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MLRC Media Law Resource Center

# MEDIALAWLETTER

Reporting Developments Through July 25, 2012

## SUPREME COURT



## REPORTERS PRIVILEGE



## LIBEL & PRIVACY

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# MLRC/NAA/NAB Media Law Conference 2012

September 12-14, 2012 | Hyatt Regency - Reston, Virginia

Registration | Full Program

## Schedule of Events

### Wednesday, September 12, 2012

| | |
|---|---|
| 9:00am | **Registration Opens** |
| Noon-2:30pm | **Individual Meetings among Breakout Chairs and Boutique Chairs** |
| 2:30-3:45pm | **Program: Is the Roberts Court a Reliable Guardian of the First Amendment?** |
| 3:45-4:00pm | **Coffee Break** |
| 4:00-5:30pm | **Boutique Sessions A** |
| | *Pre-Publication/Pre-Broadcast Review* |
| | *Latest Frontiers in Digital Technology* |
| | *Media and the First Amendment at the FCC* |
| | *Vetting Material Cross Borders: Clearing IP for International Audiences* |
| 6:00-7:00pm | **Opening Reception** |
| 7:00-9:00pm | **Dinner** |
| | **Program: Overview of the Evolving Media/Entertainment Industry: Analysts and Industry Leaders' Views of Where the Industry Is Heading** |

### Thursday, September 13, 2012

| | |
|---|---|
| 8:00-9:00am | **Breakfast** |
| | **Introductions and Announcements** |
| | **MLRC Welcoming Remarks** |
| | **NAA and NAB Welcoming Remarks** |
| 9:15-10:45am | **First Breakout Session** |
| 10:45-11:00am | **Coffee Break** |
| 11:00-12:30 | **Boutique Sessions B** |
| | *Pre-Publication/Pre-Broadcast Review* |
| | *Ethics* |
| | *Entertainment Law* |
| | *Dealing with Patent Trolls* |
| | *Regulatory Environment and Data Privacy* |

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| | |
|---|---|
| 12:30-2:30pm | **Lunch** |
| | **Program: Presentation of First Amendment Leadership Awards to Robert Hawley and Slade Metcalf** |
| | **Program: Reporting in an iWorld** |
| 2:45-4:15pm | **Second Breakout Session** |
| 6:00-7:00pm | **Reception** |
| 7:00-9:00pm | **Outdoor Dinner Party** |

## Friday, September 14, 2012

| | |
|---|---|
| 7:45-9:15am | **Breakfast** |
| | **Program: The Future of Political Advertising: Citizens United and Beyond** |
| 9:15-10:45am | **Third Breakout Session** |
| 10:45-11:00am | **Coffee Break** |
| 11:00-12:30pm | **Boutique Sessions C** |
| | *Ethics* |
| | *Trial Tales* |
| | *Music Licensing 101* |
| | *False Advertising* |
| | *Vetting Material Cross Borders: Libel, Privacy and Related Issues* |
| 12:45-3:00pm | **Lunch** |
| | **Program: The Next Big Thing: The Hottest Trends in Media Law** |

# More MLRC Upcoming Events

**MLRC Annual Dinner & MLRC Forum**
November 14, 2012, New York, NY

**Defense Counsel Section Annual Meeting and Lunch**
November 15, 2012, New York, NY

**MLRC/Southwestern Media & Entertainment Law Conference**
January 17, 2013, Los Angeles, CA

**MLRC/Stanford Digital Media Conference**
May 16-17, 2013, Palo Alto, CA

**MLRC London Conference**
September 23-24, 2013, London, England

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# Supreme Court Strikes Down Stolen Valor Act

**By Tom Clyde**

When the tsunami of reporting on the U.S. Supreme Court's recent health care decision subsided, another newsworthy decision issued on June 28, 2012, rose to the surface. In United States v. Alvarez, the Supreme Court struck down the Stolen Valor Act in a group of opinions that examined the constitutional value – or lack of it – that the Justices found in knowingly false speech.

In a 6-3 decision, with Chief Justice Roberts and Justice Kennedy joining the traditionally liberal wing of the Court, the Court struck down a federal criminal law intended to punish those who lie about their military honors.

In two separate opinions, the Justices in the majority rejected the argument urged by the government that false speech is categorically outside the realm of constitutional protection. Instead, the majority strongly endorsed the idea that false speech, particularly false speech on matters of public concern, remains subject to constitutional protection. The Court observed that a contrary holding would open the door to an Orwellian "Ministry of Truth."


**Following the decision, the Department of Defense created a website listing recent Medal of Valor recipients – a step Justice Kennedy cited as a less restrictive means of accomplishing the government's objective.**

In reaching its decision, the Court frequently referenced such familiar defamation cases as *Sullivan*, *Gertz* and *Hepps*, and emphasized the well-established notion that protecting some false speech is necessary to create the "breathing space" needed for other expression.

**Xavier Alvarez:**
**"Lying was his habit."**

In 2007, Xavier Alvarez was an official on a California water district board of directors. As Justice Kennedy observed, "[l]ying was his habit." At a meeting with a neighboring district water board, Alvarez had introduced himself by stating that he was a "retired marine of 25 years" and that "back in 1987 I was awarded the Congressional Medal of Honor."

In fact, these statements were utterly false. Alvarez had never been in the military and the accolade he had casually awarded himself was the nation's most prestigious military decoration.

Alvarez eventually pled guilty to a violation of the Stolen Valor Act, 18 U.S.C. § 704(b), which makes it a crime for a person to "falsely represent[] himself or herself" as having "been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . ." In entering his plea, Alvarez reserved his right to appeal on First Amendment grounds.

On appeal, a divided Ninth Circuit panel reversed Alvarez's conviction and struck down the Act under a strict scrutiny analysis. *See United States v. Alvarez*, 638 F.3d 666 (9th Cir. 2011 ), *cert. granted*, No. 11-210 (Oct. 17, 2011). In dissent, Judge Jay S. Bybee noted that a litany of U.S. Supreme Court decisions had stated that false statements of fact have "no constitutional value," so are unworthy of strict scrutiny.

In a concurring opinion on a subsequent denial of a petition rehearing en banc, Chief Judge Alex Kozinski dramatized the importance of strict scrutiny in this context, observing that "white lies, exaggerations and deceptions that are an integral part of human intercourse would become targets of censorship, subject only to the rubber stamp known as 'rational basis.'" Judge Kozinski elaborated with every day examples: "Saints may always tell the truth, but for mortals living means lying. We lie to protect our privacy ("No, I don't live around here"); to avoid hurt feelings ("Friday is my study night"); to make others feel better ("Gee you've gotten skinny").... to get a clerkship ("You're the greatest living jurist").

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**Kennedy Rejects Govt.'s Interpretation of *Sullivan*.**

Without using quite the same rhetorical flourish as Judge Kozinski, Justice Kennedy wrote an eloquent plurality opinion that relied heavily on the Court's recognition in *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964), that "[t]he erroneous statement is inevitable in free debate" and that punishing such falsehoods threatens the open and vigorous expression of views protected by the First Amendment.

In his opinion, Justice Kennedy acknowledged that the Court had made statements in prior cases that false information "carries no First Amendment credentials," but explained such statements all derived from cases discussing defamation, fraud, or some other well-established category of legally cognizable harm associated with false speech. "The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection."

The opinion also emphasized that the government reference to the "actual malice" standard as permitting defamation liability for a knowing falsehood or reckless disregard for the truth should not be read as an invitation to punish knowingly false speech in any context. "A rule designed to tolerate certain speech ought not blossom to become a rationale for a rule restricting it."

The Court concluded that strict scrutiny was the appropriate standard, and it was fatal to the Stolen Valor Act. Among other defects, the Court noted that the government had not shown "why counterspeech would not suffice to achieve its interests," observing that Alvarez was ridiculed when his lie was exposed to the public. "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society."

**Breyer: Intermediate Scrutiny on Speech of Private Concern**

Justice Breyer wrote a separate opinion concurring in the judgment, which was joined by Justice Kagan. It seemed to be an effort to draw a road map to revising the Stolen Valor Act in a fashion that might pass constitutional muster.

Justice Breyer stated the view that although an attempt to penalize false speech "about philosophy, religion, history, the social sciences, the arts and the like" would warrant strict scrutiny, such scrutiny was not warranted for all types of speech. Drawing a parallel to commercial speech, Justice Breyer opined that "[f]alse statements about easily verifiable facts that do not concern such subjects" make a lesser contribution to the marketplace of ideas and should only be subject to intermediate scrutiny.

Although the Stolen Valor Act was too vague to survive even under intermediate scrutiny because it lacked any connection to the "proof of injury" that anchored other similar laws, the opinion suggested that a more "finely tailored" statute might meet more favorable review.

**The Dissent: Majority "Breaks Sharply" from Precedent**

Justice Alito authored the dissent, which was joined by the remaining members of the conservative wing of the Court and endorsed the government's view that false speech is categorically outside First Amendment protection, but emphasized that even this categorical exclusion would only apply to speech that is *not* of public concern.

The dissent viewed the Stolen Valor Act as far afield from such protected speech and the conjectural risks to it discussed in the plurality opinion. "In stark contrast to hypothetical laws prohibiting false statements about history, science and similar matters, the Stolen Valor Act presents no risk at all that valuable speech will be suppressed."

**Implications for Other Laws**

*Alvarez* has been closely watched because of a brewing debate on the constitutionality of state statutes that have been enacted to restrict political advertising that contains knowingly false statements of fact.

In the past five years, the Eighth Circuit and the Washington Supreme Court have each upheld challenges to such laws on the grounds that they strike too deeply into core political speech. *See 281 Care Committee v. Arneson*, 638 F.3d 621 (8th Cir. April 28, 2011); *Rickert v. State Public Disclosure Comm'n*, 161 Wash.2d 843 (Wash. 2007).

As Professor Eugene Volokh has observed, *Alvarez* may suggest sweeping bans on lies in election campaigns are doomed because they would cover a "wide range" of speech on issues of public concern. But, narrowly tailored, factually provable laws – such as forbidding false claims about your job experience by candidates while seeking elected office – might be constitutional. See www.volokh.com/2012/06/28/freedom-of-speech-and-knowing-falsehoods/.

*Tom Clyde is a partner with Dow Lohnes PLLC in Atlanta.*

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# First Circuit Refuses to Quash UK Subpoena for Confidential "Belfast Project" Interviews

## *The New "Dirty Little Secret" About Branzburg*

**By Jonathan M. Albano**

Speaking at a seminar years before his appointment to the Second Circuit Court of Appeals, Judge Robert Sack once referred to *Branzburg* as the media defense bar's "dirty little secret." At the time, the somewhat overwhelming consensus of the federal Courts of Appeal was that *Branzburg* established a qualified privilege for reporters to protect their sources, often articulated as a three-part inquiry into the relevance, necessity and value of a reporter's testimony.

In more recent years, courts increasingly have observed that the reporters in *Branzburg* actually lost, and in fact were required to appear and testify before grand juries. These courts also have noted that the qualified reporter's privilege sounds suspiciously similar to the three-part test considered and rejected by *Branzburg* as "a virtually impenetrable constitutional shield, beyond legislative or judicial control." *Branzburg v. Hayes*, 408 U.S. 665, 697 (1972). *See, e.g., McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003).

**The First Circuit held that Branzburg so thoroughly routed any potential First Amendment interests implicated by confidential source relationships that the complaint failed to state a claim upon which relief could be granted.**

A recent First Circuit decision raises the question of whether *Branzburg* has spawned a new "dirty little secret," exchanging a once overly optimistic assessment of the case for an unduly bleak one. *See In re Request from United Kingdom Pursuant to Treaty Between Government of U.S. and Government of United Kingdom on Mutual Assistance in Criminal Matters*, No. 11-2511, 2012 WL 2628046 (1st Cir. July 6, 2012 ) ("*United Kingdom*").

Under *United Kingdom's* interpretation of *Branzburg*, a decision that initially was understood as requiring reporters who witnessed a crime to appear and answer "relevant and material questions asked during a good-faith grand jury investigation," *Branzburg*, 408 U.S. at 709, and which later grew into the doctrinal basis for recognizing a reporter's privilege, now means this: a source's interest in confidentiality does not, under any circumstances, "give rise to a First Amendment interest in the reporters to whom [the sources] had given the information under a promise of confidentiality." *United Kingdom*, 2012 WL 2628046 *13; *see also id.* *10 ("a subpoena in criminal proceedings [that] would result in the breaking of a promise of confidentiality by reporters is not by itself a legally cognizable First Amendment or common law injury").

### The Belfast Project Subpoenas

*United Kingdom* arose out of subpoenas issued to Boston College ("BC") by a commissioner appointed pursuant to the Mutual Assistance in Criminal Matters Treaty ("MLAT") between the United States and the U.K. The subpoenas originated with U.K. authorities who claimed to be investigating the 1972 abduction and death of Jean McConville, believed to be an informer for British authorities on IRA activities. Northern Ireland Police did not investigate the murder for more than two decades. Almost 35 years after her death, a Police Ombudsman for Northern Ireland reported on the ongoing failures (*i.e.*, inactivity) of the investigation. Some attribute renewed interest in the 40 year-old investigation to the possibility of linking McConville's death to Gerry Adams's leadership of the IRA.

The U.K.'s subpoena sought records of confidential interviews conducted by BC's "Belfast Project," an academic project intended to preserve historical information and provide insight into Northern Ireland's "Troubles" and other conflicts. The Project's director was Ed Moloney, a journalist and writer. Anthony McIntyre, a journalist and former IRA member, tape recorded interviews with IRA members for the Project. Interviewees signed confidentiality agreements providing that, absent their consent, access to

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interview records would be remain confidential until their death. Moloney's agreement with BC required that interviewees be given a contract guaranteeing confidentiality "to the extent American law allows." The need for confidentiality was not theoretical. A culture of death to informants pervades both sides of The Troubles, and, unfortunately, has survived The Good Friday Agreement.

**Proceedings before the District Court**

The U.K. issued two sets of subpoenas for Belfast Project interview materials. The first set concerned two interviewees, only one of whom (Dolours Price) was still alive and entitled to confidentiality under the terms of their agreement with the Project. The second set sought the records of several other interviewees.

BC, as custodian of the records, moved to quash the subpoenas. Moloney and McIntyre moved to intervene, asserting that BC did not adequately represent their interests, including their concerns for their personal safety (and their families') in the event confidential IRA information was disclosed. The district court denied intervention, holding that BC adequately represented Moloney and McIntyre's interests. *United States v. Trustees of Boston College*, 2011 WL 6287967 *18 (D. Mass. 2011).

