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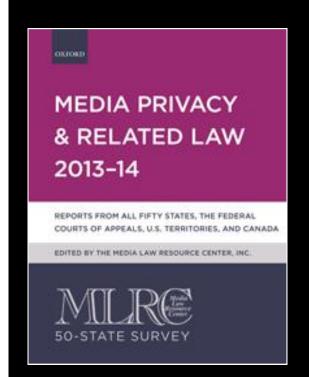
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Jury Finds TheDirty.com Defamed Former Cheerleader

Sarah Jones Gets Big Win – Not Everyone Is Cheering

By Jack Greiner

Former BenGal cheerleader and high school teacher Sarah Jones won a \$338,000 jury verdict against Dirty World Entertainment in a defamation suit on July 11. *Jones v. Dirty World Entertainment Recordings, LLC, d/b/a thedirty.com, et al.*, Civ. No. 2009-19 (E.D. Ky. jury verdict July 11, 2013) (Bertlesman, J.).

Jones, who last year pleaded no contest to criminal charges relating to her sexual relationship with one of her high school students, claimed that comments about her sex life posted by third parties on "the dirty.com" website (operated by Dirty World)

tarnished her reputation.

Section 230 Defense Denied

From a First Amendment perspective, it may not be a bad thing that Dirty World lost. The key decision in this case may be less the jury verdict than the court's <u>order in January 2012</u> denying Dirty World's Motion for Judgment as a Matter of Law. In that order, Judge William Bertelsman ruled that the federal Communications Decency Act did not shield Dirty

World from liability for the third party posts. And that allowed the case ultimately to go to the jury.

Congress passed the CDA in 1996. As acts of Congress go, it's pretty simple – a website operator cannot be deemed the publisher of "any information provided by another information content provider." So if I host a website, and a third party posts nasty comments about someone, the poster is potentially liable, but not me. On this basis, it's hard to see how her case survived.

But it did. In his <u>January 2012 order</u>, Judge Bertelsman looked at the CDA's definition of "information content

provider" and decided Dirty World fit under it. According to that definition, "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."

Judge Bertelsman reached his conclusion for three reasons. First, the dirty.com – by virtue of its name and tone "encourages the posting only of 'dirt,' that is material which is potentially defamatory or an invasion of the subject's privacy." Second, site operator Nik Richie selected which posts would actually appear on the site, apparently posting

the juiciest ones. And he refused to remove the posts about Jones, despite her requests that he do so.

Finally, the court noted that Richie added his own comments to the third-party posts. According to the court, this was the most significant factor. The court pointed to this exchange as an example:

On December 7, 2009, another post was made to "the dirty.com:" Nik, here we have Sarah J, captain cheerleader of the playoff

bound cinci bengals.. Most ppl see Sarah has [sic] a gorgeous cheerleader AND highschool teacher.. yes she's also a teacher.. but what most of you don't know is . . Her ex Nate . . cheated on her with over 50 girls in 4 yrs. . in nthat time he tested positive for Chlamydia Infection and Gonorrhea.. so im sure Sarah also has both . . what's worse is he brags about doing sarah in the gym . . football field . . her class room at the school where she teaches at DIXIE Heights.

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In response, Richie posted: "Why are all high school teachers freaks in the sack? – nik."

All three factors led Judge Bertelsman to conclude that Dirty World "encouraged what is offensive about the content of the site." (Emphasis added). And for that reason, in Judge Bertelsman's view, Dirty World became an information content provider.

At trial, Judge Bertelsman echoed this conclusion in his instructions to the jury, stating that "defendants, when they re-published the matters in evidence, had the same duties and liabilities for re-publishing libelous material as the author of

such materials." He also instructed the jury that in order for Jones to recover, she must show that the statements made about her were made with actual malice, which "requires that the publisher of the defamatory falsehood at the time of the publication entertained serious doubts as to the truth of the published material."

Imputing this level of liability to Dirty World shifts the site operator from platform host to content publisher, making Richie responsible for the same level of knowledge – and duty of care – as Dirty World's content creators. It also assumes that if a poster has actual malice, the site operator does too.

Judge Bertelsman also operated from the premise that "dirt" is synonymous with "actionable content." But that premise is false. "Dirt" may be true. And it's not

necessarily "private." This is especially true with public figures. To assume, as does Judge Bertelsman, that calling for "dirt" is a call for actionable content is unfounded.

Beyond the specific implications in this case, imposing liability on website operators to verify third-party content before posting could have far-reaching, unwelcomed consequences. Particularly in the political arena, enforcing this type of regulation on every discussion forum could have a dangerous chilling effect. At what point will hosts of online debate become paralyzed by regulation, silencing their contributors?

So why is it a good thing that Dirty World got hit with the verdict? Because the January 12 order was not a final order,

and couldn't be appealed at the time the court issued it. *See* Jones v. Dirty World Entertainment, dba Thedirty.com et al., No. 12-5133 (6th Cir. May 9, 2012) (Kennedy, Siler, Sutton, JJ.). And if dirty.com had won at trial, it would have had no need to appeal. Which means the Sixth Circuit Court of Appeals would not have had a chance to review the order and weigh in on the legal issue. Now that Dirty World has 338,000 reasons to appeal, the Sixth Circuit will have its chance.

Sixth Circuit Appeal

Ideally the appellate court will provide answers to several

questions. For instance, should the name and the tone of the website have anything to do with the simple question of who created the content of an offending post? Why? If someone creates a website called "Impeach Obama" and encourages readers to vent about their distaste for President Obama, is the site operator liable for any potentially defamatory post made by a third party?

Should the fact that the site operator screens and filters posts affect its immunity? How does that square with prior case law that states the CDA protects the editorial decision "whether to publish"? Are site operators advised not to screen at all? Isn't that inconsistent with the provision of the CDA that protects operators who "restrict access to or availability of material"? And how does choosing which posts to put online make anyone a "content creator" with

respect to any given post?

If the site operator makes a non-actionable comment in response to a third party post, why should that create any liability? The question "why are all high school teachers freaks in the sack" may be crude, but it's not defamatory. And again, how does the fact that the site operator made that comment make the site operator the creator of the preceding post?

The Sixth Circuit should take a careful look at Judge Bertelsman's comment that Dirty World "encouraged what is offensive about the content of the site." Because that may be the key issue. By the CDA's express terms, the question

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Imputing this level of liability to Dirty World shifts the site operator from platform host to content publisher, making Richie responsible for the same level of knowledge – and duty of care – as Dirty World's content creators. It also assumes that if a poster has actual malice, the site operator does too.

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about who created the content focuses on the particular content at issue – in this case, the third party post. And so the only question should be whether the operator had anything to do with the creation (not the posting) of that specific comment. Given that the poster was anonymous, Dirty World had nothing to do with creating that specific post.

But Judge Bertelsman's order by its terms looks beyond the specific post to the site itself. And he concludes that if the site operator creates a space where a third party might post actionable content, the operator's role in creating the site is sufficient to lose the CDA protection.

Predicting what an appellate court will do is almost as difficult as predicting a jury outcome. But it is safe to say lots of folks will be anxious to see if there is anything to cheer about when the decision comes down.

Jack Greiner is a partner at Graydon Head in Cincinnati, OH, and co-chair of MLRC's Internet Law Committee. Plaintiff Sarah Jones was represented by Eric Deters, Cincinnati, OH. Defendants were represented by David S. Gingras, Gingras Law Office, PLLC, Phoenix, AZ.

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Second Circuit Affirms First Amendment **Protection for Scientific Debate**

Research Study Conclusions Held to be Non-Actionable Opinion

By Robert D. Balin and Eric Feder

"See now the power of truth; the same experiment which at first glance seemed to show one thing, when more carefully examined, assures us of the contrary." - Galileo Galilei

Generally, under the law of defamation, a speaker may be liable for making false statements of fact that are harmful to reputation, but will not be liable if those statements are merely expressions of the speaker's opinion, which cannot be proven true or false. Recently, the Second Circuit was confronted with how that doctrine applies to scientific

conclusions contained in academic journal articles. The court acknowledged that "[s]cientific academic discourse poses several problems for the fact-opinion paradigm of First Amendment jurisprudence." But, in a significant win for scientists and the journals that publish their studies, the court ultimately affirmed that courts-and lawsuits—are not the appropriate forum for resolving disputes within the scientific community.

In ONY, Inc. v. Cornerstone

Therapeutics, Inc. et al., No. 12-2414-CV (June 26, 2013) (Winter, Calabresi, Lynch, JJ.), the plaintiff pharmaceutical company had alleged that the "conclusions" published in a scientific research article-specifically, speculation about why plaintiff's drug was associated with a higher mortality rate in infants than a competitor's drug-were false and misleading. In affirming the District Court's dismissal of the plaintiff's claims, the Second Circuit held that "as a matter of law, statements of scientific conclusions about unsettled matters of scientific debate cannot give rise to liability for damages sounding in defamation."

Factual Background

ONY is a pharmaceutical company that manufactures an animal-derived lung surfactant used to treat pre-term infants suffering from respiratory distress syndrome (RDS), which is a leading cause of death in premature infants. One of ONY's competitors, Chiesi Farmaceutici, commissioned a group of neonatologists to conduct a retrospective study comparing the mortality rates of thousands of pre-term infants with RDS who had been treated at 236 different hospitals with the surfactants manufactured by ONY, Chiesi and one other competing company. The neonatologists then authored an article about their study's findings, which they submitted to

the Journal of Perinatology, a leading medical journal which is published by Nature America.

In September 2011, after undergoing peer review, the article was published on the Journal's website. The article included a "Conflicts of Interest" section that disclosed that Chiesi sponsored the Based on the study's study. finding that ONY's surfactant was "associated with a 49.6% greater likelihood of death" among infants with RDS than the surfactant manufactured by Chiesi, the

authors of the article concluded that, while all three of the

In the article, the authors set forth the study's methodology (and its limitations) in detail and sought to explain the mortality rate differences, speculating that the "most likely explanation" was due to the higher dosage administered infants treated to with Chiesi's surfactant. Following publication of the article on the

studied surfactants were effective in treating RDS, ONY's surfactant was "associated with a significantly greater likelihood of death" than Chiesi's.

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Journal's website, Chiesi's distributor circulated reprints of the article to existing and potential customers as part of its marketing efforts.

ONY's representatives wrote to the Journal disputing the article's conclusions, attacking the methods of the study, and demanding that the Journal article be retracted. Nature America declined to retract the article. Consistent with common practice, however, the Journal eventually published the letters criticizing the study, as well as written responses to the criticism from the authors of the article.

ONY filed suit in December 2011 in the District Court for the Western District of New York, asserting a claim of

injurious falsehood against Nature and the editor of the Journal. ONY also brought several claims against Chiesi and its distributor arising out of their post-publication marketing uses of the article, including for false advertising under Lanham Act § 43(a) and violation of the New York state deceptive practices act, as well as claims against the authors of the study, the provider of the database used in conducting the study, and even the American Academy of Pediatrics (based on its affiliation with the Journal).

In its complaint, ONY did not challenge the mortality rate statistics themselves. Instead, ONY complained that the article's "conclusions" concerning the comparative mortality rates of the competing surfactants were "unreliable" and "misleading". Specifically, ONY claimed that the article had omitted certain key data from the study that would—in ONY's

view—have demonstrated that the mortality rate differences were due to factors other than the relative effectiveness of the surfactants.

All defendants filed pre-answer motions to dismiss the complaint on the ground (among others) that the challenged conclusions from the study constituted non-actionable opinions, not assertions of fact. The District Court agreed with the defendants and dismissed the complaint. ONY appealed to the Second Circuit.

Second Circuit Decision

In its decision, the Second Circuit grappled with where scientific discourse falls along the fact-opinion divide. On one level, scientific conclusions would seem to be quintessential statements of fact that can be proven true or false. After all, as the court noted, "it is the very premise of the scientific enterprise that it engages with empirically verifiable facts about the universe." On the other hand, "it is the essence of the scientific method that the conclusions of empirical research are tentative and subject to revision, because they represent inferences about the nature of reality based on the results of experimentation and observation."

The court explained that, ordinarily, scientific conclusions are presented to the relevant scientific community in peer-reviewed publications. Other scientists may then respond to the research by "attempting to replicate the described experiments, conducting their own experiments, or analyzing or refuting the soundness of the experimental design or the validity of the inferences drawn from the results."

The court noted that "the traditional dividing line between fact and opinion is not entirely helpful," because "[i]n a sufficiently novel area of research, propositions of empirical 'fact' advanced in the literature may be highly controversial and subject to rigorous debate by qualified experts." Thus, the court held, scientific conclusions typically "are more closely akin to matters of opinion, and are so understood by the relevant scientific communities."

The District Court had held that "any perceived fault in the method by which the authors reached their conclusions should be subjected to peer review rather than judicial review." The Circuit Court agreed, concluding that "courts are ill-equipped to undertake to referee such controversies. Instead, the trial of ideas plays out in the pages of peer-reviewed journals, and the scientific public sits as the jury." (Indeed, as the Second Circuit noted, that is precisely what occurred here, independently of the litigation. The Journal published ONY's sharp criticism of the article and the

(Continued on page 8)

As Galileo would surely agree, scientific conclusions do not present objective "truth" that can readily be evaluated for falsity by a court, because the very same data underlying those conclusions, "when more carefully examined" by other scientists, may lead to alternative conclusions. Thus, the remedy for claims of "bad science" is "more science," not

litigation.

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underlying study, as well as the response by the article's authors—leaving it to readers to debate the relative merits of the two sides and to other scientists to ultimately replicate or refute the study.)

In reaching its holding that scientific conclusions are protected expressions of opinion, the appellate court was careful to note that the plaintiff did not allege that the data presented in the article were fabricated or fraudulent. Falsified data, the court noted, would cause the ordinary process of scientific debate to break down, because other scientists would be unable to accurately assess the methods and conclusions of the underlying study. But when the data and the methods used are accurately described, "the validity of the author's conclusions may be assessed on their face by members of the relevant discipline or specialty." The court further held that even if scientific conclusions were theoretically actionable, the claim would be "weakest when, as here, the authors readily disclosed the potential shortcomings of their methodology and their potential conflicts of interest."

Because the statements at issue were deemed to be protected opinion, the Second Circuit affirmed the dismissal of ONY's claims.

Conclusion

As Galileo would surely agree, scientific conclusions do not present objective "truth" that can readily be evaluated for falsity by a court, because the very same data underlying those conclusions, "when more carefully examined" by other scientists, may lead to alternative conclusions. Thus, the remedy for claims of "bad science" is "more science," not litigation.

