

**MILRC** Media Law Resource Center  
**MEDIA LAW LETTER**

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Associate Member Edition

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

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

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

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

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

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



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



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



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



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



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

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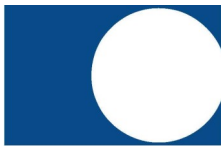


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# The Other Side of the Pond: Updates on UK Media Law

## *Phone Hacking, Libel and Privacy Decisions, Open Justice and IP Developments*

By David Hooper

These have been difficult months for News International and the scandal has acquired a momentum of its own stoked by inordinate amount of press coverage which it has received. 14 people have been arrested - usually by appointment but nearly always involving a spell in the cells while their computers and homes are searched - and questioned relating to various alleged offences including under the Prevention of Corruption Act 1906 and conspiring to intercept telecommunications unlawfully. No-one has been charged as yet as a result of these latest investigations, but only one to date has been formally exonerated by the police and that person worked not for News International but the Press Association and should not have been arrested in the first place.

The evidence will have to be sifted and the Crown Prosecution Service will almost certainly take advice as to who is to be charged from an independent Queen's Counsel. Charges there almost certainly will be. In a sense the investigation has been made easier for the prosecutors by virtue of the discovery of widespread payments to the police by newspaper executives. This seems to have been so routine that Rebekah Wade, a former editor of The Sun, unwisely appeared to admit to a House of Commons Committee that such payments were almost routine at her newspaper, although understandably she has back-tracked on this.

So far as one can judge, the British public were not overly concerned by the intercepting of the voicemails of celebrities as the information thereby obtained tended to be fairly trivial and although people would have disapproved about the intrusion, there was to some extent a feeling that celebrities who exploited the media for their own publicity were in some

measure fair game. The public tut-tutted but enjoyed reading about such shenanigans.

The public view however fundamentally changed when it appeared that not only had the mobile voice messages of the 14 year old murder victim, Milly Dowler, been intercepted, but the journalist had deleted various of the messages as the voicemail was full so that they could hack later messages, which had the effect of misleading her family into believing that she might still be alive. The public were totally shocked and the moral bankruptcy of certain tabloid journalists was exposed for all to see.

Newspaper editors may prove to have been reasonably good at avoiding leaving their fingerprints on these nefarious hacking practices and may be able to demonstrate to a dubious public that surprisingly they had no knowledge or curiosity as to where the stories were coming from or how they were being obtained. Things however may prove to be significantly different when it comes to payments made by newspapers to the press. That would involve a paper trail as expenses have to be vouched for.

It seems that the practice was sufficiently wholesale that some editors or senior executives were – quite possibly without realising the implications of doing so – signing off for apparently corrupt payments to the Police. Editors may perhaps not have known, as they claim, about telephones being hacked and may have been too intrinsically idle or uncurious to ask where these stories were coming from and how they were sourced but on the whole they do know a thing or two about expenses and the payment of their employers' money. The likelihood is that there will be charges. Some will say that they were not aware that such

**The Government has indicated that one of the matters which is under serious consideration is the replacement of the PCC by a body with much tougher regulatory powers, which is something viewed with some concern by the press as encroaching on the freedom of the press.**

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payments were illegal, but running a defence of ignorance of the law which Latin students will recollect "*haud excusat*" may prove an uphill task.

What is clear is that what had been hitherto successfully contained as a manageable if costly piece of wrongdoing in that the privacy of various celebrities had been infringed by phone hacking has now significantly escalated. At least three of the claims have been settled, one by the actress Sienna Miller for £100,000 plus costs, and another by a footballer Andy Gray for £20,000 plus costs, plus more recently a claim by Lee Chapman, a footballer and his wife, an actress called Leslie Ash.

Those figures reflected the fact that even in the Mosley case which – once a breach of privacy was established – was at the most serious end of the scale, had only resulted in a damages award of £65,000. The recent revelations seem firstly greatly to increase the likely number of claims, and secondly they may incline a judge to award higher sums than originally he might have had in mind. There are said to be 28 claims in course against News International arising out of phone hacking, but equally there seem to be a number in the pipeline.

The cases are assigned to Mr Justice Vos and there will be a specimen group of cases to be heard in the autumn which should lead to the resolution of the other cases, once he has laid down the appropriate principles. It seems that the claimants have so far had the better of the interlocutory skirmishes and have in the face of opposition secured access to the police documents, which include all the notes kept by the jailed private investigator seemingly showing who he had hacked and who he was reporting to.

The hacking affair led directly to the closure of Britain's best-selling Sunday newspaper the News of the World. Countless senior executives at News International have left the company. Some of them, such as Tom Crone, a senior lawyer at News International, and Colin Myler, the former editor of the News of the World, appear to be disputing the evidence of James Murdoch given to an investigating House of Commons Media Sports and Culture Committee as to what he and other senior executives knew and when about the extent of phone hacking.

There are very senior police officers in the London Metropolitan Police who have also resigned because of injudiciously cosy links with the News of the World and the police public relations man is busily tending his garden after

details of the hiring by Scotland Yard of a former News of the World editor as a supernumerary PR adviser emerged. In one instance a police officer had accepted free treatments at a spa facility valued at £12,000 to help him recover from a serious illness. The spa was connected with a former editor at News International (he says he was merely a friend of the owner), and in another instance a close relative of an editor obtained a job at Scotland Yard.

There was no evidence that these arrangements were corrupt, but they were very unwise and they were symptomatic of a far too cosy relationship between the newspaper and the police, and a situation whereby payments seem to have been received on a very large scale and in circumstances which may very well give rise to a series of prosecutions.

Another casualty had been Baroness Buscombe, the unmentioned head of the Press Complaints Commission who has announced that she will not be seeking an extension of her term as chairman when it runs out in January 2012. The PCC and the Baroness' handling of the hacking saga have been widely criticised as ineffectual and inept and the failure to investigate the phone hacking scandal properly was widely criticised. PCC's defence is that it did not have the facilities to carry out such an investigation, but unfortunately they did give the impression that they had investigated the matter and found nothing amiss.

The Government has indicated that one of the matters which is under serious consideration is the replacement of the PCC by a body with much tougher regulatory powers, which is something viewed with some concern by the press as encroaching on the freedom of the press, whereas the Government argues that the tougher regulatory regime that broadcasters face under Ofcom operates satisfactorily without interfering with freedom of expression.

The whole saga has been a disaster for most of those it has touched – the more so as Andy Coulson, a former editor of the News of the World, who denies any knowledge of wrongdoing, became a press adviser to Prime Minister David Cameron after his resignation as editor in the wake of the jailing of the paper's former royal correspondent – giving the scandal a distinctly political dimension. This has been compounded for the shifting of blame and falling out between the parties of which the correspondence recently released by the Media, Sports and Culture Committee is a very recent example.

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For example, Clive Goodman, the jailed former royal correspondent of the News of the World, claimed in an earlier letter that at editorial committee meetings, senior editorial staff were well aware of the phone hacking and that instructions had to be given to ban phone hacking being discussed. Nor will the gallows humour in an email where Mr. Goodman said that he did not want to go into detail about cash payments because everyone involved could “go to prison for this” play well in the cold light of hindsight.

Even the well-known media firm of lawyers Harbottle & Lewis has found itself having to justify its opinion on the extent of the knowledge of wrongdoing and to defend itself against an accusation of a white-wash. They had to correspond extensively with the Committee as to precisely what they meant and what they were hired to do when they rather helpfully apparently concluded in a carefully manicured report: *"I can confirm that we did not find anything in those emails which appeared to us to be reasonable evidence that Clive Goodman's illegal actions were known about and supported by both or either of Andy Coulson, the editor, and Neil Wallis, the deputy editor, and/or that Ian Edmondson, the news editor, and others were carrying out similar illegal procedures."*

The issue they have to address is whether this was, as one would expect, a suitably qualified opinion by experienced lawyers, answering a narrow question or whether it was injudiciously or ineptly widely expressed if they were in fact reviewing the correspondence later seen by the former Director of Prosecutions Lord MacDonald QC. The answer may lie in the precise nature of their assignment, but it must in any event have been an unwelcome development for the law firm when the former DPP hired by News International concluded that it was almost immediately apparent that there was evidence of criminality in the relevant papers.

Harbottles reacted ferociously to the attempt of James Murdoch to blame them for failing to investigate the debacle properly and for wrongly giving the Company a clean bill of health after reviewing some 2,500 emails. In a very lengthy

riposte delivered to the House of Commons Committee in a report which must have cost tens of thousands of pounds to produce, they demonstrated convincingly that they were not hired to give a "Good Conduct Certificate" to News International. In doing so, they bit the hand that fed them – to the tune of, we are told, £10,294 – a sum which they apparently viewed as underscoring the modesty of the extent of their services, as it does not seem to buy much at Harbottles. Murdoch is attacked for conduct castigated as *"self-serving, very misleading, confused and mistaken."*

However, their overall conclusion is puzzling. Their very terms of reference had, after all, started with a letter from Clive Goodman, the disgraced Royal Correspondent, who said that hacking was regularly discussed at editorial meetings until instructions were given not to talk about it. Is it likely therefore there would have been an incriminating trail of emails? Was such a fulsome exoneration appropriate or wise? It also seems unwise to have spoken of their being no evidence of knowledge of Clive Goodman's illegal actions in such terms, when evidence of corrupt payments to the police (for example, a discussion as to whether £750 or £1,000 was the going rate for procuring from the police the Green Directory of private phone numbers of members of the Royal Family and Household) jump out of the emails, or so Lord MacDonald tells us.

With hindsight Harbottles must bitterly regret ever having become involved in the assignment, engaging for the most part very junior lawyers in their team (all of whom seem to have now left the firm), producing a very short letter which went through multiple drafts seemingly to produce something satisfactory for News International and which may inadvertently have in fact misled James Murdoch into believing that more investigation had been done by their company than was in fact the case. Certainly they must wish that they had known more about the criminal law and that troubling features such as the fact that Goodman who received a salary £90,000 had nevertheless received a payoff of no less than £244,000 and

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**A bi-product of the hacking scandal has been the setting up of an inquiry under a Court of Appeal judge, Lord Justice Leveson. His inquiry is divided into two parts, the first is to look at the state of the press generally, and the second will be to investigate specific acts of wrongdoing on the part of the press.**

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according to him the promise of continued employment after his spell in jail did not lead them to be a little more proactive and a little less comatose in their investigations.

The Committee is likely to take more evidence to decide where the truth lies, but their conclusions will almost certainly reject some of the evidence they have heard and leave some of the warring parties unhappy. The Committee now wants to find out if News International had been advised by its other lawyers about the extent of wrongdoing and criminality by its other lawyers Farrer & Co on the civil side and Burton Copeland on the criminal. In all probability News International will feel compelled to waive legal privilege and their legal files will be further trawled over in public.

### **The Leveson Inquiry**

A bi-product of the hacking scandal has been the setting up of an inquiry under a Court of Appeal judge, Lord Justice Leveson. His inquiry is divided into two parts, the first is to look at the state of the press generally, and the second will be to investigate specific acts of wrongdoing on the part of the press. The plan is for Leveson to report within 12 months, although if there are criminal proceedings the second part of the inquiry will almost certainly be delayed pending the resolution of those criminal proceedings.

Leveson will operate under the Inquiry Rules 2006 which enable him to summon witnesses and documents and he will be assisted by a panel of experts. Witnesses will give evidence under oath. It is envisaged that he will make recommendations for a more effective regulatory regime for the press and his terms of reference include ensuring that this regime will support the integrity of the press, the plurality of ownership of the media and its independence from the Government. It will also seek to encourage the highest ethical standards in the media and will look in particular at contact between the press and the police, and it will review the relationship that has developed between politicians and certain sections of the press. It is also to consider the extent to which the current regulatory regime has failed. It will be, therefore, a very wide-ranging review of the ethics of the press, the culture of the media, press regulation and general corporate governance of the press.

The second half of the inquiry will focus particularly on allegations about phone hacking and illegal payments allegedly made to the police by News International and

possibly also by other sections of the media. Part of that inquiry will be as to how the police investigated allegations of unlawful conduct by persons within or connected to News International at the outset of the phone hacking scandal and the extent to which the police received corrupt payments.

Unguarded comments made by Piers Morgan – now of CNN - at the time the editor of the Daily Mirror – about having listened to a deeply personal message left by Paul McCartney for Heather Mills on – it would appear – her mobile phone has underscored the fact that News International are not the only parts of the media in the frame. Morgan must regret his light-hearted candour delivered in his normal genial manner, as does Rebekah Wade who may regret her comment made to a House of Commons Select Committee about payments made by News International to police officers. There has been a bit of back tracking on that.

The problem seems to be that these methods of obtaining stories seem to have become so common place that there was a failure to appreciate the criminal implications. In any event, the press looks as if it could be in for a rough ride from the Leveson Inquiry, just as it has been from politicians – themselves smarting from the working over that they had from the press over their creative expenses.

