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MEDIA LAW LETTER

Reporting Developments Through September 25, 2012

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Florida Jury Should Have Been Allowed to Decide Shock Jock Private Facts Claim

Directed Verdict for Defense Was Error

A Florida appellate court this month reinstated a private facts claim against Beasley Broadcasting over on-air statements made by a now-deceased Florida shock jock. [*Doe v. Beasley Broadcasting Group Inc., et al.*](#) No. 2d11-3869 (Sept. 21, 2012) (Morris, Northcutt, Crenshaw, JJ.). The appellate court held that the trial judge erred in directing a defense verdict, finding that the trial judge confused contract and tort requirements for injury. The plaintiff, according to the appellate court, did not have to prove any special damages or pecuniary loss; and she had shown evidence of stress, humiliation and physical ailment to send the case to the jury.

The trial court had also directed a verdict in favor of the defense on claims of negligent hiring and retention. That part of the ruling was affirmed without discussion.

and an “infection” that needs to be “killed.” Plaintiff also testified that she had not voluntarily appeared on the radio program but thought she was having private conversations with Scott.

After five days of testimony, the trial court granted a defense motion for a directed verdict. The judge ruled there was no evidence to establish that plaintiff was entitled to recover damages. Interestingly, in a post-trial interview, a juror told a local newspaper she would have awarded plaintiff \$2 million in damages and that the majority of the jury sided with plaintiff. See “[Florida Judge Grants Directed Verdict to Beasley Broadcasting in Shock Jock Case](#),” MediaLawLetter June 2011.

Background

Plaintiff, Patti Davis, was the former longtime girlfriend of now-deceased radio personality, Joe Scott. Scott worked on and off for Beasley Broadcasting over a 15 year period. He frequently spoke about his personal life on air and, indeed, had plaintiff on the show several times. At issue were statements he made during some 2005 broadcasts in which he called plaintiff a prostitute, thief, and drug-user, among other names and expletives.

Plaintiff sued Beasley Broadcasting for 1) unauthorized use of her name, 2) false light, 3) disclosure of private facts, and 4) negligent hiring and retention (alleging the broadcaster negligently employed Scott while he was under the influence of drugs). Scott was not named as a defendant. He died after the lawsuit was filed from complications connected to drug and alcohol abuse. The trial court dismissed the misappropriation and false light claims and allowed the private facts and negligence claims to go to trial.

At trial plaintiff testified she feared for her life and was humiliated by Scott’s on-air tirades. Her lawyer played tapes of broadcasts in which Scott called her a “stark raving bitch,”

A plaintiff in a privacy case does not have to allege or prove special or pecuniary damages. Instead, a showing of mental suffering is sufficient to support compensatory damages.

Appellate Court Decision

In a short four page decision, the appellate court held that the trial judge improperly applied contract law to a tort claim. The court stated:

“In ruling that Jane Doe had the burden to prove her damages in a definite amount, the trial court cited our opinion in *Schimpf v. Reger*, 691 So. 2d 579 (Fla. 2d DCA 1997). In *Schimpf*, we held that ‘[i]t is incumbent upon the party seeking damages to present evidence to justify an award of damages in a definite amount.’ But *Schimpf* is inapplicable because it is a breach of contract case which was concerned only with economic losses and not with the duty owed to an injured party. This is the basic difference between contract law, which protects expectations, and tort law, which is determined by the duty owed to an injured party.” (citations omitted).

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Citing to *Cason v. Baskin*, 20 So. 2d 243 (Fla. 1945), the court held that a plaintiff in a privacy case does not have to allege or prove special or pecuniary damages. Instead, a showing of mental suffering is sufficient to support compensatory damages. Moreover, the court suggested that plaintiff would be entitled to nominal damages absent proof of mental injury so long as the defendant invaded her privacy.

As to the substance of the privacy claim, the court stated, “It is clear from the record in this case that Jane Doe presented evidence that the disc jockey publicly disclosed private facts about her during the subject broadcasts.”

Plaintiff was represented by William DeForest Thompson Jr. of Fort Myers, FL. Beasley Broadcasting was represented by Kelley Geraghty Price and David Lupo of Cohen & Grigsby, Bonita Springs, FL.



Upcoming Events

MLRC Annual Dinner & MLRC Forum

November 14, 2012, New York, NY

Defense Counsel Section Annual Meeting and Lunch

November 15, 2012, New York, NY

MLRC/Southwestern Media & Entertainment Law Conference

January 17, 2013, Los Angeles, CA

MLRC/Stanford Digital Media Conference

May 16-17, 2013, Palo Alto, CA

MLRC London Conference

September 23-24, 2013, London, England

Tripadvisor's "Dirtiest Hotel" Ranking Protected Opinion

Hotel Owner's Complaint Dismissed for Failure to State Claim

A hotel with the dubious distinction of being number one on Tripadvisor's 2011 list of "Dirtiest Hotels," can now add failed libel plaintiff to its list of accomplishments. [*Seaton d/b/a Grand Resort Hotel & Convention Ctr. v. Tripadvisor*](#), No. 3:11-cv-549, 2012 U.S. Dist. LEXIS 118584 (E.D. Tenn. Aug. 22, 2012) (Phillips, J.). A Tennessee federal district court recently held that the online ranking was clearly unverifiable rhetorical hyperbole, notwithstanding the use of a numerical rank based on user reviews. In addition, the court dismissed as futile plaintiff's motion to amend the complaint to add claims for trade libel and tortious interference because neither claim could be premised on Tripadvisor's non-defamatory speech.

Background

Plaintiff Kenneth M. Seaton is the owner of the Grand Resort Hotel and Convention Center ("Grand Resort") in Pigeon Forge, Tennessee. Defendant Tripadvisor.com provides user reviews of hotels, restaurants, and related topics of interest to travelers. From 2006 to 2011, the website used its user reviews to generate and publish an annual top ten list of the "DIRTIEST HOTELS" in America.

In 2011, Tripadvisor deemed the Grand Resort the dirtiest hotel, stating "This year, the tarnished title of America's dirtiest hotel goes to Grand Resort Hotel and Convention Center, in Pigeon Forge, Tennessee." Accompanying this statement was a user review reporting "There was dirt at least ½ thick in the bathtub which was filled with lots of dark hair."

Plaintiff originally filed suit in state court, but the matter was removed to federal court because of diversity

jurisdiction. Plaintiff sued Tripadvisor and parent company Expedia for libel and false light, seeking \$10 million in damages. Among other things, plaintiff alleged that Tripadvisor used a flawed and arbitrary methodology.

Motion to Dismiss

On the defendant's motion to dismiss, the district court framed the issue as whether the ranking was inherently subjective or objectively verifiable, citing *e.g., Compuware Corp. v. Moody's Investors Servs.*, 499 F.3d 520 (6th Cir. Mich. 2007) which held that a credit agency rating was an inherently subjective calculation.

Plaintiff opposed the motion arguing that the ranking was not subjective "because, in sharp contrast to typical hyperbole...[the] list is put forth with an actual numerical ranking, with comments suggesting that the rankings are actual, verifiable and factual." Moreover, plaintiff warned that a ruling in favor of Tripadvisor would make it "more impenetrable

and more dangerous than ever in a lawless no-man's land on the Internet."

Applying a "reasonable person" test, the district court disagreed and held that the "Dirtiest Hotel" list was unverifiable, rhetorical hyperbole.

TripAdvisor's list is of the genre of hyperbole that is omnipresent. From law schools to restaurants, from judges to

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From 2006 to 2011, the website used its user reviews to generate and publish an annual top ten list of the "Dirtiest Hotels" in America.

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hospitals, everything is ranked, graded, ordered and critiqued. Undoubtedly, some will accept the array of ‘Best’ and ‘Worst’ rankings as impenetrable maxims. [T]he standard, fortunately, is what a ‘reasonable person’ would believe. A reasonable person would not confuse a ranking system, which uses consumer reviews as its litmus, for an objective assertion of fact; the reasonable person, in other words, knows the difference between a statement that is ‘inherently subjective’ and one that is ‘objectively verifiable.’

UK Advertising Ruling

In an interesting angle to the case, plaintiff submitted deposition testimony from a UK hotel owner who brought an

advertising complaint against Tripadvisor in the UK. Early this year, the UK’s Advertising Standards Authority (ASA), an independent regulatory body, [ruled in favor of the hotel owner](#). The ASA rebuked Tripadvisor for stating it provided “Reviews you can trust ... from real travelers,” and offered “honest travel reviews.” These statements were misleading under UK advertising rules because Tripadvisor’s user reviews are not verified and therefore not necessarily trustworthy comments from real travelers.

Plaintiff introduced the ASA evidence to bolster its claim that the Dirtiest Hotel list was factual. However, the court found just the opposite. “Thus, while the ASA prohibited TripAdvisor from claiming that all of its reviews were trustworthy, its study only affirms TripAdvisor’s assertion that it is clear from their website that the reviews are just that: users’ opinions.”

James Rosenfeld of Davis Wright Tremaine LLP in New York represented Tripadvisor. Plaintiff was represented by Cary L. Bauer, Gilreath & Associates, PC, Knoxville, TN.

MLRC 2012 ANNUAL DINNER

November 14, 2012 | Grand Hyatt, New York, NY

Politics, Media & Money: *Campaigning in the New Media and Money Environment*

Alex Castellanos

Founding Partner, Purple Strategies; CNN Political Analyst

Edward G. Rendell

Former Governor of Pennsylvania; NBC News Analyst

Moderated by

Andrea Mitchell

NBC News Chief Foreign Affairs Correspondent; Host, “Andrea Mitchell Reports”

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Harsh Online Review of Doctor Not Defamatory As a Matter of Law

Analyzing an online libel claim through the unique context of the Internet, a New York trial court recently dismissed a case brought by a medical doctor over harsh criticism left on an online review site. *Tener v. Cremer*, 2012 N.Y. Misc. LEXIS 3721, 2012 NY Slip Op 32022U (N.Y. Sup. Aug. 1, 2012) (Ling Cohan, J.).

At issue was a terse three sentence review stating: “Dr. Tener is a terrible doctor. She is mentally unstable and has poor skills. Stay far away!” The anonymous review was posted to Vitals.com, a website that publishes background information and user reviews of doctors throughout the United States.

Following nearly two year of litigation, including a pre-action motion for discovery, the court dismissed for failure to state a cause of action. The review was pure opinion and did not apply any defamatory facts.

The court noted that the comment was posted anonymously on an Internet message board “a format and forum commonly used by unidentified writers to make unsupported and often baseless assertions of opinions.” The

comment was notably absent of any accompanying factual description of any particular interaction with plaintiff. Moreover, the website’s Terms of Use noted that its content “includes statements of opinion and not statements of fact.” Thus any reasonable person would understand the posting as opinion not fact.

The court also cited the recent Appellate Division decision of *Sandals Resorts Intl. Ltd. v. Google, Inc.*, 925 N.Y.S.2d 407 (N.Y. App. 1st Dept. 2011) with respect to understanding online speech. In *Sandals* the court observed:

[R]eaders give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts. . . Indeed, the anonymity. . . makes it more likely that a reasonable reader would view its assertions with some skepticism and tend to treat its contents as opinion rather than as fact.

Subpoena to Google for Identity of Blog Posters Was Properly Denied

Reviewing and applying the *Dendrite* standards for protecting anonymous online speech, a New Jersey appellate court this month affirmed that a subpoena to Google seeking the identity of online posters was properly quashed. [Somerset Development v. Cleaner Lakewood](#), No. A-2819-10T3 (N.J. App. Sept. 26, 2012) (per curiam) (unpublished).

At issue in the case were statements on a community blog hosted on Google’s blogspot platform. The plaintiffs, a local real estate developer and his company, were the subjects of harsh online criticism, over their control over a piece of property. Among other things, posters called the developer a “rip off artist” and “under the table crook” who was “stealing million in tax dollars.”

