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Fourth Circuit Reverses Order Allowing Reporter James Risen to Protect Source

Majority Rejects First Amendment and Common Law Privilege

By James Lake and Kimberly Andreu

Journalists around the country are waiting to see whether *New York Times* writer and Pulitzer Prize winner James Risen will be forced to identify an unnamed source or will be held in contempt of court. Risen faces that difficult choice after the Fourth Circuit in a 2-1 decision rejected Risen's claim of a First Amendment-based reporter's privilege and held that a reporter must testify in a criminal case if subpoenaed in good faith and pursuant to the enforcement of the law. *United States v. Sterling (James Risen intervenor)*, No. 11-50-28 (4th Cir. July 19, 2013) (Traxler, Gregory, Diaz, JJ.).

Background

The demand for Risen's testimony involves Jeffrey Sterling, who worked as a CIA agent with top-secret clearance. In November 1998, Sterling was assigned to a classified program designed to frustrate Iran's ability to develop or acquire nuclear weapons. In May 2000, Sterling was reassigned, and his participation with the Iranian weapons mission ended. Sterling felt he was denied certain assignments because of his race. Sterling was ultimately terminated from the CIA and asked to sign a document acknowledging his continuing obligation to protect classified information. Sterling refused to sign the acknowledgment. Later, the CIA Publication Review Board expressed deep concern with a book proposal Sterling submitted. He responded that he would be "coming at… the CIA with everything at his disposal."

Because neither the Supreme Court nor Congress has recognized a reporter's privilege, the Fourth Circuit in Risen declined to do so. The Fourth Circuit left the Supreme Court and Congress with the decision whether to adopt a privilege.

In November 2001, the *New York Times* published a story by Risen describing top-secret CIA information obtained from a former agency official. More articles followed. One discussed top-secret information about September 11th attacks, and another talked of a former CIA agent who was wrongfully terminated. A string of emails and phone call records indicate that Risen and Sterling were in contact and exchanging information during this time.

In April 2003, Risen told the CIA and the National Security Council that he possessed classified information about the Iranian weapons mission. The *Times*, Risen said, intended to publish a story containing this information. After much discussion, the *Times* decided not to publish the article.

However, in January 2006, Risen published the book *State of War: The Secret History of the CIA and the Bush Administration*. One chapter, titled "A Rogue Operation," details the Iranian weapons mission and a scientist's failed attempt to give flawed weapon blueprints to Iran. Although Risen did not identify his source or sources, most of the chapter is told from the viewpoint of the CIA case officer assigned to the mission. Circumstantial evidence suggests Sterling was the source of this confidential information.

A grand jury indicted Sterling on ten counts relating to the unauthorized retention and communication of national defense information and obstruction of justice. The government issued a subpoena seeking Risen's testimony about his source and asking Risen to confirm that statements he reported were actually made by those sources. Risen moved to quash the government's subpoena on the grounds that the First Amendment or common law protected him from giving compelled testimony on these subjects.

The district court recognized a reporter's privilege under the First Amendment. "Risen had a qualified First Amendment reporter's privilege that may be invoked when a subpoena either seeks information about confidential sources or is issued to harass or intimidate the journalist." *United States v. Sterling*, 818 F. Supp. 2d, 945 at 951 (E.D. Va. 2011) (emphasis added). The district court held that the reporter's privilege could be overcome only if the

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government satisfied the 3-part test in *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134 (4th Cir. 1986). The district court found that the government failed to meet all three parts of the *LaRouche* test and therefore did not overcome the reporter's privilege.

Divided Fourth Circuit Opinion

On appeal, the Fourth Circuit looked to the Supreme Court's consideration of a reporter's privilege in *Branzburg v. Hayes*, 408 U.S. 665 (1972). The reporters in *Branzburg* were subpoenaed to testify about criminal activities they observed. They argued that the absence of a qualified privilege would hinder the press's future news gathering abilities and would impede the free flow of information to the public. Justice White's opinion for the Court declined to recognize an explicit First Amendment privilege for reporters seeking to protect their sources. If a government's investigation is conducted in good faith and based on the legitimate need of law enforcement, Justice White reasoned, reporters may be compelled to testify. Justice White placed great emphasis on the importance of the search for the truth and the lack of an explicit constitutional or statutory privilege granted to reporters.

Like many journalists since *Branzburg*, Risen sought protection in Justice Powell's concurring opinion in *Branzburg*, which emphasized "the limited nature of the Court's holding." But Fourth Circuit Chief Judge William Traxler and Judge Albert Diaz found that Justice Powell's concurrence did not change the proper analysis of *Branzburg*, because Justice Powell concurred in the majority's opinion and did not explicitly join the dissenters.

Risen sought protection in Justice Powell's concurring opinion in Branzburg, which emphasized "the limited nature of the Court's holding." But Fourth Circuit Chief Judge William Traxler and Judge Albert Diaz found that Justice Powell's concurrence did not change the proper analysis of Branzburg, because Justice Powell concurred in the majority's opinion and did not explicitly join the dissenters.

In the years since *Branzburg*, the Fourth Circuit panel noted, the Supreme Court had opportunities to revisit the question of a reporter's privilege but had not done so. The Fourth Circuit also noted that Congress has not taken any steps to impose a statutory reporter's privilege.

In addition to the Supreme Court's ruling in *Branzburg*, the Fourth Circuit looked to its own circuit precedent. The district court relied upon *LaRouche* in determining that a reporter's privilege exists. This privilege may be overcome if "(1) the information sought is relevant, (2) the information cannot be obtained by alternative means, and (3) there is a compelling interest in the information."

In Risen's case, the Fourth Circuit panel rejected the lower court's use of the *LaRouche* test in the criminal context. A distinction must be drawn, the panel found, between the use of a reporter's privilege in a civil case and the lack of a reporter's privilege in a criminal case. Unlike civil cases, criminal cases reflect the compelling public interest in effective prosecution, the panel decided.

Moreover, the Fourth Circuit went so far as to say that even if the *LaRouche* test applied in the criminal context, the district court's application of the test was faulty. The district court determined that the reporter's privilege was not overcome because there was enough circumstantial evidence to prove Sterling is the source of the illegally-disclosed information, therefore making the information available through alternative means.

However, the Fourth Circuit expressed concern about limiting the government's case to circumstantial evidence. The Court noted that testimony available from other sources "pales in comparison to Risen's first hand testimony"

Risen also contended that a common-law privilege ought to protect reporters. The Fourth Circuit, however, distinguished the reporter's privilege from the enumerated privileges in Federal Rule of Evidence 501, such as the spousal privilege or the psychotherapist-patient privilege. These enumerated privileges, the Fourth Circuit found, share relational privacy interests—reinforcing the public interest in marriage or encouraging a patient to open up to a therapist. In contrast, the reporter's privilege Risen advocated would protect a source accused of a crime—specifically, the Fourth Circuit said of Sterling, a very serious crime.

In sum, because neither the Supreme Court nor Congress has recognized a reporter's privilege, the Fourth Circuit in

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Risen declined to do so. The Fourth Circuit left the Supreme Court and Congress with the decision whether to adopt a privilege.

Fourth Circuit Judge Roger Gregory dissented. "Protecting the reporter's privilege," he wrote, "ensures the informed public discussion of important moral, legal, and strategic issues." Judge Gregory advocated a modified version of the *LaRouche* test: In national security cases, he wrote, courts ought to consider the *LaRouche* factors, the harm caused by the public dissemination of the information, and the newsworthiness of the information conveyed.

Despite the Fourth Circuit's decision, the Risen subpoena might be withdrawn in light of a new Department of Justice policy. On July 12, 2013, the Department of Justice issued a "Report on Review of News Media Policies," which noted that the administration supports congressional efforts to pass a media shield law.

In addition, Congress is currently considering the Free Flow of Information Act of 2013. As currently drafted, the Act would generally prohibit compelling a person to disclose protected information, unless a federal court determines that all reasonable alternative sources have been exhausted. The Act is scheduled for consideration by the Senate Judiciary Committee on September 12, 2013.

Meanwhile, Risen has sought rehearing en banc, and numerous media organizations have sought to file an amicus brief supporting his request. The Government has resisted the rehearing motion.

James Lake is a member of Thomas & LoCicero in Tampa. Kimberly Andreu is a summer associate in the firm's Tampa office. Joel Kurtzberg, Cahill, Gordon &Reindel, New York, represents James Risen.

A full list of amici is contained in the Fourth Circuit's opinion.

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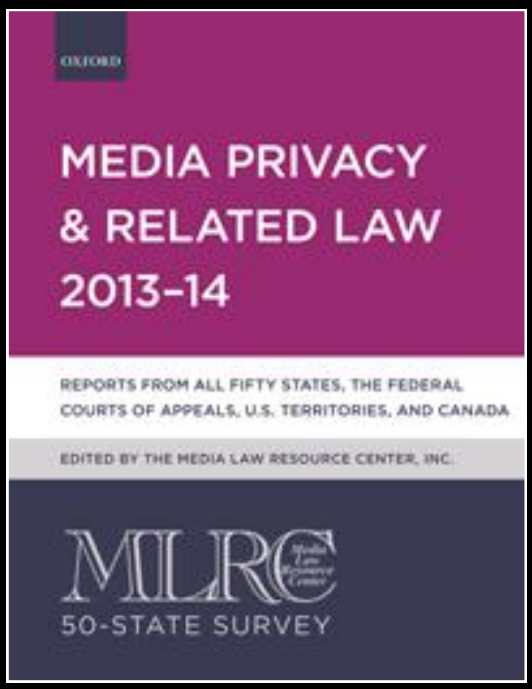

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Divided First Department Says Strong Public Policy Favors Protecting Confidential Sources

But Will Not Save Fox News Reporter From Out of State Subpoena

By Dori Ann Hanswirth and Theresa M. House

Journalists across New York might take pause the next time they're asked to report on a story that relies on confidential sources from other states, if a recent decision by a divided Appellate Division, First Department is allowed to stand. On August 20, 2013, the intermediate appellate court split 3-2 on the question of whether New York's public policy should bar the issuance of a subpoena calling for a New York reporter to cross state lines and testify in a jurisdiction that offers substantially less protection for the reporter-confidential source relationship than is recognized under New York's absolute privilege for confidential newsgathering information. *In re Holmes v. Winter*, No. 30037/13 (N.Y. App.).

Although all five justices agreed that New York's had a "strong" public policy in favor of protecting confidential sources, the majority ruled that the public policy was not threatened by the subpoena because it was not "absolute[ly] certain[]" that the judge in the out-of-state proceeding would in fact order the journalist to reveal her confidential sources. Because two justices joined a strong dissenting opinion, the issue is now primed for review by the New York Court of Appeals – but in the meantime, both Jana Winter (the investigative reporter for FoxNews.com who received the subpoena), along with all other New York journalists who report on national news out-of-state, will be left in limbo, lacking clarity as to whether they check their protections under New York's Shield Law whenever their reporting crosses state lines.

Background

The subpoena at issue calls for documents and testimony that would reveal the identities of two confidential law enforcement sources Winter relied upon in a report about the aftermath of the mass shooting that took place during a midnight showing of *The Dark Knight Rises* in Aurora, Colorado on July 20, 2012. The report at issue conveyed information about the contents of a notebook that James Holmes, who faces charges for killing 12 and wounding 70 during the vicious attack, sent to a mental health professional shortly before his shooting spree. Holmes initially sought the information from Winter in connection with a motion for sanctions against the government premised on the theory that that the unnamed law enforcement sources who spoke to Winter must have violated a gag order, but then later augmented his argument to also claim that Winter's testimony might be relevant to the credibility of certain law enforcement officers who swore under oath that they were not among Winter's sources.

Holmes obtained the subpoena by invoking Section 640.10 of the New York Criminal Procedure Law, which is New York's version of the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases (which is a reciprocal statute that is applicable in all 50 states). Section 640.10 allows a New York court, if certain conditions are met (that the testimony is "material and necessary" and will not cause undue hardship), to issue a subpoena compelling testimony from a New York witness in an out-of-state criminal proceeding. Supreme Court Justice Larry Stephen granted Holmes' request to compel Winter's testimony, over her objection, on March 7, 2013. Winter appealed the order and obtained an expedited briefing schedule at the Appellate Division so that her appeal could be heard during the Court's June term – which, due to adjournments in the Colorado action, was before she would be made to testify.

Winter's appeal presented a substantial legal question: whether compelling a reporter's testimony under C.P.L. § 640.10 would violate New York's longstanding policy of categorically insulating reporters from subpoenas demanding their confidential newsgathering information. Previously, the Court of Appeals had recognized that "a strong public policy of this State ... might justify the refusal of relief under CPL

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640.10 even if the 'material and necessary' test set forth in the statute is satisfied ...." *Matter of Codey (Capital Cities, Am. Broad. Corp.)*, 82 N.Y.2d 521, 521 n.3, 626 N.E.2d 636 (1993).

Relying on this precedent, Winter argued that the Subpoena should not have been issued and thus was invalid. In particular, Winter argued that New York's "Shield Law"—which, unlike Colorado's, provides an *absolute* protection against a journalist being compelled to disclose her confidential sources—represents a "strong public policy of" New York, such that issuing a subpoena compelling Winter to appear in a forum that does not recognize an absolute privilege was improper. *Compare* N.Y. Civ. Rts. L. § 79-h(b) (providing absolute privilege against a reporter testifying about his or her confidential newsgathering information) *with* Colo. Rev. Stat. § 13-90-119 (providing conditional privilege to a reporter's confidential information).

Appellate Division Ruling

In its splintered 3-2 decision, the First Department upheld the subpoena. All five Appellate Division justices agreed that New York's absolute protection for confidential newsgathering information does in fact "represent[] a strong public policy and the long history of vigilantly safeguarding freedom of the press." The majority reasoned that public policy was not implicated, however, because "the facts presented on this record do not establish with absolute certainty that the Colorado District Court will require the disclosure of confidential sources." Further, the majority held that "if this Court were to resolve questions of privilege under the lens of public policy or undue hardship, it would frustrate the purpose of the reciprocal statutory scheme" created by the Uniform Act.

Justice David B. Saxe, joined by Justice Rolando T. Acosta, dissented, arguing that the majority opinion "ignored both the practical reality of [Winter's] position, and the importance of our state's public policy in favor of protecting the identity of investigative reporters' confidential sources." The dissent "conclude[d] that New York's expressed public policy in favor of providing absolute protection for reporters, so that they are not required to disclose the identity of their sources, is paramount here, and requires the rejection of [Holmes'] application."

Represented by Dori Ann Hanswirth and Christopher Handman of Hogan Lovells US LLP, Winter appealed the First Department's decision to the Court of Appeals as of right pursuant to CPLR § 5601(a) on August 21, 2013, and is currently seeking an expedited briefing schedule. Winter is next due to appear in Colorado on the subpoena on September 30, 2013, but has filed a motion in the Colorado action seeking to adjourn her appearance until January 2014, so that the Court of Appeals will have time to decide whether the subpoena is valid before she is potentially ordered to comply with it on pain of incarceration. Holmes' trial is currently scheduled to begin in February 2014.

The Court of Appeals' resolution of Winter's appeal will have far-reaching consequences for how New York journalists gather news. Indeed, highlighting the importance of this issue to reporters in this State, the Reporters Committee for Freedom of the Press, represented by Katherine M. Bolger of Levine Sullivan Koch & Schulz, LLP, submitted an amicus brief to the Appellate Division on behalf of itself and 42 different news organizations. If the order granting the subpoena is not reversed, New York's absolute privilege will prove to be anything but absolute, at least when it comes to reports that touch on sourcing from out of state.

Dori Ann Hanswirth is the senior partner for Hogan Lovells US LLP's Media Law Group in New York. Theresa M. House is an associate in the Media Law Group in New York. Christopher Handman is a partner in Hogan Lovells' Appellate Group in Washington, D.C. Also assisting in this matter are: Nathaniel S. Boyer, Benjamin A. Fleming, Sarah Schacter, Nina Tandon, and Ray Torres of New York, Michael Theis and Christopher Murray in Denver, Colorado, and Sean Marotta in Washington, D.C.

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Massachusetts Court Awards Newspaper Legal Costs Incurred in Filing Motion to Quash Subpoena to Reporter

By Michael J. Grygiel and Zachary C. Kleinsasser

A Massachusetts federal court recently granted a newspaper's motion to quash a deposition subpoena served on one of its reporters and, further, took the unusual but welcome step of awarding the newspaper its attorneys' fees and costs incurred in submitting the motion to quash. In *Durand v. Massachusetts Dep't of Health*, 2013 WL 2325168 (D. Mass. May 28, 2013), the Court reaffirmed that a journalist's confidential sources are protected by the reporter's privilege, and that a subpoena to a reporter which seeks to compel testimony tangential to the underlying case and where the information at issue is available from other sources should be quashed. Notably, the Court also imposed a fee-shifting award in favor of the newspaper in objecting to the subpoena as a transparent fishing expedition.

News organizations should continue promptly to object to third-party subpoenas seeking testimony from reporters that is not critical to the merits of the claims at issue in the underlying case and/or that would require the disclosure of confidential source information for insubstantial reasons.

Background

Plaintiff Louise Durand was employed as a Nursing Supervisor for the Massachusetts Department of Health. On November 22, 2011, a so-called "Section 12 order" signed by Defendant Dr. Theresa Harpold was issued against Plaintiff pursuant to which Plaintiff was taken into custody and subjected to an involuntary psychiatric examination. Thus, Plaintiff was detained against her will by the professional colleagues with whom she worked at the Brockton Multi-Service Center, a 24-hour psychiatric crisis services unit. Based on these and other events, Plaintiff filed a $1 million lawsuit in April of 2012 alleging, *inter alia*, violations of 42 U.S.C. § 1983 against the Department of Health, the Commonwealth of Massachusetts, Defendant Harpold, and another Department of Health employee.

On January 11, 2013, *The Enterprise*, a daily and Sunday community newspaper distributed in Brockton, Massachusetts, published a news article on its website about Plaintiff's lawsuit headlined "Nurse suing state mental health facility connected to Brockton center." On the same day, *The Enterprise* published the same article in its newsprint edition under the headline "Nurse sues after colleagues have her hospitalized." The article, which was written by *The Enterprise*'s staff writer Alex Bloom, was based on reporter Bloom's review of the allegations in the Complaint. Mr. Bloom had been informed about the lawsuit by confidential sources. Prior to publication of this article, Mr. Bloom had reported extensively on labor condition disputes between the Massachusetts Nurses Association and the Department of Mental Health at the Brockton mental health facility in a series of news articles published by *The Enterprise*.

Defendant Harpold served *The Enterprise* with a "Keeper of Records" subpoena returnable on March 25, 2013. The initial subpoena commanded the newspaper to produce employment records concerning Mr. Bloom. In response to a telephonic inquiry from *The Enterprise*'s counsel as to the purpose for the issuance of the non-party subpoena, Defendant Harpold's counsel advised that she wanted to obtain reporter Bloom's residential address in order to serve him with a second testimonial subpoena. Defense counsel further asserted that although Dr. Harpold did not know what, if any, information reporter Bloom might have, her client wanted to question him under oath to learn whether he had spoken to Plaintiff or observed her behavior or condition in connection with his newsgathering for the January 11, 2013, news article. Finally, counsel for Defendant Harpold stated that her client harbored "suspicions" about the timing of the article's publication. After hearing this recitation, counsel for *The Enterprise* objected on the basis of the reporter's privilege to any attempt to compel Mr. Bloom to testify concerning his newsgathering

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and reporting activities, and followed up with a detailed 7-page letter explaining why the application of the privilege precluded Mr. Bloom's conscription as a non-party witness and prohibited the disclosure of confidential source information under these circumstances.

Defendant Harpold never responded to *The Enterprise*'s letter requesting voluntary withdrawal of the subpoena in lieu of formal motion practice, which would include a request for the newspaper's legal fees. Instead, Defendant Harpold served a second subpoena on May 21, 2013, this time noticing reporter Bloom's deposition. Counsel for *The Enterprise* advised Defendant Harpold's counsel that Mr. Bloom would not be produced as a witness and that *The Enterprise* was left with no recourse other than to file a motion to quash the subpoena.

The Massachusetts federal court's decision in Durand granting The Enterprise's motion to quash a testimonial subpoena to a reporter and awarding the newspaper its attorneys' fees endorsed the vital protection that the reporter's privilege affords the press from becoming unnecessarily entangled in a litigated matter to which it is not a party based on constitutionally protected newsgathering activity.

Motion to Quash Testimonial Subpoena

In its motion to quash, *The Enterprise* demonstrated that the deposition testimony sought by the second subpoena could not be compelled because of the reporter's privilege. *The Enterprise* established that Defendant Harpold failed to satisfy the stringent balancing test recognized by the First Circuit because the requested testimony was not critical to Defendant Harpold's defense, and because numerous other sources were available to provide the information Defendant Harpold was apparently seeking. *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 513, 594 (1st Cir. 1980).

The motion also objected to the attempt to compel the identification of confidential sources as "infringing the free flow of information to the public, thus denigrating a fundamental First Amendment value." *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998). Finally, *The Enterprise* requested an award of its costs and attorneys' fees incurred in preparing the motion to quash because the subpoena plainly lacked merit as a matter of law, as counsel had painstakingly advised Defendant Harpold before the motion to quash was filed.

On May 29, 2013, in a decision strongly supporting the First Amendment rights of the press, Judge Richard G. Stearns granted *The Enterprise*'s motion to quash the deposition subpoena. The Court reaffirmed the well-established principle that "a journalist's confidential sources are protected by a qualified privilege," and applied the requisite balancing test: "a party must show that the summons of a journalist to a deposition is not frivolous, that the information sought is critical to the merits of the claim at issue, and that other sources for the information are not available."

The Court reasoned that the subpoena was based upon speculation that Plaintiff or her counsel were the source of the information in Mr. Bloom's January 13, 2013, article reporting on the lawsuit's commencement, and that "to the extent [the requested testimony] is not wholly tangential to plaintiff's malpractice claim" it "has more to do with the credibility of the opposing parties than any revelation by Bloom of his source(s)." With a flourish, the Court concluded that the purported need for testimony from reporter Bloom was "not of enough heft to warrant a casual trenching upon First Amendment concerns."

Finally, the Court invited *The Enterprise* to file a petition for payment of the reasonable costs of filing the motion to quash.

Newspaper's Petition for Reasonable Costs

On June 11, 2013, *The Enterprise* filed a petition for payment of the reasonable costs directly incurred in filing its motion to quash the deposition subpoena. The next day − and within 30 minutes of Defendant Harpold's electronic filing of her opposition to the fee application − the Court granted *The Enterprise*'s petition in the full amount requested of $8,200.

Conclusion

The Massachusetts federal court's decision in *Durand* granting *The Enterprise*'s motion to quash a testimonial

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subpoena to a reporter and awarding the newspaper its attorneys' fees endorsed the vital protection that the reporter's privilege affords the press from becoming unnecessarily entangled in a litigated matter to which it is not a party based on constitutionally protected newsgathering activity.

"The important point … is that courts faced with enforcing requests for the discovery of materials used in the preparation of journalistic reports should be aware of the possibility that the unlimited or unthinking allowance of such requests will impinge upon First Amendment rights." *Bruno & Stillman*, 633 F.2d at 595 (footnote omitted).