Another House of Commons committee, the Home Affairs Select Committee, published a report on 20 July 2011 entitled "*The Unauthorised Tapping into or Hacking of Telephonic Communications*" and that underscored the deep rooted antipathy to the errant sections of the tabloid press and police. It concluded that News International was trying to thwart the criminal process.

### **Members of Parliament Sent Packing in the Libel Courts**

#### **[Lait v Evening Standard \[2011\] EWCA 859](#)**

One might have thought that members of Parliament would have realised that, so far as they were concerned, the libel gravy train had left the station. Not so Jaqui Lait MP. She was criticised for excessive mortgage interest claims on her two homes. In fact, the article overstated the extent of her claims in that she was accused of profiting on the sale of her second home, whereas the criticism ought to have been limited to the amount of interest she had claimed on her second home. At first instance, a robust view had been taken by Mr Justice Eady as to how to deal with claims of this sort. He concluded that the words plainly meant that people could

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legitimately get angry at her behaviour. As such, this case was evidently a matter of fair comment and her claim would, in the absence of her being able to prove malice on the part of a newspaper, be bound to fail.

Of added interest was the fact that there were two other arguable defamatory meanings which the MP sought to attribute to the article; one was that she had acted in a hypocritical manner and the other was that her whole handling of her expense claims had been underhanded and involved concealment. Mr Justice Eady felt that the articles could possibly bear that meaning. The single meaning rule does not apply in fair comment cases, but he concluded that the possible imputation of hypocrisy or concealment should not consume further time or money and did not merit this matter going to trial after the conclusion he had reached on the principal meaning (above).

In effect, he applied the abuse of process arguments in *Jameel*, namely that proceedings which did not secure the legitimate purpose of protecting a person's reputation should be brought to an end, rather than, as seemed all too often to have happened in the past, for cases to continue so that a theoretical meaning could be adjudicated upon in the court. A balance had to be struck between freedom of speech and the right of reputation. This approach was upheld by the Court of Appeal and his judgement is to be welcomed. It will encourage courts to go to the heart of the alleged libel and decide whether there is a triable issue without being distracted by theoretical meanings which, as here, were somewhat ingeniously advanced some time after the initial complaint

**[Cook v Telegraph Media Group Limited](#)**  
**[\[2011\] EWHC 2011](#)**

This was another optimistic claim by a discredited MP. On this occasion it was Mr Justice Tugendhat who slung out the claim on the basis that the defence of fair comment was bound to succeed. Mr Cook having discovered that his assistant had donated £5 to a Battle of Britain Charity felt that he was entitled to reclaim it as a business expense. This did not play well with the newspaper who criticised him as an MP who was not giving value for money. Mr Justice Tugendhat felt that this was clearly a comment which could have been made by an honest person and as Cook could not establish that the newspaper lacked an honest

belief in what they had written or were malicious, the claim was bound to fail and therefore should be struck out.

**Contempt of Court – The Courts Get Tough**  
**[Attorney General v MGN \[2011\] EWHC 2074](#)**

Normally contempt cases arise out of prejudicial material published about a Defendant in a criminal trial. Section 2(2) Contempt of Court Act 1981 introduced a test of strict liability which permitted contempt of Court to be found where the Court was of the view that there was a substantial risk that the course of justice in the proceedings in question would be seriously impeded or prejudiced. In this case, however, the contempt arose out of what the Court characterised as a campaign of vilification of a retired schoolmaster called Christopher Jeffries who was the landlord of a murder victim. He had been arrested by the police as one of the early suspects, but after questioning he was cleared of suspicion and ultimately another man admitted the killing.

The tabloid press, however, had had something of a field day suggesting that Jeffries might be linked to paedophile offences and an earlier murder and was generally a deeply suspicious character with apparently, for good measure, blue hair. As he had been completely exonerated, there was no question of his trial being prejudiced. However, the Court felt that matters should be considered at the time of publication and the fact that there was ultimately no prosecution was irrelevant. The pattern of vilification, in the court's view, potentially impeded the course of justice. Had Jeffries remained under suspicion or indeed been charged, what the newspapers wrote could have, in the view of the Court, prevented witnesses coming forward or hindered him in developing his defence.

In the UK there are statutory restrictions on what can be published after a person has been charged, so British Courts might feel less uncomfortable about acting against prejudicial material published against someone who is not charged than would be the case in the United States. One of the matters that was discussed in the case was the case of *Attorney General v Unger [1998] 1 Cr App Rep 308* which had held that the publication need only create a seriously arguable ground of appeal on the ground of prejudice, not one that would necessarily allow an appeal on the grounds that the conviction would be unsafe due to that prejudice. In other

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words, a stricter standard is applied to the Press so that a newspaper can be guilty of contempt even though (in circumstances different from the fact of the Jeffries case itself) the Defendant might not be able to persuade the Court of Appeal to quash the conviction on the grounds that a fair trial was impossible.

It is a question of a *potential* substantial risk of serious prejudice rather than *actual* risk and newspapers in the United Kingdom publish such material at their peril. After an evaluation of what had been published by the papers, one had to pay a fine of £50,000 and the other £18,000, plus costs. The decision may be appealed to the Supreme Court. Permission to appeal has to be sought by 16 September.

The Press found themselves the subject of considerable criticism in that there had been something of a feeding frenzy, it was felt, in this particularly horrific murder of a University student. Jeffries in fact commenced libel proceedings against eight newspapers (six English and two Scottish) complaining of a total of forty articles which he claimed had subjected him to a witch-hunt and character assassination. The case was settled and he received a substantial undisclosed sum of damages.

In [\*Attorney General v Associated Newspapers \[2011\] EWHC 1894\*](#) two newspapers had inadvertently on their on-line service published a photograph of the Defendant in a murder case holding a gun which it was said was prejudicial to his defence. What had happened was that the picture in one paper had been insufficiently cropped so as to remove the offending weapon and was visible online for 22 hours. The mistake was noticed almost immediately. In the other paper the photograph had not been cropped but had been on-line only for five hours, but that was during the currency of the case as opposed to most contempt cases which arise out of reporting at the time of the arrest. Both newspapers were fined £15,000 and had to pay a total of £28,000 costs.

It has been recognised by the Law Commission that additional issues relating to contempt arise as regards publication on the internet and in social media and the Law Commission proposes to start reviewing the matter in the Autumn of 2012.

### Open Justice

The law on the anonymisation of proceedings which has been brought into particularly sharp focus in privacy actions

has been the subject of a report by a committee chaired by Lord Neuberger, Master of the Rolls (the Senior Judge of a Court of Appeal) entitled *Super Injunctions, Anonymised Injunctions and Open Justice* which was published on 20 May 2011. This was followed by [New Guidance](#) which was issued on 1 August 2011 by Lord Neuberger.

This in effect required applicants to show that they had taken all reasonable and practicable steps to provide advance notice of applications for injunctions. Only in the rarest case would super injunctions be permissible, that is to say in cases of strict necessity where there was a very real danger of some miscreant being tipped off or where there were serious blackmail issues. Lord Neuberger also stressed that it was not up to the parties to agree anonymity between them. They could not waive the public's right of publicity. It was a matter for the Court to decide.

Any application for non-disclosure would be subjected to intense scrutiny by the Courts and those on whom any such Order was served should be kept informed of developments. One of the matters which the Judge has directed should take place is that statistics should be kept about non-disclosure orders on which at present there is surprisingly little reliable information. There is therefore to be a pilot scheme to run for a year until 31 July 2012.

Any applicant seeking anonymity have to establish under section 12(3) Human Rights Act 1998 that it is likely that the publication will not be allowed and under section 12(4) the Court must take account of the right of freedom of expression under Article 10 of the European Convention of Human Rights. Applications will only be heard in private if the Court is satisfied that nothing short of the exclusion of the Press will enable justice to be done. Notice must normally be given to the Press of such applications for cases to be heard anonymously and only rarely will it be appropriate not to give advance notice to the Press of such applications. The Court will require an irrevocable written undertaking from the legal advisor of the media organisation to respect the confidentiality of proceedings.

What is therefore envisaged is that the Press will be allowed to attend privacy hearings in all but the most extreme case where it can be established whether there are real anxieties about tipping off the parties or unusual considerations of particular urgency. The press will be required to comply with all Orders of the Court as to anonymising the proceedings and will, to that extent, be

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restricted in how the case can be reported so that matters of protectable privacy are not reported in the Press. What is most unlikely to happen henceforward is for super injunctions to be granted, the effect of which is to prevent even the very fact of the litigation being reported. Lord Neuberger did, however, point out that a different approach to advance notification of such hearing may be appropriate as regards internet organisations or Bloggers.

### Damages

#### *Al Amoudi v Kifle* HH Judge Parkes QC

In an uncontested case confirming the US-based online publication the *Ethiopian Review* damages of £175,000 was awarded in a case which the judge viewed as at the upper end of the scale of seriousness. The Claimant was said to have been accused of offering his daughter to an elderly prince in Saudi Arabia and to have murdered her lover and to be searching for his daughter in order to enable her to be executed by stoning and for good measure he was accused of financing international terrorism. Not surprisingly the judge viewed this as one of the more serious libels encountered by the courts notwithstanding the limited publication. The award is unlikely to be enforced and the Judge may very well have had that in mind in making a very high award against a publication which was little read in the United Kingdom.

### Honesty Opinion, Malice and a Failed Offer of Amends

#### [\*Thornton v Telegraph Media Group \(2011\) EWHC 1884\*](#)

This was a case which arose out of a review of a book by Sarah Thornton called "*Seven Days in the Art World*". It was a particularly waspish piece by a columnist called Lynn Barber. Amongst other things, she dismissed the author as "*a decorative Canadian with a limitless capacity to write pompous nonsense.*" The case spawned much interlocutory litigation including the test laid down by Mr Justice Tugendhat which has now found its way into the new Defamation Bill that libel cases should breach a threshold of seriousness and that courts should strike out trivial actions for

libel. The attempt to apply for a jury trial had failed because the claimant had failed to apply for a jury trial within 28 days of the service of the defence. Equally the Defamation Bill proposes to restrict the availability of jury trials in libel actions.

The case was heard by Mr Justice Tugendhat in a hearing that lasted 4 days. He disbelieved Ms Barber's evidence that she had not been interviewed by Ms Thornton. As she had claimed in the book, and that she (Ms Barber) had been offered copy approval. He concluded that she was at the least reckless as to the truth of her claim that she had not been interviewed, finding that there had in fact been a lengthy interview. With these shades of a *Sullivan v New York Times* test, the judge held that the offer of amends which the paper had made did not succeed as a defence to the claim by virtue of section 4(3) Defamation Act 1996, as the defence of an offer of amends which is normally conclusive in a defamation

action can be defeated if it can be proved that the Defendant knew or had reason to believe that the statement complained of was false and defamatory. Ms Thornton was awarded damages of £50,000 for libel plus £15,000 for malicious falsehood plus the very substantial costs of the action.

### Conditional Fee Agreements

The first steps have been taken towards the abolition of the recovery from defendants of CFAs and After The Event insurance taken out by claimants. Curiously this is being done in the Legal Aid Sentencing and Punishing of Offenders Bill introduced in Parliament on 21 June 2011. Part two of the bill

abolishes the recoverability of CFAs and ATEs and creates a new acronym - the DBA – Damaged Based Agreements. Just how attractive this will be to media claimant lawyers remains to be seen, as damages are relatively low in media cases and claimant lawyers are relatively avaricious.

### Costs Management

The pilot scheme requiring parties to produce cost budgets has been extended to 30 September 2012. This will enable the Courts to case manage costs, which it will do in relation to the value of the litigation, reputational issues and the public interest. Essentially the Court will look at the last

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**What is therefore envisaged is that the Press will be allowed to attend privacy hearings in all but the most extreme case where it can be established whether there are real anxieties about tipping off the parties or unusual considerations of particular urgency.**

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approved budget and will not depart from it unless it is reasonable to do so. More information on the how the pilot scheme will work is available [online here](#).

### **Mosley Appeal**

Max Mosley has appealed to the Grand Council of the European Court of Human Rights following the rejection by the Chamber of the Fourth Section of his argument that the media needed to notify a claimant when they were publishing a story which might breach the claimant's privacy rights. Were he successful it would be a severe restriction on the press and result in the grant of many prior restraint injunctions.

### **Privacy and "Spent" Criminal Convictions** [KJO v XIM \(2011\) EWHC 1768](#)

This is an interesting decision by Mr Justice Eady which shows how relatively easy it is to obtain an injunction at the interlocutory stage when a libel injunction could not have been obtained. Bizarrely this was a family dispute where a member of the family rather belatedly wanted to tell the relevant financial authorities that their relative, who ironically by now was an investment banker in Hong Kong, had in 1992 been sentenced in England to 9 months jail after admitting forging his grandmother's will. Under the Rehabilitation of Offenders Act of 1994 the conviction would have been deemed to have been spent and with granny dead he had resisted the temptation to reoffend. The banker could only sue for libel if he could establish that the publication was malicious.

