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Reporting Developments Through August 25, 2012

LIBEL & PRIVACY

3d Cir.	Hyperlinks Not a Republication for Purposes of the Single Publication Rule	
	No Limit to Liability if Links Retriggered Statute of Limitations In re Philadelphia Newspapers	
Va. Cir.	Virginia Judge Strikes \$3 Million Jury Verdict for Assistant School Principal	07
	Insufficient Evidence of Actual Malice to Support Award Webb v. Virginian-Pilot	
S.D. Ohio	JNOV Denied in Police Officer Libel Case	08
	Sufficient Evidence of Actual Malice to Support \$100,000 Damage Award	
	Young v. Gannett Satellite Information Network, Inc.	
Minn. App.	Tortious Interference Verdict Against Blogger Reversed	09
	True Statements Cannot Support Interference Claim	
	Moore v. Hoff	
D. N.J.:	Fraud, Contract and Related Claims Against Broadcaster Survive Motion to Dismiss	14
	Educational Breastfeeding Video Was Spliced With Porn by Third Party	
	Sahoury v. Meredith Corp.	
Tex. App.	Appeals Court Applies Reporter's Privilege in the Defamation Context	16
	Reporter Established Lack of Actual Malice By Affidavit	
	Nelson v. Pagan	
Cal. App.	California Appellate Court Affirms SLAPP Dismissal in Libel Case Over Weblog Post	18
	Liberal Linking to Source Material Supports Conclusion that Post Was Opinion	
	Redmond v. Gawker Media LLC	
Tex. Dist.	Texas Court Finds No Jurisdiction in Libel Case by Controversial Autism Doctor	
	British Medical Journal Called Plaintiff's Research "Elaborate Fraud"	
	Wakefield v. BMJ	
N.Y. Sup.	Bridal Shop Owner Jilted By Summary Judgment Decision	
	Court Finds Substantial Truth; No Gross Irresponsibility	
	Gebbia v. The Times Herald-Record	
ABA	ABA Makes Anti-SLAPP Legislation Official Bar Policy	
	Encourages Adoption of State and Federal Anti-SLAPP Statutes	

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Page 2	August 2012	MLRC MediaLawLetter

INTELLECTUAL PROPERTY

6th Cir.	Sixth Circuit Affirms Copyright Infringement Verdict against Hustler Magazine
9th Cir.	Tabloid's Publication of Secret Celebrity Wedding Photos Not Fair Use29Magazine Infringed Celeb's CopyrightMonge et al. v. Maya Magazines, Inc.
7th Cir.	Seventh Circuit Vacates Injunction Against Video Bookmarking Website
INTERNAT	IONAL
Australia	Australia Tightens Controls on Corporate Use of Social Media
ACCESS	
Colo. Dist.	News Media Succeed In Opening Court File in Aurora Shooting Case
INTERNET	
W.D. Wash.	Federal Court Enjoins Enforcement of Washington State Law Targeting Adult-Oriented Advertisements38 Law Is Likely Preempted By Section 230 Backpage.com, LLC v. McKenna
C.D. III.	1st Amendment & Sec. 230 Bar Claims against Legal Research Website And Search Engines

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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
	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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Page 4	August 2012	MLRC MediaLawLetter
12:30-2:30pm	Lunch	
	Presentation of First Amendment Leadershi Robert Hawley and Slade Metcalf	p Awards to
	Program: Reporting in an iWorld	
2:45-4:15pm	Second Breakout Session	
6:00-7:00pm	Reception	
7:00-9:00pm	Outdoor Dinner Buffet	

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

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

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

August 2012

Hyperlinks Not a Republication for Purposes of the Single Publication Rule

No Limit to Liability if Links Retriggered Statute of Limitations

By Edward J. Sholinsky

The United States Court of Appeals for the Third Circuit, predicting Pennsylvania law on a matter of first impression, held in *In re Philadelphia Newspapers, LLC*, No. 11-3257, 2012 U.S. App. LEXIS 15419 (3d Cir. July 26, 2012) (precedential), that providing a link on a website to an allegedly defamatory article is not republication for purposes of the Single Publication Rule or the statute of limitations. Rather, the Court held that linking is akin to referencing an article, which courts have long held is not republication.

Background

The plaintiffs had been litigating a state-court claim

against the *Philadelphia Inquirer* for publishing allegedly defamatory articles in 2008 about plaintiffs' management of a charter school in the Philadelphia suburbs. While the state litigation was pending, the owners of the *Philadelphia Inquirer* petitioned for bankruptcy. Plaintiffs then filed a claim in the bankruptcy court, alleging that Philly.com (the *Inquirer*'s website) defamed them by publishing an

editorial after the bankruptcy filing that linked to and, allegedly, "endorsed" the 2008 articles.

Plaintiffs argued that publishing the editorial linking to the 2008 articles was a separate, post-bankruptcy tort (which, unlike the original pre-bankruptcy tort, they could litigate in the bankruptcy court as an administrative expense) because the links "republished" the original, pre-bankruptcy stories. The debtors argued in response that the linking did not republish the original stories, and that the single publication rule barred plaintiffs from suing a second time for the pre-bankruptcy stories.

Both the bankruptcy and district courts rejected the plaintiffs' claims. The Third Circuit affirmed.

There would be no limit to a publisher's liability if each new link to an article retriggered the statute of limitations, the Court reasoned.

Single Publication Rule

For the plaintiffs to be able to recover for the alleged defamation by the debtors, they had to establish that Philly.com had republished the allegedly defamatory articles by linking to them on its website. Under the single publication rule, an article is actionable when it is first published and not on some later date when it is recirculated. The rule does not apply to a "republication" in which the original defamatory material is edited or put into a new form.

The Court addressed two questions that no Pennsylvania court had addressed before: (1) whether the single publication rule applies to Internet publications; and (2) whether linking to a story constituted a type of republication

that is outside the protection of the single publication rule.

The Court answered the first question in the affirmative. Following the Fifth and Ninth Circuits, and New York's state courts, the Third Circuit predicted that Pennsylvania would "extend the single publication rule to publically accessible material on the Internet." 2012 U.S. App. LEXIS 15419, at *30. The Court, applying

the reasoning of those courts, held that there was no principled reason to distinguish between traditional publication mediums and electronic publication. *Id.* at *29-30.

Addressing the second question, the Court held that linking to a previously published article on the Internet did not constitute a republication that made the linking separately actionable from the original publication. Under "traditional" defamation law, republication requires "retransmission of the allegedly defamatory material." *Id.* at *31.

For Internet publications, however, the Court followed those courts that had "distinguish[ed] between linking, adding (Continued on page 6)

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August 2012

MLRC MediaLawLetter

(Continued from page 5)

unrelated content, or making technical changes to an already published website (which they hold is not republication), and adding substantive material related to the allegedly defamatory material to an already published website (which they hold is republication)." *Id.*

Applying this distinction, the Court held, "advances the statute of limitations' policy of ensuring that defamation suits are brought within a specific time after the initial publication." *Id.* at *33. There would be no limit to a publisher's liability if each new link to an article re-triggered the statute of limitations, the Court reasoned.

The Court analogized linking to referencing an article, which has not traditionally been considered republication. *Id.* at *33-34. The Court found this reasoning particularly appropriate to the Internet, where "[p]ublishing a favorable reference with a link . . . is significantly easier" than is directing a reader to an article in traditional publishing mediums. *Id.* Thus, even though referencing and linking to an article "may allow for easy access" to allegedly defamatory material, "they do not amount to the restatement or alteration of the allegedly defamatory material in the [a]rticles necessary for republication." *Id.* at *34.

The Third Circuit in *In re Philadelphia Newspapers, LLC* set important precedent for online publications. Online publishers in Pennsylvania can now link to and reference previous stories with less fear that doing so will retrigger the statute of limitations or create new liability.

Edward J. Sholinsky is a partner at Schnader Harrison Segal & Lewis LLP in Philadelphia. Plaintiffs were represented by David A. Barnes, Obermayer, Rebmann, Maxwell & Hippel, Philadelphia. Philadelphia Media Network was represented by Sunish Gulati, Akin, Gump, Strauss, Hauer & Feld, New York.

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Virginia Judge Strikes \$3 Million Jury Verdict for Assistant School Principal *Insufficient Evidence of Actual Malice to Support Award*

A \$3 million jury verdict against the *Virginian-Pilot* newspaper was set aside this month on a post-trial motion to strike. <u>Webb v. Virginian-Pilot</u>, (Va. Cir. Aug. 6, 2012). Virginia Circuit Judge Randall Smith ruled there was insufficient evidence of actual malice to support the verdict.

The case was tried in May 2012. The jury found in favor of Phillip Webb, a high school assistant principal, on his libel claim against the newspaper over an article reporting on the arrest of Webb's son, Kevin Webb, for assaulting the father of a high school classmate, and discussing allegations that Kevin had been bullying the classmate. The article accurately reported that plaintiff's son was not disciplined by school officials; as well as a comment by a school official stating plaintiff did not seek preferential treatment for his son.

Plaintiff conceded the article was literally true, but argued it falsely implied that he used his position to obtain preferential treatment for his son. For a report on the trial verdict see "<u>Virginia Jury Awards Assistant Principal \$3</u> <u>Million in Libel Suit Against Newspaper</u>," MLRC MediaLawLetter, May 2012.

The case was tried under the actual malice standard. Plaintiff argued that the reporter had actual knowledge of falsity and recklessly disregarded evidence the story was false. According to news reports, the jury deliberated a bit more than an hour before returning a verdict for plaintiff. The newspaper has moved to strike the verdict and/or remittitur and a new trial.

Decision on Motion to Strike

The court first held that Virginia recognizes a claim for libel by implication. In addition, in such cases the plaintiff need not prove that defendant intended the defamatory implication. Thus while the article was literally true, the jury could have found it defamatory.

However, the court held that plaintiff failed to show knowledge of falsity or recklessness. Under the circumstances, the reporter simply disbelieved the official explanations of the incident and questioned the truthfulness of the school officials. This did not amount to actual knowledge of falsity.

Moreover, the record was "fatally void" of evidence showing that the reporter entertained serious doubts as to the truth of the implication. Plaintiff argued that the reporter had threatened to write a one-sided story and wrote to a colleague about the story stating "I love the smell of napalm in the morning." While this may show ill will, such evidence alone was not proof of recklessness.

Conrad Schumadine, Wilcox & Savage, Norfolk, VA, represented the Virginian-Pilot. Jeremiah Denton III, Virginia Beach, VA, represented the plaintiff.

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Update: JNOV Denied in Police Officer Libel Case

Sufficient Evidence of Actual Malice to Support \$100,000 Award

An Ohio federal district court his month denied a newspaper's post-trial motion for judgment as a matter of law, holding there was sufficient evidence of reckless disregard and harm to reputation to support the jury's \$100,000 libel damage award. <u>Young v. Gannett Satellite</u> <u>Information Network, Inc.</u>, No. 1:10cv483 (S.D. Ohio July 30, 2012) (Barrett, J.).

The plaintiff is an Ohio police officer. At issue in the case was a May 26, 2010, article in a Gannett owned paper, the *Milford-Miami Advertiser*, stating that in 1997 plaintiff had "sex with a woman while on the job." The statement was based on a sexual misconduct complaint made against the plaintiff. Plaintiff argued the article was false and published with actual malice because it contradicted an arbitration decision clearing plaintiff of sex misconduct charges. The arbitrator found the allegation against plaintiff to be a "he said, she said" dispute, and questioned the truthfulness of the complainant as well as plaintiff.

After a 3-day jury trial in December 2011, the jury found in favor of the plaintiff, and awarded him \$100,000 in compensatory damages. For a report on the trial see <u>S.D.</u> <u>Ohio: Police Officer Wins \$100,000 Judgment in Libel Trial</u> <u>Against Ohio Newspaper</u>, MediaLawLetter Dec. 2011.

Decision on JNOV Motion

The court found sufficient evidence of actual malice because the reporter had read the arbitrator's decision and went beyond its assessment of disputed evidence, to accuse plaintiff of having "had sex with a woman while on the job." The court was satisfied that this was sufficient evidence for the jury to find actual malice.

Finally, testimony by plaintiff, his wife and a police colleague provided sufficient evidence of emotional harm to sustain the verdict.

The newspaper was represented by John C. Greiner and Steven P. Goodin, Graydon Head & Ritchey LLP, Cincinnati, OH. Plaintiff was represented by Stephen E. Imm, Katz, Greenberger & Norton LLP, Cincinnati, OH.

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Tortious Interference Verdict Against Blogger Reversed

True Statements Cannot Support Interference Claim

By John Borger and Leita Walker

In a strongly worded decision favoring free speech for bloggers, the Minnesota Court of Appeals reversed a \$60,000 jury award for tortious interference. The court held:

A claim for tortious interference with a contract or prospective business advantage cannot be based on conveying true information to a third party.

When speech protected by the First Amendment is intertwined with allegedly tortious conduct, courts must carefully and explicitly delineate the tortious conduct on which liability is based so as not to infringe on a defendant's

constitutional rights. When there is no practical way to separate the tortious conduct from the protected speech, there is no liability as a matter of law.

After examining the record, the court concluded that there was no practical way to separate the allegedly tortious conduct from the protected speech, so it reversed and remanded for entry of judgment in the blogger's favor. <u>Moore v. Hoff</u>, 2012 Minn. App. LEXIS 88 (Minn. App., August 20, 2012).

Media interests supported the blogger as *amici*.

The Facts

In a blog titled "The Adventures of Johnny Northside," John Hoff writes in often caustic terms about events and issues in the north side of Minneapolis, Minnesota. On June 21, 2009, he wrote about Jerry Moore, who had been involved in neighborhood controversies and who then was working for the University of Minnesota in the Urban Research and Outreach-Engagement Center (UROC). UROC was a group of neighborhood residents asked to "focus on foreclosures in the neighborhood." Hoff criticized Moore's involvement with UROC, stating: "Repeated and specific evidence in Hennepin County District Court shows [Moor] was involved with a high-profile fraudulent mortgage at 1564 Hillside Ave. N."