**The First Circuit's assertion (in a footnote) that "[t]here is no plausible claim here of a bad faith purpose to harass" might be questioned by those familiar with the Ireland peace process and its aftermath.**

Barred from intervening, Moloney and McIntyre filed a complaint challenging the issuance of the subpoenas under MLAT and under the First Amendment. The district court dismissed the complaint, essentially ruling that its intervention decision precluded an independent action.

**The District Court's Decision**

The district court ruled that it had discretion to quash an MLAT subpoena (the government had argued otherwise) but refused to do for essentially three reasons.

1. The court found that the materials were not readily available from a less sensitive source, relying on BC's claim that the sources received the "strictest assurances and beliefs in confidentiality" and a *New York Times* article reporting that one interviewee only admitted his affiliation with the IRA because of his personal trust in McIntyre. *Trustees of BC*, 2011 WL 6287967 *18. Although these facts show that confidentiality was essential in gathering the information, they do not show that the U.K. lacks alternative sources to investigate the death of Jean McConville.

2. The court acknowledged that BC "may [] be correct in arguing that the grant of these subpoenae will have a negative effect on their research into the Northern Ireland Conflict, or perhaps even other oral history efforts." *Id.* It nevertheless concluded that the harm to the free flow of information was mitigated for three reasons:

a. Quoting *Branzburg*, the court ruled that "compelling production in this unique case is unlikely to 'threaten the vast bulk of confidential relationships' between academics and their sources." *Id.* Because intervention was denied, Moloney and McIntyre were not allowed to present evidence on this issue.

b. The court also found that "[i]t bears noting that there would be no harm to the free flow of information related to the Belfast Project itself because the Belfast Project stopped conducting interviews in May 2006." *Id.* Under this rationale, confidentiality concerns would expire at the end of any interview.

c. Any harm to the free flow of information was mitigated, the court ruled, by the fact that Project's "original intent was to disseminate this information … [and by the fact that] Moloney published a book and television documentary using two interviews from the Belfast Project in 2010." *Id.* Disseminating information, of course, usually is the purpose underlying a confidential source relationship. The court also ignored that the two published interviews were of deceased persons, a disclosure entirely consistent with the Project's confidentiality terms.

3. Finally, the court found that the governmental interest in disclosure was significant because the information was sought for the purpose of investigating serious criminal charges. *Id.* Given the history of the McConville (non)

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investigation, and the political history of Northern Ireland, this was a subject on which Moloney and McIntyre had much to say, had they been allowed to intervene.

Moloney and McIntyre appealed the denial of their intervention motion and the dismissal of their complaint, and a stay of the order enforcing the subpoena was entered pending appeal. BC did appeal the disclosure order. (It later appealed the district court's separate ruling enforcing the second set of U.K. subpoenas.)

**The First Circuit's Decision**

The First Circuit assumed, without deciding, that the district court possessed some amount of discretion to review an MLAT subpoena issued by a foreign government. 2012 WL 2628046 *10. Although the court credited Moloney and McIntyre's "allegations of threatened harm" as sufficiently "concrete, particularized, and actual or imminent" to satisfy Article III, it affirmed both the dismissal of Moloney and McIntyre's complaint and the denial of intervention.

Moloney and McIntyre's complaint, like their application for intervention, alleged that enforcing the subpoena would violate their First Amendment rights by unnecessarily infringing on their confidential source relationships and, in addition, would pose a threat to their personal safety and that of their families by, in effect, turning them into IRA informers. They also claimed the right to submit evidence concerning the IRA and events surrounding the McConville "investigation" that would bear on the merits of the trial court's decision.

The First Circuit held that *Branzburg* so thoroughly routed any potential First Amendment interests implicated by confidential source relationships that the complaint failed to state a claim upon which relief could be granted. The court interpreted *Branzburg* as not merely rejecting a qualified reporter's privilege, but as foreclosing as a matter of law any challenge to the subpoenas based on the First Amendment. The court deemed a fact-specific inquiry unnecessary – all the work had been done by *Branzburg*: "If the reporters' interests were insufficient in *Branzburg*, the academic researchers' interests necessarily are insufficient here." *Id.* *13. *See also id.* *14 (appellants "simply have no constitutional claim and so that portion of the complaint was also properly dismissed").

Having found "no cause of action under the treaty and under the Constitution," the court also found "no need [to] consider whether the district court acted within its discretion in denying appellants' motion to intervene." *Id.* *14 n.7. Moloney and McIntyre thus had Article III standing, but no right to be heard. Given their exclusion from the trial court's proceedings, the First Circuit's assertion (in a footnote) that "[t]here is no plausible claim here of a bad faith purpose to harass" might be questioned by those familiar with the Ireland peace process and its aftermath. *Id.* *12 n. 22.

**Conclusion**

If those who initially read *Branzburg* as establishing a reporter's privilege were "skating on thin ice," *McKevitt*, 339 F.3d at 533, then so too are those who read the case as holding that the First Amendment is entirely indifferent to subpoenas that "prob[e] at will and without relation to existing need." *Branzburg*, 408 U.S. at 700 (quotations and citations omitted). After all, it should be no secret that the majority opinion in *Branzburg* (not Justice Powell's concurrence and not the dissents) concluded its analysis by saying:

> [N]ews gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth. *Id.* at 707-708.

*Jonathan M. Albano is a partner at Bingham McCutchen LLP. He was a co-author an amicus brief filed by the American Civil Liberties Union of Massachusetts in support of the appellants in United Kingdom.*

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# Illinois Reporter's Privilege Shields Tech Blog's Tipster

## *Tech Blog Deemed "News Media" Under Functional Approach*

**By Esther J. Seitz**

An Illinois trial court this month reconsidered its prior construction of Illinois' reporter's privilege—holding that a technology blog can qualify as a "news medium" and avail itself of the state's reporter's privilege law. *Johns-Byrne Co. v. TechnoBuffalo LLC, et al.*, Cook County No. 2011 L 9161 (Ill. Cir. July 13, 2012).

### Background

This case was filed by Johns-Byrne Co. (JBC) against TechnoBuffalo—a website dedicated to technology news and reviews—in order to obtain the identity of an unknown person who had leaked then-secret information concerning a forthcoming smartphone to the site. JBC was in charge of packaging for the smartphone and alleges that it has possible claims against the person leaking the secrets for theft of confidential trade secrets and breach of contract. TechnoBuffalo does not dispute that it knows the identity of what it calls "an anonymous tipster." But it maintains that it need not reveal its source, raising the protections of the shield law.

Cook County Associate Judge Michael Panter had initially rejected TechnoBuffalo's claim of privilege—ordering it to reveal the tipster's identity. But the court reconsidered that holding and, in doing so, supplanted its prior opinion—which cursorily rejected the idea that TechnoBuffalo qualifies as a "news medium"—with an illuminating analysis of the reporter's privilege statute, relevant jurisprudence and the policy underlying the statute. The court also accepted the parties' invitation to review the TechnoBuffalo site.

Illinois' reporter's privilege extends a qualified privilege to "the source of any information obtained by a reporter." 735 ILCS 5/8-901. The statute defines "source" as "the person or means from or through which the news or information was obtained." 735 ILCS 5/8-902. "Reporter" is defined as "any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium on a full-time or part-time basis." *Id.* "News medium" means "any newspaper or other periodical issued at regular intervals whether in print or electronic format and having a general circulation; a news service whether in print or electronic format; a radio station; a television station; a television network; a community antenna television service; and any person or corporation engaged in the making of news reels or other motion picture news for public showing." *Id.* The privilege is designed to preserve press autonomy and allow the public to receive complete, unfettered information. *E.g. In re Arya*, 226 Ill. App. 3d 848, 852 (4th Dist. 1992).

### Trial Court Decision

The key issue in this case is whether TechnoBuffalo was engaging in the business of news or journalism when it obtained the leaked information and published it on its website. Although the judge was hardly smitten by TechnoBuffalo's model of soliciting information, he stressed the breadth of Illinois' reporter's privilege. Indeed, he harshly criticized TechnoBuffalo for capitalizing on innovation companies' stolen trade secrets—distinguishing TechnoBuffalo's practices from those of the "most elevated journalistic traditions:"

> Reviewing the website is disconcerting. The website makes it clear that TechnoBuffalo is inviting conduct which may or may not be legal and is very likely actionable. They solicit employees of tech companies to be "super secret ninjas" to "discover something top secret in your store's inventory" and handover "inside information" to TechnoBuffalo who then disseminates it for their own purposes and who will "take your name to the grave." These solicitations are particularly detrimental to the intellectual property industry so reliant upon employee

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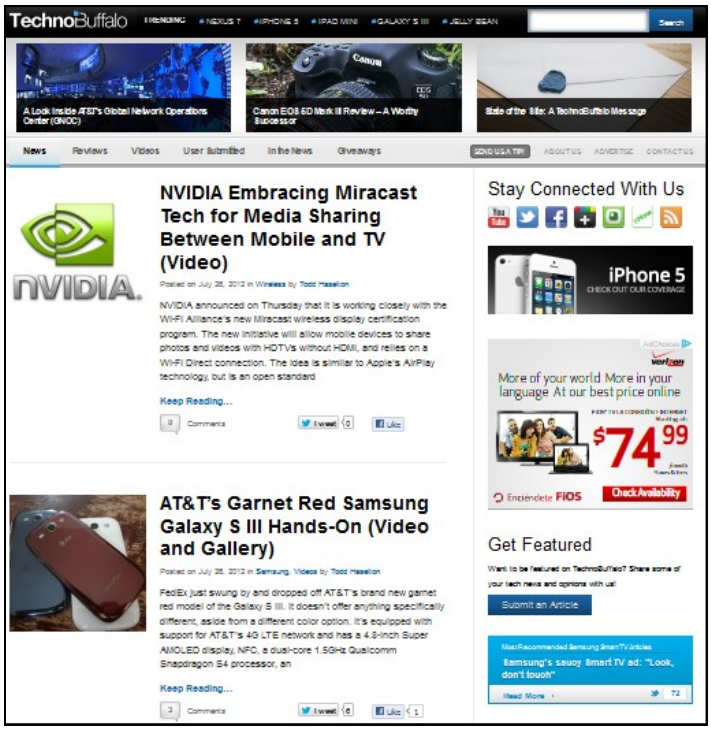
> confidentiality and so sensitive to how and when their new concepts are disclosed. TechnoBuffalo shows full understanding of the subversive conduct they encourage . . . . Unlike other famous secrets whose sources were protected in order to inform citizens of government corruption and public misconduct, the sole purpose of the TechnoBuffalo solicitation is to promote TechnoBuffalo, without a second thought as to what harm it may cause lawful and productive companies whose stolen information it leaks.

Nevertheless, the court's examination of the broad statutory language and the statute's purpose of protecting news gathering and dissemination lead it to conclude that the privilege applies to TechnoBuffalo. First, the court held that TechnoBuffalo constitutes a "news medium" under the statute, because it gathers and disseminates news to the public—adopting a "utilitarian" or functional approach, instead of focusing on the (electronic or hardcopy) form of the publication. Second, the court determined that TechnoBuffalo published "news."




**TechnoBuffalo homepage**

Since the statute does not define that word, the court construed it expansively to mean "previously unknown information" or "a report of recent events"—which includes details surrounding the anticipated release of tech gadgets. The court rejected JBC's attempt to distinguish "hype" from "actual news," because the statute fails to establish a minimum standard for the legitimacy or newsworthiness of news content. Third, the court held that TechnoBuffalo acquired this news from a "source," namely the anonymous tipster. Fourth, the court ruled that TechnoBuffalo and its staff acted as "reporters." Even though TechnoBuffalo only passively received—rather than actively procured—the leak, the site repackaged the information by crafting its own article. As such, "some journalistic process, at least as encompassed by the Act, took place."

After holding that the reporter's privilege applies, the court declined to divest TechnoBuffalo of it. In doing so, the court emphasized "the sacrosanct nature" of the privilege, which JBC's concerns about the tech website—albeit legitimate—could not overcome absent detailed proof that JBC diligently, yet unsuccessfully, attempted to identify the tipster via other means. Judge Panter, perhaps presaging an appeal, acknowledged that his decision is "not the last word on the issue."

While, to date, little judicial guidance exists concerning which information providers qualify for special protections—including shield laws—traditionally extended to the press, the rising popularity of blogs and other websites reporting on current events is sure to re-pose this question.

The pre-internet Supreme Court recognized that not only "elevated journalistic traditions" further constitutional free speech and press objectives: "The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, to play an important role in the discussion of public affairs." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). Judge Panter's ruling aptly applies this reasoning to the internet age.

*Esther J. Seitz is a lawyer at Donald M. Craven, P.C., Springfield, Illinois. TechnoBuffalo was represented by Elizabeth Bradshaw, Winston & Strawn, Chicago, IL. Johns-Byrne Co. was represented by David Eisenberg, Much Shelist, P.C., Chicago, IL.*

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# Texas Supreme Court Set to Hear Argument in "Third-Party Allegation Rule" Case

## *Is the Press Immunized When It Accurately Reports Allegations Made by a Third Party?*

**By Jim Hemphill**

Whether Texas law recognizes a "third-party allegation rule" in media libel cases – derisively characterized by the plaintiff as "neutral reportage on steroids" – is a key issue in a case that will be heard by the Texas Supreme Court.

Oral argument is set for September 13, 2012, in *Neely v. Wilson*, Cause No. 11-0228. The Court of Appeals opinion, affirming summary judgment for the media defendants, is published at 331 S.W.3d 990, 39 Media L. Rep. 1526 (Tex. App. – Austin 2011, pet. granted).

The so-called "third-party allegation rule" essentially immunizes, at least in some circumstances, the media from liability for substantially true reports of allegations that have been made against the plaintiff by a third party, regardless of the truth of those allegations. At issue in *Neely v. Wilson* is whether the holding of the 22-year-old Texas Supreme Court case relied by lower courts actually supports the rule, and if so whether the rule should be maintained, limited, or eliminated altogether.

**The so-called "third-party allegation rule" essentially immunizes, at least in some circumstances, the media from liability for substantially true reports of allegations that have been made against the plaintiff by a third party, regardless of the truth of those allegations.**

### The Background Facts

Dr. Byron Neely was an Austin neurosurgeon. According to the Court of Appeals opinion, he had been in practice 25 years and had been sued for malpractice seven times. Two of those lawsuits figured into the story at issue, a broadcast piece reported by defendant Nanci Wilson and aired on KEYE-TV, owned and operated by defendant CBS Stations Group of Texas, L.P., on January 19, 2004.