There probably was a degree of malice, but as against that there were obvious public interest arguments. And a libel injunction would have been very difficult to obtain. Eady J considered that an injunction should be granted on the grounds of privacy as the banker had an arguable case that his privacy had been infringed.

### **Libel Statistics**

A recent survey by Sweet & Maxwell, although based on small figures, confirms what many suspected about the law of libel. In the year end 31 May 2011 libel cases brought by celebrities dropped from 22 to 9, but this was probably

because they found the privacy laws provided them with a better remedy. Their figures showed that the number of defamation cases on which they based their survey rose by 4% over the previous year from 83 to 86. They found that business cases had trebled from 5 to 16 and that there was an increase from 2 social media cases in 2006 to 16 in 2010/2011. Another survey reported on by Jaron Lewis of RPC showed that defamation writs issued in London in 2010 declined to 158 from 298 in 2009. It is difficult to draw any very firm conclusions on such small figures, but there are no significant increases in the number of libel actions and the number of cases are still very small.

### **Misery Memoires**

#### **Amanda Smith v Headline Publishing Corporation plc.**

The difficulties faced by publishers who decline to publish a book they have commissioned were illustrated by this decision of Judge Bernard Livesey QC. On the advice of Counsel this history of childhood abuse could not be published for defamation reasons, but the judge found that the publishers were nevertheless in breach of contract because they had given inadequate warnings and advice to the author. Publishers normally try to encourage their authors with soothing words about the quality and viability of the book and in such cases it proves difficult to justify non-publication in court. He did however find that the publishers had acted in good faith and because the author had made a number of unsubstantiated allegations against the publishers, her victory was somewhat pyrrhic as she had to bear 65% of the costs.

### **Intellectual Property**

There have been a number of interesting developments over the last few months. The [Hargreaves Report](#) has been published with its recommendations for the updating of copyright law in the digital age. Amongst its proposals are the establishment of a digital copyright exchange for licensing the use of copyright works with an appropriate fee system and code of practice, a regime for orphan works, proposals for a system of Pan-European licensing and a review of the copyright exceptions or defences to update them in the digital era.

The government has broadly welcomed these proposals in its [response to the Hargreaves Review](#) and one now needs to

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see what action is taken to implement them. Professor Hargreaves also recommended creating a small claims jurisdiction where intellectual property claims valued at up to £5,000 could be brought and where legal costs would not be awarded to either party, which is likely to be advantageous to claimants and there was a proposal for changing the name of the patent county court to the Intellectual Property County Court, again aimed at simplifying and making less costly small claims.

#### [Allen v Bloomsbury Publishing plc \(2011\) EWCA Civ 943](#)

A very dubious claim for breach of copyright was thrown out by the Court of Appeal in *Allen v Bloomsbury Publishing* on 14 July 2011. This had been an attempt to cash in on the success of the Harry Potter books through a miserable little book written by a crooked financier who had ended up in jail with a literary agent whose only notable achievement turned out to be that he had earned more jail time (5 years) than the author (6 months). The case had been thrown out in the US District Court, in the Southern District of New York by Judge Scheindlin, who robustly rejected the alleged similarities between the two books.

In London the Court of Appeal upheld a ruling of Mr Justice Kitchin that although the action could have been continued, the claimant had, as a condition of being able to do so, to lodge £1.6 million security for the costs of the

defendants. The Judgement of the Court of Appeal lays down the principles under part 24 Rule 6 of the Civil Procedure Rules for making such conditional orders and it should be an added weapon in any defendant's armoury to dispose of claim or at any rate obtain security for costs, where weak but short of being fanciful claims with little prospect of success just scrape past the summary judgement criteria.

In [20th Century Fox v BT \(2011\) EWHC 1981](#) (28 July 2011) Mr Justice Arnold made a blocking order under section 97A Copyright Patents Designs Act 1988 (which implements the EU Information Society Directive), which required BT to prevent its subscribers accessing a website which was making available pirate films. The offending company had gone into voluntary liquidation but with the risk that other companies would spring up in its place. The film company was able to get an effective order from the ISP to prevent the films being illegally accessed.

In [Newspaper Licensing Agency Ltd v Meltwater Holding BV \(2011\) EWCA Civ 890](#) the decision of Proudman J was upheld. This concerned a media monitoring service with a hyperlink to relevant newspaper articles and an extract from the headline. The headline was held to be a literary work and the extracts were substantial parts. The upshot is that end users of commercial online media monitoring services require an end-user licence from the publishers.

*David Hooper is a partner with Reynolds Porter Chamberlain in London.*

## UPCOMING EVENTS

### **MLRC Annual Forum**

November 9, 2011 | New York, NY

### **MLRC Annual Dinner**

November 9, 2011 | New York, NY

### **DCS Meeting & Lunch**

November 10, 2011 | New York, NY



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

By Natalie Reid and Ivona Josipovic

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

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

## Background

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

In November 1995, *Noticias* published two articles about Menem that discussed his former mistress Martha Meza and their son, Carlos Nair, who was then fourteen years old. At the time of publication, Meza had been an elected representative for Menem's political party for several years. The articles described extravagant gifts and large sums of money President Menem gave to Congresswoman Meza and their son, and discussed Meza's lavish spending far in excess of her official salary.

The articles also reported that in 1994, Menem asked the Paraguayan president to grant asylum to Meza and Nair after Meza publicly claimed that Nair had been threatened. In reporting the articles, the journalists relied on prior public statements by Meza, interviews with individuals close to Meza and her son, judicial records, and a bestselling book on Menem's life. The articles were accompanied by photographs of Menem, Meza, and Nair, which were pixilated to protect the child's image, and which had been distributed to the press by presidential staff.

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

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

Although Menem lost in the trial court, this decision was reversed on appeal. In September 2001 the National Supreme Court of Justice affirmed the appellate decision and ordered

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

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the defendants to pay Menem 60,000 pesos in damages, plus interest, court costs, and fees for a total of 244,323 pesos (equivalent to \$84,000 in 2005, when the final installment of was paid). Of the nine Supreme Court judges who heard the case, six had been appointed by President Menem. Argentina has conceded in its submissions to the Inter-American Court that the highly questionable performance of these judges showed they were too close to Menem to be impartial.

The damages were two to three times higher than any the Supreme Court had previously ordered in similar suits. The award was satisfied by garnishing a substantial portion of D'Amico's salary for 21 months, and until it was paid, D'Amico could not leave the country without prior judicial authorization.

### **Proceedings in the Inter-American System**

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

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

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



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# Scraping and Aggregation: The Legal Issues Explored

By Niri Shan and Lorna Caddy

In late July 2011, the Court of Appeal of England & Wales gave its decision in the case of *The Newspaper Licensing Agency Limited and others v Meltwater Holding BV and others* [2011] EWCA Civ 890. This case is the first in which British courts have considered the practice of scraping and aggregation in any detail. For this reason, the decision has been much awaited by all UK media practitioners

## Lessons Learnt So Far from The NLA v Meltwater Dispute

The Newspaper Licensing Agency (the NLA) is in the midst of a legal dispute with a news aggregator and monitoring agency, Meltwater. The Public Relations Consultants Association Limited (PRCA), which represents the interests of its UK public relations provider members, is supporting Meltwater in the dispute.

The dispute surrounds Meltwater's provision of online media monitoring services to its customers. Customers select search terms and Meltwater sends them reports of articles containing those search terms. The reports include the headline of an article (which hyperlinks to the article), the opening words of the article and an extract showing the context in which the search term appears. It does this by monitoring a wide range of websites using "spider" or "bot" programs to "scrape" or "read" the content. It then creates an index which records the position of every word in every article on every website monitored.

The current dispute arose when the NLA introduced two licensing schemes: one imposing a charge on media monitoring organisations (such as Meltwater) and the other for end users (such as PR agencies) of those monitoring services. So far, there have been three forums for the dispute:

- ◆ Meltwater and PRCA referred the NLA's two licensing schemes to the Copyright Tribunal, arguing that the terms were unfair. The Tribunal will hear the dispute in September 2011. The Tribunal will determine the terms of the licence to Meltwater and also the terms of the end user licence.
- ◆ In the meantime, the NLA commenced High Court litigation against Meltwater and PRCA. The issue in the

case was whether Meltwater's end users, such as PR agencies, need a licence from the NLA. In relation to its own NLA licence, Meltwater did not dispute in that litigation that it has to take a licence but took the position that the terms are unreasonable. The High Court gave its ruling in November 2010. The conclusion reached was that without an end user licence, end users are infringing the relevant publishers' copyright through their use of Meltwater's services. Therefore, members of PRCA (i.e. end users) require a licence in order to avoid copyright infringement. PRCA appealed the decision.

- ◆ On 27 July 2011, the Court of Appeal confirmed the High Court decision, dismissing the appeal.

We now have some guidance from the Court of Appeal on which parts of a news aggregation service require a licence: Headlines are capable of being literary works, whether independently or as part of the articles to which they relate and are often protected by copyright. Therefore, a licence is likely to be required when reproducing headlines. Mrs Justice Proudman and the Court of Appeal were impressed by the Chief Operating Officer of the Daily Mail's evidence that:

*"The ability to compose a headline is a valuable and discrete skill and courses exist to teach it. Headlines require skill in order to fulfil the objective of capturing the reader's attention and inducing them to read the article."*

Equally, copying extracts could amount to copyright infringement. Extracts are capable of being a substantial part of the literary work. This is consistent with the Court of Justice of the European Union's (CJEU) recent decision that 11 words of copying may amount to copyright infringement if what is copied represents *"an element of the work which expressed the author's own intellectual creation."* See *Infopaq International v Danske Dagblades Forening* [2010] FSR 495. In this case, the ECJ concluded that copying of an extract of 11 consecutive words from an article constitutes reproduction in part for the purposes of Article 2 of the InfoSoc Directive, provided that those words had the necessary quality of originality. In that case the monitoring report contained only the search term and the five preceding and five subsequent words, the equivalent of the hit extract in the present case with no headline and no opening text.

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In the current situation, Meltwater reproduces extracts of 256 characters. The Court of Appeal found that each time Meltwater produced an edition of its news for a client, a large number of extracts were taken from a variety of publications such that it was inevitable that some of them would constitute a substantial part of the original.

By receiving and reading the report from Meltwater, the end user will be making a copy of the relevant publisher's headline and part of the article. The end user will also be in possession of an infringing copy. By forwarding on copies of the report to other people, the customer will be issuing further copies. These are all potentially infringing acts. The situation is not comparable with the old press cuttings business model where there was only one copy inherent in the process which had to be licensed. The electronic business model involves the creation of multiple copies, all of which must be licensed. The copies created in the process are not permitted by section 28A of the Copyright, Designs and Patents Act 1988 (dealing with temporary copies (copies which are transient or are incidental to some other use of the work and having no independent economic significance)). The Court of Appeal adopted Proudman J's finding on section 28A: "*A person making a copy of a webpage on his computer screen will not have a defence under section 28A simply because he has been browsing. He must first show that it was lawful for him to have made the copy. The copy is not part of the technological process; it is generated by his own volition.*"

The copies created in the process are not permitted by the fair dealing provisions within section 30 of the Copyright, Designs and Patents Act 1988. The Court of Appeal found the PRCA's arguments "absurd". They argued that Meltwater reports current events to its clients and the clients report current events to their end users: "*The underlying article may have nothing to do with current events. Even if it did, the scraped extracts are not made for the purpose of reporting current events but so that the end-user may see when, where and in what context the agent or search term was used.*" This is unsurprising. In addition, the Court of Appeal pointed out that Meltwater's dealings could not be described as "fair." The dealings are for commercial purposes and encourage end users to infringe copyright.

The copies created in the process are not permitted by the Database Regulations 1997 (which state that the maker of a database cannot prevent a lawful user from extracting and or re-utilising insubstantial parts of its contents). The Court of Appeal agreed with Proudman J that all the acts of infringement relied on against PRCA's members relate to the contents of the articles rather than infringement of the

arrangement or structure of the website as a database.

The Court of Appeal rejected PRCA's argument that, as Meltwater is licensed to send Meltwater News, by necessary implication, the act of receiving must be licensed: sending and receipt are not two sides of the same coin. This was because on receipt, the recipient makes further copies of the material on his or her computer.

The terms and conditions of some of the publishers' websites stipulate that paid for media monitoring services and their customers require a licence to use the content. The publishers' argument was that without a licence, use of the content is infringing and in breach of contract (on the basis of the terms and conditions of the website). Proudman J commented that she had not been taken to any authority on the effect of incorporation of terms and conditions through small type. Unfortunately, neither Proudman J nor the Court of Appeal come to a decision on whether the publishers' terms and conditions were binding on Meltwater, such that a contract existed between them. However, it seems unlikely that there would be a contract unless users of the website are required to actively confirm they have read the terms and conditions before accessing material on the relevant website. We discuss this point further below.