In fact, intervention by courts would serve only to disrupt the process of robust scientific debate. As the district judge in this case acknowledged, "[t]he chilling effect of protracted litigation can be especially severe for scholarly journals." The Second Circuit's decision re-affirms that scientists, researchers and academic journals must be accorded breathing room to engage in, and contribute to, scientific debates—without having to look over their collective shoulder for potential plaintiffs unhappy with their conclusions.

Robert D. Balin of Davis Wright Tremaine LLP, together with Victor Hendrickson (formerly at Davis Wright Tremaine, now Senior Counsel at Fuse Networks LLC) and Nelson Perel of Webster Szanyi LLP, represented publisher Nature America and the editor of the Journal of Perinatology. J. Kevin Fee of Morgan, Lewis & Bockius LLP represented defendants Chiesi, Chiesi's U.S. distributor and three of the article's authors. Lauren Handel of McDermott Will & Emery LLP represented the study's database provider and one of the article's authors, also defendants. Matthew C. Crowl and Elisabeth Carey-Davis of Schiff Hardin LLP represented defendant American Academy of Pediatrics. ONY was represented by Mitchell J. Banas, Jr. of Jaeckle, Fleischmann & Mugel LLP in Buffalo, New York.

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Texas Supreme Court Disapproves "Third-Party Allegation" Rule

Emphasizes Importance of Libel Actions for Plaintiffs

By Jim Hemphill

A majority of the Texas Supreme Court has disapproved a long line of cases from lower courts recognizing a "third-party allegation rule" in media libel cases. The Court also emphasized the important role of libel actions under the Texas Constitution in vindicating reputation.

The opinion in *Neely v. Wilson*, 2013 WL 3240040, 56 Tex. S. Ct. J. 766 (Tex. June 28, 2013), reversed summary judgment for the media defendants and remanded for trial.

Three Justices dissented. The defendants have been granted an extension of time to file a motion for rehearing, which is due August 14, 2013.

The so-called "third-party allegation rule" essentially immunized, at least in some circumstances, the media from liability for substantially true reports of allegations that have been made against the plaintiff by a third party, regardless of the truth of those allegations. A key issue in *Neely v. Wilson* was whether the holding of the 23-year-old Texas Supreme Court case relied by lower courts actually supported the rule, and if so whether the rule should be maintained, limited, or eliminated altogether.

The majority held that lower courts had misinterpreted *McIlvain v. Jacobs*, 794 S.W.2d 14, 17 Media L. Rep. 2207 (Tex. 1990), to protect accurate reports of third-party allegations. The majority in *Neely v. Wilson* held that *McIlvain* only protected reporting of allegations that had been found to be true.

The Story: Doctor Disciplined for Drug-Related Issues

Byron Neely, an Austin neurosurgeon, had been sued for malpractice at least seven times and was investigated for allegations regarding self-prescribing and taking numerous drugs, including opiates and other narcotics. An investigator for the Texas Medical Board concluded that Neely was subject to discipline based on his "[i]nability to practice medicine with reasonable skill and safety because of illness or substance abuse." Neely admitted to taking drugs that would impair the ability to perform surgery, but denied ever taking them or being affected by them when performing surgery.

Eventually, Neely and the Board entered into an agreed order under which his license to practice medicine was

suspended (with the suspension stayed and three years' probation ordered). The order found that Neely had a hand tremor and had self-prescribed various medications that were initially prescribed by a treating doctor. The order also required that Neely be examined by a "psychiatrist board certified in forensic or addiction psychiatry" appointed by the Board's executive director. The order also cited Neely's "inability to practice medicine with reasonable skill and safety to patients, due to mental or physical condition."

Defendant Nanci Wilson, a reporter for KEYE-TV, owned and operated by defendant CBS Stations Group of Texas, L.P., researched a story on Neely, focusing

on the Medical Board proceedings and two high-profile lawsuits against Neely. The story aired on January 19, 2004.

The anchor's introduction to the story included the following statement:

"If you needed surgery would you want to know if your surgeon had been disciplined for prescribing himself and taking dangerous drugs, had a history of hand tremors and had been sued several times for malpractice in the last few years?"

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The majority held that lower courts had misinterpreted McIlvain v. Jacobs, to protect accurate reports of third-party allegations. The majority in Neely v. Wilson held that McIlvain only protected reporting of allegations that had been found to be true.

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The majority opinion

repeatedly stresses the

importance that libel

actions remain

available for plaintiffs

who believe they have

been defamed.

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The story also included a quote from Paul Jetton, one of the patients who sued Neely for malpractice (and settled for policy limits):

"Narcotics, opiates, I mean it's just things that, I mean things that they don't even let people operate machinery or drive cars when they're, when they're taking them and this guy's doing brain surgery on people. I mean it's just, even now I'm just, it's just incredulous, you just can't even believe that it even happened."

Neely and his professional association sued, alleging that the story falsely stated or implied that he had been disciplined by the Medical Board for performing surgery while under the influence of narcotics, when he actually was disciplined only

for self-prescribing, not for taking narcotics or performing surgery while under their influence. He also claimed that the story falsely implied that he was, in fact, under the influence of drugs while performing surgery, and that he performed unnecessary surgeries.

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

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

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

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

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

> [W]e are convinced that when, as in this case, the report is merely that allegations

> > were made and they were under investigation, McIlvain requires proof that allegations were in fact made and under investigation in order to prove substantial truth. Otherwise, the media would be subject to potential liability everytime it reported an investigation of alleged misconduct or wrongdoing by a private person, public official, or public figure. Such allegations would never be

reported by the media for fear an investigation or other proceeding might later prove the allegations untrue, thereby ... [The] chilling effect on the media under

subjecting the media to suit for defamation. such circumstances would be incalculable.

Felder, 950 S.W.2d at 106. Many subsequent opinions adopted the Felder interpretation of McIlvain - mostly Texas courts of appeal, but also the Fifth Circuit applying Texas law. See, e.g., Green v. CBS, Inc., 286 F.3d 281, 284 (5th Cir. 2002); ABC v. Gill, 6 S.W.3d 19, 27 Media L. Rep. 2569 (Tex. App. - San Antonio 1999, pet. denied); UTV of San Antonio, Inc. v. Ardmore, Inc., 82 S.W. 3d 609 (Tex. App. - (Continued from page 10)

San Antonio 2002, no pet.); *Grotti v. Belo Corp.*, 188 S.W.3d 768, 776-77 (Tex. App. – Fort Worth 2006, pet. denied).

Summary Judgment Affirmed by Court of Appeals

The *Neely v. Wilson* defendants obtained summary judgment in the trial court, and that ruling was affirmed by the Austin Court of Appeals. *Neely v. Wilson*, 331 S.W.3d 990, 39 Media L. Rep. 1526 (Tex. App. – Austin 2011).

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

The Court of Appeals noted that no Texas court has dented the "neutral reportage" destrine and

adopted the "neutral reportage" doctrine, and alleged that the *Neely* defendants "never identify a doctrinal basis for their third-party allegation rule beyond insisting that this is what *McIlvain* and its progeny have held." The court also noted that "*McIlvain* is somewhat oblique in its analysis." 331 S.W.3d at 922.

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

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

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

This emphasis on the importance of reputation and the availability of libel actions is not typical of Texas Supreme Court opinions over the last several years, and may signal a significant change in how a majority of the Court sees such cases.

Texas Supreme Court's Majority Opinion

The Supreme Court reversed and remanded for trial. The majority opinion by Justice Eva Guzman (joined by four other Justices on the nine-member Court) rejects the interpretation of *McIlvain* as establishing a privilege for reporting third-party allegations, and repeatedly stresses the importance that libel actions remain available for plaintiffs who believe they have been defamed.

The majority begins its legal analysis by quoting the passage from "Othello" regarding the value of reputation ("Who steals my purse steals trash;/...But he that filches from me my good name/Robs me of that which not enriches him,/ And makes me poor indeed."), and points out that the Texas Constitution "twice expressly guarantees the right to bring

reputational torts." This emphasis on the importance of reputation and the availability of libel actions is not typical of Texas Supreme Court opinions over the last several years, and may signal a significant change in how a majority of the Court sees such cases.

The majority determined that the "gist" of the broadcast "was that Neely was disciplined for operating on patients while using dangerous drugs or controlled substances," and conducted a substantial truth analysis comparing that gist to what the majority believed was the literal truth.

Justice Guzman's opinion holds that lower courts had misinterpreted *McIlvain v. Jacobs*, which "stands for the proposition that if a broadcast reports that allegations

were made *and an investigation proves those allegations to be true*, the defamation claim is brought within the scope of the substantial truth defense" (emphasis added). Thus, the long line of cases finding the accurate reporting of third-party allegations to be privileged – regardless of the underlying truth of those allegations – was specifically disapproved.

The majority held that the broadcast's gist could not be held substantially true as a matter of law at the summary judgment stage because the agreed order "disciplined Neely for prescribing himself dangerous drugs or controlled

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substances. It did not discipline Neely for *taking or using* dangerous drugs or controlled substances" (emphasis in original). The Court noted that Neely provided evidence – primarily his own sworn statement – that he had never abused or been addicted to drugs and had never performed surgery while under their influence.

The majority further asserted that the agreed order between Neely and the Board did not discipline him for "substance abuse but only for a 'mental or physical condition,' which was his hand tremor."

Thus, the Court held there was a genuine issue of material fact as to whether the broadcast's gist was substantially true.

The majority did not sustain all of Neely's claims. Regarding Neely's allegation that the defendants falsely

stated or implied that he performed unnecessary surgery, the Court found that this statement was made in the context of reporting on allegations made in malpractice suits, and thus was privileged under Texas's common law and statutory privileges for accurate reports of judicial proceedings. (The majority found this privilege inapplicable to the report of the Texas Medical Board proceedings because, as described above, there allegedly was a genuine issue of material fact as to the accuracy of that report.)

The Court found that Neely was a private figure because he did not affirmatively seek publicity, and thus is only required to prove negligence. The majority also reaffirmed the long-standing Texas rule that professional associations and corporations, as well as individuals, may sue for libel.

Chief Justice Jefferson's Dissent

Chief Justice Wallace Jefferson dissented, joined by two other Justices. (One Justice on the nine-member Court did not participate.) The dissent found it unnecessary to reach the "third-party allegation" rule and the interpretation of *McIlvain v. Jacobs* (although it indicated its disagreement

with the majority on that issue), because it believed that the report was substantially true in substance.

The dissent emphasized that a Medical Board investigator concluded that Neely was unable to safely practice medicine "because of illness or substance abuse," that the agreed order required that Neely undergo a psychiatric evaluation by an addiction specialist, and that Neely admitted to using seven narcotics and many other drugs during the time frame he was performing surgeries (though Neely claimed that the effects wore off fast enough to not impact the surgeries). The Chief Justice opined that "the literal truth is as caustic as the gist, and the gist reasonably depicts literal truth."

The dissent asserts that the majority's interpretation of the Medical Board order – that the "mental or physical condition" for which Neely was disciplined was limited to his hand

tremor, not any drug-related issues – is not only erroneous, but unreasonable. "No reasonable person would interpret the Board's order the way the Court has."

The Chief Justice noted that "I disagree with the Court's restrictive view of *McIlvain*" in the context of the third-party allegation rule, but asserted that "even if that case's precise limits are unclear, the speech here would be protected under the general rules protecting reports of investigations, such as Texas' fair report privilege."

The dissent also emphasized the constitutional value of reports such as the

defendants' story about Neely's various issues:

"The broadcast is damning because it raises questions about Neely's fitness as a surgeon. But it is also substantially true. The Court's holding abridges the freedom to report on a matter of public concern. In that respect, it collides violently with the First Amendment."

The majority opinion includes a response to the dissent, a main focus of which is an argument that the dissent failed to view the facts in a light most favorable to Neely, the nonmovant at summary judgment.

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Potential Next Steps, Possible Impact of the Decision

The media defendants have until August 14 to file a motion for rehearing. Although such motions are not commonly granted, the Texas Supreme Court has in the past reconsidered its decisions, sometimes changing the outcome. This type of result may be less likely here, where the majority has already specifically responded to the dissent's forceful argument. Of course, a certiorari petition to the U.S. Supreme Court is also possible.

The primary immediate impact of the decision may be on how trial and intermediate appellate courts handle the "third-party allegation" rule. Both *Neely v. Wilson* and *McIlvain v. Jacobs* involved government investigations; at least arguably, substantially true accounts of such investigations fall within Texas' statutory "fair report" privilege, which protects "fair, true, and impartial" accounts of:

- "a judicial proceeding";
- "an official proceeding, other than a judicial proceeding, to administer the law";
- "an executive or legislative proceeding"; and
- "the proceedings of a public meeting dealing with a public purpose."

Tex. Civ. Prac. & Rem. Code § 73.002(b)(1).

In contrast, many of the post-*McIlvain* cases that applied the "third-party allegation" rule (as distinct from the statutory fair report privilege) dealt with allegations made by *private* individuals outside the scope of any official governmental proceeding such as a lawsuit or a regulatory board's investigation. For example, the allegation in *KTRK Television v. Felder* was one made by the parents of elementary school students against a teacher; though the parents made complaints to the school, no administrative proceedings were held that would have been subject to the statutory privilege.

The court nevertheless found that the allegations were newsworthy and the reporting of them should thus be protected, even though the reporting did not fall within the terms of the statutory privilege. The majority's language in *Neely v. Wilson* may mandate a different analysis in such cases: not whether the allegations were accurately reported, but whether the underlying *substance* of the allegations was substantially true.

The Supreme Court's opinion also raises the question as to whether a majority of that Court is more sympathetic to libel plaintiffs than the Court has been over the past several years. The majority's focus on the state constitution's provisions that may be read as protecting causes of action for defamation is an argument that largely has not been present in the Court's libel opinions. Similarly, the Court's focus on indulging all presumptions in favor of the non-movant arguably reaches a level in this case beyond that of previous decisions.

For example, though the majority emphasizes that Neely was not formally disciplined for *taking* prescription drugs, it does not present a detailed argument about how such an allegation would be more harmful to Neely's reputation than the literal truth – that he was disciplined for self-prescribing narcotics, that he was required to undergo psychiatric evaluation by an addiction specialist, that he admitted to taking narcotics during the same time frame that he was performing brain surgery (though he denied any ill effects from those drugs), that a Medical Board investigator had concluded that Neely should be subject to discipline due to inability to practice medicine "because of illness or substance abuse," and that malpractice suits against him alleged that he practiced medicine under the influence of drugs.