In the wake of *Durand*, news organizations should continue promptly to object to third-party subpoenas seeking testimony from reporters that is not critical to the merits of the claims at issue in the underlying case and/or that would require the disclosure of confidential source information for insubstantial reasons. The decision also validates the practice of making a pre-motion record establishing why the rigorous scrutiny demanded by the reporter's privilege cannot be satisfied in a particular context. On the basis of such a record, the press should give serious consideration to moving to recover its attorneys' fees and costs incurred in connection with the efforts required to quash a frivolous subpoena, relying on *Durand* as precedent.

Michael J. Grygiel of Greenberg Traurig, LLP's Albany office and Zachary C. Kleinsasser of the firm's Boston office represented The Enterprise.

MLRC UPCOMING EVENTS 2013-14

MLRC LONDON CONFERENCE
September 23-24, 2013 | London, England

MLRC ANNUAL FORUM
November 13, 2013 | New York, NY

MLRC ANNUAL DINNER
November 13, 2013 | New York, NY

LEGAL ISSUES CONCERNING HISPANIC AND LATIN AMERICA MEDIA
March 10, 2014 | Miami, FL

MLRC/NAA/NAB MEDIA LAW CONFERENCE
Setpember 17-19, 2014 | Reston, VA

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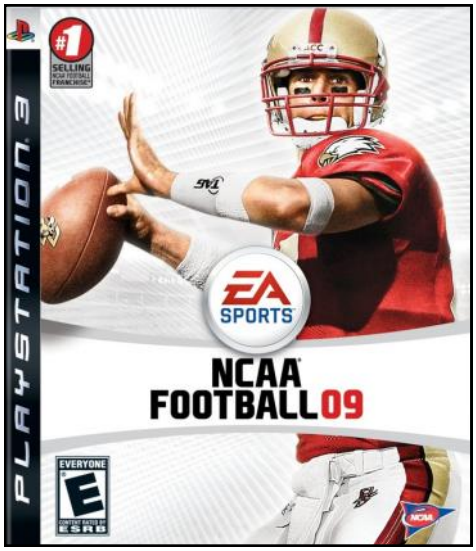
Ninth Circuit Fumbles the Ball in Videogame Likeness Cases

By Kent R. Raygor, Valerie E. Alter

Creating a new rule that gives videogames much more limited protection than other expressive works, the Ninth Circuit has ruled that realistically depicting college athletes in videogames showing them doing what they became famous for doing—in this case, playing football—is not sufficiently transformative to avoid liability for using their likenesses. In *In re NCAA Student-Athlete Name & Likeness Licensing Litigation (Keller),* 2013 WL 3928293 (9th Cir. July 31, 2013), the court held that Keller, a former college athlete prohibited by NCAA rules from commercializing his name and likeness rights, could pursue a right of publicity claim based on the use of his likeness in a football videogame—a work admittedly protected by the First Amendment—despite the game producer's assertion of First Amendment defenses.

This decision, following on the heels of the May 21, 2013 opinion in *Hart v. Electronic Arts, Inc.,* 717 F.3d 141 (3rd Cir. 2013), heavily relied on by the *Keller* decision, sets a dangerous precedent. As the *Keller* dissent points out, the Ninth Circuit now puts the ability to produce realistic but unauthorized expressive works based on historical events and people at risk. Moreover, it sets up a strange set of circumstances where an expressive work could be considered protected speech for purposes of a Lanham Act false endorsement claim, but not for a right of publicity claim, even though the two claims are highly similar, a fact that the Ninth Circuit itself acknowledged in *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1110 (9th Cir. 1992). *See also Hart,* 717 F.3d at 155 ("'a Lanham Act false endorsement claim is the federal equivalent of the right of publicity'", taken from the Tiger Woods right of publicity case, *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003)).



This article assesses the impact of the Ninth Circuit's rejection in *Keller* of the transformative use and *Rogers* (*Rogers v. Grimaldi*, 875 F.2d 994 (2nd Cir. 1989), adopted by the Ninth Circuit in *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 902 (9th Cir. 2002)) First Amendment defenses. With respect to the transformative use defense, this article argues that the majority opinion erred in rejecting its application to the facts in *Keller*, and that the dissent's analysis of the defense is more in line with First Amendment protections for expressive works. As to the *Rogers* defense, this article argues that both the majority and dissenting opinions too quickly dismiss its applicability altogether to right of publicity claims, and that application of the *Rogers* test or a similar defense is necessary to protect First Amendment rights.

The *Keller* Case

Samuel Keller ("**Keller**"), a former college football quarterback for Arizona State and Nebraska, sued Electronic Arts ("**EA**") for right of publicity violations arising from the use of his likeness in its *NCAA Football* videogame series. *NCAA Football* is a highly realistic football videogame that tries to portray each college football team as accurately as possible. *NCAA Football* does not automatically include players' names on their jerseys, but players may, using third-party sources, include names on the back of the players' jerseys. Apart from that, the game matches everything it can about the athletes portrayed—from their physiques down to any "highly identifiable playing behaviors." It similarly attempts to recreate the stadiums in which college games are played, including the coaches, cheerleaders, and even fans. *Keller*, at *1.

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Videogame players also have the ability to alter the players' physical appearances, abilities, and characteristics "at will," along with the structure of the game. As the dissent explains, an athlete's "impressive physical likeness can be morphed by the gamer into an overweight and slow virtual athlete, with anemic passing ability. And the gamer can create new virtual players out of whole cloth. Players can change teams." Players can similarly control "not only the conduct of the game, but the weather, crowd noise, mascots, and other environmental factors." *Keller*, at *14.

Keller complained that the 2005 and 2008 versions of *NCAA Football* contained an avatar of him playing quarterback for Arizona State and Nebraska, respectively. *Keller*, at **1-2. EA filed an anti-SLAPP special motion to strike, which the district court denied. The Ninth Circuit affirmed, rejecting EA's transformative use and *Rogers* defenses.

The Transformative Use Defense

As the majority recognized, the transformative use defense is "a balancing test between the First Amendment and the right of publicity based on whether *the work* in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation." *Keller*, at *3 (emphasis added) (quoting *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 391 (2001)). Note, for purposes of analyzing the impact of the Ninth Circuit's decision, further discussed below, that the court then essentially ignored that statement of the defense by foregoing an analysis of the overall *work* (*i.e.*, the NCAA Football videogame), instead limiting its review to the treatment of a single celebrity likeness (*i.e.*, Keller) in that work. That very restricted focus now leads to a rule that gives videogames much more restricted First Amendment protection than other expressive works or is precedent for a more restrictive protection for other protected expressive works.

In determining whether the transformative use test applies, the Ninth Circuit itself noted that courts often consider five factors:

- whether the depiction of a celebrity is a "raw material" used in a larger expressive work, or whether the depiction of the celebrity "is the very sum and substance of the work";
- whether the work in question is "primarily the defendant's own expression," *i.e.*, whether the primary motivation for a purchaser of the work is to buy the defendant's expressive content or a mere reproduction of the celebrity;
- "whether the literal and imitative or the creative elements predominate in the work";
- whether "the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted"; and
- whether "an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame."

Id. at *3 (quoting from *Comedy III*, 25 Cal. 4th at 406-08). But the majority focused almost exclusively on the third factor listed above—the realistic depiction of Keller, who is just one of many players in the game—ignoring the other considerations. Based exclusively on the realistic nature of the videogame, it held that the transformative use defense could not apply.

The dissent, by contrast, holistically focused on *NCAA Football* as a whole, as an entire expressive work, and criticized the majority for focusing exclusively on Keller's relatively limited appearance in the game. The dissent would have held that the transformative use defense applies, and indeed recognized the danger of not applying it: namely, the risk that works accurately portraying historical events would fall outside the scope of the transformative use defense, jeopardizing the ability to make works of historical fiction and documentaries, among others. The dissent likely has it right.

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The Majority's Rejection of the Transformative Use Defense

In rejecting the transformative use defense, the majority noted relevant precedent—*Comedy III* (the use of a realistic charcoal drawing of The Three Stooges on t-shirts and lithographs was not transformative because the drawing contained no significant transformative elements); *Winter v. DC Comics*, 30 Cal. 4th 881 (2003) (the depiction of famous rockers Johnny and Edgar Winter in a comic book as half-worm, half-human creatures was transformative because it contained significant expressive content beyond mere likenesses of the brothers); *Kirby v. Sega of America, Inc.*, 144 Cal. App. 4th 47 (2006) (the depiction in a videogame of "Ulala," a reporter from outer space allegedly based on singer Kierin Kirby was transformative because Kirby was not literally depicted and the avatar was presented in the context of elements beyond what she did in her career); *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2009) (the depiction of celebutante Paris Hilton on a greeting card was not transformative because it fell far short of the kind of expressive content contained in a videogame such as that in the *Kirby* case), and *No Doubt v. Activision Publishing, Inc.*, 192 Cal. App. 4th 1018 (2011) (discussed further below)—and determined that the use of Keller's likeness in the football game was not transformative. *Keller*, at **4-5. In so holding, the court did not appear to consider the five factors it had earlier laid out, particularly whether the primary motivation for a purchaser of the game is the "reproduction" of Keller's likeness or whether its value derives primarily from Keller's fame.

Instead, the court relied heavily on a California Court of Appeal's decision in *No Doubt*. That case involved the videogame *Band Hero*, where "users simulate performing in a rock band in time with popular songs. Users choose from a number of avatars, some of which represent actual rock stars, including the members of the rock band No Doubt." *Keller*, at *4.

The California Court of Appeal held in *No Doubt* that the transformative use defense did not apply because "the video game characters were 'literal recreations of the band members,' doing 'the same activity by which the band achieved and maintains its fame.'" *Keller*, at *4 (quoting *No Doubt*, 192 Cal. App. 4th at 1034). The Ninth Circuit then applied the case to the *NCAA Football* game as follows:

> The facts of *No Doubt* are very similar to those here. EA is alleged to have replicated Keller's physical characteristics in *NCAA Football*, just as the members of No Doubt are realistically portrayed in *Band Hero*. Here, as in *Band Hero*, users manipulate the characters in the performance of the same activity for which they are known in real life—playing football in this case, and performing in a rock band in *Band Hero*. The context in which the activity occurs is also similarly realistic—real venues in *Band Hero* and realistic depictions of actual football stadiums in *NCAA Football*. As the district court found, Keller is represented as "what he was: the starting quarterback for Arizona State" and Nebraska, and "the game's setting is identical to where the public found [Keller] during his collegiate career: on the football field."

Keller, at *5. In other words, the Ninth Circuit rejected the transformative use defense because *NCAA Football* presented videogame players with a realistic college football experience.

The court rejected EA's argument that "the district court erred in focusing primarily on Keller's likeness and ignoring the transformative elements of the game as a whole"—a point advocated by the dissent and discussed in more detail below—again based on *No Doubt*, which the majority quoted for the proposition that the fact "that the avatars appear in the context of a videogame that contains many other creative elements[] does not transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities." *Keller*, at *5 (quoting *No Doubt*, 192 Cal. App. 4th at 1034). The Ninth Circuit discounted the fact that the avatars in *NCAA Football*, unlike those in *Band Hero*, could be altered because "[t]hough *No Doubt* certainly mentioned the immutability of the avatars, we do not read the California Court of Appeal's decision as turning on the inability of users to alter the avatars. The key contrast with *Winter* and *Kirby* was that in those games [*sic*] the public figures were transformed into 'fanciful, creative characters' or 'portrayed as . . . entirely new character[s].'" *Keller*, at *6 (quoting *No Doubt*, 192 Cal. App. 4th at 1033-34).

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The Dissent Got It Right: The Transformative Use Defense Should Apply.

The dissent diverged from the majority because it viewed the *NCAA Football* game as a whole, instead of focusing only on the treatment of Keller's image therein as did the majority. As the dissent explains, the "salient question is whether the entire work is transformative, and whether the transformative elements predominate, rather than whether an individual persona or image has been altered." In *Keller*, the dissent would ask whether "[a]t its essence, EA's *NCAA Football* is a work of interactive historical fiction." *Keller*, at *13.

Although it cautioned against treating the five factors listed but not applied in the majority opinion as "analytical factors," the dissent applied each as follows:

> The athletic likenesses are but one of the raw materials from which the broader game is constructed. [Factor 1] The work, considered as a whole, is primarily one of EA's own expression. [Factor 2] The creative and transformative elements predominate over the commercial use of likenesses. [Factor 3] The marketability and economic value of the game comes from the creative elements within, not from the pure commercial exploitation of a celebrity image. [Factor 4] The game is not a conventional portrait of a celebrity, but a work consisting of many creative and transformative elements. [Factor 5]

Keller, at *14.

The dissent distinguished *No Doubt* on the ground that "[t]he literal representations in No Doubt were not, and could not be, transformed in any way," and criticized the majority for misreading *No Doubt*: "The majority places great reliance on *No Doubt* as support for its proposition that the initial placement of realistic avatars in the game overcomes the First Amendment's protection, but the Court of Appeal in *No Doubt* rejected such a cramped construction, noting that 'even literal reproductions of celebrities may be "transformed" into expressive works based on the context into which the celebrity image is placed.'" *Keller*, at *14 (quoting *No Doubt*, 192 Cal. App. 4th at 1033). *See also No Doubt*, at 1034 ("[W]hen the context into which a literal celebrity depiction is placed creates 'something new, with a further purpose or different character, altering the first [likeness] with new expression, meaning, or message,' the depiction is protected by the First Amendment.").

The dissent's attempt to distinguish *No Doubt* may have fallen flat because almost immediately after recognizing that even literal depictions of celebrities may be transformed into expressive works based on the context into which the images are placed, the *No Doubt* court held that the use of the likenesses of members of the band No Doubt was not transformative because,

> "In *Band Hero*, by contrast, no matter what else occurs in the game during the depiction of the No Doubt avatars, the avatars perform rock songs, the same activity by which the band achieved and maintains its fame. Moreover, the avatars perform those songs as literal recreations of the band members. That the avatars can be manipulated to perform at fanciful venues including outer space or to sing songs the real band would object to singing, or that the avatars appear in the context of a video game that contains many other creative elements, does not transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities."

No Doubt, 192 Cal. App. 4th at 1034. The better way to distinguish *No Doubt* may be to follow the lead of the dissenting opinion in *Hart* and to acknowledge that the California Court of Appeal *No Doubt* decision (1) is not binding on the Ninth Circuit, and (2) was likely wrongly decided. *Keller*, at *7 (quoting *Hart*, 717 F.3d at 176).

Finally, the dissent pointed out the danger in the majority's failure to apply the transformative use test:

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> The stakes are not small. The logical consequence of the majority view is that all realistic depictions of actual persons, no matter how incidental, are protected by a state law right of publicity regardless of the creative context. This logic jeopardizes the creative use of historic figures in motion pictures, books, and sound recordings. Absent the use of actual footage, the motion picture *Forrest Gump* might as well be just a box of chocolates. Without its historical characters, *Midnight in Paris* would be reduced to a pedestrian domestic squabble. The majority's holding that creative use of realistic images and personas does not satisfy the transformative use test cannot be reconciled with the many cases affording such works First Amendment protection.

Keller, at *17.

This is a real risk that the majority all but writes off in a footnote: "We reject the notion that our holding has such broad consequences. As discussed above, one of the factors identified in *Comedy III* 'requires an examination of whether a likely purchaser's primary motivation is to buy a reproduction of the celebrity, or to buy the expressive work of that artist.'" *Keller*, at *7 n.10. As noted above, however, the majority does not appear to have analyzed that factor, but rather follows *No Doubt*. Moreover, if it had analyzed the factor, it is difficult to imagine that a consumer would buy the *NCAA Football* game merely to obtain a reproduction of *Keller* himself, as opposed to the expressive work, *i.e.*, a videogame enabling the player to immerse him or herself in a college football game.

As additional examples, consider the films *Malcolm X*, *The Perfect Storm*, *Zero Dark Thirty*, *The Bling Ring* or *Argo*, all of which are based on realistic depictions of historical events. The majority's opinion would permit individuals depicted in these or similar films to sue for violation of the right of publicity—which would have an undeniable chilling effect on speech. It is hard to imagine that the majority would have reached the same result had it been presented with a historical film or other expressive work about Keller's performance as a college athlete instead of a videogame of that activity in light of a long line of cases protecting unauthorized but truthful biographies and similar works in the face of right of publicity claims. *See, e.g.*, *Frosch v. Grosset & Dunlap, Inc*., 427 N.Y.S.2d 828 (N.Y. App. Div. 1980) (Marilyn Monroe's right of publicity claims concerning Norman Mailer's book about her); *Loft v. Fuller*, 408 So. 2d 619 (Fla. Dist. Ct. App. 1981) (the use of the name and likeness of the deceased captain of a flight that crashed into the Everglades in a non-fiction book and subsequent film entitled *The Ghost of Flight 401*); *Rosemont Enterprises, Inc. v. Random House, Inc*., 58 Misc. 2d 1, 294 N.Y.S.2d 122 (1968) (Howard Hughes' publicity rights asserted against defendant publishers creating their own, unauthorized biography of Hughes); *Ruffin-Steinback v. De Passe*, 82 F. Supp. 2d 723 (E.D. Mich. 2000) (right of publicity claims by a member of The Temptations over his depiction in an NBC docudrama); *Seale v. Gramercy Pictures*, 949 F. Supp. 331 (E.D. Pa. 1996) (publicity claims of Bobby Seale, a founder of the Black Panther Party, over his portrayal in a film); *Tyne v. Time Warner Entertainment Company, L.P*., 425 F.3d 1363 (11th Cir. 2005) (right of publicity claims asserted by the family of deceased caption of a fishing boat that vanished with the death of all on board dramatized in the film *The Perfect Storm*). At best, the *Keller* majority appears to have ignored its own precedent and decided to deem videogames less worthy of First Amendment protection than other expressive works; at worst, it has endangered First Amendment protection for all expressive works that try to depict historical events.

The *Rogers* Defense

In *Rogers v. Grimaldi*, the Second Circuit, based on First Amendment protection of freedom of speech, held that Ginger Rogers could not assert a false endorsement claim over the film title *Ginger and Fred* unless (1) the use of her name has "no artistic relevance" to the film, or (2) even if it has some artistic relevance to the film, the film nevertheless "explicitly misleads as to [its] source or the content." *Rogers*, 875 F.2d at 998-99. In *Keller*, EA argued that the *Rogers* test should apply to right of publicity claims, a proposition flatly rejected by both the majority and dissenting opinions because the Lanham Act protects against consumer

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confusion, whereas the right of publicity purportedly only protects the right of a celebrity to control the use of his or her image. *Rogers*, according to *Keller*, is specifically tailored to protect the Lanham Act's interest in protecting against consumer confusion.

Neither the majority opinion nor the dissenting opinion acknowledges, however, that *Rogers* was itself a claim for false endorsement, which, under Ninth Circuit precedent, protects rights remarkably similar to the property-like rights protected by the right of publicity. Thus, the purported distinction between Lanham Act claims and right of publicity claims is an artifice, and the *Rogers* test should apply to right of publicity claims.

The Ninth Circuit's Rejection Of The *Rogers* Defense

The Ninth Circuit rejected EA's argument that *Rogers* should apply because,

> As the history and development of the *Rogers* test makes clear, it was designed to protect consumers from the risk of consumer confusion—the hallmark element of a Lanham Act claim. The right of publicity, on the other hand, does not primarily seek to prevent consumer confusion. Rather, it primarily "protects a form of intellectual property [in one's person] that society deems to have some social utility."

Keller, at *8. In other words,

> The right of publicity protects the *celebrity*, not the *consumer*. Keller's publicity claim is not founded on an allegation that consumers are being illegally misled into believing that he is endorsing EA or its products . . . . Instead, Keller's claim is that EA has appropriated, without permission and without providing compensation, his talent and years of hard work on the football field. The reasoning of the *Rogers* and *Mattel* courts—that artistic and literary works should be protected unless they explicitly mislead consumers—is simply not responsive to Keller's asserted interests here.

Id. (emphasis in original). The dissenting opinion reached a similar conclusion. *Id.* at *13.

The Application Of A *Rogers*-Like Test Is Necessary to Protect the First Amendment Right to Create Expressive, Yet Historically Accurate, Works

As noted, both the majority and dissenting opinions found *Rogers* inapplicable to right of publicity claims because Lanham Act claims, where *Rogers* still applies, are primarily concerned with consumer confusion, whereas right of publicity claims involve a property right in oneself. Keller, at *8 and *12 dissent n.1. Both opinions, however, all but ignore that *Rogers* was not a traditional trademark infringement case, but rather a false endorsement case.

As the Ninth Circuit itself has recognized, there is more to a false endorsement claim than consumer confusion. As it explained in *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1110 (9th Cir. 1992), a false endorsement case, the injury protected against is not just consumer confusion, but also the right of the celebrity to control the use of his or her image. *See also Hart*, 717 F.3d at 151 (recognizing that "the goal of maintaining a right of publicity is to protect the property interest that an individual gains and enjoys in his identity through his labor and effort. Additionally, *as with protections for intellectual property*, the right of publicity is designed to encourage further development of this property interest." (emphasis added)).

In *Waits*, the defendants argued that singer Tom Waits, who notoriously refused to do endorsements, did not have standing to bring a Lanham Act claim because he did not compete with the defendants. The Ninth Circuit rejected that argument because the alleged false endorser "is in a sense a competitor of the celebrity, even when the celebrity has chosen to disassociate himself or herself from advertising products as has Waits. They compete with respect to the use of the celebrity's name or identity. *They are both utilizing or marketing that personal property for commercial purposes*." 978 F.2d at 1110 (emphasis added). Moreover, the

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court explained that standing is "established by the likelihood that the wrongful use of [Waits'] professional trademark, his unique voice, would injure him commercially." *Id.* In this sense, a false endorsement claim then is remarkably similar to a claim for violation of the right of publicity—in fact, it appears that one must essentially assert a right of publicity claim to establish standing under the Lanham Act. The same broad protections that apply to Lanham Act false endorsement claims thus should also apply to right of publicity claims.

The Third Circuit in *Hart* also declined to apply the *Rogers* test. It argued that such a broad rule that would bar a publicity claim any time the use of a likeness can be related to the underlying work would lead to the most exploitative products—those "appropriating and exploiting [a player's] identity" and "targeted at the sports-fan market segment"—faring best under a First Amendment defense and thereby incentivize infringers to exploit an athlete's publicity rights. 717 F.3d at 155-58. *Hart* ignores a critical point. Videogames are not merely "products" like can openers or baseballs. They are expressive works protected by the First Amendment, as the Third Circuit itself recognized. *Id.* at 148. Thus, the *Rogers* test would apply *only* where "product" at issue is itself protected First Amendment expression, which arguably would not immunize the many "product" or merchandizing uses that gave rise to the Third Circuit's concerns.

It makes little sense for the same work to be protected by the First Amendment for purposes of a federal claim, but not for purposes of a state law that aims to protect similar rights. This potential for conflict is borne out in the companion case to *Keller*, *Brown v. Electronic Arts, Inc.*, 2013 WL 3927736 (9th Cir. July 31, 2013), issued on the same day by the same panel. In *Brown*, former famous professional NFL football player Jim Brown sued EA under Section 43(a) the Lanham Act, and asserted state law claims law for right of publicity violations and unlawful business practices based on EA's use of his likeness in EA's *Madden NFL* videogame series. *See Brown v. Electronic Arts, Inc.*, 2009 WL 8763151, at *1 (C.D. Cal. 2009).