Frustratingly, the Court of Appeal did not give its opinion on one of Proudman J's most controversial first instance rulings, relating to the act of linking. When an end user clicks on a link included in a Meltwater report, a copy of the article appears on his or her computer. Proudman J commented "it seems to me that in principle copying by an End User without a licence through a direct Link is more likely than not to infringe copyright." This is a particularly interesting finding, suggesting that users of the internet can find themselves inadvertently infringing copyright by clicking on links to websites which they do not have express or implied permission to access. In the majority of cases, it is likely that a publisher of a website grants the public an implied licence to access its content. Where there is likely to be an issue is where a link bypasses a paywall or registration process. The judges did not explore Meltwater's liability for providing the link. However, there would seem to be an argument here that if clicking on a link can amount to copyright infringement, Meltwater authorises that infringement by providing the link. We now await the next stage of this dispute: this Autumn, the Copyright Tribunal has to determine the terms of the end user licence as well as the standard licence that the NLA issues to news aggregators themselves.

*Niri Shan and Lorna Caddy are lawyers with Taylor Wessing in London.*

# Australian State Enacts New Journalist Privilege Law

By Rani Wynn and Kevin Lynch

The state of New South Wales (NSW), has become the first state in Australia to enact a “Journalist Privilege” law aimed at protecting journalists’ confidential sources.

Amendments were made to the Commonwealth Federal Uniform *Evidence Act 1995* in April this year, with the expectation that each State would enact their own similar legislative provisions over the coming months.

According to the Commonwealth Explanatory Memorandum, the purpose of the changes is to “send a clear message that people who wish to provide information to journalists will have their identity protected if the journalist promises them they will not disclose their identity”. The changes will allow journalists to report the news and undertake investigative journalism with an added degree of legislative protection in Australia.

The new law came into effect in NSW on 21 June 2011 and brings the jurisdiction into line with current legislation in New Zealand, the United Kingdom, and many parts of the United States, where journalists’ confidences are expressly protected at law.

In the Second Reading of the Journalist Privilege Bill to the NSW parliament last year, Parliamentary Secretary, the Honourable David Clarke, said that the purpose of the provision is to “strengthen the capacity of journalists to maintain the anonymity of their sources by creating a presumption that they may withhold the identity of their sources in proceedings in New South Wales courts.”

The provision is contained in the NSW *Evidence Act* (the Act) and is designed to operate alongside the Australian Journalists’ Code of Ethics. As such, journalists are expected to inform their sources that they are a journalist, who is capable of producing news stories before offering any protection of identity.

Moreover, the law only becomes effective where journalists have specifically offered a promise of anonymity

to their “informant”.

A “journalist” is defined in the Act as a “person engaged in the profession or occupation of journalism in connection with the publication of information in a news medium”. This appears to be quite a broad definition and although it is yet to be tested, the protection may extend to bloggers and other less conventional news journalists.

Previously in Australia, a journalists’ refusal to reveal their source during court proceedings could be regarded as “disobedience contempt” and has seen them suffer heavy fines, or even be jailed.

In practice, however, NSW judicial officers have been reluctant to impose punishments on journalists in recent years for refusing to identify an informant. In both *Nagle v Chulov* [2001] NSWSC 9 and *Cotter v John Fairfax Publications* [2001] NSWSC 587, NSW Supreme Court Justices relied on the ‘*newspaper rule*’ to excuse journalists who defied a court order to reveal sources.

The *newspaper rule* as discussed by the Australian High Court in the 1940 case *McGuinness v Attorney-General of Victoria* (1940) 63 CLR 73, accepted that media outlets in the business of providing news were responsible for

protecting their journalist employees where those employees wished to shield their sources from public identification.

In 2002, *NRMA v John Fairfax* [2002] NSWSC 563, in NSW helped to further protect journalists’ confidences by deciding that journalism was a “professional capacity” within the meaning of the *Evidence Act* in which secret confidences would be upheld unless a public interest exception was found to the contrary.

The new position in NSW gives rise to a clear *presumption* that a confidential source will be protected during court proceedings in NSW.

The relevant section states that “If a journalist has  
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**The purpose of the changes are to "send a clear message that people who wish to provide information to journalists will have their identity protected if the journalist promises them they will not disclose their identity".**

(Continued from page 21)

*promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable to give evidence that would disclose the identity of the informant or enable that identity to be ascertained."*

The privilege will only be reversed where upon an application by a party for disclosure of the source, the court decides that, on balance, it is in the public interest for the source's identity to be revealed. There is evidence to suggest that this test would have a high threshold and may only be overturned in a situation of national security, or high level police corruption, for example. See *ICAC v Cornwell* (1993) 116 ALR 97.

In deciding if such disclosure is warranted, the court must weigh up the adverse effects that revealing the identity could

have, as well as the public interest in maintaining effective investigative news media by allowing confidences to be protected.

Whilst a confidential source is an important part of journalistic practice, it remains the case that care needs to be taken where journalists and lawyers who advise in relation to publication rely upon a source who is not prepared to be identified. The new provisions do give a further level of protection for a journalist and his or her source, but they do not make up any of the ground lost where a publication is required to defend a story without the benefit of a sound witness.

*Rani Wynn and Kevin Lynch are lawyers with Johnson Winter & Slattery Lawyers, Sydney, Australia.*

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

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

By Kurt Wimmer

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

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

Justice Scalia, writing for Justices Kennedy, Ginsburg, Sotomayor, and Kagan, held that a California law restricting the sale or rental of violent video games to minors, and mandating "18" labels for such games, violates the First

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

The Court unambiguously held that the concept of obscenity is limited to depictions of sexual conduct. Moreover, it found that the "obscenity as to minors" standards of *Ginsburg v. New York*, 390 U.S. 629 (1968), could not justify the California law. "No doubt a State

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possesses legitimate power to protect children from harm,” the Court wrote, “but that does not include a free-floating power to restrict the ideas to which children may be exposed.” The Court noted that there was no “longstanding tradition” in the United States of restricting violent content from minors -- in fact, books read even to young children “contain no shortage of gore.”

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

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

The majority also pointed out that, in light of the voluntary rating system, the California law has only a marginal impact in helping parents control the video games that their children play. According to the Court, “[t]his system does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their

children bring home. Filling the remaining modest gap in concerned-parents' control can hardly be a compelling state interest.” Importantly to self-regulatory ratings efforts in gaming, film and television, the decision also pointed out that a ratings system does not need 100% coverage to be an effective self-regulatory mechanism. “Some gap in compliance is unavoidable,” Justice Scalia said, in determining that it was irrelevant that an estimated 20% of 17-year-olds can still purchase M-rated games meant only for those 18 and older.

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

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

Justices Thomas and Breyer each dissented. Justice Thomas would have held that the First Amendment does not

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

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include the right to speak to minors without obtaining the prior consent of their parents or guardians. Justice Thomas posits that this view is based on the "original public understanding" of the First Amendment, but (as the majority points out) Justice Thomas cites no case, state or federal, supporting this view.

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

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

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



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

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

By Henry R. Kaufman and Michael K. Cantwell

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

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

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

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

Justice Kennedy, speaking for six members of the Court (himself, Roberts, Scalia, Thomas, Alito and Sotomayor) squarely rejected the labeling of facts, data or information as a mere commodity. The majority held that even data-driven marketing messages are "speech" subject to heightened constitutional scrutiny under the First Amendment. The

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

The majority found that the Vermont statute did not advance doctors' privacy because it permitted their prescription practices to be disclosed for many purposes other than pharmaceutical marketing. (Patient privacy was not an issue because the data was already stripped of any patient-identifiable information.) Prohibiting pharmaceutical manufacturers from using prescription data to support messages disfavored by the states, and imposing this censorship to promote the state's counter-

marketing viewpoint favoring generic drugs, also had no bearing on improving public health. Finally, even the otherwise valid goal of lowering health care costs cannot constitutionally be pursued by requiring that truthful information be withheld from doctors and patients.

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

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

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

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

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

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

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

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

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

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

# Congressional Update: PROTECT IP Act Waiting Senate Action

By Kathleen Kirby and Shawn Bone

Online piracy has become a hot topic on Capitol Hill in recent months, with Senate Judiciary Committee action on S. 968, the "[Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act](#)" (or PROTECT IP Act). The legislation had its genesis in the last Congress, in the form of the Combating Online Infringement and Counterfeits Act (or COICA), which was approved by the same Committee in 2010, just before Congress adjourned.

The PROTECT IP Act was reported out of the Senate Judiciary Committee in late May on a unanimous vote, though not without significant controversy, as discussed below. That has left the bill in limbo, with a prominent Senator, Ron Wyden (D-WA), vowing to filibuster the proposal should Senate Majority Leader Harry Reid (D-NV) elect to open Senate debate on the measure.

## Background

The problems the legislation attempts to address, online copyright and trademark infringement, present difficult challenges. According to Senate Judiciary Committee Chairman Patrick Leahy (D-VT), the bill's sponsor, the PROTECT IP Act is intended to "protect the investment American companies make in developing brands and creating content and will protect the jobs associated with those investments."

The bill enhances the authority of the federal government to take action against "Internet sites dedicated to infringing activities."<sup>1</sup> Specifically, the legislation authorizes the Attorney General to commence an *in personam* action against the registrant or owner of an infringing site associated with a "nondomestic domain name." (A "nondomestic domain name" is a domain name for which the domain name registry that issued the domain name and operates the relevant top level domain, and the domain name registrar for the domain name, are not located in the United States.)

If the owner or registrant cannot be found after due diligence, the Attorney General may commence an *in rem* action against the site itself. A federal court may then issue a temporary restraining order, a preliminary injunction, or an

injunction against an infringing site under certain circumstances (primarily if the website is directed at or harms persons in the U.S.) and after certain findings by the court.

Once the court has issued an order, federal law enforcement may serve that order on Domain Name System (DNS) operators, financial transaction providers, Internet advertising service providers, providers of information location tools, and other similarly situated entities. Upon receipt of the order, those entities would be required to act as follows:

- ◆ **DNS operators** must take the "least burdensome technically feasible and reasonable measures" designed to prevent a domain name from resolving into the domain's IP address. Operators, however, would not be required to (1) modify their networks or systems; (2) take any measures with respect to any DNS server that they do not operate; or (3) continue to prevent access to a website that has been effectively disabled.
- ◆ **Financial transaction providers** must take "reasonable measures, as expeditiously as reasonable," to stop completing transactions with the website involving U.S. customers.
- ◆ **Internet advertising service providers** would be required to "take technically feasible and reasonable measures, as expeditiously as reasonable," to stop providing ads to infringing sites with which they contract, and cease making available ads for that website on other websites.
- ◆ **Providers of information location tools** must take "technically feasible and reasonable measures, as expeditiously as possible," to remove or disable access to the infringing website and not serve a hypertext link to that website.

Such entities are afforded immunity from suit for performing the required actions as the result of a court order.

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The Attorney General may bring a declaratory action for injunctive relief against an entity that “knowingly and willfully fails to comply” with a court order.

Significantly, under the Act, “qualifying plaintiffs” also are afforded the right to bring an *in personam* action against an owner or registrant of any infringing website or, under certain circumstances, an *in rem* action against the site itself. Here again courts may issue a temporary restraining order, a preliminary injunction, or an injunction under the same general circumstances as in an action by the Attorney General. Under the Act, a “qualifying plaintiff” is (A) the Attorney General of the United States; or (B) an owner of an intellectual property right, or one authorized to enforce such right, harmed by the activities of an Internet site dedicated to infringing activities occurring on that Internet site.

Orders issued in this action may be presented to financial transaction providers and Internet advertising service providers, who must take the same measures outlined above in order to receive immunity from suit. The qualifying plaintiff may seek an injunction to compel compliance with a court order.

Finally, the bill would provide some protections for financial transaction providers and Internet advertising service providers for taking certain voluntary actions against a potentially infringing website. Such entities will be immune from liability for damages if they act “in good faith and based on credible evidence” which results in a “reasonable belief” that a website is Internet site dedicated to infringing activities. Moreover, certain entities will be immune from liability if they “stop providing or refuse to provide services” to an infringing Internet site that endangers public health, if they act “in good faith and based on credible evidence.”<sup>2</sup>

### **Controversy**

Like COICA before it, PROTECT IP has met with significant opposition from various groups. Major Internet companies, like Google, have expressed concerns about their duties under the bill, although Google itself has pledged to work with Congress on the measure. In particular, these companies are concerned that the difficulties in defining a rogue website could lead to overbroad enforcement of the measure. Public interest groups have been strident in their opposition to the measure, declaring that the bill threatens the stability, freedom and economic potential of the Internet, and

hinder online freedom of expression and association. Those public interest groups were joined recently by a coalition of 90 law professors challenging the constitutionality of the measure, claiming it would censor freedom of speech as badly as “repressive regimes.” On July 14, 2011, a group of Internet engineers questioned whether the enforcement provisions in the measure would encourage web users to avoid trusted Internet Service Providers (ISPs) in favor of untrusted DNS servers which circumvent the ISP blocks set up by the legislation. The group also claimed that the Act could interfere with new DNS security measures, and that any blocking of infringing websites would easily be circumvented. Finally, a coalition of 50 venture capitalists have opposed the measure, suggesting that passage of the PROTECT IP Act would hamper investments in Internet companies, harming innovation and competitiveness in the U.S.

