held the Court, noting that a "golden boy" is a lucky or talented individual rather than a person literally composed of gold. The Court concluded that AT&T offered the Court no reason to ignore common usage and meaning to find that "personal privacy" under Exemption 7(C) was intended to apply only to individuals.

The Court also found that the exemption's statutory history also suggested it was meant to be limited to individuals. It noted that at the time FOIA was amended in 1974 to include 7(C), Exemption 6's personal privacy protections were already in place for 8 years. 7(C)'s language closely mirrored its use in Exemption 6 which clearly can apply only to individuals as it protects "personnel and medical and similar files" from disclosure. Further, Department of Justice Memoranda at the time 7(C) was adopted indicated it was not intended to apply to corporations.

For all these reasons, the Court refused to extend 7(C)

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protection to corporations quipping in conclusion, “[w]e trust that AT&T will not take it personally.”

### ***AT&T Analysis***

The *AT&T* case can probably better be viewed as correcting an errant and anomalous lower court ruling rather than establishing any greater rights under FOIA than what was generally previously thought to exist. Indeed, no court until the Third Circuit had ever ruled that corporations had personal privacy rights under FOIA and the conventional thinking among the media and government alike was that such rights never existed. While the decision should be lauded for making clear that corporations cannot seek shelter under 7(C) to simply shield embarrassing information from the public by raising 7(C), it does nothing to alter the fact that, just as in this case, corporations can still rely on Exemption 4 to keep confidential business records private and still rely on Exemption 7(C) to protect *individuals* within a corporate entity.

Nor does the decision negate the requirement under 7(C) that should a recognizable personal privacy interest in a record be asserted, a requester must still present a counterbalancing argument as to why disclosure would not constitute an unwarranted invasion as set forth in *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 136 (1989). However, armed with the *AT&T* decision, media lawyers should remain vigilant in ferreting out denials for records related to corporate or other non-corporate entities in which the government is claiming a wide swath of information to be protected under 7(C). It is only information that could be linked to identifiable individuals that may qualify for protection even if it reveals embarrassing or intimate details of corporate behavior.

### ***Milner Background***

In 2003 and 2004, local resident Glen Scott Milner requested copies of U.S. Navy Explosive Safety Quantity Distance (“ESQD”) information for ammunition and other explosives stored at Naval Magazine Indian Island (“NMII”) in Puget Sound, Washington. ESQD data aid Navy personnel in determining the proper and safe storage of explosives in an effort to minimize explosive damage due to chain reactions and also detail potential blast ranges should an accident

occur. This information is often portrayed in map form. Milner sought copies of NMII ESQD data in order to determine what risks storing explosives at NMII posed to the local community as the base sits near publicly accessible areas. The Navy refused to release the records citing security concerns, invoking Exemption 2 to the FOIA.

### ***Milner in the Ninth Circuit***

Writing for the 2-1 majority of a three-judge panel of the Ninth Circuit, Judge Richard C. Tallman affirmed the Court’s previous approval of the *Crooker* “High 2” rationale and held that the disclosure of such records would constitute a threat to NMII security and could aid someone intent on causing destruction. Judge William A. Fletcher in dissent wrote that while he agreed that “High 2” was a valid interpretation of Exemption 2, its application should be limited to only those classes of people that are specifically subject to agency regulation. “The Navy is not acting as a regulatory or law enforcement agency, and the arc maps do not regulate anyone or anything outside of the Navy itself,” wrote Judge Fletcher.

Judge Fletcher went on to address the potential application of additional FOIA exemptions, namely 7(F) which covers records compiled for law enforcement purposes the disclosure of which “could reasonably be expected to endanger the life or physical safety of any individual” and Exemption 1 which exempts from disclosure information classified pursuant to Executive order. Fletcher rejected application of 7(F) finding that the Navy did not compile the ESQD records for law enforcement purposes. As to Exemption 1, Judge Fletcher thought it proper, given the potential security risk the release of such records potentially posed, for the government on remand to argue that the ESQD records should be retroactively classified.

### ***Milner at the Supreme Court***

The Supreme Court reversed and remanded the Ninth Circuit’s decision holding that the plain language of Exemption 2 did not support a “High 2” construction and that “Low 2 is all of 2.” Justice Kagan, writing for the 8-1 majority (with Justice Alito concurring and Justice Breyer dissenting) began by noting that the Court’s analysis began with the text of the exemption and that the determinative

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word within Exemption 2 was the word “personnel.” That term, in common parlance and usage, refers to matters related to employee relations and management. Further, the phrase “personnel file” would normally refer to information related to an individual employee and their performance. Exemption 2, according to the Court, uses the phrase in this contemplated manner and is consistent with the notion that FOIA exemptions be construed narrowly. Hence exemption 2 cannot reach the ESQD records as they do not relate to personnel rules or matters but govern the safe placement of explosives at NMII.

The Court additionally dismissed the government’s argument that a 1966 House Report on FOIA (H.R. Rep. No. 89-1497) lending support for a “High 2” reading controlled as a companion Senate Report (S. Rep. 89-813) essentially stated the exact opposite. “When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language,” Kagan wrote. The Court also found that subsequent *post-Crooker* amendments to Exemption 7, namely 7(E) which prevents the disclosure of law enforcement records that aid in the circumvention of law, demonstrated that Congress did not believe such records to be covered under Exemption 2. Finally, the Court also rejected the government’s argument that Exemption 2 could be interpreted to cover any records that are created for use by personnel labeling such a construction as advocacy for a “Super 2.”

For these reasons, the Court held that “High 2” simply does not exist. However, the Court was not unsympathetic to its upending of developed precedent and agency reliance on “High 2.” It further stated it had no reason to doubt the Navy’s claims that the disclosure of ESQD data presented a security risk. Hence, in dicta it offered a variety of alternative avenues of relief those being: (1) post-FOIA request classification processes; (2) seeking a specific statutory exemption for such records under Exemption 3; (3) application of Exemption 7(F); and (4) Congressional codification of the “High 2” standard. The case was ultimately remanded to the Ninth Circuit to consider the application of 7(F) to the records.

Justice Alito’s concurrence focused on why he believed 7 (F) applicable, mainly arguing the case why the ESQD records are records of a law enforcement agency, compiled for law enforcement purposes as Exemption 7 requires. He wrote that crime prevention and security is just as legitimate a

law enforcement function as is investigation and prosecution. Moreover, records like ESQD maps could serve a dual purpose and the primary purpose for their compilation need not be for law enforcement so long as that it a purpose of their compilation.

In dissent, Justice Breyer noted his reluctance to upset a statutory interpretation that in his words was well-established in law and carried out the purpose of FOIA and questioned how sensitive records previously shielded by “High 2” and not compiled for law enforcement purposes such as building plans, computer passwords, credit card numbers, or safe deposit combinations could now ever be protected from disclosure.

### **Milner Analysis**

*Milner* should be praised by media lawyers as a victory in that it rejected a “High 2” reading that was often broadly and indiscriminately applied to any records that in the mind of the government could be used to commit a crime. However, it appears that the *Milner* decision may have the effect of government simply shifting its reliance to 7(F) for law enforcement records, seeking more Exemption 3 statutory exemptions from Congress, relying more on classification and possibly pushing for a statutory codification of “High 2” as an entirely new exemption.

Indeed as Justice Breyer notes in his dissent, there appears now to be some records (e.g., computer passwords) that government would have a strong interest in keeping secret but now no longer have any refuge in a FOIA exemption. Overreaction to this reality combined with a rush to enact a remedy could leave requesters with a codified “High 2” or witnessing a flurry of b(3) statutory exemptions. However, it thus far seems too soon to tell how agencies will respond and the Reporters Committee continues to monitor on this front. But as the remand proceedings in this case will highlight, the issue of what constitutes a federal “law enforcement” record and what federal records are in fact “compiled for law enforcement purposes” will surely be an issue media attorneys should be better prepared to litigate into the foreseeable future.

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# Supreme Court to Consider Constitutionality of Restoration of Certain Foreign Copyrights

By Al J. Daniel, Jr.

It is no surprise that the plaintiffs sought certiorari after the United States Court of Appeals for the Tenth Circuit rejected their claim that Congress's restoration of copyrights in foreign works that had fallen into the public domain in the United States for failure to comply with U.S. "formalities" did not violate either the Copyright Clause or the First Amendment. U.S. Const. Art. I, § 8, cl. 8, and Amend I. The surprise is that the Supreme Court of the United States took the case over the opposition of the Solicitor General. [Golan v. Holder](#), S. Ct. No. 10-545, *cert. granted*, March 3, 2011.

The Tenth Circuit held that Section 514 of the Uruguay Round Agreements Act, 17 U.S.C. § 104A, does not violate any of petitioners' First Amendment rights or exceed the government's power under the Copyright Clause. [Golan v. Holder](#), 609 F.3d 1076 (10th Cir. 2010) (*Golan II*). This decision was somewhat surprising because, in the first appeal, the Tenth Circuit had reversed the district court's ruling in the government's favor, seemingly intimating that the lower court should rule in petitioners' favor on remand. *Golan v. Gonzalez*, 501 F.3d 1179 (10th Cir. 2007) (*Golan I*), which the district court dutifully did.

Contrary to expectation, *Golan II* held that Congress properly enacted Section 514 to implement U.S. obligations under the Berne Convention and the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPs"). Section 514 restores copyright protection in the United States only for limited classes of foreign works which are still protected by copyright in their countries of origin, but which fell into the public domain in the U.S. for limited, specific reasons, such as failure to comply with U.S. copyright formalities. It also affords some protection for so-called "reliance" parties, such as petitioners, all of whom claim the right to exploit these foreign works without compensation because they had become part of the U.S. "public domain."

The Tenth Circuit also rejected petitioners' First Amendment claims, holding that Section 514 was a "content-neutral regulation" of speech reasonably enacted to satisfy U.S. obligations under the Berne Convention and under TRIPs, and to protect U.S. copyright interests abroad. The court applied an "intermediate scrutiny" test, *Turner Broad. Sys., Inc. v. FCC*, 522 U.S. 180, 189 (1997), which the parties and the courts agreed was the appropriate standard, though they disagreed as to its proper application. See *MLRC MediaLawLetter* 33 (August 2010) for a detailed analysis of *Golan II*.

The petition for certiorari presented two questions: (1) whether the "Progress Clause" (petitioners' newly-minted phrase) in Art. I, § 8, cl. 8 of the Constitution "prohibits Congress from taking works out of the Public Domain ..." and (2) whether Section 514 violates the First Amendment. *Golan Pet. i*.

To a significant extent, this case is a rerun of the challenges to Congress's copyright term extension which the Supreme Court upheld in *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

Petitioners urged the Supreme Court to take the case because of the importance of the issues presented, as there is no conflict in the circuits. The petition urges a grand argument on the importance of the "Public Domain," a capitalized realm in which works only go in, and never come out. Petitioners wax eloquent on the harm they will suffer by having to pay for the exploitation of foreign works by Stravinsky, Virginia Wolff, Alfred Hitchcock, Renoir, and Picasso, all of which are still protected by copyright in their countries of origin. Pet. 3-4. By definition, plaintiffs are not and never were the authors or owners of any of the works they previously exploited without compensation to their rights owners.

The government opposed certiorari on the ground that the

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**To a significant extent, this case is a rerun of the challenges to Congress's copyright term extension which the Supreme Court upheld in *Eldred v. Ashcroft*, 537 U.S. 186 (2003).**

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Tenth Circuit's decision is correct as a matter of law and does not conflict with decisions of the Supreme Court or any other court, pointing out that the D.C. Circuit agreed with the Tenth Circuit on the Section 514 issue. Resp. Opp. 12.

The term "public domain" does not appear in the Copyright Clause of the Constitution, Art. I, § 8, cl. 8. The government's brief in opposition points out that petitioners are wrong as a matter of fact about their "only in, never out" theory of the public domain. In fact, it points out that the very first U.S. Copyright Act, Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, provided protection for works which had already been printed in the U.S., before there was any federal protection for copyright. Resp. Opp. 14 n. 7. A number of other statutes similarly restored copyright in foreign works. *Id.*

The government points out the obligations undertaken by the United States as a member of the Berne Convention and TRIPs, and explains that Section 514 was enacted to implement the government's international obligations. It also explained that these agreements are important to the protection and exploitation of U.S. copyrighted works abroad, which are a significant part of the U.S. economy. Resp. Opp. 10-12.

On the First Amendment issue, even with these foreign works restored to copyright protection, petitioners continue to have rights to discuss the restored works, to exploit them to the extent allowed by "fair use" and other statutory exemptions in the Copyright Act, and to continue to exploit them to the extent allowed by Section 514. Resp. Opp. 18.

In further support of their petition, petitioners reiterated their position on the importance of the issues, the limits of Congress's powers under the Copyright Clause. On the First Amendment issue, petitioners invoke a phrase used in *Eldred*, by contending in Point IV that "Section 514 Alters Traditional Contours of Copyright Protection ...." Reply Br. 13. In *Eldred*, the Court stated that those, such as petitioners, who wish to use the works of others have lesser First Amendment interests than those exercising their own speech rights; the Court found it unnecessary to further explore the First Amendment issues there because Congress's term extension "has not altered the traditional contours of copyright protection ...." *Eldred*, 537 U.S. at 221.

Expect to hear much about "the traditional contours of copyright protection" in the upcoming briefs to be filed in the Supreme Court in the coming months.

## Next Prediction

This case will be a grand copyright *cause célèbre*, on the scale of *Eldred*, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 545 U.S. 913 (2005), and *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). There will be scores of amicus briefs from all the usual suspects and interest groups. Predicting the outcome is another matter, though the Court's recent decision in *Eldred*, which upheld Congress's copyright term extension, gives some indication that it would be safer to put odds on the Court affirming the 10th Circuit's decision in *Golan II*.

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## **MLRC EVENTS**

### **MLRC/Stanford Legal Frontiers in Digital Media Conference**

May 19-20, 2011  
Stanford, CA

### **MLRC London Conference**

September 19-20, 2011  
(London, England)

### **MLRC Annual Dinner**

November 9, 2011  
New York, NY

### **DCS Meeting & Lunch**

November 10, 2011  
New York, NY

# Supreme Court Assumes Constitutional Right to Informational Privacy, But Allows Broad Background Checks on Government Contractors

By Gerron L. McKnight

On January 19, 2011, the U.S. Supreme Court unanimously held that NASA's background checks of its contract employees did not run afoul of the *assumed* right to informational privacy. [\*NASA v. Nelson\*](#), 131 S.Ct. 746 (2011). The Government, acting as "proprietor" and manager of NASA's Jet Propulsion Laboratory (JPL), rather than in its capacity as regulator of the citizens at large, had greater latitude in regulating JPL's activities. Thus, the Government was allowed to ask "reasonable" rather than "necessary" questions in furthering its interests in identifying capable employees.

