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## MLRC DEFENSE COUNSEL SECTION ANNUAL MEETING

## Thursday, November 14, 2013

Lunch will be served 12:00 to 2:00 P.M. Meeting will begin promptly at 12:30 P.M.

Proskauer Rose Eleven Times Square - Conference Room 2700 <u>Google Map</u>

Price per person: \$35

We are required to submit a list of attendees prior to the event for security purposes so please send in your reservation as soon as possible!

Click to Download Registration Form or visit www.medialaw.org

## RSVP by November 4, 2013

Reservations are not refundable for cancellations received after Friday, November 8, 2013. For further information contact Debra Danis Seiden at dseiden@medialaw.org.

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# MLRC London Conference Explores International Media Law Developments



Delegates convened at Stationers' Hall near Saint Paul's Cathedral, London

Over 220 delegates from around the world attended MLRC's London Conference on September 23-24, 2013 at Stationers' Hall. This was MLRC's eighth and largest conference in London, including new participants from India, South Korea, Italy, Portugal and Spain.

The Conference opened with Lord Guy Black, executive director of The Telegraph, and Chris Blackhurst, editorial director of the Independent and Evening Standard, discussing proposed new press regulations in the UK following the Leveson Inquiry and Report.

The first day of the conference included sessions on Newsgathering Challenges: The Fate of Investigative Journalism which explored, among other things, pressures on investigative journalists and sources. "Where Publishers Fear to Tread" focused on practical concerns about publishing in Italy, Ireland and South East Asia. And Data Protection: Everything You Need to Know But Where Afraid to Ask, included Q&A with German MEP Jan Philipp Abrecht on the latest developments in the EU data protection overhaul, together with expert input from James Leaton Gray of the BBC. Delegates also heard from Andrew Caldecott QC, who delivered an after lunch talk on Leveson and the Defamation Act.

The second day included sessions on Defamation Law: Reform and Global Challenges, focusing on key features of the new Defamation Act with comparisons to other jurisdictions. In Privacy Law Developments: The Press Under a Microscope, delegates discussed the challenges of determining public interest under privacy laws. In Media IP Law Developments: Modernizing the Law for the Digital Age, delegates discussed aggregation issues, as well as legislative efforts to modernize copyright laws.

The conference concluded with a panel session on Contempt of Court in the Age of the Internet featuring Mr. Justice Tugendhat, High Court of England & Wales, Justice Chris Maxwell, President Victorian Court of Appeal, and Keir Starmer QC, Director of Public Prosecutions.

On Wednesday morning September 25, approximately 50 in-house lawyers met for breakfast at the Telegraph newspaper for a discussion of in-house practice and management issues.



**Andrew Caldecott QC addressing delegates** 



Panel: Where Publishers Fear to Tread, left to right: H.R. Dipendra, Oreste Pollicino, and Michael Kealey



James Leaton Gray, BBC, left, and Jan Philipp Albrecht MEP discussing data protection issues



Panel: Contempt of Court in the Age of the Internet, left to right: Mr. Justice Tugendhat, Justice Chris Maxwell, Keir Starmer QC, Director of Public Prosecutions



**Group discusssion at the London Conference** 

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# Fifth Circuit Applies SPEECH Act and Refuses to Enforce Canadian Defamation Judgment

#### By Dan Zimmerman and Mary Ellen Roy

The United States Fifth Circuit Court of Appeals recently issued the first appellate opinion construing the SPEECH Act, *Trout Point Lodge, Limited v. Handshoe*, 2013 WL 47766530 (5th Cir. Sept. 5, 2013) (Reavley, Elrod, Graves, JJ.). In a strong victory for free speech, the Court refused to enforce a default judgment on a defamation claim that the Supreme Court of Nova Scotia issued in a case arising, oddly, out of political scandals in a New Orleans suburb.

#### The SPEECH Act

Congress in 2010 enacted the "Securing the Protection of our Enduring and Established Constitutional Heritage

Act" (the SPEECH Act), 28 U.S.C. § 4101-4104, "in response to the apparent rise in 'libel tourism," a form of international forum-shopping" in which a plaintiff files a defamation claim in a foreign jurisdiction that has more plaintiff-favorable substantive law than does the United States.