The district court applied the *Rogers* test and dismissed Brown's Lanham Act claim. It then declined to exercise supplemental jurisdiction over his parallel state law claims. *Id.* at *5. On appeal, the Ninth Circuit affirmed the dismissal of the Lanham Act claim, which is not surprising given its precedent in *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002), and *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095 (9th Cir. 2008), which broadly applied the *Rogers* test to Lanham Act claims. Citing *Keller*, the Ninth Circuit in *Brown*, however, then stated, "We emphasize that this appeal relates only to Brown's Lanham Act claim. Were the state causes of action [*e.g.*, Brown's right of publicity claims] before us, our analysis may be different and a different outcome may obtain." *Brown*, at *2 n.2. This statement starkly illustrates that there is indeed no doctrinal consistency in the Ninth Circuit's position. The Ninth Circuit would permit a right of publicity claim to go forward in the face of a First Amendment defense, even though it would not permit the analogue Lanham Act false advertising claim to proceed based on the same First Amendment concerns.

The *Rogers* test is preferable to the transformative use test because it is simple and straightforward to apply. Either the use of a celebrity's identity has minimal relation to the underlying expressive work, or it does not. Either the use of a celebrity is explicitly misleading as to source or content, or it is not. While the dissent in *Keller* contends that "the transformative use test—if correctly applied to the work as a whole—provides the proper analytical framework," it also acknowledges that the transformative use test is "more nuanced," *i.e.*, more difficult, to apply. *Keller*, at *12 dissent n.1. Given the importance of the expressive rights at stake, the simpler *Rogers* test is warranted to avoid a patchwork of decisions, where some expressive uses are protected, others are not, and it is nearly impossible to predict into which category a work will fall.

Finally, the need for the broad and easily applied *Rogers* test is even more apparent when one considers the rights at stake. The Lanham Act, as described in *Keller*, protects the right of consumers—millions of people—to be free from misleading information. The right of publicity, by contrast, "protects the *celebrity*, not the *consumer*." *Keller*, at *9 (emphasis in original). It makes little sense that a broad right of the population at large would cede to the First Amendment, but a right that is admittedly available to a select and elite few would not.

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EA was represented by Kelli L. Sager, Alonzo Wickers IV, Karen A. Henry, Lisa J. Kohn and Anna R. Buono, Davis Wright Tremaine LLP, Los Angeles; and Robert A. Van Nest, Keker & Van Nest, LLP, San Francisco. Plaintiffs were represented by Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Seattle. A full list of amici counsel is available in the Ninth Circuit opinion.

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Seventh Circuit Addresses Actual Malice Pleading Standards

Applies Single Publication Rule to Internet

By Steve Mandell, Steve Baron, and Elizabeth Morris

The Seventh Circuit recently affirmed a Northern District of Illinois decision to dismiss a defamation and false light case by reaffirming the importance of pleading actual malice with sufficient detail. Notably, the Court also extended Illinois's single-publication rule to the Internet and found that mere passive maintenance of a website was not sufficient to retrigger publication. *Pippen v. NBCUniversal Media, LLC*, Case no. 12-3294, Aug. 21, 2013 (7th Cir.).

Background

Plaintiff and former Chicago Bulls basketball player Scottie Pippen pursued lawsuits against former financial and legal advisers after he experienced financial losses through bad investments. After learning of Pippen's financial woes, Defendants NBCUniversal Media, LLC, Mint Software Inc., Investing Answers Inc., Evolve Media Corporation, and CBS Interactive Inc. erroneously reported that Pippen had filed for bankruptcy, even though he had not.

The Court agreed that the statements at issue were not defamatory per se because bankruptcy may result from many "innocent reasons" that do not necessarily impugn one's personal or professional reputation.

Pippen filed suit against Defendants (among other defendants, who were ultimately voluntarily dismissed, had their claims dismissed on separate grounds, or were never served) in the Northern District of Illinois (Case no. 1:11-cv-8834). In his initial and amended complaints, he alleged negligence, false light, and defamation *per se*. The crux of Pippen's claim is that Defendants' reports that he was bankrupt permanently damaged his personal and professional reputation, causing offers for personal appearances and endorsements to diminish.

Defendants moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). They argued that Pippen was required to allege actual malice because he is a public figure. Further, the statements at issue were not defamatory *per se* because they did not fall within any of the traditional *per se* categories and they could be innocently construed. Pippen also sought partial summary judgment on the defamation *per se* claim.

The District Court's Dismissal

On August 2, 2012, District Judge Sharon Johnson Coleman granted the motion to dismiss. The district court dismissed the negligence claim with prejudice because "[a] plaintiff may not recover for the merely negligent publication of false statements regarding public figures." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56-57 (1988); *Time, Inc. v. Hill*, 385 U.S. 374, 389-91 (1988). The district court did not rule or comment upon Pippen's motion for summary judgment.

The defamation *per se* and false light claims were dismissed without prejudice. As to defamation, the district court held that statements regarding bankruptcy did not fall within a *per se* category; "the allegedly defamatory statements here can be construed, at worst, as allegations of a lack of ability in management of plaintiff's personal finances." In addition, Pippen failed to plead special damages and therefore did not state a claim for defamation *per quod.*

Finally, the district court noted that the pleadings establish that Pippen is a public figure, which required him to plead actual malice for both the defamation *per se* and false light claims. The complaint, however, makes the conclusory allegation "that the statements were published with actual malice . . . but provides no additional detail, and does not suggest that any of the defendants were alerted in any way to the possible inaccuracy of the statements they published." As

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a result, the pleadings failed pursuant to *Ashcroft v. Iqbal*, 556 U.S. 662, 686-87 (2009); *Schatz v. Republican State Leadership Committee*, 669 F.3d 50, 58 (1st Cir. 2012).

Pippen subsequently sought leave to file a second amended complaint, which contained newly pled false light and defamation *per se* claims. On September 26, 2012, however, the district court denied the motion for leave and Pippen's motion for partial summary judgment. Although the district court acknowledged that the new proposed complaint contained more detail regarding defendants' alleged recklessness, "the malice required to establish liability for defamation of a public figure such as famed and well-respected athlete Scottie Pippen is greater than the mere failure to investigate, no matter how allegedly egregious that failure may be." The district court then dismissed the case with prejudice. Pippen appealed the dismissal of the defamation and false light claims.

Seventh Circuit Appeal

The Seventh Circuit affirmed the district court's decision in an opinion written by Chief Judge Easterbrook. In its opinion, the Court agreed that the statements at issue were not defamatory *per se* because bankruptcy may result from many "innocent reasons" that do not necessarily impugn one's personal or professional reputation.

Next, after acknowledging that the same analysis applies to defamation *per quod* and false light claims, the Court rejected the district court's decision that special damages were not sufficiently pled in his proposed second amended complaint. Federal Rule of Civil Procedure 9(g) requires that special damages be "specifically stated," which is less than that "particularity" standard required for fraud under Rule 9 (b). Because the new pleading itemized losses and specific opportunities that were no longer available to Pippen, the allegations passed muster.

Instead, the Seventh Circuit focused on Pippen's failure to plead actual malice. Although "[s]tates of mind may be pleaded generally," the Seventh Circuit reaffirmed that pleading actual malice requires "details sufficient to render a claim plausible." *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 570 (2007); *Iqbal*, 556 U.S. at 678. The Court reinforced that the "failure to investigate . . . is insufficient to establish reckless disregard for the truth." *Harte-Hanks Comm'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989).

Moreover, Defendants' failure to retract is insufficient to show actual malice because publication of the statement had already occurred; as Illinois adheres to the single publication rule, 740 ILCS 165/1, "later circulation of the original publication does not trigger fresh claims."

The Court also rejected Pippen's contention that Defendants should have removed this information from the Internet. Although Illinois has not yet considered how the single publication rule applies to Internet publications, the Court noted that every jurisdiction which has reviewed this issue applies the rule online. As a result, the Seventh Circuit applied the rule here because "excluding the Internet from the single-publication rule would eviscerate the statute of limitations and expose online publishers to potentially limitless liability." To hold otherwise would create an "'even greater potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants.'" *Firth v. State*, 98 N.Y. 2d 365, 370 (2003); *see also Churchill v. State*, 378 N.J. Super. 471, 480-81 (2005).

The Court also rejected Pippen's contention that Defendants should have removed this information from the Internet.

Here, Defendants did not make a conscious, independent act that would trigger republication; accordingly, "the passive maintenance of a web site" does not constitute republication. "The publisher's degree of control over its content does not matter to Illinois's test for whether redistribution of a defamatory statement amounts to a republication."

Issues Raised by *Pippen*'s Analysis

Overall, the Seventh Circuit's decision is positive for media defendants because it reaffirms that pleading actual malice requires "details sufficient to render a claim plausible," citing *Twombly* and *Iqbal*.

Most notably, of course, the decision extends the single publication rule to the Internet. This holding is critical for

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Illinois media defendants because it provides authority to prevent suits for the mere passive maintenance of websites. In *dicta*, the Court reinforces that some acts of the publisher could trigger republication and suggests that even the simple act of changing a URL could be sufficient. Accordingly, defendants should exercise some level of caution when maintaining their websites.

The decision cuts slightly against defamation defendants, however, because it notes that pleading special damages in federal court simply requires "specifically stating" what opportunities were lost, and that such specificity need not meet the more particular standard of Rule 9(b) for allegations of fraud. The Court commented that Pippen met his burden of showing more than a general allegation of damage in his proposed second amended complaint, where he itemized losses and specific business opportunities that had been available to him before Defendants' publications but not after the publications. Thus, Illinois's more stringent fact-pleading standard does not appear to apply to the notice pleading requirement in federal court, even for special damages.

Steven Mandell and Steven Baron are partners and Elizabeth Morris is an associate at Mandell Menkes LLC, Chicago. Plaintiff Scottie Pippen is represented by Arthur S. Gold of Gold & Coulson, Chicago and Jefferey Ogden Katz of Patterson Law Firm, LLC, Chicago. Defendant NBCUniversal Media, LLC is represented by David P. Sanders of Jenner & Block LLP, Chicago. Defendant Mint Software Inc. is represented by Rodger R. Cole and Sean S. Wikner of Fenwick & West, Mountain View and San Francisco, California and Steven P. Mandell of Mandell Menkes LLC, Chicago. Defendant Investing Answers Inc. is represented by Ryan B. Jacobson and Michael L. Resis of SmithAmundsen, LLC, Chicago. Defendant Evolve Media Corporation is represented by Brian A. Sher and Jena Valdetero of Bryan Cave LLP, Chicago. Defendant CBS Interactive Inc. is represented by Lee Levine and Chad Bowman of Levine Sullivan Koch & Schulz, Washington, D.C. and Bryan A. Sher and Jena M. Valdetero of Bryan Cave LLP, Chicago.

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Photographer's First Amendment Right Prevails Over Neighbors' Privacy Interest

By Nancy E. Wolff

In a victory for the First Amendment rights of artists, New York-based fine art photographer Arne Svenson successfully dismissed a New York right of privacy action seeking, *inter alia*, to prevent the display, promotion or sale of certain photographs from his much-publicized series "*The Neighbors*." The decision in *Foster v. Svenson*, 2013 NY Slip Op 31782(NY Sup. Aug. 2013), definitively recognizes for the first time that photographs advertised and sold as prints are expressive works entitled to full First Amendment protection alongside sculpture, collage and photo-journalism and reaffirms the narrow scope of New York's Civil Rights Laws §§ 50 and 51 ("NYCRL 50/51").

Svenson took pictures of the framed glass-walled luxury apartment building directly across from his Tribeca studio.

Background

Svenson's involvement in the events that predicated this lawsuit came about almost by accident when, in 2012, he inherited a telephoto lens from a friend who had been an avid birdwatcher. Usually a still-life photographer, Svenson began taking pictures of the Mondrian-like framed glass-walled luxury apartment building directly across from his Tribeca studio. Over the course of a year, Svenson documented his neighbors going about their lives; cleaning the floor or holding a pair of scissors. The resulting art works – large scale color photographs, cropped to intensely focus on the subjects – became "*The Neighbors*," a series of limited edition prints first exhibited by his Los Angeles gallery in January before moving to his New York gallery from early May through June.

The promotion and exhibition of *The Neighbors* in New York provoked vigorous debate about the tension between freedom of artistic expression and the right to privacy and quickly drew national media attention. Controversy centered not so much on the content of the photographs – Svenson depicts his subjects only with their faces partially if not fully obscured, and always with "sensitivity and humility," as reported by *Art in America* – but on the manner in which they were taken.

Martha and Matthew Foster – plaintiffs in this case – saw an article about the exhibit held in Los Angeles in the *Tribeca Citizen* before the New York opening and recognized two of the photographs as depicting Mrs. Foster and their children (ages 2 and 4). Claiming to be "frightened and angered by [Svenson's] utter disregard for their privacy and the privacy of their children," they engaged an attorney and sent cease and desist letters to Svenson and his galleries demanding their removal. Svenson voluntarily agreed to remove the photographs of the Fosters from his website and from the exhibit as a courtesy, but the photographs themselves continued to be published by news

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media outlets covering the exhibit and the controversy it had engendered.

The Fosters asserted that this continued coverage constituted advertising of the exhibition and works, in violation of NYCRL 50/51, and on May 21, 2013 they brought an action against Svenson seeking an injunction against further dissemination and display of the photographs in any medium whatsoever (including news outlets), an order directing Svenson to turn over any photographs and images of themselves or their children, actual and exemplary damages, and an award of costs and expenses. (In addition to NYCRL 50/51, the complaint pled a second cause of action for intentional infliction of emotional distress, which Justice Rakower dismissed without further discussion.)

Plaintiffs additionally filed a motion for a preliminary injunction pending the outcome of the action. Svenson cross-moved to dismiss the action in its entirety. Both motions were heard in oral argument on July 2, 2013. At issue was whether the promotion and sale of the limited edition prints in the *Neighbors* series constituted "advertising or trade" within the meaning of NYCRL 50/51. Because New York has no common law right of privacy, plaintiffs' were required to fit within the limitation contained in that statute – which prohibits the use of a living person's name, image or likeness, within the state of New York, for purposes of advertising or trade, without his or her consent – in order to obtain relief. It was uncontested that the images were taken without consent and that the subject themselves were not of public interest.

The exhibited photographs communicate Svenson's ideas to the public and promote the enjoyment of art irrespective of whether they are sold.

Motion to Dismiss

In denying Plaintiffs' motion for a preliminary injunction and granting Svenson's motion to dismiss the case in its entirety, Justice Eileen A. Rakower of the New York Supreme Court recognized that "in order to avoid a conflict between an individual's right to be free from unwarranted intrusions and the First Amendment," NYCRL 50/51 have "a limited application." Relying extensively on *Hoepker v. Kruger*, 200 F. Supp. 2d 340 (S.D.N.Y. 2002), Justice Rakower went on to rule that Svenson's photographs are protected by the First Amendment as artwork and shielded from NYCRL 50/51, emphasizing that the exhibited photographs communicate Svenson's ideas to the public and promote the enjoyment of art irrespective of whether they are sold.

Further, "since art is protected by the First Amendment, any advertising that is undertaken in connection with promoting that artwork is permitted." Accordingly, the use of the Fosters' likenesses was not a use for purposes of advertising for trade. Lastly, because exhibition of *The Neighbors* was a legitimate news item, the media was entitled to use the photographs in relaying the news item.

Though she found no likelihood of success on the merits, Justice Rakower went on to address the other elements necessary for obtaining a preliminary injunction – irreparable harm and balancing of the equities – and found they both favored Svenson. The exhibition had ended and Svenson was not currently taking new pictures in this series. "Simply," Justice Rakower wrote with regard to the latter element, "an individual's right to privacy under the New York Civil Rights Law sections 50 and 51 yield to an artist's protections under the First Amendment under the circumstances presented here."

Justice Rakower concluded by granting Svenson's cross-motion to dismiss the lawsuit in its entirety without further discussion, holding that Plaintiffs were not entitled to the relief they sought under the undisputed facts presented.

The decision stands out as a significant victory for artists, especially those who document real life on rely on their subjects' ignorance of the camera. This case had a more challenging fact pattern and was a departure from previous cases where plaintiffs were public figures or had been photographed on public streets. Furthermore, it settles that photographers who exhibit and sell their photographs are entitled to the same First Amendment protection afforded to the news media or sculptors under NYCRL 50/51– a question which had been left hanging since *Nussenzwieg v. DiCorcia*, 11 Misc.3d 1051(A) (2006), was decided on a statute of limitations defense and not on the merits on appeal.

Nancy E. Wolff and Matthew A. Kaplan, Cowan, Debaets, Abrahams & Sheppard, LLP, represented defendant. Plaintiff was represented by Richard G. Menaker, Esq. of Menaker & Herrmann LLP.

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Federal Judge in Michigan Puts Creepy Mattress Case to Bed

By James E. Stewart and Leonard M. Niehoff

Defending consumer protection reporting has involved us and many of you at one time or another with plaintiffs ranging from TV repair shops, transmission shops or mini face lift clinics. In Hussein Hazime et al. v. Fox TV Stations, Inc. d/b/a Fox 2 News and WJBK, No. 12-15072 E.D. Mich., we found ourselves confronted with a plaintiff engaged in a business we never knew existed – the "perfectly legal" but indisputably sketchy business of selling used mattresses. To paraphrase the broadcast, what you're about to read about this business may have you getting up on the wrong side of the bed.

Background

In the summer of 2012, Detroit television station Fox 2 broadcast two reports about a local business that was selling "refurbished" mattresses. The reports appeared during the station's local news programming and were part of a regular consumer-protection-oriented feature called "Problem Solvers."

We found ourselves confronted with a plaintiff engaged in a business we never knew existed – the "perfectly legal" but indisputably sketchy business of selling used mattresses.

The first broadcast revealed that the business—Hassan's Shop, Inc.—was wrapping old, used, and soiled bedding in new coverings and marketing the mattresses as "custom made." The broadcast expressly stated that the practice was legal. But it also reported on reactions from some unhappy customers.

As part of the first broadcast, Fox 2 reporter Rob Wolchek interviewed a customer named "Del," who stated that the mattress she had purchased from Hassan's Shop was infested with bedbugs—as was the replacement bed the store provided after she complained. Del also told Wolchek that when she purchased the mattress she believed it was new. In addition, Wolchek interviewed a customer named "Rober," who similarly thought he was purchasing a new product and who complained to the store about the quality of the mattress. The store provided a replacement, but he remained dissatisfied. And Wolchek interviewed a former employee of Hassan's, who said that the shop did not completely strip the old mattresses but, instead, just put new covers over the "dirty" material.

The broadcast also showed an undercover reporter visiting Hassan's Shop to investigate. The reporter purchased a mattress, which Wolchek later cut open on camera to reveal an old mattress that had been covered with some new padding, a new cover and a plastic wrapping. The broadcast further showed the reporter asking a salesman whether the mattress was "new," to which the salesman responded: "Yeah, refurbished." The broadcast acknowledged that the store placed a mandatory label on the mattresses indicating that they included "second hand materials," but it also showed that the store placed that label under another mandatory label saying nothing about used materials, which were then placed under a layer of plastic, and on the end of the bed that the store positioned toward the wall.

Finally, the first broadcast showed Wolchek's interviews with representatives of the factory where the old mattresses were reconditioned. When he asked factory manager Marcus why they were using "old fabric" inside their mattresses, Marcus initially denied that they were doing so, but when confronted with remnants of the mattress that Wolchek had cut open, he conceded that "sometimes we use old material, old stuff." Wolchek also interviewed store owner Hassan, who denied that any customer had ever complained—a

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statement that could not be squared with what Del and Rober told Wolchek.

The second broadcast was a follow-up report. It repeated some of information conveyed in the first broadcast, but it focused on another local store that had stepped forward to provide Del and Rober with good quality new mattresses for free. The second broadcast reiterated that Hassan's business practices were legal.

Hassan's Shop—and a collection of related businesses and individuals—filed suit in the United States District Court for the Eastern District of Michigan against Fox TV Stations, Inc. The complaint alleged eight claims for relief, including defamation by implication. Although Plaintiffs technically named the wrong defendant in the action, Fox TV moved to dismiss on substantive grounds pursuant to Fed. R. Civ. P. 12 (b)(6). The court granted the motion.

Complaint Dismissed

The court began its opinion by making short work of some aspects of Plaintiffs' complaint. The court concluded that the broadcasts did not say anything about three of the named plaintiffs and so dismissed them from the case. Further, the court found that Plaintiffs had waived most of their claims by failing to defend them in response to Defendant's motion. That left only two claims: defamation by implication and interference with contractual relations. Relying heavily on the Michigan case of *Locricchio v. Evening News Ass'n*, 476 N.W.2d 112 (1991), the court dismissed those claims as well. *Hussein Hazime v. Fox TV Stations, Inc.*, Case No. 12-15072 (E.D. Mich., Aug. 19, 2013).

Libel by implication is a well-known headache for all of us that can quickly lead defense counsel into a quagmire.

Libel by implication is a well-known headache for all of us that can quickly lead defense counsel into a quagmire. In *Locricchio* supra, the Michigan Supreme Court reviewed the leading, and often inconsistent authority in this vexing area and concluded that like libel itself, there was much about libel by implication that did not make sense. Nevertheless, the court held that a plaintiff claiming libel by implication was still required under *Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986)*, to demonstrate that the claimed implication was materially false. In moving to dismiss plaintiff's claim for libel by implication, we chose the simple path of embracing *Locricchio* and demonstrating that plaintiff was unable to allege that any of the claimed implications were false.

Plaintiffs claimed that the reports gave rise to four false implications: that Plaintiffs were intentionally and dishonestly passing off refurbished mattresses as new; that Plaintiffs' customers were dissatisfied; that the mattresses Plaintiffs sold were contaminated with bedbugs; and that Plaintiffs were engaging in illegal conduct. Plaintiffs also argued that Defendant had omitted a material fact from the reports: customers signed a receipt that disclosed that Hassan's mattresses were "rebuilt/reconditioned."

Taking the third argument first, the court noted that the reports repeatedly stated that the refurbished mattress business featured in the "Problem Solvers" segment was legal. The court therefore concluded that the reports were not capable of implying that Plaintiffs had engaged in unlawful conduct.

The court ruled that Plaintiffs' second argument, which was based on statements made by Del and Rober, failed as well. In so ruling, the court relied principally on the Michigan Court of Appeals opinion in *McLachlan v. Kneff*, No. 193448, 1997 WL 33344009 (Mich Ct. App. 1997). In *McLachlan*, the plaintiff filed a libel claim based on a newspaper article that stated someone had accused the plaintiff of accepting a bribe. The *McLachlan* court found that the plaintiff had failed to prove the statement false because the accusation had indeed been made. (In other words, without expressly saying so, the *McLachlan* court seemed to recognize a form of the "neutral reportage" principle.) The court found that the broadcasts had accurately depicted the accusations that Del and Rober had made against Plaintiffs and had accurately reported Plaintiffs' denials.

In the same vein, the court found that the reports accurately portrayed Del's and Rober's statements that they believed they were purchasing new mattresses. The court also listed numerous undisputed facts that would support the conclusion that customers might not know they were buying mattresses that contained used material: for example, Plaintiffs covered the old mattresses with new padding and a new cover and wrapped them in plastic; Hassan's Shop

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marketed its mattresses as "custom made"; the salesman at Hassan's Shop replied to the undercover reporter's inquiry as to whether the mattress was new by saying "Yeah, refurbished"; when Marcus, Hassan's factory manager, was asked about the use of old material he dissembled; and Plaintiffs placed the "second hand materials" tag under another tag, under plastic wrapping, and against the wall.