In *NASA v. Nelson*, contract employees of JPL questioned the constitutionality of two inquiries made within the Government's National Agency Check with Inquiries (NACI). The NACI background check posed questions regarding: 1) drug treatment or counseling of the employee, and 2) whether an employee's provided references had "any reason to question" the employee's "honesty or trustworthiness" or had any "adverse information" concerning the employee.

The contract employees were not subjected to government background checks when they began employment at JPL, but were required to undergo such a check after Presidential mandate. The employees filed suit prior to the last day they could complete the NACI. Employees not completing the NACI before the deadline would be locked out of JPL and terminated by the California Institute of Technology which operated JPL under a government contract.

The employees' suit asked for a preliminary injunction alleging that the Government's inquiries violated their constitutional right to informational privacy. The federal district court denied the preliminary injunction, but the Ninth Circuit Court of Appeals reversed that decision. The Ninth Circuit held that the question regarding drug treatment or counseling furthered no legitimate government interest, and that the broad inquiry into honesty, trustworthiness, and adverse information was not narrowly tailored to meet the Government's interest in verifying contractors' identities and ensuring JPL's security. Thus, the Ninth Circuit held that both inquiries likely violated the employees' informational privacy rights.

## U.S. Supreme Court Decision

In a unanimous decision, the U.S. Supreme Court reversed the Ninth Circuit and held that the Government's background check did not violate the employees' right to informational privacy. In doing so, the Roberts Court followed Supreme Court precedent established over 30 years ago by not deciding whether the Constitution provides a right to informational privacy. Instead, the court assumed that the Constitution provides such a right, and ruled based on that assumption.

In making its ruling, the Court quickly dismissed the employees' attempt to distinguish themselves from the civil servants who were already subject to the NACI check. The Court found that the contract employees had "duties functionally equivalent to those performed by civil servants," and executed some of NASA's most critical projects.

The Court went on to state that as "proprietor" and manager of JPL's "internal operation," the Government had more

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latitude in regulating JPL and thus could make employment-related background checks regarding drug treatment and counseling. The Court reasoned that NASA is “entitled to have its projects staffed by reliable, law-abiding persons who will ‘efficiently and effectively’ discharge their duties.” According to the Court, questions regarding illegal drug use “are a useful way of figuring out which persons have these characteristics.”

Additionally, the broad, open-ended questions posed to references of the employees were “an appropriate tool for separating strong candidates from weak ones.” As the Court noted, the questions asked by the Government are similar to those used in background checks “used by millions of private employers.”

The Court went on to hold that the inquiries did not have to meet the standard of “necessary” to be asked, but the lower standard of “reasonable.” The Court then found that both the drug and reference inquiries were “reasonable, employment-related inquiries that further the Government’s interests in managing its internal operations.” Finally, dispelling concerns regarding potential misuse of the information, the Court referenced the federal Privacy Act which provides “substantial protections” against the public disclosure of personal information.

### Concurrence

Though Justice Scalia concurred in the judgment, he (joined by Justice Thomas) would have definitively decided that the Constitution provides no right to informational privacy and denied relief to the employees on that ground. According to both Justices, the Constitution does not provide a right to informational privacy through the Fifth Amendment Due Process Clause, as the employees argued in front of the Court, or otherwise.

Thus, Justices Scalia and Thomas would have decided this case solely on the ground that the Constitution does not textually provide a right to informational privacy. Justice Scalia opined that the Court’s opinion “harms [the Court’s] image, if not [the Court’s] self-respect, because it makes no sense.”

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# Second Circuit Preserves *Gonzales* Journalist's Privilege In Face of Sixth Amendment Rights

By Slade R. Metcalf and Rachel F. Strom

In [\*United States of America v. Treacy\*](#), Docket No. 09-3939-cr, 2011 WL 799781 (2d Cir. Mar. 9, 2011), the United States Court of Appeals for the Second Circuit addressed the novel issue of the scope of cross-examination of a journalist in a criminal case. While, notably, extending the journalist's privilege to protect even non-confidential and *published* information, the Court avoided confronting the issue of the clash between a defendant's Sixth Amendment right to cross-examine government witnesses and a journalist's right to protect his or her newsgathering materials.

Instead, the Second Circuit simply held that "in instances where a reporter is not protecting a confidential source or confidential materials, the showing required to overcome the journalist's privilege is the same in a criminal case as it is in a civil case—namely, the showing required by *Gonzales* [*v. Nat'l Broad. Co.*, 194 F.3d 29, 32 (2d Cir. 1999)]—and that this is true whether the party seeking to overcome the privilege is the prosecution or the defense."

## Background

Charles Forelle ("Forelle"), a reporter for *The Wall Street Journal* (the "*Journal*"), which is published by Dow Jones & Company, Inc. ("Dow Jones"), was part of a Pulitzer Prize-winning team of *Journal* reporters investigating the improper backdating of executive stock options at various corporations, including Monster Worldwide, Inc. ("Monster"). The *Journal's* series of articles triggered federal authorities to investigate nearly 140 companies and has contributed to at least 70 top executives losing their jobs and numerous former executives, including three executives at Monster, facing federal or state criminal charges.

As part of the *Journal's* investigation, Forelle spoke to James J. Treacy ("Treacy"), the defendant in this case, about the options-granting process at Monster and some of the stock options that Treacy himself received and exercised. Following that interview, Forelle authored an article (along

with another *Journal* reporter) that was published in the issue of the *Journal* dated June 12, 2006, and was entitled "Monster Worldwide Gave Officials Options Ahead of Share Run Ups" (the "Article"). In the Article, Treacy is quoted and paraphrased as saying that he was not involved in Monster's option-granting process and that he did not notice the favorable prices of the stock option grants he received.

On April 24, 2008, Treacy was indicted on two charges related to his alleged role in a scheme to commit securities fraud while he was an executive and board member of Monster (the "Indictment"). Both charges were based on the theory that Treacy was involved in backdating Monster's stock option grants so that the grants were "in-the-money" grants, *i.e.*, stock options with an exercise price lower than the fair market value of the stock grants on the date they were in fact awarded. The Indictment further alleged that Treacy personally exercised \$13.5 million from "in-the-money" stock options that he received while he was an executive at Monster.

The Government served Forelle with a subpoena *ad testificandum* on November 27, 2008 ("Subpoena"), which did not define the scope of the requested testimony.

On December 17, 2008, Forelle moved to quash the Subpoena, relying on the reporter's privilege. In opposition to Forelle's motion, the Government argued that it merely sought Forelle's testimony so that Forelle could "confirm[] the accuracy" of three published statements (including quotations and paraphrasing of statements) that were attributed to Treacy in the Article in which Treacy denied "involvement in the options-granting process." The Government claimed that Treacy's statements were relevant because they were made in furtherance of a conspiracy, were false exculpatory statements that showed Treacy's consciousness of guilt, and demonstrated Treacy's knowledge of the stock options process at Monster.

The district court thereafter ordered the Government, Treacy and Forelle to submit letters regarding the proper scope of cross-examination by Treacy. In its letter to the

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**The Second Circuit addressed the novel issue of the scope of cross-examination of a journalist in a criminal case.**

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court, Treacy took the position that the Government's inquiries opened the door to "three general areas of cross-examination" that were geared towards establishing that Treacy's statements to Forelle were about his own stock options and not about options-granting at Monster in general.

### The Trial Court's Decision

On March 23, 2009, the Honorable Jed Rakoff, of the Southern District of New York, denied Forelle's motion to quash the Subpoena, but, recognizing that a broad direct or cross-examination would violate Forelle's reporter's privilege, limited both the Government's and Treacy's lines of questioning of Forelle. *United States v. Treacy*, 603 F. Supp. 2d 670 (S.D.N.Y. 2009). The court concluded that, although no party was claiming that Treacy was misquoted, the Government should be permitted to ask Forelle about the Statements and the questions Forelle posed to Treacy that elicited these Statements. The court reasoned that this testimony was "relevant . . . as statements made in furtherance of the alleged conspiracy and false exculpatory statements evidencing consciousness of guilt."

As to Treacy, the district court permitted him to "ask[] about questions posed by Forelle to defendant . . . immediately preced[ing] the questions referred to above." Although this inquiry into the "context" of the reported materials called for testimony regarding the unreported aspects of Forelle's interview with Treacy, the court stated that Forelle was being called "solely to confirm statements that were made in a published newspaper article." Thereafter, Forelle gave limited testimony at trial, with his counsel present to object to any further intrusion into the journalist privilege.

On May 13, 2009, Treacy was convicted of one count of conspiracy to commit securities fraud and one count of substantive securities fraud (over objection to the limited scope of cross-examination), and he was sentenced on September 2, 2009.

### The Appeal

Treacy appealed on the grounds, *inter alia*, that the District Court committed reversible error by "tight[ly]" limiting the scope of Treacy's cross-examination of Forelle, thus violating Treacy's right of confrontation safeguarded by

the Sixth Amendment. In response, the government claimed that the district court did not abuse its broad discretion to balance Treacy's confrontation rights with the reporter's privilege and, even if it the court did abuse its discretion, the error was harmless because the government provided "overwhelming" evidence that supported Treacy's conviction.

Thereafter, Dow Jones submitted an *amicus* brief that did not support the Government or Treacy. Rather, Dow Jones' brief focused on the significance of the reporter's privilege and stressed that the trial court, while attempting to balance Treacy's Sixth Amendment rights against Forelle's reporter's privilege rights, erred by requiring Forelle to testify in the first place.

Dow Jones also submitted the brief to address the novel issue that faced the Court: what standard a district court should apply in circumstances where the *government* is seeking to compel a reporter to testify at a criminal trial and where a criminal defendant's right to cross-examine a government's witness will necessarily elicit information that is protected by the reporter's privilege. That situation presents unique pressures on the rights of both the reporter and the accused because no matter how narrowly tailored the prosecutor's subpoena may be, if the government is seeking to put a journalist on the stand, the criminal defendant will have a right to cross-examine the journalist. In this circumstance, unlike the cases the Second Circuit had addressed before, it is the government – not the defendant – that is creating a direct conflict between two fundamental rights, the reporter's First Amendment and common law right to protect newsgathering materials and the criminal defendant's Sixth Amendment rights.

Dow Jones argued that the Second Circuit should take the opportunity to set a new standard to address this situation and hold that, in these limited circumstances, the government should be compelled to make "a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim and not obtainable from other available sources." *U.S. v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983), *cert. denied*, 464 U.S. 816 (1983). This standard would ensure that the requested information is sufficiently relevant and probative to force the journalist to testify at all and, therefore, subject the journalist to a potentially broad cross-examination in contravention of his or her reporter's privilege.

Dow Jones noted that this heightened standard was

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consistent with the standard that the United States Department of Justice (“DOJ”) imposes on itself before it is able to obtain newsgathering information from a reporter in a criminal case. See [28 C.F.R. § 50.10](#) (the “Guidelines”). Specifically, recognizing the concern of compelling a journalist to testify on the Government’s case-in-chief, the DOJ has set forth Guidelines that are intended to protect the media in the course of DOJ investigations and prosecutions. The Guidelines state that “[b]ecause freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter’s responsibility to cover as broadly as possible controversial public issues.” [28 C.F.R. § 50.10](#). The government, therefore, is required to “strike the proper balance between the public’s interest in the free dissemination of ideas and information and the public’s interest in effective law enforcement and the fair administration of justice.” [28 C.F.R. § 50.10\(a\)](#). Under both the test proposed by Dow Jones and the Guidelines, the government must prove that the requested information is “critical” or “essential” to its case and that the information is not available from other sources. Thus, if the government is complying with the its own Guidelines, the proposed new rule should impose no further burden on the government.

In its brief, Dow Jones also pointed out that either under the proposed heightened test or the test set forth in [Gonzales v. Nat’l Broad. Co.](#), 194 F.3d 29, 32 (2d Cir. 1999) (where the information to be disclosed must (1) be of likely relevance, (2) address a significant issue in the case, and (3) not be reasonably obtainable from other sources), the subpoena should have been quashed because the government had no real need for Forelle’s testimony. In so arguing, Dow Jones cited the Government’s Brief, in which the Government conceded that it “presented abundant evidence at trial — separate and apart from the testimony of Forelle — that demonstrated Treacy’s guilt beyond a reasonable doubt on both counts of the Indictment.” Because, by the Government’s own claims, Forelle’s testimony was merely cumulative of the “abundant” evidence the Government

proffered, Forelle’s testimony was of such minimal relevance (let alone *critical* to the case, as the *Burke* test requires), that Forelle should not have been forced to testify in the first place.

### The Second Circuit’s Decision

On March 9, 2011, the Second Circuit found that the district court erred in limiting Treacy’s cross-examination of Forelle, but that the error was harmless because “even if Treacy had been able to persuade the jury that Forelle’s memory of their conversation was hazy, and that Treacy had only been discussing his own options, not a general backdating scheme, the other evidence at trial demonstrated that Treacy was, in fact, involved broadly in the backdating of options at Monster.”

In finding that the district court erred in limiting Treacy’s cross examination, the Second Circuit first reaffirmed that “a journalist possesses a qualified privilege protecting him or her from the compelled disclosure of even nonconfidential materials.” The Court cited its recent *Chevron Corp. v. Berlinger*, 629 F.3d 297, 306-07 (2d Cir. 2011) opinion, which stressed the “burden” on the press when it is forced to comply with subpoenas seeking non-confidential materials.

The Court then went on to find that because “not only was Forelle not protecting any confidential material or source, he sought to withhold evidence that his source himself (Treacy) desired be disclosed,” the Government was entitled to the requested information if it was able to meet the test set forth in *Gonzales*. Notably, because the Government only sought to have Forelle confirm the accuracy of certain *published* statements, the Second Circuit, at least implicitly, extended the reporter’s privilege to cover not only non-confidential information but non-confidential information that has been published.