Congressional findings in support of the SPEECH Act included that people were "obstructing the free expression rights of United States authors and publishers, and in turn chilling the first amendment . . . ., by seeking out foreign jurisdictions that do not provide the full extent of free-speech protections to authors and publishers that

are available in the United States, and suing a United States author or publisher in that foreign jurisdiction."

Under the SPEECH Act, "a party may enforce a foreign defamation judgment in a domestic court if either (A) the law of the foreign forum, as applied in the foreign proceeding, provides free-speech protection that is coextensive with relevant domestic law, or (B) the facts, as proven in the foreign proceeding, are sufficient to establish a defamation claim under domestic law."

Case Background

Mr. Handshoe is a blogger who operates the website "Slabbed.org." He writes with an expressive and sarcastic style the district court stated "can be characterized as derogatory, mean spirited, sexist, and homophobic." He often blogs about politics and politicians in Louisiana and southern Mississippi.

In early 2010 Mr. Handshoe, like much of the news media in the New Orleans area, turned his attention to Aaron Broussard. Mr. Broussard was a long-time elected official in Jefferson Parish, the suburban parish to the west of New Orleans. Starting in 1973, Broussard had served as mayor of Kenner (a City in Jefferson Parish), on the Jefferson Parish

Council and as Jefferson Parish President.

On January 8, 2010, several members of Broussard's staff were set to appear before a federal grand jury that had begun investigating the Broussard administration's dealings with Parish contractors. That morning, Broussard resigned. In December of 2011 Broussard was indicted on 27 counts and on September 25, 2012 he pleaded guilty to two corruption charges.

In the run-up to Broussard's resignation, Mr. Handshoe blogged about an apparent link between Broussard and Trout Point Lodge, a "Boutique Hotel and Canadian Wilderness Resort" in Nova

Scotia. Trout Point Lodge is owned by three New Orleanians, Vaughn Perret, Charles Leary and Danny Abel, a Jefferson Parish attorney. Perret and Leary run Trout Point Lodge. Broussard owned property in Nova Scotia on Trout Point Road, very close to Trout Point Lodge.

Trout Point Lodge, Perret and Leary filed suit in the Supreme Court of Nova Scotia on September 1, 2011, alleging defamation and related claims. Their First Amended Statement of Claim ("Claim") alleged that Handshoe's bloggings on Slabbed.org "were directly defamatory and

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The decision, while perhaps not unexpected in light of the SPEECH Act, is important as the first appellate court ruling against the enforcement of defamation judgments issued by foreign courts that follow English defamation law.

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were also defamatory by both true and false innuendo." The Claim asserted several primary sources of reputational harm, including: (1) content linking Trout Point with the "Jefferson Parish Political Corruption Scandal"; (2) the "imputation" that the "Trout Point Lodge business is actively failing, near bankruptcy, having once relied on the good graces of Aaron Broussard"; and (3) the "unabashed anti-gay, anti-homosexual rhetoric and rants of the defendant." Trout Point generally alleged that Handshoe's publications were false and malicious but did not make any specific statements refuting the truth of Handshoe's blog posts.

Handshoe did not appear in the Nova Scotia action, and the Nova Scotia Supreme Court entered a default judgment against him. The Nova Scotia Court held a hearing to assess damages, at which Perret and Leary testified to Handshoe's allegedly defamatory statements and the damage allegedly inflicted on Trout Point Lodge and Perret and Leary individually. The Nova Scotia Court awarded Trout Point Lodge \$75,000 in general damages and Leary and Perret each \$100,000 in general damages, \$50,000 in aggravated damages and \$25,000 in punitive damages.

Trout Point enrolled the Nova Scotia Court's Judgment in the Circuit Court of Hancock County, Mississippi. Handshoe removed the action to the United States District Court for the Southern District of Mississippi pursuant to the SPEECH Act. With the facts not in dispute, the parties filed cross-motions for summary judgment. The district court entered summary judgment in Handshoe's favor, finding that Trout Point failed to meet its burden under the SPEECH Act to show that "Handshoe was afforded at least as much protection for freedom of speech in [the Nova Scotia] action as he would have in a domestic proceeding or, alternatively, that Handshoe would have been found liable for defamation by a domestic court." Trout Point appealed.