After that posting, Donald Allen, an acquaintance of Hoff's, sent an email to the University "giv[ing] you a heads up on a pending situation[] that could possibly turn into a public relations nightmare" for UROC that went into more detail about Moore's background, stated that "there could have been an error in judgment on the part of the UROC in collaborating with" Moore, and expressing the "hope that the U of M's corrective action is swift and covert [*sic*] to avoid more media distribution of this information." Allen and Hoff

disagreed as to whether Hoff asked Allen to send the email. Moore received a letter dated June 22 from the University indicating that his "services would no longer be needed."

The Trial

On June 26, Moore sued Hoff and Allen for defamation and intentional interference with contract. Allen settled with Moore before trial. The district court determined that Moore was a limitedpurpose public figure and that the blog

statement was related to a public controversy in which Moore had played a purposeful or prominent role.

Shortly before the March 2011 trial, Hoff's lawyer withdrew and Paul Godfread stepped in to defend Hoff. Godfread had volunteered for pro bono defense through the Online Media Legal Network. This was his first jury trial. The three-day trial focused on whether the statement was true and whether Hoff had acted with actual malice. The jury found that the allegedly defamatory statement was not false, but awarded Moore \$60,000 in damages based on the torts of intentional interference with his employment contract and interference with prospective employment advantage.

(Continued on page 10)

The verdict ignited a controversy in the blogging community and elsewhere. Concern was rampant that persons who made true statements on the internet could face lawsuits and liability for tortious interference.

August 2012

(Continued from page 9)

Post-trial Amicus Participation

The verdict ignited a controversy in the blogging community and elsewhere. Concern was rampant that persons who made true statements on the internet could face lawsuits and liability for tortious interference.

Reacting to those concerns and after confirming with Hoff's counsel that he intended to file post-trial motions, the Minnesota Pro Chapter of the Society of Professional Journalists moved on March 23, 2011, to participate as an *amicus curiae* in the action. To explain the basis for the *amicus* request, the six-page motion pointed out state and federal authority for the principles (1) that Minnesota did not recognize a claim for tortious interference based on providing truthful information to third parties and (2) that when a claim is essentially a defamation claim, courts apply the law of defamation even if the plaintiff labels the claim as one for tortious interference, and that defamation law did not allow for recovery based on publication of a true statement. John Borger and Leita Walker of Faegre & Benson LLP filed the *amicus* motion.

The reaction from Moore's counsel was shrill. On March 28, she faxed a Rule 11 motion to SPJ's counsel, contending that SPJ's:

real goal here is an improper purpose. Improper purposes include: i) assuming the motion for permission [to participate as an *amicus*] will be denied, but filing the memorandum *before* the ruling, in order to get the memorandum into the hands of the defense counsel to "coach" the inexperienced attorney; or ii) to bring the Faegre & Benson *imprimatur* to the defense without frontally aligning with loose cannon Hoff.

Moore demanded that SPJ withdraw its motion. SPJ refused to withdraw. On May 16, 2011, Moore filed a motion to strike SPJ's pleading and attached the Rule 11 papers as exhibits, without formally filing a Rule 11 motion. Moore added a contention that "Now that Hoff has filed post-verdict motions, it is clear that the Society's brief is redundant and immaterial."

The Society's May 20 response to the motion to strike

pointed out:

Plaintiff's assertions have no merit and make no sense. MN-SPJ sought *amicus* participation to make the Court aware of well-established law, at a time when this Court would have a clear opportunity to apply that law in a way that might alleviate the concerns of MN-SPJ's members and other members of the public. That is a typical and proper role of *amici* in any court.

Plaintiff's criticism that an *amicus* memorandum could "'coach' the inexperienced [defense] attorney" reveals much about Plaintiff's own motivation. Was Plaintiff trying to gain unfair advantage from that perceived inexperience of his opponent's counsel, who had stepped into the case on short notice? Was Plaintiff attempting to keep defense counsel, and the Court itself, from becoming aware of the legal principles that MN-SPJ discussed? That in itself would have been improper. As far as MN-SPJ can tell after inquiry of Defendant's counsel, Plaintiff's counsel never brought these Minnesota precedents to the attention of this Court. If Plaintiff's counsel was aware of them, she had a duty of candor to the Court under Rule 3.3(a)(2)of the Rules of Professional Conduct and should have disclosed them, regardless of what defense counsel did. She must have been aware of at least the Wild v. Rarig line of cases, because she attempted without success to distinguish Wild just a few years ago, in Dunham v. Opperman, 2007 WL 1191599, at *6-7 (Minn. App. April 24, 2007) (unpublished) (copy provided as Borger Aff. Ex. 1), rev. denied. In addition, those issues (including mention of Wild and Glass Services Co.) were addressed last summer by her and by the undersigned counsel in Stepnes v. Ritschel, United States District Court for the District of Minnesota.

(Continued on page 11)

August 2012

(Continued from page 10)

Court File No. 0:08-cv-5296 ADM/JJK. See excerpts from docket entries 261 (CBS summary judgment memorandum, caption page and pp. 1-4, 15-16, 29-33), 270 (contestant plaintiffs memorandum in opposition, pp. 1, 16, 18, 22, 24-25), and 294 (CBS reply memorandum, cover page and pp. 11-12) (attached as Borger Aff. exhibits 2, 3, and 4) (full documents available through PACER). In Stepnes, the tortious interference claims were voluntarily dismissed with prejudice by the plaintiffs asserting them. Id., docket entry 305 (stipulation of dismissal) (attached as Borger Aff. Ex. 5). Those claims do not remain in the case as it is now on appeal by a different plaintiff. See Stepnes v. Ritschel, 2011 U.S. Dist. LEXIS 3027, at *20-21, 49-50, 71-72 (D. Minn., January 12, 2011), appeal pending on other issues.

The Society noted that Moore's counsel had been involved in at least recent two cases in which the cited Minnesota precedents had been briefed, including one appeal that had rejected her attempt to distinguish the precedents.

The district court on May 22 allowed the Society to participate as an amicus. On August 22, 2011, the district court denied Hoff's post-trial motions. It did not address either of the Society's points, instead invoking a deferential approach to the jury's verdict and finding that "Plaintiff provided direct and circumstantial evidence in support of his tortious interference claims, independent of and distinct from his defamation claim." The court referred to "direct testimony regarding Defendant's active involvement in getting Plaintiff fired by contacting leaders at the University of Minnesota and threatening to launch a negative public relations campaign if Plaintiff remained in their employment. ... Furthermore, during this same time period, Defendant acknowledged that it was his goal to Plaintiff fired and that he was working 'behind the scenes' to do so. After the fact, Defendant took personal responsibility for Plaintiff's termination and announced his ongoing, active involvement in the University's actions." It concluded that Hoff's "conduct, taken as a whole, amounted to an intentional interference

with Plaintiff's employment contract and prospective employment advantage."

Appellate Amicus Briefing

Hoff appealed. The Society – now joined by the Reporters Committee for Freedom of the Press and the Silha Center for the Study of Media Ethics & Law – requested leave to file an *amicus* brief. Moore opposed the request, arguing it "should either be denied because it would repeat or emphasize Hoff's argument. Or, if granted, this Court should order that the amicus brief must brief a *different* issue – not the one briefed by Hoff." The Minnesota Court of Appeals on December 6, 2011, granted the motion to file an *amicus* brief, noting that it "shall not be cumulative of the appellant's brief."

Hoff filed a 24-page brief on January 30, 2012, discussing the factual record and arguing that:

[E]very action cited by the trial court in approving the tortious interference verdict was integrally related to defendant Hoff directly or indirectly conveying information to the University or the public about plaintiff's mortgage fraud along with his entirely legitimate belief that such behavior should disqualify plaintiff from employment there. These actions cannot be separated from the actual statement itself about plaintiff, and they are no less subject to the protections of the First Amendment and the strictures of defamation law than is that statement simply because plaintiff chooses to repackage them as tortious interference. The barriers that the courts have erected in order to protect true statements, especially those involving public figures and issues of public concern, are not a jurisprudential Maginot Line around which plaintiffs may skitter simply by the use of creative pleading.

Hoff urged the appellate court to apply independent review and "reverse the judgment of the trial court and order that judgment as a matter of law be granted in defendant (Continued on page 12)

August 2012

MLRC MediaLawLetter

(Continued from page 11)

Hoff's favor or that the action be remanded for a new trial."

On February 2, *amici* filed a 17-page brief. That brief first discussed the longstanding common law and First Amendment precedents establishing, outside the context of online communications, the principles that (1) merely providing truthful information cannot provide the basis for an action for tortious interference and (2) plaintiffs cannot evade the requirements of defamation law when the claim essentially is a defamation claim. It stated that in the present case, the public perceived that these principles had been ignored and that neither the Plaintiff's post-trial submissions nor the trial court ruling "directly acknowledged the continuing vitality of the principle that statements must be false in order to support a claim for tortious interference. This Court can and should do so now, both to reassure the public and to proceed to the next analytical step."

That next analytical step, *amici* argued, was to apply independent appellate review rather than deferential review of the jury verdict, because the case presented First Amendment issues. It pointed out that Moore's closing argument had not discussed supposedly independent tortious conduct, but instead "repeatedly turned to Hoff's blog as proof of unjustified interference." It argued: "In short, the last thing the jury heard from Moore before retiring to deliberate was that his termination was caused by (1)

Hoff's blog and (2) an email that referenced Hoff's blog. The district court's jury instructions did not disentangle the claims. ... Such line-blurring has consequences. ... [A] ppellate courts cannot ignore the possibility that a jury's verdict, although arguably proper on some evidence, was tainted by its consideration of an impermissible basis for liability." *Amici*'s brief concluded:

This appeal involves issues that affect interests extending far beyond those of the parties. Increasingly, members of the public turn to blogs created by "citizen journalists" such as Hoff to learn about what is happening in their communities and around the world. It is vital that existing laws,

That next analytical step, amici argued, was to apply independent appellate review rather than deferential review of the jury verdict, because the case presented First Amendment issues.

developed to protect traditional forms of media from end-runs around the constitutional requirements of libel law, apply as well to online expression.

This Court should reverse the judgment below. Established legal principles lead to the conclusion that the jury's verdict in favor of Moore based on tortious interference cannot stand, because that verdict is tainted by the likelihood that it was based on the same truthful statement as Moore's failed claim for defamation.

Regardless of the precise determination on appeal, this Court's opinion should emphasize that it will apply the same rules

> to publicly accessible online statements that it would to a printed or spoken version of the same material: (1) regardless of what the suit is labeled, when the thing done to cause any damage to the plaintiff arises from an allegedly false and defamatory statement, the suit is governed by the constitutional requirements and other special rules applicable in defamation actions; (2) no liability for tortious interference

can arise when one merely gives truthful information to another; and (3) in cases involving protected expression, an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.

On March 5, 2012, Moore filed an 11-page brief, moving to strike the *amici*'s brief on the grounds that it "repeats and emphasizes Appellant's Hoff's arguments" by discussing some of the same cases in Hoff's Brief and by citing additional cases and that it cited to non-record evidence by (Continued on page 13) For exclusive use of MLRC members and other parties specifically authorized by MLRC. © 2012 Media Law Resource Center, Inc.

MLRC MediaLawLetter

August 2012

Page 13

(Continued from page 12)

listing websites containing commentary on the verdict and the trial court ruling. *Amici* responded on March 9, noting that

To support amici's contention that a clear judicial affirmation of those principles was necessary, the Brief ... pointed to publicly available local and national commentary on the district court proceedings reflecting consternation and confusion over the district court proceedings. Moore ... seeks to strike those references as containing material not in the Record. The Minnesota Supreme Court has rejected arguments similar to those Moore makes here. Camacho v. Todd and Leiser Homes, 706 N.W.2d 49, 52 n. 3 (Minn. 2005) ("[T]he article lies in the public domain and provides pertinent information to this court's consideration of public policy concerns in statutory construction. The article informs the court of information in the public domain that may have escaped the court's attention and therefore assists the amicus in fulfilling its proper role.").

The Court of Appeals denied the motion to strike on March 14.

Briefing on the merits continued, and the Court of Appeals heard arguments on May 23.

Court of Appeals Decision

The Court of Appeals decision focused on the principles that had been argued by *amici* and Hoff and that had been ignored by Moore and the district court. It independently reviewed the evidence and concluded not only that the verdict could not stand but also that judgment must be entered in Hoff's favor.

The Court refused to focus on Hoff's motivation for making the statement in his blog:

When a person conveys unflattering and possibly damaging information to another

person's employer, it is unlikely that the motivation for conveying that information is borne out of affection. It is much more likely that the intent is for the employer to take responsive action—up to and including termination—based on the content of that information. Regardless of the motivation of the messenger, if the information conveyed is true, it is not appropriate for liability to attach.

Further, Hoff's blog post was "the kind of speech that the First Amendment is designed to protect. He was publishing information about a public figure that he believed was true (and that the jury determined was not false) and that involved an issue of public concern. ... Attaching liability to this speech would infringe on Hoff's First Amendment rights."

The Court of Appeals rejected Moore's arguments and the district court's conclusion that there was evidence of interference by Hoff separate and distinct from his blog post:

Hoff's information about Moore's involvement in mortgage fraud was the primary reason for his communication (through Allen) to the University of Minnesota. The fact that Hoff's underlying goal in conveying this information was to get Moore fired does nothing to disentangle the protected statement from any tortious conduct. We therefore conclude that there is too great a risk of infringing on Hoff's constitutional right to publish this information if he is held liable for Moore's subsequent employment termination.

Moore has 30 days from the date of decision (until September 19, 2012) to seek further discretionary review by the Minnesota Supreme Court.

John Borger and Leita Walker of Faegre Baker Daniels LLP, Minneapolis, Minnesota, represented amici. Paul Godfread of Minneapolis represented Hoff at trial and argued the appeal; Mark Anfinson of Minneapolis also represented Hoff on appeal. Jill Clark of Golden Valley, Minnesota, represented Moore.

Fraud, Contract and Related Claims Against Broadcaster Survive Motion to Dismiss

Educational Breastfeeding Video Was Spliced With Porn by Third Party

A New Jersey federal district court this month dismissed in part, and granted in part, a motion by Meredith Corporation to dismiss a highly publicized lawsuit by a New Jersey mother suing after her educational breastfeeding video was spliced by a third party into an online porn video. *Sahoury v. Meredith Corp.*, No. 11-5180, 2012 U.S. Dist. LEXIS 108122 (D. N.J., Aug. 2, 2012) (Hayden, J.).