The appellate court reviewed and applied the protections

for anonymous online speech set out in *Dendrite International, Inc. v. John Doe No.3*, 342 N.J. Super. 134 (App. Div. 2001). Plaintiffs gave sufficient notice by posting the subpoena under each of the disputed blog posts. They also set out the complained of statements in sufficient detail to satisfy the second *Dendrite* prong. But plaintiffs failed to satisfy the third *Dendrite* prong and show a prima facie cause of action for defamation. Here no reasonable person would understand the comments to accuse plaintiffs of committing actual criminal behavior.

Plaintiff was represented by Robert J. Feinberg, Giordano, Halleran & Ciesla, Red Bank, NJ. Defendants were represented by Richard Ravin, Hartman & Winnicki, P.C., Paramus, NJ.

Florida Judge Dismisses “Fun Center” Defamation Lawsuit

By Cheryl A. Feeley

A Tallahassee, Florida trial court dismissed with prejudice a defamation suit filed by a children's play center against a television news station and two of its reporters. *C&D Macconnell's, Inc., d/b/a Ollie Wallie's Fun Center v. Gray Television Group, Inc., D/B/A WCTV* 6, No. 11-CA-2848 (Fla. Cir. Sept. 4, 2012) (Cooper, J.). The suit arose from several stories reporting on an alleged sexual assault at the plaintiff's amusement center.

Plaintiff's original suit alleged that four defendants – including WCTV, a station manager, and two reporters – made defamatory statements during the course of WCTV's reporting on an incident at plaintiff's business, the Ollie Wallie's Fun Center ("Ollie Wallie's"). On June 16, 2011, a patron reported to the Tallahassee Police Department ("TPD") that an employee of Ollie Wallie's had inappropriately touched her two-year-old daughter. WCTV began reporting that day on the TPD investigation, a matter of obvious concern to Tallahassee parents and other television viewers. The employee was cleared of the allegation. Plaintiff also included a count for tortious interference with advantageous business relationship.

In moving to dismiss the original Complaint, defendants argued that plaintiff had not complied with the state's pre-suit notice statute, Section 770.01, Florida Statutes (2011), which provides that "before any civil action is brought" a plaintiff alleging defamation against a media defendant shall serve written notice on the defendant, "specifying the article or broadcast and the statements therein which he or she alleges to be false and defamatory." Defendants also pointed out that plaintiff had not met the minimum pleading requirements for a defamation cause of action and that a tortious interference claim is not viable when the claim arises from the publication of allegedly defamatory statements.

At the hearing on the motion to dismiss, plaintiff conceded that it had not pled pre-suit notice. Counsel

represented to the court that it had complied with the statute but merely failed to include the allegation. The court issued an order dismissing the case, but permitted the plaintiff to amend to include an allegation regarding the pre-suit notice, as well to particularize the allegedly defamatory statements.

Plaintiff then filed a First Amended Complaint, which included only one count of defamation and removed the station manager as a defendant. The First Amended Complaint also attached three letters from counsel for plaintiff to a manager at WCTV – in an effort to plead compliance with the notice statute. One letter demanded that "WCTV immediately publically [*sic*] retract all prior reports and cease from any further broadcast of Ollie Wallie's Fun Center with regard to the alleged events which is [*sic*] reported to have occurred on June 16, 2011."

Again, defendants moved to dismiss the suit and argued that the pre-suit notice had not been met. Defendants also argued that the allegedly defamatory statements were not defamatory as a matter of law. Specifically, defendants highlighted a series of cases standing for proposition that an alleged statement that a crime occurred at a business is not defamatory as a matter

of law, including *Cooper v. Miami Herald Publishing Co.*, 31 So. 2d 382 (Fla. 1947); *Hatjioannou v. Tribune Co.*, 8 Med. L. Rptr. 2637 (Fla. Cir. Ct. 13th Jud. Cir. 1982) *aff'd* 440 So. 2d 360 (Fla. 2d DCA 1983); *Chatham v. Gulf Publishing Company, Inc.*, 502 So. 2d 647 (Miss. 1987); and *Northland Wheels Roller Skating Center, Inc. v. Detroit Free Press, Inc.*, 539 N.W.2d 774 (Mich. Ct. App. 1995).

Defendants also argued that an alleged statement that the business failed to cooperate or comment also was not defamatory as a matter of law, citing *Thomas v. Patton*, 2005 WL 3048033 (Fla. Cir. Ct., Oct. 21, 2005), *aff'd*, 939 So. 2d 139 (Fla. 1st DCA 2006); *Ramey v. Kingsport Publishing Corp.*, 905 F. Supp. 355 (W.D. Va. 1995), *Chapin v. Greve*,

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The court strictly applied Florida's notice statute and rejected plaintiff's argument that the court should waive the prerequisite of compliance because it could not secure a copy of the broadcast from the station.

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787 F. Supp. 557 (E.D. Va. 1992), *aff'd*, *Chapin v. Knight-Ridder*, 993 F.2d 1087 (4th Cir. 1087); *Brewer v. Capital Cities/ABC, Inc.*, 986 S.W.2d 636, 643 (Tex. App. 1998); and *Boyle v. Cape Code Times*, 2012 WL 28661, at * 2 (Mass. App. Ct., Jan. 6, 2012).

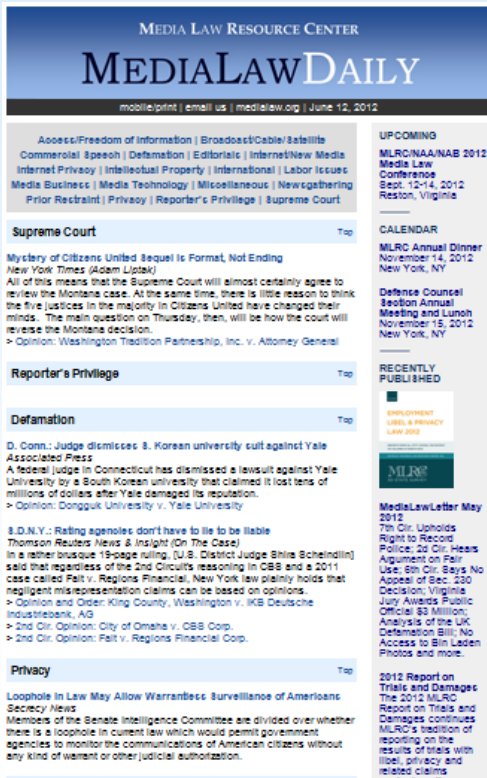
Despite plaintiff's arguments that the coverage portrayed management as derelict and uncooperative in the investigation and the business as unsafe, Judge John C. Cooper (Circuit Court of the Second Judicial Circuit) issued an order dismissing the suit with prejudice. The court strictly applied Florida's notice statute and rejected plaintiff's argument that the court should waive the prerequisite of compliance because it could not secure a copy of the broadcast from the station. The court noted that "the Notice

Statute is an important component in protecting the public's interest in the free dissemination of news."

Further, the court agreed with defendants that an alleged statement that a crime occurred at a business is not defamatory as a matter of law and that an alleged statement that the business failed to cooperate or comment also is not defamatory as a matter of law.

William R. Waters, Jr., Waters & Associates P.A., Tallahassee, FL, represented C & D MacConnell's, Inc. d/b/a Ollie Wallie's Fun Center.

Elizabeth L. Bevington, Cheryl A. Feeley and Charles D. Tobin, Holland & Knight LLP, Tallahassee, FL and Washington, D.C., represented Gray Television Group, Inc. d/b/a WCTV 6, aka WCTV "Eyewitness News," Jerry Askin, and Candace Sweat.



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Legal Blonde Bombshell

Ninth Circuit Holds That Marilyn Monroe's Right of Publicity Died with Her

By Lincoln D. Bandlow

One of the original privacy torts developed over the past hundred years is the tort of misappropriation or “right of publicity.” This tort is now recognized in most states, through common law or statute or both. In general, the tort provides a right action to an individual against a defendant who makes the unauthorized use of an individual’s name, voice, likeness or other “indicia of identity” to the defendant’s advantage.

A number of states have recognized, again either through common law or statute, that this right survives after death, *ie.*, the right can be exploited by a person’s heirs or designees. Thus, estates of such celebrities as Frank Sinatra, Elvis Presley and Marilyn Monroe have regularly generated millions of dollars each year in revenue exploiting this right. Not all states, however, recognize that the right is descendible. For example, although California does, New York does not. The test for determining whether there is a posthumous right of publicity for a particular person is simple: the Court will look to where the person was domiciled at the time of their death. Thus, if a person was domiciled in California at death, there is still an enforceable right of publicity, but if that person was domiciled in New York at death, there is not.

That was the focus of a recent decision issued by the Ninth Circuit involving a dispute over images of Marilyn

Monroe. In [*Milton H. Greene Archives, Inc. v. CMG Worldwide Inc.*](#), No. 08-56471 (9th Cir. Aug. 30, 2012) (Goodwin, Wardlaw, Sessions III, JJ.), the Ninth Circuit held that Monroe was domiciled in New York at the time of her death, extinguishing her right of publicity. In the final words of the Court’s opinion, it noted that Monroe had once said “I knew I belonged to the public and the world, not because I

was talented or even beautiful, but because I had never belonged to anything or anyone else” and that the Court’s decision bore that out.

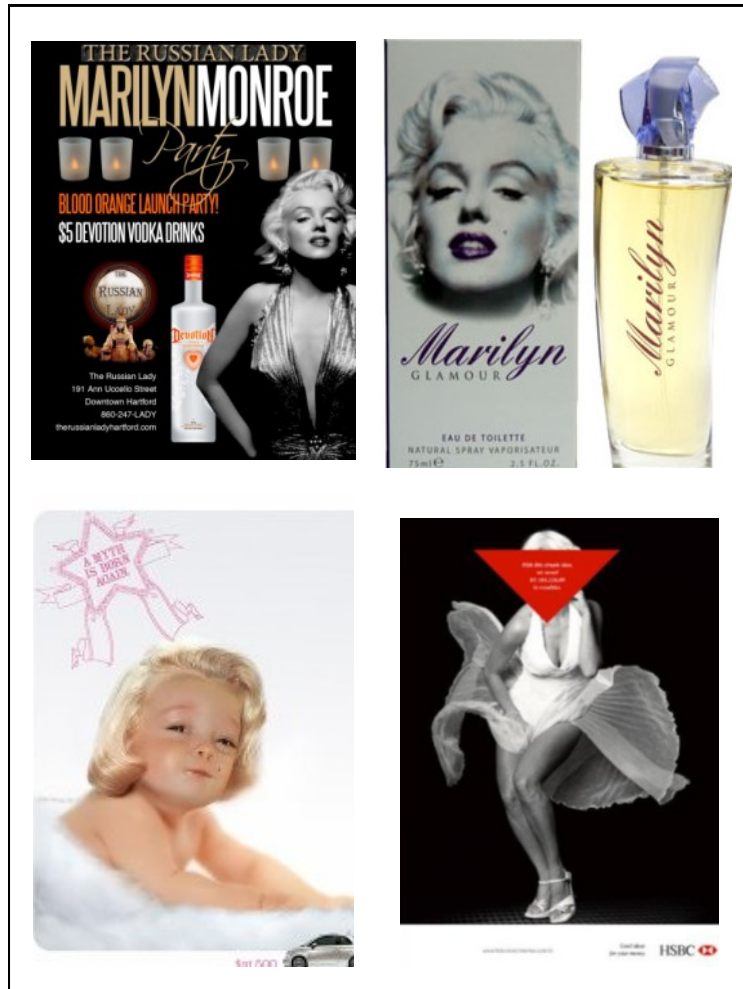
This article discusses the holding in *Milton* and questions that ultimate conclusion. Rather, even with the decision in *Milton*, it is not clear if Monroe now belongs to the public and world or if other legal remedies, such as trademark law, can be used to make her still belong to someone else, namely the beneficiaries of her estate.