#### **Fifth Circuit Decision**

The Fifth Circuit affirmed. The Court easily disposed of the claim under the first prong of the SPEECH Act. In Canada, as in the United Kingdom, "truth is a defense that a defamation defendant may raise and, if so, must prove." In Mississippi, of course, falsity is an element of the claim of defamation, as a matter of constitutional law. Thus, the Nova Scotia court did not provide Handshoe with "at least as much

protection for freedom of speech" as a Mississippi court would have.

Under the second SPEECH Act prong -- whether a Mississippi court could have found Handshoe liable under the facts as presented in the Nova Scotia court -- the Court found that a Mississippi court could not have granted a default judgment on the Claim. The plaintiffs failed to establish "falsity" because: (i) the Claim failed to "clearly and specifically allege that each of the relevant statements is false"; (ii) many of the statements complained about were unverifiable opinion -- particularly the homophobic namecalling, that the Court described as "offensive . . . [but] generally not actionable"; and (iii) certain allegations in the Claim were "legal conclusions, as opposed to well-pleaded facts," because "Trout Point's allegations of falsity are unaccompanied by any facts that contradict or otherwise undermine the allegedly defamatory statements."

The Court also briefly considered and rejected an alternative ground for "falsity" -- the Nova Scotia Court's "purported factual findings that Handshoe's statements were false and malicious." The Court held that these findings were irrelevant because the issue is whether a Mississippi court could have found falsity, not whether the Nova Scotia Court did. But even if relevant, the Court rejected the Nova Scotia Court's ruling because it did "not contain specific findings of fact with respect to the falsity of Handshoe's statements."

Finally, though declining to rule on the point, the Court stated that Handshoe "makes a strong argument" that the Nova Scotia judgment also was unenforceable because of the requirement of the SPEECH Act that a domestic court may not "recognize or enforce a foreign judgment for defamation unless the domestic court determines that the exercise of personal jurisdiction by the foreign court comported with the due process requirements that are imposed on domestic courts by the Constitution of the United States."

The decision, while perhaps not unexpected in light of the SPEECH Act, is important as the first appellate court ruling against the enforcement of defamation judgments issued by foreign courts that follow English defamation law.

Mary Elen Roy is a partner and Dan Zimmerman a staff attorney at Phelps Dunbar in New Orleans. Mr. Handshoe is represented by Jack Truitt of the Truitt Law Firm, Covington, LA, and G. Gerald Cruthird, Picayune, MS. Trout Point Lodge, Mr. Leary and Mr. Perret are represented by Henry Laird, Jr., of Jones Walker LLP, Gulfport, MS. Aaron Broussard is serving a 46-month sentence in federal prison.

# Sixth Circuit Rules That Tripadvisor's Ranking of "Dirtiest Hotels" Is Protected Opinion

e Hotels \* Flights Vacation Rentals Restaurants \* Best of 2013 Your Friends 🚹 More \* Write a Review

#### By Jim Rosenfeld and Sam Bayard

In a helpful decision for online publishers of rankings and ratings, the Sixth Circuit Court of Appeals held that a travel website's annual top-ten list of the dirtiest hotels in the United States, based on data compiled from its users' reviews, was subjective opinion that did not give rise to a defamation claim. *Seaton v. Tripadvisor*, No. 12-6122 (6<sup>th</sup> Cir. Aug. 28, 2013) (Moore, Clay, White, JJ.).

#### **Background**

TripAdvisor LLC operates a popular travel research website where users can post reviews and exchange

tripadvisor

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information about hotels, resorts. restaurants other businesses of interest travelers. The t o TripAdvisor website also publishes surveys, lists, reports regarding travel-related businesses. One such list was the "Dirtiest Hotels" which TripAdvisor published annually between 2006 and 2011. Plaintiff Kenneth Seaton's Grand Resort

Seaton's Grand Resort

Hotel and Convention Center ("Grand Resort") in Pigeon
Forge, Tennessee captured the number one spot on the 2011
list. On the website, the "2011 Dirtiest Hotels" feature listed
the ten "dirtiest hotels," providing each establishment's name
and location, a quote from a user review, a user-provided
photograph, and the percentage of reviewers who "do not
recommend this hotel." It also included a link to each hotel's
listing page on TripAdvisor, where website visitors could see
all its individual reviews and the numerical ratings that users
submitted concerning "Cleanliness," "Service," "Value,"
"Sleep Quality," "Rooms," and "Location."