The Court rejected Dow Jones’ argument that the district court should have applied a higher standard in situations such as the one presented here. In rejecting Dow Jones’ argument, however, the Court incorrectly claimed that Dow Jones was arguing that a higher standard should apply in “*all* criminal

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**The Second Circuit “again decline[d] to wade into these constitutional waters,” and determine whether the “reporter’s privilege is derived from the First Amendment rather than a federal common law of privileges.”**

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cases,” rather than in those limited cases in which the government – not the defendant – seeks to compel a journalist to disclose newsgathering materials. As Dow Jones argued, it is only in those circumstances where the government is itself creating a direct conflict between two fundamental rights that the Court should apply a higher standard that would ensure that the requested information is sufficiently important to subject the reporter to a potentially broad cross-examination, and thus an extensive invasion of the journalist’s privilege.

In refusing to apply a higher standard in these circumstances, the Second Circuit “again decline[d] to wade into these constitutional waters,” and determine whether the “reporter’s privilege is derived from the First Amendment rather than a federal common law of privileges.”

The Court then found that the district court properly applied the *Gonzales* test in compelling Forelle to testify but that it was error to limit Treacy’s right to cross examine Forelle. In this regard, the Second Circuit’s opinion is inconsistent. The Second Circuit first implies that, once the government overcomes the *Gonzales* test and compels a reporter to testify, there should be no limitation on the criminal defendant’s right to cross-examine “subject to ordinary rules regarding the scope of direct and relevance, see Fed.R.Evid. 611(b)-as he would any other witness.” The Court then states, however, that the district court should have applied “the test we set forth in *Gonzales* to evaluate Treacy’s

need for Forelle’s answers.” The Court then went on to evaluate what areas of cross-examination would satisfy the *Gonzales* test. Importantly, stressing that a defendant’s cross-examination is subject to the *Gonzales* test (and applying Dow Jones’ original argument), the Second Circuit noted that “if the district court had believed that Treacy could not fully exercise his Confrontation Clause rights because of Forelle’s assertion of the privilege, it ought to have granted Forelle’s motion to quash or subsequently stricken his testimony.” Thus, despite some statements that a criminal defendant’s right to cross examine a journalist is limited only by Fed. R. Evid. 611(b), it appears the Second Circuit recognized that the examination must be further limited by the test set forth in *Gonzales*.

Either way, in this case, the Second Circuit determined that the District Court’s limitation on Treacy’s right to cross-examine Forelle was error – just harmless.

*Slade R. Metcalf, Katherine M. Bolger and Rachel F. Strom of Hogan Lovells US LLP, New York City represented amicus curiae Dow Jones & Company, Inc. The U.S. Government was represented by Deirdre Ann McEvoy, Assistant United States Attorney for Preet Bharara, United States Attorney for the Southern District of New York. Defendant James J. Treacy was represented by Reid H. Weingarten, Bruce C. Bishop and Evan T. Barr, Steptoe & Johnson, LLP, Washington DC and New York City.*

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# Colorado District Court Quashes Subpoena to TV Station for IP Address in Murder Case

By Charles D. Tobin & Drew E. Shenkman

A Colorado Springs trial court this month quashed a murder defendant's subpoena to a TV station for the computer address of an anonymous source who sent a news tip via the internet.

In an eloquent ruling from the bench, Judge David Gilbert upheld the "extremely important principle" underlying Colorado's newsperson's privilege statute, as well as the First Amendment, which permit "a news organization's reliance on information provided by people who wish to remain anonymous." *People of Colorado v. Adan Viveros*, Case No. 10CR1482 (oral ruling, El Paso County District Court, March 8, 2011). The court quashed the subpoena to station KKTU, which is owned by Gray Television, and its reporter Lauri Martin.

The subpoena arose out of the second-degree murder prosecution of Adan Viveros, who is pending sentencing for the April 2010 gang-related street shootings in Colorado Springs that resulted in death of an 18-year-old man and the injury of a minor. No suspects were immediately arrested after the shooting.

In the days that followed, KKTU received a series of anonymous news tips through a page on its website inviting visitors to send information about newsworthy issues, and also through a direct email to the newsroom. The news tips were sent electronically directly to the station and were not posted on the public discussion pages of the station's websites.

The news tips did not identify the source as an eyewitness to the shootings or indicate first-hand knowledge. Rather, the tips stated that the police should be looking for two Hispanic males, identified by their street names, and also reported that a "girl who was standing in the neighbor's yard by the white fence" witnessed the shooting. The source did not provide his or her name, email address, or contact information.

Lauri Martin, KKTU's lead crime investigative reporter, quickly followed up on the news tips with the Colorado Springs Police Department. Days later, police arrested Viveros, whose street name, "Nono," was one of those referenced in the tips to KKTU. A few months later, Viveros pleaded guilty to second degree murder.

Sentencing was set for January 2011, but just prior to that hearing, Viveros issued a subpoena to KKTU and Martin

seeking the internet protocol, or "IP" address -- which is a series of numbers that can identify the computer from which someone sends information over the internet -- of the anonymous communicator. When station counsel advised defense counsel they would resist the subpoena, the defense filed a citation of contempt against KKTU and Martin.

Opposing the contempt citation and moving to quash the subpoena, KKTU asserted its rights under Colorado's Newspaper's Privilege, C.R.S. § 13-90-119, and the First Amendment to the U.S. Constitution, as well as Article II, Section 10 of the Colorado Constitution.

The Colorado Newspaper's Privilege provides members of the mass media with a broad privilege shielding them from providing testimony and information learned while acting in a newsperson's capacity. The statute protects any: "knowledge, observation, notes, documents, photographs, films, recordings, videotapes, audiotapes, and reports, and the contents and sources thereof, obtained by [them] while engaged as [newspersons], regardless of whether such items have been provided to or obtained by [them] in confidence." C.R.S. § 13-90-119(1)(b) & (2). In a handful of decisions, the courts have expansively applied this protective shield in both the civil and criminal contexts, including unsolicited news tips.

In order for the subpoenaing party to overcome Colorado's privilege, they must show, by a preponderance of the evidence, that (1) the information sought is directly relevant to a substantial issue in the case, (2) the information cannot be obtained by any reasonable means, and (3) there is a strong interest by the subpoenaing party which outweighs the interest under the First Amendment. C.R.S. §13-90-119(3)(a)-(c).

At the hearing this month, defense counsel asserted that they needed the IP address to identify the person the tipster described as the "girl who was standing in the neighbor's yard by the white fence." The defense argued, without providing any other evidence for the record, that the girl could possibly provide exculpatory evidence to support a withdrawal of the defendant's guilty plea. The defense further argued that, in light of the substantial penalty for a murder conviction, it was entitled to all potential evidence in the case, and counsel

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represented that a number of eyewitnesses in the case had refused to cooperate.

KKTV countered that, on their face, nothing in the tipster's communications indicated that the unnamed girl saw anything relevant to exculpating the defendant, and in fact, the email identified "Nono," Viveros' street name, as responsible. Additionally, KKTV pointed to the record from the preliminary probable cause hearings, which included over 20 named individuals who may have the same knowledge, and noted that the defendant had put no evidence before the court of any measures they had taken to obtain the same information from these people. Finally, station counsel argued that the First Amendment right to receive newsworthy information outweighed the defense's right to engage in a fishing expedition.

Applying the test under the Colorado statute, Judge Gilbert found that the information sought was "potentially relevant to the case." He noted, however, that on this record "it's difficult to say," and "purely speculative," whether the anonymous tipster was an eyewitness to the shooting and whether he knows of someone not previously identified in the investigation.

The court remained solidly unconvinced that such information could not be obtained by alternative means. The court noted that it could compel any recalcitrant witnesses to speak with the defense, and that "the privilege does [not] become moot when certain witnesses wish not to cooperate." Judge Gilbert added that an obvious potential source of the information was the neighbor who owned the property where the girl had been standing, but that he had not "heard any detail . . . any written or oral response in terms of what has been done by the defense, if anything, to canvass the neighborhood with respect to neighbors."

He continued that if the unknown girl was "someone standing in the neighbor's yard, presumably there very well may be witnesses who are aware, individuals who could have been present and could have seen [who was] there as visitors or residents in neighboring yards." He further found that the severity of the crime charged is irrelevant to the analysis under the privilege: "It is not simply a function of how high the potential sentence is . . . these principles do not bend and waiver solely with respect to the issue of how serious a case is."

As to the First Amendment balance under the third prong of the test, Judge Gilbert held that the underlying principle of

the Colorado newsperson's privilege statute was "a news organization's reliance on information provided by people who wish to remain anonymous."

The court held that people providing that information often do so anonymously:

"in hopes that their information will spark further investigation by police or further discovery of other information or journalists' further investigation into stories. And they do so under the assumption that they will be able to provide this information freely without being subject to potential retaliation. Sometimes people are afraid of gang affiliations, as individuals may very well have been concerned in this particular case. The information produced alleges the likelihood of some gang involvement, gang retaliation. The discussion here has revolved around some previous potential gang retaliation against Mr. Viveros. And then allegations in this case that they were potential gang members, that he was in fear of that allegedly caused him to shoot, in this particular case, a victim."

Judge Gilbert emphasized the "very strong interest here in terms of why an individual should be able to give information and retain their anonymity . . . that a news organization should not be forced to violate that assumed trust, lest news organizations not be included by individuals wishing to give information in the future."

The court, succinctly, alternatively ruled that the First Amendment also shielded the IP address: "Pursuant to the First Amendment, the news organization is free to guard certain information in support of their news gathering, in support of an individual's right to give certain information and withhold certain information in approaching a news organization."

*Charles D. Tobin and Drew E. Shenkman, of Holland & Knight LLP in Washington, D.C., along with James E. Dallner of Lathrop & Gage, LLP, represented KKTV and its reporter Lauri Martin in this matter. David Foley and Cynthia McKedy, of Anaya, Foley, & McKedy, P.C., Colorado Springs, CO, represented Defendant Adan Viveros. District Attorney Daniel May and Deputy District Attorney Bryan Gogarty represented the People of Colorado.*

# New Jersey Justices Lean Toward Narrow Definition of “News Media” at Argument

By Bruce S. Rosen

If oral argument is any indication, the New Jersey Supreme Court appeared ready to narrow the definition of “news media” in the state’s broadly-interpreted Shield Law, indicating that bloggers and posters would not automatically qualify for the shield.

The Court on February 8 heard argument in the much anticipated case of [Too Much Media LLC v. Shellee Hale](#), a Washington State blogger and private investigator who claimed to have been investigating the porn industry and invoked the shield to avoid revealing her sources for posts she made about Too Much Media, a New Jersey software company, on an industry website.

Several justices appeared to reject arguments from Hale’s counsel and the ACLU-NJ that the statute required protections for anyone who gathers news with the intent to disseminate it, and said that such a broad reading could apply to most any posting on the Internet. The justices appeared to focus on N.J.S.A. 2A:84A-21, which provides:

“Unless a different meaning clearly appears from the context of this act, as used in this act:

a. ‘News media’ means newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public.”

A majority of the five justices present for the argument (two had recused themselves) seemed to support an interpretation of the 1977 provision that would require an applicant for the shield to be affiliated with a “News Media” that was “similar” to newspapers, magazines, radio or television as we know it.

Too Much Media sued Hale for defamation concerning the posts. Hale claimed she was well-published and was gathering information for an investigative report on the porn industry when she accused the software company of criminal activity in posts on Oprano.com, an industry website. While Hale submitted a certification to the trial court stating her qualifications for the shield law, the trial court judge did not rule whether the certification presented a prima facie showing under the statute.

Instead, he held a plenary hearing where Hale was grilled by her own counsel and plaintiffs’ counsel. Ultimately, he

ruled that Hale lacked credibility and was simply posting like a person writing a letter to the editor and he denied her shield law protection.

The Appellate Division affirmed but went further, stating Hale “exhibited none of the recognized qualities or characteristics traditionally associated with the news process.” The Appellate panel then created a checklist of such qualities, such as proof of credentials such as affiliation with any recognized news entity, demonstrating adherence to any standard of professional responsibility regulating institutional journalism, such as editing, fact-checking or disclosure of conflicts of interest.

The Court also listed as a criteria a requirement that a defendant identify herself to her sources as a reporter or journalist so as to assure them their identify would remain anonymous and confidential, and endorsed the trial court’s use of the hearing process.

The N.J. Press Association and North Jersey Media Group Inc. were critical in their amici brief not only of the Appellate Division’s “checklist,” for who qualifies to be a journalist, but of its endorsement of the intrusive hearing and its failure to recognize that the shield law protects the news process and non-confidential sources, not just confidential sources.

Amici did not take a position on the issue in its briefs, but when pressed told the court that its interpretation of the “news media” clause was roughly correct, and that while a lone blogger could qualify for the privilege, his or her newsgathering and dissemination should be “imbued” with a news process, and that the statute cannot simply apply to all bloggers. In the end, amici urged the court to continue to interpret the statute’s language broadly.

Justice Barry Albin appeared to recognize some of the problems with the Appellate Division’s “checklist,” for who is a journalist, but more than one justice asked for guidance as to the proper criteria. Based upon previous practice, a decision will likely be issued by the summer.

*Bruce S. Rosen, McCusker Anselmi, Rosen & Carvelli, P.C. in Florham Park, NJ, argued for media amici. Jeffrey Pollock of Fox Rothschild, Princeton, NJ argued for Appellant Shellee Hale. Joel Kreizman of Evans, Osborne & Kreizman in Oakhurst argued for Too Much Media, LLC. Ronald Chen, a professor at Rutgers Law School Newark, NJ, argued for the amicus ACLU-NJ. The Reporters Committee for Freedom of the Press, joined by several media entities and organizations, filed a brief but did not argue.*



# N.Y. Trial Court Finds Criminal Defendant's Sixth Amendment Rights Trump State Shield Law for Identity of Confidential Source

## *Newspaper Elects Not to Appeal*

By Jay Adkins

In January, a Brooklyn, New York, trial judge took the unprecedented step of ruling that, in the “exceptional circumstances” of the case before him, a criminal defendant’s Sixth and Fourteenth Amendment rights trumped the state Shield Law’s absolute privilege protecting the identity of reporters’ confidential sources. *In re Subpoena [People v. Diaz]*, 2011 WL 445809 (Sup. Ct. Kings Co. Jan. 11, 2011). The court directed the New York *Daily News* to disclose *in camera* whether its confidential law enforcement sources included either of the arresting officers and, if so, which one. After evaluating its prospects on appeal, the newspaper complied.

### Background

Following a December 2009 altercation with two police officers in Brooklyn, Angelo Diaz was charged with, *inter alia*, attempted murder under a theory of accomplice liability. According to the prosecution, he shouted “Shoot the cop! Shoot the cop!” as his co-defendant Angel Rivera struggled with an NYPD officer over control of Rivera’s gun. But in its story the day after the arrest, the *Daily News* had quoted a confidential police source as saying the “shoot the cop!” statement was made by Rivera’s mother -- not Diaz, whom the article did not mention. Rivera’s mother was taken into custody on an obstruction charge, according to the *News* article. (It is unknown whether any criminal case is pending against her.)