In addition, the court rejected the Plaintiffs' claim that the Defendant had omitted a material fact from its reports because the broadcasts did not report that customers signed a receipt stating that the mattresses were "rebuilt/ reconditioned." The court noted that the receipt was irrelevant because it "fail[ed] to disclose that old, stained bedding materials [had been] used in [the] mattresses"—the "whole point" of Defendant's reports.

Finally, the court rejected Plaintiff's effort to base a libel by implication claim on the title of the Problem Solvers report ("Dirty Little Mattress Secret Uncovered") and some isolated commentary that occurred during the report (for example, "Problem Solver Rob Wolchek takes you inside a mattress factory in suburban Detroit, and what you'll see will have you tossing and turning at night" or will give you "nightmares" or give you the "creeps"). The court found that these statements fell within the rhetorical hyperbole doctrine recognized in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990) and were therefore non-actionable. The court further concluded that, because Plaintiffs' tortuous interference claim was nothing more than a re-allegation of the defamation by implication claim, it failed as well.

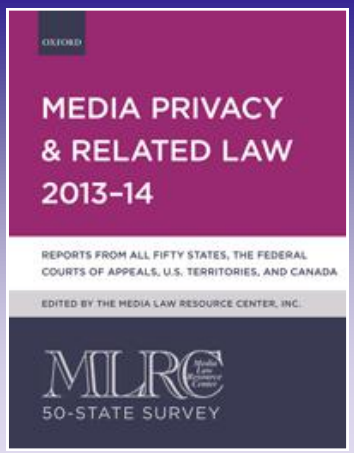
Conclusion

As defense counsel, we all debate the pros and cons of an immediate motion to dismiss. In this case we decided that it was the right approach. There is ample authority that materials relied upon in a complaint may be considered in a 12(b)(6) motion. The broadcasts were thorough and other than the usual tone of consumer protection reporting, there were no false facts plaintiff could identify.

Perhaps the most interesting aspect of the court's decision is its consideration of the entirety of both broadcasts in the course of its application of rule 12(b)(6). The court had no difficulty in concluding that the rule allowed it to review materials referenced in and central to the complaint and that this included the reports in their entirety. This application of rule 12(b)(6) aligns well with the widely recognized proposition of substantive law that a court must view a report in its whole context to determine whether a specific statement is false or defamatory.

The reporting at issue in this case was careful, thorough, and responsible. It deserved the full protection the First Amendment affords. The court's strong and sensible decision should help reporters and their counsel defending important consumer-protection stories like this to rest a little easier—provided they're not resting on a "custom made" mattress.

Jim Stewart and Len Niehoff of Honigman Miller Schwartz and Cohn along with Susan Seager of Fox Legal Group and Cynthia Amer of Fox Television Stations, Inc. represented Fox TV Stations, Inc. Plaintiff was represented by Hayssam A. El Kodssi, Hayssam El Kodssi Assoc., Dearborn, MI.



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Defamation Claims Brought by Canadian Art Expert Dismissed

Failure to Plead Actual Malice Adequately

By Julia C. Atcherley

The Southern District of New York has dismissed all remaining libel claims against Condé Nast and investigative journalist David Grann in a lawsuit brought by self-trained art authenticator Peter Paul Biro, finding that Biro failed—as a public figure—to plead facts plausibly demonstrating actual malice. *Biro v. Condé Nast*, 2013 WL 3948394 (S.D.N.Y. Aug. 1, 2013). The Court granted Condé Nast and Grann's motion for judgment on the pleadings, after having dismissed the bulk of the claims asserted against them in a ruling last year on their Rule 12(b)(6) motion to dismiss. *Biro v. Condé Nast*, 883 F.Supp.2d 441 (S.D.N.Y. 2012). The Court's latest order also dismissed claims that Biro had separately asserted against Yale University Press, Gawker Media LLC, Business Insider and Paddy Johnson of the blog ArtFagCity.com. Claims against two other defendants remain pending.

A REPORTER AT LARGE

THE MARK OF A MASTERPIECE

The man who keeps finding famous fingerprints on uncelebrated works of art.

BY DAVID GRANN

JULY 12, 2010

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Peter Paul Biro with an alleged Jackson Pollock. Photograph by Steve Pyke.

Every few weeks, photographs of old paintings arrive at Martin Kemp's eighteenth-century house, outside

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The *New Yorker* Article

Biro's claims stemmed from a profile of the self-described "leading authority" in "the use of fingerprint technology" to authenticate works of art that was written by Grann and published in *New Yorker* magazine in July 2010. Titled "The Mark of a Masterpiece: The man who keeps finding famous fingerprints on uncelebrated works of art," the article examined Biro's techniques, his growing reputation in an art community dominated by connoisseurship, and accusations of misconduct that have trailed him for decades. Against this setting, the article probed into Biro's methods of using fingerprint analysis and other forensic techniques in attempting to authenticate several disputed paintings, including the serious questions that many have raised about his methodology and results.

In the defamation action initiated in June 2011, Biro challenged 26 different statements in the *New Yorker* article and alleged that the article falsely implied he was guilty of fraud and incompetence. Biro subsequently amended his complaint to add claims against several other media defendants that either reported on Grann's article or published subsequent stories about him.

2012 Order Dismissed Majority of Claims

In an earlier order, Judge J. Paul Oetken substantially limited the claims that Biro was permitted to pursue against Condé Nast and Grann. Most of Biro's two dozen claims of false and defamatory statements and implications allegedly conveyed by the *New Yorker* article were dismissed, because the challenged statements were not susceptible of the defamatory meaning alleged, were non-actionable expressions of opinion, or were privileged as fair and true reports of judicial proceedings.

With respect to Biro's primary claim of defamatory implications conveyed by the article, the Court held that "[t]here can be no claim for an overall defamatory impact from the reporting of true statements beyond the specific defamatory implications that may arise from those specific statements." The order drew comparison with the Fourth

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Circuit's decision in *Chapin v. Knight Ridder*, in which a news article questioned the legitimacy of a charity benefitting United States soldiers. In that case, the Fourth Circuit concluded that "the mere raising of questions is, without more, insufficient to sustain a defamation suit in these circumstances. Questions are not necessarily accusations or affronts. Nor do they necessarily insinuate derogatory answers. They may simply be, as they are here, expressions of uncertainty."

Judge Oetkin found that the same analysis applied in Biro's case. Although acknowledging that "[t]here is little question that a reader may walk away from the article with a negative impression of Biro," the Court reasoned that this impression "would be largely the result of statements of fact that Biro does not allege to be false." Moreover, "[t]he Article as a whole does not make express accusations against Biro, or suggest concrete conclusions about whether or not he is a fraud. Rather, it lays out evidence that may raise questions, and allows the reader to make up his or her own mind." "At the end of the article," Judge Oetkin wrote, "the reader is left genuinely uncertain what to believe." The ruling concluded:

> Although the article reports many facts tending to suggest that Biro may not be exactly who he says he is, it also contains extensive interviews with Biro himself, includes Biro's responses to many of the accusations reported in the article, and quotes many third party sources with complimentary things to say about Biro. If anything, the article seeks to draw a parallel between the idea that one can never be wholly certain whether a piece of art is truly 'authentic' (whether through connoisseurship or science) with the idea that it is difficult to fully know the truth about who a person is. This type of inquisitive approach falls short of the 'hatchet job' that Biro's counsel described at oral argument.

After dismissing the lion's share of claims asserted in Biro's complaint, only four passages remained in dispute. After other defendants sought dismissal and raised as a basis the plaintiff's status as a public figure, Condé Nast and David Grann filed two motions, one seeking an ordering declaring Biro to be a public figure, and the second seeking judgment on the pleadings if Biro was deemed a public figure, due to the failure of his complaint to make factual allegations plausibly supporting the existence of actual malice. On August 01, 2013, the federal court again ruled against Biro, finding that he is a limited purpose public figure, who must therefore plead and prove actual malice. Because the complaint failed to assert "any factual allegations suggesting that Biro could plausibly demonstrate by clear and convincing evidence" that the four allegedly defamatory statements were published with actual malice, the remaining claims were dismissed.

Biro Is a Public Figure

In assessing defendants' claim argued that Biro was a limited purpose, or "vortex," public figure, Judge Oetken applied the Second Circuit's four-part test articulated in *Lerman v. Flynt*, 745 F. 2d 123 (2d Cir. 1984). Under this test, defendants were required to demonstrate that Biro (1) successfully invited public attention to his views in an effort to influence others prior to publication of the article, (2) voluntarily injected himself into a public controversy related to the subject matter of the article, (3) assumed a position of prominence in the public controversy, and (4) maintained regular and continuing access to the media.

In evaluating the pleadings against this standard, the Court observed Biro's admissions in his pleading that he was "a leading authority" in the field of art authentication, having lectured at a number of prominent institutions around the world, published on art authentication in industry journals, and been interviewed for a number of documentaries on the same subject matter. Biro contended that despite his numerous high-profile appearances in this field, he had made no effort to influence others, merely describing his work when invited to do so. The Court flatly rejected this argument, reasoning that "[t]he very purpose of writing articles in scientific journals, lecturing at universities, and opining in news shows and documentaries is to influence public discourse," and Biro's articles "themselves bespeak an unequivocal desire to alter the public discourse about art authentication." Thus, Biro satisfied the first prong of the *Lerman* test.

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Second, Biro had "voluntarily injected himself into several, interrelated public controversies." The Court referenced a string of decisions in the Second Circuit and other jurisdictions, which "have squarely held that statements about art and art authenticity are clearly a matter of public concern." The subject matter here was plainly controversial, according to the Court, as evidenced by Biro's own prior statements identifying the substantial skepticism surrounding forensic art authentication. Moreover, by writing scholarly articles, giving lectures, taking public stances on the authenticity of possibly invaluable paintings, and providing numerous interviews, Biro's behavior—standing alone—demonstrated that he had voluntarily injected himself into the public sphere, satisfying the second prong.

The Court also found that Biro "easily" met the third prong—which required his role in the controversy be "more than trivial or tangential." Biro describes himself in the Complaint as a "leading authority" on art authentication, as do articles pre-dating the *New Yorker* story, and Biro's authentication of an alleged Jackson Pollock constituted the principal evidence for the theory that the painting was a real Pollock. The Court concluded that Biro "clearly plays a prominent role in the controversy surrounding the value of forensic art authentication, both generally and as applied to certain works of art."

Lastly, the Court found that the "limited record in this case clearly bespeaks Biro's regular and continuing access to the media," where Biro is frequently sought out for interviews, demonstrating his continued "access to channels of self-help to which the private citizen does not." Biro satisfied all four prongs of the Second Circuit test and was deemed a limited purpose public figure and thus required to plead actual malice in order for his complaint to survive dismissal.

Biro Fails To Allege Facts Suggesting Actual Malice

Condé Nast and David Grann argued that the complaint should be dismissed, because it contained no factual allegations that could plausibly establish that they had published any of the statements still in dispute with "knowledge of their falsity or serious doubts about their truth." Following established precedent, the district court confirmed that the pleading standard set out in *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007) applies to defamation cases, such that a libel plaintiff "must state the grounds upon which his claim rests through factual allegations sufficient to raise a right to relief above the speculative **level"** in order to avoid defeat a motion to dismiss under Rule 12(b)(6) or for judgment on the pleadings under Rule 12(c).

Applying this pleading standard to the case before it, the Court observed that "[n]ot only has Biro failed to provide factual allegations rendering it plausible that the New Yorker Defendants acted with actual malice, but there is evidence in the record suggesting that it is *implausible* that they acted with the requisite intent—most notably, the Grann Article itself." Indeed, the article described numerous interviews with Biro, and setting forth his responses to nearly every allegation of misconduct or suspicion raised by the article, including the subject matter in the four remaining challenged passages. The Court observed that "[s]uch a style of reporting is far from what might be expected of an author acting with actual malice."

Judge Oetken rejected as insufficient the several ways Biro claimed he had adequately pled facts demonstrating actual malice.

Biro's inferred malice on the part of the publisher due to the author's alleged "defamatory propensities," but the alleged "propensities' were based on the fact that Grann was once before sued for libel and the complaint survived a motion to dismiss, a spurious allegation establishing nothing that the judge found to be improperly included at all and separately ordered stricken from the complaint. Biro's further allegation that the *New Yorker* failed to investigate was, according to the Court, "conclusory," "bereft of any factual support," and in any event, not evidence of actual malice in the absence of obvious reasons to doubt the veracity of those statements. Faced with an article which appeared to be the product of "an enormous amount of careful and diligent research," the Court said it was implausible that Grann's publishers would have reason to suspect that the article contained falsehoods.

The Court equally rebuffed the adequacy of Biro's allegations of actual malice on the part of Grann. Biro's allegation that the article ignored his many satisfied clients provided no evidence of actual malice because the fact an account is one-sided account has no tendency to prove that the publisher believed it to be false. Similarly, the allegations

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that Grann relied significantly on anonymous or biased sources were unavailing, because his article was not based on one source, but many, and none of the four remaining passages was attributed in any way to an anonymous tipster or purportedly biased sources. Biro's factual allegations were irrelevant to Grann's state of mind at the time he wrote the allegedly defamatory passages. Lastly, the defendants' failure to retract the story was "not enough to nudge allegations from possible to plausible." Given the lack of any factual allegations plausibly establishing actual malice, the Court dismissed Biro's remaining claims against Condé Nast and David Grann.

Additional Motions Dismissed

Yale University Press, Business Insider, Gawker Media and Paddy Johnson successfully moved to dismiss on similar grounds. These defendants had published reports following the *New Yorker* story, and in many cases commented upon it, and Biro had argued that the refusal to retract these articles supported a finding of actual malice. Judge Oetken disagreed, ruling that the allegation of actual malice with respect to these republisher defendants "lacks plausibility."

Condé Nast, a division of Advance Magazine Publishing, Inc., and David Grann were represented by David A. Schulz, Chad R. Bowman and Julia C. Atcherley of Levine Sullivan Koch & Schulz, LLP, and Richard A. Bernstein of Sabin Bermant & Gould LLP, together with the General Counsel for the New Yorker *magazine, Lynn B. Oberlander. The co-defendants were represented by Floyd Abrams, Brian T. Markley and Catherine Suvari of Cahill Gordon & Reindel LLP for Yale University Press; David G. Keyko and Joseph R. Tiffany, II of Pillsbury Winthrop Shaw Pittman, LLP for Business Insider, Inc.; David L. Feige and Oren Giskan of Giskan, Solotaroff & Anderson & Stewart, LLP for Gawker Media LLC; and Jay Cohen, Lynn B. Bayard, Adriana T. Luciano, Danielle B. Polebaum and Darren W. Johnson of Paul, Weiss, Rifkind, Wharton & Garrison LLP for Paddy Johnson. Peter Paul Biro was represented by Richard A. Altman of Law Office of Richard A. Altman.*

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N.Y. Appeals Court Grants Summary Judgment to Advertiser

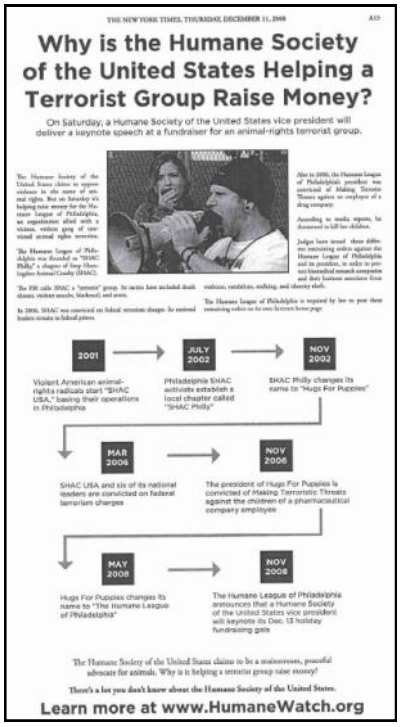
Non-Profit's Advertisement in New York Times Not Published with Actual Malice

By Mark I. Bailen and James Romoser

In 1964, a provocative full-page advertisement in *The New York Times* famously became the subject of the Supreme Court's seminal decision in *New York Times Co. v. Sullivan*, which established the "actual malice" standard for public official libel plaintiffs. Five decades later, in a libel case arising out of another full-page ad in the *Times*, an appeals court in New York recently proved that the principles of *Sullivan* are alive and well.

Last month a New York appellate court dismissed a libel claim brought by an animal-rights group against *The New York Times*, the Center for Consumer Freedom (the "Center"), which had placed the ad, and others connected to the Center. *Humane League of Philadelphia, Inc. v. Berman and Co. et al.*, 2013 WL 3305550 (N.Y. App. Div. 1st Dept. July 2, 2013).

The Humane League of Philadelphia (the "League") sued over an ad published on December 11, 2008 that called the League a "terrorist group" and identified its various connections to the radical group, Stop Huntingdon Animal Cruelty ("SHAC USA"), whose leaders had been convicted of federal terrorism charges under the Animal Enterprise Protection Act. In granting summary judgment to the defendants who placed the ad, the Appellate Division found insufficient evidence of actual malice. The *Times*, also a defendant, had been dismissed earlier by the trial court due to a lack of evidence establishing a "special relationship" with the advertiser.


THE NEW YORK TIMES, THURSDAY, DECEMBER 11, 2008 A15

Why is the Humane Society of the United States Helping a Terrorist Group Raise Money?

On Saturday, a Humane Society of the United States vice president will deliver a keynote speech at a fundraiser for an animal-rights terrorist group.

2001 — Violent American animal-rights radicals start "SHAC USA," basing their operations in Philadelphia

JULY 2002 — Philadelphia SHAC activists establish a local chapter called "SHAC Philly"

NOV 2002 — SHAC Philly changes its name to "Hugs For Puppies"

MAR 2004 — SHAC USA and six of its national leaders are convicted on federal terrorism charges

NOV 2006 — The president of Hugs For Puppies is convicted of Making Terroristic Threats against the children of a pharmaceutical company employee

MAY 2008 — Hugs For Puppies changes its name to "The Humane League of Philadelphia"

NOV 2008 — The Humane League of Philadelphia announces that a Humane Society of the United States vice president will keynote its Dec. 13 holiday fundraising gala

The Humane Society of the United States claims to be a mainstream, peaceful advocate for animals. Why is it helping a terrorist group raise money?

There's a lot you don't know about the Humane Society of the United States.

Learn more at www.HumaneWatch.org

Background

The Center is a non-profit organization that was formed to educate the public about, and to engage in the debate of, the politics of food. It created the ad to publicize a fundraising connection between the Humane Society of the United States, which is generally seen as a mainstream animal-rights group, and the League, which the Center identified as an extremist group.

The ad's headline asked in boldface type: "Why is the Humane Society of the United States Helping a Terrorist Group Raise Money?" The text of the ad documented the connections between the League and SHAC USA. A timeline graphically displayed in the ad showed that the League was first started as a local chapter of SHAC called "SHAC Philly" and eventually changed its name to the Humane League of Philadelphia. The timeline also highlighted the criminal convictions of the SHAC USA leaders, the separate conviction of the League's president for making terroristic threats, and the League's announcement that a Humane Society of the United States vice president was scheduled to "keynote" the League's holiday fundraising gala.

The ad further stated that the criminal conviction of the League's president arose from his threats to kill the children of a drug company employee, and that restraining orders issued by multiple courts barred the League from using violent or harassing tactics against biomedical research companies and their business associates.

When submitting the ad to the *Times*, David Martosko, research director for the Center, also provided a 68-page dossier of public records and other documents supporting each of the ad's assertions. The Center also published the dossier on one of its websites.

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On the day before the statute of limitations would have expired in December 2009, the League sued the *Times*, the Center, Martosko, Richard Berman (the executive director of the Center), and Mr. Berman's public relations company, Berman and Company, for libel and misappropriation for alleged unauthorized use of the plaintiff's name.

November 4, 2010 Trial Court Order

The defendants filed an initial motion seeking dismissal of both the libel and misappropriation claims. They argued that the statements in the ad constituted protected opinion, fell under the "fair report" privilege, or were substantially true, based on the corroborating evidence in the 68-page dossier. The defendants reserved their right to raise the issue of actual malice until later in the case, if necessary. The defendants argued that the misappropriation claim – asserted under New York Civil Rights Law §§ 50 and 51 – failed because, among other reasons, the plaintiff is a corporation, not an individual, as required by the statute.

On November 4, 2010, the trial court dismissed the misappropriation claim, holding that New York's statute protects only the name or likeness of an individual, not an organization. The court also dismissed part of the libel claim under the fair report privilege, but found issues of triable fact as to whether the specific connections with SHAC USA alleged in the ad were substantially true.

March 7, 2013 Trial Court Order

After the close of discovery, the defendants moved in October 2011 for summary judgment on the libel claim, arguing that the record was devoid of sufficient evidence to establish actual malice or that the ad contained any false statements of fact. On March 7, 2013, the trial court granted the motion in part and denied it in part. The court dismissed the *Times* on the grounds that, absent a special relationship between a newspaper and an advertiser, a newspaper cannot be liable for misstatements in advertisements. Citing *Coakley v. VV Publ. Corp.*, 254 A.D.2d 135, 136 (N.Y. App. Div. 1st Dept. 1998), the court concluded there was no evidence in the record of any such special relationship.

The court also found that the League was "an activist group that has sought to attract attention and to participate in public debate concerning humane treatment of animals" and thus is a public figure subject to the burden of proving that the defendants acted with actual malice. The court found that the League's violent history would have been true as recently as 2007 – the year before the ad was published – but it made the curious finding that the Center "failed to account" for a "dramatic reversal" by the League during 2008, when it supposedly abandoned its pattern of violence. The court cited no evidence in the record to support any such voluntary change in behavior, and it even acknowledged that numerous restraining orders were in place against the plaintiff restricting their criminal acts during this time period. Nevertheless, the trial court determined that although some evidence "may be probative of defendants' lack of malice, [it] does not establish a defense as a matter of law."

July 2, 2013 Appellate Division Ruling

The Center and related defendants filed an immediate, interlocutory appeal on the grounds that the trial court erred in concluding that triable issues of fact existed relating to actual malice and the substantial truth of the publication. Oral argument was held on June 11, 2013.

The Appellate Division ruled three weeks later on July 2, 2013, reversing the court below and granting summary judgment to the Center and other defendants. A unanimous five-judge panel wrote that the trial court improperly focused on the lack of evidence of violent tactics by the League during 2008 – a year when the League was subject to restraining orders explicitly barring it from such tactics. "Contrary to the [trial] court's conclusion," the Appellate Division held, "defendants' failure to mention or address the lack of violent acts during this period does not raise a triable issue of fact as to whether they printed the ad with actual malice."

The court also noted that the League presented no affirmative evidence—the very sort of evidence demanded by *Sullivan* and its progeny—to suggest that the Center had serious doubts about the truth of the ad when it published it. Citing *Khan v. New York Times Co.*, 269 A.D.2d 74, 79 (N.Y. App. Div. 1st Dept. 2000), the court held that mere speculation that a jury *could* discredit a defendant's testimony denying legal malice is insufficient to survive a summary judgment motion. "[G]iven defendants' detailed and far more specific documentary evidence and testimony, plaintiff's

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claims are too vague and speculative to defeat defendants' motion," the court concluded. Moreover, the court found that "Martosko's good faith reliance on newspaper articles" as sources for some of the ad's factual assertions "precludes a finding of actual malice." Relying on *Edwards v. Nat'l Audubon Soc'y., Inc.*, 55 F.2d 113, 120-21 (2nd Cir. 1977), the court also held that "Plaintiff's alleged denials and warnings regarding the truth of the statement in the ad are also insufficient to raise an issue of fact."