Jim Hemphill is a shareholder at Graves Dougherty Hearon & Moody, P.C., in Austin, TX and is co-chair of the MLRC DCS Litigation Committee. His firm does not represent any of the parties in Neely v. Wilson. The media defendants are represented by Tom Leatherbury, Dan Kelly, Lisa Bowlin Hobbs and Matthew Ploeger, Vinson & Elkins LLP, Dallas, TX. Plaintiff is represented by J. Bruce Bennett, Cardwell, Hart & Bennett, L.L.P., Austin, TX; James D. Baskin, III, The Baskin Law Firm, Austin, TX; and Cindy Olson Bourland, Law Firm of Cindy Olson Bourland, P.C., Round Rock, TX.

For the First Time, D.C. Federal Court Dismisses Libel Suit Based Solely on D.C.'s Anti-SLAPP Act

Applies D.C. Anti-SLAPP Act in Federal Diversity Actions Under Erie

By Laura R. Handman, Constance M. Pendleton, and Micah J. Ratner

On June 25, 2013, Judge Reggie B. Walton of the United States District Court for the District of Columbia applied the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5501 *et seq.*, in federal court and granted Atlantic Monthly Group, Inc. and its award-winning national correspondent Jeffrey Goldberg's special motion to dismiss a libel complaint brought by *pro se* plaintiff George Boley. *Boley v. Atlantic Monthly Grp.*, 2013 WL 3185154 (D.D.C. June 25, 2013).

Boley is a former Liberian public official and leader of a faction during the Liberian civil war in the mid-1990s who was later deported from the United States for alleged war crimes. This is the first time a federal court in the District of Columbia has dismissed a libel suit based solely on the D.C. Anti-SLAPP Act. The decision also addresses novel fair report privilege, opinion, and actual malice issues under D.C. law in ways that are favorable to media defendants.



Background

The lawsuit arose from two articles written by Goldberg and published on The Atlantic's website in 2010. The articles report on U.S. immigration charges against Boley for extrajudicial killings committed during the Liberian civil war, the investigation, and his arrest and detention by immigration officials, and refer to Boley an "evil" "warlord" who "belongs in the Hague." *Boley*, 2013 WL 3185154, at *1-2.

Citing an affidavit Goldberg submitted in one of Boley's prior unsuccessful libel suits, one article described how Boley's organization "recruited and armed child soldiers; fed them drugs; and ordered them to rape and kill." *Id.* at *1-2, *7-8.

Boley filed suit for defamation in January 2013 alleging that calling him an "evil" "warlord" who committed acts that would constitute war crimes tarnished his reputation. In response, The Atlantic and Goldberg filed a motion to dismiss for failure to state a claim under Federal Rules of

Civil Procedure 12(b)(6) and a special motion to dismiss under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502(a).

Anti-SLAPP Statute in Federal Court

Judge Walton decided only the anti-SLAPP motion. As a threshold matter, the court held that the D.C. Anti-SLAPP Act applies in federal diversity actions under the *Erie* doctrine, following the persuasive holdings of the

First, Fifth, and Ninth Circuits and Judge Rosemary Collyer's decision in *Farah v. Esquire Magazine*, Inc., 863 F. Supp. 2d 29, 36 & n.10 (D.D.C. 2012) that applied the D.C. Anti-SLAPP Act. *Id.* at *2.

Judge Walton expressly disagreed with the decision in *3M* Co. v. Boulter, 842 F. Supp. 2d 85, 102 (D.DC. 2012) authored by Judge Robert Wilkins that refused to apply the Act. *Id.* The United States Court of Appeals for the District of Columbia Circuit has an opportunity to put this split in

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authority to rest in *Farah v. Esquire Magazine, Inc.*, in which oral argument has been scheduled for October 3, 2013.

Prima Facie Showing of Protected Activity

Judge Walton had no difficulty finding The Atlantic and Goldberg's statements satisfied the first step of the anti-SLAPP analysis to make "a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." *Id.* at *4 (quoting § 16-5502(b)). The blog posts were "written . . . statement[s] made" on Atlantic's website, a "place open to the public," on "issue of public interest" about, not only a public figure,

but matters involving alleged war crimes by a foreign official and deportation proceedings that "are quintessentially matters of public rather than private interest." *Id.* at *4 (quoting § 16-5501(1) (A)(ii)).

The reporting also qualified as "other expression . . . communicating views to . . . the public in connection with an issue of public interest" (*id.* quoting § 16-5501(1) (B)) and as written statements made "[i]n connection with an issue under consideration or review" by an executive body. *Id.* at *5 (quoting § 16-5501(1)(A) (i)).

Likelihood of Success on the Merits

Applying the anti-SLAPP burden-shifting provisions under the second prong, Judge Walton held that Boley had failed to show "likelihood of success" because the statements were either privileged as a fair report of official proceedings, opinion or fair comment, and Boley had failed to show falsity or actual malice as to the statement that Boley was a "warlord." Judge Wilkins equated California's "probability of prevailing" standard with the District's "likelihood of success" standard – the first time a D.C. federal court had done so – but the opinion did not foreclose future courts from finding the D.C. Anti-SLAPP Act imposes a higher threshold. *Id.* at *5.

Specifically, the Court held, on a novel issue in the District, that Goldberg's summary of his own affidavit filed in one of Boley's prior civil lawsuits was protected by the fair report privilege as a fair and accurate account attributed to statements made in a judicial proceeding. *Id.* at *7. Reporting on the arrest, investigation, and charges were also privileged. *Id.* at *6. And to the extent Goldberg opined that the potential charge for war crimes was a "good thing[] because he belongs in the Hague," those statements were protected by the fair comment privilege. *Id.* at *7.

Further, the Court followed the Ninth Circuit and found referring to a plaintiff as "evil" is non-actionable "imaginative expression" and "rhetorical hyperbole" that is incapable of verification as fact. *Id.* at *8. Finally, Judge

Walton held that Boley was not likely to succeed on the claim arising from characterizing Boley as a "warlord," "because there is no indication that the statement was false or made with actual malice." Id. at *8. After finding that Boley was a limited-purpose public figure, Judge Walton held Boley was not likely to succeed on falsity or fault by merely resting on general denials without offering evidence in opposition to the anti-SLAPP motion. Id. at *8-12. This was particularly true because Atlantic and Boley pointed to evidence of the lack of actual malice, including that Goldberg conducted an investigation in which he personally observed Boley commanding child soldiers during the civil war and corroborated that Boley was a

warlord citing State Department reports and U.S. immigration authorities. *Id.* at *11-12.

After granting The Atlantic and Goldberg's motion, Judge Walton authorized them to seek attorneys' fees against Boley under the D.C. Anti-SLAPP Act.

Laura R. Handman, Constance M. Pendleton, and Micah J. Ratner of Davis Wright Tremaine LLP, and in-house counsel Bruce L. Gottlieb and Aretae Wyler, represented Defendants Atlantic Monthly Group, Inc. and Jeffrey Goldberg. Plaintiff George S. Boley, Sr. represented himself pro se.

MLRC MediaLawLetter

New York Court Of Appeals Grounds Air-Freight Libel Plaintiff

Vindicates Newspaper's Reporting and Re-Affirms Importance of Context in Analyzing Defamation Claims

By Karim A. Abdulla

Reaffirming the importance of context and its commitment to the privilege afforded by New York Civil Rights Law §74 ("§ 74") to "fair and true" reports of official proceedings, the Court of Appeals unanimously affirmed the dismissal of defamation claims brought by an air-cargo executive against *The Buffalo News* ("*The News*") for a series of reports published in 2007 and 2008. <u>Alf v. The Buffalo News, Inc.</u>, No. 209 (N.Y. June 27, 2013).

Factual Background

The case involved challenges by Plaintiff Christopher J. Alf to thirty-six statements contained within six articles and one editorial (the "Reports") published by The News between October 2007 and March 2008 concerning the federal investigation of and criminal guilty plea by Mr. Alf's solelyowned and closely-held company, National Air Cargo ("NAC"). The official proceedings and resulting Reports concerned

allegations that NAC overcharged the Department of Defense by millions of dollars for military air-freight forwarding services.

On October 25, 2007, NAC appeared in federal court, pleading guilty to a single-count criminal information which charged the company with making a false statement under 18 U.S.C. § 1001(a)(2), a federal felony statute criminalizing materially false, fictitious or fraudulent statements or representations knowingly and willfully made to the U.S. Government.

While the criminal information formally charged the company with only a specific, single instance of malfeasance,

the government alleged the company had engaged in a pattern of misconduct spanning years. Indeed, the guilty plea was entered in satisfaction of "any and all federal offenses committed for the period of January 1999 to and including April 2005," and NAC, in both the plea agreement and in open court, agreed its conduct caused a \$4.4 million loss thus entitling the government to an order of restitution in that amount. NAC also agreed to pay a fine of \$8.8 million and an additional \$14.8 million in penalties and civil forfeitures. The total amount paid by NAC – \$28 million – was described at the time by the then-U.S. Attorney as "the largest criminal recovery, in terms of dollars, in the history of Western New

York.

Mr. Alf was not a defendant in the criminal prosecution. In fact, the written plea agreement included a provision expressly insulating Mr. Alf and other NAC officers from prosecution and jail time: "The government agrees that [none of NAC's] present or former owners, directors, officers, or employees will be prosecuted by the office of the United States Attorney for the Western District of New York for ... any criminal

offenses committed for the period between January 1999 to and including April 2005...."

On October 26, 2007, having attended the plea proceeding and reviewed the plea agreement and other official records, veteran reporter Dan Herbeck wrote and *The News* published what was to become one of many articles and editorials concerning NAC and Mr. Alf. This article, published under the banner headline "Orchard Park company admits cheating U.S. Military," reported to the public the details of the allegations against and admissions by the company, and included the statement that the company had

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"admitted" it had cheated the Defense Department "out of millions of dollars."

The article reported the substantive terms of the plea agreement (including the monetary amounts at issue), and stated that while NAC was pleading guilty to a single felony count, the official proceedings related to conduct spanning a period of years and the admitted losses to the government ran into the millions of dollars. The article also reported that as part of the plea agreement, the government agreed to not prosecute Mr. Alf or any other NAC officials for any criminal offenses committed during this period. Subsequent reporting repeated many of the same statements initially published in the October 26 article.

Later publications included a November 2007 editorial, headlined "Taxpayers are cheated," which questioned the patriotism of the company and asked why "in the name of decency," the leaders of NAC were allowed to escape personal punishment for the company's conduct. In March 2008, *The News* published a multi-part "special report" which included a detailed profile of Mr. Alf and his lavish lifestyle (and included a reference to his insistence that he did nothing wrong).

Mr. Alf brought suit in 2008 (amending his complaint in 2010), alleging that the newspaper's reporting was false and defamatory. He claimed that none of the allegations were ever established as "facts" and, indeed, neither he nor his company ever admitted to cheating the government out of millions of dollars.

After issue had been joined but before any substantive discovery had taken place, *The News* moved for summary judgment arguing: (1) the Reports were privileged under § 74 as fair and true reports of a judicial proceeding; (2) many of the statements (including, in particular, those in the editorial) were privileged opinion; and (3) the complained-of statements referencing only NAC were not "of and concerning" the plaintiff (NAC was not a party to the proceeding) and therefore should have been dismissed on this basis as well. The plaintiff cross-moved for partial summary judgment, seeking an order: (1) holding the Reports to be false as a matter of fact and law; (2) striking the newspaper's § 74, substantial truth and opinion defenses; and (3) directing the parties to proceed with discovery.

The Trial Court's Decision

On December 22, 2011, the trial court (Hon. Gerald J. Whalen, Sup. Ct., Erie Co.) granted *The News*' motion on the basis of § 74 (the decision was silent as to the other prongs of the motion). Properly recognizing the "chilling effect" of protracted litigation on news gathering, Justice Whalen observed that "courts are encouraged to decide motions for summary judgment early in the litigation." Citing to the Court of Appeals' seminal decision in *Holy Spirit Association for the Unification of World Christianity v. The New York Times Company*, 49 N.Y.2d 63 (1979), the trial court also correctly noted the historic "degree of liberality" which must be afforded when determining whether an article constitutes a fair and true report of an official proceeding, and that the language used in such a report "should not be dissected and analyzed with a lexicographer's precision."

Despite the outcome, the trial court's decision was not entirely satisfactory to the newspaper: in his decision, Justice Whalen held that "a fair reading of the articles leads the reader to inaccurately conclude that NAC and Alf admitted to cheating the government over a period of years." (Emphasis added.) This, the court found, was not accurate because Mr. Alf was not a party to the criminal proceeding (indeed, he did not even appear during the plea proceeding) and NAC had only pleaded guilty to making a false statement on a single occasion.

Attributing the supposed "mistake" to the reporter's misinterpretation of the plea agreement insofar as it concerned or referred to "relevant conduct" (a legal term of art used in federal sentencing), the trial court was willing to overlook the newspaper's supposed error because "to hold a newspaper reporter to such a standard as to require technical legal knowledge of specific terms used during a legal proceeding, such as federal sentencing, in order to submit an article for publication is unreasonable." In essence, the trial court held that while the newspaper got it wrong, it was close enough for purposes of § 74: "The content of [the record of the proceeding]...could fairly lead one to report this story as it was reported by The News despite it not being technically accurate. When viewed in the totality of circumstances, the reporter's factual account of what transpired is accurate enough to fall under the protection of § 74 of the Civil Rights Law."

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On plaintiff's appeal to the Fourth Department, this became a central issue for both sides. Mr. Alf, not surprisingly, argued that the trial court's holding that the Reports were erroneous mandated reversal: in his view, an article that was erroneous and misleading to readers was, by its very nature, not fair and true.

While *The News* did not disagree with the legal standards used by the trial court (*i.e.*, employing a degree of liberality, avoiding dissection and analysis using a lexicographer's precision, and not holding reporters to a standard of precise knowledge of technical terms of art), it chafed at the court's conclusion that the reporting was inaccurate. Thus, while defending Justice Whalen's award of summary judgment, the newspaper nonetheless challenged the trial court's determination that the Reports were

inaccurate and its 'average reader' determination.

The Appellate Division Decision

On November 16, 2012, the Appellate Division (Centra, J.P., Peradotto and Lindley, JJ.; Carni and Sconiers, JJ., dissenting in part) affirmed the Trial Court's award of summary judgment to *The News*.