The first malpractice suit was brought by former University of Texas and NFL player Paul Jetton, who Neely had diagnosed with a brain tumor. Neely recommended surgery to place a shunt in Jetton's head. The surgery became complicated and Jetton developed post-operative infection. Jetton continued to have complications, ultimately undergoing another dozen surgeries and ending up largely unable to walk.

The second suit involved surgery on an engineer, Wei Wu, to remove a brain tumor. Although the tumor was removed, Neely stated that during surgery he observed that the cancer had spread to multiple locations in the brain. Wu's oncologist opined that Wu had only months to live. Wu then committed suicide. The medical examiner's report indicated that Wu's brain following surgery showed "no residual metastatic melanoma on gross inspection." Wu's ex-wife filed suit on behalf of their minor child.

The Jettons' allegations against Neely included a claim that while he was providing medical care to Paul Jetton, Neely had been impaired by dependency on steroids and opiates, and had hand tremors attributable to medications he was allegedly taking. The Jettons also filed a complaint against Neely with the Texas Medical Board (TMB).

Neely acknowledged he was prescribed medication for various ailments, including a torn rotator cuff and allergies, and eventually had begun self-prescribing. According to the Court of Appeals opinion, Neely also acknowledged that some of the medications were capable of impairing his medical competence, but he denied ever using them at times or in amounts that actually did impair him. Neely also admitted occasional hand tremors but contended he could control them. The Jettons, in their lawsuit, disputed Neely's claims.

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The Jettons settled their case against Neely for his policy limits of $500,000. The suit brought by Wu's ex-wife was dismissed because it was not filed by a lawyer but purported to represent Wu's estate and minor child. The TMB dismissed the Jettons' complaint against Neely regarding the surgery, finding no violations of the medical practices act.

About a month before the broadcast at issue, the TMB and Neely entered into an agreed order under which Neely agreed to a three-year probated suspension of his medical license. The order contained agreed fact findings, including that Neely had refilled his prescriptions himself for medications (15 are listed, including Hydrocodone and Darvocet) and that he had a "history or tremors." The TMB requested independent physical and psychiatric evaluations to determine Neely's capacity to practice medicine and perform surgery.

Based on the findings, the TMB concluded, according to the court of appeals, that Neely was subject to discipline due to his "inability to practice medicine with reasonable care and safety to patients, due to mental or physical condition." The TMB issued a press release setting forth public disciplinary actions taken against several doctors including Neely. An article in the *Austin American-Statesman* followed, which piqued Wilson's interest. She began researching Neely's history for her story.

Wilson interviewed the Jettons, a friend of Wu's, and a TMB representative for the story. Neely declined to be interviewed, but his lawyers provided information to Wilson.

**The Broadcast**

The story focused on the Jetton and Wu cases and reported the TMB's disciplinary action against Neely. It included quotes from the Jettons, an excerpt from a Neely deposition, and excerpts from the medical examiner's report of the Wu autopsy. The story also included information from Neely's lawyers, such as claims that "two highly qualified neurosurgeons … agree with the medical decisions made by Dr. Neely" and that the TMB "investigated the Jetton case and found no wrong doing." The story further noted the dispositions of the Jetton and Wu cases.

Particularly relevant to Neely's libel suit are the following statements from the broadcast:

> The anchor's introduction stated: "If you were told you needed surgery would you want to know if your surgeon had been disciplined for prescribing himself and taking dangerous drugs, had a history of hand tremors and had been sued several times for malpractice in the last few years?"
>
> Sheila Jetton, Paul's wife, stated that "every neurosurgeon that's looked at Paul's MRIs from before Neely operated on him have said they would have never done surgery."
>
> Paul Jetton stated: "Narcotics, opiates … things that they don't even let people operate machinery or drive cars when they're, when they're taking them and this guy's doing brain surgery on people."
>
> Wilson, in summarizing the medical examiner's findings from the Wu autopsy, stated: "Examiners noted no residual metastatic melanoma. Meaning Wei Wu did not have brain cancer."

**The Lawsuit Allegations**

Neely's lawsuit claims that the broadcast was false in several respects. In his briefing, Neely relies largely on claims of "implication." Neely contends that the broadcast's falsities include the following:

> An assertion that Neely was disciplined for "taking dangerous drugs," when in fact he was only disciplined for prescribing them to himself, not specifically for taking them.
>
> An implication that Neely was impaired due to drug use during surgeries, based on Paul Jetton's statement set forth above; Neely claims that although he took drugs that could

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> impair his ability to practice medicine, he was not actually impaired during any surgeries.
>
> An implication that his hand tremor somehow affected his ability to perform surgery; although the TMB findings mention the tremor, they do not find that the tremor affected his ability to practice.
>
> An implication that he performed unnecessary surgeries, based on Sheila Jetton's statement set forth above, and on the account of the medical examiner's report from the Wu autopsy; Neely alleges that the latter implies that Wu never had brain cancer, when in fact Wu did have cancer before Neely performed surgery.

**History of the "Third-Party Allegation Rule" in Texas**

The version of the so-called "third-party allegation rule" at issue in *Neely v. Wilson* has its roots in a brief 1990 Texas Supreme Court opinion, *McIlvain v. Jacobs*, 794 S.W.2d 14, 17 Media L. Rep. 2207 (Tex. 1990).

**The Austin Court of Appeals issued a lengthy opinion outlining the history of *McIlvain*, *Felder*, and their progeny, ultimately concluding that it was bound to uphold the summary judgment against Neely under that line of cases.**

*McIlvain* involved a report an investigation of the plaintiff by the City of Houston's Public Integrity Review Group (PIRG). The trial court granted summary judgment, finding the story substantially true. The Court of Appeals reversed, holding that the defendant was potentially liable for the republication of the third-party allegations that resulted in the investigation, and that the defendant had not proven the substance of those allegations to be true. *Jacobs v. McIlvain*, 759 S.W.2d 467 (Tex. App. – Houston [14th Dist.] 1998). The Supreme Court reversed and rendered, holding that the story was substantially true because "McIlvain's broadcast statements are factually consistent with PIRG's investigation and its findings."

The first significant interpretation of *McIlvain* in the present context was a 1997 Houston Court of Appeals decision, *KTRK Television v. Felder*, 950 S.W.2d 100, 25 Media L. Rep. 2418 (Tex. App. – Houston [14th Dist.] 1997, no writ). In *Felder*, the court held that because the defendant accurately reported that parents of schoolchildren had accused plaintiff, a teacher, of physically threatening and verbally abusing their children, the story was substantially true, notwithstanding whether the parents' allegations were accurate.

The *Felder* court justified its holding in large part on the following rationale:

> [W]e are convinced that when, as in this case, the report is merely that allegations were made and they were under investigation, McIlvain only requires proof that allegations were in fact made and under investigation in order to prove substantial truth. Otherwise, the media would be subject to potential liability everytime it reported an investigation of alleged misconduct or wrongdoing by a private person, public official, or public figure. Such allegations would never be reported by the media for fear an investigation or other proceeding might later prove the allegations untrue, thereby subjecting the media to suit for defamation. … [The] chilling effect on the media under such circumstances would be incalculable.

*Felder*, 950 S.W.2d at 106. Many subsequent opinions adopted the *Felder* interpretation of *McIlvain*. *See, e.g.*, *ABC v. Gill*, 6 S.W.3d 19, 27 Media L. Rep. 2569 (Tex. App. – San Antonio 1999, pet. denied); *UTV of San Antonio, Inc. v. Ardmore, Inc.*, 82 S.W. 3d 609 (Tex. App. – San Antonio 2002, no pet.); *Grotti v. Belo Corp.*, 188 S.W.3d 768, 776-77 (Tex. App. – Fort Worth 2006, pet. denied).

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**Court of Appeals Opinion**

The Austin Court of Appeals issued a lengthy opinion outlining the history of *McIlvain*, *Felder*, and their progeny, ultimately concluding that it was bound to uphold the summary judgment against Neely under that line of cases.

The Court of Appeals noted that no Texas court has adopted the "neutral reportage" doctrine, and alleged that the *Neely* defendants "never identify a doctrinal basis for their third-party allegation rule beyond insisting that this is what *McIlvain* and its progeny have held." The court also noted that "*McIlvain* is somewhat oblique in its analysis." 331 S.W.3d at 922.

Nevertheless, the court ultimately agreed "that *McIlvain* stands for the proposition that a media defendant's reporting that a third party has made allegations is 'substantially true' if, in fact, those allegations have been made and their content is accurate reported." *Id.* In so holding, the court – essentially inviting further review – stated:

> We acknowledge that Neely raises some perplexing questions regarding the doctrinal basis for the supreme court's holding, questions that the McIlvain opinion did not clearly answer. … [W]e are bound to follow McIlvain unless and until the Texas Supreme Court instructs us otherwise.

*Id.* The Supreme Court accepted the invitation and granted discretionary review.

**The Parties' Supreme Court Briefing**

In his Supreme Court briefing, Neely broadly attacks the lower courts' interpretation of *McIlvain*, often in provocative language:

> The key issue presented is whether this Court, in McIlvain v. Jacobs, intended to radically alter this State's defamation law by granting media defendants absolute immunity from liability when they publish false and defamatory statements, as long as the defamatory words are uttered by others. ….
>
> Such a rule undermines, if not totally destroys, the constitutional and statutory protections that Texans have had against defamation at the hands of a scandal-mongering, ratings-seeking media.

Petitioner's Brief on the Merits at ix. Rather, Neely argues, the holding in *McIlvain* turns on the fact that the governmental investigation at issue found the allegations to be *true*. Thus, according to Neely, *McIlvain* forecloses liability only for the substantially true account of an investigation's *findings*, not any unconfirmed allegations that are or were under investigation. Neely asks the Supreme Court to clarify and/or narrow its holding in *McIlvain* such that it is limited to substantially true reports of investigative findings.

Neely contends that the broadcast's alleged allegations and implications go beyond the scope of the official TMB report and thus do not qualify as reports of judicial or other official proceedings, which are privileged under Texas statute and common law. (In his reply brief, Neely even argues that accurate accounts of allegations made in the Jettons' lawsuit filings are not privileged "because they were unsubstantiated allegations, made outside of open court and never found by a court to have been true"; this argument is contrary to substantial Texas law finding substantially true reports of lawsuit allegations to be privileged. *See, e.g.*, *Texas Monthly, Inc. v. Transamerican Natural Gas Corp.*, 7 S.W.3d 801 (Tex. App. – Houston [1st Dist.] 1999, no pet.).)

The media defendants argue that the lower courts' interpretation of *McIlvain* is correct, and that substantially true reports of "newsworthy allegations" are, and should be, protected:

> Allegations in and of themselves are often newsworthy. News organizations could never report on these types of statements at all if they were required to adopt all of them as their own and prove the truth of the underlying allegations to avoid liability. …

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> The chilling effect that would result from adopting Neely's position is obvious and untenable.
>
> [W]here the gist of the Broadcast is that serious allegations have been made, the defendant need not establish the truth of the underlying allegations themselves.

Respondents' Brief on the Merits at 16-17, 18-19. *McIlvain*, they argue, is solidly grounded in the substantial truth doctrine and was a straightforward application of that accepted principle. The cases interpreting and applying *McIlvain* have recognized this, and further have specifically set forth the deleterious consequences should substantial truth not shield the media from liability for republication of newsworthy allegations.

The media defendants further argue that judgment in their favor can be upheld on a variety of alternative grounds, including lack of actual malice, no evidence of negligence, and the official-proceeding, judicial-proceeding, and fair-comment privileges.

The parties' briefings are available online. The Texas Supreme Court is set to hear oral argument on September 13, 2012, and likely will issue an opinion sometime in 2013.

*Jim Hemphill is a shareholder at Graves Dougherty Hearon & Moody, P.C. and is co-chair of the MLRC DCS Litigation Committee. His firm does not represent any of the parties in* Neely v. Wilson.

*The media defendants are represented by Tom Leatherbury, Dan Kelly, Lisa Bowlin Hobbs and Matthew Ploeger, Vinson & Elkins LLP, Dallas, TX. Laura Prather and Catherine Robb, Haynes & Boone LLP, Austin, TX, filed an amicus brief on behalf of the Reporters Committee for Freedom of the Press and Texas Association of Broadcasters.*

*Plaintiff is represented by J. Bruce Bennett, Cardwell, Hart & Bennett, L.L.P., Austin, TX; James D. Baskin, III, The Baskin Law Firm, Austin, TX; and Cindy Olson Bourland, Law Firm of Cindy Olson Bourland, P.C., Round Rock, TX.*



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# Court Refuses to Dismiss Privacy and Emotional Distress Claims Over Accident Photo

## *Plaintiffs Sued Newspaper Over Use of Photo on Mugs and Mouse Pads*

In an interesting case involving the boundaries between editorial speech and commercial use, a Massachusetts federal court denied a motion to dismiss privacy and emotional distress claims over the secondary use of an undoubtedly newsworthy photo. Peckham v. New England Newspapers, No. 11-30176, 2012 U.S. Dist. LEXIS 76847 (D. Mass. June 4, 2012) (Nieman, J.).

**Background**

The plaintiff was injured in a car collision with a drunk driver. A photographer from a local newspaper, the *North Adams Transcript,* captured the scene. The photograph was used to illustrate a news article about the accident. According to the complaint, the photograph was then made available through the newspaper's online store to be reprinted on shirts, mugs and mouse pads. The complaint does not provide details about the arrangements for reprinting the photograph, but several third party vendors, such as CafePress.com, provide such services.


**The complaint alleged that defendant violated plaintiff's privacy by selling "reproductions of the accident scene photo in color on Tee-shirts, coffee mugs, and mouse pads" and that Plaintiffs suffered emotional distress as a result.**

Plaintiff filed suit against New England Newspapers over the sale of the image on products. The complaint simply alleged that defendant violated plaintiff's privacy by selling "reproductions of the accident scene photo in color on Tee-shirts, coffee mugs, and mouse pads" and that Plaintiffs suffered emotional distress.

The publisher moved to dismiss for failure to state a claim, arguing that the publication of a newsworthy photograph was constitutionally protected whether in the form of the newspaper or digitally in an online store. *Citing, e.g., Florida Star v. B.J. F.*, 491 U.S. 524 (1989) and *Cox Broadcasting v. Cohn,* 420 U.S. 469 (1975).

**Decision**

Denying the motion to dismiss, the court ruled it was too early to decide whether a First Amendment defense applied, especially on such an "anemic" record. The court noted that under Massachusetts law a determination of newsworthiness most often requires some discovery since "the lines demarcating the boundaries of the newsworthy defense are not easily discerned."