The Appellate Division did not reach the issue of whether there was a triable issue of fact regarding the falsity of the statements in the ad given its ruling on actual malice.

Mark I. Bailen and Sammi Malek of Baker & Hostetler (Washington, D.C. and New York) represented The New York Times, The Center for Consumer Freedom, David Martosko, Richard Berman, and Berman and Company. Bryan W. Pease (San Diego, CA) represented The Humane League of Philadelphia. James Romoser, a student at the Georgetown University Law Center, is a summer associate at Baker & Hostetler in Washington.

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Pennsylvania Appeals Court Affirms Jury Verdict in Defamation Case

By Michael Berry

On August 7, the Pennsylvania Superior Court affirmed a jury verdict in favor of *The Pocono Record*, a Dow Jones Local Media Group newspaper, and one of its reporters, Matt Birkbeck, in a case brought more than twelve years ago by a local real estate developer. *Raintree Homes, Inc. v. Birkbeck*, No. 2643 EDA 2011 (Pa. Super. Aug. 7, 2013).

The case arose from investigative reports that revealed the developer sold houses to poor-credit buyers at inflated prices based on artificially inflated appraisals. The developer, Raintree Homes, alleged that the reports – which won the 2001 Investigative Reporters and Editors Award for small newspapers – were false and claimed more than $25 million in damages. At trial, the jury returned a unanimous defense verdict, finding that the articles were accurate. Raintree then raised more than a dozen issues in an extensive post-trial motion, which the trial judge denied. On appeal, the Superior Court affirmed that ruling, adopting the trial court's decision as its own.

The appellate court affirmed the trial court's decision to allow the newspaper to show the jury a national television network news report that was broadcast more than a year after The Pocono Record published its articles.

Background

At the turn of the twenty-first century, Monroe County, Pennsylvania was suffering through a horrendous foreclosure epidemic. Its residents experienced a foreclosure rate that far exceeded the state and national average. Indeed, it was among the highest in the country. *The Pocono Record* investigated the causes of this crisis and, in April 2001, published a series of articles titled "A Price Too High." The articles, written by Matt Birkbeck, reported on the causes of the County's foreclosure crisis and highlighted individual homeowners' experiences, real estate appraisers' practices, and the views of professionals in the real estate industry. As the series explained, real estate agents, appraisers, and foreclosed-upon homeowners maintained that the foreclosure problem stemmed at least in part from the fact that first-time homebuyers with poor credit histories who were unfamiliar with the Poconos' housing market had been sold new houses at prices far above their fair market value, and that those prices were supported by inflated appraisals. When these homeowners sought to refinance or sell their homes, they learned that the actual value of the houses was far less than they had paid, and many wound up in foreclosure and in bankruptcy.

The articles reported that several companies' business practices contributed to the foreclosure problem, including Raintree Homes, Inc., a builder, and Chapel Creek Mortgage Banker, a mortgage broker, both of which were owned by Gene Percudani. Raintree advertised heavily in the New York metro area, drawing renters to the Poconos with promises that they could overcome bad credit and buy the American Dream for the same amount they paid in rent. After publishing the initial series, the newspaper continued to report on the controversy as it unfolded, informing readers, for example, about homeowners' protests against Raintree and the ensuing government investigations into alleged real estate fraud in the Poconos.

Raintree and Chapel Creek filed suit against *The Pocono Record* and Birkbeck the following month. After the court dismissed claims arising from certain of the articles, Raintree, Chapel Creek, and Percudani filed a second suit, this time alleging claims for defamation because the articles were posted on the newspaper's website. Soon after, the Pennsylvania Attorney General filed a civil consumer fraud action against Percudani and his companies. The defamation cases were stayed while the Attorney General's action proceeded.

In 2007, the Attorney General's action was resolved when Raintree, Chapel Creek, and Percudani agreed to the terms of a consent decree. That decree required Percudani to pay $250,000, Raintree and Chapel Creek to terminate their businesses, and all of the plaintiffs to be permanently barred from the mortgage business in Pennsylvania. Plaintiffs also admitted violating consumer protection laws relating to provisions in their form contracts and disclosures in their

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Internet marketing. None of their admissions addressed homeowners' allegations that they had been victimized by Raintree's inflated prices or the inflated appraisals supporting those prices.

One year later, the stay over the defamation case was lifted, and the case proceeded to discovery and ultimately to trial, where Raintree claimed over $27 million in damages. (Percudani's claims were dismissed on summary judgment, and Chapel Creek did not oppose a motion for a directed verdict against it during the trial.) The trial lasted eight days over three weeks and featured testimony from twenty-six witnesses, including Percudani and many of his employees, Raintree's principal appraiser, government officials, victims of Raintree's scheme, Birkbeck, and two of the newspaper's editors. After less than two hours of deliberations, the jury returned a unanimous verdict in favor of Birkbeck and the newspaper, finding in special interrogatories that Raintree had failed to meet its burden of proving that the reports were materially false. A more complete description of the trial can be found in the October 2010 edition of the *MediaLawLetter*.

Following the trial, Raintree and Percudani filed a voluminous post-trial motion that raised more than a dozen issues spanning the decade-long life of the case. The motion contained challenges to nearly every aspect of the litigation, including the trial court's rulings on early motions to dismiss the case, discovery issues, summary judgment, evidentiary issues, and jury instructions. Nearly a year after the jury rendered its verdict, the trial judge, Senior Judge Peter J. O'Brien, denied the motion in a detailed opinion that rejected each of plaintiffs' arguments. Raintree and Percudani subsequently appealed that decision and the jury's verdict to the Superior Court, an intermediate appellate court. Their appeal raised eleven separate issues.

Superior Court's Decision

The Superior Court affirmed the jury's verdict in favor of *The Pocono Record* and Birkbeck. In a short, unpublished decision the Court adopted Judge O'Brien's rulings as its own. Several of those rulings are particularly relevant to First Amendment litigators, as they address evidentiary issues that regularly arise in libel trials, but for which there is little reported case law.

First, the appellate court affirmed the trial court's decision to allow the newspaper to show the jury a national television network news report that was broadcast more than a year after *The Pocono Record* published its articles. That report described the Attorney General's suit against Raintree and complaints filed by some of Raintree's customers. Although plaintiffs claimed that the broadcast was unfairly prejudicial and constituted impermissible hearsay, the court ruled that "its probative value rested with the fact that other entities . . . were investigating curious business practices in Monroe County and that Plaintiffs' reputation was not harmed solely by Defendants."

In other words, the television report was properly shown for a non-hearsay purpose and was admissible in mitigation of plaintiffs' purported damages, even though it was broadcast long after the newspaper published its own reports and after the plaintiffs allegedly began suffering damages. As the court observed, plaintiffs sought damages through 2007, when they were forced out of business by the consent decree, and the newspaper was permitted to "show that independent factors harmed plaintiffs' economic and reputational standing."

Second, the court rejected plaintiffs' efforts to introduce correspondence from customers who cancelled their contracts after the original series was published. Plaintiffs sought to use this correspondence as evidence of damages instead of producing witnesses to testify to this damage, but the court held that this correspondence was "classic hearsay." As the opinion explained, for the correspondence to have any probative value, plaintiffs would need to show "that the out-of-court declarants read the particular articles that formed the basis for plaintiffs' claims and took some sort of adverse action because of the specific statements plaintiffs claimed were false and defamatory." This could only be proven "by offering the correspondence for the truth of the matter asserted therein." Because the customers who wrote the correspondence were not called as witnesses, Raintree was properly barred from offering the letters as evidence.

The court also issued several rulings on defamation issues worth noting. For example, it held that even though the articles included references to Percudani as the president of Raintree and stated that he refused to comment in response to the newspaper's questions, any defamatory statements about the company were not "of and concerning" him because they did not attribute any misconduct to Percudani personally. The court likewise held that Raintree and Chapel Creek were

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public figures for purposes of reports about their business practices. The court rested this holding on its findings that they voluntarily thrust themselves into public discussion through their extensive marketing and there was a direct relationship between the focus of *The Pocono Record*'s articles and their promotional message.

Conclusion

Plaintiffs have thirty days following the entry of the Superior Court's decision to file a petition seeking discretionary review by the Pennsylvania Supreme Court. In the meantime, the newspaper is filing a motion asking the Superior Court to publish its decision adopting Judge O'Brien's opinion as its own so that it will have precedential value.

As the Superior Court wrote, that opinion "thoroughly, comprehensively, and correctly dispose[d] of Raintree's claims." Media defendants should be able to rely on that opinion in Pennsylvania in future cases.

The Pocono Record and Matt Birkbeck were represented at trial and on appeal by Gayle Sproul and Michael Berry in the Philadelphia office of Levine Sullivan Koch & Schulz, LLP. Alia Smith of the firm's Washington, DC office also represented the defendants during the trial of the case, and Paul Safier of LSKS's Philadelphia office also worked on the appeal. Plaintiffs were represented by Marshall Anders of Anders Riegel & Massington LLC in Stroudsburg, Pennsylvania.

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Report That Prosecutor Gave "False Testimony" Not Actual Malice, Maryland Judge Rules

By Chuck Tobin and Drew Shenkman

A rural newspaper reporter demonstrated "the opposite of actual malice" in reporting that the county's chief deputy prosecutor had given "false testimony" during a murder case, a Maryland judge has ruled. *Daggett v. Landmark Community Newspapers of Maryland, et al.*, No. 02-C12-169832, Anne Arundel County, Maryland, Circuit Court (Memorandum Opinion and Order, July 25, 2013).

Circuit Judge Pamela L. North in Annapolis awarded summary judgment and dismissed a defamation and false light lawsuit filed by David P. Daggett against the *Carroll County Times* and its reporter Brett Lake.

Background

Daggett sued over three articles and an editorial concerning testimony he gave on March 5, 2012 in a hearing during the prosecution of two suspects for the murder of Jeremiah DeMario. Daggett's office was under pressure to salvage the murder case after the judge threw out confessions and the murder weapon, finding that sheriff's detectives had unlawfully arrested and interrogated the criminal defendants. The defamation litigation revolved around the following question posed to Daggett and his answer:

> Q: And did you ever get any calls on the evening of September 13 into the early morning of September 14, 2010 from investigators with questions about the Jeremiah DeMario homicide?
>
> A: Not to my knowledge, no.

Daggett further testified that that he later heard the victim -witness counselor in his office was contacted that evening from the DeMario murder scene. He also testified that he had attended another murder scene, and notified his boss, two weeks after the DeMario homicide when the Sheriff's Office called him at home at night.

Daggett's boss, the elected State's Attorney, also testified at the criminal hearing. He criticized the Sheriff's Office for not calling him, Daggett, or one of the other prosecutors from the DeMario murder scene.

A week after their testimony, the State's Attorney announced in court that his office was dismissing the murder charges. He cited the Sheriff's Office's "willful failure to call our office for legal advice." To date, no one has been further charged in DeMario's murder.

In the weeks after Daggett testified, 10 sources told the newspaper's reporter that Daggett had received a call from the murder scene. Then, in late April 2012, the sheriff called the reporter into his office, presented him with the phone bill, and introduced him to the sergeant who had made the call. After calling Daggett for comment, and being told that he did not remember the sergeant's call, the newspaper ran a story with the headline, "Daggett Gave False Testimony" reporting on the testimony, the phone record, and Daggett's comment. The newspaper also published an editorial calling for a "thorough house cleaning" at the Sheriff's and State's Attorney's Office.

Lake took all appropriate precautions before writing the article to make sure it was well verified and his words did not mischaracterize Plaintiff's testimony.

Daggett's boss fired him a few days later. In his deposition in Daggett's libel lawsuit, the State's Attorney testified that he had specifically asked Daggett after the murder if Daggett received any calls, and that Daggett said he had not. Later in his own deposition, Daggett disputed that the State's Attorney ever asked whether he received any calls. The State's Attorney testified that after reading the newspaper's story, he interviewed the Sheriff's sergeant, corroborated the reporting, and then offered Daggett, a 17-year veteran of that office, the option of resigning or being fired. Daggett refused to resign.

Daggett sued the newspaper and the reporter a few days later. He alleged that the newspaper falsely reported that he was asked whether he had received any calls at all. Instead, Daggett characterized the sergeant's call as a "notification

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call" and asserted that the question he was asked at the hearing concerned any calls for "legal advice". Daggett also disputed that his answer, "Not to my knowledge, no," constituted a definitive denial that he had received a call.

On the standard of care, Daggett asserted that he was a private figure and that the newspaper's reporting was negligent. Daggett also argued that he could establish actual malice because the reporter had been in the courtroom that day and heard Daggett for himself, and then listened to the court's audio recording of the testimony. Because of this, Daggett argued, the reporter must have deliberately distorted the question and answer in the reporting. Daggett also argued that the reporter had told another prosecutor the newspaper was pressuring him to write "sensational" stories, which the reporter and the newspaper denied.

The newspaper deposed eight members of the State's Attorney's Office, all of whom testified about Daggett's leadership in the legal and administrative operations of their office. Daggett also provided a resume in discovery that boasted of his statewide teaching, drafting a police practices manual, and testifying before the Maryland General Assembly in support of legislation.

The newspaper also obtained affidavits from the sheriff, the sergeant, one of the criminal defendant's lawyers, and two courtroom observers who knew the sergeant had called Daggett. Each attested that, beginning immediately after the hearing and during the next several weeks, they told the reporter Daggett had received a call and that his testimony had not been truthful.

Summary Judgment Motion

Judge North, in her seven-page opinion awarding summary judgment, cited Daggett's resume and the other prosecutors' deposition testimony and held that he was a public official under the standard of *Rosenblatt v. Baer*, 383 U.S. 75 (1966). She therefore held that Daggett had the burden to establish actual malice by clear and convincing evidence.

Next, examining the question put to Daggett and his answer in the context of the entire hearing, as Daggett urged, the judge noted the question to Daggett was phrased, "did you ever get *any calls* . . ." (emphasis is the court's). She continued that whether Daggett thought the question meant something else "is not the issue here." In light of Daggett having received the sergeant's call from the murder scene, and his additional testimony about attending the other murder scene, Daggett's "answer was a false statement to any listener."

Turning to actual malice, the judge noted:

- The reporter "was almost immediately approached by people who had knowledge that Plaintiff's statement was false."
- Ultimately, the reporter "had a total of ten sources to verify the Plaintiff's answer constituted a false statement."
- The reporter received a printout of the sergeant's phone bill documenting the call to Daggett.
- The reporter "did not believe [Plaintiff] told the truth when Plaintiff responded to the question in open court."
- The reporter "spoke to his editor first about appropriate language ["false testimony"] to use in the article."
- The reporter "waited about seven weeks before submitting his story."

The judge concluded that the reporter had taken "exhaustive measures" in preparing the story:

This record discloses the opposite of actual malice. It shows Lake took all appropriate precautions before writing the article to make sure it was well verified and his words did not mischaracterize Plaintiff's testimony. If Lake had a motive to write a sensational story, that motive absent other proof of malice is insufficient to prove malice.

Daggett has appealed the judge's award of summary judgment to the newspaper and the reporter. He signed the notice of appeal himself, without the counsel who had been representing him at the trial level.

Chuck Tobin, Drew Shenkman and Cheryl Feeley, of Holland & Knight LLP in Washington, D.C., represent the Carroll County Times and reporter Brett Lake. James Astrachan, Christopher Lyon and Daniel Doty, of Astrachan Gunst & Thomas P.C. in Baltimore, represented David Daggett in the trial court.

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Touchdown!

Defendants Beat Back Coach Mike Leach's Libel and Tortious Interference Claims

By Nathan Siegel, Thomas Curley and Rachel F. Strom

On August 6, 2013, the 99th District Court of Lubbock, Texas granted the summary judgment motions of ESPN, public relations firm Spaeth Communications and former NFL player and ESPN college football analyst Craig James, and dismissed the defamation, tortious interference and conspiracy claims of former Texas Tech football coach Mike Leach. *Leach v. James et al.*, No. 2009-550359. Coach Leach has vowed to appeal.

The Background: Adam James, Mike Leach and Texas Tech

By the end of 2009, after almost a decade as the head football coach at Texas Tech, Mike Leach was recognized as one of college football's most innovative offensive strategists. He had never had a losing season, and had led the Red Raiders to nine consecutive bowl appearances.

The case took place against the backdrop of two equally acrimonious relationships – one between Leach and Craig James's son Adam James, and the other between Mike Leach and Texas Tech University, the school Leach worked for.

Leach advanced a novel tortious interference claim, in addition to his defamation theories. He alleged that James, Spaeth and ESPN successfully conspired to get him fired over his treatment of Adam James.

First, there was the relationship between Texas Tech and Mike Leach, which had been suffering after tense negotiations over renewing Leach's coaching contract. At the end of the day, in early 2009, Leach renegotiated a five-year contract with the university that allowed the university to terminate him for cause.

Then there was the relationship between Leach and his player, Adam James. Leach believed Adam was lazy and, more than that, Leach resented what he alleged was repeated interference by Adam's father, Craig, whom he labeled a "little league dad." On December 17, 2009, the disagreements between Adam and Coach Leach came to a head. When Adam showed up to practice after having been diagnosed with a mild concussion, Leach told a trainer to "put his f-ing p***y ass in a place so dark he would not know he had a d**k unless he reached down and touched it" (sorry for the language, folks). Leach also told the trainer to make sure Adam stood up for the entire practice. The trainer put Adam in a small, dark shed near the field, ordered him to stand and had a student trainer wait outside who was supposed to make sure Adam remained standing for the entire practice.

On December 19, Adam again showed up for practice. Leach again instructed the trainer to do whatever he had done with Adam for the last practice. Adam was placed in a pitch black media room, which contained an electrical closet, and was told to remain standing throughout practice. Adam later told his father he had actually been put in the electrical closet, a claim later repeated to the media but disputed by the trainer.

Adam's parents complained to Texas Tech officials and said they wanted Coach Leach fired. Texas Tech launched an investigation into the incidents and found that the family's complaints had merit. On December 28, Texas Tech suspended Coach Leach, just days before the team was playing in a bowl game, after Leach refused to take any responsibility for the Adam James incidents. Both Leach and James prepared for the public relations battle both knew would likely come. Leach had his sports agents distribute statements from former coaches and players calling Adam lazy and undisciplined, while the James family hired Spaeth Communications of Dallas, Texas to handle its own media relations.

ESPN's Post-Suspension and Post-Termination Reports

After Leach was suspended, the controversy was one of the main stories featured in ESPN's reporting, led by its national college sports reporter Joe Schad. ESPN reported

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the James' family story as relayed by Spaeth Communications, and Leach's side of the story as explained by his agents and lawyers. At the time, Leach's representatives claimed that Leach's treatment of Adam had nothing to do with discipline. Rather, they claimed, placing Adam in dark, confined spaces was a medical response to his concussion because he was sensitive to light. During discovery in the lawsuit, neither the team physician who diagnosed Adam nor its two principal trainers supported that account – nor did Dr. Robert Cantu, the nation's leading expert on sports concussions, who was retained by the defendants.

On December 30, Leach was fired after he sought a temporary restraining order to allow him to coach in the upcoming bowl game. Following multiple media interviews in which Leach's attorney disputed that any electrical closet was involved, Spaeth Communications posted on YouTube a 15-second clip shot on Adam James' cellphone camera while he was in the electrical closet, which received extensive coverage in the media. Leach would later accuse Adam of going into the electrical closet solely to shoot the cellphone footage to manufacture a story.

On January 2, 2010, ESPN broadcast the Alamo Bowl, featuring Texas Tech's first game without Leach. During the broadcast, play-by-play announcer Mike Patrick referred to Adam James as a player "who was actually punished for having a concussion" by Leach. Subsequently, ESPN's ombudsman at the time, Don Ohlymeyer, published a critique on ESPN.com lambasting ESPN's coverage of the bowl as biased in favor of Craig James.

Leach's Evolving Legal Theories

Leach's first lawsuit was not against these defendants, but rather directed at Texas Tech for alleged breach of contract and other related claims. Leach at that point claimed that he was in part disciplining Adam James because he allegedly showed up to practice behaving lazily and in defiance of team rules about the proper attire for injured players. That lawsuit ultimately failed when the Texas appellate courts upheld the university's sovereign immunity defense.

In late November 2010, Leach filed a separate lawsuit for defamation against ESPN and Spaeth Communications, but it remained inactive until his lawsuit against Texas Tech finally failed, whereupon Leach joined Craig James as well. Leach advanced a novel tortious interference claim, in addition to his defamation theories. He alleged that James, Spaeth and ESPN successfully conspired to get him fired over his treatment of Adam James. He alleged that James wanted Leach fired because he was unhappy about his son's playing time, and leveraged his status as ESPN analyst to pressure the university to fire him to avoid bad publicity – thus also making ESPN vicariously liable for the family's complaints to the university. He further claimed that ESPN then allowed itself to be used as a platform by James and his PR firm to spread a false media story of the alleged abuse of Adam, which defamed Leach and ensured his demise at Texas Tech.

An additional unusual twist to the story took place just as discovery in the lawsuit was beginning, with the publication by Leach of his memoir, *Swing Your Sword*, which contained his public counter-attack against ESPN, Spaeth and James. The book had been in the works well before any controversy erupted, and it was co-written by Bruce Feldman – a long-time ESPN college football writer. After a public falling out with his employer, Feldman left ESPN two months later to work for CBS Sports and became a key witness in the lawsuit for Leach.

Discovery

Collectively, the parties took about 20 depositions. One of the most interesting was the testimony of Leach's journalism expert, Gerald Eskenazi – a semi-retired, long-time sports journalist whom many readers of this article may remember as the author of the book review that was the subject of *Moldea v. The New York Times*. Eskenazi submitted an affidavit criticizing ESPN's journalism ethics, contending principally that it should not have relied upon or granted anonymity to James' PR firm, whom ESPN (and other media) had at the time called "a source close to the [James] family" in its reports. At his deposition, however, Eskenazi admitted that he had never actually read or seen any of the ESPN news reports that were the subject of Leach's defamation claims. When presented with several of them for the first time at the deposition, he pronounced them "objective," "fair," and in one case "a good story."

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The Summary Judgment Motions

On, April 19, 2013, the defendants moved for summary judgment. James' motion was based on the premise that he was just doing what any father would do – asking a university to take responsibility for his child's safety, which he genuinely believed was endangered. Spaeth's motion was based on the grounds that it was relying on its client – a client it had no reason to doubt. Finally, ESPN focused its motion on ESPN's actual reporting, emphasizing that it prominently reported both sides of the story from multiple sources favoring both. ESPN also argued in its motion that it was not responsible for the claims against Craig James because he was an independent contractor who, in any event, had been acting in his role as a father, not ESPN commentator, when complaining to the university.

Despite the different positions of the defendants, their arguments overlapped substantially. For example, for Leach's defamation claims, all the defendants argued that the statements at issue were substantially true and were published without actual malice. The defendants argued that Leach's story had changed so much, he could never establish that the defendants had actual malice with respect to any particular version of it. Spaeth and ESPN also argued various allegedly defamatory statements were not defamatory at all or were constitutionally protected opinions. Among many other arguments, the defendants relied on a string of Texas case law 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 accurately reported." *Neely v. Wilson*, 331 S.W.3d 900, 922 (Tex. App.–Austin 2011, pet. granted) (citing *McIlvain v. Jacobs*, 794 S.W.2d 14, 14-16 (Tex. 1990)). Thus, they argued that by accurately reporting Adam James' claims, their reports were substantially true and not actionable.