While the trial court had dismissed the case only on the § 74 aspect of the motion, the Appellate Division also addressed the "of and concerning" portion of the newspaper's motion. In this regard, the Appellate Division was unanimous in its decision. As the majority held, "the

statements referencing NAC only, and not plaintiff, were not 'of and concerning' plaintiff, and the amended complaint therefore was subject to dismissal to the extent that the allegedly defamatory statements did not name plaintiff, apart from the defense of absolute privilege under Civil Rights Law § 74."

Consistent with the historically "liberal interpretation" and application of the statute as well as the Court of Appeals' decision in *Holy Spirit*, *supra*, the Appellate Division majority agreed with the newspaper and determined that all of the challenged statements, when read in context, were privileged pursuant to § 74. In doing so, the majority rejected the trial court's misreading of the articles, holding

instead "[w]e agree with defendant that the articles read as a whole, including all of the allegedly defamatory statements, would lead the average reader to conclude that NAC, <u>not plaintiff himself</u>, had cheated the government." (Emphasis added).

Dissenting in part, Justices Carni and Sconiers disagreed with the majority concerning the application of the § 74 privilege to those statements "specifically concerning plaintiff," holding that the newspaper's reports fell outside of the scope of the § 74 privilege because they "impute wrongdoing to the plaintiff as an individual" and "produce a different effect on the mind of the reader from that which the pleaded truth would have produced." The dissent opined that it would strike the § 74 defense as to those statements specifically of and concerning Mr. Alf.

The Court of Appeals Decision

In a decision viewed as a vindication of *The News*' reporting, the Court of Appeals on June 27, 2013 affirmed the Appellate Division's majority decision upholding the award of summary judgment. In doing so, the Court noted the importance of context when reviewing statements alleged to be defamatory:

When examining a claim of libel, we do not view statements in isolation. Instead, the publication must be considered in its entirety when evaluating the defamatory effect of the words...viewing the articles as a whole, the average reader would conclude that the company, and not the plaintiff,

pleaded guilty to wrongdoing and that the amount of restitution covered more than the single admitted incident. [...] Here, the News provided substantially accurate reporting of the plea agreement and the fines and restitution, as discussed in open court. Thus, all the challenged statements concerning NAC and plaintiff relating to these proceedings are entitled to immunity under Civil Rights Law § 74.

The Buffalo News was represented by Joseph M. Finnerty and Karim A. Abdulla of Hiscock & Barclay, LLP. Plaintiff Christopher J. Alf was represented by John J. Walsh, Carter, Ledyard & Milburn, LLP; and Richard T. Sullivan, Harris Beach, PLLC.

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Here, the News

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concerning NAC and

plaintiff relating to

these proceedings are

entitled to immunity.

Expanding The Tort Of Outrage?

Court Dismisses Privacy Tort But Allows Outrage Claim Based On Publication of Public Concern

By Rachel F. Strom

On May 22, 2013, the United States District Court for the Northern District of Alabama granted in part and denied in part a motion to dismiss claims for invasion of privacy and outrage (or intentional infliction of emotional distress) brought by the mother of Natalee Holloway, an Alabama teenager who went missing in Aruba in 2005. *Holloway v. American Media, Inc.*, No. 2:12-cv-2216-TMP, 2013 WL 2247990 (N.D. Ala. May 22, 2013). The claims are based on three articles published in the *National Enquirer* that reported on the investigation into the disappearance of Natalee Holloway, including leads that she may have been murdered and, if so, where she was buried.

The court dismissed plaintiff's invasion of privacy claim because "descriptions of the investigation into Natalee's alleged death and gravesite do not constitute a private matter." Despite finding that the articles addressed matters of public concern and were not "of and concerning" plaintiff, the court concluded that, on a motion to dismiss and accepting plaintiff's allegations that the articles were false, the claim was not barred by the First Amendment and their publication could fit within the narrow confines of Alabama's cause of action for outrage.

Notably, in the context of a motion to dismiss, the court declined to take judicial notice of the scores of other publications and television shows that reported on substantially similar information in essentially the same

terms, often conveyed through the plaintiff's own words and appearances. Rather, the court determined that any argument that the *National Enquirer*'s reporting could not be considered sufficiently "outrageous" under these circumstances was better addressed on a motion for summary judgment. Taking the court up on this invitation, the

defendants recently filed a motion for summary judgment making this precise argument.

Motion to Dismiss

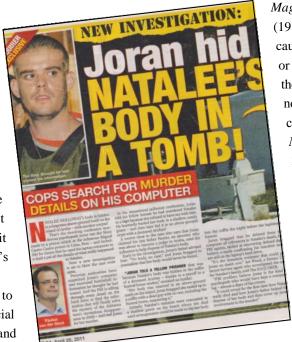
On August 17, 2012, defendants moved to dismiss both of plaintiff's claims. Defendants first argued that they were barred by the First Amendment because: (1) under *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the articles at issue could not support a claim for intentional infliction of emotional distress or invasion of privacy because they address matters of public

concern; and (2) under *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), plaintiff could not maintain a cause of action to recover emotional or reputational damages arising from the speech at issue because she could not satisfy the constitutional "of and concerning" requirement set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Defendants also argued that both claims failed under Alabama state law because: (1) the articles were not about plaintiff; (2) the claim of outrage failed because, particularly given plaintiff's own public comments about her daughter's case and the legion of other publications that were

substantially the same as the articles at issue, she could not establish that the defendants conduct was sufficiently outrageous or that she suffered extreme emotional distress from the publication of defendants' articles; and (3) while it was unclear what specific privacy tort plaintiff was attempting to assert, the claim would be barred because the articles at issue addressed a matter of public interest.

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In response, plaintiff argued that her allegations of knowing falsity stripped the articles of First Amendment protection. She also asserted that there was no First Amendment or state common law requirement that the articles at issue concern her.

The May 22 Opinion

On May 22, the court issued its opinion, granting in part, but denying in part, defendants' motion to dismiss. The court first rejected defendants' First Amendment arguments. It held that the fact that the speech at issue was allegedly knowingly false takes the case outside of the protections of *Snyder* and *Falwell*. The court also found that *Sullivan*'s "of

and concerning" requirement does not apply to claims for intentional infliction "because of the different essential natures of the two torts.... Publication of false facts that are not 'of and concerning' the plaintiff cannot damage the plaintiff's reputation, which is an essential element of libel; publication of false facts may, however, serve to inflict severe emotional distress where the defendant 'acted for the specific purpose of inflicting emotional distress on [plaintiff] or knew or should have known that emotional distress to [her] would likely result."" Holloway, 2013 WL 2247990, at *10 (citing Foretich v. Advance Magazine Publishers, Inc., 767 F. Supp. 1099, 1105 (D.D.C. 1991)).

Addressing defendants' state law arguments, the court first held that, based on the pleadings alone, plaintiff had stated a viable claim for outrage. In so holding, the court noted that "defendants argue that the outrage claim is not actionable because similar information was reported on television or in other publications, and because Ms. Holloway contributed to the widespread media coverage by appearing on television, granting interviews to the media, and writing about the events. This argument, which relies primarily upon evidence submitted outside of the pleadings, does not provide a basis for a Rule 12(b)(6) motion." *Id.* at *11. The court, however, held that "[t]he argument may well be asserted in a motion for summary judgment." *Id.* at *11 n. 21.

Next, turning the merits of the outrage claim, the court explained that "[t]here are no reported Alabama cases where the underlying conduct allegedly causing the extreme emotional distress was a mere publication of information." *Id.* at *12. The court also recognized that "[t]he Alabama Supreme Court ... has generally acknowledged only three types of cases that constitute successful outrage claims: (1) cases involving "wrongful conduct in the context of family burials"; (2) cases in which "insurance agents employ [] heavy-handed, barbaric means ... to coerce ... insured[s] into settling ... insurance claim [s]," and (3) cases "involving particularly egregious sexual harassment." *Id.* (citing *Tinker v. Beasley*, 429 F.3d 1324, 1330 (11th Cir. 2005)).

Despite these strict limitations, the court determined that, "[i]n this case, the plaintiff's outrage clam arises from

graphic descriptions of the treatment of her daughter's corpse. Because 'family burials' is one of the limited types of cases in which this tort has been applied, this court is unwilling to state as a matter of law that falsely reporting gruesome details of a daughter's death, coupled with the intent to cause emotional distress, could never support a claim for outrage." *Id*.

The court did, however, dismiss plaintiff's claim for invasion of privacy. It noted that "[e]ven assuming ... that Ms. Holloway can maintain an action for invasion of privacy based upon the publication of descriptions of Natalee's alleged burial, the action is viable only if the subject of the intrusion must be, or is entitled to be, private." *Id.* (internal citation

The court concluded that, on a motion to dismiss and accepting plaintiff's allegations that the articles were false, the claim was not barred by the First Amendment and their publication could fit within the narrow confines of Alabama's cause of action for

outrage.

omitted).

The court concluded that:

"Under the unusual facts of this case, the court finds that descriptions of the investigation into Natalee's alleged death and gravesite do not constitute a private matter. First, such accounts are plainly newsworthy as reporting on possible criminal, public-safety, or law enforcement activities. Whether and how Natalee may have died, where and how her body may have been disposed of, and the progress of the investigation

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into these questions was simply not a private matter. Second, Ms. Holloway admits that she actively sought media interest, inquiry, and attention to the plight of Natalee. In her undeniably determined efforts to find her daughter, Ms. Holloway chose publicity and

attention, forgoing any right to claim the matters private. The court is not critical of this decision, but is simply pointing out that once she made the matters public, they could no longer be private." *Id.*

In this regard, the court noted that it "recognizes some dissonance in a finding that the publication of gruesome, false descriptions of a daughter's death can be 'outrageous' while the subject matter itself is not 'private.' That result, however, is a logical result of the public policy behind the common law torts asserted in this case.... Although Ms. Holloway may have chosen to surrender any existing privacy (of which there was precious little, in any event) in order to gain support for the search for her

daughter, she did not chose to be subjected to the emotional pain allegedly caused by outrageous and knowingly false stories on such an emotional topic as the fate of her daughter. She no longer has a claim for invasion of privacy, but she has sufficiently pleaded a claim for intentional infliction of emotional distress. Accordingly, the motion to dismiss the invasion-of-privacy claim is due to be granted because, under state law, Ms. Holloway did not have a privacy interest in the subject matter and, even if she did, the published information was not treated as private by her." *Id*.

Pending Motion For Summary Judgment

Taking the court up on its invitation to demonstrate, on a motion for summary judgment, that "similar information was reported on television or in other publications" as well as in plaintiff's own contributions "to the widespread media coverage by appearing on television, granting interviews to

the media, and writing about the events," on July 8, 2013, defendants moved for summary judgment with respect to plaintiff's sole remaining claim for outrage. The motion for summary judgment asks the court to evaluate plaintiff's claim for outrage within its full context – a context where plaintiff herself, along with a multitude of other publications and broadcasts, addressed the same topics in substantially similar terms as defendants.

Following the filing of defendants' summary judgment motion, the court *sua sponte* stayed discovery pending a determination of the motion, but invited plaintiff to file a Rule 56(d) affidavit, arguing that limited discovery is necessary before the court decides the motion. The defendants will then have an opportunity to

contest plaintiff's entitlement to discovery before the motion is adjudicated.

Defendants are represented by Lee Levine, Cameron A. Stracher, Jay Ward Brown and Rachel F. Strom of Levine, Sullivan, Koch & Schulz, LLP, and Harlan I. Prater, IV and Jeffrey P. Doss of Lightfoot Franklin & White LLC, Birmingham, AL. Plaintiff is represented by L. Lin Wood and Stacey Godfrey Evans of Wood Hernacki & Evans LLC, Atlanta, GA; and Carolyn Littell Courson.

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NEW FROM MLRC: PUBLISHING PHOTOS, IMAGES, OR OTHER ILLUSTRATIONS

A presentation from the Pre-Publication/Pre-Broadcast Committee on the legal issues arising from the use of photos. The presentation consists of two components: a powerpoint to show an audience, and a "script" to explain what is in each slide. The powerpoint can be customized to suit the needs of a particular client. Slides that are not relevant to the organization's needs/issues can be deleted, and other information could be added, if desired.

New York Court Drills Dentist's Case Against Yelp

Filtering Positive Reviews, Paid Ads Do Not Defeat Section 230 Protection

Last month, a New York trial court ruled in favor of Yelp in a defamation case filed by a Manhattan dentist. <u>Braverman v Yelp</u>, <u>Inc</u>., 2013 N.Y. Misc. LEXIS 2764 (N.Y. Sup. June 28, 2013) (Scarpulla, J.). Under Section 230 of the Communications Decency Act, Yelp was not responsible for negative user reviews, and did not lose Section 230 immunity by allegedly filtering out positive reviews or posting ads for other dentists.

Background

Plaintiff Mal Braverman operates a dental practice in midtown Manhattan called "Smiles Studio." Several very negative reviews are posted on online review site Yelp.com, among them statements that he is "creepy" and "wildly unprofessional and offensive." Braverman sued Yelp.com for defamation, tortuous interference with business relations, and tortuous interference with contractual relations. Yelp filed a motion to dismiss.

The court heard oral arguments on the case earlier in February, and at that time dismissed the tortuous interference claims for failure to state a claim.

Section 230 Applied

Ruling on the remaining claim for defamation, the court last month found that the claim could not survive the protection of Section 230 of the CDA. Section 230 protects a defendant from liability as long as (1) they are a provider of an "interactive computer service"; (2) the complaint seeks to hold them liable as a "publisher or speaker"; and (3) the action is based on content provided by another individual (or, put more directly, user generated content). The court found that Yelp was clearly an interactive computer service and plaintiff was attempting to hold it liable for user reviews that Yelp had no part in creating.



Plaintiff argued that Yelp was not entitled to immunity

because the "defamation action is based on information that Yelp itself created or developed." His evidence of this was based on two theories: (1) that Yelp filtered out positive reviews; and (2) placed a "Best of Yelp list" advertisement on the same page. According to plaintiff, this made Yelp the defacto author of the material.

The court disagreed, finding that even if Yelp filtered out positive reviews this would not make it the creator of the user content. Filtering is "an exercise of a publishers traditional editorial function protected by the CDA." *Citing Batzel v. Smith*, 333 F.3d 1018, 1030 (9th Cir. 2003).

In addition, the "Best of Yelp List" of dentists fell well within the bounds of CDA protection even if it was a paid advertisement. This is because choice of "what content to display on the page" does not change the status of a provider regarding CDA immunity.