The court held that plaintiff alleged sufficient facts to state claims for fraud, breach of contract, negligence and negligent infliction of emotional distress.

Plaintiff's theory of fraudulent inducement was sufficient at the motion to dismiss stage to overcome the broad release she had signed. Plaintiff's right of publicity claim, however, was dismissed because it failed to allege any facts showing that defendants' educational video had a predominately commercial purpose.

Background

Plaintiff Maryann Sahoury is a New Jersey mother. In January 2010, she

agreed to appear with her infant daughter in an educational video about breastfeeding produced by Parents TV, owned by Meredith Corporation. Plaintiff alleged that she participated in the video -- entitled *Breastfeeding Help* -- -- on condition that defendants not disclose her and her daughter's full names, that the video be used only for educational purposes, and that it appear only on Parent TV.

Plaintiff admitted she signed a release after taping the segment, but claimed she was told to do so as she was rushing home with her infant. She did not read it and believed it simply memorialized her understanding of the agreement. The "Authorization & Full Release," gave defendants a broad release from all claims arising out of the video.

In July 2010, Sahoury did a Google search of her name and discovered links to a pornographic video that included footage of her and her daughter from the *Breastfeeding Help* video. She also alleged that defendants uploaded the *Breastfeeding Help* video to YouTube, and used her and her daughter's full names in violation of their agreement.

Defendants assisted plaintiff in trying to identify the person who created the porn video. They also offered to provide reputation management services, but acknowledged

that could not completely suppress the online porn video.

Motion to Dismiss Denied

The court first held that plaintiff stated claims for fraudulent misrepresentation, negligent misrepresentation, and equitable fraud. Plaintiff alleged with sufficient factual detail that she participated in the video relying on defendant's promise that her full name would not be used and the video would only be distributed on Parent TV's website and cable channel. Moreover, she alleged sufficient facts to

show fraud in the inducement and overcome the release she had signed. Plaintiff "moved these claims across the line from conceivable to plausible under the standards of *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Second, the court found that the complaint stated a plausible claim for breach of contract because plaintiff's full name was used. Again the defendants cited the signed release, but the court found that resolution of the breach of contract issue required interpretation of the language of the release, which was beyond the scope of the motion.

(Continued on page 15)

Plaintiff alleged sufficient facts to state claims for fraud, breach of contract, negligence and negligent infliction of emotional distress. Her theory of fraudulent inducement was sufficient at the motion to dismiss stage to overcome the broad release she had signed.

August 2012

(Continued from page 14)

Third, the court found that the complaint states a plausible claim for negligence and negligent infliction of emotional distress. Plaintiff alleged that in other Parents TV videos, as a matter of policy, defendants do not post the full names of the participating mothers or babies, and that defendants routinely protect videos from being downloaded by third parties. The complaint further alleged that plaintiff suffered emotional and physical harm, as well as damage to her reputation. The court noted that any specific fact finding regarding the duty owed by defendants to Sahoury and her daughter would be investigated at further stages of litigation.

Finally, the court denied the defendant's reliance on the economic loss doctrine, which "prohibits fraud or tort claims predicated on the same underlying facts as a breach of contract claim." The court noted that while the doctrine bars recovery, it does not bar a plaintiff from pleading such claims, hinting as well the economic loss doctrine would not apply in this case.

Plaintiff, however, failed to plead sufficient facts to support a right of publicity / misappropriation claim. "The mere fact that defendants may have profited in some way by producing and disseminating the *Breastfeeding Help* 'institutional or educational' video is not sufficient to fulfill the 'commercial purpose' element of the misappropriation tort." Thus, the claim failed because it only stated a legal conclusion.

Plaintiff was represented by Fred J. Pisani of Ramp & Pisani, Tenafly, NJ. Defendants were represented by Jennifer Klear, Law Offices of Jennifer Klear, New York.

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MLRC MediaLawLetter

Texas Appeals Court Applies Reporter's Privilege in the Defamation Context

By Jason Bloom and Nick Nelson

A Texas court of appeals has ruled that even without the protection of the state's new shield law, a journalist sued for libel has a qualified First Amendment privilege not to divulge confidential sources. *Nelson, et al. v. Pagan, et al.*, No. 05-09-01380-CV (Tex. Civ. App.—Dallas Aug. 8, 2012) (Morris, Francis, and Lang-Miers, JJ.).

In upholding summary judgment for the defendants, the court also held that a reporter can establish absence of actual malice by affidavit even when that affidavit suggests heavy reliance on confidential sources. This interesting case is a boon for journalists in Texas and beyond.

'Minus One Good Cop'

The case stemmed from a 2007 *D Magazine* article entitled "Minus One Good Cop" written by journalist Trey Garrison. The article described how a rookie police officer was fired after she blew the whistle on several of her superiors. She and other sources – some of them anonymous – were quoted saying that the officers had been issuing bogus citations and making baseless arrests to boost their own performance numbers.

In May 2008, the officers sued Garrison and *D Magazine* for defamation and other torts. The trial court granted the

defendants' motion for summary judgment, and the plaintiffs appealed.

On appeal, the plaintiffs argued that the trial court had erred (1) by failing to require Garrison to divulge his anonymous sources, (2) by ignoring the plaintiffs' objections to Garrison's affidavit filed to establish absence of actual malice, and (3) by granting the defendants' summary judgment motion.

In its opinion, the Court of Appeals for the Fifth District in Dallas affirmed the summary judgment, rejecting all of the plaintiffs' points of error.

Reporter's Privilege in the Defamation Context

The court first addressed whether the trial court abused its discretion by failing to require Garrison to divulge his confidential sources. The court noted that Texas' shield law, which took effect in May 2009, does not apply retroactively, and therefore analyzed the issue under principles of common law and constitutional law.

The court agreed with defendants' argument that the new shield law was simply a codification of the law that existed when it was passed, finding support in Texas common law for "a qualified First Amendment privilege against compelled

> disclosure of confidential information possessed by a journalist." The court found that Garrison qualified for that privilege based on his reliance on confidential sources in preparing the article and his promise to maintain the confidentiality of those sources.

> The court then found that the plaintiffs had not met their burden to show that they had made reasonable efforts to learn the sources' identity by alternative means, and therefore could not overcome the qualified privilege.

Affidavits Relying On Confidential Sources Can Be Valid Summary Judgment Evidence

The second issue was whether the lower court abused its discretion when it accepted Garrison's affidavit as valid summary judgment evidence even though the affidavit admittedly relied on confidential sources. Under Texas law, a defendant's affidavit can be valid summary judgment evidence only if it can be "readily controverted." The plaintiffs argued that an affidavit that relies on unnamed sources cannot be "readily controverted" because the opposing party cannot challenge the sources directly.

(Continued on page 17)

In upholding summary judgment for the defendants, the court also held that a reporter can establish absence of actual malice by affidavit even when that affidavit suggests heavy reliance on confidential sources. This interesting case is a boon for journalists in Texas and beyond. For exclusive use of MLRC members and other parties specifically authorized by MLRC. © 2012 Media Law Resource Center, Inc.

MLRC MediaLawLetter

(Continued from page 16)

Citing *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989), the appellate court disagreed, concluding that "[r]eadily controverted does not mean the evidence could have been easily and conveniently rebutted; it means that testimony at issue is of a nature which can be effectively countered by opposing evidence." In other words, the fact that the source of the information is unknown does not prevent an opposing party from rebutting the information itself.

The court found that Garrison's affidavit gave details about his mindset at the time he wrote the article, an important consideration when assessing actual malice, and as such was "relevant, non-hearsay evidence regarding his state of mind." The court found that the trial court did not abuse its discretion in overruling the plaintiffs' objections to Garrison's affidavit.

Rebutting Allegations of 'Actual Malice' by Affidavit

Finally, the court addressed whether summary judgment had been properly granted in the defendants' favor, and the dispositive question, the court found, was whether the plaintiffs had raised a fact issue as to whether the defendants acted with "actual malice." (The plaintiffs conceded they were public figures).

To establish absence of malice, the defendants submitted numerous affidavits, including Garrison's. In addition to summarizing his research and the named and unnamed sources that he consulted, Garrison's affidavit stated that "[a]t the time all of the statements in question were made, and at all other relevant times, I believed them to be true and had no knowledge that any of the statements were false." Other defendants submitted similar affidavits. The court found these affidavits sufficient to meet the defendants' burden of presenting evidence that they did not publish statements with actual malice.

The court noted that the burden then shifted to the plaintiffs to offer "specific, affirmative proof" to show that the plaintiffs "either knew the publication was false or entertained serious doubts as to its truth." The plaintiffs argued that they could not make the required showing because they did not have the opportunity to depose Garrison's confidential sources or otherwise test their credibility. Addressing this argument, the court wrote: We acknowledge most of the cases granting summary judgment on actual malice do not involve a media defendant's reliance on confidential sources. Appellants question whether the confidential sources exist at all, and if so, whether they actually corroborated any information from any identified source. [But] the confidential sources here are not Garrison's only or even his primary sources. . . . Instead, he relied on them to corroborate information he obtained from [named sources], police department and city records, and a newspaper article he considered reliable.

The court also added that "the issue is whether Garrison acted in reckless disregard of the truth" and not "whether a particular underlying source was truthful." The court found that the plaintiffs had not met their burden to show actual malice. Their denials of the article's conclusions and arguments regarding inadequate investigation and lack of specific detail "are insufficient to meet this burden," the court said.

The court found this to be dispositive of all of the plaintiffs' remaining claims and affirmed summary judgment for defendants.

Conclusion

It can be difficult to dispose of a defamation action involving confidential sources on summary judgment, but by focusing on the information given rather than the nature of the source, courts will be willing to do so. Additionally, the Court's recognition of a qualified constitutional privilege against compelled disclosure of confidential sources is significant in that Texas has had, at best, mixed case law on the subject, and while Texas now has a shield law this case could be useful for bloggers or other defendants who might not be considered "journalists" for purposes of Texas' shield law.

Jason Bloom and Nick Nelson are associates in the Dallas office of Haynes and Boone, LLP. David Harper, Jason Bloom, and Charlie Jones of Haynes and Boone, LLP's Dallas Office represented the defendants in the Nelson case. Plaintiffs were represented by David Schiller and John Exline, Schiller Exline PLLC, Plano, TX.

California Appellate Court Affirms SLAPP Dismissal in Libel Case Over Weblog Post

Liberal Linking to Source Material Supports Conclusion that Post Was Opinion

By Rachel Matteo-Boehm and Leila Knox

In a decision that contains useful guidance for applying the law of opinion to blogs, a California appellate court has

affirmed Gawker's special motion to strike a defamation lawsuit under California's anti -SLAPP statute on opinion grounds. <u>*Redmond v. Gawker*</u> <u>*Media LLC*</u>, No. A132785 (Cal. App. Aug. 10, 2012).

The lawsuit, filed by plaintiff Scott Redmond early in 2011, alleged that Gawker's technology-oriented blog, Gizmodo, defamed Redmond by falsely asserting, among other things, that the plaintiff was "scamming" investors through a current venture called Peep Wireless as well as past business ventures.

But in affirming the trial court's order striking Redmond's action under



Plaintiff alleged that Gawker's technology-oriented blog, Gizmodo, defamed him by falsely asserting, among other things, that the plaintiff was "scamming" investors.

California's anti-SLAPP statute, the Court of Appeal concluded that the post was protected opinion. In reaching this conclusion, the appellate court looked at many factors, including the post's casual and sarcastic tone, its first-person narrative style, its use of "language of apparency," and the authors' liberal inclusion of, and/or live links to, the very source material on which they relied on in reaching their conclusions. Although the opinion is currently designated as unpublished, it nevertheless provides useful guidance for both bloggers and the lawyers who defend them.

this controversy emerge, two Gizmodo writers, John Herrman and Adrian Covert, began investigating not only the Peep venture, but also a series of other questionable business ventures that Redmond had been involved in.

The end product of their work, a January 13, 2011 post on Gizmodo.com entitled "Smoke & Mirrors – the Greatest Scam in Tech," was a lengthy, first-person narrative account that not only set forth the authors' frank and mostly unflattering observations on Redmond's business ventures, but included within the post copies of and/or links to the material they had reviewed so that the readers would be free to review that same material and reach their own conclusions.

(Continued on page 19)

Background

The Gizmodo post focused on Redmond, a self-described

"award-winning visionary" whose latest venture, Peep Wireless, purported to utilize so-called "mesh" software that Redmond touted would eliminate the need to ever pay a cell phone bill again, and would make all email, internet and media access free forever. Redmond began promoting Peep Wireless around the time of the Las Vegas Consumer Electronics Show ("CES") in January 2011, offering to meet with media and potential investors and partners in Las The Peep venture Vegas. quickly became the subject of Twitter and blogger posts raising questions about the viability of his claims. Seeing

August 2012

Page 19

(Continued from page 18)

Unhappy with the post, on the same day it was published, Redmond emailed Gizmodo stating that "he would like to speak with someone, preferable [sic] live on CNN, to understand why you allowed an obvious competitors [sic] attack on my company and me personally." In an email response, an editor from Gizmodo not only offered to meet with Redmond, but invited him to demonstrate his technology, and assured him that if there were any factual errors in the post, they would be corrected. Redmond ignored this offer. Instead, later that same day, he emailed Gizmodo his own comments embedded in a copy of the post that he characterized as the "correct facts in response," and requested that Gizmodo publish them "as a fair and accurate counterpoint to the inaccurate post." Gizmodo, in turn, re-

published the post with Redmond's embedded comments.

Despite Gawker's publication of Redmond's comments as he had requested, in February 2011, Redmond sued Gawker for defamation and false light in San Francisco Superior Court. As will be no surprise to the readers of this publication, the Gawker defendants began preparing a special motion to strike under California's anti-SLAPP statute, Code of Civil Procedure § 425.16, which provides

a procedural remedy for the early dismissal of claims arising out of conduct in furtherance of the person's right of free speech "in connection with a public issue."

As those who are familiar with California's anti-SLAPP statute well know, an anti-SLAPP motion involves a two-step process. First, the moving defendant must satisfy its burden to show that the anti-SLAPP statute applies to the claims alleged by the plaintiff. If so, the burden shifts to the plaintiff to present *evidence* demonstrating a "probability" that he "will prevail" on his claims. If he cannot meet his burden, the action must be stricken. In making these determinations, the trial court may consider declarations submitted by the parties. In essence, the SLAPP law creates an early summary judgment-like procedure, with added benefit of a mandatory fee-shifting provision that entitles a winning defendant to recover its attorneys fees and costs from the plaintiff.