Diaz served a subpoena on the *Daily News* seeking the

identity of the unnamed law enforcement officer(s) quoted in the article. The paper moved to quash, arguing that because any such source was confidential, the information sought was absolutely privileged under the state Shield Law, N.Y. Civil Rights Law Section 79-h(b), and numerous state court precedents. (It also asserted that notes and other documents requested by the subpoena were, in any event, long ago destroyed.)

During briefing of the motion, defendant’s attorney narrowed Diaz’s demand to seek disclosure of the source’s identity only if the source was one of the two arresting officers.

### Trial Court’s Opinion and Order

The court conceded that New York constitutional and statutory law was clear in its support for the *Daily News*’ position and would preclude any prosecution subpoena for the same information. But it elected to treat the Shield Law privilege as a “rule of evidence,” citing *Chambers v. Mississippi*, 410 U.S. 284 (1973), for the proposition that “under some extreme circumstances, rules of evidence must be subordinated to a defendant’s due process right to a fair trial.” The court

then went on to state that “any number of state and federal decisions have concluded that the interests of the press protected by constitutional and statutory privileges may have to give way when weighed against a criminal defendant’s claim that protected information is vital to his defense.”

While all of the cases cited in this regard had either

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**The court then went on to state that “any number of state and federal decisions have concluded that the interests of the press protected by constitutional and statutory privileges may have to give way when weighed against a criminal defendant’s claim that protected information is vital to his defense.”**

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analyzed a *conditional* statutory or common law reporter's privilege or concluded that the persons invoking the privilege were ineligible to do so, the *Diaz* court nonetheless distilled from them a new conditional privilege -- applying "even if the information is confidential" -- that "must give way in the face of the Sixth Amendment" when "a criminal defendant seeks press information that (1) is highly material, (2) is critical to the defendant's claim, and (3) is not otherwise available."

The court declared the case before it to be "a textbook example of circumstances requiring that the press privilege be overridden." First, "the People's claim that [Diaz] was an accomplice to serious crimes is almost completely dependent on the ["shoot the cop!"] statement at issue." Second, defendant's claim that someone else made the statement "is critical to his defense." And third, assuming without saying that one or both of the arresting officers would lie about whether he was the source if in fact he had been, the court concluded that the *News* reporters alone possessed the "crucial information" whether one of those officers had told them that somebody other than Diaz made the statement -- thus opening the officer to impeachment if he testified to the contrary at trial.

The court limited the required disclosure to the sole question of whether the newspaper's source was an arresting officer, and if so who -- to be communicated to the court *in camera*. by the *News*' counsel. Only if counsel responded in the affirmative, and then only if the named officer (if any) actually testified at trial, would the identity of the source be revealed to the defense.

### **Decision Not to Appeal**

In the absence of on-point appellate authority in New York, a variety of considerations went into the *Daily News*' decision about whether to comply with the court's order or appeal it -- among them the quality of the court's legal reasoning, the facts of the case, New York cases that have weighed other privileges against Sixth Amendment rights, and on-point decisions from other jurisdictions. The newspaper concluded that while the opinion's legal analysis was certainly open to challenge on several grounds, other

factors weighed against an appeal.

The *Diaz* facts put the defendants' Sixth Amendment rights in a sympathetic light; the arresting officers' attribution of the "shoot the cop!" statement to Diaz is apparently the prosecution's sole evidence of his accessory liability on the attempted murder count -- and access to contrary evidence (if it exists) could be seen by a reviewing court as an interest strong enough to overcome even an absolute privilege. And that higher court could formulate a more sweeping rule, going beyond the narrow *Diaz* facts, to govern confrontations between the Shield Law's confidential source provisions and the Sixth Amendment; indeed the very appellate department that would hear any appeal of *Diaz* has held that a criminal defendant could, under the Sixth Amendment, pierce a different absolute privilege if he met a test similar to the one the *Diaz* court formulated.

Moreover, the *News*' research found that at least one other state's highest court, facing precisely the same question, reached the same result as the judge in *Diaz*, at least to the extent of requiring the journalist to turn over all materials requested by the criminal defendant for *in camera* review to determine their relevance and materiality to the defense.

Finally, a reported decision emanating from the same trial court that issued *Diaz* firmly rejected a criminal defendant's claim that, notwithstanding the Shield Law, his due process and Sixth Amendment rights entitled him to a taped confidential interview conducted by a news organization of the victim he was accused of raping on the ground that the victim might have made statements in the interview that could be used to impeach her at trial. *People v. Hendrix*, 12 Misc.3d 447 (Sup. Ct. Kings Co. 2006). The interests asserted by the *Hendrix* defendant were arguably less compelling than those here, and the case stands as a counterweight to efforts by criminal defendants to expand the scope of the *Diaz* decision -- which, as it stands, has minimal precedential effect in any case.

*Jay Adkins is the 2010-2011 Daily News Media Fellow and a third-year student at NYU Law School. The Daily News was represented by its Deputy General Counsel Anne B. Carroll; Rob Balin and Victor Hendrickson of Davis Wright Tremaine assisted in evaluating the newspaper's prospects on appeal. The defendant was represented by Laurie Dick of the Legal Aid Society.*

# Second Circuit Approves Court-Ordered Production of Documentary Film Outtakes

## *Existence of Reporter's Privilege Reaffirmed with Emphasis on Journalistic Independence*

By Landis C. Best and Catherine Suvari

In January 2009, documentary filmmaker Joseph Berlinger released a film entitled “*Crude: The Real Price of Oil*.” Berlinger’s film details an ongoing Ecuadorian legal battle in which a group of native Ecuadorians allege that Texaco Petroleum Company, a predecessor to Chevron Corporation’s wholly-owned subsidiary, Texaco, Inc., dumped billions of gallons of toxic waste into the Ecuadorian rainforest as part of an oil exploration and drilling effort begun in 1964. The plaintiffs allege that Texaco’s work caused an outbreak of cancer in the area surrounding rainforest drilling sites and the decimation of local indigenous groups.

### Background

Approximately one year after the debut of Berlinger’s documentary, in April 2010, Chevron Corporation filed a petition pursuant to 28 U.S.C. §1782 in the United States District Court for the Southern District of New York, seeking production of over 600 hours of outtake footage from the film. Chevron argued that it needed the outtakes to defend the ongoing litigation in Ecuador and to pursue a related arbitration regarding the alleged denial of due process by Ecuador’s government. Two individual petitioners also claimed that the outtakes would help them to

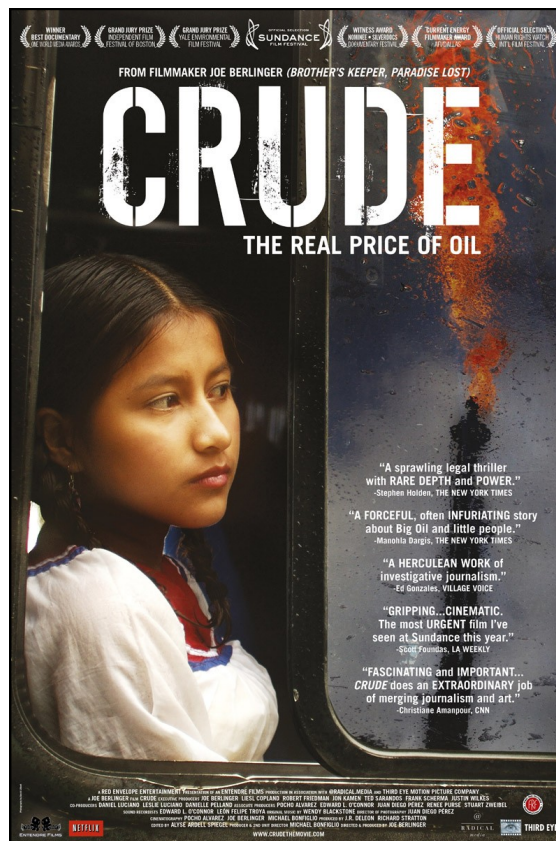
defend pending criminal charges in Ecuador stemming from the same events.

On May 10, 2010, Judge Lewis A. Kaplan granted Chevron’s application and authorized the subpoena of all 600 hours of unpublished footage. Judge Kaplan’s opinion noted that, even assuming the existence of a qualified journalist’s privilege for Berlinger’s material, Chevron’s petition satisfied the dual requirements of likely relevance and unavailability prescribed in *Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999) for production of non-confidential materials by a non-party press entity.

Judge Kaplan took special note of *Crude*’s provenance in his review of relevance, emphasizing that because plaintiffs’ counsel Stephen Donziger had “solicited Berlinger to create a documentary . . . from the perspective of his clients” and granted Berlinger “extraordinary access to players on all sides of the legal fight and beyond,” there existed “considerable reason” to believe that Berlinger’s outtakes were relevant to significant issues in the Ecuadorian proceedings, including whether there was improper influence of witnesses and the

Government of Ecuador. *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 297 (S.D.N.Y. 2010).

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**Berlinger’s film details an ongoing Ecuadorian legal battle in which a group of native Ecuadorians allege that Texaco Petroleum Company, a predecessor to Chevron Corporation’s wholly-owned subsidiary, Texaco, Inc., dumped billions of gallons of toxic waste into the Ecuadorian rainforest.**

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Berlinger resisted production under the May 10 order on several grounds, including that Judge Kaplan's order was overbroad, misapplied governing standards for the production of privileged material, and failed to adequately consider the existence of confidentiality agreements between Berlinger and his subjects. Berlinger's appeal, which began with an emergency motion to the Second Circuit for a stay pending accelerated appellate review, received support from several national media entities and organizations who filed a brief *amici curiae* in support of Berlinger. A panel of the Second Circuit granted Berlinger's stay application and set forth an expedited briefing schedule on the merits of Berlinger's appeal.

The Second Circuit (Leval, Hall, Parker, JJ.) heard oral argument of the merits of Berlinger's appeal on July 14, 2010 and issued an interim order following that argument that narrowed Judge Kaplan's May 10 ruling by limiting the production of outtakes to footage in three categories: footage showing (i) counsel for plaintiffs in [the Lago Agrio litigation]; (ii) private or court-appointed experts in that proceeding; or (iii) current or former officials of the Government of Ecuador. *Chevron Corp. v. Berlinger*, No. 10-1918(L) (2d Cir. July 15, 2010).

The interim order also specified that the use of any material produced under its authority should be limited exclusively to litigation, arbitration, or submission to either local or international official bodies, and it noted that a written opinion on the merits of Berlinger's appeal would follow. Berlinger complied with the narrowed order and produced the categories of outtakes required thereunder as the parties awaited the Second Circuit's written opinion. The Court issued its long-awaited opinion on January 13, 2011, reasserting the existence of a "qualified evidentiary privilege for information gathered in a journalistic investigation" but holding that, in light of Berlinger's failure to adequately demonstrate journalistic independence, the privilege either did not apply in his case at all or was so diminished that it had been overcome on the basis of plaintiffs' showing of need. See *Chevron Corp. v. Berlinger*, Nos. 10-1918-cv(L), 10-1966-cv(CON), slip op. (2d Cir. Jan. 13, 2011) ("*Chevron*"). Judge Pierre Leval, who had articulated the Circuit's existing standard for protection of non-confidential information gathered during a journalistic investigation eleven years

earlier in *Gonzales* authored the Court's unanimous opinion.

### Second Circuit's January 13 Decision

The Second Circuit reviewed the merits of Berlinger's appeal under the abuse of discretion standard and affirmed Judge Kaplan's May 10 ruling in full. See *Chevron*, slip op. at 15, 23. The Court began its opinion by restating that "[t]his Circuit has long recognized a qualified evidentiary privilege for information gathered in a journalistic investigation" but that the protection accorded by such a privilege is not absolute and varies according to the circumstances of each claim. *Id.* at 15 (citing *Gonzales*, 194 F.3d 29, *In re Petroleum Products Antitrust Litigation (Petroleum Products)*, 680 F.2d 5, 7-8 (2d Cir. 1982), and *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972)).

The Court further noted that the reporter's privilege is "intended to protect the public's interest in being informed by a 'vigorous, aggressive and independent press,'" and it summarized several guidelines for recognition of the privilege in Second Circuit case law: (i) the protection accorded by the privilege "is at its highest when the information sought to be protected was acquired . . . through a promise of confidentiality"; (ii) a person "need not be a credentialed reporter working for an established press entity to establish entitlement to the privilege," but "must have acted in the role . . . identified . . . as that favored by the public interest that motivates the privilege — [i.e.] the role of the *independent press*"; and, (iii) for purposes of determining the existence or relative strength of a particular privilege claim, "all forms of intention to publish or disseminate information are not on equal footing." *Id.* at 15-17 (italics in original; internal citations omitted).

In a key passage, the Court explained its reasoning as follows:

"While freedom of speech and of the press belongs to virtually anyone who intends to publish anything (with a few narrow exceptions), all those who intend to publish do not share an equal entitlement to the press privilege from compelled disclosure. Those

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who gather and publish information because they have been commissioned to publish in order to serve the objectives of others who have a stake in the subject of the reporting are not acting as an independent press. Those who do not retain independence as to what they will publish but are subservient to the objectives of others who have a stake in what will be published have either a weaker privilege or none at all.” *Id.* at 17.

Applying these principles to Berlinger’s claim, the Second Circuit concluded that “the district court’s findings adequately justified its denial of the press privilege” because, “[a]lthough the court did not explicitly state a finding that Berlinger failed to show his independence, its findings that (1) [plaintiffs’ attorney] Donziger ‘solicited Berlinger to create a documentary of the litigation from the perspective of his clients,’ and (2) ‘Berlinger concededly removed at least one scene from the final version of *Crude* at their direction,’ essentially assert that conclusion.” *Id.* at 18. Addressing Berlinger’s own written testimony regarding his intent to produce an objective film, the Court stated that, “[w]ithout doubt, . . . a journalist [solicited to investigate an issue who presents the story supporting the point of view of his solicitor] can establish entitlement to the privilege by establishing the independence of her journalistic process, for example, through evidence of editorial and financial independence.” *Id.* at 19. “But the burden is on the person who claims the privilege to show entitlement;” in this instance, the Court concluded, the district court was not obligated to credit Berlinger’s self-serving testimony without further corroboration and did not commit clear error when it declined to accept Berlinger’s unsupported assertion of independence. *Id.*

The Second Circuit also acknowledged Berlinger’s arguments regarding confidentiality and overbreadth but determined that Berlinger had failed to make any affirmative showing sufficient to render the district court’s ruling erroneous. Although Berlinger personally testified in written declarations to the district court, for example, that his subjects assumed confidentiality and would never have expected Chevron to see their footage, he did not submit any

corroborative evidence to establish this expectation and cited a release form in his submissions to the district court that entitled him to use such contributions freely and in perpetuity. *See id.* at 21.