Plaintiff was represented by Andrew C. Risoli, Eastchester, NY. Yelp.com was represented by Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York, NY.

New York Court Dismisses Former Politician's Defamation Suit against The Wall Street Journal

Plaintiff Failed to Show Statements Were False

A New York trial court dismissed a former New York City Councilman's defamation suit against *The Wall Street Journal* over an article reporting that he once ran a campaign ad "declaring his love for Asian women." *Jennings v. Wall Street Journal*, No. 103559/12, 2013 N.Y. Misc. LEXIS 2076 (N.Y. Sup. May 15, 2013).

Background

The plaintiff was a New York City Councilman from 2001 to 2005. In 2011, he challenged incumbent Councilman Ruben Wills for a seat on the City Council. In August 2011, *The Wall Street Journal* published an article about the election and the background of the candidates.

The article noted that almost a decade earlier Jennings placed campaign advertisements in two New York Chinese-language newspapers. The advertisement referred to Jennings as a "Councilman with a Chinese Heart" and included several photographs of Jennings with a woman of Chinese descent. The advertisement also described Jennings's previous marriage to a Taiwanese woman and his relationship with a "new love," a woman from China.

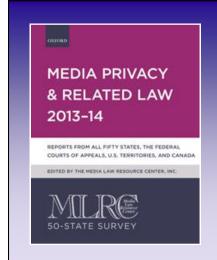
Jennings sued both *The Wall Street Journal* and its parent company, asserting a single cause of action for defamation over one sentence stating: "Allan Jennings placed an advertisement in a Chinese language newspaper declaring his love for Asian women."

Jennings claimed the statement was defamatory because it was "intended to turn voters against Allan Jennings in his district" and "intended to ruin and destroy Allan Jennings's future in politics and turn all New Yorkers, the people of America and the World against him."

Motion to Dismiss

Plaintiff argued that the sentence was false because his campaign ads were about "racial harmony not a declaration of love for Asian women." However, the court rejected that position. The court held that "the fact that the article omitted certain information that was contained in his advertisement did not alter the substantially accurate character of the article."

In addressing plaintiff's claim that he lost votes with the black community as a result of the article, the court called the argument "unavailing." It noted that the article did not claim plaintiff disliked women of other races or that he only loved Asian women. Furthermore, it held "it would serve no useful purpose in this case to analyze and then to controvert the innuendos that plaintiff asserts can be read into the gossipy tale which was retailed in the challenged article."



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MEDIA PRIVACY LAW 2013-14

Media Privacy and Related Law 2013-14 examines privacy and related claims that often arise in a media context, and how courts handle these issues.

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Ohio Court Reinstates Libel and Related Claims Against Local Newspaper

Trial Court Erred in Applying Neutral Reportage Privilege

The Ohio Court of Appeals recently reinstated a high school football coach's defamation and emotional distress complaint against a local newspaper, finding the trial court erred in adopting and applying the neutral report privilege. <u>Bahen v. Diocese</u> <u>of Steubenville</u>, 2013 Ohio 2168 (Ohio App., May 24, 2013) (DeGenaro, Donofrio, Waite, JJ.).

The neutral reportage privilege, the court held, could not be applied because of a prior decision by the Ohio Supreme Court that explicitly declined to adopt it. Since there was no other basis for the trial court's ruling, all of plaintiff's claims were reinstated.

Background

In early 2011 the Diocese of Steubenville, Ohio issued a press release stating that "there is a semblance of truth to the allegation" that plaintiff, a teacher and head football coach at Steubenville Catholic Central High School, had physically abused a student. The press release also stated that plaintiff had been placed on paid leave and the matter referred to a local prosecutor in accordance with law.

Shortly after, the *Steubenville Herald Star* and a local television station reported on the content of the press release. The newspaper article also included a quote from a representative of the Survivors Network of Those Abused by Priests, which "urg[ed] anyone who has been harmed by Greg M. Bahen, to report it to law enforcement, not the diocese. The police are the proper officials to be investigating crimes against kids."

In September 2011, plaintiff sued the *Herald Star*, the television station and the Diocese for defamation and negligent and intentional infliction of emotional distress.

The newspaper filed a motion to dismiss arguing that it was protected by the neutral report privilege and that the article accurately described the press release and was not false. The trial court granted the motion, finding that the neutral reportage privilege applied and barred the defamation and emotional distress claims.

Court of Appeals Decision

The Ohio Court of Appeals first rejected the newspaper's argument that the U.S. Supreme Court's heightened pleading standards of <u>Bell Atlantic v. Twombly</u> and <u>Ashcroft v. Iqbal</u> should apply in state court. The sole authority to construe Ohio civil procedure lies with the state supreme court and it has not adopted the more restrictive standards of *Twombly*, the court concluded.

Substantively, the court held that the trial court erred in applying the neutral reportage privilege. The privilege protects accurate and disinterested reports of newsworthy statements made by reputable third parties about public figures. The Court of Appeals declined to comment on the trial court's findings that these elements were met. Instead the court ruled that the privilege was unavailable due to the decision of the Ohio Supreme Court in <u>Young v. The Morning Journal</u>.

In *Young*, a divided Supreme Court declined to recognize the privilege, and did so without much discussion. A strongly worded dissent in the case faulted the majority for not giving due consideration to the privilege.

Noting that the Ohio Supreme Court has not revisited the issue, the court concluded "We will not do so here, and expressly reject the neutral reportage privilege."

Plaintiff was represented by John Mascio, Mascio Law Offices, Steubenville, OH. Defendant was represented by Melanie Morgan-Norris, Steptoe & Johnson PLLC, Wheeling, WV.

Judge Dismisses Former Television Reporter's Defamation, Intrusion Claims Against CBS

Defamatory Implication Not Intended; No Expectation of Privacy While Meeting Sources

By Matthew E. Kelley

A trial judge in the Circuit Court of Cook County, Illinois, granted summary judgment in favor of CBS in a defamation and invasion of privacy lawsuit filed by a former reporter for NBC's Chicago television station. *Jacobson v. CBS Broadcasting Inc.*, No 08 L 7331 (Cir Ct. Cook Cnty., Ill. July 2, 2013) (memorandum opinion and order).

In disposing of the defamation claims, Judge Jeffrey Lawrence held that where a public-figure plaintiff alleges defamation by implication, she must show that the defendants intended the defamatory inferences or at least knew such inferences could be made. The judge held that plaintiff Amy Jacobson, then a prominent reporter for WMAQ-TV, was a general-purpose public figure, and that she had presented no evidence of actual malice on the part of CBS.

Earlier, Judge Lawrence granted CBS's motion for partial summary judgment on Jacobson's intrusion upon seclusion claim, holding that she had no reasonable expectation of privacy when she was videotaped meeting with sources. *Jacobson v. CBS Broadcasting Inc.*, No 08 L 7331 (Cir Ct. Cook Cnty., Ill. Sept. 10, 2012) (memorandum opinion and order).

Background

In 2007, Jacobson reported for WMAQ on the case of Lisa Stebic, a suburban mother of two children who disappeared while in the process of divorcing her husband. Police and journalists quickly focused on the estranged husband, Craig Stebic, who local police named a "person of interest" a few months after his wife vanished. The case remains unsolved.

Craig Stebic's sister, brother-in-law and their children visited him in the midst of the investigation, and invited Jacobson to come talk to them at the Stebic home. Jacobson, who was on her day off, arrived at the home with her two young sons and swam with them in the Stebics' backyard

pool during the course of the visit, which she later described as both an opportunity to spend time with her own children and a job-related meeting with sources.

Meanwhile, a reporter and videographer for CBS-owned WBBM-TV also happened to be in Stebic's neighborhood that day covering the story of Lisa Stebic's disappearance. After having their request for an interview rebuffed by Stebic's brother-in-law, the CBS journalists visited neighbors who live in a house on a small hill overlooking Stebic's backyard. They noticed Jacobson and recorded videotape of her in Stebic's yard, dressed in a bikini top and wrapped in a towel.

WMAQ suspended Jacobson as news spread of Jacobson's visit to the home of a key subject of one of her stories, and Chicago's major daily newspapers posted articles about her suspension online three days later. The following morning, WBBM broadcast a report that included separate scenes of Jacobson and Stebic in his yard. Later that day, WMAQ fired Jacobson. She now works as a morning talk-show host on Chicago's WIND-AM.

Jacobson sued CBS in 2008, claiming defamation, intrusion upon seclusion, and a number of tag-along torts. She asserted that the CBS story defamed her by stating that her NBC bosses were questioning her "technique in pursuing a source," that she had frequently visited Stebic's house, that her reason for being there was unclear, and that she had "never mentioned her social relationship with Stebic or his family." Jacobson claimed those statements, accompanied by images of her in her bikini top and, separately, of Stebic putting on his shirt, implied she lacked journalistic integrity and used sex to pursue sources and obtain stories.

Summary Judgment

In granting summary judgment on the defamation claims, Judge Lawrence held that "[t]here can be little doubt that

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Jacobson was a public figure for all purposes." He cited her testimony that she was a "well known" reporter, her agent's testimony that she was a "very prominent" journalist with "great name recognition," as well as the fact that Chicago newspapers had repeatedly reported on her off-air activities such as being featured in charity events including "Dancing with Chicago Celebrities." The judge rejected Jacobson's contention that she was not even a limited-purpose public figure.

Applying the criteria for limited public figures laid out in Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir. 1980) and later referenced by Illinois appellate courts, the judge held Jacobson was the "major participant" in the story first reported in the Chicago Tribune and Chicago Sun-Times regarding her journalistic ethics, and the allegedly defamatory statements "clearly bore on her credibility" in connection with that controversy.

Turning to the question of actual malice, the court found that a public-figure plaintiff claiming defamation by implication must provide "clear and convincing evidence that the defendant published the libel with intent to imply a falsehood or, at least, with the subjective knowledge that such an implication was foreseeable." Although Illinois appellate courts have not addressed this issue, Judge Lawrence cited two cases in which the Seventh Circuit came to the same conclusion: Woods v. Evansville Press Co., Inc., 791 F.2d 480 (7th Cir. 1986) and Saenz v. Playboy Enters., Inc., 841 F.2d 1309 (7th Cir. 1988). "Any other rule," the judge wrote, "would require a publisher to anticipate every possible meaning which a reader might draw from the text and impose the very self-censorship which is abhorrent to the First Amendment."

The judge held that there was no evidence of actual malice because all of the statements in the broadcast were true and all of the CBS employees involved testified they did not intend the alleged sexual implication or believe viewers would get that impression.

In an earlier ruling granting CBS partial summary judgment on Jacobson's intrusion claim, Judge Lawrence held that videotaping Jacobson while she was meeting with sources was not an invasion of her privacy. Noting that "intrusion upon seclusion is a newborn tort in Illinois law whose features are not fully formed," the court described

"analytical confusion" among intermediate state appellate courts regarding what constitutes a private matter or activity the observation or revelation of which gives rise to an actionable claim. The confusion, Judge Lawrence explained, arose because some courts focused on whether the activity or information at issue was in plain view or otherwise public, while other courts focused on whether the activity or information was inherently a private matter.

Jacobson's intrusion claim failed, the court held, because of its public context: Her meeting with sources involved in the criminal investigation of Lisa Stebic's disappearance. Not only was Jacobson recorded while doing her job, she was aware that the CBS journalists were in the area because she observed them being turned away at Stebic's front door. "The precise boundaries of a legally enforceable zone of privacy are hard to discern," the court wrote. "However, the matter which she was investigating as well as Jacobson herself, while engaged in her profession, are clearly outside of it." The court also rejected Jacobson's contention that CBS's use of a telephoto lens amounted to an actionable intrusion, because "Illinois cases hold that seeing what is in plain view without trespassing is not rendered illegal by the use of binoculars."

Finally, in the most recent ruling granting summary judgment on the defamation claim, the court also granted CBS summary judgment on Jacobson's claims of tortious interference with business relations and intentional infliction of emotional distress. Jacobson conceded that the defeat of her defamation claim doomed any derivative torts based on the defamation, but argued that CBS's recording and editing of the videotape were independent bases for her tag-along claims. The court disagreed. "Jacobson might have a point, if the court had not previously dismissed her claim based upon intrusion upon seclusion," the court held. "As to the editing of the tape, this was a purely internal operation which had no meaning apart from the broadcast."

CBS Broadcasting Inc. was represented by Anthony Bongiorno and Naomi Waltman of the CBS Law Department, Lee Levine, Jay Ward Brown, Ashley Kissinger, Katharine Larsen, and Matthew E. Kelley of Levine Sullivan Koch & Schulz LLP, and Brian Sher of Bryan Cave L.L.P. Plaintiff was represented by Kathleen T. Zellner and Douglas H. Johnson of Kathleen T. Zellner & Associates.

New Laws in Texas Impacting the Media

By Laura Prather and Catherine Robb

For the third legislative session in a row, the Texas legislature has made significant strides in advancing First Amendment rights by passing laws to protect journalists and citizens in their exercise of free speech. Past sessions have seen the passage of a Reporters' Privilege law and one of the strongest anti-SLAPP laws in the nation. This year, legislators passed a Retraction Statute which establishes a uniform process for broadcasters and newspapers to correct or clarify statements made, thereby minimizing their legal exposure when mistakes are made. In addition, Texas' anti-SLAPP statute was strengthened and the Public Information Act was expanded to clarify that government officials' electronic communications — even on personal devices — and communications related to third party contractors are subject to the Act.

Texas Enacts a Retraction Statute

On June 14, 2013, Texas joined thirty-two other states in enacting a <u>retraction</u> statute – a concept that dates back as far as 1882. Like the recently enacted Washington retraction statute, the Texas law is patterned after the Uniform Correction or Clarification of Defamation Act adopted by the Uniform Law Commission in 1993. The statute

encourages someone who believes they have been defamed to come forward in a timely manner and give the publisher the opportunity to correct any mistake that may have been made. It applies to defamation claims related to any publication made on or after the effective date whether by a public or private figure and whether complaining about a media or non-media publication.

During the legislative session, Texas lawmakers agreed that defamation is a unique area of law where the harm to reputation can often be cured by measures taken other than money damages, and lawsuits can be prevented with a swift and prominent correction. They were persuaded by the fact that ninety percent of defamation cases are decided on the basis of constitutional privileges and take an average of four years to adjudicate. And, even in cases in which truth or falsity of the statements is ultimately determined, the

long after the time it can help restore the plaintiff's reputation. Given these realities, lawmakers decided to change the current system in an effort to promote early resolution of disputes involving speech related issues. The goal of this legislation is to provide a quick and cost-effective means of correcting or clarifying mistakes, restoring reputations, and avoiding costly and lengthy litigation by all parties.