In support of their motion to strike, the Gawker defendants submitted several declarations, including a

in turn, refuel cell company Perhaps most helpful in terms of going-forward advice to bloggers, was the fact that the post's authors specified the sources they relied on and incorporated active links to much of their

source material.

declaration from one of the post's authors that set forth, stepby-step, the process that he and his co-author went through to research Redmond and his various business ventures through basic Google searches. Importantly, the declaration also put into evidence the Twitter statement and blog posts that preceded the Gizmono post and prompted its writers to decide to investigate Redmond in the first place.

Through the declaration, Gawker also offered evidence that Redmond had a long history of self-promotion as part of his efforts to attract investors not only for his latest Peep venture but for a disparate array of past projects, which ranged from a company with a plan for an inflatable, build-ityourself car, to a service that was supposed to offer streaming movies on demand, to a virtual reality product, to a hydrogen fuel cell company.

> On May 31, San Francisco Superior Court Judge Loretta Giorgi granted Gawker's SLAPP motion. In making her ruling, Judge Giorgi found that the Gawker post "was made in a public forum in connection with an issue of public interest," Code of Civil Procedure § 425.16(e)(3), and thus was speech in connection with a public issue for the purposes of the first part of the SLAPP analysis. As to the merits, Judge Giorgi found both that the article was protected

opinion and that Redmond was a limited purpose public figure, but had failed to make a prima facie showing of actual malice. Thus, Redmond failed to prove a "probability" of prevailing. Redmond appealed.

Proceedings in the Court of Appeal

On August 10, 2012, the First District Court of Appeal affirmed the trial court's ruling, agreeing that the Gizmodo post concerned "an issue of public interest," and thus constituted speech on a public issue for the purposes of the anti-SLAPP statute. As to the second part of the SLAPP analysis, because the Court of Appeal found that the post was protected opinion, it did not go on to address the trial court's alternate basis of dismissal, *i.e.*, that Redmond was a public figure who had failed to present evidence of actual malice.

(Continued on page 20)

August 2012

MLRC MediaLawLetter

(Continued from page 19)

The Gizmodo Post Concerned An Issue Of Public Interest

What is and is not a matter of public interest for the purposes of the anti-SLAPP statute has been the subject of numerous California appellate court decisions. In the First District Court of Appeal, speech has been found to concern a matter of public interest in any case where the speech (1) concerned a person or entity in the public eye; (2) involved conduct that could directly affect a large number of people beyond the direct participants; or (3) contributed to the public debate on a topic of widespread public interest.

In agreeing with the trial court's ruling that the post concerned a matter of public interest, the Court of Appeal pointed to the evidence Gawker had submitted showing that Redmond's Peep venture had become the topic of Twitter and blog commentary well before the Gawker post was published. The Court of Appeal also noted the evidence of Redmond's considerable efforts to promote himself and his business ventures, observing:

> [Redmond] actively promoted his product ideas in Internet media heavily trafficked by tech consumers and members of the tech He sent out press releases, community. responded to inquiries by well-known tech writers, gave interviews, maintained Web sites with promotional videos, and sought to use the CES and the publicity surrounding it as a means to bring his company to the attention of the public and potential investors. His own Web sites touted media interest in his ventures as a selling point. Moreover, the Gizmodo article was disseminated in a public forum and concerned a public controversy. At least four articles about Peep, as well as a widely followed Twitter message by a well-known tech analyst, had preceded the Gizmodo article. Four of these had expressed open skepticism about Redmond's technological claims, and significant reader response had been generated.

In addition, the appellate court agreed with Gawker's argument that its post was in the nature of consumer protection information, and was thus a matter of public

interest for the added reason that, as discussed in a prior decision by the First District, such information can affect a large number of people beyond the direct participants. *See Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 898-99 (2004). The court noted: "Similarly here, the Gizmodo article was a warning to a segment of the public – consumers and investors in the tech community – that Redmond's claims about his latest technology were not credible. That segment was at least as large as the rather specialized group of consumers involved in *Wilbanks*."

Gizmodo Post Was Protected Opinion

Moving on to the second prong of the anti-SLAPP analysis, the Court of Appeal also agreed with the trial court's conclusion that the post was non-actionable because it was protected opinion. Using California's "totality of circumstances" test to determine whether the alleged defamatory statements were one of fact or opinion, the Court of Appeal first found that use of the word "scam" in the headline was protected opinion because the word "has no precise meaning. ... Although undoubtedly a pejorative term, 'scam' means different things to different people and is used to describe a wide range of conduct."

Moving on to the body of the post, the Court of Appeal cited several reasons why the post was protected opinion rather than fact. As an initial matter, the Court of Appeal found that the post's tone and style put it in the category of opinion:

> [T]he article is written in a casual, first-person style, which puts the reader on notice the authors are expressing their own views rather than stating objectively verifiable facts. ... The article has the tone and style of a sarcastic product or movie review – negative about its subject matter to be sure, but with little pretense of objectivity. The authors assert, for example, Peep's product descriptions "don't make sense," "sound[] like bullshit," and are "filled with meaningless technobabble."

In addition, the court found that the authors had couched their conclusions "in the language of 'apparency.' … Peep's technological claims were '*arguably* impossible'; Peep was (Continued on page 21)

August 2012

Page 21

(Continued from page 20)

'just the latest in a string of *seemingly* failed startups ... *seemingly* driven into the ground' by Redmond; Redmond '*seems* drawn to areas where there are cash prizes available; some of Redmond's ventures '*look like*' they were never meant to work." Such qualifying language, the court found, reinforced the impression that the post's authors "were expressing their personal, subjective perspective rather than declaring objective facts."

Finally, and perhaps most helpful in terms of goingforward advice to bloggers, was the fact that the post's authors specified the sources they relied on and incorporated active links to much of their source material, mainly web sites and promotional material created and maintained by Redmond. As the post stated in its concluding paragraphs, "Peep's background information is freely available online, and everything you see above was discovered with a few quick searches on Google." As the Court of Appeal explained, the transparency was yet another factor that pushed the post into the category of opinion:

> Having ready access to the same facts as the authors, readers were put in a position to draw their own conclusions about Redmond and his ventures and technologies. As shown by the comments posted, many readers did view these sources, and not all of them agreed with the authors' views. Statements are generally

considered to be nonactionable opinion when the facts supporting the opinion are disclosed.

This principle – that when the facts underlying a statement are disclosed, readers will understand that they are getting the author's interpretation of the facts presented and thus are unlikely to construe the statement as insinuating the existence of additional, undisclosed facts – has of course been the subject of several prior court decisions in California and the Ninth Circuit, as well as in other jurisdictions. But in applying this rule to a blog post, the Court of Appeal's opinion provides useful guidance for other bloggers wanting to similarly ensure their posts fall into the category of protected opinion.

Gawker has previously been awarded more than \$67,000 in attorneys fees and costs for the trial court portion of the proceedings, and having prevailed on appeal, Gawker is now entitled to recover its appellate fees and costs as well. The case is *Redmond v. Gawker Media LLC et al*, Case No. A132785 (California Court of Appeal, First Appellate District, August 10, 2012).

The Gawker Defendants and Respondents were represented by Rachel Matteo-Boehm, Roger Myers and Leila Knox of the San Francisco office of Bryan Cave LLP. Plaintiff and Appellant Scott Redmond represented himself in pro per, although his opening brief in the Court of Appeal listed Barak Lurie and Stephen Weaver of Lurie & Park on the cover page as "Attorneys for Petitioner."

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RETURN TO TABLE OF CONTENTS

Texas Court Finds No Jurisdiction in Libel Case by Controversial Autism Doctor

British Medical Journal Called Plaintiff's Research "Elaborate Fraud"

By Marc Fuller

A Texas state court ruled that it does not have personal jurisdiction over three defendants from the United Kingdom in a libel case brought against them by controversial autism researcher Dr. Andrew Wakefield over a series of reports in the *British Medical Journal* in which Wakefield's research was called an "elaborate fraud." <u>Wakefield v. BMJ</u>, (Tex. Dist., Aug. 3, 2012) (Meachum, J.).

Background

In 1998, Dr. Wakefield and twelve co-authors published an article in the esteemed medical journal,

The Lancet, purporting to "find" that parents of twelve children who had been referred to a London hospital with severe problems and regressive bowel development disorders (generally, autism) associated the onset of their children's behavioral symptoms with administration of the measles, mumps, and rubella (MMR) vaccine. In other words, according to Wakefield's research, parents were showing up at the hospital and reporting that their previously normal kids

had begun exhibiting the first signs of autism within days of receiving the MMR shot.

Predictably, this research ignited a public controversy over the safety of the MMR vaccine and concerns that it could be responsible for the rising rate of autism diagnoses. While Wakefield's co-authors quickly moved to reassure parents that the *Lancet* research was preliminary and did not justify delaying or altering the recommended course of childhood vaccinations, Wakefield repeatedly refused to endorse the MMR vaccine's safety. Over the next few years, larger and better designed studies showed no correlation between MMR and autism. Nevertheless, vaccination rates in the U.K. and the U.S. plummeted, and both countries saw

A Texas state court ruled that it does not have personal jurisdiction over three defendants from the United Kingdom in a libel case brought against them by controversial autism researcher Dr. Andrew Wakefield.

outbreaks of measles and other deadly diseases for the first time in decades.

In 2004, British investigative reporter Brian Deer authored a series of reports in the *Sunday Times* detailing serious conflicts of interest that Wakefield had failed to disclose in his *Lancet* paper. For example, Wakefield had failed to disclose that he was working as a consulting expert to plaintiffs' lawyers preparing class action litigation against vaccine manufacturers, and several of the *Lancet* children were themselves prospective litigants. Later that year, Deer helped produce a documentary for London's Channel 4 television network, which reported that Wakefield had also

failed to disclose that he had a patent pending for a rival vaccine.

Wakefield responded to these reports by suing Deer, the *Sunday Times*, and Channel 4 for libel in London. After Mr Justice Eady refused his request to stay the case against Channel 4 (the *Sunday Times* agreed to a stay) and ruled against Wakefield on two important discovery disputes, Wakefield voluntarily dismissed his claims against all defendants.

In 2010, the U.K.'s General Medical Council (GMC) revoked Wakefield's

medical license for numerous acts of dishonesty and serious professional misconduct. By then, Wakefield had already decamped to Texas, where he remained active in the so-called "vaccine-safety" movement.

In January 2011, the *British Medical Journal (BMJ)* published a series of reports authored by Deer, alleging that Wakefield had misreported and altered much of the patient data in the 1998 *Lancet* paper. In editorial commentary accompanying the series, the *BMJ* opined that the paper was an "elaborate fraud."

August 2012

(Continued from page 22)

The Lawsuit

Wakefield sued the *BMJ*'s publisher, its editor-in-chief, and reporter Deer for libel in state court in Austin. The defendants, all of whom are based in the United Kingdom, first moved to challenge personal jurisdiction by filing "special appearances" under Texas procedure. While those motions were pending, the defendants moved, in the alternative, to dismiss the case under Texas's new anti-SLAPP statute, which is codified in Chapter 27 of the Texas Civil Practice & Remedies Code.

In opposing the special appearances, Wakefield argued that the defendants had established minimum contacts with Texas because they knew that he was living in Texas at the time of the articles' publication. Although the January 2011 reports did not mention Texas, several prior *BMJ* reports had noted that Wakefield was living and working in Texas.

Wakefield also relied on the *BMJ*'s subscription base in Texas, which included 20 print subscribers and an additional 28 online subscribers. These online subscriptions were primarily for hospitals, medical schools, and other large institutions, and each subscription granted access to hundreds or (in some cases) thousands of students, faculty, or medical professionals.

In addition, Wakefield pointed to press releases that had been sent to Texas journalists and other contacts, promoting the *BMJ* reports.

The defendants argued that, despite the prior reports mentioning Wakefield's Texas residence, there was no evidence that they knew Wakefield was still living there at the time of the January 2011 series. Moreover, none of the *BMJ* reports relied on any Texas sources, and they concerned Wakefield's activities in London more than a decade ago. In addition, the defendants argued that evidence of the *BMJ*'s online subscriptions was irrelevant because the reports at issue in the case were published on the *BMJ*'s website freely accessible to the public, both subscribers and nonsubscribers alike.

The defendants also argued that, even if the court found sufficient minimum contacts, it should dismiss the case for lack of personal jurisdiction under the second due-process requirement, that exercise of jurisdiction not offend "traditional notions of fair play and substantial justice." The defendants explained the history of litigation between Deer and Wakefield in the London courts and argued that prosecution of Wakefield's claims in the Texas case would require him to mount a collateral attack on the validity of the GMC's findings of misconduct against him. Considerations of comity therefore made Texas an inappropriate forum for adjudicating this dispute.

After discovery on the special appearances and anti-SLAPP motion and several hearings, the court granted the special appearances for all three defendants, thereby dismissing the case for lack of personal jurisdiction.

The ruling means that the court will not address various arguments raised by Wakefield regarding the application and interpretation of Texas's new anti-SLAPP statute, including its interplay with Texas's special-appearance procedures and the standard that a nonmovant must satisfy in order to overcome an anti-SLAPP motion.

The defendants were represented by Tom Leatherbury, Marc Fuller, Sean Kelly, and Kim McCoy of the Dallas office of Vinson & Elkins, as well as Lisa Bowlin Hobbs of Kuhn Hobbs in Austin. Dr. Wakefield was represented by William Parrish and John Saba of DiNovo Price Ellwanger & Hardy in Austin and Brendan McBride of Gravely & Pearson in San Antonio.

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Bridal Shop Owner Jilted By Summary Judgment Decision

By Tom Curley

A New York trial court has granted summary judgment to *The Times Herald-Record* in a libel suit brought by the owner of a bridal shop who claimed the newspaper's reports about her customers' complaints drove the shop out of business. *Gebbia v. The Times Herald-Record*, Index No. 2009/6858 (N.Y. Sup. Orange Cnty Aug. 13, 2012).