ESPN focused its motion on ESPN's actual reporting, emphasizing that it prominently reported both sides of the story from multiple sources favoring both.

After the summary judgment hearing, but before the Court had ruled, the Texas Supreme Court reversed the long line of Texas case law that had recognized this "third party allegation rule." *Neely v. Wilson*, 2013 WL 3240040 (Tex. Jun 28, 2013). ESPN thus notified the Court that it would withdraw that particular defense, but argued that it made no difference to the outcome.

A critical issue in the case was Leach's tortious interference claim, which Leach maintained stood separate and apart from his defamation claims. Given that Leach had made more than $2 million a year and had effectively lost almost three years of income before being hired as the head football coach at Washington State in 2011, the stakes over this issue were high. The defendants argued that at bottom Leach's complaint was about what he alleged were false reports of player abuse, and thus the claim was barred by *Hustler v. Falwell* and related principles of Texas law. The defendants also argued that the tortious interference claim failed on the merits, pointing in particular to the First Amendment's *Noerr-Pennington* doctrine and related state-law privileges, protecting any effort to lobby public officials.

On August 6, 2013, in a one page letter to the counsel of record, the Honorable William Sowder of the 99th District Court of Lubbock, Texas granted each of the defendants' motions for summary judgment. Counsel for Leach has publicly stated his client's intention to appeal once an order is formally entered.

Defendant ESPN, Inc. was represented by Nathan Siegel, Thomas Curley, Rachel Strom and Matthew Kelley of Levine Sullivan Koch & Schulz, LLP as well as by Jacob Goldstein, formerly of Levine Sullivan and now at Dow Jones & Company, Inc. ESPN was also represented by Matt Matzner and Eliott Nixon of Crenshaw, Dupree & Milam, L.L.P. in Lubbock Texas. Defendant Spaeth Communications was represented by Scott McLaughlin, Shannon Zmud Teicher and Ryan Pittman of Jackson Walker L.L.P. in Dallas, Texas and Robert Craig, Jr. of Craig, Terrill, Hale & Grantham, LLP of Lubbock, Texas. Defendant Craig James was represented by Mike O'Brien of Mike O'Brien, PC in Washington, Texas, James Drakeley of Hiersche, Hayward, Drakeley & Urback, P.C. in Addison, Texas and Don Dennis of Boerner, Dennis & Franklin, PLLC or Lubbock, Texas. Plaintiff Mike Leach was represented by Stephen Heninger and Gayle Larece Douglas of Heninger Garrison Davis, LLC in Birmingham, Alabama and Ted Liggett of The Liggett Law Group, P.C. in Lubbock, Texas.

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The Supreme Court Should Rule on Content-Based Taxes

Can the Tax Collector Be an Art Critic?

By Robert Corn-Revere

Just as the Supreme Court has always understood that "the power to tax involves the power to destroy," *McCulloch v. Maryland*, 17 U.S. (Wheat.) 316, 431 (1819), it has long held the power to tax also includes the power to censor. *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943). Special taxes imposed on disfavored speakers and content-based taxation have long been considered to be forms of prior restraint and particularly repugnant to First Amendment values. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

The application of these principles to the area of adult entertainment is the subject of a petition for certiorari in *677 New Loudon Corp. v. State of New York Tax Appeals Tribunal*, No. 13-38 (filed July 5, 2013). The specific question presented is whether the government may deny an entertainment tax exemption for live dramatic, choreographed, or musical performances through the exercise of New York State's content-based aesthetic preferences. Or, more to the point, can the tax collector be an art critic?

The specific question presented is whether the government may deny an entertainment tax exemption for live dramatic, choreographed, or musical performances through the exercise of New York State's content-based aesthetic preferences. Or, more to the point, can the tax collector be an art critic?

The New York Tax Scheme and the Proceedings Below

N.Y. Tax Law § 1105(f)(1) imposes a four percent sales tax on "places of amusement," but exempts from taxation admission charges for "dramatic or musical arts performances." Rules codifying the exemption provide examples of exempt performances, including "[a] theater in the round [which] has a show which consists entirely of dance routines. The admission is exempt since "choreography is included within the term musical arts."

Petitioner New Loudon Corp. operates Nite Moves, a Latham, New York club that provides choreographed entertainment consisting of nude dance performances. The New York State Division of Taxation assessed sales taxes on Nite Moves in the amount of over $128,000 following a tax audit for the period from December 2002 through August 2005, ruling that the performances did not qualify as "choreography."

An administrative law judge initially overturned the assessment, ruling that no tax was due because of the exemption for "dramatic or musical arts performances." But the New York Tax Appeals Tribunal reversed the ALJ decision, holding that the dance routines at issue could not be considered choreography because they did not rise to the aesthetic level of a ballet performance. The tribunal cited a dictionary definition and explained that "[a]s we use the term here, 'choreography' is 'the art of composing ballets and other dances and planning and arranging the movement, steps, and patterns of dancers.'"

The New York Supreme Court, Appellate Division, affirmed the decision, and matter ultimately was reviewed by the New York Court of Appeals. Once again, the lower court was affirmed, but this time by a court divided 4-3. The majority concluded "it was not irrational for the Tax Tribunal to conclude that a club presenting performances by women gyrating on a pole to music, however artistic or athletic their practiced moves are, was also not a qualifying performance entitled to exempt status." *677 New Loudon Corp. v. State of New York Tax Appeals Tribunal*, 19 N.Y.3d 1058, 1061 (N.Y. App. 2012).

Judge Robert Smith dissented, joined by Chief Judge Jonathan Lippman and Judge Susan Read. They noted that the majority made "a distinction between highbrow dance and lowbrow dance that is not to be found in the governing statute" and that the distinction "raises significant

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constitutional problems." *Id*. at 1061 (Smith, J. dissenting). According to Judge Smith, the only relevant question the state had to answer "– an extremely easy question – [is] whether these women are dancing or not." *Id*. at 1063. As Judge Smith explained:

> I do not read *Hustler* magazine. I would rather read the *New Yorker*. I would be appalled, however, if the State were to exact from *Hustler* a tax that the *New Yorker* did not have to pay, on the ground that what appears in *Hustler* is insufficiently 'cultural and artistic.' That sort of discrimination on the basis of content would surely be unconstitutional.

Id.

What is at Issue?

By basing tax assessments on an evaluation of the artistic merit of the performances involved, the State of New York has implicated two important First Amendment principles – that the government cannot impose content or speaker-based taxes and that it cannot use the law to enforce aesthetic preferences.

By basing tax assessments on an evaluation of the artistic merit of the performances involved, the State of New York has implicated two important First Amendment principles – that the government cannot impose content or speaker-based taxes and that it cannot use the law to enforce aesthetic preferences.

While generally applicable taxes may be levied on the press and entertainment industry, just as they are on other businesses, the Supreme Court has characterized "special" taxes on expression as "a form of prior restraint on speech." The Court has explained that such "obnoxious" taxes led to adoption of the First Amendment. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 583-84 & n.6 (1983). Accordingly, it is settled law that the First Amendment does not permit the government to impose taxes that discriminate based on the content of speech. *E.g.*, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987). Like other forms of prior restraint, content-based taxes are presumptively unconstitutional. *Id*. at 229-30.

These principles apply equally to discriminatory tax exemptions or exclusions as they do to direct taxes. *E.g.*, *Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("[A] discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech."). In *Minneapolis Star*, for example, the Court invalidated an exemption for the first $100,000 in paper and ink that treated some newspapers more favorably than others. 460 U.S. at 591-92. This principle was extended in *Arkansas Writers' Project* to invalidate a state sales tax exemption that benefited religious, professional, trade and sports magazines, among other publications. *Arkansas Writers' Project*, 481 U.S. at 229.

The *677 New Loudon Corp.* decision raises the question whether a state may use tax exemptions to promote cultural venues to the exclusion of other forms of entertainment. But this cannot be reconciled with the general prohibition of content-based taxation, and also implicates an equally well-established proposition – that the government cannot enforce its artistic preferences by law.

The Supreme Court has stressed in various contexts that "a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system." *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 158 (1946). It has emphasized that "esthetic and moral judgments about art and literature … are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000). As Judge Smith wrote in dissent in the New York Court of Appeals, making such artistic judgments, or the "'ranking,' either of gymnasts or dancers, is not the function of a tax collector." *677 New Loudon Corp.*, 19 N.Y.3d at 1062 (Smith, J., dissenting).

Broader Implications?

Should the government be allowed to impose higher taxes, or selectively give tax breaks, based on its estimation of the relative "value" of the speech? Some suggest that the issue presented in *677 New Loudon Corp.* is not significant because it only involves the issue of nude dancing. This is

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not an uncommon reaction in cases that involve the regulation of adult entertainment. Some lower courts – and in particular, the New York court in this case – have been particularly dismissive if they believe the speech at issue lacks sufficient cultural merit.

But the Supreme Court has cautioned that "[w]e cannot be influenced ... by the perception that the regulation in question is not a major one because the speech is not very important." *Playboy Entm't Group*, 529 U.S. at 818, 826. Indeed, some of the Court's most significant First Amendment decisions in recent years soundly rejected arguments that the government has greater power to restrict speech because of claims the expression at issue lacked value. It has invalidated flawed efforts to prohibit lying about military honors, *United States v. Alvarez*, 132 S. Ct. 2537, 2544-47 (2012); to regulate violent video games, *Brown v. EMA*, 131 S. Ct. 2729, 2733-34 (2011); to penalize offensive demonstrators, *Snyder v. Phelps*, 131 S. Ct. 1207, 1216-17 (2011); or to prohibit images of animal cruelty. *United States v. Stevens*, 130 S. Ct. 1577, 1585-86 (2010).

The significance of any given case is measured by the substance of the constitutional issues it raises. The mere prospect that the government could manipulate the tax system to reward favored speakers or to penalize disfavored ones is a matter of the utmost importance. *E.g.*, Juliet Eilperin and Zachary A. Goldfarb, *IG Report: 'Inappropriate Criteria' Stalled IRS Approvals of Conservative Groups*, Wash. Post, May 14, 2013; Josh Hicks and Kimberly Kindy, *For Groups, an IRS 'Horror Story*,' Wash. Post, May 16, 2013 at A1.

But the issue is more than theoretical. A number of states have already adopted special taxes or fees on nude dancing, and the trend is not limited to adult entertainment. Several states currently are considering legislation to impose special taxes on "violent" video games notwithstanding what should have been the definitive word on such content-based regulation in *Brown v. EMA*. Such proposals may gain added momentum after being endorsed by government officials at the highest levels. *See, e.g.*, Paul Tassi, *Joe Biden Sees "No Legal Reason" Why We Can't Tax Violent Video Games*, Forbes.com, May 14, 2013.

The significance of these issues led to the filing of broad amicus support urging the Court to grant certiorari in *677 New Loudon Corp.* by free expression organizations and trade associations (the American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Comic Book Legal Defense Fund, Entertainment Merchants Association, and Freedom to Read Foundation), and by other adult businesses (CMSG Restaurant Group, LLC; M.A.G. Enterprises, Inc.; Concheta, Inc.; Deja Vu Showgirls of Las Vegas, LLC; Little Darlings of Las Vegas, LLC; Shac, LLC; and K-Kel, Inc.). The trend toward more, and various kinds of, content-based taxing schemes strongly suggests that the Supreme Court should articulate governing principles in this area now, before such revenue measures become more ingrained in state fiscal policies.

Robert Corn-Revere is a partner at Davis Wright Tremaine LLP in Washington D.C. where he practices First Amendment and media law. He is counsel of record for 677 New Loudon Corp.

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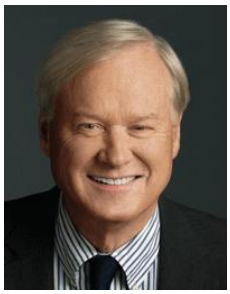

Chris Matthews
Host of *Hardball*
With Chris Matthews

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Second Circuit Rules in Favor of Appropriation Artist Richard Prince

Transformative Use Based on Broad Suite of Aesthetic Considerations

By Christopher Robinson

In April 2013, a year after hearing oral argument, the Second Circuit issued its much anticipated decision in *Cariou v. Prince*, 714 F.3d 694 (2nd Cir. 2013), a case involving fair use in the visual arts. As most observers expected, the appellate court rejected the district court's narrow interpretation of the fair use defense, but the decision still delivered some surprises.

The Second Circuit reaffirmed that, for purposes of the first copyright fair use factor, a new work need not "comment on the original artist or work, or popular culture" to be transformative.

Because the test is whether a reasonable person would view a use as transformative, an artist's stated purpose in choosing a source is but one factor in the analysis, which also includes the extent to which the new work contains new expression as embodied in such elements as composition, scale, color, media and general aesthetic.

The discussion below begins with background on the works themselves and the district court opinion, then describes the Second Circuit decision, and closes with a look at the decision's consequences.

Richard Prince's 'James Brown Disco Ball,' incorporating work by Plaintiff.

Background

The case involves a series of photographs of Rastafarians taken by professional photographer Patrick Cariou, who published the photos in a 2000 book titled *Yes Rasta*. After discovering the book, Richard Prince, the highly successful appropriation artist, created a series of thirty canvases he titled *Canal Zone*. The Prince canvases incorporated many of Cariou's *Yes Rasta* photographs, in whole or in part. In a few works, the incorporated Cariou photo is readily apparent as Prince's material contribution was limited to painting over the subject's eyes and mouth and other relatively minor elements.

In other works, Cariou's original photos were greatly enlarged, cut up, painted over and incorporated with other materials so that the sources are hard to identify. Prince exhibited the *Canal Zone* paintings at the gallery of his regular dealer, Larry Gagosian, who sold a number of them for a total of over $10 million.

Cariou sued Prince, Gagosian and Gagosian's gallery for direct and secondary copyright infringement, with the defendants asserting that Prince's use of Cariou's photos constituted a transformative fair use. On cross-motions for summary judgment, Judge Deborah Batts found for Cariou. In her fair use analysis, Judge Batts considered the series of works as a whole rather than analyzing each work individually. On the key first fair use factor (which looks, *inter alia*, to whether and to what extent the defendants' use is transformative), she noted that Prince at his deposition had disavowed any intention to "comment on Cariou, on Cariou's Photos, or on aspects of popular culture closely associated with Cariou or the Photos."

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For Judge Batts, it was not enough that the new work exhibit a very different aesthetic; to be transformative, Judge Batts found, a new work must "comment on, relate to the historical context of, or critically refer back to the original works." On market harm (the fourth fair use factor), she credited the fact that Cariou's prospective dealer had canceled a show of his Rastafarian photographs when she heard of the Gagosian exhibition.

The district court also found that summary judgment against Gagosian was appropriate because Gagosian knew the risks of appropriation art and "had at the very least the right and ability (and perhaps even responsibility) to ensure Prince obtained licenses." In granting Cariou's summary judgment motion, the Judge ordered defendants to deliver up the unsold paintings for Cariou to dispose of as he wished, including impoundment or even destruction.

The implications of the decision were immediately apparent to the art world, where artists borrow heavily from other artists and from contemporary imagery to create new work, and dealers prefer to avoid questioning their artists about their sources and licensing issues.

Appellate Decision

The Second Circuit reversed in part, vacated in part and remanded, holding that, contrary to the standard applied below, there is no requirement that a new work comment in some way on the earlier work or popular culture for it to be deemed transformative. The categories of fair use listed in 17 USC § 107 are illustrative, not exhaustive, and although some types of fair use such as satire and parody do indeed comment on an original work or some aspect of society, many other types of works which constitute fair use do not. The essence of the inquiry, the Court stated, is whether the artist has created "new information, new aesthetics, new insights and understandings," quoting *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006), however that "new" material may be manifested in the new work.

The Court recognized that many alleged infringers take pains at deposition to justify their use as commenting on or critiquing the original work, but the fact that Prince declined to do so was not dispositive, because the test does not focus solely on the intent of the artist but whether a *reasonable person* would find the use transformative. The emphasis is therefore on the works themselves, mandating a side-by-side comparison of each of Prince's works with the Cariou photograph[s] that served as the source.

When viewed under the correct test, the majority of the Second Circuit panel found twenty-five of Prince's works to be transformative as a matter of law. Prince had testified that he had ignored the meaning of the originals and instead created what he called "a post-apocalyptic screenplay" on the "equality of the sexes," an aim clearly different from that which had motivated Cariou. In contrast to Cariou's "serene and deliberately posed portraits and landscape photographs," Cariou's works were "crude and jarring . . . hectic and provocative." Prince had taken Cariou's small format black and white photographs and created vastly larger works on canvas that incorporated color, collage and distortions. In the Court's view, these images "have a different character, give Cariou's photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou's."

The Court acknowledged that not every reworking may constitutes a fair use. "For instance, a derivative work that merely presents the same material but in a new form" would not be transformative. Quoting *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 143 (2d Cir. 1998). The majority believed that a further factual record was necessary with respect to the remaining five of Prince's works (including the work called *Graduation* which had illustrated almost every article and news report on the dispute), and so remanded to the district court to determine whether they were fair uses under the Court's formulation of the proper standard.

The Court gave little credence to Cariou's claims of market harm under the fourth fair use factor since the audience and price point for each artist's work were totally different; likewise, there was no indication that Cariou would prepare derivative works or license others to do so in Prince's market sphere. The proposed exhibition of Cariou's work, on which the lower court placed great emphasis, had been canceled because his potential dealer was under the misimpression that Cariou had collaborated with Prince on his exhibition, not because the market for Cariou's photographs had been usurped. Finally, the Court offered no

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guidance to the district court on the appropriate standard to apply on remand to the claims of vicarious and contributory infringement alleged against Gagosian.

An application to the Second Circuit for rehearing en banc was denied on June 10, 2013. Cariou has indicated his intention to seek United States Supreme Court review; a petition for certiorari would be due September 10.

Consequences

The Second Circuit decision has been cautiously welcomed in the art world. Many believed that the district court holding – that a transformative use required explicit commentary – if upheld, might have crippled the whole field of appropriation art. The issue had already arisen in the wake of two decisions involving the artist Jeff Koons. In the first, *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), Koons' fair use parody defense failed in part because he had been unable to articulate how his sculpture was intended to comment on his source; but in *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006), his use of a magazine advertisement photograph in one of his collage paintings was held to be transformative in large part due to his carefully stated deposition testimony on how he intended to comment on the original.

Defendants' backdrop incorporating plaintiff's Scream Icon image.

In light of these decisions, transformativeness appeared to pivot around a formulaic and, some would argue, cynical exposition of a "motive" to comment on the original work of art or on popular culture. By totally refocusing transformative use on a broad suite of aesthetic considerations such as scale, medium, aesthetic impact, and artistic purpose**,** the *Cariou* decision better reflects the creative process and permits artists and their dealers to be more confident that significant reworking of visual sources will not give rise to copyright infringement.

Some commentators have expressed discomfort with the Second Circuit making determinations on the transformative nature of individual works of art based on the extent and character of the artistic reworking. Indeed Judge Wallace of the Ninth Circuit, sitting by designation on the panel, dissented as he was less inclined to discount Prince's own disavowals and thought that the court on remand was better positioned to make the fair use determination on all of the works, applying the principles set forth in the decision to "such additional testimony as needed." It is not clear what additional testimony Judge Wallace had in mind, whether it be further testimony from Prince or even expert testimony on the application of a reasonable person standard. Commentators were quick to point out the risk that such a burden, going forward, might chill the very artistic creativity that the majority of the panel seeks to promote.

The impact of the *Cariou* decision is already being felt. On August 7, 2013, in *Seltzer v. Green Day, Inc.*, 2013 US App. LEXIS 16322 (9th Cir. Cal. Aug. 7, 2013), the Ninth Circuit affirmed a district court's summary judgment on grounds of fair use. Plaintiff, an artist and illustrator, alleged that the band Green Day and others had infringed his copyright in an image he created entitled "Scream Icon" when the band used a modified version of his work in the backdrop to a four-minute video for one of its songs, "East Jesus Nowhere."

In applying the first fair use factor, the Ninth Circuit panel began by commenting on the highly contentious nature of the inquiry into transformativeness, citing among other examples Judge Wallace's dissent in *Cariou*. Nonetheless, by returning, as did the Second Circuit, to the principles set forth in *Campbell v. Acuff-Rose Music, Inc*, 510 U.S. 569 (1994), the panel had no difficulty in finding Green Day's use of "Scream Icon" transformative. The Court noted that "an allegedly infringing work is

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typically viewed as transformative as long as new expressive content ***or*** message is apparent." (emphasis added). The Court went on to stress that "[t]his is so even where – as here – the allegedly infringing work makes few physical changes to the original or fails to comment on the original," citing, *inter alia*, the language in *Cariou* that a "fundamentally different aesthetic" may form the basis to find a work transformative.

Artists continue to express discomfort at the subjective nature of the fair use inquiry. Nonetheless, the renewed emphasis on aesthetic transformation in *Cariou* can only strengthen the hand of practitioners of appropriation art and indeed any artist who uses the art of others to inspire his or her own work.

Christopher Robinson is a partner at Davis Wright Tremaine LLP in New York. Plaintiff was represented by Daniel Brooks, Seth Spitzer, and Eric Boden, Schnader Harrison Segal & Lewis LLP, New York. Defendant Richard Prince was represented by Joshua Schiller, Jonathan Schiller and George Carpinello, Boies Schiller & Flexner LLP, New York. A full list of amici is available in the hyperlinked opinion.

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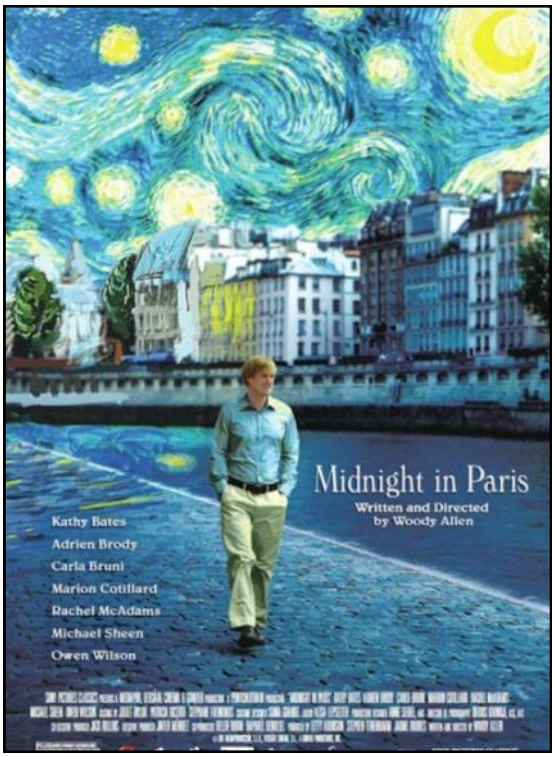
Northern District of Mississippi Dismisses Favorite Son Faulkner's "Midnight in Paris" Infringement Suit

By Samuel Fifer and Gregory R. Naron

"The artist is of no importance. Only what he creates is important, since there is nothing new to be said."
- William Faulkner

Following the success of Woody Allen's 2011 film "Midnight in Paris," the holder of William Faulkner's literary rights sued the film's producer, Sony Pictures Classics, claiming that the film's paraphrase of what is perhaps the most quoted line in the Faulkner canon infringed Faulkner's copyright and constituted unfair competition under the Lanham Act. Recently, in a thoughtful (and somewhat bemused) opinion, Northern District of Mississippi Chief Judge Michael Mills dismissed the case. *Faulkner Literary Rights, LLC v. Sony Pictures Classics Inc.*, Case No. 3:12-cv-100, 2013 WL 3762270 (N.D. Miss. July 18, 2013).