Berlinger also failed to support his argument that outtake relevance could not be assessed from scenes in the published film with a proposal for distinguishing between relevant and non-relevant material. The Second Circuit remarked that: “[w]hile in general it is desirable for a district court to tailor a production order to material likely to be relevant, the district court lacked any reliable means of doing so. The court is not obligated to undertake this burden without help from the party requesting the limitation.” *Id.* at 22.

### Implications for the Journalist’s Privilege

First, the good news: the Second Circuit’s January 13 decision reasserts the continued vitality of existing First Amendment principles and suggests specific guidelines for securing protection. From a practical perspective, the decision is certain to impact the planning and execution of future investigative efforts by those members of the newsgathering and film-making communities eligible for protection from compelled disclosure of their work. But the narrow scope of the Court’s review limits its precedential effect on such protection: in reaching its decision, the Court reaffirmed the existence of a qualified privilege for information gathered in a journalistic investigation and then emphasized numerous factual details unique to Berlinger’s project that precluded a finding of error by Judge Kaplan.

Throughout its twenty-three page opinion, the Court cited practical defects in Berlinger’s showing to the district court while simultaneously identifying specific solutions that could have buttressed a privilege claim. The Court approved Judge Kaplan’s finding that Berlinger’s work had been solicited by plaintiffs, for example, but it noted that even a filmmaker who has been solicited to investigate a particular story and presents a final product that supports the soliciting party’s point of view can, “without doubt,” “establish entitlement to the privilege” through affirmative evidence of financial and editorial independence. *Id.* at 19.

The Court similarly approved Judge Kaplan’s findings

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regarding confidentiality and relevance in the *Crude* outtakes while emphasizing that Berlinger's own failure to demonstrate a confidentiality demand or to articulate a proposal for identifying irrelevant outtake footage (especially in a case presenting over 600 hours of outtakes) undermined his argument of error by the district court.

Second, the not-so-good news: the Second Circuit's focus on "independence" as an element to weigh in analyzing the reporter's privilege introduces uncertainty into the privilege. The requirement of independence gives those seeking outtakes another argument for defeating the privilege. What is worse is that the Court's opinion puts the burden of proving independence on the journalist. While successful challenge to traditional or mainstream reporters on independence grounds seems unlikely, it remains to be seen how this concept will be applied to non-traditional reporters such as amateur filmmakers, bloggers and the like.

In the end, the *Chevron* case is one that presents unusual facts and a deferential standard of review. That combination produced a poor result for Berlinger. Had Berlinger divined the Second Circuit's focus on independence ahead of time, there is little doubt that he could have presented a stronger basis for his independence and qualified for a more robust application of the privilege. And with a more robust application of the privilege, the Second Circuit may have had a harder time affirming Judge Kaplan's order in all respects. Thus there is a certain *ex post facto* nature to the Court's opinion that is unsettling. However, the basics of the reporter's privilege have been strongly endorsed by the Second Circuit, and all who would claim protection are on notice of the importance of the reporter's independence in securing the full protection of the privilege.

*Landis Best is a partner and Catherine Suvari an associate at Cahill Gordon & Reindel LLP. Together with Floyd Abrams, they represented a group of media companies and organizations as amici curiae in support of Mr. Berlinger's appeal of the district court's order requiring production of outtakes. Maura Wogan, Frankfurt Kurnit Klein & Selz P.C. represented Joseph Berlinger. Randy Mastro, Gibson Dunn & Crutcher LLP, represented Chevron Corp.*



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# U.S. District Court Unseals Search Warrant Materials in Giffords Shooting Case

By David J. Bodney and Peter S. Kozinets

In the two months following the January 8, 2011 shootings near Tucson, Arizona, which killed U.S. District Judge John Roll and wounded U.S. Rep. Gabrielle Giffords, the government and the defense team have joined in the filing of motions to seal a host of records in the case – for example, autopsy reports, mug shots and search warrant records. So far, none of those motions has been successful, and one – the attempt to block access to search warrant records – has resulted in a 13-page opinion that bolsters the media’s right of access to search warrant records in federal proceedings.

On March 9, 2011, U.S. District Court Judge Larry Alan Burns granted a motion to unseal search warrant records filed by Phoenix Newspapers, Inc., which publishes *The Arizona Republic*, and KPNX Broadcasting Company, which broadcasts *12 News*, in Phoenix. The Court held that there is a qualified First Amendment right of access to inspect search warrant records when the government’s criminal investigation has concluded, and the indictment has been filed, but before trial and before the records have become the subject of a suppression or other similar motion in the case. *United States v. Loughner*, --- F. Supp. 2d ---, 2011 WL 876852, No. 11cr0187 TUC LAB (D. Ariz. Mar. 9, 2011). In so ruling, Judge Burns answered a question left unresolved by the Ninth Circuit for more than two decades in *Times Mirror Co. v. United States*, 873 F. 2d 1210 (9th Cir. 1989). The court held that the government and the defense – which both opposed public access – had failed to demonstrate that “non-disclosure is ‘strictly and inescapably necessary’ in order to protect the Defendant’s fair trial guarantee or some other compelling interest.” *Loughner*, 2011 WL 876852 at \*6 (citations omitted).

## Background

On January 8, 2011, 19 people were shot – six fatally –

during Rep. Giffords’s “Congress on Your Corner” event at a shopping center near Tucson, Arizona. Jared Lee Loughner was arrested at the scene, and federal and state law enforcement officers jointly obtained a search warrant from a state court judge to search Loughner’s home. Within days, federal investigators obtained a second search warrant, from the same judge, to search a computer and two hard drives seized during the house search. Upon return of the warrants, the state court ordered the warrants, supporting affidavits and property inventories sealed.

On January 20, *The Arizona Republic* and *12 News* filed an application to intervene in state court for the limited purpose of seeking to vacate the court’s order sealing the search warrant records. The government, having already obtained a three-count federal indictment against Loughner for, *inter alia*, attempted assassination of a member of Congress in violation of 18 U.S.C. § 351(f), filed papers removing the application to the federal court presiding over the Loughner prosecution.

*The Republic* and *12 News* did not oppose removal, but instead proposed that the government provide copies of the search warrant records to the Court and counsel for the Defendant within 48 hours, and that both the government and the defense submit any specific proposed redactions to the court within five business days. Judge Burns substantially adopted the proposed order, and scheduled a hearing for February 18.

At the hearing, the prosecution represented that the government’s investigation remained active and ongoing, and that a superseding indictment would be filed promptly. Judge Burns found that, under *Times Mirror*, the press and the public had neither a First Amendment nor a common law right of access to the search warrant records at that time, but he expressly invited the media intervenors to renew their motion to unseal when circumstances changed.

On March 3, the grand jury returned a superseding

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**The court found “plenty” of recent authority specifying that warrants must be open to the public either after they are served or after criminal charges are filed.**

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indictment, and *The Republic* and *12 News* promptly renewed their motion to unseal. Judge Burns granted the renewed motion at Loughner's March 9 arraignment in Tucson, at which the government confirmed that its investigation had concluded and no further indictments were expected. Judge Burns then issued a detailed written opinion in support of public access to the records.

### The History and Logic Test

Quoting Chief Justice Burger's observations in *Richmond Newspapers v. Virginia*, 448 U.S. 555, 570-72 (1980), about the important role of openness when a shocking crime occurs – that “no community catharsis can occur if justice is done in the corner or in any covert manner,” and “the appearance of justice can best be provided by allowing people to observe it” – Judge Burns wrote that these concerns “resonate even louder in today's digital age.” *Loughner*, 2011 WL 876852 at \*2. Judge Burns observed: “Courts today play a major role in defining rights and liberties and in shaping public opinion. Because of this, access to court proceedings has grown increasingly important and there has been a corresponding expansion of rights on the part of the general public and the media under the First Amendment to attend almost all criminal proceedings.” *Id.* The court traced the expansion of public access to criminal proceedings – “which also encompasses a qualified First Amendment right to inspect and copy public records and documents, including judicial documents and records” – as developed in Supreme Court and Ninth Circuit decisions over several decades. *Id.* at \*2-\*3.

Judge Burns then turned to the “historical experience and logic test” in *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1, 8 (1986) (“*Press-Enterprise II*”), to evaluate whether a qualified First Amendment right of public access attached to the search warrant records at issue. The court noted that “[e]ven without historical tradition or experience, the Ninth Circuit has held that logic alone may be enough to establish a qualified right of access to court documents.” *Loughner*, 2011 WL 876852 at \*3 (citing *In re Copley Press*, 518 F.3d 1022, 1026 (9th Cir. 2008)).

While the government and the defense still insisted that *Times Mirror* barred public access, Judge Burns found that “changed circumstances” – the completion of the government's investigation and issuance of a final indictment – “have rendered that case inapposite.” *Id.*

### Trend of Allowing Public Access to Search Warrant Materials

Applying the history and logic test, Judge Burns noted that the case law on access to search warrants at the post-investigation, post-indictment, but pretrial, stage of criminal proceedings “is thin.” *Id.* at \*4. Nevertheless, the court found “plenty” of recent authority – largely consisting of numerous state statutes, local rules and other post-Watergate cases – “specifying that warrants must be open to the public either after they are served or after criminal charges are filed.” *Id.* Judge Burns wrote: “Given the critical importance of the public's right to be fully informed in [a] high profile case like this one, as well as the need for robust protection of a free press, this Court opts to be guided by the more recent authority.” *Id.* at \*5.

Judge Burns also found that logic supports early disclosure of search warrant records, and that openness can play a significant positive role in the functioning of the criminal justice system in numerous ways. For example, the court noted: “Search warrants are a ubiquitous part of the criminal investigatory process, and ordinary citizens are well aware of their prevalent use. The raw power implicated by the authority to conduct a search is enormous . . . . A person whose home or property is searched pursuant to a search warrant has an obvious interest in knowing that proper procedures have been followed. The general public shares that interest. Public scrutiny of the search warrant process – even after the fact – can shed light on how and why a warrant was obtained, and thereby further the public's interest in understanding the justice system.” *Id.*

Specifically, with respect to the recent Tucson shootings, Judge Burns agreed with *The Arizona Republic* and *12 News* that public inspection “will enable the public to evaluate for itself whether the government's searches went too far – or did not go far enough.” *Id.* at \*6. Moreover, “[p]ermitting inspection of the search warrants, the accompanying affidavits, and the property inventory will further public understanding of the response of government officials to the Tucson shootings, and allow the public to judge whether law enforcement functioned properly and effectively under the hectic circumstances of that day.” *Id.*

Judge Burns disagreed with a 2004 decision by the Southern District of California in which such access rights were rejected. *United States v. Inzunza*, 303 F. Supp. 2d 1041

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(S.D. Cal. 2004). Among other things, he disagreed with *Inzunza*'s conclusion that the "logic" factor of the *Press-Enterprise II* test applies only when evidence seized in a search becomes the subject of a suppression hearing. The *Inzunza* approach, he reasoned, would prohibit public access to, and scrutiny of, search warrants whenever the defense fails to raise the issue. *Loughner*, 2011 WL 876852 at \*6. See also *id.* n.2 ("[T]he historical justifications for open hearings and for the right to inspect court documents strongly suggest that the phrase 'the particular process in question' [from *Press-Enterprise II*, 478 U.S. at 8] should be broadly construed to encompass the post-investigation, post-indictment stage of the criminal process . . .").

Finding that the First Amendment right of access applies at this early stage, Judge Burns wrote that the government and the defense had failed to demonstrate "that non-disclosure is 'strictly and inescapably necessary' in order to protect the Defendant's fair trial guarantee or some other compelling interest." *Id.* at \*6 (citations omitted). The court observed that much of the requested information had already found its way into the public domain, and that the privacy and reputational interests of third parties were unlikely to be harmed because "the only third parties mentioned in the

warrant materials are law enforcement agents and citizen witnesses who are not, and have never been, suspects in the case." *Id.* at \*7.

The court favorably considered a variety of alternatives to closure of the search warrant records, including "a comprehensive jury questionnaire," allowing counsel to "personally and extensively voir dire prospective jurors," and possibly permitting "additional peremptory challenges to each side . . ." *Id.* at \*8. Finally, the court "redacted a minimum of information" from the property inventory and one of the affidavits "that are likely to be inflammatory and difficult to forget, or inadmissible at trial." *Id.*

On March 9, shortly following the issuance of the court's opinion, the search warrant records in the *Loughner* case were made publicly available.

*David J. Bodney and Peter S. Kozinets of the Phoenix office of Steptoe & Johnson LLP represented Phoenix Newspapers, Inc. and KPNX Broadcasting Co. in this matter. The government was represented by Wallace H. Kleindienst, Beverly K. Anderson, Christina M. Cabanillas and Mary Sue Feldmeier of the United States Attorney's Office in Tucson. The defendant was represented by Judy C. Clarke, Reuben Camper Cahn and Mark Francis Fleming.*

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# Plaintiffs in Girls Gone Wild Civil Suit Allowed to Proceed Anonymously

## *Potential for Harm Outweighs Interest in Openness*

The Eleventh Circuit granted a request by four young women plaintiffs to proceed anonymously in their civil lawsuit against the producers of the Girls Gone Wild video series. *Plaintiff B v. Joseph R. Francis*, No 10-10664 (11th Cir. February 1, 2011) (Dubina, Anderson, Moody, JJ.). Florida Freedom Newspapers intervened at the trial level and Court of Appeals to argue that plaintiffs' identities should be revealed in open court even if the media exercised its judgment not to publish plaintiffs' names. The defendants also opposed the request for anonymity.

The plaintiffs in the case are four women who were under 18 at the time they exposed their breasts or engaged in sexual activity in front of the Girls Gone Wild cameras. They sued for privacy and related claims and filed a motion to remain anonymous throughout the trial. The district court denied their motion, finding that the presumption of a trial's openness overrode potential concerns related to disclosing "information of the utmost intimacy." The district court found that their on camera sexual activity was not "the type of fundamentally personal issue that warrants the imposition of anonymity like abortion, birth control, or religion." The court further failed to find any significant evidence of harm that plaintiffs would suffer due to having their identities revealed.