In the summer of 2008, *The Times Herald-Record* began receiving complaints from customers of Jo-Marie Dress and Bridal Shoppe ("Jo-Marie") in Newburgh, New York. These customers were brides who had gone to Jo-Marie to purchase wedding dresses. They called *The Times Herald-Record*, located in neighboring Middletown, looking for assistance, alleging they had not received their dresses as promised, or had not received them in a timely fashion.

The bridal customers also told the newspaper that they had been unable to reach Jo-Marie's owner with their concerns and that their messages, increasingly frantic as wedding dates neared, went unreturned. In early July, a newspaper photographer also encountered a customer arriving to find the bridal store locked and closed during its normal business hours and the customer similarly complained about being unable to get her dress order.

The newspaper then ran several articles concerning the bridal shop in the ensuing weeks, headlined: *Bridal shop's apparent closure leaves brides-to-be furious, Newburgh shop target of frequent criticism; Newburgh bridal shop suddenly closes doors, leaving brides in a lurch; Here Comes the AG's Office, State reviewing sudden closing of bridal shop; Brides still furious over dress shop nightmare, Newburgh store owner blames media attention; and Bridal shop troubles persist, Owner of Jo-Marie blames media reports for 'hysteria'.*

One of the articles, quoted by the trial court, described the scene at the bridal shop thusly: "Weeping women and threats to call the police made for a dramatic scene Wednesday at the store, where brides, their bridesmaids and families were in a panic over dresses they ordered and paid for but never received."

Taken as a whole, the news reports generally recounted the concerns being publicly voiced by Jo-Marie customers,

some of whom also contacted the state Attorney General's office as well as other news organizations. In essence, the sting of the articles was that the bridal shop was not open to business traffic in early July 2008, that the shop's owner was apparently ill and inaccessible, and that there were various problems with the shop's dress orders.

The newspaper also attempted to interview the store's owner, who, while declining direct comment, issued a statement through an attorney which the *Times Herald-Record* published.

In 2009, Jo-Marie's owner, Deborah Gebbia, sued *The Times Herald-Record* for defamation and for intentional and negligent infliction of emotional distress. In short, Gebbia claimed that her customers' dissatisfaction was the result of the news coverage itself, coverage which she alleged had prompted upset brides to descend upon the store, ruined her reputation and drove her out of business.

As summarized by the trial court, Gebbia specifically challenged the accuracy of the complaints that the brides had made about her business practices as well as what Gebbia construed as the implication arising from one or more of the news reports, *i.e.*, that her store had permanently closed down.

"Plaintiff alleges that the following statements were false, defamatory and caused emotional distress: (1) that she suddenly, mysteriously, or without explanation or warning closed her business; (2) that dresses, were ordered and/or paid for but never received or received late; (3) that telephone calls to the shop were not answered and messages not returned; (4) that the store was closed during regular business hours; (5) that Plaintiff failed to appear for fittings; (6) that [the seamstress] stated that she had no idea what was going on or that customers could not get into the store; and (7) that customers were crying; or that Plaintiff failed to offer any help."

Following discovery, the newspaper moved for summary judgment in 2012 on substantial truth, relying on the testimony of its own journalists, who had been present at the locked store and seen the distraught customers for themselves, the complaints made by customers to governmental authorities, and the affidavits of certain of the

(Continued on page 25)

August 2012

(Continued from page 24)

brides interviewed by the paper when the stories were first reported.

The trial court concluded that, with respect to statements two through seven above, "Plaintiff failed to raise a triable issue of fact as to the falsity of any of these statement[s]" and thus *The Times Herald-Record* should be granted summary judgment with respect to those statements.

However, the court found there was a triable issue of fact as to whether one or more of the articles might reasonably be construed as implying that the bridal shop had permanently closed its doors, and whether that was in fact substantially true.

Nevertheless, the court concluded that the subject matter of the reports was clearly a topic of "public concern," and therefore under New York law, Gebbia had the burden of demonstrating that the newspaper was "grossly irresponsible" in publishing the sole remaining statement at issue. The Court found no evidence of gross irresponsibility here.

As the court summarized, the reporter who researched the articles "averred that none of the customers she interviewed appeared to have a motive to provide her with inaccurate information. Rather, all seemed genuinely upset. [The reporter] also knew from her investigations that many of the same customers had also complained to the police and to the Attorney General's office. In addition, some had made complaints to consumer protection agencies. In sum, she avers, the complaints were consistent and credible, and supported by reference to several sources."

In light of the extensive reporting that had gone into the publication of the articles, including the defendant's efforts to contact Gebbia and to include her views, the court readily concluded that plaintiff could not meet this burden and granted summary judgment on the defamation claim in its entirety.

Finally, the court dismissed the negligent and intentional infliction of emotional distress claims, finding that Gebbia failed to make the requisite showing under either tort.

The Times Herald-Record was represented by in-house counsel Gail Gove of Dow Jones & Company, Inc. together with Gayle C. Sproul, Amanda Leith (now in-house at NBC Universal), Thomas Curley and Shaina D. Jones of Levine Sullivan Koch & Schulz, LLP. The plaintiff was represented by Jonna M. Spilbor and Danielle Hinton of the Law Office of Jonna M. Spilbor, Poughkeepsie, NY.



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August 2012

MLRC MediaLawLetter

ABA Makes Anti-SLAPP Legislation Official Bar Policy

By Charles D. Tobin and Laura Lee Prather

The 560-member governing body of the American Bar Association this month adopted a <u>resolution</u> encouraging legislatures to enact and strengthen anti-SLAPP legislation.

The House of Delegates resolution, adopted by overwhelming voice vote in Chicago on August 7, makes anti-SLAPP legislation the official policy of the organized Bar in the United States. It reads:

RESOLVED, That the American Bar Association encourages federal, state and territorial legislatures to enact legislation to protect individuals and organizations who choose to speak on matters of public concern from meritless litigation designed to suppress such speech, commonly known as SLAPPs (Strategic Lawsuits Against Public Participation).

The resolution was drafted by a committee of the ABA Forum on Communications Law and co-sponsored by three powerful ABA components: the Section of Litigation, the Section on Individual Rights and Responsibilities, and the Torts and Insurance Practice Section.

In a report accompanying the proposed resolution, the sponsors explained to the ABA Delegates that SLAPP lawsuits typically are brought by powerful interests, not to vindicate legal rights, but to divert attention and resources from an underlying public issue. These lawsuits severely chill free speech, and even meritless suits can drain an individual speaker's resources.

SLAPP lawsuits can also waste a corporate defendant's resources by tying the company up in years of probing discovery proceedings. The report explained that the best protection against these lawsuits are procedures that allow for quick dismissals of actions arising from protected speech – and the ability to recover the fees, costs and damages incurred in defending the meritless suit.

Anti-SLAPP legislation has now been passed in 28 states, the District of Columbia and the territory of Guam, with the legislatures in Texas and D.C. most recently enacting the measures. Efforts are underway to enact a federal anti-SLAPP law to consistently protect the citizens of all states and to overcome court challenges being made to the application of state anti-SLAPP laws in federal court litigation.

Sponsors of the ABA resolution are hopeful that the Bar's support will enhance efforts to enact legislation in the jurisdictions that do not have anti-SLAPP laws, as well as efforts to strengthen existing laws where needed.

The sponsors' full report the Delegates is available at: <u>http://www.americanbar.org/groups/communications_law/</u> news_announcements.html

Charles D. Tobin, with Holland & Knight in Washington D.C., is immediate past Chair of the ABA Forum on Communications Law, introduced the resolution at the ABA House of Delegates meeting, and successfully litigated the first antiSLAPP motion in the D.C. courts. Laura Lee Prather, with Haynes and Boone in Austin, Texas, chaired the ABA Forum committee that drafted the ABA resolution and report, and she represented the coalition of news media, civil liberties, and business interests that successfully lobbied the Texas Legislature in 2011 to enact the state's antiSLAPP law.

Sixth Circuit Affirms Copyright Infringement Verdict against Hustler Magazine

Embarrassing Photo of News Anchor Not Transformative

The Sixth Circuit this month affirmed a \$135,000 jury verdict against *Hustler* magazine for copyright infringement for publishing a photograph of an Ohio news anchor participating in a "wet t-shirt" contest. *Balsley v. LFP, Inc.*, No. 11-3445, 2012 U.S. App. LEXIS 17187 (6th Cir. Aug. 16, 2010) (Guy, Clay, Hood, JJ).

The plaintiff had obtained the copyright of the embarrassing photograph to prevent publication. The magazine published it on advice of counsel who opined that publication of one photo from the Internet would be fair use. The Sixth Circuit held that the jury could reasonably have found that publication of the photo was not a fair use.

Background

In 2003, Catherine Bosley was a news anchor for a CBS television affiliate in Ohio. While on vacation in Florida, she entered a "wet t-shirt" contest at a bar and danced nude. Without Bosley's knowledge, an amateur photographer took pictures of her in various states of undress. The photos were ultimately published on

the Internet and Bosley lost her position as an anchor when the story was publicly reported. Bosley later purchased the photos from the photographer and registered them with the United States Copyright Office.

Hustler magazine runs a "Hot News Babes" contest each month, inviting readers to nominate women news reporters to be featured. In 2005, a reader nominated Bosley as a "Hot News Babe." The reader did not include a photo, but noted that nude photos of Bosley were available online. Hustler employees located the photos. They also contended that they attempted to find the copyright owner but were unable to do so.

The magazine asked its outside counsel whether it could publish a Bosley photograph without obtaining a copyright license and counsel concluded that one photograph could be published as "fair use" without need for permission. The photo was published in the "Hot News Babes" feature in February 2006.

Bosley sued Hustler for copyright infringement and state law privacy and right of publicity claims. The state law claims were dismissed before trial and the case was tried solely on the copyright infringement claim.

Hustler raised the affirmative defense of fair use, and argued that its conduct was not willful in light of its reliance on counsel's advice. The jury found that Hustler infringed plaintiff's copyright, but that the infringement was not willful, and awarded plaintiff \$135,000 as a percentage of the magazine's profit from the issue.

Hustler filed a Rule 50(b) motion for JNOV, which the district court denied.

Hustler appealed the fair use decision, the award of damages, the award of attorney fees, and also sought a new

trial because of alleged prejudicial comments made by plaintiff's counsel during trial.

Fair Use Analysis

On the fair use analysis, the Sixth Circuit first looked at the purpose and

character of the use, examining both whether the photo was used for commercial purpose and whether the use was transformative. Though Hustler contended that the piece was noncommercial, informative commentary on Bosley, "the jury could have rejected that argument in light of the contest aspect of the piece, the picture and description of the Bosley photograph that appeared in Hustler, and the fact that the incident giving rise to the picture was three years old and no longer considered newsworthy."

According to the Court, "common sense informs any reasonable jury that the contest would, in fact, be in place for commercial purposes, by encouraging the involvement of its readers and promising illicit pictures of real women who are in the public eye."

Similarly, the court found no transformative use involved. (Continued on page 28)

The Sixth Circuit held that the jury could reasonably have found that publication of the photo was not a fair use.

August 2012

MLRC MediaLawLetter

(Continued from page 27)

"Defendant's use of the photograph was the same as [the amateur photographer's] original use—to shock, arouse, and amuse. ... 'the jury could have reasonably concluded that the photograph was used...to enhance readership, rather than as a social commentary."

Turning to the nature of the copyrighted work, the court discussed whether the photograph was factual or creative. The Sixth Circuit had not previously addressed this question with respect to photography, but the Court was persuaded that the photograph possessed a mixed nature of fact and creativity and that "the jury could reasonably find that this factor weighed in flight favor of plaintiffs, or, at the very least, its impact was neutral."

Third, looking at the amount and substantiality of the use, the Court rejected Hustler's argument that it published only one out of a set of Internet photographs. Instead, the Court concluded that Hustler "published the entire photograph at issue less minor cropping of the background," militating against a finding of fair use.

Fourth and finally, the court examined "the effect of the use upon the potential market for or value of the copyrighted work." The Court rejected Hustler's argument that its use had no effect upon the market because Plaintiff had no intention of selling the photograph.

Of course, a copyright owner is not required to show that actual harm has come to her, *Sony Corp.*, 464 U.S. at 451, but must show merely a "potential" effect on the market for the copyrighted work. *Harper & Row*, 471 U.S. at 568–69. We agree with Plaintiffs that their current desire or ability to avail themselves of the market for the Bosley photograph is immaterial to the issue outlined by the statute, namely, whether there is potential for an adverse effect on the market for the photograph should the challenged use become widespread. The Court agreed that plaintiff presented ample evidence of the market for the photograph and that the magazine's use directly competed for a share of that market. The jury was not unreasonable in finding that this factor weighed in favor of plaintiff and in rejecting the fair use defense. Thus the district court did not err in denying Hustler's motion for judgment as a matter of law on the copyright claim.

Other Issues on Appeal

Hustler also sought a new trial because of alleged prejudicial comments during trial. Among other things, Hustler objected to comments made about its outside counsel. Hustler called as a witness the lawyer who rendered the fair use opinion. That lawyer's firm also represented Hustler at trial. On cross-examination Hustler's lawyer testified that his firm has a \$1.5 million annual retainer agreement with the magazine. Plaintiff's lawyer then repeatedly referred to the magazine as a "1.5 million client," that "provides a tremendous amount of revenue" to the law firm. The Sixth Circuit rejected Hustler's objection, finding these comments fair because they related to the credibility and potential bias of the lawyer's testimony.

The Court also affirmed the award of damages and attorney fees to plaintiff. The district court awarded plaintiff \$133,812 in attorneys fees as the prevailing party. It rejected Hustler's claim that it be deemed the "overall" prevailing party based on the number of claims that it successfully defended. Instead, the district court did not abuse its discretion in awarding plaintiff attorneys fees and rejecting Hustler's request for fees on the dismissed state law claims.

LFP, Inc., publisher of Hustler magazine, was represented by Timothy P. Murphy of Lipsitz Green Scime Cambria LLP, Buffalo, NY. Plaintiff was represented by Richard C. Haber and Andrew A. Kabat of Haber Polk Kabat LLP of Cleveland, OH.