For the Grand Resort Hotel and Convention Center, the user quote stated that "There was dirt at least ½" thick in the bathtub which was filled with lots of dark hair," and the photograph showed a ripped bedspread. The user quotes for the other nine hotels on the list was equally harsh (e.g., "Hold your nose for the garbage smell" and "Camp out on the beach instead"). Text at the top of the page explained that the information displayed in the list was "as reported by travelers on TripAdvisor." TripAdvisor also issued a "2011 Dirtiest Hotels" press release with similar information, which featured additional language such as "TripAdvisor lifts the lid on America's Dirtiest Hotels" and "Top 10 U.S. Grime-Scenes Revealed, According to Traveler Cleanliness Ratings."

October 2011. Seaton sued TripAdvisor for libel in Tennessee state court, claiming that the "2011 Dirtiest Hotel" list w a s based "unsubstantiated rumors grossly distorted ratings and misleading statements." TripAdvisor removed the case to the United States District Court for the Eastern

District of Tennessee and

moved to dismiss under Rule 12(b)(6), arguing that the list was constitutionally protected opinion rather than a statement of objectively verifiable fact. Seaton opposed the motion and also moved to amend the complaint to add claims for false light, tortious interference with prospective business relationships, and trade libel/injurious falsehood.



Q. Search for a city, hotel, etc

#### The District Court's Decision

On August 22, 2012, Judge Thomas W. Phillips of the United States District Court for the Eastern District of

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Tennessee issued an opinion granting TripAdvisor's motion to dismiss and denying Seaton's motion to amend.

Recognizing that the federal and Tennessee Constitutions protect "statements of pure opinion, hyperbole or rhetorical exaggeration," the District Court focused on whether the statements about Grand Resort in the "Dirtiest Hotel" feature implied any assertions of objective fact, so as to be actionable under *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-20 (1990). It found that "neither the fact that Defendant numbers its opinions one through ten, nor that it supports its opinions with data, converts its opinions to objective statements of fact. Any reasonable person can

distinguish opinions based on reasons from facts based on reasons...." It accordingly found the "Dirtiest Hotels" list to be "unverifiable rhetorical hyperbole."

Judge Phillips observed that lists and numerical rankings like TripAdvisor's are "omnipresent," and reasonable readers understand them to convey subjective opinion:

From law schools to restaurants, from judges to hospitals, everything is ranked, graded, ordered and critiqued. Undoubtedly, some will accept the array of "Best" and "Worst" rankings as impenetrable maxims. Certainly, some attempt to obfuscate the distinction between fact and opinion as part of the course of their business. For those that read "eat here," sleep there" or "go to

this law school" and are unable to distinguish measured analysis of objective facts from sensational "carnival barking," compliance will be both steadfast and assured. Nevertheless, the standard, fortunately, is what a "reasonable person" would believe. A reasonable person would not confuse a ranking system, which uses consumer reviews as its litmus, for an objective assertion of fact; the reasonable person, in other words, knows the difference between a statement that is "inherently subjective" and one that is "objectively verifiable."

The District Court therefore dismissed the libel claim and also denied Seaton's motion to amend the complaint as futile.

#### The Sixth Circuit Affirms

On August 28, 2013, the Sixth Circuit affirmed the District Court's decision in all respects. Judge Karen Nelson Moore, writing for a unanimous panel, concluded that the "Dirtiest Hotels" list had not stated, as an assertion of fact, that Grand Resort was the dirtiest hotel in the United States. The Court focused both on TripAdvisor's specific use of the term "dirtiest" and on the "general tenor" of the list and

website.

First, TripAdvisor's use of the word "dirtiest" was rhetorical hyperbole. The Court explained that "'[d]irtiest' is a loose, hyperbolic term because it is the superlative of an adjective that conveys an inherently subjective concept." Readers would understand, the Court explained, that the term's use was an exaggeration, rather than taking it literally.