Under the law, someone who feels they have been

slowness of the litigation process means the decision comes

Under the law, someone who feels they have been defamed should make a request for a correction no later than 90 days after receiving knowledge of the publication and in all circumstances, prior to the statute of limitations running out. In addition, when making the request, there are specific parameters one must follow, including who and how to notify the publisher, stating with particularity what is alleged to be false, and identifying when and where the publication was made (if known).

After a retraction request is received, the publisher may publish a correction, an apology or the requester's own statement of facts or a summary thereof. To comply with the statute, the publisher must correct the mistake within 30 days of receiving the request, and the correction must be made in the same manner and medium as the original publication or, if that is not possible, in a

prominent manner and medium intended to reach the same audience as the original mistaken publication reached. If necessary, the publisher can request additional information from the requester to substantiate the allegations that a mistake was made and additional time is provided under the statute for that exchange of information to take place. Also, if the article in question was published on the internet, the retraction must be permanently attached to the original article online.

A lawsuit can still be filed after a retraction is run; however, the damages will be mitigated by the retraction, and the plaintiff cannot obtain exemplary damages if he waited more than 90 days to request the retraction or unless he can show actual malice. Further, if a defamation lawsuit is filed

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All of the legislative successes came through enormous effort and political wrangling.

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without previously giving the publisher notice of the mistake and an opportunity to cure, the publisher can have the case abated for 60 days so that the procedures for a request for a retraction can take place. The new law is good public policy because it promotes free speech, judicial economy, and resolution of disputes in a manner the existing legal system in Texas could not provide.

Texas Strengthens its Anti-SLAPP Law

Another victory in the 2013 Texas legislative session was the strengthening of Texas' anti-SLAPP law. The Citizens Participation Act, passed in 2011, was already one of the strongest in the country, allowing a judge to dismiss a meritless lawsuit that "relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association," and the exercise of free speech was defined as "a communication made in connection with a matter of public concern." If the anti-SLAPP motion is granted, the non-movant is required to pay the movant's attorney's fees and sanctions.

Under the law, the burden of proof is initially on the party who files the anti-SLAPP motion to establish by a preponderance of the evidence that the lawsuit was filed in response to the exercise of his/her First Amendment rights. Then the burden shifts to the party who brought the claim to establish by "clear and specific evidence," a prima facie case for each essential element of the claim. "Clear and specific" is a heightened evidentiary standard between preponderance of the evidence and beyond a reasonable doubt.

The original law was intended to provide the right to an interlocutory appeal for all denials of anti-SLAPP motions, but because an errant Texas court misinterpreted the language in the statute, the 2013 legislature clarified this and some other aspects of the law. First, in some cases, plaintiffs had argued that a valid defense, such as judicial privilege, was not something that should be considered at the anti-SLAPP stage. Although there were no judicial holdings that adopted that perspective, the legislature took the opportunity to clarify its original intent and amend the statute to state that if the moving party establishes, by a preponderance of the evidence, each essential element of a valid defense to the claim, the court shall grant the anti-SLAPP motion.

Second, because, during the interim, there was a split among the Texas appeals courts concerning the right to an interlocutory appeal under the anti-SLAPP statute, the Legislature made it crystal clear this session that such a right was provided for by the statute by placing denials of anti-SLAPP motions within the confines of the interlocutory appeal statute contained in Tex. Civ. Prac. & Rem. Code sec. 51.014. (During the prior interim, four courts of appeals in Texas (Dallas, Corpus Christi, and two Houston courts of appeals) all read the statute correctly to provide for the right to an interlocutory appeal under any circumstances when a motion is denied; however, the Fort Worth Court of Appeals came to a different conclusion holding that only those motions to dismiss that were denied by operation of law could be immediately appealed.)

Finally, because there had been some problems with the judiciary applying some of the deadlines under the statute too stringently and not even permitting the parties to agree to deadlines outside the parameters of the statute, the Legislature also amended the statute to provide some additional leeway with its deadlines. The 2013 legislative changes clarified that 1) the hearing must be set no later than 60 days after the motion is served, 2) the hearing can be held up to 90 days after the motion is served if the docket conditions require it, or if the parties agree, or if there is a showing of good cause, and 3) if a court allows special and limited discovery, the court may extend the hearing to allow that discovery, in which case the hearing must be held within 120 days of the motion being served. Like the retraction statute, this law became effective on June 14, 2013.

Texas Public Information Act Applies to Public Officials' Electronic Communications

The last of the free speech trifecta passed this year in Texas was a <u>new law</u> clarifying the Public Information Act and closing two potential loopholes that government officials and agencies were using to circumvent the Act.

First, the definition of public information was updated and expanded to include electronic communication, including, but not limited to, Internet posting, text messages and instant messages. In addition, the Act now applies to electronic communications on any device, whether personal or otherwise, if it is used to conduct official business. This change was prompted by a series of lawsuits and disputes over attempts by government officials to conduct official

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business on personal devices and the communications did not fall within the purview of the Act. Despite rulings by the state Attorney General that such communications were covered under the Act, several government officials were challenging those rulings in protracted litigation, needlessly costing taxpayers immeasurable sums of money. In one city, council members were encouraged to communicate via instant message during meetings to avoid scrutiny of their discussions. Through the new law, there can be no doubt that officials cannot escape the public eye by using personal communications devices to conduct public business.

In addition to codifying existing Attorney General Opinions concerning electronic communications, the Legislature also codified his decisions concerning the applicability of the Public Information Act to third party contractors who are performing government functions and being paid for by government dollars. The definition of public information in the Act was expanded to include materials created in connection with any project, activity, or other matter funded wholly or partly with public funds of a governmental body. Both changes in the Act become effective on September 1, 2013.

All of the legislative successes came through enormous effort and political wrangling. At one point, the Electronic Communications bill died when the House committee failed to get the paperwork to the Calendars committee in time for the final calendar. Fortunately, we were able to use the third-party contractor bill, which was still moving, as a vehicle to add it too, it were able to get it out of both chambers in the nick of time. In addition, at the beginning of the legislative session, the general consensus was to only deal with the appeals provision and not re-open the statute; however, the day before the deadline to get the bill out of the Senate, we were summoned to sit down with the trial lawyers, who wanted clarification of the insurance exemption in the underlying statute, and, as a result, it provided an opportunity to open up the bill for additional improvements in the underlying statute. The herculean undertaking of moving these three pieces of legislation through a legislature known for killing rather than passing legislation was undertaken through the bi-partisan support of the bills' passionate sponsors, Chairman Todd Hunter (R-Corpus Christi) and Sen. Rodney Ellis (D-Houston) who have been tireless supporters of free speech in Texas.

Laura Prather is a partner, and Catherine Robb of counsel, at Haynes and Boone LLP in Austin, TX.



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Update on Registration of DMCA Agents in U.S. Copyright Office

By Jerry Birenz

There are a number of requirements for a service provider (such as a website operator) to be entitled to the safe harbor against copyright infringement claims arising from material posted on a website by the website's users provided by the Digital Millennium Copyright Act, 17 USC § 512(c). Among the requirements is that the service provider register the name of, and certain contact information for, the website's DMCA agent in the U.S. Copyright Office. Failure to do so results in loss of the safe harbor.

As with all procedures, there are traps for the unwary and the danger of inadvertent failures to comply. Following are

some reminders and suggestions for complying with this requirement of the DMCA, and an update on recent changes in the Copyright Office's procedures that as far as I know have not yet been announced by the Copyright Office. (This article discusses only the process of registering DMCA agents with the Copyright Office; it does not address other issues regarding DMCA agents or entitlement to the DMCA's safe harbor.)

1. The Copyright Office website contains a listing of all registered agents, an "Interim Designation of Agent" form and an "Amended Interim Designation of Agent" form for the registration of the agent, and other information, at: http://

www.copyright.gov/onlinesp . The Copyright Office "interim regulations" are at http://www.gpo.gov/fdsys/pkg/FR-1998-11-03/pdf/98-29382.pdf . The "interim" regulations promulgated immediately after the passage of the DMCA have not been significantly amended or updated since 1998 (thus the use of the word "Interim" in the name of the forms, even though nearly 15 years have passed), except that the filing fee has been raised to \$105 plus \$30 for every 10 names listed in each filing.

2. The filing process is still based on paper filings, manually entered by Copyright Office personnel onto the Copyright Office website listing, in alphabetical order. There

is no search mechanism to find the names of service providers, websites, or agents. Mistakes in the alphabetical listing and in the spelling of names of service providers and websites are sometimes made. In addition, if a service provider lists a website in its filing with a "www." before the website's domain name, the website will be listed under "www", not under the first letter of the domain name. Keep that in mind when searching the online listing of DMCA agents, and avoid using "www." when listing your websites unless that is actually how you want it listed.

3. Multiple sites operated by the same entity can be registered on one Designation form, with payment of one

fee. Indeed, each service provider, whether a natural person or a corporation or another legal entity, can only file one Designation form at a time, i.e., a service provider cannot have multiple forms on file at the same time. In addition, each corporate entity must file its own Designation form – affiliates, subsidiaries, etc. cannot file a combined form.

4. In completing the form, specify the actual legal name of the entity on the first line, and all of the names under which the entity does business on the second line. You can include the regular business name(s) and assumed names (i.e., d/b/as) of the business, the name of the client's website(s) (if it is different than the name of the business), and

all domain names and/or URLs where the website(s) resides. The purpose of doing so is to defeat any argument by a copyright complainant that you had made it hard to find the copyright agent. Each of these names will be included as separate names with a link to the filed Designation form in the Copyright Office's online listing of agents.

5. Keep up with new businesses, websites, and domain names/URLs added by your clients. Whenever you learn of a new website (e.g., websites tied to new television shows, movies, magazines, books, promotions, marketing ventures, etc.), it is advisable to add them to the registration.

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Following are some reminders and suggestions for complying with this requirement of the DMCA, and an update on recent changes in the Copyright Office's procedures that as far as I know have not yet been announced by the Copyright Office.

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Depending on how active your client is, this can be very difficult to do; consider taking periodic surveys of clients in order to learn of new divisions, d/b/as, products, websites, etc., but be aware that failure to add a website <u>might</u> result in loss of the safe harbor (if the website is operated by a service provider listed in the Designation form, even if the website itself is not, that may satisfy the requirement – I don't know whether any court has so ruled). (You should also of course make sure that all new websites include the required copyright agent disclosures.)

- 6. When filing new Designations of Agent, the Copyright Office will automatically replace a previous filing under a particular legal name with the new filing, meaning that if the new filing does not contain all of the previously-registered names, the names not listed on the Amended form will be removed from the list of agents. Therefore, all new filings on behalf of a client should be cumulative, including all previously-filed names. Note that each Amended filing
- will incur the same \$105 plus \$30 for every 10 names filing fee, even though in most cases most of the names will be the same (but see Update below).
- 7. There is currently a two-to-four week lag in filings. Therefore, keep records of the date Designations are sent to the Copyright Office. In addition, check to make sure the Copyright Office has listed your filings, and

has done so correctly! Check that each name in your Designation form has been added to the online listing, in the correct place and spelled correctly. In case of problems, contact the Copyright Office (see Update below for contact information).

- 8. If a service provider terminates its operations, it is supposed to notify the Copyright Office by certified or registered mail.
- 9. In September 2011, the Copyright Office announced that it is considering revisions to its procedures regarding the process by which DMCA agents are registered, including instituting an electronic filing system. The "Notice of proposed rulemaking" is available here: http://www.copyright.gov/fedreg/2011/76fr59953.pdf, and the submitted comments are available here: http://www.copyright.gov/onlinesp/NPR/. Comments closed in December 2011. No further announced action has been taken on the proposal.

Update on Recent Changes

On Thursday, May 16, 2013 I had a substantive discussion with Sue Nelson, who is in charge of DMCA agent registrations for the Copyright Office. Sue's telephone number is (202) 707-7358; her email address is snel@loc.gov. Sue told me she is the only person handling the Copyright Office's online listing of DMCA agents. Sue was very friendly and open, and invited me to contact her whenever I have questions.

Our conversation was mostly about how to deal with Amended Designations for companies that have numerous sites/"alternative names" on their DMCA agent registration.

Ms. Nelson confirmed that every time a service provider has a new website/alternative name for which it wants DMCA safe harbor protection, it must file a new, complete (i.e., including all of the existing names and the new names) Designation. (By the way, Ms. Nelson made a point of

telling me that she and the Copyright Office consider the name of the form silly, and that internally they refer to it as the "OSP form" and that we can refer to it that way also.) Ms. Nelson also confirmed that when filing a new OSP form, the service provider is charged for all of the names on the form, even though many if not most of the names are already registered. Ms. Nelson described

that when she receives an Amended OSP form for filing, she has to manually go through each name on the new form and compare it to the old form in order to determine which names to delete and what names to add, and to make sure each name on the Copyright Office online listing links to the Amended Form.

(I mentioned to Ms. Nelson that sometimes the names on the Copyright Office online listing are not in proper alphabetical order; she laughed and said "Oh, you noticed that?" and told me that she is in the process of going through the entire list to correct the alphabetization. I also asked Ms. Nelson when the online listing process will be digitized, because the current system is quite outmoded. She said she has been told they are working on it, but that she's been told that for years.)

Ms. Nelson said that she would prefer if registrants follow the following procedure when filing Amended OSP forms:

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- Website/alternative names should be listed in columns, rather than in narrative form (this applies both to original registrations as well as Amended forms).
- If there are a lot of names, it is preferable that they be listed on an attachment to the form rather than within the form (applies to both types of forms).
- On Amended forms, the names being continued from the previous filing should be listed first, under a heading stating that these names are being continued.
- After the listing of continuing names, insert a note that states "The following names are being added", and then list the new names.
- Then, add a note that states "The following names are being deleted", and then list the names that are being deleted.

If a service provider follows the procedure described above, the Copyright Office will not charge the service provider for the names that are being continued (which are presumably most of the names on the OSP form); rather, the Copyright Office will charge the basic \$105 fee, plus \$30 for each 10 new names. (I have made some Amended Designation filings since the call, following this procedure, and was charged as Ms. Nelson described.)

In addition, the Amended OSP form asks for the "filing"

date of the previous form. The service provider can use either the date it signed the initial OSP form, the date the Copyright Office received it, or the date the Copyright Office scanned it (all of these dates are on the form as displayed on the Copyright Office website), and should state which date it is.