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August 2012

Tabloid's Publication of Secret Celebrity Wedding Photos Not Fair Use

A divided three-judge panel of the Ninth Circuit this month held that the publication of celebrity wedding photos by a Spanish-language gossip magazine was not a fair use under the Copyright Act. <u>Monge et al. v. Maya Magazines</u>. <u>Inc</u>., No. 10-56710, 2012 U.S. App. LEXIS 16947 (9th Cir. Aug. 14, 2012) (McKeown, Smith, Brewster, JJ).

The majority found that "[t]he tantalizing and even newsworthy interest in the photos does not trump a balancing of the fair use factors." In a lengthy dissent, Judge Smith criticized the decision, stating it "thwarts the public interests of copyright by allowing newsworthy public figures to control their images in the press."

Background

In 2007, pop singer and model Noelia Monge married her manager Jorge Reynoso at a Las Vegas wedding chapel. The couple kept the wedding secret from family and friends, at least in part to preserve Monge's image as a single sex symbol. Only the minister and two chapel employees witnessed the wedding. Three pictures were taken on Monge's personal camera at the ceremony and three others were taken of the couple in wedding attire later in the evening.

Oscar Viqueira, a paparazzo who occasionally worked as a driver and bodyguard for the couple, claims he found a memory stick containing the photos in his car after allowing Reynoso to borrow the vehicle. Viqueira tried to use the files to extort money he claimed Reynoso owed him, but when his plan failed, he sold all of his files to Maya Magazines for \$1,500 "to recuperate the payment for [his] work."

In 2009, Maya published the six wedding photos in its celebrity gossip magazine *TVNotas*. Three photos ran on the front cover under the headline "The Secret Wedding of Noelia and Jorge Reynoso in Las Vegas." The remaining three photos were featured in an inside spread, along with text reading in part: "In fact, a lot has been said about a supposedly secret wedding in Las Vegas, Nevada, that took place in January 2007, but until now, no one had shown photos of that memorable day. TVNotas got a hold of those photos and shows them to you."

After the publication, the couple registered copyrights in five of the six published photos, excluding a photo taken in front of a Playboy logo. They then filed suit against Maya for copyright infringement and misappropriation. The misappropriation claims were dismissed and the district court then granted Maya's motion for summary judgment based on the fair use defense.

Ninth Circuit's Fair Use Analysis

On appeal, the Ninth Circuit panel reversed, finding that none of the four fair use factors weighed in favor of defendants. The Copyright Act sets out four non-exclusive factors for courts to examine in fair use determinations: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107.

Purpose and Character of Use

The Court did not doubt that the magazine's coverage of the wedding was news reporting, but it added "[a]lthough news reporting is an example of fair use, it is not sufficient itself to sustain a per se finding of fair use." Instead, the court focused on the transformative and commercial aspects of the use.

First, the court found that each photo was reproduced in its entirety and neither minor photo cropping nor the addition of headlines or captions transformed the copyrighted works.

Maya claimed that publication of the photos was an expose which transformed the plaintiffs' personal photos into newsworthy coverage of a "clandestine wedding." The Court, however, pointed out that the pictures themselves were not the story and were not necessary to prove the controverted fact. Plaintiffs' marriage certificate could have been used to show the public that the couple secretly married two years prior.

(Continued on page 30)

August 2012

MLRC MediaLawLetter

(Continued from page 29)

"Under the copyright law, Maya possess 'an unfettered right to use any factual information revealed [through the photos] for the purpose of enlightening its audience, but it can claim no need to bodily appropriate [the couple's] expression of that information by utilizing portions of the actual [photos]."" (quoting Iowa State Univ. Research Found., Inc. v. Am. Broad Cos. Inc., 621 F. 2d 57, 62 (2d Cir. 1980). Thus, "Maya's use—wholesale copying sprinkled with written commentary—was at best minimally transformative."

Second, the court quickly concluded that Maya's use was undisputedly commercial in nature: "The gossip magazine makes no pretense that it is educational. It is a commercial publication." Consequently, the purpose and character of Maya's use is "at best neutral" and does not tip in favor of fair use: "Maya's minimal transformation of the photos is substantially undercut by its undisputed commercial use."

Nature of Copyrighted Work

The court's analysis of the second factor was straight forward: "We balance the copyright protection received by marginally creative works with the Supreme Court's clear recognition that the unpublished status of the work is a 'critical element."" Here there were no "extraordinary circumstances to overcome the presumption against prepublication fair use."

Amount Reproduced

Though the third standard is flexible and looks beyond the simple percentage of photos used, the court again was quick to point out that Maya's role as a newsgatherer "could have been served through publication of the couple's marriage certificate or other sources rather than copyrighted photos. ... Maya used far more than was necessary to corroborate its story—all three wedding images and three post-wedding photos." This factor also weighed against defendant.

Effect on the Market

With respect to effect on the market, the district court had held that no market for the pictures existed because plaintiffs had no intention to sell the photos. This was clear error, the majority concluded. While Maya boldly emphasized that its publication was "[f]irst and exclusive," the couple's intention at the time of the publication did not give Maya license to forever deprive them of their right to decide when, "whether and in what form to release" the photos. Thus, Maya's claim that a confidential work receives less copyright protection because its author intends to maintain confidentiality finds no support; to the contrary, "[i]t has never been seriously disputed that the fact that the plaintiff's work is unpublished . . . is a factor tending to negate the defense of fair use." (citations omitted)

Moreover, Maya's purchase of the photos showed that a market existed. And after the magazine published the photos, "the bottom line literally dropped out of the market—neither Maya nor anybody else is likely to purchase these pictures from the couple."

"Waving the news reporting flag is not a get out of jail free card in the copyright arena," the majority noted. And it concluded that plaintiffs were entitled to summary judgment.

Dissent: Majority Undermines Free Press

In a lengthy dissent, Judge Smith criticized the majority opinion as inconsistent with Supreme Court precedent, stating

It thwarts the public interests of copyright by allowing newsworthy public figures to control their images in the press. ...Under the majority's analysis, public figures could invoke copyright protection to prevent the media's disclosure of any embarrassing or incriminating works by claiming that such images were intended only for private use. The implications of this analysis undermine the free press and eviscerate the principles upon which copyright was founded.

Plaintiffs were represented by Michael D. Kuznetsky of Kuznetsky Law Group, P.C., of Universal City, California. Defenants were represented by D. Fernando Bobadilla of The Bobadilla Law Firm, Miami; and Angela C. Agrusa and Allen P. Lohse of Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP of Los Angeles.

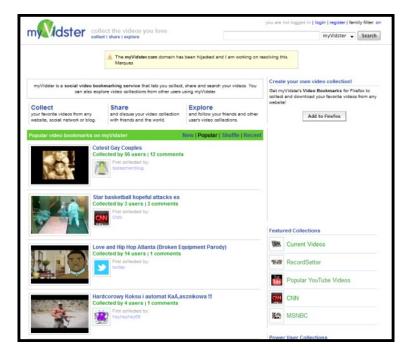
Seventh Circuit Vacates Injunction Against Video Bookmarking Website

Links to Pirated Videos Not Contributory Infringement

The Seventh Circuit this month held that a "social bookmarking" website that allows users to post links to online videos is not liable for contributory copyright infringement if the bookmarks link to pirated videos. *FlavaWorks, Inc. v. Gunter*, No. 11-3190, 2012 U.S. App. LEXIS 15977 (7th Cir. Aug. 2, 2012) (Posner, Flaum, and Wood, JJ).

An Illinois federal district court had issued a preliminary injunction against the website, holding emphatically that plaintiff was likely to succeed o n its infringement claims. Among other things, the district court faulted the website for ignoring DMCA takedown notices and having no DMCA procedures for copyright complaints.

In a decision written by Judge Richard Posner, the Seventh Circuit reversed. The Court found that there is no



Defendant allows users to post links to online videos.

infringement of plainitff's right to distribute copies of its works when users simply view streaming videos. Consequently there was no contributory infringement by defendant. "The facilitator of conduct that doesn't infringe copyright is not a contributory infringer," Judge Posner wrote. The DMCA was therefore entirely irrelevant to the case.

Background

Plaintiff Flava Works (Flava) produces and distributes gay porn videos. Users pay to access Flava's online content which is behind a pay wall. Under Flava's terms, users must agree not to copy, transmit, or sell the videos, though they are permitted to download videos for "personal, noncompetitive use."

Defendant myVidster allows users to "bookmark" videos to the site, i.e., add a hyperlink to an online video hosted elsewhere. Once a video is "bookmarked," myVidster

> embeds the code from the host server. This code enables myVidster to display a thumbnail for the video on its site. Users click who on the thumbnail can view the video within the frame of myVidster's site, though the content is coming from the host site. As Judge Posner explained, "It's like YouTube, except that YouTube hosts the videos it provides access to and myVidster as we know does not."

> myVidster is free for general users. It had also offered a "pro"

subscription for \$40 per year which allowed subscribers to store their favorite videos directly on the myVidster site. myVidster said it stopped providing this service and plaintiff apparently made no claim over stored videos.

Flava alleged that 300 of its videos were bookmarked on myVidster and sued the website for contributory copyright infringement. Flava alleged its sales fell by 30 to 35 percent, causing a loss of more than \$100,000 in revenue.

An Illinois federal district court granted a preliminary injunction against myVidster on plaintiff's claim for (Continued on page 32)

August 2012

MLRC MediaLawLetter

(Continued from page 31)

contributory copyright infringement. *See <u>FlavaWorks, Inc. v.</u></u> <u>Gunter</u>, No. 10 C 6517 (N.D. Ill. July 27, 2011) (Grady, J.); and <u>FlavaWorks, Inc. v. Gunter</u>, No. 10 C 6517 (N.D. Ill. Sept. 1, 2011) (denying motion for reconsideration).*

Defendant argued it was free to host links to any publicly available online video; that it essentially had no obligation to respond to DMCA notices; and that Flava's remedy was to complain to the site that actually hosted the video. The district court wrote that "this perspective is the epitome of willful blindness."

Seventh Circuit Decision

The district court's confident opinion ran into the buzz saw of a Judge Posner opinion. At the outset, Judge Posner faulted the district court for applying the wrong standard for issuing a preliminary injunction in a copyright case. The district court presumed irreparable harm followed from its finding that plaintiff showed a likelihood of success on the merits. Instead, Judge Posner explained, a court must not adopt a categorical rule or general presumption that plaintiff will suffer irreparable harm. *Citing, e.g., <u>eBay Inc. v.</u>* <u>MercExchange, L.L.C., 547 U.S. 388, 392-93 (2006), and Salinger v. Colting, 607 F.3d 68, 82 (2d Cir. 2010).</u>

On the copyright claim, Posner reasoned that a visitor to myVidster does not violate the plaintiff's exclusive right to copy and distribute its videos simply by watching a pirated video, as long as no copy of the video is made. "[B]ypassing Flava's pay wall by viewing the uploaded copy is equivalent to stealing a copyrighted book from a bookstore and reading it. That is a bad thing to do (in either case) but it is not copyright infringement."

Since users were not infringing plaintiff's copyrights, myVidster could not be liable for contributory copyright infringement. Flava argued that myVidster encourages users to circumvent Flava's pay wall by providing the connection to illegal copies of copyrighted videos, but the Court concluded that "unless those visitors copy the videos they are viewing on the infringer's websites, myVidster isn't increasing the amount of infringement. ...Someone who uses one of those addresses to bypass Flava's pay wall and watch a copyrighted video for free is no more a copyright infringer than if he had snuck into a movie theater and watched a copyrighted movie without buying a ticket. The facilitator of conduct that doesn't infringe copyright is not a contributory infringer."

myVidster's failure to respond to DMCA takedown notices was therefore irrelevant. "[A] noninfringer doesn't need a safe harbor. ...myVidster is not an infringer, at least in the form of copying or distributing copies of copyrighted work. The infringers are the uploaders of copyrighted work. There is no evidence that myVidster is encouraging them, which would make it a contributory infringer."

Public Performance Rights?

Although neither party had raised the issue, Judge Posner went on to ruminate on whether myVidster implicated plaintiff's public performance rights under Section §106(4) of the Copyright Act. "There is an argument that even though the video uploader is responsible for the transmitting and not myVidster, myVidster is assisting the transmission by providing the link between the uploader and the viewer, and is thus facilitating public performance."

Posner expressed surprise that Flavaworks did not argue this point, but then threw cold water on his own theory. He drew a "remote analogy" to the "swap meet" copyright infringement case of *Fonovisa, Inc. v. Cherry Auction, Inc.,* <u>76 F.3d 259, 262 (9th Cir. 1996)</u> where the Ninth Circuit reinstated a copyright infringement claim against a flea market owner for facilitating the sale of pirated music recordings. But since myVidster did not sell pirated videos, Posner suggested it was unlikely that the "bookmarking service is actually contributing significantly to the unauthorized performance of Flava's copyrighted works by visitors to myVidster's website."

Posner also distinguished defendant's bookmarking service from P2P file sharing cases such as <u>In re Aimster</u> <u>Copyright Litigation, 334 F.3d 643 (7th Cir. 2003)</u> In Aimster the defendant failed to show that its service had ever been used for a noninfringing use. "That can't be said about myVidster's social-bookmarking service. Unlike Aimster, it's not encouraging swapping, which in turn encourages infringement, since without infringement there is nothing to swap."

Flava Works was represented by Meanith Huon of Huon Law Firm in Chicago. Defendant Marques Gunter d/b/a myVidster.Com and Salsaindy, LLC, was represented by William J. Lenz and Kevin C. May of Neal, Gerber & Eisenberg LLP in Chicago.

August 2012

Australia Tightens Controls on Corporate Use of Social Media

Corporations May Be Liable for User Postings

By Nicholas Liau & Paul Kallenbach

A number of recent Australian decisions have considered the issue of companies' liability for users' social media postings. In short, it is possible that a company will be held liable for its users' postings in some circumstances.

Allergy Pathway

In 2011 in <u>ACCC v Allergy Pathway Pty Ltd and Anor</u> (<u>No 2</u>) [2011] FCA 74, the Australian Federal Court held that Allergy Pathway was liable for misleading and deceptive statements posted on its Facebook page by users. Allergy Pathway was an alternative medicine-based allergy reduction clinic. It made false claims about the effectiveness of its own products, and had been sanctioned by the Court previously.

After receiving penalties from the Court, including a ban on advertising that its products were effective, Allergy Pathway continued to allow users to post comments on its Facebook page which suggested the products were effective. The Court held that '*it is appropriate to*

conclude that Allergy Pathway accepted responsibility for the publications when it knew of the publications and decided not to remove them'.