Under the federal pleading standard of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the complaint raised a plausible claim for relief.

> "In short, for present purposes, the court finds that reasonable minds may disagree as to whether the sale of an accident photograph, unaccompanied by any information regarding the accident, sold

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> exclusively for commercial purposes disconnected to the dissemination of news, following the prior publication of the photograph alongside an undisputedly legitimate news article, crosses the line from the mere "giving of information" to a "sensational prying into private lives for its own sake." *Quoting* Restatement (Second) Torts § 652D, cmt. h (1977).

In late June, the parties settled the case.

*Plaintiffs were represented by Judith C. Knight, Law Office of Judith C. Knight, Great Barrington, MA. New England Newspapers Inc. was represented by William E. Martin, Martin, Oliveira & Hamel, PC, Pittsfield, MA.*

# MLRC Upcoming Events

**MLRC/NAA/NAB 2012 Media Law Conference**
September 12-14, 2012, Reston, Virginia

**MLRC Annual Dinner & MLRC Forum**
November 14, 2012, New York, NY

**Defense Counsel Section Annual Meeting and Lunch**
November 15, 2012, New York, NY

**MLRC/Southwestern**
**Media & Entertainment Law Conference**
January 17, 2013, Los Angeles, CA

**MLRC/Stanford Digital Media Conference**
May 16-17, 2013, Palo Alto, CA

**MLRC London Conference**
September 23-24, 2013, London, England

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# Little League Coach Strikes Out In Libel Action

**By Tom Curley**

A New Jersey appeals court has affirmed a grant of summary judgment to CBS's Philadelphia television station in a defamation case. The case arose from news reports about a verbal altercation on a Little League field involving an adult assistant coach and a 12-year-old player on the opposing team.

The Appellate Division of the Superior Court held, as did the trial court below, that the challenged news reports dealt with a matter of public concern, and were not published with actual malice. *Rossi v. CBS Corporation et al.*, No. A-4322-09T2 (N.J. Super. Ct. App. Div. July 3, 2012).

In 2007, plaintiffs Philip and Annette Rossi filed a defamation lawsuit in state court in Gloucester County, New Jersey. Plaintiffs named as defendants CBS Broadcasting Inc., and its journalists Angela Russell and Ukee Washington. (Ms. Rossi was not mentioned in the broadcasts or the website report. She apparently pursued a claim for loss of consortium derivative of her husband's defamation claim.)

**A central issue in the case was the fault standard to be applied. New Jersey law provides that where a matter of "public concern" is involved, the actual malice standard applies. The CBS defendants argued that community youth sports in general, and allegedly improper conduct by adults within those sports in particular, clearly qualifies as a matter of public concern.**

### Background

The case involved a heated dispute at a Little League game in Deptford, New Jersey one year earlier. Plaintiff Phillip Rossi was a baseball coach who became embroiled in a controversy with a child on an opposing team. KYW-TV, CBS' owned station in Philadelphia, reported that Mr. Rossi had been involved in a "verbal attack" on an opposing player and that he had been suspended by the League.

The broadcast was reported by KYW's Angela Russell and she interviewed Mr. Rossi himself and his son, a player on the Little League team that his father helped coach, the head of the Little League and parents of players. On the broadcast, Mr. Rossi acknowledged that he shouted several times at an opposing player, culminating in him yelling "go back to your fucking dugout," after which outburst Mr. Rossi was restrained by several adults.

Mr. Rossi denied that he moved toward the child as he shouted or had to be restrained, but other eyewitnesses testified that he did go in the player's direction and was then confronted by other adults. Mr. Rossi also stated that he acted as he did only because he feared that the child on the opposing team whom he shouted at had his fist cocked and was about to physically attack Rossi's son. In any event, there was no dispute that coach Rossi was suspended by the League as the result of his actions on the field.

KYW was contacted about the incident by someone troubled by the event and by Rossi's potential presence at games. The initial report about the incident by Angela Russell aired on KYW's 11 p.m. news. A brief excerpt of that first report was also broadcast early the next morning in a report anchored by Ukee Washington. In addition, a version of the news report also appeared on the KYW website.

Each of the challenged reports were, at bottom, even-handed accounts of the Little League altercation that relied in part on Mr. Rossi's own on-camera recitation of events and each report included the coach's explanation that he shouted an expletive at the child only out of concern for his own son's safety.

Nevertheless, Mr. Rossi contended that one or more of the news reports implied that he had in fact physically assaulted a child on the opposing baseball team. Alternatively, Mr. Rossi contended that one or more of the reports conveyed the impression that he had moved aggressively in the direction of the child when, according to Mr. Rossi, he had stood his ground and simply shouted out several warnings when he saw his son in danger.

### Appellate Court Decision

A central issue in the case was the fault standard to be

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applied. New Jersey law provides that where a matter of "public concern" is involved, the actual malice standard applies. The CBS defendants argued that community youth sports in general, and allegedly improper conduct by adults within those sports in particular, clearly qualifies as a matter of public concern.

The Appellate Division agreed, emphasizing that the New Jersey legislature had specifically directed the state's Attorney General to promulgate a model code of conduct for youth athletic leagues which, if violated, could result in an offender being banned from attending subsequent events. The court also observed that "in the record [below there were] numerous articles and internet reports concerning the conduct of parents at youth sporting events."

In its decision, the Appellate Division parsed the several news reports at issue closely in relation to the two principal defamatory implications alleged. Although the news reports on their face negated the implication that Mr. Rossi had in fact physically assaulted a child – indeed the reports stated the opposite – Rossi seized in particular on a brief, early morning follow-up report by KYW anchor Ukee Washington which stated as follows:

> UKEE WASHINGTON: A dispute involving a coach and players and Little League causes tensions in a Gloucester County community.
>
> *Deptford Coach Philip Rossi has been suspended for verbally abusing or assaulting, rather, an opposing player.*
>
> CBS 3 spoke to Rossi about what happened in Monday's game. He says he sprung into action when he saw a player about to hit his son during post-game handshakes.
>
> PHILIP ROSSI: I told him to get back in the dugout, very loudly, but he kept coming. I said it two or three times. And he went and he – all of a sudden there was four or five guys on top of me pushing me away. …

Plaintiff contended that the italicized language above could reasonably be construed as a statement that Mr. Rossi *both* verbally *and* physically abused a child at the Little League game. At his deposition, however, Mr. Washington explained that he was reading from a teleprompter script and inadvertently used the phrase "verbally abusing" instead of "verbally assaulting" as was written in the script. He immediately corrected himself by inserting the word "rather."

The Court, emphasizing the context of the report as a whole, held that "Washington's statement could not reasonably be construed to suggest that plaintiff criminally assaulted a child." Even if such a construction was reasonable, the Appellate Division continued, such a slip of the tongue could not rise to the level of clear and convincing evidence of actual malice.

With respect to Mr. Rossi's charge that the news reports conveyed he had moved toward the child on the opposing team, as distinct from calmly standing his ground, the Court noted that eyewitnesses told journalist Angela Russell that Rossi had indeed done so and was restrained by other parents. And Mr. Rossi himself said on camera that "all of a sudden there was four or five guys on top of me pushing me away."

Although the trial court in its 2010 decision granting summary judgment for the defendants had found the news reports both substantially true and also published without actual malice, the Appellate Division declined to wade into the distinctions between coach Rossi's various statements and those of other eyewitnesses on the issue of substantial truth.

Even crediting Rossi's version of events at his deposition, "Plaintiff's denial that he aggressively moved toward the opposing player did not require the defendants to disregard the contrary statements, and did not require the trial court to disregard the same statements when it decided whether plaintiff had presented sufficient evidence of malice to submit that issue to a jury."

Thus, having found no evidence of actual malice in its review of the record, the Appellate Division affirmed the trial court's grant of summary judgment to the CBS defendants.

*The media defendants were represented below and on appeal by Mary Kate Tischler of CBS and by Gayle Sproul, Thomas Curley and Katharine Larsen of the Philadelphia and Washington, D.C. offices of Levine Sullivan Koch & Schulz, LLP. Plaintiffs represented themselves on appeal and were represented in the trial court by Glen J. Leary of the Law Offices of Glen J. Leary in Cherry Hill, New Jersey.*

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# RI Supreme Court Affirms Dismissal of Libel Complaint Against Newspaper and Radio Station

## *"Off the Record" Not Defamatory; Radio Rant Protected Opinion*

The Rhode Island Supreme Court this month affirmed dismissal of libel claims against the Providence Journal, Citadel Broadcasting, a reporter, and talk radio host over statements criticizing media access restrictions at a political luncheon. Burke v. Gregg et al., No. 2011-148 (R.I. July 5, 2012).

The court held that even if the newspaper falsely blamed the plaintiff for making the event "off the record" that could not have harmed plaintiff's reputation. The radio talk show host's stream of invectives about the ban was non-actionable even if highly offensive.

**Background**

Plaintiff Robert Burke is a Providence restaurateur. At issue were press descriptions of a March 2009 St. Patrick's Day political luncheon held at one of plaintiff's restaurants. The event, hosted by then-Speaker of the House William Murphy, was in the style of a "roast" and included prominent politicians, business people and the press. While the press was invited, reporters were told not to disclose the jokes made during the event.

Providence Journal reporter Katherine Gregg wrote an article about the restriction. In a sub-head titled "The hush of the Irish," she quoted plaintiff stating:

"One of the hoped-for side effects of the event is to lessen the polarization that has become rife in our politics," Burke said in a recent exchange of e-mails. He said he imposed the off-the-record rule because he felt a former Journal columnist took a Murphy quip about homosexuals, at an earlier St. Patrick's Day lunch, out of context . . . creating an impression of an event that is mean-spirited. "The phrase once burned, twice shy applies,' he said.

**The Court affirmed that even a false attribution of the the "off the record" rule to plaintiff was not defamatory. "We cannot conceive of how these comments could reasonably be interpreted to have injuriously affected Burke's reputation, degraded him in society, or brought him into public hatred and contempt."**

Local talk radio host Dan Yorke, an employee of Citadel Broadcasting, read the article and piled on with a tirade against plaintiff. Among other things, he called plaintiff a "manipulative piece of garbage," "an absolute disgrace," a "stupid person," and a "punk, mob type actor."

In March 2010, Burke sued. Among other things, he alleged that prior to publication he twice informed the Providence Journal that Speaker Murphy was responsible for the "off the record" rule. Indeed, in an email exchange with reporter Katherine Gregg he told her that he considered her persistent accusations of censorship to be "repugnant and false."

Last year the Superior Court dismissed the complaint against the newspaper, holding that even if false, "this is not the type of comment that would injuriously affect Burke's reputation, as a restaurateur or otherwise, degrade him in society, or bring him into public hatred or contempt." *See* Burke v. Gregg *et al*., No. 2010-1706, 2011 R.I. Super LEXIS 15 (R.I. Super. Feb. 4, 2011). The court also dismissed the libel claim against the radio defendants, holding that the comments were non-actionable opinion. Moreover, insofar as the opinions were based on facts in the Providence Journal article the wire service defense applied.

**Supreme Court Decision**

On appeal, plaintiff argued that the newspaper falsely portrayed him as "someone to be disliked because he is a political insider who attacks the First Amendment." The Court rejected this reading as "overly broad" and not reflective of the language and context of the article. The Court affirmed that even a false attribution of the the "off the

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record" rule to plaintiff was not defamatory. "We cannot conceive of how these comments could reasonably be interpreted to have injuriously affected Burke's reputation, degraded him in society, or brought him into public hatred and contempt."

The talk radio host's comments were non-actionable opinions based on disclosed, non-defamatory facts. Although the Court agreed that plaintiff was justifiably offended, "it is a prized American privilege to speak one's mind, although not always with perfect good taste."

Plaintiff had also brought two contract based claims against the radio defendants. The Supreme Court affirmed dismissal of a claim for tortious interference with prospective contractual relations where plaintiff failed to identify any intentionally disruptive conduct or specific business relationships. A claim for breach of contract was remanded to the Superior Court for clarification as to whether it had previously been dismissed by the lower court.

*Plaintiff was represented by John R. Mahoney. Joseph Cavanagh, Jr., Blish & Cavanagh, Providence, RI, represented reporter Katherine Gregg and The Providence Journal Company. Jeffrey S. Brenner, represented radio host Dan Yorke and Citadel Broadcasting.*

**MLRC gratefully acknowledges our 2012 Summer Interns**

**Mitchell Drucker**
**Harvard Law School**

**&**

**Sarah Gordon**
**Georgetown Law School**



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# New York Appellate Court Affirms Dismissal of Politician's Libel Claim

## *Calling Candidate Anti-Semitic and Racist Is Protected Opinion*

A New York appellate court this month affirmed dismissal of a failed political candidate's libel suit against multiple media defendants who had described plaintiff as anti-Semitic and racist. Russell v. Davies, et al., 2012 NY Slip Op 05507 (N.Y. App. Div. 2d Dept. July 11, 2012). The court held that the press reports were pure opinion and/or opinion based on disclosed facts.

In 2010, plaintiff, James C. Russell, was the Republican Party candidate for Congress in New York's 18th Congressional District, covering the northern suburbs of New York City. Described as a perennial candidate, this was his fifth attempt to run for Congress.

During the 2010 campaign, Politico discovered that nine years earlier Russell had written an essay entitled "The Western Contribution to World History" for a fringe journal.

Among other things, plaintiff's essay lauded ancient Greek civilization, Viking ancestors, classical composers and the inventor of television -- but also approvingly quoted T.S. Elliot's statement that "any large number of free-thinking Jews is undesirable" and concluded with a condemnation of racial integration and inter-racial relationships. ("In the midst of this onslaught against our youth, parents need to be reminded that they have a natural obligation, as essential as providing food and shelter, to instill in their children an acceptance of appropriate ethnic boundaries for socialization and for marriage," plaintiff concluded.)

MONDAY, SEP 20, 2010 04:01 PM EDT

**N.Y. GOP candidate exposed as racist**

Congressional hopeful Jim Russell wrote an essay opposing interracial relationships and integration of schools

BY JUSTIN ELLIOTT

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TOPICS: 2010 ELECTIONS, REPUBLICAN PARTY, WAR ROOM

Jim Russell

Maggie Haberman at Politico today dug up a virulently racist essay written by Republican Jim Russell, who is challenging Rep. Nita Lowey (D-NY) — and who has been endorsed by the state Republican Party and the state Conservative Party, according to

**Article by defendant Justin Elliott**

Local and national media criticized and lampooned plaintiff for being anti-Semitic and racist. The Republican Party withdrew its support of his candidacy. Russell declared the media was misinterpreting his essay and he sued The Journal News (naming as individual defendants a reporter, columnist, cartoonist and source); two local television stations; a ProPublica reporter; and two Republican Party officials. In July 2011, the trial court granted the defendants' motion to dismiss for failure to state a claim.