Background

"Midnight in Paris" tells the story of Gil Pender, "a Hollywood screenwriter with literary aspirations." Gil is convinced he is living in the wrong time, and while on vacation in Paris with his fiancée, Inez, travels back in time to the 1920s Paris of his dreams. There he encounters the literary and artistic luminaries of the "Lost Generation." At one point in the film, Gil accuses Inez of having an affair; incredulous, she asks where he got such an idea. "Gil responds that he got the idea from Hemingway, Fitzgerald, Gertrude Stein and Salvador Dali, a notion Inez ridicules because they are all dead. In response, Gil states, 'The past is not dead. Actually, it's not even past. You know who said that? Faulkner, and he was right. And I met him too. I ran into him at a dinner party.'" *Faulkner*, 2013 WL 3762270 at *1-2.

Now comes the plaintiff. The complaint alleged that the quote was taken from a passage in Faulkner's novel *Requiem for a Nun*, which reads: "The past is never dead. It's not even past." (The novel is a sequel to Faulkner's *Sanctuary*, set in the fictional Yoknapatawpha County, Mississippi; the line is spoken by county defense attorney Gavin Stevens). Allen's use of the paraphrased quote – eight seconds of dialogue in a 90 minute film – was the sole basis for Faulkner's claims against Sony.

Sony moved to dismiss the complaint, asserting the fair use defense and, in the alternative, the *de minimis* doctrine (*i.e.*, the taking was too small to rise to the level of infringement). The *de minimis* doctrine "is part of the initial inquiry of whether or not the use is infringement in the first instance, as opposed to the fair use inquiry, which is an affirmative defense", however, the court found the *de minimis* analysis was "wholly encompassed within the fair use affirmative defense" and thus "will utilize the fair use factors in making a determination on the *de minimis* and substantial similarity issues." *Faulkner*, 2013 WL 3762270 at *4.

Fair Use Analysis

In ruling on the motion, the court viewed both works (thankful that "the parties did not ask the court to compare *The Sound and the Fury* with *Sharknado*"); it disagreed with

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Sony's characterization of *Requiem* as "relatively obscure" ("Nothing in the Yoknapatawpha canon is obscure"), and could not resist editorializing that of the two works at issue "one is timeless, the other temporal." *Id.* at *2 n.1.

The court summarized the issue as "whether a single line from a full-length novel singly paraphrased and attributed to the original author in a full-length Hollywood film can be considered a copyright infringement. In this case, it cannot." *Id*. at *1.

In reaching that conclusion, the court analyzed the use of the quote under the four statutory fair use factors: (1) purpose and character of the work; 2) nature of the copyrighted work; 3) amount and substantiality of the portion borrowed in relation to the work as a whole; and (4) potential adverse effect on the market for, and value of, the work. *Id.* at *4 (citing 17 U.S.C. § 107).

1) The court had little trouble finding the purpose and character of the allegedly infringing use was transformative; "[t]he speaker, time, place, and purpose of the quote in these two works are diametrically dissimilar. Here, a weighty and somber admonition in a serious piece of literature set in the Deep South has been lifted to present day Paris, where a disgruntled fiancé, Gil, uses the phrase" in the course of "a comedic domestic argument. . . . The use of these nine words in *Midnight* undoubtedly 'adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.'" *Id.* at *5 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994)). The transformative showing was so strong, and the amount taken so "miniscule," that "it diminishes the significance of considerations such as commercial use that would tip to the detriment of fair use. It is difficult to fathom that Sony somehow sought some substantial commercial benefit by infringing on copyrighted material for no more than eight seconds in a ninety minute film." *Id.*

The court summarized the issue as "whether a single line from a full-length novel singly paraphrased and attributed to the original author in a full-length Hollywood film can be considered a copyright infringement. In this case, it cannot."

2) As to the second factor, while *Requiem* is "entitled to the core protections of copyright law," the Supreme Court has held that fact is unlikely to "help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works." *Id.* at *6 (quoting *Campbell*, 510 U.S. at 586). The court declined to determine "whether or not *Midnight*'s use constitutes a parody because it has found the work to be highly transformative under the first factor, whether parody or not," and thus was analogous to *Campbell.* Ultimately, the court deemed this factor to be neutral. *Id.*

3) Regarding substantiality of the use, Faulkner conceded that "*Midnight*'s use is not of quantitative importance," but argued that the alleged infringement was "qualitative" because the theme expressed in the quote -- the "inescapability" of the past – is "central to the entire novel" and its unique expression is "manifested by its fame." *Id.* at *6. The court properly observed that Faulkner's argument "addresses the qualitative importance of a theme in *Requiem*, not the qualitative importance of the quote itself, however eloquent in conveying this theme the quote may be." *Id.* "Qualitative importance to society of a nine-word quote is not the same as qualitative importance to the originating work as a whole," and it "should go without saying that the quote at issue is of miniscule quantitative importance to the work as a whole. Thus, the court considers both the qualitative and quantitative analyses to tip in favor of fair use." *Id.* at *7.

4) Even though the record was "silent" on the market effect factor, the court found it to be "essentially a non-issue in light of the stark balance of the first factors weighing in favor of Sony." *Id.* The court further opined that Faulkner's conclusory assertions of market harm and bad faith conduct by Sony simply did not withstand scrutiny, and certainly not under the Supreme Court's *Twombly/Iqbal* standard on motions to dismiss. Not only was it "highly doubtful that any relevant markets have been harmed by the use in Midnight," if anything, common sense would suggest that the film enhanced the market for *Requiem*; as the court put it:

> How Hollywood's flattering and artful use of literary allusion is a point of litigation, not celebration, is beyond this court's comprehension. The court, in its appreciation

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> for both William Faulkner as well as the homage paid him in Woody Allen's film, is more likely to suppose that the film indeed helped the plaintiff and the market value of Requiem if it had any effect at all. *Id.* at *8.

The court dismissed Faulkner's proposed evidence that Sony received permission from other artists for use in *Midnight* (Cole Porter's song "Let's Do It (Let's Fall in Love)"; Pablo Picasso's artwork), noting "the obvious distinction between the use of Cole Porter and Pablo Picasso's work," *i.e.*, they were "used in their entirety while *Requiem* is used by fragment only." *Id.* at *9.

Based on this analysis, the court found "no substantial similarity exists between the copyrighted work and the allegedly infringing work, and Sony's use in this matter was *de minimis*. The use is not actionable, and this claim is dismissed." *Id.*

Lanham Act Claim Dismissed

Turning to Faulkner's Lanham Act claim, the court had "no doubt that the interests of Sony in First Amendment protection outweigh Faulkner's interest in pursuing a Lanham Act claim in this case," but declined to thoroughly analyze the issue because no Lanham Act claim existed as a threshold matter, *i.e.*, Faulkner failed to plead any conceivable, non-conclusory basis for consumer confusion "as to the origin, sponsorship, or approval of Sony's goods, services, or commercial activity by William Faulkner and/or his written works."

The film's "literary allusion, the name Faulkner and a short paraphrase of his quote," could not "possibly be said to confuse an audience as to an affiliation between Faulkner and Sony. Allusion is not synonymous with affiliation, nor with appropriation. Faulkner has not provided any precedent suggesting that the mere use of a celebrity name in an artistic work somehow rises to the level of deception." *Id.* at *9-10. Indeed, such non-existent precedent would be fundamentally at odds with the First Amendment principles that the court did not reach in dismissing this claim.

Finally, the court declined to exercise jurisdiction over Faulkner's state law commercial misappropriation claim; while Faulkner could conceivably re-file that claim in state court, it should likewise be a non-starter under the First Amendment, and the common law rules that govern and constrain such claims in the interest of protecting expression.

Samuel Fifer is a partner, and Gregory R. Naron is counsel at Dentons US LLP, Chicago, Illinois. Faulkner Literary Rights, LLC was represented by J. Cal Mayo, Jr., Paul Bowie Watkins, Jr., and Pope S. Mallette, of Mayo Mallette, PLLC, Oxford, Mississippi. Sony Pictures Classics Inc. was represented by Christian Dominic Carbone and Thomas Dennis Nolan, of Loeb & Loeb, LLP, New York, NY, and Anita K. Modak–Truran and Paul S. Rosenblatt, of Butler, Snow, O'Mara, Stevens & Cannada, Jackson, Mississippi.

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Ninth Circuit Affirms Refusal to Enjoin Ad-Skipping Service

By Ilana Rubel and Sebastian Kaplan

Fox Broadcasting Company v. Dish Network LLC marks the latest effort by content providers to block ad-skipping technologies. While more modern methods were at issue, the Ninth Circuit's July 24, 2013 ruling largely tracked the outcome of the case in which ad-skipping was first addressed, three decades ago, in the context of VCR technology. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("*Sony*"). In its *Fox* ruling, the Ninth Circuit affirmed the Central District of California District Court's refusal to enjoin Dish's operation.

The panel rejected direct infringement on Dish's part, affirming that the end consumer, not Dish, engages in the volitional conduct causing a copy to be made. As to indirect infringement, the Ninth Circuit confirmed that recording for time-shifting purposes is a protected fair use, and because Fox lacked any copyright interest in advertisements, it could not rely on harms caused by ad-skipping to defeat Dish's fair use defense or show irreparable harm. All that remained of Fox's copyright claims pertained to the "quality assurance copies" made internally by Dish in implementing its ad-skipping technology. As to this copying, the Ninth Circuit affirmed the district court's finding that while there is a likelihood of success in establishing infringement, the irreparable harm threshold was not met for a preliminary injunction to issue.

Content providers and distributors should remember that the Ninth Circuit's opinion was narrowly cabined by its highly deferential standard of review, and left open key issues for future litigation.

The Ninth Circuit's decision may prove limited in application due to the deferential standard of review in effect, but it nevertheless provides cautionary lessons for content providers seeking to use copyright law to shut down ad-skipping technologies.

Background

Dish offers its customers a "Hopper" digital recording device that allows large blocks of broadcast programming to be copied for time-shifted replay. In March 2012, Dish introduced a service allowing Hopper users to concurrently record all primetime broadcast programming for all four networks, including Fox, on the user's local device. Once a consumer selects "enable" for this feature, the Hopper will by default record the entire primetime window for all four networks every day of the week. Dish then rolled out "AutoHop," allowing subscribers to skip commercials automatically. Dish employees manually review broadcast programming content using a set of "quality assurance copies," bookmarking commercial breaks to ensure the service skips to the right spots.

Fox sought preliminary injunctive relief, alleging copyright infringement, *inter alia*. The district court denied the motion, holding Fox failed to show a likelihood of success on most of its claims. The court did find that Dish's quality assurance copies infringed, but that as to such copying, Fox failed to show irreparable harm. Under the "limited and deferential" standard of review, the Ninth Circuit affirmed the district court's denial of injunctive relief.

Infringement Claims at Issue: *Direct Infringement*

The Ninth Circuit affirmed the district court's finding that Fox was unlikely to establish direct infringement by Dish as to consumer use of the service. The panel focused on the question of causation: "*Who* made the copies?" It concluded it was Dish subscribers making the copies, citing the user's initial step in enabling the recording feature. Because "Dish's program creates the copy only in response to the user's command," Dish was not liable for directly infringing Fox's copyrights. The Ninth Circuit did note that Dish could "decid[e] how long copies are available for viewing, modif[y] the start and end times of the primetime block, and preven[t] a user from stopping a recording," but concluded only that these facts *might* be relevant to an infringement claim.

In potential fodder for future litigation, the Ninth Circuit left open what causation standard applies. The district court

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purported to apply ordinary tort principles to determine whether Dish was directly liable; it held, and the Ninth Circuit repeated: "The user, then, and not Dish is the 'most significant and important cause' of the copy." 905 F. Supp. 2d at 1102 (quoting Prosser & Keeton on Torts § 42); Opinion at 12. Oddly, this statement misquotes the treatise, which provides: "[Legal Causation] is sometimes said to depend on whether the conduct has been so significant and important a cause that the defendant should be legally responsible." Prosser & Keeton § 42. By substituting "most" for "so," the opinions suggest that only one actor may be liable for direct infringement. This approach threatens to eliminate the ordinary rule of joint and several liability in favor of a new "primary causation" standard. As the Ninth Circuit limited its opinion to the preliminary nature of the proceedings, Fox may yet later prevail on this issue.

Contributory Infringement

The Ninth Circuit affirmed the district court's holding that Fox was unlikely to prevail on its secondary liability theory because the underlying use by Dish's subscribers was protectable under the "fair use" principles of *Sony*. *Sony* held that the private recording of copyrighted work for later watching ("time-shifting") constituted fair use, immunizing Sony from secondary liability. The Ninth Circuit in *Dish* held *Sony* directly controlled in establishing three of the four elements of Dish's fair use defense—(1) the purpose and character of the use; (2) the nature of the copyrighted work; and (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole. As to the fourth element, effect of the use upon the potential market for the copyrighted work, the Ninth Circuit ducked the question of whether ad-skipping would devastate free over-the-air television, holding that it did not "implicate any copyright interest" as Fox owned no copyrights in the ads.

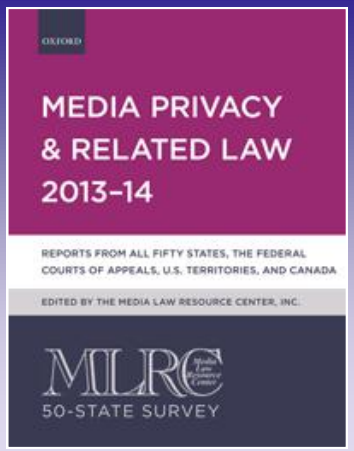
Claims Arising from "Quality Assurance Copies"

The Ninth Circuit affirmed the district court's finding that Dish likely infringed Fox's copyrights by making its own "quality assurance copies," but that this copying did not comprise irreparable harm.

Conclusion

This case is undoubtedly at least a temporary setback to content-providers seeking to enjoin ad-skipping technologies through copyright infringement suits. However, content providers and distributors should remember that the Ninth Circuit's opinion was narrowly cabined by its highly deferential standard of review, and left open key issues for future litigation.

Ilana Rubel is a partner, and Sebastian Kaplan an associate, at Fenwick & West LLP in Mountainview, CA. Plaintiffs were represented by Paul Smith, Richard Stone, Andrew Thomas, David Singer and Amy Gallegos, Jenner & Block LLP. Defendants were represented by Joshua Rosenkranz, Peter Bicks, Elyse Echtman, Lisa Simpson, Annette Hurst and William Molinski, Orrick, Herrington & Sutcliffe LLP; and Mark Lemley and Michael Page, Durie Tangri LLP.



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Ohio Juvenile Judge Held In Contempt

By Jack Greiner and Darren Ford

A three-judge panel of the Ohio First District Court of Appeals recently found Hamilton County Juvenile Judge Tracie M. Hunter in contempt of court for violating the appellate court's order requiring the Judge to allow representatives of The Cincinnati Enquirer to attend certain proceedings in her courtroom. *State ex Rel. The Cincinnati Enquirer v. The Honorable Tracie M. Hunter*, No. C-130183 (Ohio App. July 23, 2013).

The unprecedented contempt citation is the latest in a string of rulings arising from a tragic incident in August of 2012.

Background

Patrick Mahaney, an unemployed factory worker, had purchased some beer and was heading to his apartment in the North College Hill section of Cincinnati to watch a Reds baseball game. Before he arrived, a group of six teenagers allegedly knocked him to the ground and proceeded to beat him, until a nearby neighbor scared the teenagers off by threatening to call the police. Mahaney was hospitalized for several days as a result of the beating. Mahaney recently died, but an autopsy confirmed that his death was not the result of the beating.

An Enquirer reporter was ordered to leave the courtroom and vacate the floor where the courtroom was located. The same Enquirer reporter was again denied access to attend a proceeding in the Judge's courtroom.

Following the incident, The Cincinnati Enquirer obtained the North College Hill Police incident reports, which named the juveniles. The police reports also indicated that the juveniles told the police they had beaten Mahaney because they "were bored." Given the serious nature of the charges, The Enquirer decided to name the juveniles in a series of articles it published concerning the incident.

All six of the teenagers' cases were assigned to Judge Hunter, after the prosecutors indicted them as "serious youthful offenders." In September 2012, Judge Hunter docketed an entry purporting to condition The Enquirer's right to attend any of the proceedings on her order that The Enquirer not publish the names of the juveniles or their parents.

On March 15, 2013, Judge Hunter docketed an entry revoking The Enquirer's "permission" to attend the proceedings for one of the juveniles in response to a March 12, 2013 article in which The Enquirer allegedly published the names of the juveniles. Three days after the entry, an Enquirer reporter was ordered to leave the courtroom and vacate the floor where the courtroom was located. The same Enquirer reporter was again denied access to attend a proceeding in the Judge's courtroom on March 25, after the Judge docketed an identical order in another of the juvenile cases.

Newspaper Sues Judge

The Enquirer immediately brought suit against Judge Hunter in the First District, requesting that the appellate court prohibit the Judge from enforcing her March 15 and 25 orders, and to prohibit her from denying The Enquirer access to the otherwise open proceedings. On March 29, the appellate court issued an alternative writ ordering Judge Hunter to permit representatives of The Enquirer to attend the proceedings.

On June 24, at the first hearing in the matter since the appellate court granted the alternative writ, Judge Hunter again entered an order conditioning The Enquirer's right to attend on its not publishing the names of the juveniles or their parents. When counsel for The Enquirer attempted to object, the Judge instructed him to remain silent.

In response, The Enquirer filed a motion with the First District asking that it hold Judge Hunter in contempt of its March 29 alternative Writ. The appellate court held a hearing on July 22, and the next day, found Judge Hunter in contempt of the alternative writ. In its entry, the First District found that Judge Hunter's June 24 order "again imposed the name-publication restriction as a condition of access in violation of

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our alternative Writ staying, or suspending the effect of, the March 15 Entry, and ordering that The Enquirer be admitted to the juvenile proceedings."

The appellate court gave Judge Hunter until 4:00 pm July 25 to purge the contempt by docketing an entry vacating the March 15 order. On the day of her deadline, however, the appellate court granted Judge Hunter's motion to stay the purge order pending her appeal to the Ohio Supreme Court. She filed that appeal on the morning of July 25.

In the entry granting the stay, the appellate court expressly noted that Judge Hunter remained in contempt, and that its alternative Writ staying Judge Hunter's enforcement of the March 15 order remained in effect.

Although some hearings had been scheduled in the underlying proceedings, Judge Hunter postponed the hearings, and none have occurred as of yet. The Ohio Supreme Court has not rendered a decision.

Jack Greiner and Darren Ford, attorneys at Graydon Head & Ritchey LLP in Cincinnati, Ohio, represent the Cincinnati Enquirer in this matter.

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California School District Suspends Social Media Policy in Face of a Constitutional Challenge

By Dan Laidman and Thomas R. Burke

Protests from students, parents, and First Amendment advocates prompted a California school district to suspend a controversial social media policy that gave administrators broad power to punish students for their online speech. Billed as an effort to curb bullying, the Lodi Unified School District's policy restricted students from using Facebook, Twitter, Instagram, Tumblr, or virtually any other mode of online communications to engage in any "inappropriate" or "demeaning" speech, as judged by officials at their discretion.

A grassroots effort by students and parents to draw national attention to the policy led to campus demonstrations, scrutiny in the media, lively debates at board meetings, and ultimately a demand by a pair of civil liberties organizations for officials to address the policy's serious legal deficiencies.

Policy restricted students from using Facebook, Twitter, Instagram, Tumblr, or virtually any other mode of online communications to engage in any "inappropriate" or "demeaning" speech, as judged by officials at their discretion.

Background

The Lodi Unified School District, which serves about 30,000 students and is located some 40 miles south of Sacramento, California, first adopted the policy in March 2013. Officials characterized it as a "pre-emptive strike" against the growing nationwide scourge of bullying. The policy broadly defined "social media" to include "any form of electronic communication through which users create online communities to share information, ideas, personal messages, and other content." It applied on and off campus, and during and after school hours, essentially encompassing any content that students post to the Internet.

The policy generally prohibited "inappropriate behavior as deemed so by" school officials. And it specifically barred "[d]emeaning statements about or threats to any third party"; "[i]ncriminating photos, statements, or language in reference to violence, drug or alcohol use, bullying, or any other inappropriate behaviors"; "[g]eneral inappropriate language of a profane or sexual nature"; and "[p]rofane or inappropriate language or remarks directed toward teammates, coaches, other … students, staff … athletic administrators and representatives from other schools," among other categories of speech.

The policy also outlawed "liking," "favoriting," or "retweeting" any "inappropriate" online content posted by others, finding that such conduct necessarily "indicates … approval" of the third party content, regardless of a student's intent. Finally, the policy barred "subtweeting," a practice in which someone posts about another individual without mentioning his or her name.

As students prepared to return to school, they learned that they would have to sign a contract agreeing to abide by the policy or else be barred from participating in extracurricular activities, including sports and campus clubs. Students mobilized to protest the policy in early August, holding demonstrations on campus and speaking out at school board meetings. Students at Bear Creek High School were particularly vocal, writing about the policy in the Bruin Voice newspaper and reaching out to the Student Press Law Center ("SPLC"), a national nonprofit organization dedicated to educating high school and college students about the First Amendment and supporting students in opposing censorship. The SPLC aggressively covered the issue on its website and brought in pro bono counsel to present the district with the legal concerns.

Constitutional Objections

Counsel sent a letter to the Lodi Unified superintendent and trustees on behalf of the SPLC and the American Civil Liberties Union of Northern California ("ACLU-NC") on August 12, 2013, stating that "[w]hile the Policy may be a well-intentioned effort to discourage bullying, it sweeps far too broadly and impermissibly has the Government acting as a 24-hour a day censor of student speech." The groups argued

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that the policy failed to withstand basic First Amendment scrutiny because it completely restricted broad categories of speech – such as "demeaning statements" and "language in reference to violence, drug or alcohol use, bullying, or any other inappropriate behavior" – that clearly included legitimate constitutionally protected social and political criticism.

The groups pointed out that, as written, the policy even prohibited speech condemning bullying or drug use, and that the blanket prohibition on "liking" and retweeting failed to account for the reasons why a user was highlighting third party content. *See*, Kenneth Chang, "'Like' This Article Online? Your Friends Will Probably Approve, Too, Scientists Say," N.Y. Times (Aug. 8, 2013) (reporting on recent study that concluded that the highlighting of another's Internet posting does not necessarily correlated with approval of its content; rather, crowd dynamics make "liking" far more common than expressing disapproval of content online). Among other infirmities, the letter accused the policy of running afoul of the First Amendment vagueness, overbreadth, and unconstitutional conditions doctrines, and of giving government officials unfettered discretion to determine what speech is punishable.