Second, the Court found that the "general tenor" of the "Dirtiest Hotels" list reinforced the impression that the rankings were based on the subjective views of TripAdvisor users, not a scientific study that produced objective rankings. Readers would reasonably interpret the photographs and user quote accompanying the ranking of Grand Resort as "entertaining examples of the specific experiences of two of

TripAdvisor's users." Likewise, the quotes regarding other hotels on the list were similarly "dramatic," "entertaining," and "hyperbolic," such that "any reader would understand the list not to be communicating anything more than the experiences of individual users of TripAdvisor."

TripAdvisor's statements on its website that it provides the "World's Most Trusted Travel Advice" and "share[s] the whole truth about hotels" did not alter the Court's conclusion. The panel found that these claims of trustworthiness related to the site's "conveyance of its individual users' personal opinions," not objective facts.

(Continued on page 13)

The Sixth Circuit's decision in this case protects the efforts of consumer-oriented websites like TripAdvisor to gather, synthesize and organize the individual views and feedback of a multitude of reviewers in a form that, while subjective, is tremendously useful to users.

(Continued from page 12)

Finally, like the District Court, the Circuit Court noted the ubiquity of top-ten lists and the like on the Internet, finding that reasonable observers interpreted such features as opinion, not provable fact.

The Circuit Court also disposed of plaintiff's argument that TripAdvisor had employed "flawed methodology." To the extent these arguments had been pled below, they were simply irrelevant given that the end-product of the challenged methodology was subjective opinion rather than verifiable fact. The Court reaffirmed its holding in a prior case, <a href="Compuware Corp. v. Moody's Invs. Servs.">Compuware Corp. v. Moody's Invs. Servs.</a>, Inc., 499 F.3d 520, 529 (6th Cir. 2007), that "the subjective weighing of factors cannot be proven false and therefore cannot be the basis of a defamation claim."

The Sixth Circuit also rejected plaintiff's other claims, both as pleaded and as set forth in its proposed Amended Complaint. It held that Seaton could not prevail on a false light claim because such a claim could only be asserted by an individual, and the "Dirtiest Hotels" list had identified Seaton personally. It affirmed the dismissal of Seaton's trade libel/injurious falsehood claim because, like defamation, the claim could not be founded on subjective opinion. Finally, it similarly affirmed as to plaintiff's tortious interference claim because plaintiff had relied on defamation as defendant's allegedly "improper means" of interference.

#### **Takeaway**

The Sixth Circuit's decision in this case protects the efforts of consumer-oriented websites like TripAdvisor to gather, synthesize and organize the individual views and

feedback of a multitude of reviewers in a form that, while subjective, is tremendously useful to users. In short, it allows these sites to distill the wisdom of the crowd. In particular, the case provides comfort to websites using star-rating and similar consumer-feedback systems to rank business, organizations, and individuals. For years, there's been a good argument that Section 230 protects this type of aggregation of user commentary. *See* Levitt v. Yelp! Inc., 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011); *Gentry v. eBay*, 121 Cal. Rptr. 2d 703, 714 (Cal. Ct. App. 2002). But the prospect remains that, in some situations, a website can lose Section 230 protection by crossing the line into creating its own content.

While the application of Section 230 is fact-dependent, this decision suggests that websites that go beyond mere aggregation and publication of user-generated content are entitled to constitutional protection against libel claims, at least so long as the underlying data relates to a subjective judgment. The decision may also be a boon to journalists and academic researchers who work with crowd-sourced data, or to anyone who wishes to go beyond simply publishing third-party content to drawing conclusions based on that content.

TripAdvisor LLC was represented in the District Court by Jim Rosenfeld and Sam Bayard of Davis Wright Tremaine in New York and Russell Headrick and Meghan Morgan of Baker, Donelson, Bearman, Caldwell & Berkowitz in Knoxville. Laura Handman of Davis Wright Tremaine joined the defense team for, and argued, the Sixth Circuit appeal. Seaton was represented by John T. Milburn Rogers and Todd A. Shelton of the John Rogers Law Group and Sidney Gilreath of Gilreath & Associates.



Aaron Sorkin Screenwriter Playwright

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# Libel and Related Claims Against Better Business Bureau Survive Anti-SLAPP Motion

The California Court of Appeals affirmed that a moving broker given an online "F" grade by a local Better Business Bureau demonstrated a probability of success on libel and related claims sufficient to survive an anti-SLAPP motion to strike. *Budget Van Lines v. Better Business Bureau of Southland*, No. B235338 (Cal. App. Aug. 20, 2013) (unpublished).