The Appellate Division affirmed dismissal of the complaint in a brief decision, holding that in context all the statements at issue were opinion. *Citing, e.g., Mann v Abel*, 10 NY3d 271, *cert. denied*, 555 US 1170; *Steinhilber v Alphonse*, 68 NY2d 283 and *Gross v New York Times*, 82 NY2d at 152. Reasonable readers would conclude the statements were opinion. Moreover, all the statements referenced plaintiff's essay and they were thus protected as statements of opinion based on disclosed fact.

*Mark A. Fowler and Glenn C. Edwards, Satterlee Stephens Burke & Burke, LLP, New York, represented The Journal News defendants. David Schultz and Cameron Stracher, Levine Sullivan Koch & Schulz, LLP, New York, represented the News 12 defendants. Elizabeth McNamara and Victor Hendrickson, Davis Wright Tremaine, LLP, New York, represented the RNN Television defendants. Plaintiff was represented by Charles G. Mills, Glen Cove, NY.*

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# Idaho Newspaper Ordered to Reveal Identity of Commenter

## *Commenter Not a Protected News Source; Court Applies Modified Dendrite Test*

An Idaho District Court refused to quash a subpoena to the *Spokesman-Review* newspaper seeking the identity of an online commenter who posted allegedly defamatory statements about a public figure plaintiff. Jacobson v. Doe, No. 12-3098 (Idaho Dist. July 10, 2012) (Luster, J.). The court first rejected the newspaper's argument that the commenter was a confidential news source protected by the First Amendment and Idaho State Constitution. The court then applied a modified version of the *Dendrite / Cahill* tests and determined that plaintiff overcame the commenter's First Amendment right to speak anonymously.

Both issues were matters of first impression in Idaho. With respect to protecting commenters under the reporter's privilege umbrella, the court did not rule out that possibility, but found that the newspaper merely facilitated and administered the comments at issue rather than rely on them for news content. The court also recognized the constitutional protection for anonymous speech, and indeed applied a summary-judgment test to plaintiff's claim, but found sufficient evidence of actual malice for plaintiff to proceed.

**With respect to protecting commenters under the reporter's privilege umbrella, the court did not rule out that possibility, but found that the newspaper merely facilitated and administered the comments at issue rather than rely on them for news content.**

### Background

The plaintiff, Tina Jacobson, is the Chair of Kootenai County's Republican Central Committee. The newspaper features an online blog entitled "Huckleberries" written by columnist Dave Oliveira. In February 2012, he wrote an article about then-GOP Presidential candidate Rick Santorum's visit to Coeur d'Alene. The article included a picture of Santorum, Jacobson and other local party officials.

The column and photo elicited numerous sarcastic and hyperbolic comments. Among other things, users compared the group photo to a Star Wars convention and mocked the clothes worn by Santorum and Jacobson.

At issue in the litigation are comments made by a user with the screen name "almostinnocentbystander" who wrote: "Is that the missing $10,000 from Kootenai County Central Committee funds actually stuffed inside Tina's blouse??? Let's not try to find out."

Users with the screen names "Phaedrus" and "OutofStaterTater" asked for more information, writing "Missing funds? Do tell" and "Yes, do tell, Bystander. Tina's missing funds at the local GOP, Sheriff Mack, and John Birch Society are coming to town, things are getting interesting around here." Almostinnocentbystander then restated the allegations about Jacobson, writing:

> "the treasury has gone a little light and Mistress Tina is not allowing the treasurer report to go into the minutes (which seems common practice). Let me rephrase that ... a whole Boat load of money is missing and Tina won't let anyone see the books. Doesn't she make her living as a bookkeeper? Did you just see where Idaho is high on the list for embezzlement? Not that any of that is related or anything."

The comments about Jacobson were online for about 2 ½ hours before being deleted by Oliveria. Local GOP officials complained about the comments and asked Oliveira to identify the source. Oliveira refused, but emailed the commenter who posted an apology stating: "I apologize for and retract my derogatory and unsubstantiated commentary regarding Tina Jacobson." The court later found the apology to be evidence of actual malice.

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In April 2012, plaintiff filed a libel suit against almostinnocentbystander and served a subpoena on Cowles Publishing Co., owner of the Spokesman-Review, to obtain the commenters identity. Plaintiff also sought to obtain the identity of Phaedrus and OutofStaterTater as witnesses. Cowles moved to quash.

**Are Commenters News Sources?**

The newspaper argued that its relationship with its online commenters is premised on confidentiality of their identities, citing its user policy on confidentiality. It noted the nature of the Huckleberries blog which solicits user comments in conjunction with the staff journalist's postings. And it cited case law from other states applying the reporter's privilege to commenters. *See, e.g., Doe v. TS, et al.,* No. 08030693 (Ore. Cir. 2008); *Doty v. Mollnar*, No. 07-022 (Mont. Cir. 2008).

The court, however, found that the privilege did not apply "because Oliveira was not acting as a reporter when the statements were made, but instead was acting as a facilitator of commentary and administrator of the blog." The court emphasized that in his affidavit Oliveira did not state that he was gathering information from the commenters to be used in news reporting. And most notably, no one at the newspaper intended to use the comments to create a news story or editorial opinion about the allegations. Under these circumstances, Oliveira was simply facilitating and administering the blog.

**Modified Dendrite / Cahill Test Applied**

The plaintiff and the newspaper both accepted that anonymous online speech should be protected under the *Dendrite / Cahill* standard. The trial court agreed, and applied a modified *Dendrite / Cahill* standard relying on an unpublished Idaho federal district court decision, *S 103, Inc. v. Bodybuilding.com*, LLC, No. CV 07-6311-EJL (D. Idaho 2007).

The *Bodybuilding* decision held that an order for disclosure of an anonymous poster can be granted under the following standard:

> a court may order the disclosure of an anonymous poster's identity if a plaintiff: (1) makes reasonable efforts to notify the defendant of a subpoena or application for an order of disclosure; and (2) demonstrates that it would survive a summary judgment motion ... and 3) the court must balance the anonymous poster's First Amendment right of anonymous free speech against the strength of the plaintiff's case and the necessity of the disclosure to allow Plaintiff to proceed."

Applying this standard, the court first found that the notice given by plaintiff was adequate. Two weeks before the hearing on the motion to quash, she submitted a post about it to the Huckleberries blog – the same forum where the alleged defamatory statements were made. In addition, the newspaper had posted the subpoena and motion to quash.

On the second prong, the court granted the motion to quash as to the commenters Phaedrus and OutofStaterTater since plaintiff was seeking their identities merely as witnesses. However, plaintiff's claim against almostinnocentbystander could survive a summary judgment standard. The blog postings were defamatory since they accused plaintiff of embezzlement, mentioned her job as a bookkeeper and could injure plaintiff's professional reputation. Moreover, the commenter's apology was evidence of actual malice.

Stating "I apologize for and retract my derogatory and unsubstantiated commentary" was sufficient evidence that the commenter was reckless or knew the statements were false when made – for purposes of deciding the motion to quash. (The court noted that if the commenter were to appear and defend the action the court would revisit the issues of fault and defamatory meaning.)

Finally, under the third prong's balancing test, the court concluded that plaintiff was entitled to know the identity of almostinnocentbystander and have her day in court. The newspaper chose not to appeal the ruling and on the commenter came forward and identified herself. She stated that she was raising questions and did not intend to make defamatory assertions of fact.

*Plaintiff was represented by C. Matthew Andersen, Winston & Cashatt, Coeur d'Alene, ID. Cowles Publishing Co. was represented by Duane Swinton and Joel P. Hazel, Witherspoon Kelley, Coeur d'Alene, ID.*

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# Malicious Prosecution Tort, Sanctions Rules Applied Against Libel Plaintiffs

## *Claims May Provide Useful Tools in Media Litigations*

In May of 2012, Rashad Richey, the Political Director of the Georgia Democratic Party, filed a defamation lawsuit in a Georgia Superior Court against Andre Walker, a blogger who operates the site "Georgia Politics Unfiltered." *See Richey v. Walker*, No. 2012-CV-214700 (Ga. Super 2012).

In blog postings, Walker had referred to Richey as a "criminal," a "recidivist," and as a person who "has a history of making poor personal decisions." However, Georgia public records show, and Richey admitted in a press conference, that he had indeed been arrested multiple times and was a convicted criminal.

In addition to Walker's answer to the complaint, Walker's lawyer sent a letter to Richey and his lawyers notifying them that if they do not timely drop the lawsuit, then Walker would seek attorneys' fees pursuant to Georgia's "Abusive litigation" statute, Ga. Code Ann. §51-7-81. Moreover, Walker notified them that, even if they did drop the lawsuit, he reserved the right to seek attorneys' fees pursuant to Ga. Code Ann. §9-15-14 which provides for recovery of fees for frivolous or vexatious litigation.

Soon thereafter, Richey dropped the lawsuit. On June 28th, Walker filed a Rule Nisi motion for attorneys' fees under Ga. Code Ann. §9-15-14. A hearing on that motion was set for July 19th.

Walker's case exemplifies how the prospect of bringing claims for attorneys' fees under abusive litigation and malicious prosecution statutes, as common law tort claims, or through motions for sanctions, can be an effective tool for defendants facing frivolous defamation claims. While these methods are no substitute for a robust anti-SLAPP statute, they can nevertheless serve an important purpose for defamation defendants.

Inspired by this recent case, MLRC has compiled a list of other instances in which these types of tools have been utilized in defamation cases involving both media and non-media defendants. Examples of states where these tools have been successful in cases involving media company defendants include Arizona, Kentucky, Michigan, Minnesota, and New York. *See Condit v. Conestoga Merchants*, CV 2006-010682 (Ariz. Super. Sept. 24, 2007); *Kirk v. Marcum*, 713 S.W.2d 481 (Ky. App. 1986); *Wilson v. Knight-Ridder Newspapers*, 475 N.W.2d 388 (Mich. App. 1991); *Fisher v. Detroit Free* Press, 404 N.W.2d 765 (Mich. App. 1984); *In Re Petition for Disciplinary Action Against Jesse Gant, III*, 796 N.W.2d 310, 311 (Minn. 2011); *Cole v. Star Tribune*, 581 N.W.2d 364 (Minn. Ct. App. 1998); *Mitchell v. Herald Co.*, 137 A.D.2d 213 (N.Y. Sup. 1988); *Millennium of Rochester, Inc. v. Town of Webster*, 305 A.D.2d 1014 (N.Y. App. Div. 2003).

**To access the survey, please click here.**

**If you are aware of any recent cases not included in the survey in which media or non-media defendants mounted these types of claims, please contact MLRC.**

*Walker was represented by John T. Sparks, Sr. of Austin & Sparks, P.C. in Atlanta. Richey was represented by Quinton G. Washington of Bell & Washington LLP in Atlanta and by Reginald J. Lewis of The Mabra Firm in Atlanta.*

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# Illinois Appellate Court Recognizes Federal Immunity For News Websites

## *Rejects 7th Circuit Dicta on Section 230*

**By Michael M. Conway and Marilee L. Miller**

In July 2012, an Illinois Appellate Court held that a newspaper website's policy allowing editors to refuse to post or to remove anonymous comments the newspaper regarded as obscene, profane or inappropriate did not strip the website of the immunity bestowed on internet service providers by the federal Communications Decency Act (CDA). *Gains et al. v. Romkey et al.* , No. 3-11-0594, 2012 IL App (3d) 110594-U (July 3, 2012).

In only the second Illinois Appellate Court opinion to apply the CDA – and the first in nine years – the Third District Appellate Court concluded that a newspaper owner, a newspaper website, and an editor could not be sued for defamation based on the content of third party comments. In so deciding, the Illinois court joined state and federal courts nationwide that have concluded with near unanimity that the CDA broadly bars any suit that would seek to impose tortious liability on an internet service provider for content provided by third parties.

**Gains, the first Illinois appellate decision to grant CDA immunity to a newspaper website, signals that Illinois news organizations are safe in adopting terms of use that allow for discretion in the decision to post or remove third party comments from a website without stripping the website of crucial CDA immunity.**

### Background

*The Moline Dispatch* and *The Rock Island Argus* are newspapers circulated throughout the Quad Cities region that straddles the Iowa-Illinois border. Like many other newspapers, they offer supplemental online content through a website commonly referred to as the Quad-Cities Online website. This website allows members of the general public to submit anonymous comments to news stories.

In January 2011, the Quad-Cities Online website published an article about the arrest of a man named John Hager by Ryan Gains and Raymond Goosens, officers with the Cordova, Illinois police department. The article detailed subsequent court proceedings related to that arrest as well, including the court's dismissal of all charges against Hager.

Members of the public wrote comments anonymously posted to the Quad-Cities Online website. These comments included: "[T]his whole case was one big lie and these two 'public servants' need to be reprimanded . . . thank you Judge Braud for seeing through their lies . . . ." and "[I]t has been proven that the officers were WRONG and LIARS. [I] am very close to Mr. Hager . . . he was BEATEN MACED and HANDCUFFED in front of his own mother."

Gains and Goosens filed suit against the operators of the Quad-Cities Online website in April 2011, arguing that the operators had failed to make "any attempt to verify the truth or falsity" of these allegedly false, defamatory, and injurious comments. The operators asked the Illinois Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois to dismiss the suit, arguing that they were immune from liability by federal law.

Section 230 of the Communications Decency Act or CDA provides, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The Quad-Cities Online website operators argued that they provided an interactive computer service to members of the public to express personal comments about news events. Consequently, the website operators argued that they did not qualify as the publishers of the comments at issue and were immune from liability.

In support of this claim, the website operators submitted sworn statements from an editor and the editor/publisher, detailing the procedure by which comments made by members of the public are posted to the Quad-Cities Online website. As these statements described, a member of the public is required to register for an account at no cost in order to post a comment. Once submitted, a comment passes to a

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holding queue until it can be reviewed by an editor to ensure that it is not abusive, obscene, profane, or otherwise offensive in violation of the website's notice of use. Editors do not edit submitted comments in any way before they are posted to the Quad-Cities Online website; the notice of use is merely intended to promote civility and not an attempt to steer the discussion in any particular direction.