Background

In *Milton*, Milton Green Archives, Inc. and Tom Kelley Studios, Inc. (collectively “Milton Greene”) advertised and

sold photographs of Monroe. In 2005, Marilyn Monroe LLC and its licensee, CMG Worldwide, Inc., which controlled rights to Monroe’s identity, sued Milton Greene in the federal district court for the Southern District of Indiana over Milton

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Greene's sale of the photographs. Shortly thereafter, Milton Greene brought a separate action in the federal district court for the Central District of California, essentially seeking a declaration that Monroe no longer had a right of publicity. Eventually the cases were consolidated and heard in the Central District in California. The cases had at one time asserted a variety of claims other than right of publicity, such as copyright and Lanham Act trademark claims, but these other claims were all voluntarily dismissed until the court was dealing strictly with the issue of Monroe's right of publicity.

The district court granted summary judgment in favor of Milton Greene, holding that Monroe no longer had a right of publicity because, at the time of her death in 1962, the states of New York, California and Indiana did not recognize a posthumous right of publicity. The district court acknowledged that California had through statute created a posthumous right of publicity in 1984 (then codified at California Civil Code Section 990 but later renumbered California Civil Code Section 3344.1), but because it did not exist in 1962, Monroe could not devised through her will a right that at the time did not exist. When California's statutory posthumous right of publicity was enacted, it did not address whether it was intended to have retroactive effect.

In response to this dismissal, the California legislature passed a law that specifically amended California Civil Code Section 3344.1 to abrogate the court's holding and provide that the California posthumous statutory right of publicity existed at the time of death of any deceased personality who died before January 1, 1985 and was freely transferable and descendible. Based on this new law, Monroe's estate sought reconsideration of the court's ruling, which was granted and the court held that Monroe's right of publicity could pass to her estate, if California's substantive right of publicity law applied. The court recognized that unlike California, New York had rejected efforts to amend New York law to create a descendible, posthumous right of publicity.

Ninth Circuit Decision

Thus, this set up the big question: where was Monroe domiciled at the time of her death? If it was New York, Monroe's right of publicity would have been extinguished at her death, but if it was California, the right was not only alive and well, but could be exploited for many more decades. On summary judgment, the district court held that she was domiciled in New York, holding that Monroe's estate was

judicially estopped from arguing that Monroe was domiciled in California when she died. The Ninth Circuit agreed, holding that Monroe's will had been subject to probate in the state of New York and that Monroe's executors "consistently represented during the probate proceedings and elsewhere that she was domiciled in New York at her death to avoid payment of California estate taxes, among other things" and thus the estate was judicially estopped from asserting California's posthumous right of publicity.

The Ninth Circuit, noting that Monroe was an "enduring American celebrity" who had continued to "inspire both admiration and litigation a half-century after her death", first traced Monroe's activities about a year prior to her death. Following her divorce from Arthur Miller, while in New York City, Monroe had executed her Last Will and Testament on January 14, 1961. She named a New York attorney as her executor. She then traveled to California in the spring of 1961, where she went from a hotel to a rental apartment to a home in Brentwood in the span of a year. In April of 1962, Monroe began filming *Something's Got to Give* on the Fox lot in Los Angeles but was ultimately fired during filming for repeated absences and tardiness. She died in her Brentwood home on August 5, 1962. All throughout the above period of time, she maintained her New York apartment and staff.

Her will was submitted to probate in the New York Surrogate's Court on October 30, 1962. Her New York attorney, who drafted the will, served as the executor of the estate from that time until his death in 1989. The will did not specifically address the right of publicity, but assuming it existed, it could pass through the will's residual clause which distributed the "rest, residue and remainder" of Monroe's estate to various people and entities. Eventually, in 2001, the Surrogate's Court decreed the estate settled and authorized the estate to transfer all remaining assets to Marilyn Monroe LLC ("Monroe LLC").

The Ninth Circuit pointed out that during the forty-year period in which Monroe's estate was in probate proceedings, it had been consistently represented that Monroe was domiciled in New York at her death. Monroe's New York attorney, in his capacity as executor of the estate, "consistently represented in numerous judicial and quasi-judicial settings that Monroe was domiciled in New York when she died." The executor who took over after this New York attorney passed away had also represented to the

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Surrogate's Court that Monroe died a domiciliary of New York.

Moreover, in California, Monroe's estate had represented to the California tax authorities that Monroe died a domiciliary of New York. Because Monroe had owned property in California when she died, her estate initiated ancillary probate proceedings in Los Angeles. In those proceedings, Monroe's New York attorney had "successfully avoided substantial California estate taxes by proving that Monroe was a domiciliary of New York." In particular, on behalf of the Monroe estate, he had sought a "no tax certificate" from the Inheritance Tax Appraiser, which required substantiation of Monroe's New York domicile to accept her California counsel's representation that she died a non-California resident.

In April of 1964, the estate's California counsel sought from New York counsel "information to counteract the fact that Miss Monroe owned a home and actually was living in California at the time of her death, and that her mother is physically in California" and advised him that it was important for him to answer all the questions in the "Affidavit Concerning Residence" (the "Affidavit") and "in doing so build as strong a case as possible."

New York counsel for the estate provided a completed Affidavit along with supporting statements from four "Monroe intimates" which were then sent to the Inheritance Tax Appraiser, representing that "Miss Monroe was a non-resident of the State of California at the time of her death." The Affidavit stated that Monroe had filed her last income tax return in New York City in April of 1962 and that she had purchased her home "in Los Angeles to live at while engaged in performing services in a motion picture film." When asked where Monroe was "actually living at the time of her death," the Affidavit responded that Monroe was residing "temporarily in Los Angeles while performing" and that she "had a fully furnished apartment in New York City, which was her permanent residence."

When asked about Monroe's business interests outside of California, the Affidavit stated that she was "[a]ctive as principal, sole shareholder and officer and director in Marilyn Monroe Productions, Inc., A New York Corporation with offices in New York City." For further evidence of Monroe intent to remain a resident of New York, the Affidavit represented that Monroe "in all respects retained her New

York Residence" which was not sublet, remained fully furnished, contained her "personal effects, clothing, and substantially all of its contents" and was maintained by Monroe's maid. Finally, the Affidavit stated that on a number of occasions, Monroe had told people that she was returning to New York after completing her movie and that she "considered N.Y. her residence." Various affidavits recounting Monroe saying as much were submitted.

Indeed, in these affidavits, it was represented that Monroe had only purchased the Brentwood home because she disliked living in hotels and preferred both the comfort and privacy of a private home and would only use it during the times she was shooting a movie. It was further asserted that Monroe had said that she "intended vacating her California house and was going to return to her New York apartment which she considered her permanent home and residence and to reside permanently thereat." Monroe's housekeeper stated that Monroe had instructed her to be at Monroe's New York City

apartment every day while Monroe was "temporarily" away and that Monroe had repeatedly stated that this apartment "was her permanent home" to which she intended to return. Monroe's private secretary declared that Monroe had a general practice and custom to "temporarily depart from her New York apartment approximately two to three weeks prior to the commencement" of a movie project and after it was done, would return to New

York. She further stated that she always understood that Monroe considered her New York apartment "as her official and permanent residence."

A friend of Monroe's that did public relations work for her attested that Monroe only bought the home in Brentwood because she did not like hotels and that Monroe "had no intention of making her permanent residence in her said California house, but intended leaving California and returning to her New York residence upon the completion of her" film. This friend also stated that Monroe's closest personal friends lived in New York and that she wished to continue her permanent activities at the Actors Studio in New York.

In April of 1967, the Inheritance Tax Appraiser reported to the Los Angeles County Superior Court that Monroe had died a resident of the County of New York, State of New

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"In every prior judicial and quasijudicial proceeding, the Monroe entities took the position that Monroe died domiciled in New York" and yet Monroe LLC was now asserting that Monroe died domiciled in California."

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York. Although this conclusion exempted substantially all of Monroe's assets from California taxes, a small portion of her estate remained taxable under California law. The estate paid a total of \$777.63 in California inheritance taxes. Monroe's estate also received a stream of royalties from profit participation agreements for motion pictures in which Monroe had appeared.

This income in California led to additional assertions by the estate, separate and apart from those made in the probate proceedings, that Monroe died a domiciliary of New York. In 1971, the California Franchise Tax Board found that the estate owed income taxes on a portion of Monroe's profit participation for the films *Some Like It Hot* and *The Misfits*. Monroe's New York counsel paid income taxes for the estate on the participation income in New York, but took the position with the Franchise Tax Board that no California income tax was owed because the estate was a resident of New York, not California.

Until recently, another executor of Monroe's estate, Anna Strasberg, represented in judicial proceedings on behalf of the estate that Monroe died domiciled in New York. In 1992, a woman sued the estate in Hawaii claiming she was Monroe's biological child and seeking portions of the estate under California law. Strasberg moved to dismiss the complaint and argued that New York law applied because "the decedent's domicile at the time of death determines what law will be applied," and that it was undisputed that Monroe "was a New York domiciliary at the time of her death."

Agreeing with Strasberg, the district court determined that New York, and not California, law applied to the claims. In 2002, this same woman who had sued petitioned the New York Surrogate's Court to reopen and vacate its orders in the probate of the Monroe estate and, again, Strasberg argued that the claims were foreclosed under New York law and that the prior ruling in Hawaii to apply New York law precluded the claims under the doctrine of *res judicata*. The Surrogate's Court ultimately applied New York law and dismissed the petition.

Despite all of this, Monroe LLC asserted that Monroe died domiciled in California, not New York, and contended that the district court had improperly extended the doctrine of judicial estoppel to preclude litigation of the question of Monroe's domicile at death. The Ninth Circuit noted that the doctrine of judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another

phase." Thus, the doctrine is designed "not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of 'general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings,' and to 'protect against a litigant playing fast and loose with the courts.'"

The Ninth Circuit noted that there was little guidance on the principle by the Supreme Court, but that the Supreme Court had identified three factors to be considered. First, the party's later position must be clearly inconsistent with its earlier position. Second, courts should inquire whether the party has succeeded in persuading a court to accept that party's earlier position, "so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." Finally, the court should consider "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." In addition to these factors, the Ninth Circuit also noted one of its own prior decisions holding that the doctrine of judicial estoppel applies "when a party's position is tantamount to a knowing misrepresentation to or even fraud on the court."

Monroe LLC argued that the court had to find a "knowing antecedent misrepresentation by the person or party alleged to be estopped," and that it was error for the district court to hold that the prior nowdisavowed statements by Monroe's New York counsel about Monroe's domicile were knowing misrepresentations. The Ninth Circuit examined numerous cases and held that "chicanery or knowing misrepresentation by the party to be estopped is a factor to be considered in the judicial estoppel analysis" but was not an "inflexible prerequisite" to its application. Moreover, although a knowing misrepresentation was not a prerequisite for judicial estoppel, the Ninth Circuit found that the district court had not erred in finding such a misrepresentation.

Monroe LLC itself had stated that the information previously submitted by the Monroe estate were "patently inconsistent" with the evidence, were "riddled with blatant inaccuracies" and were "prepared years after Marilyn's death for the express purpose of trying to avoid tax liability at a time when the Monroe Estate was believed to be insolvent." Thus, the Monroe LLC was "repeatedly insinuated" that the estate had "misrepresented Monroe's true domicile to obtain favorable tax assessments, both as to inheritance and income."