Applying an abuse-of-discretion standard, the Court of Appeals reversed, finding that the district court improperly characterized some of plaintiffs' conduct as casual and voluntary and discounted expert evidence of harm. The Court acknowledged that there is a strong presumption in favor of openness, but it may be overridden by demonstrating a substantial privacy right, judged by all the circumstances of a case.

The district court failed to give proper weight to the intimate information that would arise during plaintiffs' testimony, including details about their nudity and sexual encounters, as minors, during the filmed events at issue. For two of the plaintiffs who flashed their breasts, the lower court should have considered whether they would be revealing information of the utmost intimacy, even if their conduct was not eventually classifiable as sexual in nature. For the other two plaintiffs, the Court of Appeals determined that the district judge improperly deemed their actions as casual and voluntary, after finding that both engaged in graphic sexual activity.

The Court of Appeals also found that the district court failed to properly consider the plaintiffs' expert evidence on harm from the loss of anonymity. Such evidence included the psychological damage of being labeled a "slut," a permanent connection to the videos through websites like IMDB.com, and the public's ability to discover their association with the videos through search engines. The Court noted that all these problems would be exacerbated by the videos' continuing availability on the marketplace, on sites such as Amazon.com, and the plaintiffs would suffer a lifetime as "subjects to any online shopper's desire for underage nudity."

The court further noted that the defendants did not show that anonymity would result in any harm and would likely be unable to do so. Furthermore, because the defendants are themselves aware of plaintiffs' identities, they are not constricted in conducting full discovery in this case in preparation for trial.

The court ordered the district judge to allow two of the plaintiffs who engaged in sexual activities to remain anonymous and to reconsider the requests of the other two plaintiffs in light of the opinion. The Court explicitly did not address the issue of whether allowing anonymity here would serve as a prior restraint in violation of the First Amendment but directed the district court to do so. In a brief partial concurrence and partial dissent, Judge Moody opined that the district court did not abuse its discretion in not allowing the first two plaintiffs to proceed anonymously, as their acts of flashing on a public street did not meet the utmost intimacy standard.

*Charles Marshall, Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., Raleigh, NC represented Florida Freedom Newspapers in this matter.*

# Court Invalidates \$1 Million Fee for Access to Electronic Public Records

By Sigmund D. Schutz

The trial-level round of Maine's most complex and hard-fought right-to-know case in recent memory ended in victory for the public with a decision issued on February 22, 2011. *MacImage of Maine, LLC v. Androscoggin County*, Slip Op., CV-09-605 (Cumb.Cty.Sup.Ct. Feb. 20, 2011) (Warren, J.). The case pit a business owner and entrepreneur who seeks to build a website providing efficient public access all Maine land records against six counties intent on preventing competition by what the counties considered to be an interloper.

In a thirty-eight page decision following a five day trial Superior Court Justice Thomas Warren addressed a range of issues of interest to the media.

## The Little Guy Takes on County Government

In September of 2009, MacImage of Maine, LLC sent six identical public records requests to six Maine counties. MacImage is a one-man operation that offers internet access to land records and owns the [www.registryofdeeds.com](http://www.registryofdeeds.com) domain. MacImage requested all electronic data files containing scanned copies of all recorded land records and grantor-grantee indexes, a total of more than 25.8 million pages of records (excluding indexes).

The operative Maine statute as applied to MacImage's request limited copy charges to a "reasonable fee." 33 M.R.S.A. § 751. The Maine Legislature amended the statute by P.L. 2009, ch. 575 (effective July 11, 2010), to set out a list of factors "relating to the cost of producing and making copies available" to be considered in setting a "reasonable fee."

One county offered a copy of its microfilm for a charge of \$96,962 plus labor. The remaining five counties quoted a collective price tag of \$912,853.15 plus various incidental charges.

## Right of "Bulk Access" to Electronic Records Vindicated

MacImage's position was, essentially, that copying data files from one computer to another can be done easily,

quickly, and inexpensively. As a result, the fees set by the counties for copies were not reasonable.

The Counties countered with a slew of arguments including: (A) that a reasonable fee may be based on the overall cost of maintaining data in electronic form; (B) that the public is not entitled to a copy of an electronic database if given access to a website that allows the public to search for and retrieve individual records; and (C) that contracts with outside computer vendors responsible for their computer systems prevented copying. The counties' arguments failed across the board.

(A) *Fees Based on Overall Costs of Maintaining Electronic Data.* Reasoning that government incurs costs to create and maintain electronic records whether or not copies of a record are ever requested or provided to the public, the Court rejected the argument that a copy fee could be "based on the overall cost of maintaining their data in electronic form." *Id.* at 15. Maintenance costs do not relate to copying since counties incur such costs regardless of whether there is ever a request for a copy of a record. "The court also understands the counties' and the registers' evident desire to maintain the integrity of their registries against an entity they perceive as an interloper and to protect their sources of revenue against competition. However, that does not permit them to charge fees that cannot be justified under the Freedom of Access Law . . ." *Id.* at 16.

(B) *Whether the Public Is Entitled to a Copy of a Database.* The counties argued that their public access obligations were fulfilled by offering to the public an opportunity to inspect and copy any land record at their websites, which allow the public to search for and retrieve any individual record. The court disagreed. "[T]he copying of individual records from the website on an image by image basis" did not "substitute for [MacImage's] right under the Freedom of Access Law to obtain a copy of the electronic data compilations maintained by the counties." *Id.*

(C) *The Right to Pass on Vendor Charges.* A few counties took the position "that it is not unreasonable . . . to charge a fee that simply passes along its vendor's charges"

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for making the requested electronic copies. *Id.* at 24. The court was not convinced.

[T]he court cannot accept Cumberland's argument that [the vendor] has a legal right to exercise a veto power over any request for copying of Cumberland's electronic land records and indexes. A governmental entity cannot place public records subject to the Freedom of Access Law beyond the request of requests by using an outside contractor to manage that data . . . .

*Id.* at 26. Likewise, a county "cannot insulate data from a Freedom of Access request by maintaining it with [a contractor] in a [ ]proprietary form." *Id.* at 28-29.

The Court issued a sweeping mandatory injunction requiring that each county respond to MacImage's request and limiting the amount that may be charged to no more than a few thousand dollars per county, less than 2% of the amount initially quoted.

### Implications for the Media

As government records go digital the media faces new hurdles and opportunities in the fight for public access. The problem of excessive fees should diminish when electronic records are at issue since the cost of making digital copies is nominal.

As *MacImage* demonstrates, the media should not stand for new and creative ways of ratcheting up fees for digital copies. Government databases are a great tool for gathering statistics and other information shedding light on the functioning of government. Those databases are public records. Access to individual files in hard copy or electronic form is not an acceptable substitute.

Finally, government agencies often contract with computer vendors to maintain websites, databases, and computer systems. The involvement of a non-governmental vendor is a complication, but cannot impede public access to electronic public records.

*Sigmund D. Schutz of Preti Flaherty LLP in Portland, Maine represents MacImage of Maine, LLC. The six defendants were represented collectively by five different Maine-based law firms.*

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# New York Trial Court Dismisses Article 78 Petition Attempt to Block Release of Teacher Data

## *Teachers Have No Privacy Interest In Performance Ratings*

By Amanda M. Leith

Decision

A New York trial court recently dismissed an effort by the New York City teachers union to block the release of reports assessing the job performance of city school teachers that had been sought by a number of news organizations under New York's Freedom of Information Law. *Mulgrew v. Board of Education*, No. 113813/10 (N.Y. Sup. Ct. Jan. 10, 2011) (Kern, J.). The court denied the union's petition, finding that the Department of Education properly determined that the teachers had no significant privacy interest in the performance of their public functions, and that release of the reports was crucial to local control of public schools.

### Background

The New York City Department of Education ("DOE") has in the last few years implemented a program designed to evaluate teacher's "added value" by comparing students' predicted improvement on state-wide tests with their actual improvement, known as teacher data reports ("TDRs"). In August through October 2010, several media organizations made requests under New York Freedom of Information Law ("FOIL") for the TDRs, including disclosure of the individual teacher's names. Although in the past it had redacted teacher names before disclosing the reports, the DOE indicated that it would comply with the most recent requests and disclose the names.

Upon learning of the DOE's determination to disclose teacher names, the United Federation of Teachers ("UFT") filed an Article 78 petition, seeking an order directing the DOE to redact and keep confidential the names of any teachers found in the TDRs. The UFT argued that the TDRs, and specifically the teachers' names, should be withheld under two exemptions to the presumed disclosure under FOIL – the exemptions for "inter-agency or intra-agency materials which are not statistical or factual tabulations of data" and materials which, "if disclosed, would constitute an unwarranted invasion of personal privacy."

The news organizations moved to intervene in order to oppose the petition.

The court first addressed UFT's standing to bring the petition. It found that, although the union was not the entity that made the FOIL request, it had standing to challenge the DOE's determination to release the records. The court noted both that FOIL did not specifically address the question of whether the subject of requested records may challenge disclosure and the lack of case law directly on point, but further observed that several courts had permitted such cases to go forward. In addition to promoting disclosure by the government, FOIL is intended "to protect the interests of parties who would be harmed by such disclosure if the subject records fall into one of the exceptions enumerated under FOIL." The court held that the UFT had demonstrated that the DOE's action would have "a harmful affect" on the union and that "it is within the zone of interest encompassed by the statute."

With respect to the issue of the disclosure, the court concluded that the only issue before it was "whether the DOE was 'arbitrary and capricious' in determining that the unredacted TDRs would be released because the names of the individual teachers did not fall into any exception under FOIL," and that it would not conduct a *de novo* review of the DOE's decision. The court held that "the DOE's determination that teachers' names were not subject to any of the [FOIL exemptions submitted by the UFT] was not arbitrary and capricious."

According to the court, while the TDRs may have been intra-agency records, as a compilation of data regarding students' performance "the DOE could have rationally determined that . . . the unredacted TDRs . . . are statistical tabulations of data which must be released." It found the UFT's argument that the records should be released because they were flawed and unreliable to be without merit, noting that the "Court of Appeals has clearly held that there is no requirement that data be reliable for it to be disclosed," citing *Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 277

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(1996).

The court similarly held that the DOE rationally found that the release of the teachers' names would not cause an "unwarranted invasion of personal privacy." It found that under Court of Appeals' precedent, the appropriate test required it to balance the "privacy interests at stake" against the "public interest in disclosure of the information," citing *The New York Times Co. v. City of New York Fire Dept.*, 4 N.Y.3d 477, 485 (2005).

The court noted that the release of even negative job-performance related information repeatedly has been held not to constitute an unwarranted invasion of privacy, while the release of personal information such as birth dates or personal contact information had been held to constitute such an invasion. Since the data at issue related to the teachers' work performance in connection with a public agency, as opposed to their personal lives, the Court found that the DOE could have reasonably determined that releasing the unredacted TDRs would not be an unwarranted invasion of the teachers' privacy and, in addition, that the privacy interests of the teachers was outweighed by the public interest in disclosure.

Finally, the court dismissed the UFT's contention that the DOE could not release the TDRs under FOIL based on the department's promise to the teachers that the reports would be confidential, holding that regardless of whether such assurance "constituted a binding agreement, 'as a matter of public policy, the Board of Education cannot bargain away the public's right to access to . . . public records,'" quoting *LaRocca v. Board of Educ. Of Jericho Union Free School Dist.*, 220 A.D.2d 424, 427 (2d Dep't 1995).

UFT has noticed its appeal of the decision, and the trial court's decision has been stayed pending an expedited briefing of the appeal.

*The Media Organizations, which included Dow Jones & Company, Inc., NYP Holdings, Inc., Daily News, L.P., the New York Times Company and NYI News, were represented by David A. Schulz, Cameron Stracher and Amanda M. Leith of the New York office of Levine Sullivan Koch & Schulz, L.L.P. The United Federation of Teachers was represented by Charles G. Moerdler, Alan M. Klinger and Ernst H. Rosenberger of Stroock & Stroock & Lavan LLP and the Department of Education was represented by Jesse Levine, Assistant Corporation Counsel.*

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## Colorado Judge Seals Arrest Warrant Affidavits

### *First Amendment and Common Law Rights Outweighed by Countervailing Interests*

By Steven D. Zansberg

A Colorado County Court judge has kept under seal arrest warrant affidavits in the sexual assault case filed against a Denver Broncos football player, Perrish Cox. In doing so, Judge Susanna Meissner-Cutler denied the motions to unseal that had been filed by the Associated Press, *The Denver Post*, and *The New York Times*.

Cox, a defensive back for the Broncos, has been charged with two counts of felony sexual assault (involving a victim who was "physically helpless" and "incapable of determining the nature of the conduct"), charges that reportedly carry a maximum sentence of life in prison. At his first court appearance, on December 10, 2010, reporters for the Associated Press, *Denver Post*, and *New York Times* each asked the court, in handwritten motions, to unseal the court

file, including the affidavit of probable cause in support of arrest.

After a hearing on those motions on December 13, 2010, Judge Meissner-Cutler ordered that the felony complaint be unsealed, with the victim's name redacted (as is required under Colorado's Criminal Justice Records Act), but reserved until the next court date, a status conference on January 7, 2011, whether to unseal any portions of the affidavit of probable cause, which sets forth the factual basis for the arrest and charges.

At the hearing on January 7th, both the prosecutor and defense counsel represented to the court that they were engaged in "ongoing investigations," which they claimed would be interfered with if the arrest warrant affidavit were unsealed. Additionally, the victim had retained her own

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attorney, who appeared and notified the court that the victim, too, wished to maintain the affidavit under seal. Counsel for the three news entities urged the court to exercise its discretion and release a redacted affidavit, that would adequately protect the privacy rights of the victim and the ongoing investigation, while allowing the public to know what is the basis for the defendant's arrest and the felony charges against him.

In a detailed bench ruling (borrowed, literally verbatim, in parts from the similar ruling, back in 2003 in the Kobe Bryant rape case in Colorado that was dismissed by the prosecutor on the first day of jury selection), Judge Meissner-Cutler denied the news media's request to unseal the affidavit of probable cause in its entirety.

The Court said it was required to balance competing interests: the rights of the press and public, under First Amendment, to attend proceedings and inspect court files, and the privacy rights the defendant and the victim, the ongoing investigations of counsel, and the defendant's fair trial rights.