Ms. Nelson also confirmed that it is possible for the same website to have more than one registration. That would happen, for example, if a website was transferred to a new owner who made its own ISP filing, but the original OSP filing was not amended to delete that website. Until an Amended filing is made by the original service provider deleting the name, the name will show up twice on the Copyright Office online listing, each with a link to its own OSP form.

Ms. Nelson told me that the Copyright Office has started accepting credit card payments for OSP filings. In order to pay by credit card, the form should be e-mailed to her stating that the service provider wants to pay by credit card. The service provider should then call her up and give her the credit card information over the telephone. This e-mail registration process is only available, at least as of now, for credit card payments; if the filing fee is to be charged to a deposit account or paid by check, the OSP form must still be filed by mail. Even though it is being filed by e-mail, the OSP form will still go through the manual handling process described above.

Finally, Ms. Nelson told me that the current average processing time for OSP filings, from receipt to appearance on the Copyright Office online listing, is 2-3 weeks.

Jerry Birenz is a partner at Sabin, Bermant & Gould LLP in New York.



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When Amazon Becomes the Strand Bookstore

The ReDigi Case—Whether US Copyright Law Permits Resale of "Used" Digital Goods

By Devereux Chatillon

A recent summer weekend was hot, steamy in fact, part of the heat wave that enveloped the East Coast of the United States. So I bought a copy of *Inferno* by Dan Brown through the iBookstore and read it on my iPad. Gulped it down, really. I was finished by Sunday afternoon. Did I mention that it was really hot?

Once I had finished reading it, I moved it to the Archive in my bookshelf on my iPad. Other than throwing the copy away, that was really my only choice.

Now imagine that I had bestirred myself and driven to a local bookstore and bought a hardcover copy of the book. First of all, it would have cost me approximately \$29.95 in contrast to the \$12.99 that I spent for the digital version. Once I had inhaled the physical book, I could give my copy to a

friend, I could donate it to my local library or other literate charity, I could put it on my physical bookshelf and admire it, or I could sell it to a used book reseller, such as the Strand bookstore or one of the used booksellers that shows up on Amazon.

The question posed by the *ReDigi* case, *Capitol Records, LLC v. ReDigi Inc.*, 2013 U.S. Dist. LEXIS 48043 (S.D.N.Y. March 30, 2013), is whether the law requires these two divergent scenarios--whether once a

consumer has read the book, watched the movie or tv series, or tired of the music, she would have many more options for disposition of the physical copy than she has for the digital. I believe that the *Redigi* court correctly ruled that the current copyright law does not allow for resale of previously sold digital goods (it seems silly to call them "used" as they are not used in any way discernible to humans). And I believe that to allow for such an aftermarket will require striking a new balance between consumers, distributors, and creators to ensure that each retains sufficient economic incentives to continue to play their respective roles in a vibrant digital economy.

The question squarely posed for the first time by the ReDigi case was whether digital goods

could legally be resold

under copyright law.

But First, a Bit of Background

This all starts with what's called the first sale doctrine in copyright, now codified at 17 USC § 109. The relevant portion of that statute says:

Notwithstanding the provisions of section 106(3) [the exclusive right to distribute copies of the copyrighted work], the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord

This portion of the Copyright Act is what allows all of us to sell our used cds, dvds, books, posters, etc. without having to get permission from the copyright holder. This section of

the law is a codification of an older Supreme Court case entitled *Bobbs-Merrill v. Straus*, 209 U.S. 339 (1908). Decided under the statute that preceded the statute that preceded the current Copyright Act, the Court held that copyright law does not provide the copyright holder with the ability control sales after the initial sale to the consumer. The case obviously involved sales of physical goods incorporating copyrighted material, in that case, a book. The Court and

the parties assumed that a resale of the book was allowed without permission of the copyright holder, that wasn't the issue in the case. What was at issue was whether the publisher could try to impose copyright liability for a resale at below its suggested list price. That's what the Court rejected.

In interpreting this case, the Copyright Office in its 2001 report on the impact of the Digital Millennium Copyright Act on the first sale doctrine, pointed to the Court's expressed doubts in *Bobbs* "that Congress intended to abrogate the common-law principle that restraints on alienation of tangible property are to avoided." US Copyright Office, DMCA Section 104 Report p. 20 (August 2001). In short, the first

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sale doctrine stems from old English (and then US) common law that whoever has lawful possession of tangible personal property has the legal right to dispose of it.

Prior to digital becoming a significant market force, the markets for new and used goods incorporating copyrighted content, books, movies, magazines, dvds, cds, records, have coexisted quite peacefully for decades, and in the case of books, even hundreds of years. So what's the big deal about extending that paradigm to digital goods?

The ReDigi Case

The question squarely posed for the first time by the *ReDigi* case was whether digital goods could legally be resold under copyright law. The Court, in a cogent and I believe correct decision, granted partial summary judgment on that

question and ruled that digital goods may not be resold. The decision did not address digital rights management software, the terms of service on the various websites that distribute digital music or the end user license agreements entered into by consumers upon purchase of many of these goods (to the extent that those are separate from the terms of service). The decision dealt only with copyright law and according to the latest docket sheet, the case is in discovery and heading for a trial date on the remaining counts.

Redigi Inc. touts itself as the world's first pre-owned digital marketplace that allows consumers to sell their legally purchased digital music. https://www.redigi.com/ While ReDigi heralds itself as a free service, it monetizes the service by taking a cut of each sale.

A consumer would download a song from iTunes (the service was limited to iTunes to make it easier to confirm legal ownership). If the consumer then tired of that song, he could sign up for the ReDigi service. Software would be downloaded to that consumer's computer and would search the hard drive for the iTunes library. Then the consumer could tell ReDigi that he wished to sell say, all his Bob Dylan songs. The software would upload those songs to the ReDigi servers and offer those songs for less than the 99¢ that they would sell for on iTunes. Once the sale was consummated, the original consumer's access to the song would be

discontinued on that computer by the ReDigi software. While ReDigi would get a cut of the sale, Bob Dylan, his record label, his publisher, and iTunes would not.

So what's wrong with that? Capitol Records sued, claiming that the ReDigi service violated both its exclusive rights to distribute the music it had recorded as well as its exclusive rights to reproduce that music, two separate rights under section 106 of the Copyright Act.

Violation of the Reproduction Right

The Court first turned to whether the ReDigi service violated Capitol Records' reproduction rights and concluded that it did. The Court distinguished between the code that incorporates the music, which it found is the copyrighted work, and the material object in which that code is fixed—hard drives, cds, records and such. *Id.* at 13. Examining the

language of the statute, the Court held that "the plain text of the Copyright Act makes clear that reproduction occurs when a copyright work is fixed in a new *material object*." *Id*. The Court relied heavily on the line of cases holding that peer to peer file sharing systems like the original Napster, MegaUpload, and their kind were clear copyright violations to conclude that the ReDigi systems copying from a user's hard drive to the cloud and then to the purchasers computer constituted illegal reproductions of the copyrighted work. Because the identical material object cannot be transferred over the internet (no beaming has yet been

invented), the reproduction right is necessarily implicated.

The fact that the original downloaded version is erased or somehow cut off did not solve the reproduction problem, said the Court, because the legal violation is in the creation of a new material object, not an additional one. *Id.* at 16.

Violation of the Distribution Right

The Court next turned to whether ReDigi's system violated Capitol Records' exclusive distribution right, "the exclusive right to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership." 17 U.S.C. § 106(3). Again following the peer to

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ReDigi argued that because all it was doing was facilitating the resale of lawfully purchased digital goods, the first sale doctrine, which is an explicit exception to the exclusive distribution right, protected it.

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peer file sharing cases and the Supreme Court's decision in *New York Times Co. v. Tasini*, 533 U.S. 483, 498 (2001), the Court concluded without much discussion that electronic file transfer clearly fits within the statutory definition of distribution of a phonorecord. *Id.* at 20.

The only remaining question was whether ReDigi had any affirmative defenses that might excuse the infringement. The Court made short shrift of the possible fair use defense. The Court concluded that the commercial nature of the enterprise combined with the lack of transformation of the copyrighted works, the creative nature of the works themselves, the copying of the entire work, and the potential negative impact on the marketplace doomed ReDigi's fair use defense.

Of perhaps more consequence is the Court's decision on the first sale defense raised by ReDigi. ReDigi argued that because all it was doing was facilitating the resale of lawfully purchased digital goods, the first sale doctrine, which is an explicit exception to the exclusive distribution right, protected it. The Court rejected this for two reasons. First because the first sale doctrine applies only to lawfully made copies and since the digital music file available for resale on the ReDigi was an unlawful reproduction, that qualification was missing. Second, the "statute protects only distribution 'by the owner of a particular copy or phonorecord . . . of that copy or phonorecord." (Italics are the Court's):

Put another way, the first sale defense is limited to material items, like records, that the copyright owner put into the stream of commerce. Here, ReDigi is not distributing such material items; rather, it is distribution reproductions of the copyrighted code embedded in new material objects namely, the ReDigi server in Arizona and its users' hard drives. The first sale defense does not cover this any more than it covered the sale of cassette recordings of vinyl records in a bygone era. *Id.* at 33-14 (emphasis in original)

rendered the literal language of the Copyright Act ambiguous and that therefore the Court should interpret the Act in light of its basic purpose. The Court disagreed. It found that the Copyright Act was quite unambiguous , although perhaps unsatisfactory to some businesses and consumers. And it referred ReDigi to Congress for relief along those lines.

ReDigi went on to argue that technological changes had

What Does It Matter?

While the *ReDigi* decision is undoubtedly only the first round in what will be a multifaceted commercial and cultural discussion of the rights of various constituencies in digital goods, it has some immediate as well as longer ranging ramifications. Amazon has recently obtained a patent on a

"secondary market for digital objects." Pursuant to the patent, digital objects include "e-books, audio, video, computer applications, etc., purchased from an original vendor by a user." Apple has applied for a similar patent. And ReDigi itself has a new version of its marketplace that involves storing all of the copies of consumer digital goods in its cloud upon acquisition that, according to its CEO, mitigate the legal impact of the *ReDigi* court's decision.

How do these various schemes look under the Court's decision in *ReDigi?* While without access to detailed technical discovery, it's a little opaque, most of these marketplaces would seem to fall afoul of the Court's distribution right analysis, if not its

reproduction right analysis. But it's also possible that these companies could accomplish by licenses and contracts what the ReDigi company could not via an aggressive reading of the copyright law.

First the copyright analysis: According to the ReDigi CEO, ReDigi 2.0 redirects a consumer's purchases from that person's computer to ReDigi's servers, with an additional copy downloaded to the iTunes user's personal device. Once the first purchaser tires of the music, she notifies ReDigi and those music files are made available for sale on ReDigi's servers. Upon a consummated "resale," access is turned off for purchaser no. 1 and turned on for purchaser no. 2. *ReDigi*, at7n.3. *See also* "ReDigi CEO Says the Court Just Snatched

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Away Your Right to Resell What You Legally Own," Time, April 25, 2013.

So would this constitute copyright infringement under the judge's decision in *ReDigi*? I think so. First, even though some of the copying back and forth has been eliminated from the equation, there are at least two suspect copies apparently being made during these transactions. The first is the copy deposited on the first purchaser's computer in addition to the copy on the ReDigi server. And while it's not entirely clear from the public descriptions, it seems apparent that a copy would also have to be deposited to the second purchaser's

personal device to avoid the second purchaser's only having access to the music when that purchaser's device has internet access.

In addition, ReDigi is still distributing copies of the music files, in violation of the distribution right as analyzed by the Court. Third, while not discussed in the ReDigi decision, ReDigi 2.0 might well violate the public performance right (a separate exclusive copyright right under section 106) as more than one member of the public apparently could have access to that transmitted file. And finally, both ReDigi 2.0 and the original ReDigi marketplace would seem to violate the very restrictive terms of use for the iTunes store (as well as similar digital distributors) that prohibit resale and presumably don't allow for storage of the file purchased from iTunes in a remote storage location dedicated to the "resale" of iTunes content. ReDigi itself may have some issues with how it's gaining

access to the iTunes servers to allow the initial download.

Similar questions can be raised about the marketplaces outlined in the Amazon and Apple patent documents. Amazon seems to contemplate a marketplace in which a digital object is transferred among several users, sometimes with what is termed a "counter" so that only a certain number of transfers are allowed. Absent agreement with the copyright owner, such a marketplace would appear to run right into the same issues that tripped up ReDigi. Amazon Patent No. 8,364,595.

Apple's application speaks more to storing data indicating which transferee has authorized access to a particular digital file at any given time and specifically refers to the possibility that a "portion of the proceeds of the "resale" may be paid to the creator or publisher of the digital content item and/or the entity that originally sold the digital content item to the original owner." Apple Patent Application No. 20130060616. That may indicate that Apple would enter into such a marketplace only with the consent of the copyright holders. Based on the information available via the patent, it's impossible to tell whether what Apple is proposing would have copyright law problems or not.

The Court relied heavily on the line of cases holding that peer to peer file sharing systems like the original Napster, MegaUpload, and their kind were clear copyright violations to conclude that the ReDigi systems copying from a user's hard drive to the cloud and then to the purchasers computer constituted illegal reproductions of the copyrighted work.

Licenses versus Sales

Another important topic that was not covered in the *ReDigi* decision is the impact that the increasing use of licenses for digital distribution has on copyright law. It's a simple but important distinction. The first sale doctrine's exception to the distribution right applies only to sales of goods, not to licenses or rental of those goods. This has been litigated most frequently in the context of software licenses or sales, with many of the cases coming out of the Ninth Circuit, which covers California and Washington states, the home states of much of the major software developers.

In that line of cases, used software, sometimes in physical CD-ROMs, sometimes not, were purchased and then resold. The courts pretty uniformly concluded that if the software was sold via a license, something that was clicked through

or was wrapped around the box in which the software was delivered, the first sale doctrine did not apply and the resale violated copyright law. *See, e.g., Vernor v. Autodesk*, 621 F.3d 1102 (9th Cir 2010), *cert. denied*, 132 S. Ct. 105 (2011).

The significance to this topic is obvious. To the extent that most digital goods are sold to consumer under licenses that restrict their ability to resell or transfer the licensed goods, the first sale doctrine likely will not apply.

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Block That Metaphor

But perhaps the best lesson for the future to come of the *ReDigi* decision is the Court's refusal to adopt the various metaphors proposed by ReDigi to justify its service under current law. Digital goods are not like physical goods. To go back to the old common law, digital goods are not tangible personal property, but are intangible personal property. All the reasons that the law favored vesting full ownership rights in the tangible physical property in the possessor—ease of transfer, clarity of ownership etc. —do not apply at all to digital goods.