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Monroe LLC also suggested that it had always believed that Monroe died domiciled in California, and that her New York estate counsel was “simply mistaken in his belief and representations because he did not have access to some documents that allegedly contradict the materials and declarations he relied upon.” The Ninth Circuit found this assertion to be “dubious, at best.” Monroe’s New York counsel “had contemporaneous access to people knowledgeable about Monroe’s intentions” including a friend of Monroe who was “reportedly the last person to see her alive.”

Indeed, the Ninth Circuit noted that there was actually the possibility that it was Monroe LLC’s “present position on Monroe’s domicile” that was in fact a “knowing misrepresentation, or tantamount to a fraud on the court.” Thus, because there was an “irreconcilable conflict between diametrically opposed representations about Monroe’s intended domicile,” the district court’s conclusion that Monroe’s New York estate counsel had intentionally misled the courts was supported by the record and was therefore not an abuse of discretion.

Turning to the three factors set forth by the Supreme Court, the Ninth Circuit first concluded that Monroe LLC had taken clearly inconsistent positions in prior judicial proceedings. Noting that Monroe could not have been domiciled in both California and New York at the time of her death, the Ninth Circuit pointed out that until the litigation that was pending before it, “in every prior judicial and quasijudicial proceeding, the Monroe entities took the position that Monroe died domiciled in New York” and yet Monroe LLC was now asserting that Monroe died domiciled in California. “These positions are plainly inconsistent. Because judicial estoppel bars only inconsistent positions taken by the same party in two different matters, the question thus becomes whether the successive executors’ representations on behalf of the estate that Monroe died a domiciliary of New York are attributable to Monroe LLC.”

Thus, the Ninth Circuit had to determine if there was privity between the executor and the beneficiaries of the Monroe estate. After examining numerous cases, the Ninth Circuit held that the executor and the beneficiaries of an estate are in privity for estoppel purposes. Both executors of the Monroe estate “consistently stated in judicial proceedings, from 1962 to at least 2002, that Monroe died domiciled in

New York, and not California.” New York counsel for the estate always acted in a representative and not a personal capacity in his representations to the courts and acted on behalf of the estate and its beneficiaries to minimize financial exposure to the estate. Monroe LLC, as beneficiary of the estate, was thus in privity New York counsel for the estate.

Moreover, the second executor continued to assert the position that Monroe died domiciled in New York. Indeed, since this second executor was a 75% beneficiary of the residual estate, her personal interests were “arguably even more closely aligned with those of the estate” than the first executor. She had successfully defended an action against the estate by representing that Monroe had died domiciled in New York. Thus, not only was she acting on behalf of the Monroe estate, but her status as a beneficiary of the will and as an owner of Monroe LLC further supported a finding of

privity. Accordingly, “Monroe LLC’s new litigation position that Monroe died domiciled in California, asserted to obtain the benefit of California’s posthumous right of publicity statute, is inconsistent with the preceding forty years of representations on behalf of the estate that Monroe died domiciled in New York.”

The Ninth Circuit also agreed that allowing Monroe LLC to assert that Monroe died a domiciliary of California would unfairly allow it to obtain a “second advantage.” The Court held that Milton Greene did not need to prove that it detrimentally relied on the prior

representations about Monroe’s domicile to justify the application of judicial estoppel. Rather, it was enough that Monroe LLC was seeking to use the new position to gain Monroe’s right of publicity, which carries the “immeasurable value of the name, likeness, and persona of Marilyn Monroe.”

The Ninth Circuit noted that Monroe had been identified as the third highest money-maker in an annual ranking of “The Top-Earning Dead Celebrities,” with an income of \$27 million in 2011. Thus, Monroe LLC was seeking to “control and profit from most, if not all, commercial exploitations of Monroe’s name, likeness and persona” which would allow Monroe LLC to “derive a substantial advantage — one which it contrived to create through the California legislature — were it not estopped from asserting its current position.” The Ninth Circuit held that prior enforcement actions by Monroe

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The Ninth Circuit held that this was a “textbook case for applying judicial estoppel” because “Monroe’s representatives took one position on Monroe’s domicile at death for forty years, and then changed their position when it was to their great financial advantage.

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LLC “have forced Monroe photographers into lengthy litigation in order to simply defend their right to profit from their copyrighted photographs.”

Moreover, if Monroe LLC’s new position on Monroe’s domicile was allowed, it would create the perception that either prior courts or the Ninth Circuit had been misled by representations about her domicile. The Court found that the “need to preserve the dignity of judicial proceedings weighs heavily against” allowing Monroe LLC to “proceed down its newly charted path.”

Thus, the Ninth Circuit held that this was a “textbook case for applying judicial estoppel” because “Monroe’s representatives took one position on Monroe’s domicile at death for forty years, and then changed their position when it was to their great financial advantage; an advantage they secured years after Monroe’s death by convincing the California legislature to create rights that did not exist when Monroe died.” The Court itself quoted Monroe as saying “If you’re going to be two-faced, at least make one of them pretty” and found that there was “nothing pretty in Monroe LLC’s about-face on the issue of domicile.”

Thus, because Monroe died domiciled in New York, New York law applied to the question of whether Monroe LLC has the right to enforce Monroe’s posthumous right of publicity. The Ninth Circuit held that because no such right exists under New York law, Monroe LLC did not inherit it through the residual clause of Monroe’s will, and cannot enforce it against anyone else. The Court concluded with the Monroe quote set forth in the beginning of this article and noted that “the lengthy dispute over the exploitation of Marilyn Monroe’s persona has ended in exactly the way that Monroe herself predicted more than fifty years ago: ‘I knew I belonged to the Public and to the world, not because I was talented or even beautiful but because I had never belonged to anything or anyone else.’”

Conclusion

Certainly, eliminating an enforceable right of publicity for Monroe may significantly reduce the value of her name, likeness, etc. But the right of publicity is only one way in which the estates of deceased celebrities can control such uses.

In particular, courts have routinely held that a person’s name, likeness, etc. can serve as a trademark for purposes of

the Lanham Act or related state law unfair competition claims.

Thus, the estate of a celebrity could assert a variety of claims other than right of publicity stemming from a use. For example, a use could give rise to a trademark infringement action. Unlike a right of publicity action, however, such an action would require a showing that there was a likelihood of consumer confusion as to sponsorship, affiliation or endorsement. Thus, if the use made it clear that it was not a use that was sponsored by, affiliated with or endorsed by the particular estate, this would likely defeat any such claim. In addition, a use could give rise to a trademark dilution action.

Such an action, however, would be difficult to prove. Dilution can take the form of “blurring” in which it is contended that a mark is uniquely associated with one particular kind of goods and services and the new use risks blurring the distinction in the minds of consumers as to the origin of goods. That would be hard to demonstrate in the celebrity likeness context.

In addition, dilution can take the form of “tarnishment” whereby the mark is associated with something foul or nefarious. It would seem that such uses would not be commonplace.

Moreover, dilution claims only apply to purely commercial uses, so creative or editorial uses would be immune. Finally, courts may see such an action as an end run around the well-established doctrine that one cannot defame the dead and refuse to recognize such claims.

It will be interesting to see whether the Monroe estate will continue to try to enforce rights in Marilyn Monroe after the decision in *Milton* (it is reported that the estate is in fact continuing to do so) and whether, assuming it does, courts will conclude that the decision in *Milton* did indeed give Monroe to the public, or whether other legal doctrines will allow the estate to make sure for years to come that no *Gentlemen Prefer Blondes* like Monroe when it comes to using icons from Hollywood’s past on goods and services.

Lincoln D. Bandlow is a partner at Lathrop & Gage LLP in Los Angeles, CA. Douglas Mirell, Loeb & Loeb LLP, Los Angeles, represented Anna Strasberg and Marilyn Monroe LLC. Theodore J. Minch, Sovich Minch LLP, McCordsville, Indiana, and William Weinberger, Parker, Milliken, Clark, O’Hara & Samuelian, Los Angeles, represented CMG Worldwide, Inc. Surjit P. Soni, The Soni Law Firm, Pasadena, CA represented The Milton Green Archives, Inc. and Tom Kelley

Federal Court Asks for Help in *Girls Gone Wild* Privacy Case

Georgia Supreme Court Asked to Clarify Misappropriation and Consent Issues

The Northern District of Georgia, late last month, certified a series of questions to the Georgia Supreme Court to help determine whether a minor who was featured in a *Girls Gone Wild* video and related advertising has a claim for misappropriation of image. *Bullard v. [MRA Holding, LLC and Mantra Films, Inc.](#)*, No. 1:04-cv-02407-JEC, 2012 U.S. Dist. LEXIS 121308 (N.D. Ga., Aug. 27, 2012) (Carnes, J).

Finding it “not at all clear that the law has caught up with the kind of vulgar exploitation of a young girl” typical of the video series, the court specifically sought clarification on whether Georgia law applied to an incident that occurred in Florida, whether a claim for misappropriation exists under the circumstances, and whether consent to being videotaped on the street protects the use of plaintiff’s image on a videotape cover and related advertising.

Background

In April 2000, plaintiff Lindsey Bullard, then 14 years old and in middle school, vacationed in Panama City, Florida, with friends and parental chaperones during Spring Break. She was walking with friends down “The Strip” one evening when two men approached the girls with a video camera and asked them to step off the strip into a parking lot to “see their boobs.” Bullard showed them her breasts in exchange for a beaded necklace.

Defendants, the producers of the *Girls Gone Wild* video series, purchased the video and used a five second clip of plaintiff in *Girls Gone Wild*, *College Girls Exposed*, *Volumes 1 and 2*. Defendants also use a still photo of plaintiff on the videotape box, with the statement “Get Educated!” over her breasts. Defendants also used plaintiff’s image in television commercials and Internet advertisements for the video franchise.

In 2004, plaintiff sued defendants alleging she was harassed and humiliated by students and teachers at school. Among other things, she became known as “Porn Star” at

school. Last month the district court granted summary judgment to defendants on the first two counts of the complaint. The first count was a recitation of factual allegations which failed to specify a cause of action. The second count was a claim for “exploitation of children,” which lacked a basis in law. The third count for appropriation of likeness for commercial purposes survived summary judgment, pending guidance from the Georgia Supreme Court.

Choice of Law

Though the court characterized the choice of law issue as a “very uncertain undertaking,” it applied Georgia law, finding that in tort claims, the place of wrong is the “place where the injury sustained was suffered rather than the place where the act was committed.” Though the events giving rise to the claim occurred in Florida, the court found that Bullard suffered her injuries in Georgia, where she lived and attended school and where her classmates viewed the *Girls Gone Wild* advertisements.

Georgia Misappropriation Law Unclear

Turning to the misappropriation claim, the court found “scant Georgia case law on this general type of claim.” The court cited two cases examining the claim: *Cabaniss v. Hispley*, 114 Ga. App. 267 (1966), and *McQueen v. Wilson*, 117 Ga. App. 488 (1968).

In *Cabaniss*, the court recognized a claim for misappropriation and/or right of publicity where plaintiff alleges and proves “the value of the use of the appropriated publicity,” i.e., the actual damages caused by the unauthorized use. Similarly, in *McQueen*, the court recognized a claim to recover “the advertising value” of an appropriated image. Both cases involved plaintiffs who

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regularly used their images to promote their entertainment careers.

In contrast, the plaintiff here never wanted her image widely distributed and did not explicitly agree to have her image on the cover of a *Girls Gone Wild* video. The court questioned whether a 14-year old girl who agrees to be videotaped on the street in a semi-nude state also agrees to have her image used in a video and related advertising, particularly when she does not know the video is being created.

Girls Gone Wild Jurisprudence

The court surveyed decisions from Florida and Louisiana involving *Girls Gone Wild* videos. In *Gritzke v. M.R.A. Holding, LLC*, 2002 WL 32107540 (N.D. Fla. March 15, 2002), the court held plaintiff stated a claim for misappropriation under Florida law when her image was used on a video cover and its advertisements. Shortly afterwards another Florida federal court dismissed misappropriation claims. *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205 (M.D. Fla. 2002). The court in *Lane* found the video series an “expressive work” and thus claims over its advertising were barred. Moreover, the court held that the minor plaintiff was capable of consenting to use of her image.