In an unpublished opinion, the California Court of Appeal, Second Appellate District, affirmed that Budget Van Lines' could proceed with claims of trade libel, libel per se, and unfair competition over the grade and accompanying statements suggested that plaintiff was unlicensed and engaged in misleading advertising.

#### **Background**

The BBB gave Budget Van Lines an "F" grade. The website explained that an F grade could be given when:

"We strongly question the company's reliability for reasons such as that they have failed to respond to complaints, their advertising is grossly misleading, they are not in compliance with the law's licensing or registration requirements, their complaints contain especially serious allegations, or the company's industry is known for its fraudulent business practices."

Budget alleged this explanation was false and defamatory. Among other things, plaintiff alleged it was a "moving broker" not a moving company and was in compliance with all relevant state regulations. The BBB argued that the explanation was a hypothetical explanation of how a company could earn an F grade and the statements were not specifically about Budget. The trial court denied a motion to strike.

#### **Probability of Success**

Affirming denial of the anti-SLAPP motion, the court first found insufficient evidence that plaintiff was a public figure required to prove actual malice. Plaintiff's extensive advertising did not make it a public figure, the court explained, because a "person in the business world advertising his wares does not necessarily become part of an existing public controversy."

Moreover, the court rejected the argument that the statements about being unlicensed and engaging in misleading advertising were hypothetical. Instead, they were provably false statements of fact about plaintiff. This was particularly so because the "BBB holds itself out as an expert on the professionalism and trustworthiness of businesses."

It was a closer question, the court said, whether Budget could demonstrate the probability of prevailing on its claim it was defamed by the "F" grade. Grading systems are generally considered to be nonactionable opinions, the appeals court said. But because Budget showed a probability of prevailing on the other statements, the panel said that it need not resolve whether the "F" grade was protected opinion.

The court also held that because Budget's libel claims survived, its unfair competition claims based on the same facts could go forward. The court also refused to strike a claim for a post-trial injunction, noting that the rule against prior restraints does not apply to post-trial orders barring defendants from repeating specific statements found at trial to be defamatory.

Plaintiff was represented by Law Office of Adrianos Facchetti, Pasadena, CA; and Tedford & Associates, Pasadena, CA. Defendant was represented by Walter Sadler, Leopold, Petrich & Smith, Los Angeles, CA.

# Court Affirms Judgment for Yale in Libel and Negligence Case Over Bogus Ph.D. Claim

## Heightened Protection Applies to Negligence Claims Over Public-Interest Speech

The Second Circuit recently affirmed summary judgment to Yale University on defamation and negligence claims brought by a South Korean University relating to a scandal over a bogus claim to a Ph.D. degree from Yale. *Dongguk Univ. v. Yale Univ.*, No. 12-2698-cv (2d Cir. Aug. 15, 2013) (Fuentes, Smith, Fisher, JJ.). The court found insufficient evidence of actual malice to sustain plaintiff's defamation claims and held that this same heightened standard applied to

- and barred - most of plaintiff's negligence claims against the university. As to the negligence claim, the Second Circuit held that "heightened First Amendment protections apply to any tort alleging reputational harm as long as the underlying speech relates to a matter of public concern."

Plaintiff Dongguk University, a prominent, Buddhist-affiliated educational institution in South Korea, sued Yale University in Connecticut federal court for \$50 million in damages after Yale mistakenly confirmed that a professor hired by Dongguk had earned a Ph.D. there and then later denied that it had confirmed the bogus credential.

The court found insufficient evidence of actual malice to sustain plaintiff's defamation claims and held that this same heightened standard applied to – and barred – most of plaintiff's negligence claims against the university.

#### Background

In 2005, Dongguk hired Shin Jeong-ah as an art history professor. Shin claimed she had received a Ph.D from Yale and submitted a document on university letterhead purportedly certifying her degree. After hiring Shin, Dongguk University asked Yale to confirm her credentials. Yale Associate Dean Pamela Schirmeister sent a fax to Dongguk mistakenly verifying that Shin received a Ph.D. in art history from Yale.