The ASB's recent decisions

Recently, the Advertising Standards Board (ASB) was called upon to make a pair of decisions about user comments on the Facebook pages of <u>VB</u> and <u>Smirnoff</u>, both alcohol brands. A number of complaints were made to the Advertising Standards Bureau about offensive user comments on the companies' respective Facebook pages, as well as comments which may have encouraged an excessive consumption of alcohol.

Importantly, in both cases the ASB found that the posts of users on corporate Facebook pages constitute "advertising" for the purposes of the relevant advertising standards code. The ASB reasoned that companies were responsible because they have a reasonable degree of control over their own Facebook pages. Further, because the medium is regularly used to engage with customers, the posts of customers are part of the advertising of the company.

Where Does the Law Stand Now?

So, where does Australian law now stand in relation to liability for users' posts on social media? On the one hand, *Allergy Pathway* suggests that a company must have some *degree of knowledge* about users' posts, and to make some sort of active choice to not remove them from its Facebook page, in order to be liable. On the other hand, the VB and

> Smirnoff decisions suggest that liability for everything posted on a company's Facebook page is the default position.

> In *Allergy Pathway*, the company itself had previously made misleading and deceptive statements about its products. There was clear evidence that the

company knew about the comments of its users but chose to do nothing about them because they clearly helped its business.

Conversely, in Smirnoff and VB's cases, it was much less clear that the companies knew about the posts. In fact, VB claimed that it had hired an agent to monitor its page and remove offensive comments, but that some comments were missed and remained on the page. Nonetheless, these comments were still considered 'advertising' by the ASB. It would seem less likely that such comments would have attracted liability under the *Allergy Pathway* approach to Facebook postings.

The Australian Competition and Consumer Commission (ACCC) also weighed in on the issue recently, saying that it *(Continued on page 34)*

Companies could potentially be liable for user postings without necessarily having been aware of them.

August 2012

MLRC MediaLawLetter

(Continued from page 33)

would <u>consider prosecuting companies</u> that allowed misleading statements to remain on their Facebook pages. The ACCC said that the law could apply where a company *"had somehow become aware and ignored"* the comments. This suggests that the ACCC supports the *Allergy Pathway* view of a company having to be aware of comments before becoming liable, rather than the broader approach adopted by the ASB.

If the ASB's approach were applied by the courts in areas like misleading and deceptive conduct, it would represent a subtle yet significant expansion of liability for user generated content, in that companies could potentially be liable for user postings without necessarily having been aware of them. It will be interesting to see whether the courts adopt the ASB's broader approach the next time a case comes before them.

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What Next?

In the meantime, the most appropriate course of action is for companies to implement "house rules" for their social media pages stating clearly that offensive, misleading and defamatory comments should not be posted. Social media pages should also be regularly monitored and any such comments removed.

However, companies should also be conscious of not being overly proscriptive – the purpose of social media, after all, is to promote dialogue with customers, so an overzealous policy of deletion will inevitably attract the ire of users. As with so many other areas, companies must balance the competing demands of the law and business reality, and find a level of risk with which they are comfortable.

Nicholas Liau and Paul Kallenbach are lawyers with Minter Ellison in Australia.

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RETURN TO TABLE OF CONTENTS

August 2012

News Media Succeed In Opening Court File in Aurora Shooting Case

But Secrecy Still Enshrouds Much in Criminal Matter

By Steven Zansberg

According to practically ubiquitous press reports (including official press conferences): shortly after midnight on July 20, 2012, a heavily-armed 24-year-old graduate student, James Eagan Holmes, entered a premiere showing of *Batman: The Dark Knight Rises* at a movie theater in Aurora, Colorado, where he shot and killed twelve people and wounded 58 others. Moments after the shooting, Holmes was arrested in the parking lot behind the theater. That very

same morning, July 20, 2012, a criminal case file was opened in the Arapahoe County District Court. The first filing in that case is a motion by the prosecution to seal the entire file, including any warrants, affidavits, and requests for production of documents. The District's Chief Judge (and former prosecutor), William Sylvester, granted the motion and placed the entire court file, including the docket, under seal.

The following Monday, July 23rd, Holmes appeared in court for the advisement of his rights, in a proceeding Judge Sylvester had granted permission to be televised live. (Holmes was shown in a state of apparent confusion,

appearing to be largely oblivious to the proceedings.)

The following day, July 24th, Judge Sylvester denied a request to allow camera coverage for Holmes' next court appearance, at which the prosecution was to announce the formal charges against him. In that order, the judge made reference to, and relied upon, the objection that had been filed by the defendant. However, the defendant's objection was under seal, as was the remainder of the court file.

During the week following the advisement, the court set up an official website on which it posted a handful of motions and orders. On Thursday, July 26th, the court unsealed and posted the People's motion that had been filed on Monday, July 23rd, asking the court to order the University of Colorado not to disclose any public records in its possession concerning James Holmes. That same day,



Mugshot of alleged Aurora killer James Holmes.

July 23rd, Judge Sylvester had entered that order (unsealed on Thursday, July 26th), despite the fact that none of the news media entities who had pending records requests in to the University of Colorado had been apprised that such an order was being sought, and had not been provided an opportunity to be heard. Indeed, the judge's order was contrary to the procedures and standards set forth in Colorado's Open Records Act.

News Media Coalition Challenges Court Secrecy

On Friday, July 27th, twenty-one news media entities – ABC, Inc.; The Associated Press; Bloomberg L.P.; Cable News Network, Inc. ("CNN"); CBS News, a division of CBS Broadcasting Inc., and CBS Television Stations, Inc., a subsidiary of CBS Corporation; *The Denver Post*; Dow Jones & Company; Fox News Network, LLC; Gannett; KCNC-TV, Channel 4; KDVR-TV, Channel 31; KMGH-TV, Channel 7; KUSA-TV, Channel 9; *Los Angeles Times*; The McClatchy Company; National Public Radio ("NPR");

NBCUniversal Media, LLC; The New York Times Company; The E.W. Scripps Company; and *The Washington Post* – filed a motion asking the court to unseal the court file, and in particular the Register of Actions (docket), any affidavits of probable cause, and all other records for which no showing had been made under the applicable standard of the First Amendment, be unsealed.

The motion asked the court to set an expedited briefing schedule and a hearing on the motion to unseal. At Holmes' next court appearance, on July 30, 2012, Judge Sylvester set the briefing schedule on the media petitioners' motion to unseal and set a hearing on the motion for Thursday, August 9th.

(Continued on page 36)

August 2012

(Continued from page 35)

The People Respond and Oppose Unsealing

On Monday, August 6th, the prosecution filed its <u>Response</u> objecting to unsealing; the DA argued that the ongoing investigation would be compromised by the release of any further documents not already publicly available. In the alternative, the prosecution stated that it did not oppose the unsealing of several documents in the court file, including affidavits of probable cause for warrants that had already been executed and returns filed with the court, but stated that the People believed names and identifying information of certain individuals in those affidavits should be redacted.

Backdrop of Publicly Available Information Renders Closure Futile

On Wednesday, August 8th, the Media Petitioners filed their reply in support of the motion to unseal. In their reply, the Media Petitioners argued that neither of the governmental interests asserted for maintaining the sealing of the entire court file – (1) any threat to the then-ongoing investigation or (2) concerns concerning the defendant's right to obtain a fair trial – could be shown to be subject to a "substantial probability of harm" as a result of disclosure of information in the court file. The Media Petitioners noted that this was not a case that involved a crime committed in secret; indeed, in the hours and days immediately following the tragic shooting, Aurora Police Chief Daniel Oates and other governmental officials held numerous press conferences and appeared on nationally-televised news programs, in which they informed the public of the following facts:

• Based on numerous eyewitness accounts and an unnamed federal official: just after midnight on July 20, 2012, James Eagan Holmes, 24, entered theater number 9 at the Century Aurora 16 multiplex through the audience entrance. Some moments later, Holmes exited through the emergency exit at the front of the theater, propped the door open, and retrieved a series of weapons from his car, a white Hyundai, parked near the emergency exit.

• Back inside theater 9, Holmes deployed two separate grenades, one filling the theater with smoke, the other releasing a chemical irritant.

• Holmes was dressed all in black. He was wearing a tactical ballistic vest, tactical ballistic helmet, bullet resistant leggings, a throat protector, groin protector, gas mask, and black tactical gloves.

· Holmes' hair was dyed red; he told someone that he was

"the Joker," one of the fictional villains in the Batman comic book and movie series.

Holmes fired multiple rounds into the crowd, using an AR-15 assault rifle. He also had a 12-gauge shotgun, and two 40caliber Glock handguns.

• Holmes killed twelve people, ten of whom died in the theater, two in area hospitals. Holmes shot and injured another 58 individuals.

• Holmes exited the theater through the emergency exit and walked to his car, parked outside. There, he was observed by two Aurora Police Department officers, who noticed that one aspect of his clothing/body gear was unusual, *i.e.*, inconsistent with typical SWAT attire. The two officers placed Holmes under arrest without encountering any resistance.

• Upon being taken into custody, Holmes informed the officers that his apartment was armed or "booby trapped" with several incendiary devices.

• Upon arriving at Holmes' apartment, police encountered an elaborate web of tripwires and explosive or incendiary devices. According to official law enforcement statements, the tripwire at the front door to defendant's apartment was "set up to clearly detonate when someone entered that apartment and it was set up to kill that person and that could have been a police officer executing a search warrant."

• Prior to the events of July 20, 2012, Holmes had been a student in the Ph.D. program in neuroscience at the University of Colorado campus in Aurora.

• Holmes had voluntarily withdrawn from that academic program in mid-June.

• Holmes had no prior criminal record; he had one traffic summons for speeding, in October 2011.

• Beginning in approximately May 2012, Holmes had lawfully acquired the four firearms and some 6,000 rounds of ammunition – some purchased over the internet – including the 100-round barrel cartridge that was recovered at the scene.

• Holmes has also been a psychiatric patient of Dr. Lynn Fenton at the University of Colorado.

The Media Petitioners argued that in light of all of this information that has already been publicly disclosed (and which represents only a miniscule sample of the vast amount of publicly available information about this crime), closing of the court file, either in its entirety or in redacted form, could not be shown to be effective in preventing information about the case from reaching potential witnesses and jurors.

On Thursday, August 9th, the defendant filed his <u>response</u> (Continued on page 37)

August 2012

(Continued from page 36)

in opposition to the Media Petitioners' motion to unseal. In his response, the defendant argued that there was no First Amendment right of access to judicial records, only one arising under the common law; and, under that discretionary standard, the defendant's rights to a fair trial outweighed the public's right to monitor judicial proceedings and records.

On Thursday, August 9th, Judge Sylvester held a hearing on the Media Petitioners' motion, where all parties basically reiterated their positions above. Counsel for the Media Petitioners noted that the Court had, earlier in the hearing that day, resolved several motions exclusively on written filings that were under seal; as a result, the sealing of the court file had negated the public's right to *attend* judicial proceedings and to understand the basis for judicial action.

The Court Rules

On Monday, August 13, the court issued its written <u>ruling</u>. Judge Sylvester granted the Media Petitioners' motion to unseal the court file, but held that certain identified records should remain under seal: "While the Court is cognizant of the role Media Petitioners play in informing the public's legitimate interest in knowing the actions taken by government officials responsible for the investigation, prosecution, and trial of Defendant, the Court also will not jeopardize the integrity of the process and the truth-seeking functions of our justice system by authorizing a premature release of records."

Notably, the court adopted and applied the standards set forth in the ABA Criminal Justice Standard 8-3.2, which requires a party seeking to close the court file to demonstrate

• a substantial probability of harm to a compelling government interest;

• that closure of the court file would be effective in protecting that governmental interest; and

• that no less restrictive means exist to adequately protect that governmental interest.

Applying this standard, the court found that no showing had been made to maintain under seal the index of pleadings ("Register of Actions"), and ordered it immediately unsealed. In addition, the court ordered unsealed 34 motions, responses, and orders that were in the court file and had not previously been publicly disclosed. Later that day, the unsealed pleadings were posted on the court's <u>website</u>.

However, and disappointingly, the court found that the standard for closure had been met with respect to the affidavits of probable cause and five separate motions papers concerning the package Holmes had sent to his therapist, Dr. Lynn Fenton, at the University of Colorado. The court has set a hearing concerning whether that package is subject to the patient-therapist privilege on August 30, 2012. The filed pleadings that frame that legal issue are, at this time, completely under seal.

Unprecedented Gag Order on Public University Reaffirmed (and Expanded to Other Public Entities)

In addition, Judge Sylvester devoted the first two paragraphs of his order regarding the Media Petitioners' motion to unseal the court file to re-affirm his earlier order commanding the University of Colorado not to disclose public records concerning James Holmes. Although the Media Petitioners had not directly challenged that order, they noted its impropriety in a footnote to another motion they had filed. (That motion asked the court to clarify that its "gag order" -regarding pre-trial publicity, directed to the attorneys of record and to all criminal law enforcement agencies assisting in the prosecution - did not apply to any noncriminal law enforcement agency, including the University of Colorado, and did not preclude the release of public records.) Judge Sylvester explained that his order directed to the University of Colorado was motivated not, primarily, by a concern over the defendant's fair trial rights, but over the still -pending issue of his therapist-patient privilege. Judge Sylvester stated that once information subject to such a privilege has been publicly disclosed, there is no adequate means to protect that interest. Judge Sylvester stated that the analogy is often made to attempting to unring a bell, but he preferred his own: to try to address a disclosure of privileged information after the fact is equivalent to tapping the brakes in a car that has been driven off a cliff.

In another <u>order</u> entered that same day, Judge Sylvester denied the Media Petitioners' request that he clarify the scope of his gag order on trial participants, saying it was not the court's place to tell public agencies how to respond to press inquiries. Without expressly directing public agencies to withhold public records or decline to issue comments to the press, Judge Sylvester nevertheless lauded the agencies that had done so. Thus, without formally extending the scope of his unprecedented gag order directed only to the University of Colorado, he strongly encouraged other public agencies to follow suit.

Steven Zansberg and his colleagues at Levine Sullivan Koch & Schulz LLP represent the media coalition in this matter.