Though the court surveyed state laws from elsewhere, it specifically noted that Georgia has not addressed these same questions. Nor could the federal court predict what a Georgia appellate court would decide with respect to the elements of a claim. And, “[t]o add to the confusion, other state court decisions on these *Girls Gone Wild* types of scenarios are not consistent.”

The Georgia Supreme Court should therefore answer the question: “Does the agreement to be videotaped by a stranger constitute an agreement to let that stranger use one’s image to market a videotape that the stranger will later try to sell, particularly when the subject has not even been told that a video product containing her image was going to be created?... If consent to be photographed constitutes a consent to having one’s image later used in an expressive work, was plaintiff’s consent here invalidated by the fact that she was only 14 years old when she allowed herself to be videoed while exposing her breasts?”

Plaintiff was represented by Jeff Banks of Roma, GA. Defendant was represented by Sarah Riedel of Banks & Reidel in Kennesaw, GA.



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Supreme Judicial Court of Massachusetts Holds That Rape Shield Law Does Not Preclude Public Access to Search Warrant Affidavit

By Michael J. Grygiel and Zachary C. Kleinsasser

In the context of a public access issue of first impression, the Supreme Judicial Court (“SJC”) of Massachusetts – the Commonwealth’s highest court – recently reaffirmed that search warrant materials are presumptively public after the search warrant return has been filed in the issuing court. [*Commonwealth v. George W. Prescott Publishing Co., LLC*](#), 463 Mass. 258 (Aug. 23, 2012).

The SJC held that the Massachusetts rape shield law, which imposes confidentiality on police reports of rape and sexual assault, does not encompass search warrant affidavits or other judicial records pertaining to such charges. The SJC also upheld the lower court’s finding that the defendant had failed to establish good cause for continued impoundment of the search warrant affidavit, and that disclosure would not jeopardize the defendant’s constitutional right to a fair trial.

Background

In early 2011, the Massachusetts State Police Department applied for and obtained a search warrant authorizing the search of a luxury condominium owned by William O’Connell, a prominent Massachusetts real estate developer. The police sought the warrant in connection with allegations that O’Connell had engaged in sexual intercourse with a minor. After the warrant had been executed and the return of service filed in the lower court, the Commonwealth moved to impound all materials filed in connection with the search warrant application. The lower court allowed the motion to impound.

George W. Prescott Publishing Co, LLC, the publisher of *The Patriot Ledger* newspaper, filed a complaint and emergency motion seeking to terminate the impoundment of the search warrant materials. After a hearing, the judge initially determined that good cause existed for continued impoundment.

Two days after the hearing, a criminal complaint issued in the lower court charging O’Connell with aggravated statutory rape, engaging in sexual conduct for a fee, and trafficking in cocaine. At *The Patriot Ledger*’s request, the judge convened

another hearing and, after granting the newspaper’s motion to intervene in the criminal case, ordered the Commonwealth and counsel for O’Connell to agree upon a redacted version of the search warrant affidavit that would be subject to public disclosure. The court instructed the parties to return two weeks later.

At two subsequent hearings, the Commonwealth (both the Special Prosecutor assigned to the case and the Massachusetts Attorney General’s office) argued that the continued impoundment of the search warrant materials was warranted because the materials constituted a “report of rape and sexual assault” rendered confidential by the Massachusetts rape shield law. O’Connell argued that he would be unfairly prejudiced by disclosure of the search warrant materials in violation of his Sixth Amendment right to a fair trial. Both the Commonwealth and O’Connell also argued that there was good cause for impoundment.

The lower court granted *The Patriot Ledger*’s motion to terminate the impoundment but stayed the unsealing for one week in order to permit an appeal to a single justice of the SJC. The Commonwealth and O’Connell petitioned to the single justice. After hearing extensive oral argument from counsel of record, the single justice reserved and reported the case to the full bench.

Judicial Records, Including Search Warrants, Are Presumptively Public

In analyzing the parties’ arguments on appeal, the SJC took care to emphasize the principle that, under the common law, judicial records are presumptively available to the public. Quoting Justice Holmes, the SJC observed that “[i]t is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.” *Prescott*, 463 Mass. at 262-63 (quoting *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884)). The SJC recognized that the Massachusetts legislature had gone so far as to codify

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the common law rule that search warrants are presumptively public, enacting a statute to the effect that once search warrant materials have been returned to court they become public documents. *Id.* at 263.

Rape Shield Law Does Not Prohibit Disclosure of Judicial Documents

With respect to the Commonwealth's rape shield law, the SJC held that the blanket confidentiality it imposes on reports of rape and sexual assault does not encompass judicial records, including search warrant materials, and therefore does not abrogate the common law presumption of public access thereto.

Massachusetts General Laws ch. 41, § 97D provides that "All reports of rape and sexual assault or attempts to commit such offenses and all conversations between police officers and victims of said offenses shall not be public reports and shall be maintained by the police departments in a manner which will assure their confidentiality." The Commonwealth and O'Connell argued that the legislature intended § 97D to apply not only to police records containing reports of rape or sexual assault, but to court records, such as search warrant affidavits, that *incorporate or refer to* the same information.

In a unanimous decision, the SJC disagreed, holding that § 97D does not preclude public access to police report information or the content of a victim's conversations with police regarding an alleged rape or sexual assault when they are included in documents submitted to a court. *Id.* at 264-68. Citing several cases where police divulged such information in court – including cases where police officers testified at trial about a victim's report of rape – the SJC recognized that reports about rape or sexual assault are "routinely disclosed publicly by police in the course of judicial proceedings." *Id.* at 265-66. Citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 611 (1982), the SJC also held that construing § 97D as applying to judicial records such as search warrant affidavits would be "at odds with the general principle that blanket prohibitions on public access to court records are to be avoided." *Id.* at 266. "If applied to judicial records," the SJC reasoned,

such a requirement would have unacceptably far-reaching consequences. A wide range of court records in cases

involving allegations of rape or sexual assault would be subject to mandatory and permanent impoundment, regardless of the specific facts of each case. The United States Supreme Court has emphatically rejected blanket prohibitions on public access to judicial proceedings.

Id. at 267.

Defendant's Fair Trial Right Not Jeopardized

The Commonwealth and O'Connell also argued that the lower court erred in determining that good cause did not exist to continue the order of impoundment, primarily because disclosure would allegedly jeopardize O'Connell's constitutional right to a fair trial. The SJC rejected this claim, for two reasons. First, recognizing the availability of less restrictive alternatives to wholesale impoundment, the SJC found that judges "are well equipped to safeguard a defendant's right to a fair trial" by properly balancing interests and utilizing procedural tools – such as change of venue, voir dire, and proper jury instructions. Second, the SJC held that a criminal defendant's conclusory assertion that anticipated adverse pretrial publicity would prejudice the jury pool is legally insufficient to overcome the public's right of access to judicial documents.

Conclusion

The SJC's decision in *Prescott* endorses the well-established principle that mandatory, *per se* prohibitions on public access to court records cannot withstand judicial scrutiny. It also serves as an important reminder to prosecutors that the impoundment of judicial records is an exception to the general rule in favor of public access. *Prescott* should also strengthen the resolve of the press in seeking information at the early phases of criminal investigations that the government desires to hide from view in making clear that motions to terminate the impoundment of search warrant materials after the warrant is returned should be denied only in rare cases.

Michael J. Grygiel, Cynthia E. Neidl and William A. Hurst of Greenberg Traurig, LLP's Albany office and Zachary C. Kleinsasser of the firm's Boston office represented The Patriot Ledger in this matter.

Media Coalition Seeks Supreme Court Review of “State Only” FOI Law

By Kevin Goldberg

In 2009, two individuals – not members of the media – filed relatively self-interested requests in Virginia under the Commonwealth’s Freedom of Information Act. In 2012 (or, more likely 2013), Mark McBurney and Roger Hurlbert could make it significantly easier – or harder – for anyone – including members of the media – to file requests under state FOI or right to know laws around the nation (McBurney for records relating to his quest to receive owed child support; Hurlbert seeking property assessment records relating to a business he owned).

Each request was denied because of a provision in Virginia’s Freedom of Information Act which says:

Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth.

Inherent in the second sentence is that persons, publications or broadcasters outside Virginia are not allowed to request records via the Commonwealth’s FOI Law.

McBurney and Hurlbert filed a constitutional challenge to the provision, alleging that it violates the Privileges and Immunities Clause or the Dormant Commerce Clause of the U.S. Constitution. The United States District for the Eastern District of Virginia disagreed. They appealed to the United States Court of Appeals for the Fourth Circuit.

Virginia is one of just a handful of jurisdictions with “citizens-only” restriction in its FOI law. Wanting to keep things that way, the Reporters Committee for Freedom of the Press, joined by 22 major news companies and organizations filed an amicus brief in the Fourth Circuit.

Unfortunately, the Fourth Circuit affirmed the lower-court ruling, holding that held that the restriction only imposed an incidental effect on out-of-state requesters while protecting

state officials from overwhelmed by a voluminous number of requests. [*McBurney v. Young*](#), No. 11-1099 (4th Cir. Feb. 1, 2012). The Fourth Circuit posited that a fair middle ground existed – out of state requesters could simply have someone a Virginia resident file the request by proxy.

Cert. Petition Filed

The requesters decided to pursue this case to the United States Supreme Court. Many media organizations, while still hoping for ultimate victory, refrained from supporting the request for certiorari, fearing an adverse result from the Court that would open the door to every state and territory enacting a similar provision to build a virtual border fence around state government records throughout the nation.

While one fully expects that those organizations will support the requesters if the Court grants certiorari, the American Society of News Editors decided to act immediately and joined several Internet-focused organizations, publications and authors including Ars Technica, Automattic, the Center for Investigative Reporting, Daily Kos, Grist, Matthew Lee, Muckrock, Techdirt and Tumblr on an amicus brief drafted by Washington, DC based attorney

Marvin Ammori which supports the request that the Supreme Court hear the case. The brief made several arguments, however, that are common to all media.

The amici first argue that the Court must step in regarding the constitutionality of citizens-only state FOIA provisions to clear up the confusion that exists when different states have different rules (as is the case right now, when 8 states limit FOIA requests to citizens of the state). This confusion is exacerbated by the fact that at least one Court of Appeals (the Third Circuit) has struck down these restrictions, while another (the Fourth Circuit, in this particular case) – and yet another (the Sixth Circuit) is currently considering a similar case).

Furthermore, journalism is no longer (and maybe never

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The Court must step in regarding the constitutionality of citizens-only state FOIA provisions to clear up the confusion that exists when different states have different rules.

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was) specific to different states or localities.

There are many reasons that a reporter in one state might need to file a FOIA request in another state, including the need for records about a major national corporation that is located in a different state, a need for records of national political candidates who previously served as state Governors (such as Bill Clinton, Mike Huckabee and, of course, Mitt Romney), a desire to do requests across multiple states for comparison purposes or to review implementation of a federal policy, or a need to do a locally focused story involving mainly out of state actors.

Two very timely examples were deployed relative to that last point: the recent murder trial of George Hugely in Charlottesville, VA, where the victim, Yeardley Love, was from the Baltimore, MD; under the Virginia law, the Baltimore Sun and local Baltimore TV stations couldn't file requests with state law enforcement authorities for records relating to the case; former Washington, DC police Chief Charles Ramsey is now the police chief in Philadelphia; if the District of Columbia had a similar citizens-only FOIA restriction, the Philadelphia Inquirer could not have done any real research into Ramsey's record as police chief in DC.