The SPLC and ACLU-NC further argued that the policy squarely violated a pair of California statutes: Education Code § 48907, which protects student speech at school, and Education Code § 48950, which prohibits school districts from punishing students based on expression that would be constitutionally protected outside of campus. In contrast to the policy's loose and wide-ranging categories of "inappropriate" speech, California's stringent laws protecting student expression have narrow, well-delineated exceptions that only apply to speech lacking constitutional protection. Finally, the groups argued that the policy raised serious due process concerns, because the policy forced students to submit to a vague and far-reaching speech code in order to participate in extracurricular activities, which California courts have held to be protected by the free schools guarantee of the state Constitution.

Two days after receiving the letter, the district announced that it was "suspending the portion [of the policy] that sets forth offenses and consequences." On August 17, 2013, it proposed a revised policy that abandoned the various categories of prohibited speech in favor of a narrower statement that the district "has a right to discipline students for online conduct which is related to school activity or attendance and: 1) substantially or foreseeably disrupts the school environment; 2) is lewd, vulgar or offensive; and/or 3) advocates violence or illegal activity."

The SPLC and ACLU-NC followed up with a letter on August 19, 2013 – the day before the school board was set to take up the revised policy – acknowledging that progress was being made but objecting to the updated language. In particular, the groups noted that case law makes clear that the First Amendment prevents school officials from punishing speech that is "lewd, vulgar or offensive" simply because it may be "related to school activity or attendance." The letter recommended that the district bring its language into conformity with the relevant case law by limiting discipline to cases involving "plainly" offensive, school-related online conduct. At its August 20 meeting, the board postponed adoption of the new policy and announced that it would study further revisions to the district's social media guidelines.

The Student Press Law Center ("SPLC") and American Civil Liberties Union of Northern California ("ACLU-NC") are represented in this matter by Thomas R. Burke and Dan Laidman of Davis Wright Tremaine LLP and Frank LoMonte of the SPLC, and Linda Lye of the ACLU-NC.

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

The Defamation Act, Leveson, Lance Armstrong and More

By David Hooper

A date still needs to be announced for the coming into effect of the Defamation Act 2013. The changes being introduced by the Act are summarised in my article *The New Defamation Act 2013: What Difference Will it Really Make*? However, one missing piece of the jigsaw is close to being put in place. Under Section 5 Defamation Act 2013 there is a defence for operators of websites in relation to claims posted on the website where the operator can show that he or she did not post the statement on the website.

A problem arose in relation to anonymous postings and/or situations where it was not possible to identify the person who posted the statement. Regulations have now been drafted called the Defamation (Operators of Websites Regulations) 2013. Details of their workings are set out in my article, but essentially a complainant has to send a Notice of Complaint which meets the requirements set out in regulation 2. A Claimant would, for example, have to explain the meaning he attributes to it and why it is defamatory and specify where it was posted. The website operator then has 48 hours excluding weekends and Bank Holidays to respond to the Notice of Complaint and in effect will give the poster of the alleged defamatory material if known to the website operator five days' notice after which the offending publication will be taken down unless the poster provides certain information.

The provisions are of some complexity, but the purpose of the Regulations is to provide an opportunity for a hitherto anonymous poster to identify himself or herself so that in effect the dispute would proceed as a matter between the complainant and the poster without the operator being involved. Alternatively the post would be taken down by an operator wishing to retain a Section 5 defence.

A website operator does not have to take any of these steps unless it wishes to avail itself of the defence under Section 5. This defence is in addition to the existing defences that operators have. They could choose to defend themselves on the basis of Section 1 of the Defamation Act 1996 or Regulation 19 of the E-commerce Regulations 2002 or indeed a defence of truth, honest opinion, privilege and so forth. A Notice of Complaint may not be sufficient to meet the requirements of actual notice of unlawful material as is required by Regulation 19 to put a party hosting material on notice and therefore make it liable if it fails to remove the material.

There is a long way to go before we find out what impact Leveson's recommendations will have any real impact on regulation of the press in this country.

Leveson Update

Lord Justice Leveson made various recommendations at the conclusion of his Inquiry into the culture, practices and ethics of the British press as to how press regulation should be reformed in this country. There seems to be an acceptance by most that at least some of these recommendations need to be implemented in order to satisfy the public's concern that it was apparent deficiencies in regulation that led to the phone hacking scandal and other alleged press abuses of power.

Two competing proposals as to how these recommendations should be implemented have now been produced: one backed by some of the big newspaper groups; and another approved by the many politicians in the House of Commons. Both of these proposals provide for a regulatory system grounded in a Royal Charter; a rather antiquated way of establishing a legal entity through the approval of the Queen acting through the Privy Council, which is being used so that everyone can avoid saying the dreaded words

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"statutory regulation." This Royal Charter would establish the constitution for a "recognition body" which would not itself then regulate the press, but would instead assess whether any regulatory body established by the industry, or any other interested party, met Leveson's requirements for an effective regulator. If these requirements were met, that body would then be formally recognised as a press regulator, and members of the press would then be encouraged to sign up to be monitored by it via various carrots and sticks (e.g. failure to sign up leading to costs sanctions for press bodies in civil litigation).

This elaborate system is what Leveson called an "independent self-regulatory regime," i.e., it is intended to result in a regulator being set-up by the industry ("self-regulation"); however the existence of a recognition body to verify the regulator is doing its job properly means that the regulator will be prevented from getting too close to the industry to prevent future abuses ("independent").

The industry's proposed Royal Charter is the first to go before the Privy Council for consideration. Should that be rejected, the politicians' Royal Charter will be next up for consideration. Whatever the end result, it is far from clear, even if a recognition body is established, what, if any, regulator will then emerge and/or be approved by that body (although parts of the industry have already put forward a potential candidate in the form of the newly named Independent Press Standards Organisation). It is still less clear whether, even if a regulator is subsequently "recognised," the industry will choose to sign up to it, or whether many will choose to operate outside of the intended regulatory system and seek to challenge any sanctions they face as a result (e.g. on the grounds that those sanctions breach their rights to freedom of expression under Article 10).

In short, there is a long way to go before we find out what impact Leveson's recommendations will have any real impact on regulation of the press in this country.

Libel and Malicious Falsehood

In *Cruddas –v- Calvert* (2013) EWHC 2298 a former Treasurer of the Conservative Party was awarded £180,000 damages which included aggravated damages of £15,000 in respect of a series of four articles in the Sunday Times which had headlines such as "*Tory Treasurer charged £250,000 to meet PM,*" "*Cash for Cameron,*" "*Cosy Club buys PM's ear*." The suggestion was that donations to the Conservative Party would buy influence – perhaps not in itself the most astonishing proposition – but, the Judge concluded that the way that the article were written suggested that the former Treasurer who resigned as a result of the articles had corruptly offered for sale the opportunity to influence government policy through secret meetings with the Prime Minister and other ministers and had indicated a willingness to accept payment of the sums in breach of electoral law through opaque means involving payment through Lichtenstein.

The Judge was satisfied that the allegations were false. The newspaper had contended for lesser meanings which it believed it could defend. Indeed the original view of the trial judge, Mr Justice Tugendhat, said that the article was suggesting that Cruddas was or was reasonably suspected of being guilty of the criminal offence of corruption had been reduced in scope by the Court of Appeal. Most unusually the Judge had concluded that in addition to libel the newspaper was guilty of malicious falsehood in that the journalists knew that these meanings were false – although their contention was that they had not understood the words to bear these meanings and the Judge concluded that they had a dominant interest of injuring Cruddas. The case was a very unwelcome reminder of the complexity of the law of libel with a series of interlocutory hearings and appeals about the meaning of the words. The legal costs on both sides were estimated in the press to be in the region of £1 million and the Sunday Times were ordered to pay £500,000 on account of costs within 14 days.

The paper ran a successful Reynolds defence in *Hunt –v- Times Newspapers* (2013) EWHC 1868. Following a twelve day hearing a claim brought by a leading underworld figure called Hunt was dismissed by Mr Justice Simon. Hunt was accused of being a crime lord controlling a criminal network involved in murder, drug-trafficking and fraud as well as a business of witness intimidation. Although the Judge did not find all the allegations against Hunt made out, he did find that the Reynolds defence was established and the Judgment provides a detailed analysis of the journalistic methods of

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Michael Gillard which the Judge found to be matters of public interest and responsible.

If the Reynolds defence had failed and these allegations had been made against a man of good character, the Judge would have considered the level of damages to be at the top end of the scale, namely £250,000, although, so far as Mr Hunt was concerned, on the basis of what the Judge did find to have been proved about his bad character, that would have been reduced to £50,000. One footnote to the case is that Mr Hunt's Counsel was Hugh Tomlinson QC well-known for his extremely comprehensive Informm blog which is scarcely slow in chastising the press when they are found to have libelled third parties or published private information about them. I have not been able to find in Informm a detailed analysis of the case or of the scandal that a man such as Hunt could have brought such a libel action. Although the newspaper was successful, it again is a salutary reminder of how enormously expensive defending such claims can be.

Flood –v- Times Newspapers

Readers will recollect that in this case Times Newspapers also succeeded in establishing a Reynolds defence in relation to their reports of an investigation into an allegation against a police officer of taking bribes from Russian exiles. This meant that the article which had been published in 2006 could successfully be defended under the *Reynolds* defence until September 2007 when the newspaper was informed that Flood had been exonerated by the Inquiry. Flood is continuing his libel action in respect of the period after 5 September 2007 when the article remained on the newspaper's website until it was taken down. The court has accepted his argument that the article does carry the meaning that this would be understood as suggesting that he had or may have been reasonably suspected of abusing his position as a police officer and/or committing a serious criminal offence.

Lance Armstrong

The Sunday Times has secured a settlement, the precise terms of which have not been disclosed, against Lance Armstrong, the drug-consuming former Tour de France cyclist. In 2006 Armstrong had, in settlement of his libel claim concerning an article in 2004 which called him a fraud, cheat and liar, received £300,000 damages. The newspaper also had to incur legal costs of £720,000. After Armstrong admitted on the Oprah Winfrey programme that he was indeed a cheat, he was sued for repayment of the damages and the costs incurred on both sides.

The Sunday Times has secured a settlement, the precise terms of which have not been disclosed, against Lance Armstrong, the drug-consuming former Tour de France cyclist.

Political Libels

It has become increasingly difficult for politicians who used to be regular visitors to the libel courts to bring libel actions. The case of *Waterson –v- Lloyd* (2013) EWCA Civ 136 is a cautionary tale and an interesting decision on the question of what constitutes honest opinion. Both parties were contesting the parliamentary seat of Eastbourne. Lloyd, the Liberal Party candidate, produced a mocked up newsletter during the campaign which wrote about the "Expenses Scandal MP." The newsletter drew attention to the true fact that Waterson, the Conservative candidate and the person who had hitherto been the MP for Eastbourne, had claimed £70,000 in parliamentary expenses for his family home 60 miles away from Eastbourne. That, said Mr Lloyd, was a scandal.

Mr Waterson surprisingly disagreed pointing out that his expenses claims were entirely within the parliamentary rules. The question was whether referring in this way to a scandal was a matter of comment or whether it was an allegation of fact that he had in fact been guilty of improper conduct in breach of the parliamentary rules. The Court of Appeal, by a majority of two to one, disagreed with the trial Judge and concluded that it was comment. The case therefore shows that the courts are less inclined than they used to be to discover imputations of fact which had therefore then to be proved to be true.

The case also reminds one of the continuing complexities of this area of law where the judges effectively divided 2-2 on

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the question of whether it was fact or comment, but as the Court of Appeal by a majority decided that it was comment, the Defendant won and the claim failed.

In the case of *Fox –v- Boulter* (2013) EWHC 1435, Fox who was former government minister had mixed results in his claim in respect of an alleged defamation of him by a businessman in a television interview. The businessman complained that Fox could exonerate him in respect of serious charges brought against him in the United States by an American corporation but was dragging his feet in doing so and was likely to have to be compelled to attend court. The court found that the short television interview did not amount to a substantial tort although the longer article on the website was capable of doing so.

Unsuccessful Claim in Libel and Malicious Falsehood

Euromoney Institutional Investor plc –v- Aviation News (2013) EWHR 1505

This decision of Mr Justice Tugendhat was essentially a business dispute between organisers of business conferences. An advertisement claimed that the advertiser had greater experience on organising aviation finance conferences and, unlike its competitor, no record of fleecing. The courts do not look favourably on what are essentially commercial disputes proceeding as libel or malicious falsehood claims. The claim failed because the judge concluded that there was no substantial tort or prospect of substantial damages being awarded. He also concluded that this would not constitute malicious falsehood. It was largely a matter of opinion and not an imputation of dishonesty or fraud, he felt that the Claimant would not establish that there was a false allegation of fact or that they have suffered financial loss in consequence. More marginal was the question of whether the allegation was essentially an expression of opinion or a value judgment. Although the court concluded that allegations of over-charging could be said to be an accusation of fact, the case overall was dismissed.

Control of Legal Costs

Mitchell –v- News Group Newspapers 2013 EWHC 2355. This decision of Master McCloud at a procedural hearing indicated that the courts were now going to hold parties to their estimate of costs and in this particular instance to punish parties who failed to submit their estimate of costs in accordance with the requirements of PD51D and CPR 3.13 and 3.14. Parties must now, seven days before the first Case Management Conference, produce a detailed estimate of the likely level of costs. The newspaper had done so but the Claimant, a government minister who had lost – probably most unfairly – his job in the wonderfully named Plebgate scandal, had failed to do so.

His lawyers made the point that they were a two partner firm with a number of key personnel away on maternity leave and suffering from pressure of work. This cut no ice with Master McCloud. The case is going on appeal and it will be worth following the views of the Court of Appeal on how strictly costs budgets will be adhered to. *Henry –v- News Group Newspapers* 2011 EWHC 236 had allowed Claimants more wriggle room.

Hackgate

The trial of the leading editors and newspaper executives in relation to matters such as alleged unlawful payments to police officers, prison staff, hospital and revenue employees in return for privileged information as well as in relation to charges of conspiracy to hack phones will start on 28 October 2013. The case is likely to last for the better part of four months. There are then two further sets of trials due to take place. There had been very great concerns about issues of potential contempt of court and/or the publication of prejudicial material which could undermine the fairness of the trials. There is likely to be worldwide coverage of the trial.

It seems that it is possible that a court might postpone the reporting of any guilty verdict in the first trial until the later trials are concluded and if that does happen, it will be interesting to see whether such an order can, in the modern world, be effective. It also appears that such are the concerns about possible prejudice that the normal permissions for tweeting and the like by those present in court will be suspended so that matters are not widely reported where the court may want to temporarily postpone court reporting.

David Hooper is a partner at RPC in London.

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Ethics Corner

Ethical Considerations of Technology and Lawyer Competence

By Jess Askew III

We live and practice in times of rapid technological advances that change the way we communicate in business and social settings. Like the typewriter and telephone before them, Facebook, Twitter, Linked-In, iPhone, iPad, Google, Google Scholar, LEXIS, Westlaw, Bloomberg Law, blogs, chat rooms, on-line forums, email, SMS, ESI, ECF, PDF, Hashtag, and Snapchat are only some of the new and different means of communication or sources of information, and more are on their way.

What ethical considerations are there for lawyers concerning these technologies? Must a lawyer be able to use these tools in order to be competent? If a lawyer uses these tools, what ethical obligations does the lawyer assume?

Technological Competence v. Lawyer Competence

For those of us who came to the bar at or before the dawn of the fax machine, new technologies can be challenging and even daunting. Must a lawyer be proficient or competent in their use in order to be a competent lawyer? The answer is not obvious, depends on the circumstances, and veers uncomfortably close to the question of professional malpractice.

For those of us who came to the bar at or before the dawn of the fax machine, new technologies can be challenging and even daunting.

The ethical rule of lawyer competence is in Model Rule of Professional Conduct 1.1 and states:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

By defining competence in terms of "legal" knowledge and skill, the rule invites a fundamental distinction between "legal knowledge and skill" and "technological knowledge and skill." If accepted, this distinction would seem to create a wide gulf between legal and technological competence.

But the answer probably is not so simple, because legal competence in an engagement depends on what is reasonably necessary for that engagement. As THE LAW OF LAWYERING puts it, the definition of competence "is somewhat circular, for the elements of competent representation are all qualified by the words 'reasonably necessary for the representation,' when exactly what is necessary is often the key issue in both disciplinary matters and corresponding legal malpractice actions. But this qualification also has the advantage of making it clear that each case of alleged incompetence must be judged on its facts." Geoffrey C. Hazard, Jr., W. William Hodes and Peter R. Jarvis, THE LAW OF LAWYERING (3d ed. 2011), at §3.2, page 3-4. The authors contend there is a minimum standard, "below which no lawyer is permitted to fall," that develops "on a common law basis." *Id.*

Because professional competence is defined according to the reasonable requirements of the engagement, there is a feedback-loop between the ethical rule and the standard of conduct, and the standard of conduct in a community is probably driven by the breadth of practitioner acceptance and use of the technology. If the engagement is to provide a tax opinion reasonably requiring knowledge of an IRS regulation and private letter rulings, then certainly Facebook would not enter the picture. Unless the IRS were to begin tweeting interpretive guidance, social media would not be relevant to the engagement.

In litigation concerning a business transaction in which the client used email and text messages, the client would have an obligation to preserve electronically stored information ("ESI") under the rules of discovery, and the lawyer would have an obligation to advise and represent the client in connection with ESI. If the client used text messaging in

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connection with the transaction, does this require the lawyer to master the technology of text messaging?

Mastery of the technology would be a stretch, because the ethical rule focuses on the legal knowledge, skill and thoroughness reasonably necessary for the engagement. Traditionally, legal knowledge and skill involves knowing a legal rule, ascertaining the facts important in applying the rule in the circumstances, and then forming an opinion or advocating for particular result.

Yet trying to divorce the legal skill and knowledge from the context in which it must operate probably does not give the lawyer a complete pass on some level of technological competence. Lawyers who litigate cases always litigate in a particular context and often develop specific knowledge about that business or area. For instance, medical malpractice lawyers seem to know a lot of medicine, and product liability lawyers often learn a great deal about product design and manufacture. This is always a practical advantage to a client, and one can easily imagine an argument that the standard of conduct for a reasonable lawyer in such a case is to possess or have access to specific knowledge concerning that context. By the same logic, a lawyer who must advise a client concerning preservation and production of text messages arguably should have some understanding of the technology of texting. The level of understanding should be sufficient to advise the client on how to retain and produce text messages.

Regardless of whether ethical or strategic considerations encourage a lawyer to use technology, the massive use of new technologies in business and social settings has brought and will continue to bring the bar into its gravitational field.

The Feedback Loop Between Actual Practice and Standards

When does specific content knowledge cross the threshold from being a practical advantage for sophisticated lawyers and clients to being a minimal required level of competence for lawyers? This would seem to depend on how broadly the technology is adopted and used by lawyers who practice in the area.

Consider the process of selecting a jury. There is certain information available to help a lawyer and a client determine which jurors they prefer and which they wish to strike from a jury panel. Jurors provide courts biographical information that is available to lawyers, and lawyers often have a local lawyer help choose a jury in venues where the trial lawyer does not often appear. These sources of information are widely accepted methods of helping decide who should sit on a jury. Arguably, these practices are so broadly accepted as to fall within the standard of conduct required of a trial lawyer in choosing a jury. There are additional sources of information available. For instance, some lawyers suggest that it is helpful to observe any bumper stickers that the potential jurors have on their cars in order to determine their strongly held attitudes and beliefs.

What about the wealth of information now available on Facebook, Linked-In, Twitter, blogs, and even Google from and about potential jurors? Certainly there are stories in which enterprising lawyers have used these sources to discover information about jurors or potential jurors that have helped their client.

(In one case, a criminal defense lawyer found a juror blogging about the case during trial, posting photos of the murder weapon and criticizing the court's staff. In another, a plaintiff's lawyer discovered that a potential juror belonged to an on-line support group for claustrophobics. The case involved an injury inside a machine in tight quarters. The juror ultimately served as foreman and plaintiff won a verdict. These examples are from *Investigating Jurors in the Digital Age: One Click at a Time*, 60 KAN. L. REV. 611.)

Using these sources may be a great tactical advantage to a party in a case, if there is information available and the right questions and databases are used to find it.

Does this mean that Internet and social-media searches concerning potential jurors are required in order to be an ethically competent trial lawyer? The question involves both the legal skill of picking a jury and the technological skill of developing information to use in that process. From this perspective, there is a compelling argument that a lawyer should have the ability to develop Internet and social media information on potential jurors.

Frankly, this argument concerns me, because I have not opened a Facebook account and maybe never will. Does this mean I am not an ethically competent lawyer? I don't think so, and I think the suggestion that I need to join Facebook in

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order to pick a jury is, as we say, "over-egging the pudding." (Lawyers in Arkansas and beyond will recognize this phrase as a nod to United States District Judge Billy Roy Wilson of the Eastern District of Arkansas, who does not hold the copyright but can probably claim it as a trademark.)

Just as I do not need to know how to build a watch to tell what time it is or write software code in order to use a word processor, I don't believe I need to know how to use Facebook to pick a jury. But, based on the chance that Facebook may have information I'd like to know, I will probably always have someone on my team run appropriate inquiries to help me pick a jury. I feel an obligation to the client to do this, and I think most lawyers want to seek this kind of practical edge (or keep the field even). (Certainly any such inquiry would need to be appropriate under the ethical rules. Model Rule 3.5 prohibits a lawyer from seeking to influence a juror or prospective juror or communicating with such a person during the proceeding. Further, the practice of physically tracking a juror during trial can result in a contempt citation. *E.g.*, *Sinclair v. United States*, 279 U.S. 749 (1929).)

Does this move the needle on the standard of care, or the legal skill, thoroughness and preparation reasonably necessary in the case?

Technology Will Win; How Do We Use It?

Regardless of whether ethical or strategic considerations encourage a lawyer to use technology, the massive use of new technologies in business and social settings has brought and will continue to bring the bar into its gravitational field. Lawyers use and will increasingly use social media, iPads, Google, and all other types of technologies or databases. From this standpoint, where the lawyer elects to use technology for its own sake, without concern for whether it is necessary to comply with ethical or professional obligations, what is the ethically competent use of that technology? Model Rule 1.1 speaks to this issue as well, because any action taken by a lawyer in an engagement must be taken with the legal skill and knowledge commensurate with the matter.

In most cases this means protecting confidentiality of client information. There are numerous state and ABA ethics opinions advising lawyers who use email, cloud computing and other technologies for client communication or information to take appropriate safeguards to ensure the protection and confidentiality of client information. *E.g.*, ABA Formal Opinion 99-413 (March 10, 1999) (confidentiality of unencrypted email); ABA Formal opinion 11-459 (August 4, 2011) (protecting confidentiality of client email communications); *Contemporary Issues in Cyber Law: Red Skies in the Morning – Professional Ethics at the Dawn of Cloud Computing*, 38 WM. MITCHELL L. REV. 111.

As lawyers adopt new technologies and use them more commonly in particular areas or types of matters, the standard of conduct of a reasonable lawyer in those circumstances probably will tend to change under the common law. The understanding of what is "reasonably necessary" technology in the representation will also evolve. In the meantime, when we lawyers choose to use a particular technology in an engagement, we must be comfortable that we are competent enough with the technology to protect the client's information and attorney-client privilege.

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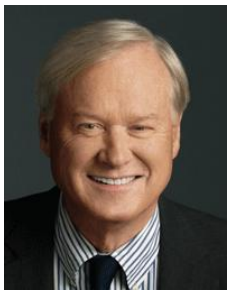

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