Many major trade groups and businesses, however, have come out in support of the PROTECT IP Act, including certain media companies, the U.S. Chamber of Commerce, Nike, the Motion Picture Association of America, the National Cable & Telecommunications Association, and certain manufacturers. Those same entities have long sought action by Congress to limit online piracy and to protect online shoppers from counterfeit goods. The content creation community has been particularly vocal in support of the Act, suggesting that the bill would ensure that writers, directors, and other content producers receive fair payment for their work. Recent editorials in the New York Times and the Los Angeles Times commended the bill’s goal of making piracy less profitable, but cautioned that, if passed as is, the legislation would subject the Internet to overzealous enforcement.

### **Outlook**

The outlook for the PROTECT IP Act in the present Congress is unclear. Senator Wyden’s declared intent to filibuster the measure forces Chairman Leahy to find 60 votes to overcome that filibuster. The bill currently has 25 bipartisan co-sponsors, well short of that number. Still, Senator Leahy may be able to garner additional support. The House of Representatives does not have a similar bill pending before it, and the receptiveness of the House Republican leadership to the legislation is unclear. Both House Judiciary Committee Chairman Lamar Smith (R-TX) and IP Subcommittee Chairman Bob Goodlatte (R-VA) are known

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to be longtime supporters of intellectual property rights, but neither has taken a public position on the current Leahy measure. (Rep. Goodlatte did express some reservations about COICA and the provision in that measure allowing for government seizure of infringing websites.) Representative John Conyers (D-MI), the Democratic Ranking Member on the Committee, similarly supports strong protections for intellectual property and is an advocate for the content community.

Even if a groundswell of support started to build for the PROTECT IP Act, timing may become an issue. Legislative activity on other matters ground to a halt this summer as the two Chambers worked to resolve their impasse over the debt ceiling. Many high-profile issues are languishing on the House and Senate calendars, and the possibility of an upcoming fight over the FY 2012 budget remains. With a Presidential election looming and parties beginning to refine their messaging for the battle over the White House, it could be difficult for supporters to find floor time for a controversial measure.

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

#### Notes

1. An “Internet site dedicated to infringing activities” is defined in the bill as a website that:

(A) has no significant use other than engaging in, enabling, or facilitating the--

(i) reproduction, distribution, or public performance of copyrighted works, in complete or substantially complete

form, in a manner that constitutes copyright infringement under section 501 of title 17, United States Code;

(ii) violation of section 1201 of title 17, United States Code; or

(iii) sale, distribution, or promotion of goods, services, or materials bearing a counterfeit mark, as that term is defined in section 34(d) of the Lanham Act; or

(B) is designed, operated, or marketed by its operator or persons operating in concert with the operator, and facts or circumstances suggest is used, primarily as a means for engaging in, enabling, or facilitating the activities described under clauses (i), (ii), or (iii) of subparagraph (A).

2. An “infringing Internet site that endangers the public health” is:

(i) an Internet site dedicated to infringing activities for which the counterfeit products that it offers, sells, dispenses, or distributes are controlled or non-controlled prescription medication; or

(ii) an Internet site that has no significant use other than, or is designed, operated, or marketed by its operator or persons operating in concert with the operator, and facts or circumstances suggest is used, primarily as a means for--

(I) offering, selling, dispensing, or distributing any controlled or non-controlled prescription medication, and does so regularly without a valid prescription; or

(II) offering, selling, dispensing, or distributing any controlled or non-controlled prescription medication, and does so regularly for medication that is adulterated or misbranded.

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# New Jersey's High Court Addresses Shield Law Protection for "New Media" Journalists

## *Privilege Claims By "New Media" Journalists Require Scrutiny*

By Bruce S. Rosen and Kathleen A. Hirce

The New Jersey Supreme Court, in a seminal ruling regarding what might be the nation's most expansive shield law, has put the brakes on automatically providing the privilege to persons using new media who claim to be journalists. *Too Much Media v. Hale*, No. A-7 (June 7, 2011). The Court's decision rejects arguments that the shield be provided whenever there is "intent" to disseminate news and instead reads the statute to require that an applicants' new media be "similar" to traditional news media.

At oral argument, the Court appeared to reject arguments by the defendant Shellee Hale and amicus ACLU-NJ that the Shield Law should generally apply to anyone who gathers news with the intent to disseminate it, citing the potential for most posters on the internet to be eligible for shield protections. The unanimous Court focused heavily on interpreting the statutory language, which it said, "did not extend the Shield Law to all people who proclaim they are journalists."

While the Court did not explicitly define the parameters of just how similar new media news providers must be to traditional media, it left the burden of proof on the new media news providers. The Court took pains, however, to reinforce the broad application of the privilege for traditional news media or web sites clearly similar to traditional newspapers or magazines: the decision prohibits intrusive hearings regarding who is a journalist that could eviscerate the privilege, and completely rejects a list of misguided criteria drawn up by the Appellate Division to determine who is a journalist.

### Background

While this was good news for most media, it was a mixed bag for Defendant Shellee Hale of Washington State, a life coach, private detective, and sometimes TV commentator with an online presence who sought shield law protection for allegedly defamatory postings she placed on the message

board of Oprano, an adult-industry website. Hale claims she was in the midst of an investigation of corruption in that industry when she posted on Oprano claiming Too Much Media, a New Jersey-based software company that provides invoicing services for adult sites, and two of its principals, were involved in allegedly criminal activity. The company and the principals acknowledged the company had a breach of security regarding its customer information months earlier, but denied any criminal activity and sued.

Hale first tried to have the matter dismissed on jurisdictional grounds, mistakenly swearing that she was unaware of the company's New Jersey connections. She then

filed a standard certification stating she was a journalist and seeking shield law protection so as not to disclose her sources for her postings (she also claimed in the certification that disclosure would ruin her reputation as a licensed private detective).

Plaintiff responded by pointing out her lack of credibility in the jurisdictional motion, but did not file anything disputing Hale's status as a journalist. The trial judge then held an extensive and intrusive hearing, during which Hale was asked questions by her own attorney, plaintiff's counsel and the court regarding every facet of her alleged journalistic endeavors except the names of her source(s), after which the court found that Hale had no credibility and Oprano was not similar to traditional news media cited in the Shield Law. The judge also ruled that the Internet defamation should be considered equivalent to slander per se with presumed damages because the Internet disseminated information so rapidly, it was akin to the spoken word.

### Appeals Court Decision

Defendants sought leave to appeal and North Jersey Media Group Inc. (NJMG), The New Jersey Press

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**The Court took pains to reinforce the broad application of the privilege for traditional news media or web sites clearly similar to traditional newspapers or magazines.**

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Association (NJPA), *The New York Times* and NBC Universal filed an amicus brief on the presumed damages argument. The Appellate Division granted leave to appeal and while it made short shrift of the slander per se argument, it attempted to define who a journalist by drawing up a list of “characteristics” that journalists need have to be eligible for the privilege, including that they had official credentials, did fact checking, disclosed conflicts of interest, identified themselves as a reporter, and contacted other parties to get their side of the story. It concluded that Hale had exhibited none of the characteristics of a reporter and upheld the trial court. The Supreme Court then agreed to hear the case.

### NJ Supreme Court Decision

The 27 page opinion by Chief Justice Stewart Rabner first pointed out that the case had nothing to do with the First Amendment, but noted that to the extent that Hale’s published statements involved matters of public concern, plaintiffs would have to prove actual malice. The Court rejected a First Amendment Shield argument by Hale based on *Branzburg*, stating that the New Jersey Shield Law was absolute absent a conflicting constitutional right, and rejected those cases inferring an “intent” test from the First Amendment.

“If the Legislature wanted to create an intent test, it could have done so,” Chief Justice Rabner write. “Instead, the Shield Law requires claimants to show three things: first, a connection to news media, second, a purpose to gather, procure, transmit, compile, edit or disseminate news, and third that the materials sought were gathered in the course of professional activities.” While the second prong is similar to an intent test, the Court said, purpose – or intent – is not enough.

The statute’s language, the Court said, “does not mean that a newsperson must be employed as a journalist for a traditional newspaper or have a direct tie to an established magazine. But he or she must have some nexus, relationship, or connection to “news media” as that term is defined.” The Court cited previous state cases granting newspersons protections involving non-fiction books, freely distributed tabloids, and reality shows, none of which are mentioned in the statute but are “similar” to the traditional media that is mentioned.

The Court also dismissed the idea that a message board

was similar to traditional news media, such as letters to the editor, because they are generally unfiltered and unedited. “Neither writing a letter to the editor, nor posting on an online message board establishes the connection with “news media” required by the statute,” the Court concluded.

North Jersey Media Group and The New Jersey Press Association (this time alone) had filed an amici brief with the Supreme Court critical of the Appellate Division’s criteria to determine who is a journalist, its failure to recognize that the Shield Law protects both the news process and confidential sources, and its countenancing of the interrogation of Hale at a plenary hearing.

The Court agreed with all of these suggestions, made clear the Shield Law’s equal protections for news processes, and set down strict guidelines for any hearing under the Shield statute, essentially ruling them out for traditional news media.

“However,” the Court noted, “self-appointed journalists or entities with little track record who claim the privilege require more scrutiny. As the Appellate Division noted, the popularity of the Internet has resulted in millions of bloggers who have no connection to traditional media. Any of them, as well as anyone with a Facebook account, could try to assert the privilege. In these cases, a more probing hearing would likely be needed to determine whether the privilege applies.” Even then, the Court said, the inquiry must be limited to the connection to news media, purpose to gather or disseminate news, and a showing that the materials were gathered in the course of professional newsgathering.

The Court remanded the matter for further proceedings. Shortly thereafter, defendants asked the Court to permit a new hearing so that Hale could submit evidence in an attempt to qualify under the Court’s new criteria.

*Bruce S. Rosen and Kathleen “Katie” Hirce, McCusker, Anselmi, Rosen & Carvelli, P.C. of Florham Park, NJ, represented amici NJMG and the NJPA. Hale was represented by Jeffrey M. Pollock of Fox Rothschild in Princeton, NJ. Plaintiffs were represented by Joel N. Kreizman of Evans, Osborne and Kreizman of Oakhurst, NJ. Amicus ACLU-NJ was represented by Ronald K. Chen, a professor at Rutgers Law School Newark and ACLU-NJ Legal Director Edward Barocas. Amici The Reporters Committee, Gannett Co., and the Society of Professional Journalists submitted a brief authored by Gayle C. Sproul and Michael L. Berry of Levine Sullivan Koch & Schulz.*

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

## *Rejects First Amendment Challenge to Licensing Scheme*

**By Robert Dreps**

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

### **Background**

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

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

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

### **Seventh Circuit Decision**

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

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

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



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

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

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

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

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

This distinction also proved fatal to the newspapers’ argument that WIAA’s streaming license policies gave it unbridled discretion to influence or control content. Since it found the newspapers had no First Amendment right to stream a public athletic event, the panel concluded that “cases addressing licensing or permitting regimes for speakers and performers or public park-goers are inapposite as well.” As a result, permit requirements for the placement of newsracks on public property receive greater First Amendment scrutiny than government restrictions on video coverage of public school athletics.

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

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

## **Combating Online Piracy: The Protect IP Act and Alternatives**

**Wednesday, November 9, Marriott Marquis, New York City**

(preceding the MLRC Reception and Annual Dinner)

**Timothy Alger**, Partner, Perkins Coie LLP (Moderator)

**Mary Snapp**, Vice President and Deputy General Counsel, Microsoft Corporation

**David Green**, Vice-President for Public Policy, NBCUniversal

**Katherine Oyama**, Policy Counsel, Google Inc.

RSVP: [dseiden@medialaw.org](mailto:dseiden@medialaw.org)

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

By Carol E. Head

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

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

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

based on qualified immunity.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

One aspect of the Court’s decision is of particular

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

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

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

## MLRC ANNUAL DINNER

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# The Ongoing Assault on the Right to Photograph/Record in Public

By Mickey H. Osterreicher

Phil Datz, Jim Epstein and Emily Good may not be household names but they are among a growing list of citizens and journalists who have been arrested for doing nothing more than taking pictures or recording video on a public street or during a public meeting. Photographers are never charged with the crime of “photography” but it is that activity that brings them to the attention of police officers who use a range of catch-all charges to prosecute them.