Finally, the brief argued that Virginia's law is particularly concerning because of an exemption that allows out of state requests to be filed by "representatives of newspapers and magazines with circulation in the Commonwealth, and

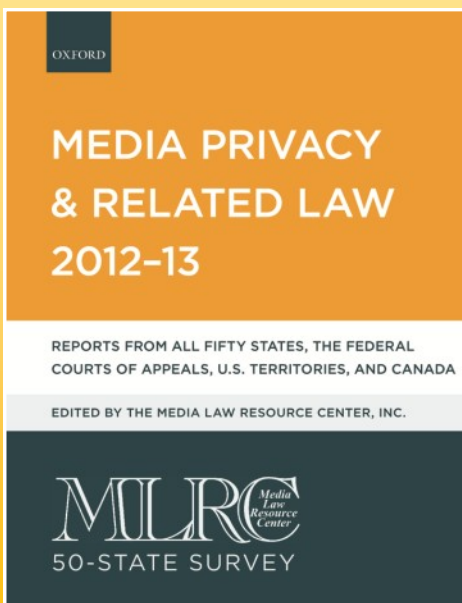
representatives of radio and television stations broadcasting in or into the Commonwealth." This "partial media exemption," as the brief terms it, raises several issues that are somewhat specific to its primarily online-only signatories.

Strictly looking at the plain language of the law, many online-focused reporters will fall outside that partial media exemption because they are not "representatives of 'newspapers', 'magazines', or 'broadcast stations.'" Many former newspapers (like the Seattle Post-Intelligencer) have converted to online-only publications and others may have significant online readership in Virginia but no actual print circulation or broadcast presence there.

The brief notes that, even if the VA law is read broadly to include online news outlets and circulation, it would "invite considerable discrimination and has no logical boundaries – all the way out to a "citizen journalist" with a WordPress or other blog (the brief actually goes into a somewhat extended argument about the increasing democratization of journalism, allowing anyone to be a journalist, concluding that "[i]ndeed, today, more Americans get most of their news from the Internet than from print newspapers or broadcast radio" and "these trends show no sign of abating").

We are still awaiting a decision from the Court on the [petition for certiorari](#).

Kevin Goldberg is a partner at Fletcher Heald & Hildreath PLC in Washington, D.C. , and is counsel to the American Society of News Editors.



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Ending Hostile Legal Environments Abroad: An Anthology

A newly published anthology featuring essays by fifteen prominent media lawyers, including several MLRC members, explores the challenges and rewards of pro bono service abroad pursuing reforms of media law.

The anthology, *Exporting the Matrix: The Campaign to Reform Media Laws Abroad*, presents the personal accounts of fifteen experts who volunteered to work in transitional democracies to help adopt progressive media laws.

Among the book's contributors are MLRC's Sandra Baron, Dan Byron (Indianapolis), David Cook (Newark), Jonathan Donnellan (Hearst Corporation), Robert Freeman (New York State), Professor Peter Krug, David McCraw (*New York Times*), Professor Monroe Price, Madeleine Schachter (Baker & McKenzie), Kurt Wimmer (Covington & Burling) and Richard Winfield (formerly Clifford Chance). Reviewing the book, the great English human rights barrister, Geoffrey Robertson, Q.C., described the volunteers as "secular missionaries."

Another reviewer, the prominent press freedom litigator and scholar, Floyd Abrams, found the book an "enlightening and uplifting publication" with "fascinating, well-told experiences."

By turns idealistic and practical, the essayists write from their years as pro bono volunteers abroad. They write with passion and with understanding of how central progressive reforms of media laws are to creating democratic institutions in the developing world. The authors strike the right balance between their enthusiasm for the First Amendment-rich American model of an unfettered press, on the one hand, and their sensitivity to the particular cultural, religious and historical traditions in the countries where they work on reform legislation.

Exporting the Matrix provides colorful case histories of the challenges faced by the writers in navigating these traditions while working side-by-side with their colleagues abroad. What social and political taboos, for instance, are confronted in helping draft a nation's first Freedom of Information law? How is it possible to overcome centuries of

imprisoning journalists for the crime of criticizing the head of state?

The anthology provides valuable analyses of various legal environments affecting the mass media and the Internet, and features examinations of American, common law, European and Asian jurisprudence.

Several essayists describe their experiences while pursuing reforms of media laws in the Middle East during the years 2007 through 2009. Their prescient essays, written in the months before the Arab uprising in early 2011, provide snapshots of repressive political cultures undergoing challenges and beginning to undergo seismic tremors. The essayists identify the forces of change and resistance to change. What emerges is the centrality of the reformers' demands for freedom of expression to the irresistible drive toward democratic self-rule.

The title, *Exporting the Matrix*, derives from a famous line by U.S. Supreme Court Justice Benjamin Cardozo in the 1937 case of *Palko v. Connecticut*. Writing about a free press in a democracy, Cardozo wrote, "Freedom of thought and speech... is the matrix, the indispensable condition, of nearly every other form of freedom."

Exporting the Matrix was conceived, organized and edited by Richard Winfield as a publication of an NGO he co-founded, International Senior Lawyers Project (ISLP). ISLP sponsors and operates a wide variety of media law reform programs.

Winfield said, "Our sincere hope is that this anthology will act as an impetus for like-minded media lawyers to serve pro bono in the cause of reform. The need could hardly be greater. Forty percent of the world's population lives under regimes with an unfree press. Another forty-four percent lives in countries with only a partly free press.

Organizations like MLRC and ISLP offer opportunities for media lawyers to use their skills abroad to improve this challenging picture."

Copies of Exporting the Matrix are available to MLRC members at a discount. Order online at www.caplaws.com or by phone (800) 489-7486.



Philippines Enacts Cybercrime Law Making Online Libel a Crime

By Harry Roque

On September 12, Philippines President Benigno Aquino III signed a controversial new law, the [Cybercrime Prevention Act of 2012](#). The bulk of the new law deals with the protection of computer systems and deterrence of computer hacking. However, a more controversial section makes online libel a new cybercrime. This portion of the law has been loudly criticized by media freedom groups in the Philippines and internationally.

In October, an inter-governmental body, the Cybercrime Investigation and Coordinating Center (CICC), will begin drafting implementing rules and regulations for the law. Officials from the National Bureau of Investigation, the Philippine National Police, and the Department of Justice Office of Cybercrime will be involved in drafting the regulations, together with unnamed representatives from the private sector and academia.

The Center for Media Freedom and Responsibility in Manila, which opposes the new law, stated it “can signal the opening of the floodgates of Internet regulation that will affect Filipino netizens, given the restrictive mindset of the country's leaders. It is a distinct possibility to which journalists and bloggers, ordinary citizen and anyone committed to free expression through whatever medium, should be alert, and must be prepared to combat.”

This cybercrime law, insofar as it infringes on freedom of expression, will come to court with a very heavy presumption of unconstitutionality.

Criminal Libel in the Philippines

Last year the United Nations Committee on Human Rights ruled that the Philippine's criminal libel law is contrary to Article 19 of the International Covenant on Civil and Political Rights (ICCPR) on freedom of expression. Nevertheless, the Congress and President Benigno Aquino III still enacted the Cybercrime Prevention Law which, among other things, added electronic libel as a new criminal offense.

Worse, this new law increased the penalty for cyber libel to prison mayor from the current prison correctional provided under the Revised Penal Code. This means that

electronic libel is now punished with imprisonment from six years and one day to up to 12 years, while those convicted for ordinary libel under the criminal code are subject to imprisonment only from six months and one day to four years and two months. And because parole, a means by which a convict may be spared from actual imprisonment may be granted only to those sentenced to serve a prison term for no more than six months and one day, anyone convicted for cyber libel will inevitably serve a prison term.

Since the Philippines leads the rest of the world in terms of Facebook and Twitter usage, this means that unlike ordinary libel complaints which are oftentimes brought against printed newspapers -given the element of publication, any user of these leading social media tools is now liable for prosecution. The fact that an allegedly libelous writing appeared on the Internet is already sufficient to prove the element of publication.

The new Cybercrime law is an outright defiance of the UN Human Rights Committee View in the case of Alexander Adonis vs. Republic of the Philippines. See “[UN: Philippine Criminal Libel Law Violates Freedom of Expression](#),”

MediaLawLetter March 2012.

In that View, the UNHRC declared that Philippine libel law under the RPC contravenes freedom of expression on two counts: one, it is a disproportionate means by which to achieve its avowed goal of protecting the privacy of private persons; and two, because there is an alternative in the form of civil libel, or the payment of damages.

The UNHCR also took the view that our libel in the Philippines, because it does not recognize truth as a defense, is additionally defective on this ground. While the View of the UNHRC is this instance is non-binding, the Philippines nonetheless is under an obligation to heed it because of the maxim “pacta sunt servanda”, or that treaty obligations must be complied with in good faith. The UN Human Rights Committee Views, since the membership of the body consist of leading experts in human rights, are accepted as

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authoritative on the issue of states compliance with their obligations under the ICCPR.

Simply put, the view against our libel law is very strong evidence of breach of a state obligation under the ICCPR. And instead of heeding the UN's call to review its existing libel law, Congress and President Aquino appeared to have slammed the body by enacting an even more draconian legislation against cyber libel. Our constitutional commitment to freedom of expression has long been recognized. Justice Holmes, for instance, wrote: "When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market"

The commitment exists because it is only through freedom of expression that we are able to discern the truth and able to fiscalize despotic regimes: "The freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common

quest for truth and the vitality of society as a whole. We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions.

By criminalizing internet libel, the government expanded the infringement of freedom of expression even to the realm that has enabled us to give life to the principle of a free market place of ideas- the internet. Prior to this law, it is ironic that the Philippines was even cited by the United Nations for not interfering with the internet. The law is a testament to the reality that despite the overwhelming mandate given to this administration, coupled with its unprecedented public approval ratings, it continues to be insecure and unable to compete in the market place of ideas.

We will see the Aquino administration in court on this one. And we will prevail. For unlike other laws that enjoy the presumption of regularity, this cybercrime law, insofar as it infringes on freedom of expression, will come to court with a very heavy presumption of unconstitutionality.

Harry Roque is a lawyer with Roque and Butuyan in Manila, Philippines and Chair of the Center for International Law.

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Publishers' Lawsuit Against Arizona Sheriff Arpaio and Special Prosecutor May Proceed

En Banc Ninth Circuit Panel Reinstates Suit

By David J. Bodney and Peter S. Kozinets

On the night of October 18, 2007, officers from Maricopa County Sheriff Joe Arpaio's "Selective Enforcement Unit" arrested Michael Lacey and Jim Larkin, co-owners of the *Phoenix New Times* ("New Times"), following *New Times*'s publication of a front-page exposé of a grand jury investigation into its reporting about the Sheriff. The arrests provoked a storm of criticism, which prompted the then-Maricopa County Attorney, Andrew Thomas, to fire the special prosecutor he had appointed to conduct the investigation – his former employer, Dennis Wilenchik. Lacey and Larkin then filed a wrongful arrest lawsuit against Thomas, Arpaio and Wilenchik under 42 U.S.C. § 1983, alleging violations of their First, Fourth and Fourteenth Amendment rights.

Nearly five years after the arrests, an *en banc* panel of the Ninth Circuit has held that Lacey's and Larkin's claims may proceed, overruling the district court's dismissal of their suit on theories of absolute and qualified immunity. [Lacey v. Maricopa County](#), 2012 WL 3711591 (9th Cir. Aug. 29, 2012) (page references are to the printed pages of the Westlaw version of the opinion.)

The Ninth Circuit's decision underscored that "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecution, for speaking out." 2012 WL 3711591, at 25 (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)). While the panel nevertheless found that Thomas was entitled to absolute immunity on the facts as alleged, Chief Judge Kozinski, in a blunt dissent, would have stripped Thomas of immunity entirely for appointing Wilenchik "as his cat's paw." *Id.* at 45.