Court Enjoins Enforcement of Washington State Law Targeting Adult-Oriented Advertisements *Law Is Likely Preempted By Section 230*

By Ambika Kumar Doran & Jim Grant

A federal court in Washington last month preliminarily enjoined enforcement of a new state law targeted at adultoriented advertisements (but encompassing much more) because, the court found, the law likely is preempted by section 230 of the Communications Decency Act and violates the First and Fourteenth Amendments and the Commerce Clause of the United States Constitution. <u>Backpage.com</u>, <u>LLC v. McKenna</u>, No. C12–954, 2012 WL 3064543 (W.D. Wash. July 27, 2012) (Martinez, J.).

The statute—Senate Bill 6251—makes it a felony to knowingly publish, disseminate, or display or to "directly or indirectly" cause content to be published, disseminated or displayed, if it contains a "depiction of a minor" and any "explicit or implicit offer" of sex for "something of value." It is not a defense that the defendant did not know the age of the person depicted, nor may the defendant rely upon any representation by or apparent age of the person depicted. Instead, the only defense requires the defendant to have obtained and

maintained a record of government or school identification for the person depicted.

Although the law was targeted at Backpage.com, the nation's second largest online classified ad website (after craigslist), both Backpage.com and the Internet Archive (publisher of the Wayback Machine, which archives pages on the Internet) filed suit, contending that SB 6251 was preempted by Section 230 of the Communications Decency Act, 47 U.S.C. § 230 and violated the First and Fourth Amendments and Commerce Clause of the federal constitution. The court agreed.

Section 230

Section 230 prohibits the government from treating websites and other online service providers "as the publisher

or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). It also prohibits holding any such provider liable for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider ... considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." *Id.* § 230(c)(2)(A). Finally, it contains an express preemption clause that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3).

> The court found that Section 230 likely preempted SB 6251 for two reasons. First, it found, SB 6251 treats websites "as the publisher or speaker of information created by another information content provider." *Id.* at *9. Second, the law is inconsistent with Section 230 because it "criminalizes the 'knowing' publication, dissemination, or display of specified content ... creat[ing] an incentive for online service providers *not* to monitor the content that passes through its channels." *Id.*

The court rejected the state's argument that because Section 230 has an exception for federal criminal laws, one must exist for state criminal laws consistent with federal laws. It found that SB 6251 is *not* consistent with federal criminal laws. *Id.* at 9. It also rejected defendants' claim that Section 230 does not apply to liability under state criminal laws: "If Congress did not want the CDA to apply in state criminal actions, it would have said so." *Id.* at *10.

First Amendment

The court also found that SB 6251 likely "runs afoul of the First Amendment" on three grounds. *Id.* at *11.

First, by dispensing with any scienter requirement as to the age of the person depicted in an advertisement, SB 6251 (Continued on page 39)

The court rejected the state's argument that because Section 230 has an exception for federal criminal laws, one must exist for state criminal laws consistent with federal laws.

August 2012

(Continued from page 38)

impermissibly created strict liability. "A pre-screening mechanism as set forth in SB 6251 would limit the amount of content available on some publishers' websites to the amount of content that such publishers had the time and money to screen. Some individuals would be reticent to provide government identification in connection with borderline content The Constitution does not permit such collateral burdens on protected speech." Id. at *14. The law would also incentivize publishers, faced with any notification that content might be illegal, to remove the content altogether, "whether or not it constitutes protected speech." Id. Finally, the court found, the affirmative defense could not save the statute because "the possibility of mistaken factfinding ... will create the danger that the legitimate utterance will be penalized." Id. (quotation marks citation, omitted).

Second, the court found, SB 6251 is impermissibly vague because it fails to provide adequate notice as to what is prohibited. For example, the court reasoned, defendants could not be expected to know "what ... it mean[s] for the website operator to 'know' that an advertisement 'implicitly' offers sex." *Id.* at *15. The court rejected the government's attempt to define the terms because "nothing binds Defendants, or their successors to their current interpretations." *Id.*

Third, the court found the law to be overbroad. The law "criminalizes more than offers to engage in illegal transactions because the statute encompasses transactions that are not illegal." *Id.* at *16. "Assuming that the undefined term 'something of value' means anything that can be traded on a free market—including a bottle of wine, a nice dinner, or

a promise to do the dishes—SB 6251's definition of 'commercial sex act' encompasses vast swaths of legal, consensual, non-commercial sexual activity." *Id.* The court also took issue with the absence of any requirement that the minor depicted have anything to do with the offer itself, and its prohibition on the "indirect publication, dissemination, and display" of offers. *Id.* at *15-16.

Finally, the court found the law was a content-based restriction that failed strict scrutiny. Although the state "certainly" had a compelling interest in curbing the exploitation of minors, defendants, by failing to acknowledge the statute reaches protected speech, "fail[ed] to show that SB 6251 is the least restrictive means" to achieve the interest.

Commerce Clause

The court also held that SB 6251 likely violated the dormant Commerce Clause because it "regulates conduct that occurs wholly outside the state of Washington"; the out-of-state burden "will be significant"; and "the Internet is likely a unique aspect of commerce that demands national treatment."

The decision threatens the efforts of legislators to hold the publishers of third-party content liable for that content. Similar laws have been proposed in New Jersey and New York, and Backpage.com has another challenge pending to an analogous law in Tennessee. That court will hold a hearing on Backpage.com's motion for preliminary injunction on August 29, 2012.

Ambika Kumar Doran is an associate, and Jim Grant a partner, Davis Wright Tremaine in Seattle, WA.

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

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1st Amendment—Sec. 230 Bar Claims Against Legal Research Website And Search Engines *Plaintiff Sued Over Links to Court Filings and Rulings*

By Steve Mandell, Steve Baron and Elizabeth Morris

Both a magistrate judge and a district court judge in the Central District of Illinois agreed that a plaintiff who sought to "delink" public records about his employment litigation could not sustain any claims against a legal search website or internet search engines, regardless of whether the content in question – judicial decisions and other court documents – is available for sale. The First Amendment permits the sale of addition, internet search engines like Google, Yahoo!, and Microsoft Bing linked to these webpages. Mr. Nieman believed that easy access to his litigation history effectively blacklisted him from seeking future employment.

To mitigate the impact of easy public access to his litigation history, Mr. Nieman contacted VersusLaw and other similar online services and asked them to delink his cases from internet search engines. VersusLaw denied Mr.

Nieman's request.

Nieman also

Google,

Mr

and

approached

Yahoo!,

Microsoft and asked them to

delink as well, but all three

filed complaints against

VersusLaw, Google, Yahoo!,

and Microsoft with both the

Opportunity Commission

("EEOC") and Illinois

Department of Human Rights

Employment

Mr. Nieman subsequently

search engines declined.

public records, and Section 230 of the Communications Decency Act ("CDA") immunizes websites that link to such content. First Amendment protection encompasses information in the public record, even when the facts pertain to a private citizen. The CDA also bars recovery because websites with public records providing, and are not generating, content. The Court separately questioned in dicta whether the CDA could bar intellectual property or federal criminal claims, though it did not



VersusLaw provides court cases to subscribers for a fee.

reach a decision on this point. *Nieman v. VersusLaw, Inc.*, No. 3:12-cv-3104 (C.D. III.).

Background

Between November 2009 and March 2011, Jason Nieman filed lawsuits against his former employer, Nationwide Mutual Insurance Company, after he was terminated, and against other companies that failed to hire him. He soon discovered that online legal research services like VersusLaw, which provides court cases to subscribers for a fee, made information about his cases readily available. In ("IDHR") on February 2, 2012. On February 6, 2012, the EEOC issued a "right to sue" letter after determining that no employer-employee

Equal

relationship existed with any of the respondents. Mr. Nieman then requested the IDHR to accept the EEOC's ruling as well.

On February 29, 2012, Mr. Nieman filed suit in the Circuit Court for the Seventh Judicial Circuit of Sangamon County against VersusLaw, Joseph Acton (the founder and president of VersusLaw), Google, Yahoo!, and Microsoft. On April 3, 2012, all Defendants jointly removed the action to the Central District of Illinois.

Mr. Nieman alleged ten counts against Defendants, including violations of the Illinois Human Rights Act, the Civil Rights Act, the Lanham Act, and the RICO Act, (Continued on page 41)

August 2012

(Continued from page 40)

commercial misappropriation, intentional interference with current and prospective economic advantage, and unjust enrichment and civil conspiracy. He also separately moved for a preliminary injunction against VersusLaw and Mr. Acton, requesting that the Court sever links between VersusLaw and the internet search engines during the pendency of the case.

Although these claims differed from one another, the thrust behind them was the same. Mr. Nieman alleged that, because he had a protected right to pursue employment claims, he had a right to stop websites like VersusLaw from linking his cases to internet search engines. Otherwise, potential employers could easily exclude him from consideration for open positions, which is impermissible.

All Defendants separately moved for dismissal; Yahoo! and Microsoft also moved for judgment on the pleadings. Defendants made similar arguments, namely: (1) the First Amendment bars recovery because the information in question is in the public record (ironically, through Mr. Nieman's own doing); (2) Section 230 of the CDA, 47 U.S.C. § 230, also bars recovery because Defendants only provide content and have not developed it; and (3) Mr. Nieman failed to state a claim.

Report and Recommendation of the Magistrate Judge

On June 13, 2012, Magistrate Judge David Bernthal issued a report and recommendation to dismiss the case in its entirety. Magistrate Judge Bernthal's holding focused on a fundamental point: no liability exists when public judicial records are maintained or reproduced. He cited the specific First Amendment privilege to publish private matters that are in the public record, "even when they are facts of a kind that people want very much to conceal." *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993).

Magistrate Judge Bernthal also went on to find that the CDA precluded relief. Under the CDA, "[n]o 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." 47 U.S.C. § 230 (c) (1). To determine whether CDA protection applied, Magistrate Judge Bernthal analyzed whether three elements were satisfied: "(1) the defendant is a provider of an interactive computer service; (2) the plaintiff's claims seek to treat the defendant as a 'publisher or speaker' of allegedly harmful or unlawful

information; and (3) the information at issue was 'provided by another information content provider.'" At the suggestion of Mr. Nieman, Magistrate Judge Bernthal considered the internet search engines and VersusLaw as two separate groups. However, Magistrate Judge Bernthal ruled that the result was the same: Defendants were not liable.

First, Magistrate Judge Bernthal found that all Defendants provide an "interactive computer service." An interactive computer service includes "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230 (f) (2). The Magistrate decided that the search engines were clearly covered since their function is to provide search results after a user inputs a query. He also found that VersusLaw is "a typical example of an 'interactive computer service.""

Second, none of the Defendants are information content providers because the parties did not create or develop the content in dispute (namely, the court rulings in the public record). Magistrate Judge Bernthal in particular relied on *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003), which held "so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process." *Id.* at 1123. Magistrate Judge Bernthal ruled that it was "indisputable" that the search engines did not create or develop the content at issue here. In addition, Magistrate Judge Bernthal rejected Mr. Nieman's invitation to impose liability on VersusLaw simply because it posted the information; the records themselves "would still be considered content provided primarily by third parties."

Third, Magistrate Judge Bernthal determined that none of the Defendants were publishers by analyzing each count and finding that Mr. Nieman had failed to state a claim. Magistrate Judge Bernthal also found that the state law claims of the complaint were really just a variation of defamation claims. The Magistrate did not review the applicability of the CDA to federal law claims since Mr. Nieman had already failed to state a claim.

The District Court's Decision

On August 3, 2012, Judge Sue E. Myerscough adopted Magistrate Judge Bernthal's report and recommendation in her own separate opinion, and she dismissed the complaint. (Continued on page 42) For exclusive use of MLRC members and other parties specifically authorized by MLRC. © 2012 Media Law Resource Center, Inc.

Page 42

August 2012

MLRC MediaLawLetter

(Continued from page 41)

She took a slightly different tack and devoted the bulk of her opinion to Mr. Nieman's failure to state and support any of his claims. Fundamentally, however, Judge Myerscough's opinion aligns closely with Magistrate Judge Bernthal's Report and Recommendation. She held that repleading would be futile. The First Amendment creates a privilege to publish information in the public record, even when facts involve a private figure.

Judge Myerscough also agreed with Magistrate Judge Bernthal's report with regard to the CDA. In dicta, she, like Magistrate Judge Bernthal, further contemplated whether the CDA's reach would extend to criminal and intellectual property claims. In her opinion, Judge Myerscough noted that the CDA should not "be construed to (1) impair the enforcement of any Federal criminal statute or (2) limit or expand any law pertaining to intellectual property." *See* 47 U.S.C. § 230 (e) (1), (2). Judge Myerscough then questioned whether the CDA alone could bar claims pled under federal claims under the Lanham Act or RICO or a state law claim under the Right of Publicity Act. However, given Mr. Nieman's failure to plead claims under these laws, she did not resolve this question.

Accordingly, Judge Myerscough granted the motions to dismiss. Her ruling thus mooted the motion for judgment on the pleadings and the motion for preliminary injunction.

Pending Appeal to the Seventh Circuit

On August 3, 2012, the same day of the dismissal, Mr. Nieman appealed to the Seventh Circuit, where the case is currently pending. *Nieman v. VersusLaw, Inc.*, 12-2810 (7th Cir.). On August 15, 2012, Mr. Nieman moved for a preliminary injunction against all Defendants, specifically seeking relief that the links between VersusLaw and the internet search engines be severed during the pendency of the suit. On August 22, 2012, Judges Richard A. Posner, Michael S. Kanne, and Diane S. Sykes denied this request. Briefing is now underway.

The Central District rulings go further than reinforcing basic First Amendment rights. They also affirm that protection under the Constitution and the CDA extends to subscription services that provide customers with access to information in the public record. VersusLaw is not creating content when it sells copies of pre-existing court records. Rather, the service it provides with the internet search engines is easy access to information that is already available in the public record.

Mr. Nieman is a pro se litigant from Springfield, Illinois. VersusLaw, Inc. and Mr. Acton are represented by Steven Mandell, Steven Baron, and Elizabeth Morris of Mandell Menkes LLC, Chicago. Google Inc. is represented by Jade Lambert of Perkins Coie LLP, Chicago. Yahoo!, Inc. and Microsoft Corporation are represented by Lynn Thorpe of Gonzalez Saggio & Harlan LLC, Chicago.

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

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