Applying a "strict scrutiny" analysis, the court found that the First Amendment rights to attend judicial proceedings and inspect court records were outweighed by countervailing interests "of the highest order." The judge found that release of the affidavit of probable cause "would recite facts that could severely prejudice the defendant's rights to a fair trial, [because] this information is not presently a matter of public record." Moreover, the judge stated, much of the information in the affidavit would not be entered into the public record in the preliminary hearing. The affidavit, as she described it, includes a factual recitation of:

- ◆ graphic details of the alleged sexual encounter;
- ◆ statements of police officers, including hearsay from third parties that would not be admissible;
- ◆ medical tests that have not been subject to cross-examination by the defense;
- ◆ witness statements from individuals who may not know that they are identified in the affidavit;
- ◆ numerous factual details that are

irrelevant and inadmissible;

- ◆ statements of the defendant that may not be admitted at trial or introduced at the preliminary hearing; and
- ◆ descriptions of items of evidence that were obtained which also may not be admitted.

In short, the court said, the affidavit contains "multiple statements that bear little relevance to the determination of probable cause and the release of such information would be highly prejudicial and inflammatory."

On this basis, the Court found, there is "a substantial probability of prejudice to the defendant's fair trial rights." Acknowledging that some of the information concerning the alleged crime will be disclosed at the preliminary hearing, the Court found that delaying release of documents is one way to protect the fair trial rights of the defendant.

The Court also found that both the victim and the accused enjoy rights of privacy and that the release of the arrest affidavit (even with the victim's name redacted) would subject her to harassment and abuse.

Based on the evidence the Court had received (some of it under seal), and the representations of the attorneys before the court concerning their investigations, the Court also found that releasing the affidavit would interfere with ongoing investigations.

Lastly, the Court rejected the press' request to release a redacted version of the affidavit, finding that "redaction would render the affidavit meaningless" and would result in "inappropriate presumptions and presumptions" by those reading the affidavit in a highly redacted form. In sum, "redaction of prejudicial information only is not a viable alternative." Thus, the affidavit of probable cause shall remain under seal, in its entirety, until further order of the court.

The preliminary hearing is set for March 10, 2011. It is anticipated that one or more of the parties will ask the court to close portions, if not all, of that preliminary hearing, on the same grounds that the court has ordered that the arrest warrant affidavit be sealed.

*Steven D. Zansberg, a partner in the Denver office of Levine Sullivan Koch & Schulz, represented the media intervenors.*

# Associated Press and Shepard Fairey Settle Obama "HOPE" Poster Case

## *Settlement Calls for Both Sides to Work Together with "HOPE" Image*

By Nancy E. Wolff

The Associated Press and the street artist, Shepard Fairey, who created the Barack Obama "HOPE" poster have agreed to settle their copyright infringement claims against each other. The deal ends a dispute that began in February 2009 when Fairey brought an action in federal court seeking a court declaration that he did not violate AP's copyrights by basing his Obama "HOPE" poster on an AP image. The AP countersued for infringement, arguing that his uncredited, uncompensated use of its photograph was not fair use but an infringement. The Fairey "HOPE" poster became an unofficial image of the Obama's presidential campaign, never sanctioned presumably due to rights issues.

As part of the settlement, Fairey agreed to not use another AP photograph in his work without obtaining a license from the AP. The settlement, as reported, calls for both sides to work together with the "HOPE" image and share rights to make posters and merchandise based on it. Fairey and the AP have agreed to collaborate on a series of images that Fairey will create based on AP photographs. The AP's copyright infringement lawsuit against Obey Clothing and One 3 Two, Inc., a company that sells clothing including the Obama "HOPE" image, is still active and unless settles, is scheduled for a March trial. The



**The deal ends a dispute that began in February 2009 when Fairey brought an action in federal court seeking a court declaration that he did not violate AP's copyrights by basing his Obama "HOPE" poster on an AP image.**

financial aspect of the settlement is confidential.

The settlement allows each side to maintain its legal positions with respect to fair use. In the press release announcing the settlement, Tom Curley, the AP's president and CEO states "The AP will continue to vigilantly protect its copyrighted photographs against wholesale copying and commercial-ization where there is no legitimate basis for asserting fair use" Fairey statement includes: "I respect the

work of photographers, as well as recognize the need to preserve opportunities for other artists to make fair use of photographic images, I often collaborate with photographers in my work, and I look forward to working with photos provided by the AP's talented photographers."

This settlement ends (except for the remaining lawsuit against Obey Clothing) a dispute that has had more twists, turns and out rights surprises over the past two years. Initially, Anthony

Falzone and attorneys from The Stanford Law Center Internet and Society's Fair Use Project represented Fairey, among others against the AP.

The website for The Stanford Center for Internet and Society's "Fair Use Project" states that it "was founded in 2006 to provide legal support to a range of projects designed to clarify, and extend, the boundaries of "fair use" in order to

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enhance creative freedom.”

Although Fairey admittedly used an AP image to form the bases of the HOPE poster image, Fairey steadfastly denied that it was the close-up portrait of Obama as asserted by the AP, but rather one in which Obama is photographed seated with George Clooney and his head is titled at a slightly different angle.

After discovery revealed missing files from document production, it was learned that Fairey had fabricated or destroyed or attempted to destroy relevant evidence. Fairey alleged he made a mistake, about the AP photo he used, and in October 2009 AP filed an amended Answer, Affirmative Defenses and Counterclaims based on the spoliation and fabrication of evidence. Obey Clothing, as the exclusive licensee of Fairey’s trademarks and designs on clothing was added as a counterclaim defendant.

Thereafter, in November 2009, Judge Hellerstein, the federal judge hearing the case ruled that Fairey’s lawyers could withdraw from the case based on Fairey’s fabrication of evidence. The AP had objected over concern that the substitution of attorneys would cause additional delay and expense for the not-for-profit news agency. It was later revealed in January of 2010 that Fairey was under criminal investigation. Attorneys Jones Day were substituted as counsel for the Stanford Internet Law and Society Project and Fairey’s other lawyers.

Meanwhile, in July 2009 AP photographer, Mannie Garcia intervened and made cross claims against the AP and counterclaims against the Fairey parties for copyright infringement, alleging that he, not the AP was the owner of the copyright in the now infamous image. On July 16, 2009, AP released a statement on Garcia’s employment stating that “AP clearly owns the copyright in the photograph as a work for hire. Mannie Garcia was a salaried employee from whom taxes were withheld and to whom overtime was paid, among many other documented indicators providing proof that he was a staff employee at the time the photo was taken in 2006.

At the same time, the AP notes that Mr. Garcia shares AP’s position that the photo used by Mr. Fairey is protected by copyright. Like AP, Mr. Garcia also disputes Shepard Fairey’s assertion of the Fair Use Doctrine and claims infringement of copyright.”

On August 20, 2010, Garcia voluntarily withdrew his action against the parties with prejudice. The AP put out a statement noting that it pleasure that Mannie Garcia withdrew from the case with prejudice, and without any payment or consideration of any kind. AP also withdrew its claims against Garcia.

Based on the suggestion of settlement, On January 11, 2011 Judge Hellerstein filed an order severing the issues and dismissed the claims between AP and Fairey, with prejudice and without costs, subject to reinstatement by motion within 30 days.

On January 20, 2011 Fairey and the other plaintiffs, other than the third party clothing companies, voluntarily dismissed the claims against the AP with prejudice and without costs.

It seems unlikely that the clothing companies that profit from the sale of merchandise depicting the “HOPE” poster image, will take on the Fair Use fight alone after Fairey’s settlement with AP.

For a case that began after a gallery owner started a search for the photo that served as the underlying art for the Fairey “HOPE” poster, no substantive decisions were made and the Fair Use doctrine has neither been clarified nor expanded.

The position that a license may be required from the underlying copyright owner when creating a derivative work remains an issue that must be analyzed on a case-by-case basis. What a long, strange trip this has been!

AP press releases on this case are located at [http://www.ap.org/pages/about/pressreleases/pr\\_011211a.html](http://www.ap.org/pages/about/pressreleases/pr_011211a.html)

*Nancy E. Wolff is a partner at Cowan DeBaets, Abrahams & Sheppard, LLP in New York City.*

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# Media Defendants All A-Twitter

## *Southern District Construes Twitter's Terms of Use Narrowly, to Media Entities' Chagrin*

By Toby Butterfield and Ben Bartlett

The recent decision in [Agence France Presse v. Morel](#), 2010 U.S. Dist. LEXIS 139103 (S.D.N.Y. Dec. 23, 2010) (Pauley, J.) highlights the dangers of reproducing or distributing online content found on a website before carefully analyzing and understanding the website's terms of use agreement. While website terms of use typically include a wide range of broadly drafted provisions aimed at insulating the website operator from legal liability, that protection does not insulate the website's users or customers from potential legal claims. As demonstrated in *Morel*, content found on another party's website, no matter how widely distributed, may need to be cleared before use by a third party, and failure to obtain such clearance may subject the user to litigation.

### Proving the Contents of a Terms of Use Agreement

As a preliminary matter, it is worth recapping enforceability of terms of use agreements. Such agreements are posted online and are designed to establish the terms to which users of a website and the website's operator have

agreed or to which they are deemed to have agreed by virtue of their use of the site. Practices vary widely as to whether the terms simply appear as a link which a user must seek out (a "browse-wrap" agreement), terms which every user is shown each time they log in, or which they are shown once when they become a registered user of the site. Sometimes the terms disappear into a long unseen box (usually bearing a dauntingly small scrollbar symbol), and sometimes users must scroll past every word before having the opportunity to check the box indicating that they have seen and agree to all the terms.

While courts have typically enforced so-called "click-wrap" agreements, and sometimes enforce "browse-wrap" agreements, courts have been historically reluctant to assume that a consumer has agreed to specific terms, absent

credible proof that they were in fact shown the actual terms in force at the time of the particular transaction. [Rappaport v. Storfer Bros., Inc.](#), 2 Misc. 2d 395 (N.Y. App. Term 1956) (bailee accused of losing property through negligence had burden to prove bailor was specifically aware of limitation of liability in fine print of storage receipt).

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While "[a] party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing," courts are quick to add that "when the writing does not appear to be a contract and the terms are not called to the attention of the recipient ... no contract is formed with respect to the undisclosed term." *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.*, 89 Cal. App. 4th 1042, 107 Cal. Rptr. 2d 645, 651 (Cal. Ct. App. 2001); Cf. *Cory v. Golden State Bank*, 95 Cal. App. 3d 360, 157 Cal. Rptr. 538, 541 (Cal. Ct. App. 1979).

So while courts have accepted the enforceability of "click-wrap" agreements generally, some have concluded that "the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms." *Bar-Ayal v. Time Warner Cable Inc.*, 2006 WL 2990032, at \*13 (S.D.N.Y.) (quoting *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 35 (2<sup>nd</sup> Cir. 2002); *Jackson v. American plaza Corp.*, 2009 WL 1158829, at \*4 (S.D.N.Y.).

Instead, when a user does not concede the point, courts consider in detail "whether a website user has actual or constructive knowledge of a site's terms and conditions prior to using the site." 2007 U.S. Dist. LEXIS 96230; see also *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 20 (2d Cir. 2002); [Hines v. Overstock.com, Inc.](#), 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009).

### The Facts in Morel

*Morel* dealt with the terms of use of the social networking site Twitter, and whether these terms permitted a news organization to reproduce photographs originally posted to one of Twitter's websites by an individual photographer. In the hours following the Haiti earthquake, both the photographer Morel and someone else acting without Morel's authorization, uploaded various photographs taken by Morel to Twitter's picture sharing service, Twitpic. In the wake of the disaster, the French press agency, AFP, found both sets of Morel's photographs on Twitter, and then reproduced the photographs and distributed them to other media companies. As a result, Morel's photographs were widely used in media reports of the earthquake.

After discovering AFP's use of his photographs, Morel

asserted that he had not authorized AFP to use the photographs and that such unauthorized use constituted copyright infringement. AFP responded by filing a declaratory judgment complaint against Morel, asking the court to declare that AFP had the right to use the photographs Morel had posted on Twitter. In turn, Morel filed a counterclaim for copyright infringement and various other claims against AFP, as well as Getty Images, another photography agency, and two broadcasters, CBS Broadcasting and Turner Broadcasting System, whom Morel claimed had also used his photographs without permission.

AFP and its fellow counterclaim defendants (collectively, the "Media Parties") filed a motion to dismiss Morel's claims, arguing that Morel had effectively licensed others to use his photographs by virtue of uploading them under Twitter's terms of use. The Twitpic login page explicitly advised users that "by clicking 'Allow', you continue to operate under Twitter's Terms of Service." *Morel*, 2010 U.S. Dist. LEXIS 139103 at \*14.

Twitter's terms of use provided, in part:

You retain your rights to any Content you submit, post or display on or through the Services. By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods . . .

You agree that this license includes the right for Twitter to make such Content available to other companies, organizations or individuals who partner with Twitter for the syndication, broadcast, distribution or publication of such Content on other media and services, subject to our terms and conditions for such Content use.

[www.twitter.com/tos](http://www.twitter.com/tos) (Last accessed January 13, 2011).

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While Twitter's general terms of use did refer to Twitter's and its users' intent to make uploaded content widely available, additional terms applying specifically to the Twitpic picture sharing service stated that users of the website granted a license to use their photographs "only to Twitpic.com or affiliates." *Morel*, 2010 U.S. Dist. LEXIS 139103 at \*15.

### The Morel Court's Analysis

The *Morel* court analyzed these terms of use and rejected the Media Parties' argument that they had a license to use Morel's photographs by virtue of Twitter's terms of use. *Id.* at \*15-16. The court found that Twitter's terms of use granted a license to use Morel's photographs only to Twitter and its partners or affiliates. *Id.* Because the Media Partners were neither partners nor affiliates of Twitter, their uses were not licensed. Though Twitter's terms of use stated that "[we] encourage and permit broad re-use of Content," the court found that the terms of use made clear that, in reference to content posted by Twitter users, "what's yours is yours – you own your content." *Id.* at \*15.

Accordingly, the court denied the Media Parties' motion to dismiss with respect to Morel's copyright infringement claims, leaving the Media Parties vulnerable to an award of potentially substantial damages if Morel's claims ultimately prove successful. *Id.* at \*16, \*32-33. (The court also denied the Media Parties' motion to dismiss with respect to Morel's additional claims based on violation of the Digital Millennium Copyright Act. The court granted the Media Parties' motion to dismiss with respect to Morel's claims of false advertising under the Lanham Act.)