Factual Background

Since the 1990s, *New Times* – a free, weekly newspaper that

now belongs to the Village Voice Media Network – has published numerous articles critical of Sheriff Arpaio. In 2004, it ran articles questioning Arpaio's commercial real estate transactions, and Arpaio's use of an Arizona statute to hide information about his holdings in public records. *New Times* noted that Arpaio's home address was available from numerous public sources and published it, in print and online.

Months later, after Thomas' election as County Attorney, Arpaio asked Thomas to investigate *New Times* for allegedly violating an Arizona statute that prohibits the dissemination of information online if the information poses an "imminent and serious threat" to a law enforcement officer or his family. Thomas's staff studied the issue and concluded that a potential criminal case would have several weaknesses. *Id.* at 17-18.

Arpaio persisted, and Thomas – who had similarly become the subject of critical coverage by the newspaper – declared a conflict of interest and transferred the case to the Pinal County Attorney's Office. That Office declined to prosecute, citing First Amendment and evidentiary concerns. *Id.* at 18. In 2007, it returned the matter to Thomas.

Thomas then appointed Wilenchik as an independent "special prosecutor" to investigate the Sheriff's claims. Wilenchik was well-known to both Thomas and Arpaio. Among other things, Wilenchik had hired Thomas as an associate during Thomas's race for County Attorney, and Wilenchik had done millions of dollars of legal work for Thomas and Arpaio. *Id.* at 19.

In August 2007, Wilenchik issued two subpoenas to *New Times*. *Id.* The subpoenas demanded that the newspaper identify its confidential sources and produce reporters' and editors' notes and memoranda for any story critical of Arpaio; they also sought information about online readers of any story since 2004. Although styled "grand jury" subpoenas,

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The en banc panel readily found that Wilenchik's conduct violated several established constitutional rights, and that Wilenchik knew or should have known that he was violating the Constitution.

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Wilenchik had not appeared before a grand jury, as Arizona law requires. *Id.* He then issued a third subpoena, which sought documents relating to a story that criticized *his* recent legal work for Arpaio. *Id.*

In October 2007, he attempted to arrange a meeting with Maricopa County Superior Court Judge Anna Baca, who presided over the sitting grand jury. Judge Baca scheduled an emergency hearing, and called Wilenchik's attempted *ex parte* communication "absolutely improper." *Id.* at 19-20.

Concerned about Wilenchik's conduct, *New Times* published a front-page story on October 18, 2007 that revealed the terms of his subpoenas. That day, Wilenchik filed a motion asking Judge Baca to hold *New Times* in contempt, issue arrest warrants for Lacey, Larkin and three of their lawyers, and fine *New Times* \$90 million. (Arizona law prohibits the knowing disclosure of grand jury testimony and "other matter attending a grand jury proceeding which is required by law to be kept secret, except . . . when permitted by the court in furtherance of justice." A.R.S. § 13-2812.A.) Before the court ruled on Wilenchik's motion, Arpaio's officers arrested Lacey and Larkin at their homes. *Id.* at 20.

After withering public criticism, Thomas fired Wilenchik. A month later, Judge Baca held that the subpoenas were invalid, and that Wilenchik had acted "ultra vires" because he had issued them without grand jury or court approval. *Id.*

In April 2008, Lacey and Larkin sued Thomas, Wilenchik and Arpaio in state court. The defendants removed. The district court dismissed all federal claims on absolute and qualified immunity grounds. A divided Ninth Circuit panel affirmed in part and reversed in part. The Ninth Circuit granted *en banc* review, and permitted the suit to proceed, as discussed below.

Majority Opinion / Former Special Prosecutor Wilenchik

The *en banc* panel rejected Wilenchik's claim to absolute immunity. Such immunity applies to prosecutorial acts that involve the judicial process. However, because Wilenchik had acted ultra vires – he issued the subpoenas, and

authorized or counseled about the arrests, without grand jury or court approval – his acts "side-stepped the judicial process" and fell outside the scope of absolute immunity. *Id.* at 23.

The court also rejected Wilenchik's qualified immunity defense to the lion's share of the plaintiffs' claims. Qualified immunity protects officers from suit when they make a reasonable mistake of law or fact, and involves a two-pronged inquiry. First, the court must determine whether the allegations, construed in the plaintiff's favor, show a violation of a constitutional right. Second, it must decide whether the constitutional right was "clearly established," i.e., whether it would have been clear to a reasonable officer that his conduct was unlawful. *Id.* at 24.

Unlike the district court, the *en banc* panel readily found that Wilenchik's conduct violated several established constitutional rights, and that Wilenchik knew or should have known that he was violating the Constitution.

The close proximity in time of the arrests to *New Times*' publication supported a "strong inference that Wilenchik was motivated by retaliatory animus."

First, the court held that the plaintiffs had adequately alleged that Wilenchik had violated their First Amendment rights by arresting them in retaliation for, and with the purpose of, suppressing core political speech critical of Arpaio, Wilenchik and Thomas. To establish a First Amendment violation, the plaintiffs had to allege that Wilenchik, by his actions, "deterred or chilled [the plaintiff's] political speech and such deterrence was a substantial or motivating factor in [the defendant's] conduct." *Id.* (quoting *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999)).

Here, plaintiffs alleged that Wilenchik's "primary intent was to silence *New Times*'s protected speech," and referenced his broad subpoenas and motions, and plaintiff's arrests without court approval. *Id.* at 25. Moreover, the close proximity in time of the arrests to *New Times*' publication supported a "strong inference that Wilenchik was motivated by retaliatory animus." As the Court of Appeals remarked: "It is hard to conceive of a more direct assault on the First Amendment than public officials ordering the immediate arrests of their critics." *Id.* at 26.

Second, the court held that plaintiffs could proceed on their "false arrest" claim against Wilenchik. The complaint

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adequately alleged that Wilenchik had authorized or advised Arpaio to conduct the arrests without court authorization. *Id.* at 27.

Third, the court found that plaintiffs had, in part, stated a claim against Wilenchik for selective enforcement in violation of the Fourteenth Amendment. *Id.* at 27. To state a claim, they had to plead discriminatory effect and purpose. *Id.* at 28. The court held that Lacey and Larkin had met the burden of discriminatory effect regarding the investigation of their publication of Arpaio's home address (which was available on other websites), but not as to the investigation of their publication of the grand jury subpoenas. Moreover, plaintiffs adequately alleged that Wilenchik's activities were based on a retaliatory purpose. *Id.*

Addressing a separate count, the court found that Lacey and Larkin had not adequately stated a claim for malicious prosecution. *Id.* at 27.

Sheriff Joseph Arpaio

For similar reasons, the court found that Arpaio could not invoke qualified immunity to block plaintiffs' claims. The alleged facts showed that Arpaio had "been at it" for much longer than Wilenchik -- "his efforts to muffle the *New Times*" began two years before Wilenchik's appointment. *Id.* at 29. Moreover, Arpaio should have known that "something was amiss" regarding the ostensible need to arrest Lacey and Larkin. Although publication of grand jury information was a misdemeanor, typically handled by issuing a citation, Arpaio sent his officers to arrest Lacey and Larkin at their homes without a warrant in the absence of exigent circumstances. *Id.* at 30-31.

Former County Attorney Andrew Thomas

Plaintiffs' claims against Thomas were based on the notion that Thomas should not have appointed Wilenchik as the special prosecutor. The court held that Thomas was entitled to absolute immunity for appointments and removals in a particular matter -- decisions that fell within the prosecutor's "judicial or and quasi-judicial roles . . ." *Id.* at 37.

The court also found that plaintiffs had sufficiently

alleged a claim of conspiracy against Wilenchik and Arpaio, but not Thomas. However, it held that plaintiffs should be given leave to amend their complaint regarding the conspiracy claim against Thomas. *Id.* at 44.

The Dissents

Dissenting in part, Chief Judge Kozinski rejected the majority's conclusion that Thomas was entitled to *absolute* immunity. He emphasized that Wilenchik was not truly an "independent" special prosecutor. Rather, "[h]e got the job because his crony, [Thomas], gave it to him." *Id.* at 45. Instead of taking action related to any particular judicial proceeding, Thomas "gave up the power to take any such action and transferred it to his special buddy, Wilenchik." *Id.* By conferring such immunity on Thomas, the majority "encourage[d] malicious or corrupt prosecutors to do exactly what plaintiffs allege Thomas did here: intimidate and harass political rivals by delegating prosecutorial authority to a straw man." *Id.* at 46.

Judge Kozinski also dissented from the majority's dismissal of Lacey and Larkin's selective enforcement claim regarding their nighttime arrests for allegedly violating Arizona's grand jury disclosure statute. Here, plaintiffs were treated differently than other misdemeanor defendants, who are usually given citations -- rather than forced to face "commando raids, arrests, handcuffs, and jail cells in the dead of night." *Id.* at 46.

Judge Tallman, joined by Judges Bea and Ikuta, dissented from that part of the majority's decision that denied Wilenchik and Arpaio qualified immunity on the selective enforcement claims. They argued that the publication of Arpaio's home address in the *New Times* was more likely to pose an imminent and serious threat to Arpaio than the more obscure publication of the same information on County websites.

David J. Bodney and Peter S. Kozinets practice media, intellectual property and commercial litigation at the Phoenix office of Steptoe & Johnson LLP. Plaintiffs were represented by Michael J. Meehan, Law Office of Michael Meehan, Tucson, AZ; and John T. White, Stinson Morrison Hecker LLP, Phoenix, AZ. Joseph Arpaio was represented by Eileen Dennis Gilbride, Jones, Skelton & Hochuli, P.L.C., Phoenix, AZ.

A Tale of Two Conventions

By Mickey H. Osterreicher

It was not the best of times or the worst of times but it certainly was an interesting time. In anticipation of demonstrations during the recently held political conventions there was a strong desire to avoid a repeat of 2008, where journalists were arrested in St. Paul and Denver leading to lawsuits that resulted in six-figure settlements in both cities.

Beginning with the NATO Summit, held in Chicago in May, the National Press Photographers Association (NPPA) along with the Reporters Committee for Freedom of the Press (RCFP) held a training session with 200 supervisory Chicago Police officers that resulted in improved police press-relations. Although one photographer from Getty Images was arrested, through the intervention of Steven Mandell (of Mandell Menkes LLP, the local firm working with the RCFP) and myself, those charges were almost immediately reduced from a serious felony to a misdemeanor and we were able to expedite his release on bond.

Lawyers from NPPA and RCFP also did training with the Tampa and Charlotte-Mecklenburg police departments in April of this year regarding 1st and 4th Amendment rights of citizens and journalists to photograph and record in public. Those organizations working with local attorneys Gregg Thomas, Carol LoCicero and Paul MacAdoo from Thomas & LoCicero PL in Tampa and Jonathan Buchan of McGuireWoods LLP in Charlotte, provided free 24-hour legal assistance through a hotline available for journalists covering the conventions. While there were a number of protestors arrested in both Tampa and Charlotte no journalists were arrested.

Tampa Police Department Public Information Officer (PIO) Laura McElroy said that her department was pleased that there were no police-press issues during the RNC. She credits the NPPA and RCFP for helping to not only train officers but

keeping the media in the know at the convention. "There is a big disparity between what the officers expect and what the media expect at events like these," McElroy said. "We tried to bridge that disparity."

What did take place was that everyone – from mainstream media to bloggers, citizen journalists, protesters, and bystanders – with a ready camera of one kind or another was documenting everything and everyone.