Perhaps even more importantly, the market for used physical goods is not at all similar to that for digital goods. In the digital world, the millionth copy is identical to the first. Passing through 10 or 100 or 1,000,000 iPads will not dent the cover, tear the pages, or wear out the binding of an ebook. There will be no scratches on the vinyl and no missing liner notes for digital music or digital copies of TV series. Physical wear and tear will not limit the "used" digital marketplace. And with services such as Amazon the natural limits on the ability to find the correct previously owned copy could substantially disappear.

So what does it matter if the previously owned marketplace supplants the market for "new"? A major difference between the two is that absent either contractual or legislative action, in the previously owned marketplace, the original creator and the original distributor receive no compensation for the resale. So a market for previously owned digital goods that replaces any kind of significant new sales is a substantial financial issue for those creating this content and investing in its initial distribution.

Because of the significant differences between physical and digital markets, most of the disinterested parties that have looked at this, the courts and the Copyright Office, have concluded that authorizing resale of digital goods is a task for Congress, not via extension of current copyright law via metaphor or otherwise. In a recent speech by the Registrar of Copyrights, she outlined her current views on possible subjects for Congress to include as it considers new copyright legislation:

On the one hand, Congress may believe that in a digital marketplace, the copyright owner should control all copies of his work, particularly because digital copies are perfect copies (not dog -eared copies of lesser value) or because in online commerce the migration from the sale of copies to the proffering of licenses has negated the issue. On the other hand, Congress may find that the general principal of first sale has ongoing merit in the digital age and can be adequately policed through technology—for example, through measures that would prevent or destroy duplicative copies. Or, more simply, Congress may not want a copyright law where everything is licensed and nothing is owned.

Maria A. Pallante, <u>The Next Great Copyright Act</u>, 36 Columbia Journal of Law & arts, 315 (2013).

Copyright or Contract?

Another aspect of this issue could come into play in the even nearer future before any possible congressional action. Could the larger players in the distribution game accomplish via contract what ReDigi has so far failed to achieve via copyright law? I seems quite possible. After all, many of the publishers sell or license digital copies to libraries under a variety of restrictions about the number of copies that can be lent simultaneously, about the number of times a particular "copy" can be lent before it must be replaced or an additional payment made to the publisher and author. See, e.g., Publisher Limits Shelf Life for Library eBooks, Julie Bosman, March 14, 2012, NY Times. Why couldn't Apple or Amazon negotiate with copyright holders for similar deals with consumers? Barnes & Noble's Nook allowed consumers to lend their ebooks to limited friends or family. The same thing could happen by way of a distribution agreement with Amazon, for example, that would grant permission from the rights holder for Bob Dylan's albums to Amazon and its customers for those customers to resell any Amazon purchases.

Why would the content industry agree to this? Apart from the exercise of increasingly strong market power from two of the most dominant digital (and in Amazon's case physical) distributors, good business reasons might make this attractive to the various industries. Consumers will be happier if they can lend, give or sell some of their digital content after

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they're done with it, even if there are some restrictions placed on those activities. In turn, that would lead to greater adoption of digital goods by consumers, with corresponding lower costs to producers. Higher prices might be charged for versions of books, movies, music or television shows that allowed future transfer. And giving people a legitimate way to do something that they might do anyway is always a good idea. All digital rights management systems can ultimately be hacked and eliminating reasons to do so is beneficial.

And the Apple patent application referred to above has a tantalizing hint that perhaps a royalty or other compensation back to the content originators for these resales could help adjust the incentives and avoid some of the possible negative consequence. This might provide an alternative to the subscription model that while great for consumers is, in the music business at least, proving difficult financially for musicians. *See*, *e.g.*, *As Music Streaming Grows, Royalties Slow to a Trickle*, by Ben Sisario, NY Times, Jan. 28, 2013.

Devereux Chatillon is a media and intellectual property attorney in New York. Capitol Records was represented by Richard S. Mandel, Cowan Leibowitz & Latman, P.C., New York. ReDigi was represented by Gary Adelman and Sarah M. Matz, Davis Shapiro & Lewit LLP, New York



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Copyright Reform Legislation

Contempt of Court and the Internet

Government Fraud Suit Against S&P Survives Motion to Dismiss

Credit Ratings Not Mere Puffery; Fraud Pled With Sufficient Detail

A California federal district court this month refused to dismiss the U.S. government's civil fraud suit against Standard & Poor's, and parent company McGraw Hill Financial (together "S&P"), for allegedly manipulating the credit ratings of certain mortgage backed securities in the lead up to the U.S. financial crisis. *United States v. McGraw-Hill Co. et al.*, No. 13-0779, 2013 U.S. Dist. LEXIS 99961 (C.D. Cal. July 16, 2013) (Carter, J.). The government is seeking up to \$5 billion in civil penalties against S&P, alleging that it deliberately misrepresented the creditworthiness of the investments because of its interest in collecting ratings fees from the issuers.

Denying the motion to dismiss, the court held that the government pled fraud with sufficient particularity to proceed and rejected S&P's argument that the ratings were non-binding puffery. While S&P disputed the government's version of the underlying facts, the court noted "the opportunity to challenge such factual allegations comes later in the litigation process."

S&P's policy
statements about how
ratings are computed
are not "mere
aspirational musings of
a corporation setting
out vague goals for its
future."

Background

At issue are S&P credit ratings for certain Residential Mortgage Backed Securities (RMBSs) and Collateralized Debt Obligations (CDOs). This year the government sued S&P under the Financial Institutions Reform, Recover, and Enforcement Act of 1989, U.S.C. §1833a, enacted following the savings and loan crisis of the 1980s. The complaint asserts that S&P violated three criminal fraud statutes: 18 U.S.C. §1341 (mail fraud); 18 U.S.C. §1343 (wire fraud); and 18 U.S.C. §1344(1), (2) (financial institution fraud).

The gravamen of the complaint is that S&P "issued or confirmed ratings that did not accurately reflect true credit risks" and that S&P executives manipulated the credit ratings because they "wanted to take advantage of the high profits that were coming in" from the issuers of the investments.

Motion to Dismiss

S&P moved to dismiss, claiming that (1) "the allegedly fraudulent statements identified by the government's complaint are not actionable because they consist of generalized aspirational language and 'puffery;'" (2) the complaint "fails to plead facts showing that S&P's credit ratings were objectively or subjectively false and

misleading," and (3) the complaint fails to plead that defendants had "the requisite culpable state of mind' to have violated the fraud statutes because it fails to allege that defendants had 'the intent to obtain money or property from the parties who allegedly were deceived — the investors in the CDOs identified in the complaint."

Denying the motion, the court agreed with the government that S&P's policy statements about the integrity of its ratings were not general, subjective claims about the avoidance of conflicts, "but rather a promise

that it had 'established policies and procedures to address the conflicts of interests through a combination of internal controls and disclosure." S&P's policy statements about how ratings are computed are not "mere aspirational musings of a corporation setting out vague goals for its future."

The court accepted at this stage that sophisticated investors could have relied on the presumed objectivity and independence of S&P's ratings. "[I]f no investor believed in S&P's objectivity, and every bank had access to the same information and models as S&P, is S&P asserting that, as a matter of law, the company's credit ratings service added

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absolutely zero material value as a predictor of creditworthiness?"

S&P cited a recent Second Circuit case in support of dismissal, *Boca Raton Firefighters and Police Pension Fund v. Bahash*, 506 F. App'x 32 (2d Cir. 2012), where the court dismissed a shareholder fraud suit against McGraw Hill over statements about the honesty and integrity of S&P's credit ratings. The district court, however, distinguished the cases, noting among other things the difference between the interests of outside investors and shareholders.

The complaint also contained sufficient factual particularity in its claims that S&P's credit ratings were objectively false or subjectively disbelieved by S&P when issued, e.g., that S&P had knowledge that CDOs were backed by deteriorating RMBSs. "[T]he government's complaint alleges, in detail, the ways in which none of S&P's credit ratings represented the thing that they were supposed to represent, which was an objective assessment of creditworthiness, because business considerations infected the entire rating process."

Finally, the court found that the government sufficiently alleged that S&P acted with specific intent to obtain money or property from investors. The court agreed with the government, "that the Ninth Circuit has recognized that money need not flow 'directly to the defendant from the party deceived by the defendant." *United States v. Ali*, 620 F.3d 1062, 1064 (9th Cir. 2010). The government sufficiently alleged that S&P engaged in a scheme to defraud investors in RMBS and CDOs: "Specifically, S&P knew this scheme to defraud would result in S&P obtaining funds directly from the investors who were fooled by their ratings, since S&P charged its ratings fees to CDO issuers and 'those issuers ordinarily did not bear the cost of the ratings fees. Instead, as S&P knew, the costs of those fees were passed through to the investors who purchased CDO tranches."

Floyd Abrams and S. Penny Windle of Cahill Gordon and Reindel LLP in New York represented defendants, jointed by John W. Keker, Elliot R. Peters, Paven Malhotra, and Steven K. Taylor of Keller and Van Nest LLP in San Francisco. Jennifer L. Keller of Keller Rackauckas Umberg Zipser LLP in Irvine also represented defendants. The government was represented by Anoiel Khorshid, George S. Cardona, Leon W. Weidman, and Richard E. Robinson of the U.S. Attorney's office in Los Angeles, along with Sondra L. Mills and Stuart F. Delery, U.S. Department of Justice.



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Florida Supreme Court Leaves Media Use of Electronic Devices Intact

Adopts Rule for Jurors, Other Observers

By Jennifer A. Mansfield

After almost three years of work, on July 3, 2013, the Florida Supreme Court adopted a new Rule 2.450 of the Rules of Judicial Administration, which governs the use of electronic devices in courtrooms. After strong opposition, the Court scaled back a proposed version of the Rule that would have allowed judges to confiscate electronic devices and delete digital files from those devices. As adopted, the majority of the new Rule applies to jurors, not the media, and eliminated many provisions that sparked widespread

opposition. For example, it no longer incorporates a definition of "journalist" from Florida's Journalist's Privilege law to distinguish media from non-media attendees, and no longer refers journalists to Rule 2.450 for the use of electronic devices in courtrooms, and eliminated the provisions allowing for confiscation of devices and deletion of digital files.

In early 2011 the Florida Bar's Rules of Judicial Administration Committee proposed the first version of the new Rule, but it met widespread opposition, with 172 of the 177 comments against adoption. The Florida Press Association, the First Amendment Foundation, the Florida Association of Broadcasters, the Reporters Committee for Freedom of the Press, media attorneys at Holland & Knight LLP, the

Criminal Law Section of the Florida Bar, the Florida Bar's Rules of Civil Procedure Committee, the Broward County Bar Association Bench Bar Committee, the non-profit Citizens for Sunshine, Inc., Florida attorneys, and 164 individuals were among those who submitted opposition letters to the Committee.

The focus of the new Rule is on *jurors'* use of electronic devices during a trial, providing that electronic devices may be removed as directed by the judge from all members of a jury panel at any time before deliberations and must be removed from all members of a jury panel before jury

deliberations begin. It also contains a list of the prohibited uses of electronic devices by jurors. These new prohibitions on the use of electronic devices by jurors are in reaction to a number of cases throughout the United States and in Florida where jurors have used electronic devices to research aspects of the case and to communicate with parties and witnesses. One particularly recent case in Southwest Florida concerned a juror who, after the judge instructed the jury not to communicate with anyone in the case, the same day sent a Facebook "friend" request to the defendant. The court

ultimately found that juror in contempt of

Subdivision (c) of the new Rule governs the use of electronic devices in courtrooms by people other than jurors. Although the language in the Rule itself does not differentiate between media and non-media courtroom attendees, when adopting the rule the Florida Supreme Court's opinion included a reference that the new rule only governs non-media attendees, and still referred to the parallel Rule 2.450(a) as governing the use of electronic devices by the media. The Court's language in adopting the Rule is unfortunate, because previously Florida's First District Court of Appeal, in Morris Publishing Co., LLC v. State, 2010 WL 353318, 38 Media L. Rep. 1245 (Fla. 1st DCA Jan. 20, 2010), ruled that the plain

language of Rule 2.450 only deals with television cameras, radio equipment, and photography, and does not cover all types of electronic devices in the courtroom. In that case, citing Rule 2.540, a trial court ordered a reporter who was blogging live from a trial to leave the courtroom. But the appellate court clarified that Rule 2.540 only applies to television, radio, or photography; it does not regulate blogging on a laptop computer. Thus, the appellate court concluded that constitutional principles governing access to court proceedings governed a court's ability to exclude the

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The adoption of this new Rule illustrates the necessity for media advocates to be vigilant in monitoring the courts and rules adopted to govern court proceedings, as even the courts themselves sometimes need reminding of the relevant constitutional rights of access to open courts.

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blogging reporter from the courtroom. Notwithstanding that the language of the new Rule itself does not differentiate between media and non-media courtroom attendees, the Court's language in adopting the new Rule 2.541 may again cloud the issue of what rule, if any, governs the media's use of electronic devices in courtrooms.

The adoption of this new Rule illustrates the necessity for media advocates to be vigilant in monitoring the courts and rules adopted to govern court proceedings, as even the courts themselves sometimes need reminding of the relevant constitutional rights of access to open courts. Ultimately, however, beginning on the new Rule's effective date of October 1, 2013, all people who attend court proceedings in Florida and have electronic devices are subject to the authority of the presiding judge to: (1) Control the conduct of proceedings before the court; (2) ensure decorum and prevent distractions; and (3) ensure the fair administration of justice in the pending cause.

Jennifer A. Mansfield is a partner in the Jacksonville, FL, office of Holland & Knight LLP.

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The Pre-Publication/Pre-Broadcast Committee's latest paper – Risks and Tips for Digital Images – explores various risks likely to be encountered with the use of digital images and summarizes cases and new issues in this area, all within the framework of a handy checklist full of tips for the expert and general practitioner alike.

DISCOVERY ROADMAP

In 2004, the Pre-Trial Committee, now known as the Litigation Committee, put together a "Discovery Roadmap" to help media law practitioners strategize discovery in defamation/invasion of privacy lawsuits. Since that time, the increased prevalence of electronically stored information (ESI) has transformed the discovery process in a number of ways. The Litigation Committee decided to update the Discovery Roadmap to encompass the unique issues presented by ESI.