While the Media Parties' heavy reliance on Twitter's terms of use left them legally vulnerable, Twitter's terms of use ensured that Twitter's operators evaded Morel's claims. Indeed, Twitter's terms of use were drafted specifically to insulate Twitter against liability in cases such as *Morel*. In particular, the terms provided:

You [the user] are responsible for your use

of the Services, for any Content you provide, and for any consequences thereof, including the use of your Content by other users and our third party partners . . .

www.twitter.com/tos (Last accessed January 13, 2011).

Further limiting Twitter's potential liability, another provision states:

TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, TWITTER . . . WILL NOT BE LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL OR PUNITIVE DAMAGES . . . RESULTING FROM . . . (ii) ANY CONDUCT OR CONTENT OF ANY THIRD PARTY ON THE SERVICES, INCLUDING WITHOUT LIMITATION, ANY DEFAMATORY, OFFENSIVE OR ILLEGAL CONDUCT OF OTHER USERS OR THIRD PARTIES; (iii) ANY CONTENT OBTAINED FROM THE SERVICES; AND (iv) UNAUTHORIZED ACCESS, USE OR ALTERATION OF YOUR TRANSMISSIONS OR CONTENT . . . WHETHER OR NOT TWITTER HAS BEEN INFORMED OF THE POSSIBILITY OF SUCH DAMAGE . . . (capitalization in original) *Id.*

While the *Morel* court did not analyze this provision, website operators should review their own terms of use to ensure the terms insulate the website from liability arising from a third party's use of the website and to prevent third party users from suing the website as a contributing infringer.

The *Morel* decision may be something of a wake-up call to the dangers of using even widely available content posted online. In the past, some media entities have simply used widely disseminated images from social networking sites

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without a license, relying on implied license or fair use arguments, especially in news reporting contexts.

*Morel* illustrates, however, that media entities and producers cannot rely on protection from a website's terms of use, even ones which seem to promote use of content found on the website. It remains to be seen what measures media entities may take to avoid similar lawsuits in the future.

Possible steps include obtaining a blanket license from social networking sites or simply refraining from using even widely available content unless it has been specifically licensed by the original content owner. The terms of use adopted by social networking sites such as Twitter and Facebook, however – along with the increased instances of claims such as *Morel's* – may make it more desirable for media entities such as newspapers, broadcasters, and photography agencies to license such rights from such social networking websites directly.

As the Internet has grown increasingly interactive, terms of service agreements have become a vital tool in shaping the

legal relationship between websites' operators and third parties who use the websites. *Morel* demonstrates that use of content found on a website will leave website users open to lawsuits, regardless of the protections the website has devised for itself. To minimize the risk of legal liability, website users who upload content or who rely on content found online must pay careful attention to a website's terms of use and understand what rights they are being granted.

Before reproducing or distributing content found online, media entities and producers, in particular, should understand the risks of relying on an allegedly implied license or the defense of fair use, or attempt to secure a license to use the content in question.

*Toby Butterfield is a litigation partner at Cowan, DeBaets, Abrahams & Sheppard LLP in New York City, Ben Bartlett is a media attorney at ION Media Networks. Daniel Morel is represented by Barbara Hoffman, The Hoffman Law Firm, New York, NY. AFP is represented by Joshua J. Kaufman, Venable LLP, Washington, D.C.*

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# Seventh Circuit, Florida State Court Reach Opposite Conclusions on Whether Non-Party Websites May Ignore Takedown Orders

## *Website Ordered to Remove Third-Party Postings*

By Charles D. Tobin and Christine N. Walz

The U.S. Seventh Circuit Court of Appeals and a state trial court in Florida -- within one day of each other, and in cases involving the same website -- reached contradictory conclusions about the authority of judges to enforce third-party takedown orders against web operators. The stark divergence of judicial opinions highlights the difficulties courts continue to face in developing consistent principles governing jurisdiction over websites.

In the Seventh Circuit case, the panel agreed with the trial judge and held that-- where a non-party website's operator has done "nothing more than . . . [ignore] the injunction" -- courts lack the authority under the Federal Rules to order [www.ripoffreport.com](http://www.ripoffreport.com), to take down allegedly defamatory postings. *Blockowicz v. Williams*, 2010 WL 5262726, \*5 (7<sup>th</sup> Cir. December 27, 2010) (Cudahy, Flaum, Wood, JJ.)

On the day following this decision, a Florida Circuit Court judge in Miami, in an unrelated case, issued an order enjoining the same website's operator, on pain of contempt, from maintaining the statements about the plaintiffs posted on the website. *Giordano v. Romeo*, No. 09-68539-CA-25, "Final Order on Plaintiffs' Motion for Temporary Injunctive Relief" at 4 (Fla. 11<sup>th</sup> Cir. Ct. Dec. 28 2010).

### Background

Xcentric Ventures, LLC, an Arizona-based company, operates the "Ripoff Report" site, which describes itself as "a worldwide consumer reporting Web site and publication, by consumers, for consumers, to file and document complaints about companies or individuals." As of this writing, the site boasts that it contains more than 570,000 indexed, searchable reports about businesses and individuals.

The site has a business model of its own. It states that if the subject of a report believes it is the subject of a false complaint, it may enter the "Ripoff Report's VIP Arbitration Program" by paying \$2,000. The fee will pay for the services

of one of the "private arbitrators" under contract with the site's owner, "who have extensive experience, including experience as judges in court." The site promises that, after the arbitrator reviews submissions from the business, "any statements of fact that the arbitrator determines to be false will be removed from the original report."

However, the site's Terms of Service makes clear that, absent participation in this arbitration program, the postings are "a permanent record of disputes, including disputes which have been fully resolved" and further, that "in order to maintain a complete record, information posted on [the site] will not be removed."

### Seventh Circuit Decision

In the Seventh Circuit *Blockowicz* case, the Northern District of Illinois court had enjoined the individual posters, ordering that they remove the crude, critical comment about the plaintiffs. When the defendants failed to comply, the plaintiffs asked the judge to enforce the injunction and compel the [www.ripoffreport.com](http://www.ripoffreport.com) to remove the statements. They argued that under Federal Rule of Civil Procedure 65, which allows a federal court to issue an injunction against those who are "in active concert or participation" with an enjoined party and who have actual notice of the injunction, the website's operator was bound by the injunction. The Northern District of Illinois court disagreed, however, and determined that it lacked the power to require the host and manager of the website to remove the statement.

On appeal, the Seventh Circuit affirmed. The appeals court said that the website operators could not be bound by the injunction under Rule 65, and therefore could not be compelled to remove the allegedly defamatory statement. The appeals court held that, because all of the website's actions predated the injunction, its operator did not have actual notice of the injunction at the time it acted, and that the

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operator therefore did not aid and abet the posters' violation of the injunction or act in concert with them.

The Seventh Circuit also rejected the argument that the website's failure to take down the posts, even though they had the technical ability to do so, constituted action in concert with the posters. Mere inactivity, the court concluded, is not aiding and abetting the posters' violation of the injunction: "Since the injunction was issued, [the website operator] has simply done nothing, and it has certainly not actively assisted the defendants in violating the injunction."

### **Florida Circuit Court Decision**

In Florida, the *Giordano* court took a radically opposite view of the legal consequences of Ripoff Report's decision to ignore that court's injunction. There, the owner of the business G&G Holistics Addiction Treatment Center originally sued both the poster and Ripoff Report's operator for postings alleging unsanitary conditions and poor staff treatment at the facility, and for calling the business's owner a convicted felon.

The trial judge had dismissed the website from the lawsuit, finding that the Communications Decency Act, 48 U.S.C. §230(c)(1), immunized the operator. The poster then entered into a stipulated injunction with the plaintiffs that required her to ask the website operator to take down her postings. After the website refused, the judge held an immediate hearing and ordered the operator to take down the postings.

In a curious ruling that contradicts a thread of CDA decisions around the country, the Florida judge held that the statute only immunizes a website from liability for damages, not from contempt sanctions. "The Court specifically finds that the CDA does not categorically bar this Court from issuing an injunction against" the website's operator, the order stated. Relying on a provision in the CDA (§230(e)(3)) that preserves the authority of state judges to enforce state laws that are "consistent" with the CDA, the Florida judge further held: "The Court does not believe that Congress intended to provide immunity from an equitable injunction in such a situation."

The Court finds that in this situation, Xecentric [sic] refusal to comply with the Court's order and the demand of the publisher to remove the

statements, makes Xcentric the publisher of the statements. This is different from determining that they are the publisher solely because of the posting. However, even if Xcentric were not treated as the publisher (and indeed, Plaintiffs do not seek to impose civil liability upon Xcentric), the CDA does not bar this Court from entering injunctive relief.

In a post commenting on this case, Ripoff Report said, "We intend to appeal the court's decision because we believe that it violates both the First Amendment right to free speech and, in addition, we believe the court's injunction is barred by federal law, specifically the Communications Decency Act, 47 U.S.C. § 230."

*Charles D. Tobin and Christine N. Walz are with the Washington D.C. office of Holland & Knight LLP*

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# Consumers Union Wins Typosquatting Litigation

## *Typosquatters Ordered to Turn Over Domain Names*

By Eric Rayman

Typosquatting – registering a domain that is an intentional misspelling of someone else’s domain name – is aggravating to domain owners. As anyone who’s ever typed more than a 3-letter name domain into a search box knows, dropping a letter, omitting a double “t,” or adding an unauthorized “s” happens to all of us. When I kept landing on a webpage of keyword ads every time I tried to visit the advertising-free *Consumer Reports* site, I finally asked their counsel about it.

*Consumer Reports* and *ConsumerReports.org* are published by Consumers Union of United States, Inc. (Speaking of names, that is its name. There’s no “the” in there.) CU is a non-profit whose mission is to test and evaluate products and services sold to consumers. CU accepts no advertising or commercial sponsorship so that the independence of its ratings cannot be questioned. Not surprisingly, CU counsel knew about this squatter and didn’t like it either.

The owner of some of the most common misspellings of the CR domain, including the one on which I kept landing, was Netex Galaxy, a Latvian company who registered its domains with a Russian registrar.

The international domain registries all must agree to abide by the Uniform Dispute Resolution policies administered by ICANN, the Internet Corporation for Assigned Names and Numbers. In theory these policies allow an aggrieved domain owner to bring a case against a squatter relatively easily and inexpensively. The matter is entirely handled on paper. There’s no discovery and no hearing. There are essentially only three things a plaintiff has to prove:

1. that the defendant’s domain name is confusingly similar to the plaintiff’s trademark;
2. that the defendant has no legitimate rights in the domain that’s the subject of the dispute; and
3. that the domain was registered in bad faith.

CU appeared to have an excellent basis for bringing this action against Netex Galaxy on all three elements, but had just one concern. Under the Uniform Dispute Resolution rules, if the defendant seeks to appeal an adverse ruling of an

arbitrator, the plaintiff must consent to the dispute being heard in the country where the defendant resides or the jurisdiction where the Registrar is located. In this case, that meant Latvia or Russia.

Consequently, CU chose to file an action in the Eastern District of Virginia under the provisions of the 1999 Anticybersquatting Consumer Protection Act instead of consenting to jurisdiction in Russia or Latvia under the Uniform Domain Name Dispute Resolution policies of ICANN. Since CU could not obtain jurisdiction over Netex Galaxy in Virginia, it brought an “*in rem*” action against the five misspellings of its domain name.

On December 6, 2010, United States District Judge Leonie M. Brinkema held that the five domain names violated the anticybersquatting provisions of the Lanham Act and ordered them turned over to Consumers Union. *Consumers Union of United States v. Consumerreport.com et al.*, No. 1:10-268.

Judge Brinkema found that Consumers Union owns the trademarks CONSUMER REPORTS and CONSUMERREPORTS.ORG. She ruled that the five contested domain names differed from Consumers Union’s mark by only one or two letters each and that the registrant for the contested domain names was only using them to generate “click-through” advertising fees. Accordingly, she held that there was no genuine dispute of material facts other than that the five contested domains were confusingly similar to Consumers Union’s marks and that Netex Galaxy must have had a bad faith intent to profit from that confusion.

Judge Brinkema ordered Verisign and Public Interest Registry to transfer the ownership of the contested domain names to Consumers Union. Previously the Magistrate Judge overseeing discovery had ordered Netex Galaxy to pay Consumers Union’s attorney’s fees in connection with a Motion to Compel Discovery. Netex failed to provide any discovery in response to the Motion, or the underlying requests.

*Eric Rayman is Of Counsel at Miller Korzenik & Sommers in New York. Thomas W. Brooke and Birte Hoehne of Holland & Knight represented Consumers Union. Netex Galaxy was represented by Anatoly Ostrovsky in Latvia and Brian Fletcher in Virginia.*



## Scripts, Lies & Videogames

### *MLRC – Southwestern Law School Conference Explores Hot Entertainment Issues*

MLRC and Southwestern Law School held their 8th Annual Entertainment and Media Law Conference in Los Angeles, California, on January 20. The Conference's three panels discussed clearance issues for motion pictures, TV programs and video games, libel in fiction cases and vetting programs, and the development and distribution of video games.

MLRC thanks the Planning Committee: Kraig Baker (Davis Wright Tremaine LLP), David Cohen (ABC), Jennifer Dominitz (NBC Universal Television Group), Steven Krone (Southwestern Law School), and Louis Petrich (Leopold, Petrich & Smith).

We also thank the conference sponsors for their generous support: Chubb; Davis Wright Tremaine LLP; Doyle & Miller LLP; Hiscox; Leopold, Petrich & Smith; Sidley Austin LLP.

And thanks to the moderators and panelists.



#### **Trademarks, Transformations, and Touchdowns**

**Left to right: Moderator: Robert Rotstein (Mitchell Silberberg & Knupp); Panelists: Elizabeth Masterton (Twentieth Century Fox); Donald Gordon (Leopold, Petrich & Smith); and Christopher Cosby (Activision).**



**Ripped (Off) from Real Life?**

**Left to right:**  
**Moderator:**  
**Patricia Cannon**  
**(NBCU Television Group)**  
**Panelists:**  
**Robyn Aronson**  
**(MTV Networks);**  
**Stephen Rohde**  
**(Rohde & Victoroff);**  
**and**  
**Jody Zucker**  
**(Warner Bros. Television)**

**Issues with Development and Distribution of Video Games**

**Left to right:**  
**Moderator: Kraig Baker**  
**(Davis Wright Tremaine);**  
**Panelists:**  
**Heidi Holman**  
**(Microsoft);**  
**Daniel O’Connell**  
**Offner**  
**(Loeb & Loeb);**  
**Seth Steinberg**  
**(Digital Arts Law)**