For journalists recording audio of any type there had been a heightened concern in Illinois that police would be enforcing the state's Eavesdropping Act, which criminalizes

(with a possible sentence of 15 years in jail) audio recording of police officers performing official duties in a public place without their consent but fortunately in the case of [ACLU v. Alvarez](#), the U.S. Court of Appeals for the Seventh Circuit found the law to be unconstitutional only days before the start of the summit and granted a preliminary injunction against its enforcement. However, the Illinois State's Attorney has appealed that

decision to the U.S. Supreme Court.

Both [Tampa](#) and [Charlotte](#) had also established security zones around their respective convention centers. Those ordinances also banned a long list of items deemed to be potential weapons, but there never appeared to be any issues with journalists carrying gas masks or those with monopods or tripods. Additionally, while those cities also established "free speech zones," for "permitted" marches police and city officials allowed protestors to march without permits and in Charlotte even permitted them to protest on the sidewalk in areas outside those zones. There was only one minor issue when private security guards in Charlotte stopped a Washington Post photographer from taking pictures from a public sidewalk outside the Bank of America corporate headquarters but that was quickly straightened out.

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Former President Bill Clinton addresses the DNC.

Photo by Mickey H. Osterreicher © 2012

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Charlotte-Mecklenburg Police Department PIO Brian Cunningham said that an important step the department took was to place field PIO's in several locations to work with the media. The PIO's answered journalists' questions and informed them of where to go. Cunningham also credits the NPPA & RCFP with helping the department develop policies such as the field PIO program. "They helped with training on working with the media for large scale events," Cunningham said. "We were able to train our entire department in media relations, which was critical to our success."

Also of concern was the possible enforcement of [H.R. 347](#) also known as "The Federal Restricted Buildings and Grounds Improvement Act of 2011," which was signed into law in March, making it a federal offense to cause a disturbance at certain events. More specifically, anyone who trespasses on specified property or at times and locations "so restricted in conjunction with an event designated as a special event of national significance" may be prosecuted and subject to a fine or imprisonment or both. Both conventions have been designated a "[National Special Security Event](#)" by the Department of Homeland Security. Fortunately none of those fears came to fruition.

Another positive result of preparations for the conventions was the development and launch by the RCFP of a [mobile app for reporters](#) that, according to its website, "gives

reporters in the field immediate access to legal resources, particularly in situations where newsgathering or access may be stymied." RCFP also produced a [handbook](#) entitled "Police, Protesters and the Press" which remains available for free download.

Both the NPPA and RCFP provided information for journalists in case of detention or arrest and also in those cases where their equipment may be seized. One of the important things that was stressed was that according to the [Department of Justice](#) "under the First Amendment, there are no circumstances under which the contents of a camera or recording device should be deleted or destroyed" (emphasis added).

The police in Tampa and Charlotte should be commended for exercising considerable restraint when dealing with protesters and

for not distinguishing between credentialed and non-credentialed journalists who were covering those events. To paraphrase Dickens - when it came to police-press relations - "It is a far, far better thing that we did than we have ever done; it is a far, far better result that we strive for than we have ever known."

Mickey H. Osterreicher is of Counsel to Hiscock & Barclay' and serves as general counsel for the National Press Photographers Association (NPPA). He is actively involved in police-press issues throughout the country and has written extensively on the subject.



Photo by Mickey H. Osterreicher © 2012

Police, media & protestors outside RNC in Tampa.



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Documentary Filmmaker Can Sue NJ Police For Civil Rights Violations

No Qualified Immunity Since Filmmaking Is Protected Newsgathering

In an interesting decision, a New Jersey appellate court this month reinstated a documentary filmmaker's civil rights complaint against a local New Jersey police department and an individual officer. [*Ramos v. Flowers, et al.*](#), No. A-4910-10T3 (N.J. App. Sept. 21, 2012) (Cuff, Waugh, St. John, JJ.). The court held that police officers were not entitled to qualified immunity in the lawsuit because as of 2006 they should have known that newsgathering on a matter of public interest was a clearly established constitutional right.

Background

The plaintiff, Kelly Ramos, was working on a project about the emergence of gangs in Trenton, New Jersey. This included videotaping police during enforcement actions against gang gatherings. During the course of filming Ramos had five encounters with the Trenton Police Department, included being arrested, having his camera seized, and receiving multiple warnings not to film. One officer warned plaintiff that "something would happen to him" if he didn't stop filming.

In 2008, Ramos sued under the New Jersey Civil Rights Act (Act), N.J.S.A. 10:6-1 to -2 for violation of his free speech rights. The state statute is modeled on federal law that creates a civil action for deprivation of constitutional rights (42 U.S.C.A. § 1983), and similar state statutes in Massachusetts and Maine. The trial court granted summary judgment to the police on the basis of qualified immunity, finding no well-established right to videotape the police at the time of the incidents.

Appellate Decision

On appeal, the court first noted that the protection for newsgathering extends to both traditional and new media. See *Senna v. Florimont*, 196 N.J. 469, 489 (2008) ("In an era marked by a diminution of the classic newsmedia and the print investigative journalist and the proliferation of investigative reporting in media such as cable television, documentary Journalism – both televisions and movies – internet reporting and blogging, the need for protection remains the same.").

The court found persuasive the First Circuit's recent decision in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), denying a qualified immunity defense to police officers who had arrested the plaintiff for filming them with his cell phone in the Boston Commons.

Moreover, the New Jersey court found nothing "new or novel" about filming police activity. "News footage of police activity has been a fairly regular feature of television news programs at least since the 1950s or 1960s." Thus "a reasonable police officer in 2006 could not have believed he had the absolute right to preclude Ramos from videotaping any gang activities or any interaction of the police with gang members for the purposes of making a documentary film on that topic."

Plaintiff was represented by the Lawrence S. Lustberg, Edward L. Barocas, Jeanne LoCicero, and Alexander R. Shalom of the NJ ACLU.

Online Streaming of Television Programming Not a “Cable System” Under Copyright Act

Second Circuit Affirms Preliminary Injunction

The Second Circuit, late last month, held that ivi, Inc. (“ivi”), a company that streams television programming live and over the Internet, is not a “cable system” under §111 of the Copyright Act of 1976. *WPIX, Inc. et al v. ivi, Inc.*, No. 11-788-cv, 2012 U.S. App. LEXIS 18155 (2d Cir. Aug. 27, 2012)(Winter, Chin, Droney, JJ). The court affirmed a preliminary injunction against ivi for copyright infringement brought by a number of television broadcasting stations.

Background

In September 2010, ivi began live streaming plaintiffs’ copyrighted programming over the Internet — for profit, and without consent. Though Ivi began by retransmitting signals from about 30 New York and Seattle broadcast stations, by February 2011 it expanded to transmit signals from Chicago and Los Angeles.

Ivi subscribers, who download the company’s “TV player” on their computers, pay a monthly subscription fee of \$4.99 for streaming services. For an additional \$0.99 per month, subscribers are also able to record, pause, fast-forward, and rewind ivi’s streams.

Though several broadcast stations and program owners sent cease and desist letters to ivi, ivi responded, justifying its operations on the ground that it was a cable system entitled to a compulsory license under §111 of the Copyright Act, 17 U.S.C. §111.

Ivi filed a declaratory action in the United States District Court for the Western District of Washington. Eight days later, plaintiffs sued defendants for copyright infringement in the Southern District of New York, seeking damages and injunctive relief. In January 2011, the Western District of Washington dismissed ivi’s declaratory action as an impermissible anticipatory filling. In February 2011, the Southern District of New York granted plaintiffs’ motion for a preliminary injunction.

Preliminary Injunction Affirmed

The Second Circuit reviewed the district court’s preliminary injunction under an abuse of discretion standard and applied the *Salinger* test for preliminary injunctions in copyright cases. *Salinger v. Colting*, 607 F.3d 68, 79-80 (2d Cir. 2010). Plaintiffs must demonstrate, (1) a likelihood of success on the merits; (2) irreparable harm in the absence of an injunction; (3) a balance of the hardships tipping in their favor; and (4) non-disservice of the public interest by issuance of a preliminary injunction. *Id.*

The court examined each factor, but focused its analysis on determining the plaintiffs’ likelihood of success on the merits, particularly with regard to the §111 affirmative defense to the Copyright Act.

Plaintiffs’ losses would be difficult to measure and monetary damages would be insufficient to remedy the harms.

Likelihood of Success

Under the Copyright Act, television broadcasters generally have exclusive rights to authorize display of their content. *Echostar Satellite LLC v FCC*, 457 F.3d 31, 33 (D.C. Cir. 2006). The §111 exception, however, establishes that cable systems can “publicly perform and retransmit signals of copyrighted television programming to its subscribers, provided they pay royalties at government-regulated rates and abide by the statute’s procedures.” *See* 17 U.S.C. §111(c) (exception), (d) (royalties); U.S. Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report 1* (2008) (“SHVERA Report”). Thus, the court’s decision here turned on whether ivi constitutes a cable system under §111.

The court used a *Chevron* analysis to assess the scope of §111. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Determining that the language of the statute is ambiguous at *Chevron* Step 1, at least insofar as whether a service that retransmits television programming live and over the Internet constitutes a cable system under

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§111, the court examined the legislative history and legislative intent.

“The legislative history indicates that Congress enacted §111 with the intent to address the issue of poor television reception, or, more specifically, to mitigate the difficulties that certain communities and households faced in receiving over-the-air broadcast signals by enabling the expansion of cable systems. ...Congress did not, however, intend for §111’s compulsory license to extend to Internet transmissions. Indeed, the legislative history indicates that if Congress had intended to extend §111’s compulsory license to Internet retransmissions, it would have done so expressly—either through the language of §111 as it did for microwave retransmissions or by codifying a separate statutory provision as it did for satellite carriers.”

Moving on to *Chevron* Step 2, and analyzing the agency’s “reasonable” interpretation of the statute, the court found that the Copyright Office has consistently concluded that Internet retransmission services are not cable systems and do not qualify for §111 compulsory licenses. Specifically, the Copyright Office “has maintained that §111’s compulsory license for cable systems is intended for localized retransmission services,” which would preclude Internet transmission services, as they provide “nationwide—and arguably global—services.”

Finding that “the Copyright Office’s interpretation of §111—that Internet retransmission services do not constitute cable systems under §111—aligns with Congress’s intent and is reasonable,” the court held that “the district court did not abuse its discretion in finding that plaintiffs were likely to succeed on the merits of the case.”

Irreparable Injury

Next, the court found that the district court did not abuse its discretion in finding that plaintiffs would suffer irreparable

harm without a preliminary injunction. “First, ivi’s live retransmissions of plaintiffs’ copyrighted programming over the Internet would substantially diminish the value of the programming.

Second, plaintiffs’ losses would be difficult to measure and monetary damages would be insufficient to remedy the harms. Third, ivi would be unable to pay damages should plaintiffs prevail.”

Balance of Interests

Next, the court noted that plaintiffs demonstrated “that the balance of hardships weighed heavily in favor of granting a preliminary injunction...the absence of an injunction would result in the continued infringement of [plaintiffs’] property interests in the copyrighted material.”

Public Interest

Looking finally at the impact of a preliminary injunction on the public’s access to the content, the court examined the public’s interest in protecting copyrighted information while balancing the interests of ivi. The court found that “[t]he service provided by ivi is targeted more toward convenience than access, and the public will still be able to access plaintiffs’ programs through means other than ivi’s Internet service, including cable television.” Thus, the district court did not abuse its discretion.

In conclusion, the court affirmed the decision of the S.D.N.Y., finding that all *Salinger* factors were met.

Plaintiffs/appellees were represented by Robert Allen Garrett (with Peter L. Zimroth, Hadrian R. Katz, Lisa S. Blatt, C. Scott Morrow, and R. Reeves Anderson on the brief) of Arnold & Porter LLP in New York and Washington, D.C. Defendants/appellants were represented by Lawrence D. Graham (with Ellen M. Bierman on the brief) of Black Lowe & Graham PLLC, in Seattle.

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