The matter later erupted into a huge public scandal in South Korea, including allegations that a Korean government official pressured Dongguk University to hire Shin and cover up her lack of a degree from Yale. Shin ultimately resigned as a professor in June 2007 and served 18 months in prison for embezzlement and falsifying academic records.

In response to questions from Dongguk and South Korean media, Yale repeatedly denied confirming Shin's Ph.D. For

example, Yale's Public Affairs Office denied that Yale ever received an inquiry letter from Dongguk about Shin let alone confirm that she obtained a Ph.D. In fact, Yale claimed that the confirmation fax from its Dean must be a fake as well.

However, Yale was forced to do an about face after the U.S. Attorney's Office for the District of Connecticut subpoenaed Yale at the request of Korean prosecutors. After an internal investigation, Yale's in-house counsel told federal prosecutors that the university had indeed received Dongguk's letter of inquiry about Shin and confirmed that she obtained a Ph.D. from Yale. Forty days after Yale acknowledged its denials were false, it informed Dongguk University.

Initially, the Connecticut federal district court denied summary judgment on the defamation and negligence claims. *Dongguk Univ. v. Yale Univ.*, No 08-cv-0441 (D. Conn. Feb. 10, 2012). But on reconsideration, the court granted summary judgment to Yale on all counts. *Dongguk Univ. v. Yale Univ.*, 873 F. Supp. 2d 460 (D. Conn. 2012). The trial court held that First Amendment protections apply to all torts involving speech about public figures and that the allegedly negligent statements were entitled to heightened constitutional protections.

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#### **Second Circuit Ruling**

The three judge panel was made up of judges from the Third Circuit sitting by designation. While the case against Yale was pending, the university's in-house counsel Susan Carney – whose statements were at issue in the case – was nominated and confirmed for a judgeship on the Second Circuit.

The panel first affirmed that there was insufficient evidence of actual malice to sustain Dongguk's claims. There was no evidence that defendants deliberately lied and their failure to "investigate, without more" did not establish actual malice. Here, there is nothing "more," the court concluded. "Even the failure to review one's own files is inadequate to demonstrate malice by the party responsible for publishing a statement."

The court rejected Dongguk's additional argument that Yale's failure to expeditiously retract its earlier misstatement was probative of actual malice. The panel noted that Connecticut courts have held that the failure to correct an earlier misstatement may be relevant to the actual malice inquiry, "but this holding has only been applied in circumstances where there was some evidence of actual malice at the time the statements were made." Here, there was no evidence that defendants were aware of the probable falsity of their statements at the time they were made.

**Negligence** 

Dongguk's negligence claims were based on Yale's erroneous confirmation of Shin's degree, Yale's erroneous statement that its fax confirming the degree was a fake, and the delay in informing Dongguk of the truth once discovered. Dongguk alleged these acts severely damaged its reputation in Korea. Dongguk also argued that it was damaged by paying Shin's salary under false pretenses, but the Second Circuit held this argument was raised too late to be heard on appeal.

Relying on <u>Snyder v. Phelps</u>, 131 S. Ct. 1207 (2011) and <u>Hustler Magazine v. Falwell</u>, 485 U.S. 46 (1988), the Second

Circuit panel held "that when speech is related to a matter of political, social, or other concern to the community or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public, then the speaker may be liable for 'damage to reputation . . . only if the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not." (Internal citations omitted). "This is true regardless of the claim at issue, be it defamation, intentional infliction of emotional distress, or negligence; heightened First Amendment protections apply to any tort alleging reputational harm as long as the underlying speech relates to a matter of public concern."

#### **Public Concern**

The court found that most, but not all, of the statements involved matters of public concern. Yale's initial and erroneous confirmation of Shin's degree was not a matter of public concern because at that time there was no public controversy surrounding the matter.

However, the negligence claim over this statement failed because there was no evidence that it caused any reputational harm to Dongguk. To the contrary, the court explained, any reputational injury to Dongguk University was caused, if at all, by

the later highly publicized scandal involving Shin, the Korean government official and Yale's statements to the media. Statements related to this scandal, however, all involved matters of public concern and were made without evidence of actual malice.

Finally, the court affirmed dismissal of an additional Connecticut state law claim for reckless and wanton conduct since this tort required actual bodily injury to be actionable.