Mr. Datz, a freelance photojournalist, was arrested by Suffolk County police in Long Island, New York,[1] while attempting to record a police investigation. Datz was standing on a public street when a sergeant approached him while repeatedly yelling at him to “go away, go away now.”[2] When Datz asked where he should go he was told that he needed to leave the area or face arrest. The video of the incident then shows police activity recorded from more than a block away with members of the public, including children, freely moving about near the scene. A police car then roars up and stops inches from the camera and the same sergeant jumps out of the car while shouting at Datz that he was now under arrest. The charge was dropped after letters objecting to the arrest were sent and the story was highly publicized.[3]

Jim Epstein and Peter Tucker, both online journalists, were arrested and removed from a public meeting of the Washington D.C. Taxicab Commission.[4] Both were charged with disorderly conduct and “unlawful entry/remaining” by U.S. Park Police after refusing to stop photographing and recording the meeting which was held at Park Police headquarters in order to better accommodate the large number of taxicab drivers who were there to voice their opposition to a change in licensing rules. The attorney general dismissed the charges almost immediately after the actions were widely criticized in the press.[5]

Ms. Good was arrested for videotaping a traffic stop from the front lawn of her home, charged by Rochester police[6] with violating NYS Penal Law §195.05 – Obstructing governmental administration in the second degree – whereby a “person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or

perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act . . . .” Obstructing governmental administration is a class A misdemeanor.[7] The charge against Ms. Good was dropped within days after the story received national attention.[8]

These are but a few of the incidents happening throughout the country where citizens and journalists have been stopped, questioned, interfered with, detained and arrested while engaged in free speech/press activities. In some cases it also appears that the right against unreasonable search and seizure was also violated. There have been similar incidents in Baltimore, MD; Miami Beach, Fort Lauderdale and Tampa, Florida; Rochester, Buffalo and Orange County, New York; Spokane, Washington; Los Angeles and Long Beach, California; and Washington, DC. The National Press Photographers Association (NPPA) has been involved in all of these cases, (in some) joining with the ACLU, the Press Club of Long Island and the South Florida Society of Professional Journalists.

The increase in these incidents may be attributed to a number of factors. The first is greater awareness because of the almost instantaneous posting and widespread viewing on such sites as YouTube and the Photography is Not a Crime blog.[9] Many of these postings have then been picked up and broadcast on CNN and other networks as part of news stories or topical discussions. A second factor is the worldwide proliferation of cell phone cameras capable of taking high quality photographs and audio-visual recordings along with the ease in which those files may be wirelessly uploaded to the Internet. Other factors include the loss of staff positions by photojournalists from newspapers and television stations who become freelance journalists; and who may now lack the legal support they once had from their employers. This is coupled with an increase in “citizen journalism” -- members of the public “playing an active role in the process of collecting, reporting, analyzing and disseminating news and information.”[10]

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### **Citing National Security**

Another piece of the perfect storm contributing to the rise in these confrontations is the post 9/11 attitude by law enforcement in characterizing photography as a “suspicious activity.” An example of this may be seen in the response by one agency to a recent case. In that incident a Long Beach, California police officer detained and questioned a journalist because he was taking pictures of an oil refinery from a public area.[11] In the exchange, the officer was reported to have said that “because of Homeland Security and new laws, [the police] have the authority to ask for [your] driver’s license and run it when they feel that there’s cause.”[12] Although the officer ultimately allowed the journalist to continue taking pictures, in a follow-up article the police chief “confirmed that detaining photographers for taking pictures ‘with no apparent esthetic value’ is within Long Beach Police Department policy.”[13] The chief went on to say that “while there is no police training specific to determining whether a photographer’s subject has ‘apparent esthetic value,’ officers make such judgments ‘based on their overall training and experience’ and will generally approach photographers not engaging in ‘regular tourist behavior.’”[14] NPPA has been made aware of many incidents over the years in which photographers were questioned for taking pictures of oil refineries.

The origins of the Long Beach policy trace from the Los Angeles Police Department's Special Order No. 11,[15] following directives found in the Nationwide Suspicious Activity Reporting (SAR) Initiative (NSI) as called for in the National Strategy for Information Sharing (NSIS).”[16] This is part of a 2009 U.S. Department of Justice (DOJ) strategy “to develop, evaluate, and implement common processes and policies for gathering, documenting, processing, analyzing, and sharing information about terrorism-related suspicious activities.”[17] NSI is a collaborative effort that includes state, local, tribal, and federal law enforcement organizations, as well as private sector entities and allows them to share collected information.[18]

Also connected to SAR, the Spokane County Sheriff’s Office produced an online “Report It Form”[19] as part of the “If You See It Say It” campaign “to collect tips about any suspicious activity within the region.” The area labeled “Incident of Event Description” originally included a checkbox for “photography.” Although that section contained

a disclaimer stating that “these activities are generally First Amendment-protected activities and should not be reported absent articulable facts and circumstances that support the suspicion that the behavior observed is not innocent. . . , but rather reasonably indicative of criminal activity associated with terrorism or other crimes, including evidence of pre-operational planning related to terrorism,”[20] NPPA expressed concern that photography had been suggested at all rather than have been included under the category “other.”

In response to press reports the Sheriff’s Office sent a letter of apology “to [NPPA] and everyone of the over 120 people that sent us complaints about the form.” He went on to say that they “copied the form, verbatim, from our Washington State Fusion Center’s web tip form.” The Sheriff’s Office immediately changed the form as did the Washington State Fusion Center.[21]

According to NSI “a fusion center is defined as a ‘collaborative effort of two or more agencies that provide resources, expertise, and information to the center with the goal of maximizing their ability to detect, prevent, investigate, and respond to criminal and terrorist activity.’”[22] As part of the Joint Terrorism Task Forces, [23] there are 56 fusion centers located throughout the country to assist law enforcement agencies and the Department of Homeland Security (DHS) “in preventing, protecting against, and responding to crime and terrorism” as stated in the 2010 National Security Strategy document.[24]

Given the widespread dissemination of these policies and guidelines it is not surprising that photography is viewed with such suspicion. NPPA believes that an effective way to counter those misguided views is to contact each agency involved in such incidents in order to make them aware of constitutional violations as well as to offer assistance in developing reasonable and workable policies and practices so as to avoid similar situations.

In that regard NPPA has seen some success. Aside from the incidents described above NPPA has received replies from the LAPD and the Suffolk County Police Department. In response to an NPPA letter after a widely publicized incident that occurred in Florida, the Miami Beach Police Department issued new guidelines on August 1, 20011.[25] NPPA has either met or been in close contact with other law enforcement agencies to discuss similar issues in previous years.

Unfortunately there are situations in which letters and discussions fail to bring about positive change. In some of

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those cases lawsuits (or the threat of a lawsuit) have led to favorable decisions or desired results. This was the case in Ft. Lauderdale where photojournalists were barred from taking pictures on a public street[26] and in Baltimore where the local chapter of the ACLU was successful in bringing about a positive outcome.[27]

### Wiretapping Laws and Public Recordings

Another weapon against videotaping police activity on the street are state laws that criminalize such recordings as illegal wiretaps. In a number of cases citizens have been arrested when they admitted to recording the incident or when police later learned that such recordings had been made. Illinois[28] and Massachusetts[29] have such statutes but the law in the latter state requires that there be a reasonable expectation of privacy on the part of the party being recorded for it to be applicable.[30] In a recent case a Massachusetts court rejected an officer's criminal complaint making such allegations.[31]

This past June the United States Court of Appeals for the First Circuit heard arguments in a case brought by a man against a police officer and the City of Boston with the help of the Massachusetts ACLU.[32] The case involves Simon Glik, who was arrested after openly videotaping police arresting another man. Although all charges against Glik were later dismissed he has brought a suit for false arrest along with a First Amendment infringement upon his right to record the actions of government officials. He is also suing the city for failing to properly train its officers about the law and the

Constitution.[33] At press time, the [First Circuit ruled](#) in favor of Glik, holding he "was exercising clearly-established First Amendment rights in filming the officers in a public space, and that his clearly-established Fourth Amendment rights were violated by his arrest without probable cause."

A Maryland judge decided a similar case[34] in favor of a motorcyclist who recorded his own traffic stop, stating "those of us who are public officials and are entrusted with the power of the state are ultimately accountable to the public." [35] The judge also wrote "when we exercise that power in public fora, we should not expect our actions to be shielded from public observation." [36]

In a time of technology and terrorism, citizens and photojournalists throughout the world have risked and in some cases given their lives to provide visual proof of governmental activities. Yet what is viewed as heroic abroad is often considered as suspicious or illegal at home. That is why organizations dedicated to protecting these liberties face a formidable and ongoing battle in their efforts to counter constitutional abridgments through intervention, education and training.

*Mickey H. Osterreicher is the general counsel for the National Press Photographers Association (NPPA) and drafted letters to law enforcement agencies in all of the above listed incidents. He recently helped draft the new Miami Beach Police General Order concerning the "Seizure & Search Of Portable Video And Photo Recording Devices" as well as guidelines related to photography and videotaping for the Niagara Frontier Transit Authority Police.*

## Notes

[1] See: <http://www.rcfp.org/newsitems/index.php?i=11980>

[2] See: [http://www.youtube.com/watch?v=o138MnpAlW4&feature=player\\_embedded](http://www.youtube.com/watch?v=o138MnpAlW4&feature=player_embedded)

[3] See: <http://online.wsj.com/article/AP19ca5ba9a42b47c8a23c52deef77346b.html>

[4] See: <http://www.nbcwashington.com/news/politics/Journalists-Handcuffed-Removed-From-Taxi-Commission-Meeting-124384719.html>

[5] See: <http://www.wjla.com/articles/2011/06/journalists-won-t-face-charges-62814.html>

[6] See: [http://www.huffingtonpost.com/2011/06/22/emily-good-arrested-videotaping-police-rochester\\_n\\_882122.html](http://www.huffingtonpost.com/2011/06/22/emily-good-arrested-videotaping-police-rochester_n_882122.html)

[7] <http://ypdcrime.com/penal.law/article195.htm>

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- [8] See: [http://rochester.ynn.com/content/top\\_stories/548242/charges-against-emily-good-dropped/](http://rochester.ynn.com/content/top_stories/548242/charges-against-emily-good-dropped/)
- [9] See: <http://www.pixiq.com/>
- [10] Bowman, S. and Willis, C. "We Media: How Audiences are Shaping the Future of News and Information." 2003, The Media Center at the American Press Institute.
- [11] See: <http://www.pixiq.com/article/long-beach-police-trained-to-detain-photographers>
- [12] See: <http://www.lbpost.com/life/greggory/12188>
- [13] Id.
- [14] Id.
- [15] <http://www.aclu-wa.org/sites/default/files/attachments/LAPD%20SAR%20Program.pdf>
- [16] <http://nsi.ncirc.gov/>
- [17] Id.
- [18] [http://nsi.ncirc.gov/nsi\\_partners.aspx](http://nsi.ncirc.gov/nsi_partners.aspx)
- [19] <http://www.spokanecounty.org/Sheriff/tips/default.aspx>
- [20] Id.
- [21] Also see photography listed under: Department of Justice ISE-SAR Criteria Guidance Part B
- [22] See: [http://www.dhs.gov/files/programs/gc\\_1156877184684.shtm](http://www.dhs.gov/files/programs/gc_1156877184684.shtm)
- [23] [http://www.dhs.gov/files/programs/gc\\_1298911926746.shtm](http://www.dhs.gov/files/programs/gc_1298911926746.shtm)
- [24] [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf)
- [25] See: <http://www.pixiq.com/article/miami-beach-police-issue-new-policy>
- [26] See: <http://www.pixiq.com/article/judge-determines-photography-still-legal-in-fort-lauderdale>
- [27] See: <http://www.baltimoresun.com/news/maryland/bs-md-mta-policy-20110601,0,2129369.story>
- [28] See: <http://www.ilga.gov/legislation/ilcs/ilcs4.asp?DocName=072000050HArt.+14&ActID=1876&ChapAct=720%26nbsp;ILCS%26nbsp;5/&ChapterID=53&ChapterName=CRIMINAL+OFFENSES&SectionID=60651&SeqStart=26600000&SeqEnd=27800000&ActName=Criminal+Code+of+1961>
- [29] See: <http://www.malegislature.gov/Laws/GeneralLaws/PartIV/TitleI/Chapter272/Section99>
- [30] For a state-by-state Guide to Taping Phone Calls and In-Person Conversations see: <http://www.rcfp.org/taping/states.html>
- [31] [http://www.masslive.com/news/index.ssf/2011/08/officer\\_michael\\_sedergren\\_fall.html](http://www.masslive.com/news/index.ssf/2011/08/officer_michael_sedergren_fall.html)
- [32] See: <http://www.menwithfoilhats.com/2011/06/first-amendment-tested-wiretapping-law-hears-arguments-in-mass-us-appeals-court/>
- [33] Id.
- [34] [http://weblogs.baltimoresun.com/news/crime/blog/2010/09/motorcyclist\\_wins\\_taping\\_case.html](http://weblogs.baltimoresun.com/news/crime/blog/2010/09/motorcyclist_wins_taping_case.html)
- [35] See: [http://www.aclu-md.org/aPress/Press2010/Court\\_Opinion\\_092710.pdf](http://www.aclu-md.org/aPress/Press2010/Court_Opinion_092710.pdf) at 18.
- [36] Id.
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# Missouri Federal Court Enforces Section 230's Immunity Provision Despite Plaintiff's Creative Attempts To "Plead Around" The Statute

By Michael Nepple

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

## Background

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

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

## Plaintiff's Plethora of Legal Theories

Anticipating Backpage's Section 230 defense, M.A.'s amended complaint alleged Backpage was "responsible in part for the development and/or creation of information"

because Backpage created adult-focused categories and provided a search engine that allowed keyword searches of advertisements. Plaintiff further alleged that Backpage was aware that other minors had appeared in advertisements for escorts.