Gains and Goosens opposed the dismissal of their suit, arguing that the broad claim of immunity was unfounded as a matter of law. Citing the absence of controlling Illinois Supreme Court precedent, Gains and Goosens encouraged the trial court to abandon the guidance of case law from other jurisdictions and follow dicta from the U.S. Court of Appeals for the Seventh Circuit in *Doe v. GTE Corp*., 347 F.3d 655 (7th Cir. 2003).

The trial court granted a motion to dismiss with prejudice based on the CDA. Gains and Goosens appealed.

**The Appellate Decision**

Two primary issues were raised on appeal: whether Illinois courts should apply the CDA to grant immunity to the newspaper website for defamatory content supplied by a third party, and whether the Quad-Cities Online website operators had lost CDA immunity by actively monitoring and exercising the right to decide what comments to allow to be posted on the website.

The court began by noting the lack of binding Illinois case law regarding the meaning of the CDA. In such circumstances, the court noted that decisions of the federal courts interpreting a federal statute must control unless an unresolved split of authority exists among the federal courts of appeals. The Illinois appellate court quoted at length from *Ben Ezra, Weinstein, & Co., v. America Online, Inc*., 206 F. 3d 980 (10th Cir. 2000), and cited other decisions that had adopted a broad reading of the CDA's grant of immunity. These cases revealed, according to the court, "a consistent approach in the federal case law holding that Congress intended the CDA to prevent state causes of action where a provider of an interactive computer service disseminates information provided by a third party." The court construed the relevant provision of the CDA accordingly and concluded that it "preempts and bars state causes of action for defamation by granting immunity to internet online service providers, such as defendants in the instant case."

Turning to the case filed by Gains and Goosens specifically, the court noted that the undisputed facts demonstrated that the Quad-Cities Online website was provided for "the public to post their personal comments and views about particular news articles." Besides "screening these comments, the editors did not modify the comments prepared by third parties or contribute to the content whatsoever." The Quad-Cities Online website operators "merely disseminated the comments made by third parties" such that they qualified as an "interactive computer service" for purposes of the CDA and could not be considered the speaker or publisher of the anonymous comments at issue for purposes of a defamation cause of action.

**Significance of the Decision**

Significantly, the Illinois Appellate Court in *Gains* afforded no credence to dicta in the Seventh Circuit's opinion in *GTE*, which had criticized the approach taken by at least four federal courts of appeal, including the Tenth Circuit in *Ben Ezra*, that had broadly construed the CDA's grant of immunity. Gains and Goosens had unsuccessfully argued that Illinois courts should construe the CDA narrowly, consistent with the sentiment of this dicta in the *GTE* opinion.

In the *GTE* opinion, Judge Frank Easterbrook stated that a broad reading of the CDA made internet service providers "indifferent to the content of information they host or transmit: whether they do . . . or do not . . . take precautions, there is no liability under either state or federal law." He also noted in *GTE* that such a broad reading is inconsistent with the title of the relevant provision of the CDA, "Protection for 'Good Samaritan' blocking and screening of offensive material"—"hardly an apt description if its principal effect is to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services."

While one other Illinois appellate court district previously had upheld CDA immunity, the website operator in that 2003 case was not a news organization. *Gains,* the first Illinois appellate decision to grant CDA immunity to a newspaper website, signals that Illinois news organizations are safe in adopting terms of use that allow for discretion in the decision to post or remove third party comments from a website without stripping the website of crucial CDA immunity.

*Michael M. Conway of Foley & Lardner, LLP in Chicago and Marilee Miller of Foley & Lardner LLP in Washington, D.C, represented the defendants.*

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# Consumer Review Website Protected by Section 230

## *Court Rejects "Creative" Attempt to Plead Around Statute*

Rejecting what it called a "creative" attempt to plead around Section 230, a Louisiana federal court dismissed a defamation complaint against consumer review website Angie's List. *Courtney v. Vereb and Angies List, Inc.*, No. 12-655, 2012 U.S. Dist. LEXIS 87286 (E.D. La. June 21, 2012) (Zainey, J.). Plaintiff argued that the website was not entitled to Section 230 protection because registered users are able to receive reviews by telephone and fax, in addition to online. The court, however, found no law or policy reason to hold the website responsible for third party statements.

**Background**

The plaintiff John Courtney is a medical psychologist at Children's Hospital in New Orleans and in private practice. According to his complaint, he searched the psychologist listings on Angie's List and discovered a highly disparaging review of himself. Among other things, the review stated:

> Courtney is NOT a doctor, nor is he a Ph.D. Is some para-professional, not much of anything, who has gained, through legislative shenanigans, the ability to prescribe psychotropic medications. There is no indication that he has any idea of what the side effects may be … and he is not licensed to treat those side effects in any case. He is, in sum, a quack.

The comment was made by Dr. Bartholmew Vereb, a Florida-based psychiatrist. After complaining to Angie's List, the comment was ultimately removed since the website does not allow competitors to rate each other. Courtney sued Vereb and Angie's List for defamation, alleging he never met or treated Vereb or anyone in Vereb's family.

In his claim against Angie's List, plaintiff alleged that the website is a "marketer, publisher, distributor and/or seller" of medical services information. And that the website had a duty to verify negative user reviews; negligently failed to follow its own policy and verify Vereb's review; and should have known the review was false. The website moved to dismiss under Section 230.

**Section 230 Analysis**

Opposing the motion to dismiss, plaintiff argued that Angie's List was outside the scope of Section 230 because it also provided registered users with hard copies of consumer reviews by telephone and fax upon request. There was no allegation that any user received the review by fax or telephone. The court called this argument "creative, but unsupported by the case law."

> Plaintiff did not provide, and the Court has been unable to locate, cases in which a website which offers users the option of receiving hard copies of online information via telephone or fax was deemed to be "not merely just an 'interactive computer service.'" The Court finds that excluding websites which offer this type of additional service from the protection of the CDA would be contrary to the policy behind the statute, which was "to promote the continued development of the internet" by allowing it to expand "unfettered by federal or state regulation." 47 U.S.C. § 230.

Plaintiff also argued that Angie's List was responsible for the content of the review because it was created in response to standard queries. But the court found no binding support to establish that mere use of a questionnaire renders a website the "content provider."

*Plaintiff was represented by Justin I. Woods, Gainsburgh, Benjamin, David, Meunier & Warshauer, New Orleans, LA.*

*Angie's List was represented by Kyle Potts, David C. Coons, Jaimme A. Collins, Adams & Reese, LLP, New Orleans, LA.*

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# Split Decisions on Netfix's Obligation to Provide Captions under the ADA

## *Are Websites Places of Public Accommodation?*

In June and July of 2012, federal district courts in Massachusetts and California reached different conclusions as to whether the Americans with Disabilities Act (ADA) applies to websites' online services. *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, No.11-CV-30168-MAP, 2012 WL 2343666 (D. Mass. June 19, 2012) (Ponsor, J.); *Cullen v. Netflix Inc.*, No. 5:11-cv-01199-EJD, 2012 WL 2906245 (N.D. Cal. July 13, 2012) (Davila, J.).

At issue in both cases was whether the "Watch Instantly" video streaming service on Netflix's website constituted a "place of public accommodation" under the ADA's requirement that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of… any place of public accommodation." 42 U.S.C. § 12182(a). The Massachusetts federal court in *Nat'l Ass'n* held that the Netflix website was a "place of public accommodation" and could therefore be liable for a violation of the ADA, but the California federal court in *Cullen* rejected that exact proposition.

**Both cases arise out of the "Watch Instantly" service on Netflix.com that allows users to watch streaming videos online. Some, but not all, of this streaming content is available with closed captioning that displays text on the screen providing a transcript of the audio portion of the video program.**

### Netflix "Watch Instantly" Service

Both cases arise out of the "Watch Instantly" service on Netflix.com that allows users to watch streaming videos online. Some, but not all, of this streaming content is available with closed captioning that displays text on the screen providing a transcript of the audio portion of the video program. The amount of streaming content available with closed captioning was disputed because of disagreement as to the proper method of measurement: Netflix claimed that as of February, 2011, "about 30% of viewing" was available with closed captioning, while the plaintiffs in *Cullen* claimed that only 6% of streaming titles had that capability.

### Public Accommodation Law and the Web

On June 16, 2011, the National Association of the Deaf, the Western Massachusetts Association of the Deaf and Hearing Impaired, and Lee Nettles, an individual member of both those organizations, filed suit against Netflix "for failure to provide equal access to its video streaming site, 'Watch Instantly,' for deaf and hearing impaired individuals." The plaintiffs sought an injunction requiring Netflix to make all of its streaming content available with closed captioning. The plaintiffs alleged that Netflix's "failure to caption all of its streaming library violates the ADA's prohibition of discrimination on the basis of disability."

In response, Netflix filed a motion for judgment on the pleadings, arguing that (1) its website is not a "place of public accommodation" under the ADA; (2) it doesn't have control over the captioning; and (3) the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA) precludes the ADA's application to the captioning of streaming video programming.

In considering whether the Netflix website constituted a "place of public accommodation," the court looked to the ADA's enumerated list of twelve categories of entities that qualify as places of public accommodation. Citing the First Circuit Court of Appeals in *Carparts Distrib. Ctr. V. Auto. Wholesaler's Assoc.*, 37 F.3d 12 (1st Cir. 1994), the court here reasoned that "'places of public accommodation' are not limited to 'actual physical structures.'" As the *Carparts* court noted, "[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same service over the telephone or by mail are not."

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Asserting that the same logic applies equally to websites, the court here was convinced that, at a minimum, the Netflix site could fall into at least one of three different ADA categories of places of public accommodation: (1) "service establishment"; (2) "place of exhibition of entertainment;" or (3) "rental establishment."

However, Netflix argued that no categories in the ADA's list of covered entities include services that are at all analogous to websites. Indeed, Netflix argued further that any place of public accommodation must be in a public space, not in a private residence where "Watch Instantly" would be utilized.

The court rejected both of these arguments by contending that in 1990, when the ADA was passed, websites did not exist, so it would be unrealistic to expect their inclusion in the list. Further, the court found that the truest reading of the statute's language does not indicate that places of public accommodation must be in public spaces. As the statute is written, "[t]he ADA covers the services 'of' a public accommodation, not services 'at' or 'in' a public accommodation."

Therefore, the court concluded that, applying the First Circuit's precedent from *Carparts*, "the Watch Instantly web site is a place of public accommodation and [Netflix] may not discriminate in the provision of the services of that public accommodation – streaming video – even if those services are accessed exclusively in the home." As a result, the court denied Netflix's motion for judgment on the pleadings.

The court went on to reject Netflix's other arguments that it doesn't have control over the closed captioning and that the ADA is precluded in its application to Netflix by the CVAA. The court reasoned that the plaintiffs made sufficient allegations of Netflix's control to survive a motion for judgment on the pleadings and that the CVAA was enacted to complement, not replace, the ADA's requirements.

**California Federal Court Dismisses Complaint**

On March 11, 2011, even before the *Nat'l Ass'n* complaint was filed, Donald Cullen filed a class action suit against Netflix in California on largely the same grounds. Cullen alleged that Netflix's shortage of streaming content with closed captioning capabilities constituted discrimination under California's Unruh Civil Rights Act (Unruh Act), Cal Civ. Code §§ 51, *et seq* and California's Disabled Persons Act (DPA), Cal. Civ. Code §§ 54, *et seq*. Cullen further alleged that representations made by Netflix officials about their closed captioning services constituted violations of California consumer protection laws.

Both of those state anti-discrimination laws, the Unruh Act and the DPA, are defined so that they are violated when the federal ADA is violated. As such, Cullen's claim here amounted to essentially the same claim made by the plaintiffs in *Nat'l Ass'n*. However, the Ninth Circuit Court of Appeals had previously held in *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000), that "a 'place of public accommodation' under the ADA, is limited to 'an actual physical place.'"

The court here observed that the Ninth Circuit jurisprudence stands in direct contrast to decisions by other Circuit Courts, including the First Circuit in *Carparts*. Moreover, the court explicitly noted that the Massachusetts district court in *Nat'l Ass'n* had recently addressed the same question and held that Netflix is liable under the ADA as offering a "place of public accommodation."

Nevertheless, the court here explained that it "must adhere to Ninth Circuit precedent." The court then indicated that several other district courts in the Ninth Circuit have applied *Weyer* to reach the conclusion that websites cannot be considered places of accommodation under the ADA. Following that line of decisions, the court held, in direct contrast to the court in *Nat'l Ass'n*, that "[t]he Netflix website is not 'an actual physical place' and therefore, under Ninth Circuit law, is not a place of public accommodation."

The court went on to reject the plaintiff's other allegations as insufficient to state independent claims of the state discrimination or consumer practices laws and ultimately dismissed the plaintiff's complaint with leave to amend.

*In* Nat'l Ass'n, *Netflix was represented by David McDowell and Jacob M. Harper of Morrison & Foerster LLP in Los Angeles and by Julie G. O'Neill of Morrison & Foerster LLP in Washington, DC. Plaintiffs were represented Arlene B. Mayerson, Charlotte L. Lanvers, and Shira T. Wakschlag of Disability Rights Education and Defense Fund Inc. in Berkeley, CA.*

*In* Cullen, *Netflix was again represented by Jacob M. Harper and David McDowell of Morrison & Foerster LLP in Los Angeles. Plaintiff was represented by Melanie Rae Persinger and Gregory Steven Weston of The Weston Firm in San Diego and by John Joseph Fitzgerald, IV in Santa Clara, CA.*

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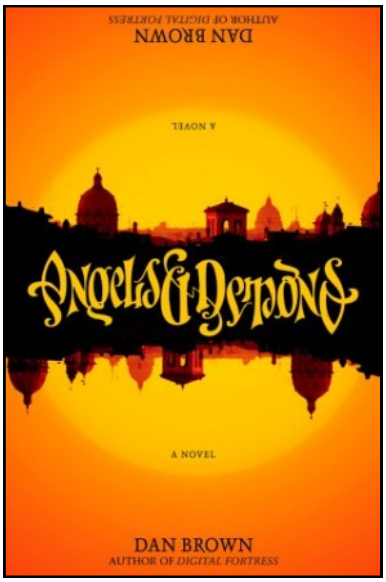
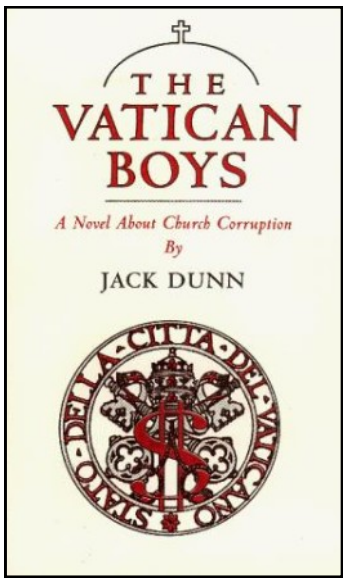
# Massachusetts Court Awards Attorneys' Fees to Successful Copyright Defendants

**By Elizabeth A. McNamara and Gordon P. Katz**

Section 505 of the Copyright Act grants a U.S. District Court discretion to award reasonable attorneys' fees to a prevailing party in a copyright case. 17 U.S.C. §505. The possibility of an adverse fee award is, among other things, designed to deter meritless copyright claims or defenses.