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

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

## The District Court's Opinion

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

The district court also rejected the argument that Backpage should lose Section 230 immunity because – as alleged by plaintiff – Backpage was aware of prior cases of minors being trafficked on the website. According to the district court, "[i]t is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider's own speech." *Id.* at \*8.

M.A. also alleged that Backpage aided and abetted McFarland's criminal acts so as to be liable as a principal

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

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

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

may still pursue a civil remedy against McFarland.” *Id.* at \*13.

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

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

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

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## Facebook User’s ADA Lawsuit Dismissed

### *Plaintiff Failed to State a Claim for Federal or State Law Relief*

A California federal district court recently dismissed a lawsuit against Facebook, Inc. alleging that it violated the Americans with Disabilities Act and related state law claims. *Young v. Facebook, Inc.*, No. 10-3579 (N.D. Cal. May 17, 2011) (Fogel, J.). The court found that plaintiff, a Facebook user whose account was deactivated, failed to state any facts upon which relief may be granted under both federal and state disability laws, as well as state contract and negligence law.

#### **Background**

Plaintiff Karen Beth Young is a Maryland resident and Facebook user with over 4,000 Facebook friends. In 2010, her account was permanently deactivated after Facebook’s security systems determined that she had been sending potentially harassing “friend” requests to people she did not know in violation of Facebook’s terms of use.

Plaintiff drove from Maryland to California seeking a face

to face meeting and an opportunity to appeal both of which were rejected. She then sued Facebook for a variety of claims: violation of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101, *et. seq.*, violation of the Unruh Civil Rights Act, Ca. Civ. Code § 51, *et seq.*, violation of the California Disabled Persons Act, Cal. Civ. Code § 54, *et. seq.*, and breach of contract and negligence.

The basis of her complaint was the allegation that she suffers from bipolar disorder and that Facebook unlawfully discriminated against her by failing to provide reasonable customer services to assist individuals with mental disabilities.

#### **ADA and Related Claims Dismissed**

The court dismissed the complaint for failure to state a claim. To prevail on an ADA discrimination claim, a

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plaintiff must show that: (1) she is disabled within the meaning of the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; and (3) the plaintiff was denied public accommodations by the defendant because of her disability. Under controlling Ninth Circuit authority, “places of public accommodation” under the ADA are limited to actual physical spaces.

The court held that while Facebook’s physical headquarters are obviously a physical space, it is not a place where the online services to which plaintiff Young claims she was denied access are offered to the public. Furthermore, while retail stores that sell Facebook gift cards may be places of accommodation, plaintiff did not allege that Facebook “owns, leases (or leases to), or operates” those stores. Thus, Facebook’s internet services do not have a nexus to a physical place or public accommodation for which Facebook may be liable under the statute.

Turning to the claims for violation of the Unruh Civil Rights Act and California’s Disabled Persons Act, the court clarified that the Unruh Civil Rights Act – providing for full and equal accommodations, advantages, facilities, privileges, and services in all business establishments regardless of disability – may only be maintained independent of an ADA

claim where the plaintiff pleads “intentional discrimination in public accommodations in violation of the terms of the Act.” This must be more than just disparate impact of a facially neutral policy on a particular group. Plaintiff similarly failed to state a claim under California’s Disabled Persons Act which generally tracks the requirements of the federal ADA.

The breach of contract claims failed because plaintiff was unable to identify with any particularity how Facebook breached any obligation under its terms of use. Facebook’s “Statement of Rights and Responsibilities” provides that it will give email notification of account termination and plaintiff received such notice. “Given this express language,” the court noted, “Facebook could not have an implied obligation to provide a different termination process.”

The court noted that although “[i]t is at least conceivable that arbitrary or bad faith termination of user accounts, or even termination of user accounts with no explanation at all, could implicate the implied covenant of good faith and fair dealing,” no facts supported the suggestion that Facebook terminated her in bad faith.

Finally, the court dismissed the negligence claims because plaintiff failed to allege any legal duty owed or legal authority for a non-contractual duty to support a tort claim.

## **UPCOMING EVENTS**

### **MLRC Annual Forum**

November 9, 2011 | New York, NY

### **MLRC Annual Dinner**

November 9, 2011 | New York, NY

### **DCS Meeting & Lunch**

November 10, 2011 | New York, NY

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

January 19, 2012 | Los Angeles, CA

# Second Circuit Reverses “Hot News” Judgment and Injunction

## *But Media “Hot News” Claims Remain Viable*

By Andrew L. Deutsch

The “hot news” misappropriation doctrine was born in the Second Circuit. In 1917, a panel of that court entered an injunction in favor of the Associated Press and against AP’s competitor, International News Service (INS). The court found that INS’s practice of copying recently-published AP news and providing the factual substance to INS newspaper customers was a form of unfair competition that should be enjoined under federal common law. *Associated Press v. Int’l News Serv., Inc.*, 245 F. 244 (2d Cir. 1917). The U.S. Supreme Court affirmed the validity of this “misappropriation” cause of action and the injunction entered by the Second Circuit, in its celebrated decision, *Int’l News Serv., Inc. v. Associated Press*, 248 U.S. 215 (1918) (*INS*).

Some commentators have suggested that the Second Circuit’s recent decision in *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, No. 10-1372-cv, 2011 WL 2437554 (2d Cir. June 21, 2011), has mortally wounded its own child, the “hot news” doctrine. The reality is otherwise. *Barclays*, like earlier Second Circuit decisions, merely refused to expand *INS* beyond its traditional role of protecting news gatherers and publishers against unfair competition.

### Second Circuit Decision

The lengthy decision, written by Circuit Judge Robert Sack, held that three financial companies that issue newsworthy recommendations to buy, hold, or sell stocks (the Firms), could not maintain a New York law “hot news” claim against Theflyonthewall.com, Inc. (Fly), an Internet newsletter that reported the Firms’ stock recommendations to its subscribers before market opening. The court found that because the plaintiffs had not shown “INS-type”

misappropriation, their state law claim was preempted by the Copyright Act. However, *Barclays* reaffirmed what the Second Circuit had already held in 1996 – “hot news” claims by one news publisher against another are not preempted.

As *Barclays* recognized, the fate of the Firms’ “hot news” claims depended on developments in the 93 years since *INS* was decided. The Supreme Court abandoned the creation of federal common law in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), making *INS* no longer a binding precedent on any court. However, before and after *Erie*, some state courts adopted the misappropriation doctrine declared in *INS* into their own common law of unfair competition.

This state adoption of misappropriation became important when Congress enacted the Copyright Act of 1976. One goal of the new law was creation of a nationally-uniform law of copyright, which was addressed by section 301(a) of the Act. This provision expressly preempts state causes of action that address material within the general scope of copyright, and protect rights equivalent to those comprised in federal copyright, such as the right to copy, publish, display, or perform. Because copyright law permits the copying and republication of already-published facts, as a general matter, state claims that

would prevent such copying are preempted by section 301(a).

However, Congress did not intend to do away with the “hot news” doctrine. The House Judiciary Committee report that accompanied the Copyright Act, and which is accepted as the authoritative expression of Congress’ legislative intent, see *Eldred v. Ashcroft*, 537 U.S. 186, 210 (2003), expressly stated that notwithstanding section 301(a), “state law should have the flexibility to afford a remedy (under traditional principles of equity) against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting ‘hot

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**In the key sentence of the opinion, Judge Sack concluded that “The Firms are making the news; Fly, despite the Firms’ understandable desire to protect their business model, is breaking it.”**

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news,’ [including] in the traditional mold of International News Service v. Associated Press.” H.R. Rep. 94-1476 at 132, reprinted in 1976 U.S.C.C.A.N. at 5748 (House Report).

### NBA v. Motorola

By the mid-1990s, the Internet and other means of simultaneously transmitting digital information were on the rise, and this gave new life to “hot news” claims. These issues came to the fore in the *NBA* case. The NBA sued STATS, a statistical service, and Motorola, a pager manufacturer. STATS employees viewed NBA basketball games on television, and entered scoring and other statistical facts seen in the game into computers; this data feed was then transmitted to Motorola pagers. The NBA contended that by these acts, the defendants were misappropriating their uncopyrightable games under New York law. The district court agreed, found that this claim was not preempted by section 301(a), and enjoined the service.

The Second Circuit, in a seminal decision written by Circuit Judge Ralph Winter, reversed and vacated the injunction. In reliance on the House Report, *NBA* held that the only form of misappropriation not preempted by section 301(a) is the *INS*-type “hot news” claim. 105 F.3d at 850. From *INS* and earlier Second Circuit cases, *NBA* identified five elements that are necessary for a state misappropriation claim to be in the mold of *INS*, and therefore not preempted: the plaintiff collects or generates information at some expense; the information’s value is highly time-sensitive; the defendant’s use of the information constitutes “free-riding” on the plaintiffs’ costly efforts to collect or generate the information; the plaintiff and defendant’s products or services directly compete; and if such free-riding were generally permitted, this would reduce the incentive to create the original product or service so that “its existence and quality would be substantially threatened.” *NBA*, 105 F.3d at 852.

Judge Winter concluded that the NBA’s misappropriation claim failed on the free-riding element, because STATS was not copying from an NBA compilation of statistics, but was instead using its own employees to gather scoring and statistical information through observing game broadcasts.

*Id.* at 853. The NBA’s claim was therefore dismissed as preempted. *Id.*

### Barclays v. Flyonthewall

*Barclays* was the next Second Circuit case to consider the preemption of “hot news” claims. The Firms have retail and institutional brokerage divisions, and equity research staff which create recommendations as to securities trading. These recommendations are provided on a daily basis to the Firms’ clients before markets open, and many of the clients trade on the basis of the recommendations through the Firms’ brokers. The Firms contended that keeping these recommendations exclusive to their clients was crucial to their business model. Without protection against copying, they claimed that they would shrink or close their equity research groups, and thus ultimately stop issuing recommendations. Fly is an Internet newsletter that publishes a financial newsfeed, which reports the daily stock recommendations of 65 investment companies, including those of the Firms. Fly’s employees obtained the recommendations from speaking to traders, going on chatrooms, and so forth.

The Firms claimed that Fly’s copying and republication of their recommendations was actionable “hot news” misappropriation, while Fly argued that this misappropriation claim was preempted by section 301(a). After trial, District Judge Denise Cote found that the plaintiffs had proven each of the five factors identified in *NBA* for a non-preempted “hot news” claim. The court entered an injunction that restrained Fly from publishing the Firms’ recommendations for a period of 30 minutes to two hours after market opening, depending on circumstances.

On appeal, the Second Circuit reversed and vacated the injunction, holding that the Firms’ misappropriation claim was preempted by section 301(a). At the outset, the panel opinion, written by Circuit Judge Robert Sack (Circuit Judge Reena Raggi wrote a separate concurrence), rejected the views of *amici* Google Inc. and Twitter, Inc. These companies had argued that the court should “repudiate” the “hot news” doctrine as contrary to public policy and as providing unconstitutional copyright-like protection for facts.

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**The ultimate conclusion is that *Barclays* is a pro-newsgatherer decision that reaffirms established “hot-news” law.**

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*Barclays* said that the court was bound by *NBA*'s determination that (1) "hot news" was a cause of action recognized by New York law and (2) that Congress, in enacting section 301(a), intended that "*INS*-like state-law torts," if recognized under state law, would survive copyright preemption. 2011 WL 2437554 at \*11.

However, Judge Sack also devoted much discussion to showing that *NBA*'s statement of "tests" for the non-preempted "*INS*-like" tort was non-binding dictum. *Id.* at \*18-20. The parties to the litigation and District Court had agreed that the five-part analysis given in the *NBA* decision, which Judge Winter had prefaced with the normally precedential phrase "We hold," was governing law. The panel opinion disagreed. The court found that *NBA* was merely "opining about the hypothetical set of circumstances – not present in that case – that might give rise" to the "non-preempted *INS*-like 'hot news' claim," and that this conjecture, while descriptive and illuminating of *NBA*'s reasoning, "could not bind subsequent courts." *Id.* at \*19 n. 32.

The court was particularly influenced by the fact that *NBA* restated the "tests" for a non-preempted "hot news" claim in different ways, and found that this inconsistency was such that *NBA*'s listing of those "tests" were not equivalent to a "statutory command to which we or the district court are expected to adhere." *Id.* at \*20. It should be noted that Circuit Judge Reena Raggi, the third panel member, while concurring with the decision to reverse the judgment below, disagreed with Judge Sack's determination that *NBA*'s statement of these "tests" was dictum. Judge Raggi concluded moreover that even if the "tests" were dictum, they were deserving of substantial consideration and respect. *Id.* at \*29-30.

Judge Sack concluded that only one element identified in the *NBA* tests had precedential force: the determination that the *NBA* had failed to show "free-riding" as required by *INS*, because *STATS* was "bearing its own costs of collecting factual information on *NBA* games." *Barclays*, 2011 WL 2437554 at \* 24, quoting *NBA*, 105 F.3d at 854. Judge Sack found the Firms' misappropriation claim was preempted because *Fly* also was not free-riding. Rather, it was "collecting, collating and disseminating factual information" – the fact of the plaintiffs' securities recommendations, which

had impact on trading behavior – using its own paid employees, just as *STATS* had done. *Barclays*, 2011 WL 2437554 at \* 21. *Fly*'s employees were engaged in the "financial-industry equivalent" of observing and reporting facts about basketball games. *Id.* at \*24. In the key sentence of the opinion, Judge Sack concluded that "The Firms are making the news; *Fly*, despite the Firms' understandable desire to protect their business model, is breaking it." *Id.* at \*21.

The *Barclays* court found no meaningful difference between *Fly*'s obtaining recommendations created by a Firm and selling it by identifying its origin, and standard "behavior by members of the traditional news media" who report on award winners, the newsworthy political endorsements of newspapers, or the scores of *NBA* games. *Id.* at \*23, 23 n. 38. *INS* did not address such conduct. *Id.* at \*23. The court also rejected the Firms' contention that, as the defendant did

in *INS*, *Fly*'s activities were diverting a significant portion of the Firms' profits to *Fly*. *Barclays* found that even if one accepted the Firms' theory that readers of the *Fly* newsletter would use the Firms' recommendations to trade with discount brokers, and not the Firms, it would be those brokers, not *Fly*, which would receive the funds that would otherwise go to the Firms' brokerage

divisions. *Id.* (The Firms have since sought rehearing and rehearing en banc on the grounds that the panel majority's declaration of *NBA* as dictum was erroneous and that the panel decision conflicts with *NBA*.)

### Analysis

The ultimate conclusion is that *Barclays* is a pro-newsgatherer decision that reaffirms established "hot-news" law. First, the holding protects news "breakers" against misappropriation suits brought by those who are news "makers." The court regarded *Fly* as indistinguishable from a traditional newsgatherer, and the Firms (insofar as they created market-moving stock recommendations) as no different from financial companies whose activities are covered in the business pages of newspapers. It was concerned that enjoining such reporting would have serious First Amendment implications, *id.* at \*22, and allow

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**Nothing in *Barclays* suggests that the arrival of the Internet has limited or preempted traditional "hot-news" claims.**

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newsmakers to “control who breaks that news and how.” *Id.* at \*23. *Barclays*’ refusal to extend *INS*-type preemption to claims outside of the publisher versus publisher scenario is consistent with *NBA*’s refusal to allow the NBA to control who published its scores and statistics, and with earlier Second Circuit case law that was “hostile to a broad reading” of *INS*. *NBA*, 105 F.3d at 852 n. 7.

Second, nothing in *Barclays* suggests that the arrival of the Internet has limited or preempted traditional “hot-news” claims. The court does remark that *INS* does not protect established businesses and their models against disruptive technologies. However, this statement is made in the course of rejecting the view that it was morally “unfair” for Fly to have profited by collecting and reselling the Firms’ recommendations (this echoes *NBA*’s prior rejection of earlier decisions that had interpreted *INS* as forbidding all forms of “commercial immorality”). *Id.* at \*16; see *NBA*, 105 F.3d at 853. *NBA* is expressly stated to be binding precedent insofar as it holds that *INS*-type claims are not preempted. *Barclays*, 2011 WL 2437554 at \* 11.

That “hot news” remains intact in its traditional context – as a protection for publishers – is beyond question. *Barclays* suggested that if the Firms were themselves engaged in disseminating news about the securities recommendations of other companies, and Fly copied those facts, it might be liable to the Firms on a non-preempted hot-news theory. *Barclays*, 2011 WL 2437554 at \* 24. The court also cited the recent decision in *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454 (S.D.N.Y. 2009), which refused to dismiss a classic “hot news” claim by a news service against an aggregator on preemption grounds, as an example of a claim that was more closely analogous to *INS*. *Id.* And, as noted above, the court rejected the Google/Twitter argument that “hot news” is unconstitutional or contrary to public policy. One open question is what weight future courts will give to *NBA*, given Judge Sack’s conclusion that *NBA*’s five-part non-preemption test (except for the free-riding factor) is dictum. It should be noted that Judge Sack’s own conclusion, reached

after some rather baroque reasoning, may itself be dictum, because it was certainly not necessary to a finding that the Firms’ claim was preempted. The court could have simply stated that it did not have to determine the full precedential scope of *NBA*, because the Firms had failed to establish one essential element of the *INS*-type tort, namely that the defendant was free-riding.

In any event, even if *NBA* (other than its free-riding analysis, which *Barclays* does treat as precedential) is no longer binding in the Second Circuit, the decision will undoubtedly remain important in future “hot news” decisions. Outside of the Second Circuit, where *NBA* has never been precedential, the decision has still been regarded as “an influential opinion interpreting New York law,” *Confold*

*Pac., Inc. v. Polaris Indus., Inc.*, 433 F.3d 952, 960 (7th Cir. 2006) (Posner, C.J.), and its analysis has been adopted by a number of district courts. See, e.g., *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 977 (E.D. Cal. 2000); *Fred Wehrenberg Circuit of Theatres, Inc. v. Moviefone, Inc.*, 73 F. Supp. 2d 1044, 1050 (E.D. Mo. 1999).

In the author’s view, *NBA* will retain its influence in the

future within and without the Second Circuit. A court that must determine whether a plaintiff has stated an *INS*-type non-preempted “hot news” claim, and which finds that the defendant *is* free-riding on the plaintiff’s investments, will be compelled to identify the remaining elements of the *INS*-type claim. Rather than reinvent the wheel, that court is likely to follow *NBA* as the most relevant, well-reasoned, and persuasive decision on the issue, and adopt *NBA*’s full list of “tests” for non-preemption.

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# Third Circuit Rules Cropping Photo Credits Violates the DMCA

## *Defendants Seek Rehearing En Banc*

**By Toby Butterfield and Joshua Wolkoff**

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

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

### Background

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

An unknown employee of WKXW scanned the Image

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

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

### The Decision Below

Section 1202(b) provides in pertinent part that:

No person shall, without the authority of the copyright owner or the law

- (1) intentionally remove or alter any copyright management information, [or]...
- (3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has

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



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

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

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

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

As the Defendants pointed out, to trigger liability under § 1202, the information removed must function as a component

part of an “automated copyright protection or management system.” Thus, under the DMCA and the *IQ Group* decision, removing a gutter credit created with Adobe InDesign software when cropping the page is not sufficiently *automated* to fall within the ambit of § 1202.

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

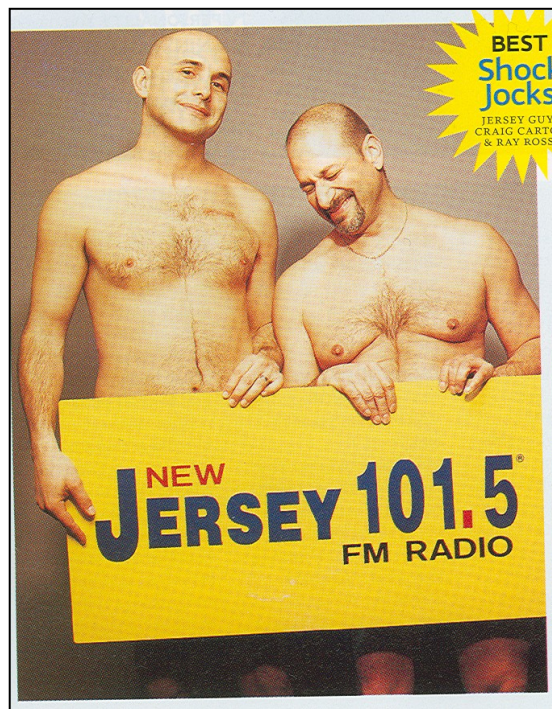
### The Decision on Appeal

The Court of Appeals disagreed. Reversing the District Court’s grant of summary judgment, the Court suggested that the District Court had interpreted the DMCA too narrowly, pointing out that the plain language of § 1202 simply established a cause of action for the removal of (among other things) the name of the author of a work when it has been “conveyed in connection with copies of” the work. The Circuit Court concluded that the section includes no explicit requirement that such

information be part of an “automated copyright protection or management system;” instead, it “appears to be extremely broad, with no restrictions on the context in which such information must be used in order to qualify as CMI.” Contrary to Defendants’ position, the Court noted that nothing in § 1201 restricts the meaning of CMI in § 1202 to information contained in “automated copyright protection or management systems,” that § 1201 makes no reference to § 1202, and that the definition of CMI is located squarely within § 1202.

The Court conceded that the DMCA’s legislative history

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

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can support the defendants' interpretation of CMI, but that it does not provide an "extraordinary showing of contrary intentions" compelling the Court to disregard the plain language of the statute and traditional canons of construction. The decision certainly has the capacity to turn "garden variety" copyright claims into DMCA claims, and may pave the way for future lawsuits against publishers for simply

removing or altering a photo credit. Defendants have filed a motion for rehearing *en banc*.

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

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## FCC Releases Report on "The Information Needs of Communities" "Future of Media" Report Credits Broadcast News, Proposes Modest Regulatory Change

By Kurt Wimmer

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

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

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

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

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

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

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

The policy recommendations made by the report are modest. It finds that our current system of public-interest regulation is broken – that broadcasters collect and produce massive amounts of information on the programming that responds to local issues that neither the FCC nor the public ever read. It also notes that license renewals are routinely

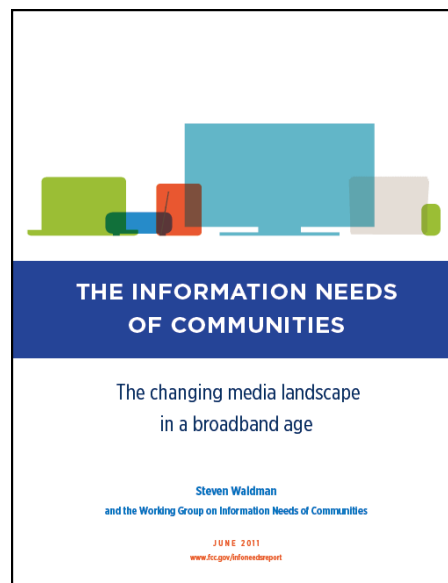
granted without scrutiny. Over the course of 75 years, the report notes, the FCC has granted more than 100,000 license renewals. It has denied only four renewals for a licensee’s failure to meet public interest obligations, and none in the past 10 years.

But the measures that the report proposes to remedy the failings it perceives are measured and designed to permit viewers to better understand local programming policies. The report recommends that the FCC scuttle the long-dormant “enhanced disclosure” docket that would have expanded dramatically the record-keeping requirements imposed on broadcasters. Rather than proposing a system of intrusive

regulation, the report proposes that stations publish online a “sample” week of programming so that communities can be empowered to better understand which stations are producing local programming and which are not. It does not propose that stations be judged by the levels of programming they disclose; it finds that the value of transparency alone will assist local populations in learning about our work and may lead to them supporting stations that do more. That recommendation reads as follows:

“[T]he FCC should eliminate the long-standing requirement that local TV stations keep, in a paper file on the premises, a list of issues-responsive programming for the year. This should be replaced with a streamlined, web-based form through which

broadcasters can provide programming information based on a composite or sample week. Information could include: the amount of community-related programming, news-sharing and partnership arrangements, how multicast channels are being used, sponsorship identification disclosures . . . and the level of website accessibility for people with disabilities. Over time, move to an online system for most disclosures, while ensuring that the transition is sensitive to the needs of small



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

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

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

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

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

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

*Kurt Wimmer is a partner at Covington & Burling in Washington, D.C.*

## **UPCOMING EVENTS**

### **MLRC Annual Forum**

November 9, 2011 | New York, NY

### **MLRC Annual Dinner**

November 9, 2011 | New York, NY

### **DCS Meeting & Lunch**

November 10, 2011 | New York, NY

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

January 19, 2012 | Los Angeles, CA