To be sure, fee awards in copyright cases are not routine. However, in a decision rendered on June 27, 2012, a judge of the U.S. District Court for the District of Massachusetts (F. Dennis Saylor, J.) exercised his discretion to award author Dan Brown and publisher Simon & Schuster attorneys' fees against an author, Jack Dunn, who unreasonably and unsuccessfully claimed (via a 2010-filed suit) that Brown's novel, *Angels & Demons*, infringed Dunn's fictional work, *The Vatican Boys*. *Dunn v. Brown and Simon & Schuster, Inc.,* No. 10-11383.




**Dunn unsuccessfully claimed that Brown's novel, Angels & Demons, infringed Dunn's fictional work, The Vatican Boys.**

### The Novels

*The Vatican Boys*, self-published by Dunn in 1997, is a thriller centered around a multi-million dollar banking fraud commenced in part by a wing of the Catholic Church. The story is also a search for a sacred cloth which holds the potential of bringing the Second Coming and peace on earth.

Brown's novel, *Angels & Demons*, takes place over the course of one day, primarily in Rome. The plot follows the adventures of the main character, Harvard symbologist Robert Langdon, who must decipher a series of clues hidden by an ancient brotherhood to prevent the murder of four Cardinals and the release of antimatter in St. Peter's Square.

### The Suits

In 2010 Dunn brought suit against Brown and Simon and Schuster, claiming that his work was infringed by *Angels & Demons*. The case was dismissed on defendants' motion to dismiss (or in the alternative for summary judgment). Accepting the report and recommendation of dismissal of Magistrate Kenneth Neiman, Judge Saylor ruled on September 26, 2011 that there was no substantial similarity of protected expression between the two books, thus mandating dismissal. Dunn had unsuccessfully objected to the Magistrate-Judge's report, arguing, among other things, that there were textual similarities which had been overlooked. The District Court however, agreed with the report and recommendation that any such similarities were *de miminus* and not subject to copyright protection.

Judge Saylor's decision was not surprising. In 2007 Dunn had claimed copyright infringement of *The Vatican Boys* by Brown's (and, in that case, Random House's) publication of the blockbuster novel, *The DaVinci Code*. Here, too, Dunn unsuccessfully alleged that Brown's work was substantially similar to *The Vatican Boys*. In that action, *Dunn v. Brown*, 517 F. Supp. 2d 541 (D. Mass. 2007), District Judge Michael Ponsor granted summary judgment for the defendants, concluding that, while both books were thrillers involving artifacts from the Catholic Church, "the characters, plot devices, settings, pacing, tone, and theme of the two books [were] entirely different." *Id.* at 546.

Dunn appealed Judge Saylor's 2011 *Angels & Demons* decision to the First Circuit. However, the First Circuit made

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short work of the appeal. Quickly affirming summary judgment in a two-page unpublished decision, the Court ruled on March 22, 2012 that "no reasonable juror could find either substantial similarity of expression sufficient to support an infringement claim or probative similarity of expression sufficient to support an inference of actual copying…" (Unpublished Slip Op. No. 11-2291).

**The Attorneys' Fee Award**

After the First Circuit affirmed summary judgment in favor of Brown and Simon & Schuster, the District Court turned its attention to defendants' motion for attorneys fees, which had been timely filed but held in abeyance by the District Court.

In determining whether prevailing party attorneys' fees were warranted under Section 505, the District Court focused "on the objective reasonableness of [Dunn's] claims and whether an award of attorneys' fees [was] desirable to compensate defendants and promote deterrence." The Court noted that a finding of unreasonableness did *not* require any evidence of bad faith or culpability on the part of the losing party.

In this case, the District Court found Dunn's *Angels & Demons* claim unreasonable in light of Dunn's having litigated and lost at summary judgment his nearly identical infringement claim arising out of the publication of *The DaVinci Code*. The Court further found that a fee award "would support considerations of compensation and deterrence."

Insofar as fee award amount, the Court found none of the defendants' time entries, totaling $55,114, to be "duplicative, unproductive, excessive, or otherwise unnecessary." Nevertheless, the Court reduced the fee award against Dunn to $22,045, in recognition of the fact that Brown had previously defended against the same *Vatican Boys* infringement claim in *The DaVinci Code* case.

The District Court's decision should provide useful precedent in the future – as well as a strong reason for prospective copyright infringement plaintiffs to "think twice" before commencing litigation. The decision, published at *Dunn v. Brown*, 2012 WL2500881 (D. Mass.), is a helpful reminder that copyright litigation is not a risk free endeavor.

*Elizabeth A. McNamara and Joanna Becker Summerscales of Davis Wright Tremaine, New York City, and Gordon P. Katz, Holland & Knight LLP, Boston represented defendants Dan Brown and Simon & Schuster, Inc. Plaintiff Jack Dunn was pro se.*



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# Louis Vuitton Wins Trademark Dilution Claim Against Hyundai

## *Court Rejects Fair Use Defense for Social Commentary in Ad*

A New York federal district court recently granted summary judgment to Louis Vuitton ("LV"), the luxury French fashion house, on trademark dilution claims against Hyundai over the use of LV's "toile monogram" in a television advertisement. *Louis Vuitton Malletier, S.A. v. Hyundai North America* (S.D.N.Y. March 22, 2012) (Castel, J.).

Hyundai argued the advertisement was a fair use as a "broader social commentary" on what it means for a product to be luxurious. The court, however, held the defense failed as a matter of law where the use was not directly commenting, criticizing or parodying LV.

**Background**

The case arose over Hyundai's thirty-second commercial that goes by the name "Luxury." The commercial consisted of brief vignettes juxtaposing symbols of luxury with everyday life to give consumers the impression that the Hyundai 2011 Sonata, a mid-priced sedan, provided "luxury for all."

**Scene from Hyundai's "Luxury" commercial.**

One such vignette, for example, shows policemen eating caviar in a patrol car; another vignette features large yachts parked beside modest homes. The particular vignette at issue in this case was a four-second scene of an inner-city basketball game played on a lavish marble court with a basketball bearing marks similar, but not identical, to the LV's famous monogram.

Hyundai's outside advertising firm sought permission to use the brand, but received no response. The ad first aired during the Superbowl post-game show on February 7, 2010. LV sent Hyundai a cease-and-desist letter on February 12th, but Hyundai went forward with their plans to air the ad three times during the NBA All-Star game weekend, over February 12 to February 14. LV commenced litigation on March 1, 2010; Hyundai aired the commercial once again during the Academy Awards ceremony on March 7.

LV sued for trademark dilution and infringement under the Lanham Act, and related state law claims. LV moved for summary judgment on its state and federal dilution claims; Hyundai sought summary judgment dismissing all claims.

**Trademark Analysis**

After analyzing the Trademark Dilution Revision Act of 2006 (the "TDRA"), and Hyundai's fair use arguments, the court granted summary judgment to LV and denied Hyundai's motion in its entirety.

The TDRA defines blurring as an "association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark." *See* 15 U.S.C. § 1125(c)(2)(B). To determine whether there had been blurring, the court used the six statutory factors in the TDRA and found that LV set forth sufficient evidence in its favor on each.

The marks on the basketball and the LV monogram were "virtually indistinguishable." That the basketball appeared only fleetingly on screen "heightened the similarity," rather than minimized it. The LV marks "are famous and distinctive," and so are entitled to a high degree of protection. There was also significant evidence supporting LV's exclusive use of its marks, and that the mark has a high degree of recognition. Hyundai did not dispute that it

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intended to create an association with the LV marks "and the luxury they convey." And expert evidence from both sides showed that viewers perceived a connection between the commercial and LV.

Interestingly, LV introduced Twitter messages to bolster its blurring argument. Among the examples cited by the court: "I think a Louis vuitton football or basketball would be gangsta." "Dyd yall See tht Louis Vuitton Basketball? Lols iWant 1." "Were they just playing ball with a LV basketball lol." Although the court found the messages of "limited weight," they did "provide some evidence of actual association."

**Fair Use Defense Rejected**

The TDRA includes exceptions for fair use, including using a mark for "parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner." *See* 15 U.S.C. § 1125(c)(3)(A)(ii).

The court found that Hyundai's fair use defense was undermined by the deposition testimony of its executives who repeatedly stated that the Luxury advertisement was not a direct commentary on LV. See, for example, the following exchange:

> "Q. And, in fact, you weren't commenting in any way or giving any commentary on Louis Vuitton, were you? A. No. Q. And the point here was not to actually make fun of Louis Vuitton or criticize Louis Vuitton, was it? A. That is correct."

Thus based on the record, the court held that the LV mark was not "used in connection with .... identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner."

Hyundai argued that even if the advertisement did not comment on LV specifically "some symbol of luxury had to be chosen" to make the generalized comment about its car and luxury. The court concluded, however, that under the TDRA such a generalized observation was not comment, criticism or parody "upon the famous mark owner or the goods or services of the famous mark owner."

The parties had briefed fair use decisions by the Second Circuit in the broader trademark and copyright contexts and the court went on to add that even under those standards Hyundai loses. *See, e.g., Harley-Davidson, Inc. v. Grottanelli*, 164 F.3d 806, 813 (the parody exception does not apply when the purported parody "makes no comment" on the original mark, and "simply uses it somewhat humorously to promote [its] own products and services"); *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992) ("there would be no real limitation on the copier's use of another's copyrighted work to make a statement on some aspect of society at large"); *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group,* Inc., 886 F.2d 490, 496-97 (2d Cir. 1989) (citing for proposition that fair use does not typically apply to "subtle satire" of the original).

In April, the district court denied Hyundai's motion for an interlocutory appeal. The case subsequently settled.

*LV was represented by Flemming Zulack Williamson Zauderer, LLP, New York; and Thomas Michael Gniot, Fitzpatrick, Cella, Harper & Scinto, New York. Hyundai was represented by Robert L. Raskopf and Julie Shapiro, Quinn Emanuel, New York.*



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# Inter-American Court Issues First Press Privacy Decision

## *Newspaper Reports About President's Private Life Protected*

**By Eduardo Bertoni**

Late last year, the Inter-American Court of Human Rights issued its decision in the press privacy case of Fontevecchia and D´Amico v. Argentina," deciding that press reports about the private life of a public official were protected as matters of public concern.

### Background

In September 2001 the Supreme Court of Argentina ordered journalists Jorge Fontevecchia and Hector D´Amico to pay former Argentinean President Carlos 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 was paid).

The damages were imposed in an invasion of privacy lawsuit filed by the President against Fontevecchia, founder and then-Director of the Argentinean magazine "Noticias," Hector D'Amico, the magazine's Managing Editor at the time, and Editorial Perfil, Noticias's parent company. In 1995, the journalists reported that Mr. Menem, President of Argentina at the time, had an unacknowledged child. The mother was an elected national representative from Menem's party, and the articles discussed their relationship and the relationship between the President and his alleged child. The articles included photographs of all three, which were pixilated to protect the child's image, and which had been distributed to the press by presidential staff.

Additional background on the case is available in the article "Inter-American Court of Human Rights Hears Arguments in First Case Involving Privacy Claim for Reporting on Matters of Public Concern," MLRC MediaLawLetter, Sept. 2011.

### Media Petitioners' Argument

As the lawyers for Mr. Fontevecchia and Mr. D´Amico, we argued before the Inter-American Court of Human Rights that the decision of Argentina's Supreme Court violated Articles 11 and 13 of the American Convention on Human Rights.

Article 11. Right to Privacy provides:

> 1. Everyone has the right to have his honor respected and his dignity recognized.
> 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
> 3. Everyone has the right to the protection of the law against such interference or attacks.

Article 13. Freedom of Thought and Expression provides:

> 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
> 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
> respect for the rights or reputations of others; or
> the protection of national security, public order, or public health or morals.
> 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to

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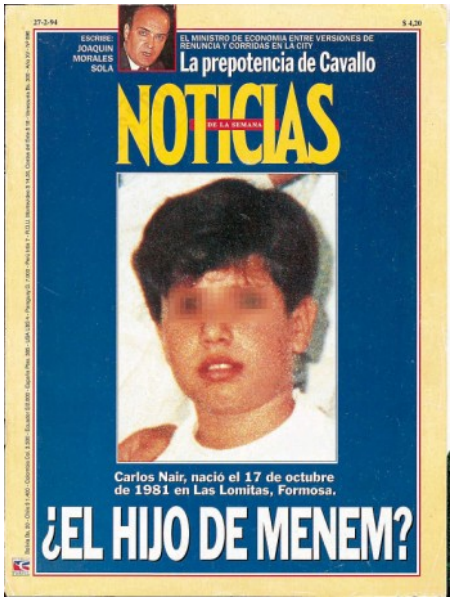
impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.





As the lawyers for Mr. Fontevecchia and Mr. D´Amico, we basically highlighted the importance of freedom of expression in a democratic society, the different threshold involved in the protection of the private life of public officials, as well as the public interest regarding the information published by the magazine Noticias. We underscored that the former President was "a political figure with high exposure and [even] existent public controversy with respect to his family life."

Although there has been much focus on the chilling effect of criminal sanctions in press cases in Latin America, we argued that civil damages or fines also severely restrict freedom of expression. We also explained that the photographs included in the articles of Noticias were obtained with the consent of Mr. Menem because for the photographs to be taken, the former President must have allowed the journalists entry into the Presidential residence.

**IACourtHR Decision**

In a landmark decision, the Inter-American Court stated that:

"the statements regarding a person's qualification to hold office or the actions of public officials in the performance of their duties are afforded greater protection, among others, so that debate in a democratic system is encouraged."

And, the Court continued:

"[…]in a democratic society political and public personalities are more exposed to scrutiny and the criticism of the public. This different threshold of protection is due to the fact that they have voluntarily exposed themselves to a stricter scrutiny. Their activities go beyond the private sphere to enter the realm of public debate. This threshold is not only based on the nature of the individual but also on the public interest inherent in the actions performed."

This different threshold was applied in the past by the Court in cases were reputation of public officials was balanced against freedom of expression. However, in the *Fontevecchia* decision, the Court said that:

"the standards used regarding the protection of freedom of expression in cases of the rights to honor and reputation are applicable, where appropriate, in cases such as this [Fontevecchia]. Both rights are protected under the same Article under a

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> common formula and involve similar principles related to the functioning of a democratic society. Thus, two important standards for the dissemination of information about potential private life issues relate to: a) the different threshold of protection for public officials, especially those who are popularly elected, for public figures and individuals, and b) the public interest in the actions taken."

Finally, the Court considered that:

> "the publications carried out by the magazine Noticias regarding the elected pubic official of the highest ranking position in the country involved matters of public interest, which were in the public domain and involving the alleged victim who, by way of his own conduct, had not contributed to protect the information that he later contests. Thus, there was not an arbitrary interference with the right to private life of Mr. Menem. Thus the measure of further liability imposed, which excluded any assessment in the case of aspects of public interest of the information, was unnecessary in relation to the alleged purpose of protecting the right to private life."

The Court concluded that there was no unreasonable or arbitrary interference in the private life of Mr. Menem. Rather the magazine's reports constituted a legitimate exercise of the right to freedom of expression.

*Eduardo Bertoni is the Director of the Centro de Estudios Legales y Sociales (Center for Legal and Social Studies) in Buenos Aires, Argentina. (www.cels.org.ar) Lawyers from the Center and Mr. Bertoni represented the journalists in this case. Debevoise & Plimpton LLP, acted as counsel to the Committee to Protect Journalists as amicus in this case.*

# Iowa Supreme Court Reverses Order Compelling State University To Release Student Records

## *Open Records Act Inapplicable Where Release Might Violate FERPA*

**By Regwood Snipes**

On July 13, 2012 − as Penn State University was being roundly criticized for lack of openness and transparency in the aftermath of the Sandusky scandal − the Iowa Supreme Court reversed and remanded an Iowa district court decision ordering a state university to release student records regarding a sexual assault incident to the local newspaper. *Press-Citizen Co. v. Univ. of Iowa*, No. 09-1612 (Iowa July 13, 2012).

In addressing an issue of first impression in Iowa, the Court held that the university could withhold specific student records the release of which it claimed would violate the Family Educational Rights and Privacy Act (FERPA). The 4-3 decision ended a legal dispute that spanned more than four years.

**As Penn State University was being roundly criticized for lack of openness and transparency in the aftermath of the Sandusky scandal − the Iowa Supreme Court reversed and remanded an Iowa district court decision ordering a state university to release student records regarding a sexual assault incident to the local newspaper.**

### Background

During the early morning hours of Sunday, October 14, 2007, a female student-athlete was allegedly sexually assaulted by two football players in a dormitory located on the University of Iowa campus. The assault resulted in a criminal investigation, criminal charges and the dismissal of the two football players from the football program. Following a jury trial, one player was convicted on a charge of assault with intent to inflict serious injury and the other of simple misdemeanor assault. The case generated significant national scrutiny after the victim's mother expressed that university officials responded inconsiderately and inadequately to her daughter's allegations. Both football players were named in media accounts.

On November 13, 2007, the Iowa City Press-Citizen served requests on the university to produce reports and correspondence records relating to attempted or actual sexual assaults that occurred after October 1, 2007. The request by the Press-Citizen was made pursuant to the Iowa Open Records Act, Iowa Code § 22.2(1), which confers on every person the right to examine, copy, and disseminate public records. The university responded with only 18 pages of documentation, asserting that the remainder of the responsive documentation was exempt from public disclosure.

As a result of this non-disclosure, in January 2008, the Press-Citizen filed a lawsuit requesting that the university produce a *Vaughn* index for all withheld responsive documents that identified: 1) the unique number assigned to the document; 2) the date of the document; 3) a description of the document; 4) the authority relied upon to justify withholding the document; 5) the author and all recipients of the document; and 6) the current location of the document.

Initially, the university refused to provide the Press-Citizen with the requested *Vaughn* index, prompting the Press-Citizen to file a motion to compel. On August 7, 2008, the motion was granted by the district court. Thereafter, the university prepared a *Vaughn* index of more than 3000 pages of documents and submitted the documents to the district court for an *in camera* review.

The district court entered an order dividing the university's documents into five categories and directing the university to disclose documents in category 3 (documents not protected as confidential and subject to disclosure without redaction) and category 4 (documents subject to disclosure with appropriate redactions made to remove student-identifying information).

Following the district court's final judgment that directed

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the disclosure of the documents and awarded attorneys' fees to the Press-Citizen, the university moved to stay the enforcement of the order to release the category 3 and category 4 documents. On October 19, 2009, the district court granted the stay and the university appealed to the Iowa Supreme Court.

**Iowa Supreme Court Decision**

Under FERPA, no federal funds shall be available to educational institutions with policies or practices of releasing, or providing access to, personally identifiable information in education records. *See*, 20 U.S.C. § 1232g(b)(2).

The university relied on FERPA and related regulations as the basis for two claims asserted on appeal. First, the university claimed that the withheld category 3 documents could not be disclosed because they "constitute confidential education records under FERPA." *See*, 34 C.F.R. § 99.3. Second, the university claimed that FERPA prohibited the release of the redacted category 4 documents because the students referenced would be known or reasonably identifiable by the Press-Citizen. *Id.* In recognition of FERPA's status as a federal law, the university argued that Iowa law "[could] not authorize disclosure where federal law requires confidentiality."

**The dissent believed disclosure of the student records in question was appropriate, as there was no conflict between FERPA and the Iowa Open Records Act.**

Although the Press-Citizen agreed that the students would be identifiable if the documents were released – even in a redacted form – the newspaper argued that FERPA is "not a positive law at all, but simply a funding provision, which cannot override the express directives of the Iowa Open Records Act." The Press-Citizen argued that FERPA was not established to provide institutions with the right to operate in secrecy, which would result if any document with a student's name was prohibited from disclosure. Instead, FERPA's purpose was to discourage educational institutions from releasing confidential information in a careless manner.

The majority acknowledged that "state and federal courts are sharply divided on th[e] issue" whether or not FERPA supersedes state disclosure laws. Yet, the majority believed it unnecessary to weigh in on the issue, as it found that section 22.9 of the Iowa Open Records Act conceded priority to FERPA:

> [I]f it is determined that any provision of this chapter would cause the denial of funds, services or essential information from the United States government which would otherwise definitely be available to an agency of this state, such provision shall be suspended as to such agency, but only to the extent necessary to prevent denial of such funds, services, or essential information.

According to the majority, the university's release of student records containing "personally identifiable information" could lead to a denial of federal funding under FERPA. Thus, the majority believed it was required to exempt the university from legal compliance with section 22.2(1) of the Iowa Open Records Act even though Press-Citizen had argued the university would not be susceptible to the loss of funds because FERPA only prohibits the "policy or practice" of releasing student records, not individual disclosures. The majority rejected this argument, stating that the "production [of the records] would set some kind of precedent… [and] a policy or practice to some extent would be established." The majority also refused to apply a FERPA exception for records furnished in compliance with a judicial order. It stated that it would make "no sense" to interpret the exception as authorizing disclosure whenever a party chooses to sue for access.

The majority also rejected the Press-Citizen's argument that the university should not be allowed to withhold documents just because the Press-Citizen would know the identity of the student to whom the records referred. The Press-Citizen argued that this created a "sliding scale" where FERPA is most vigorously applied "to records concerning crimes and alleged crimes that are most notorious." The majority held that this "feature" derived from earlier determinations by Congress and the Department of Education and it was not the courts role to re-examine those decisions.

The Iowa Freedom of Information Council, Des Moines Register & Tribune Company, Iowa Newspaper Association, The Reporters Committee for Freedom of the Press, Gazette

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Communications, Inc., and The Associated Press submitted an *amici curaie* brief in which they argued that "it would violate federal and state constitutional provisions if access to public documents could depend upon the knowledge or identity of the requester."

However, the majority declined to address this argument, noting that this issue was not raised by the Press-Citizen and therefore not reviewable on appeal pursuant to Iowa law. *See*, *Mueller v. St. Ansgar State Bank*, 465 N.W.2d 659, 660 (Iowa 1991); *Rants v. Vilsack*, 684 N.W.2d 193, 198–99 (Iowa 2004). The majority similarly declined to address the argument of *amici* that FERPA's carve out for records of law enforcement applied, making the confidentiality provisions of the federal statute inapplicable to the withheld records created by the campus and local police, again noting that the Press Citizen had not raised that contention.

In a two-paragraph opinion, the dissent stated that "compliance with a judicial order pursuant to a generally applicable state public records statute does not amount to a policy or practice of *any educational agency or institution*." Therefore, the dissent believed disclosure of the student records in question was appropriate, as there was no conflict between FERPA and the Iowa Open Records Act.

*Regwood Snipes is a summer associate at Faegre Baker Daniels LLP in Minneapolis and second-year law student at Columbia Law School. Plaintiffs were represented by Paul D. Burns and Joseph W. Younker of Bradley and Riley, PC in Iowa City. Defendants were represented by Thomas J. Miller, Attorney General of Iowa, and Diane M. Stahle and George A. Carroll, Assistant Attorney Generals of Iowa. The amicus curiae were represented by Michael A. Giudicessi of Faegre Baker Daniels LLP in Des Moines, and Leita Walker of Faegre Baker Daniels LLP in Minneapolis.*

# Ohio Supreme Court Finds That FERPA Trumps State Open Records Law

## *Federal Law Shields Records in Ohio State Tattoo for Memorabilia Scandal*

Analogizing FERPA to a contract conditioning the receipt of federal funds, the Ohio Supreme Court recently held that the federal student privacy law could bar the release of certain state records relating to an Ohio State University football scandal. State ex rel. ESPN v. Ohio State Univ., Slip Opinion No. 2012-Ohio-2690 (June 19, 2012) (granting in part and denying in part a writ of mandamus filed by ESPN).

**Background**

In May 2011, Ohio State University football coach Jim Tressel resigned in the wake of a tattoo for memorabilia scandal involving several members of his team. Tressel learned, but failed to report, that several players were giving uniforms, shoes, rings and other memorabilia to the owner of a tattoo parlor in exchange for money and discounted tattoos. The owner of the parlor was under federal investigation for drug trafficking at the time.

ESPN made a request under the state open records law, R.C. 149.43, for emails and correspondence relating to the University's investigation of Coach Tressel. This included documents mentioning Ted Sarniak, a local businessman and longtime booster of the football team. The University refused to release certain responsive records claiming they identified student athletes and were therefore exempt from disclosure under FERPA, the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g(b)(2). (Other records were withheld on privilege grounds not relevant to this article). ESPN filed a writ of mandamus to obtain disclosure.

**Scope of FERPA**

ESPN argued that FERPA does not trump the state's open records law, but merely allows the federal government to withhold educational funding from states that fail to adequately protect the privacy of certain student records. The Ohio Supreme Court disagreed, comparing FERPA to a contract. In return for education funds, the state agrees to comply with federally imposed conditions on the release of student records, notwithstanding the requirements of the open records law.

Moreover, the definition of "education records" within the meaning of FERPA is broad and covers any information "directly related to a student." Thus the University was correct in withholding certain records about Sarniak, the non-student booster, insofar as those records identified student athletes. (The Court found that some records could be released with redactions.)

While lauding the purpose of the state open records law, the court concluded by observing that "not every iota of information is subject to public scrutiny." *Quoting State ex rel. Wallace v. State Medical Board,* 732 N.E.2d 960, 965 (2000).

*ESPN was represented by John C. Greiner, Graydon, Head & Ritchey, L.L.P., Cincinnati, OH. Michael DeWine, Ohio Attorney General, and U.S. Attorney Carter M. Stewart, for amicus curiae United States, opposed the writ.*

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# Public University Law School Legal Clinic Not Subject to State Open Records Law

## *Legal Clinics Do Not Perform a Government Function*

In an interesting access case, the New Jersey Supreme Court held that a state law school legal clinic is not subject to the state's open records law. Sussex Commons Assocs., LLC v. Rutgers University, A-97-10 (July 5, 2012). The Court reasoned that the state legislature did not intend to impose open records requirements on legal clinics that represent private clients; and that no right of common law access applied to a legal clinic's case records.

**Background**

The plaintiff Sussex Commons is the developer of a proposed shopping mall. The Rutgers Environmental Law Clinic (RELC) is a clinical legal education program at Rutgers Law School, part of New Jersey's public university system. RELC agreed to represent several local environmental groups opposed to the mall project. In the ensuing litigation, involving a number of parties, Sussex Commons sued Rutgers University alleging that it had a statutory and common law right of access to RELC's records. Among other things, plaintiff wanted access to RELC's time records and billing on the case, and copies of any documents received from other counsel in the case.

In 2008, the trial court denied the request, holding that public law school legal clinics were "unique hybrids" and thus exempt from the state's Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. The trial court concluded that an exemption was necessary to protect the unique and valuable function the law clinics provide in both education and jurisprudence.

In 2010, however, an appellate court reversed, holding that the legal clinic met the statutory definition of a public agency. *See* 416 N.J. Super. 537 (2010). The legal clinic was subject to the law, but RELC could oppose disclosure under the statute's exemption for attorney client privileged materials and related documents.

On appeal to the Supreme Court, Rutgers and a number of academic and legal amici argued that subjecting clinical programs to open records requirements would jeopardize such programs and compromise principles of academic freedom.

**New Jersey Supreme Court Decision**

The New Jersey Supreme Court largely agreed. The court reasoned that the state's open records law was intended to serve the public interest by facilitating access to documents "that record the workings of government in some way." In contrast, clinical legal programs "do not perform any government functions.... Instead, they teach law students how to practice law and represent clients."

The court contrasted document requests for funding of a clinical program – which it conceded are discoverable under OPRA – with case records which "would not shed light on the operation of government or expose misconduct or wasteful government spending."

Moreover, applying OPRA to a legal clinic would be impractical and harm the mission of its legal education. The law school would have to bear the "administrative burden of preparing for, responding to, and possibly litigating over each item requested." In addition, such a rule would disadvantage public law school clinics vis a vis private law school clinics – a result the legislature would not have intended.

Finally the Court also held that no common law right of access applied "because clinical professors at public law schools do not act as public officers or conduct official business when they represent private clients at a law school clinic."

*Plaintiff was represented by Kevin D. Kelly, Kelly & Ward, Newton, NJ. Rutgers University was represented by James P. Lidon, McElroy, Deutsch, Mulvaney & Carpenter, Morristown, NJ.*

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