Plaintiff was represented by Andrew Kratenstein and Robert A. Weiner of McDermott Will & Emery LLP in New York and Ira B. Grudberg of Jacobs, Grudberg, Belt, Dow & Katz P.C. in New Haven, CT. Defendant was represented by Felix J. Springer and Howard Fetner of Day Pitney LLP in Hartford, CT.

"Even the failure to review one's own files is inadequate to demonstrate malice by the party responsible for publishing a statement."

# 2d Cir. Affirms Dismissal of Executive's Defamation Action Against Slate, Eliot Spitzer

# Summary Order Cites "Numerous Linguistic and Logical Flaws" with Plaintiff's Argument

#### By Matthew E. Kelley and James A. McLaughlin

Less than 48 hours after hearing oral argument, a Second Circuit panel summarily affirmed the dismissal of a defamation action filed by a former insurance executive against former New York Gov. Eliot Spitzer and the publisher of Slate.com. *Gilman v. Spitzer*, No. 12-4169-cv (2d Cir. Sept. 18, 2013) (Walker, Livingston, Chin, JJ.), *aff'g* 902 F. Supp. 2d 389 (S.D.N.Y. 2012). The panel agreed with the trial court that no reasonable reader would understand the challenged statements to be "of and concerning" the plaintiff, citing "numerous linguistic and logical flaws" in the plaintiff's argument.

**Background** 

William Gilman, a former executive of insurance broker Marsh & McLennan, claimed he was defamed by a piece Mr. Spitzer wrote and Slate published in August 2010. In the piece, Mr. Spitzer defended his decision as New York Attorney General to launch a probe of bid-rigging in the insurance industry that culminated in judicial proceedings against Marsh, other insurance-related companies, and their employees, including Mr. Gilman. The

piece did not mention Mr. Gilman by name but referred to his conviction on a felony charge and to a ruling vacating that conviction because of prosecutorial error that occurred after Mr. Spitzer had been elected governor.

Mr. Spitzer's piece responded to a *Wall Street Journal* editorial that, as the Second Circuit put it, "called into question Spitzer's record prosecuting the insurance industry." Mr. Spitzer expressed his view that criticism of these cases was part of a broader pattern of denial in the financial sector

that was hindering effective government policymaking in the wake of the financial crisis.

After discussing successful cases the attorney general's office brought involving American International Group, Mr. Spitzer turned to the investigation of Marsh. The relevant portions of the piece—with added emphasis—read:

The *Journal*'s editorial also seeks to disparage the cases my office brought against Marsh & McLennan for a range of financial and business crimes. The editorial notes that two of the cases

against employees of the company were dismissed after the defendants had been convicted. The judge found that certain evidence that should have been turned over to the defense was not. (The cases were tried after my tenure as attorney general.) Unfortunately for the credibility of the Journal, the editorial fails to note the many employees of Marsh who have been convicted and sentenced to jail terms, or that [2] Marsh's behavior was a blatant abuse of law and market power: price-fixing, bid-rigging,

kickbacks all designed to harm their customers and the market while Marsh and its employees pocketed the increased fees and kickbacks. Marsh as a company paid an \$850 million fine to resolve the claims and brought in new leadership. At the time of the criminal conduct, Jeff Greenberg, Hank Greenberg's son, was the CEO of Marsh. He was forced to resign.

No reasonable reader would understand the challenged statements to be "of and concerning" the plaintiff, citing "numerous linguistic and logical flaws" in the plaintiff's argument.

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Mr. Gilman asserted that the two bolded portions of this passage were false and defamatory in that they wrongfully portrayed him as being guilty of criminal conduct although his conviction had been overturned. He further argued that a reasonable reader would understand the bolded statements to be about Mr. Gilman because of the context provided by the underlined sentences. Mr. Gilman was one of two former Marsh executives whose convictions and sentences were vacated by the trial judge after the judge determined that prosecutors had failed to disclose certain exculpatory evidence.

#### **Second Circuit Decision**

The Second Circuit agreed with District Judge J. Paul Oetken that the bolded statements were not defamatory of Mr. Gilman as a matter of law. "No reasonable reader would understand Spitzer to, in one instance, state that the *Journal* 'note[d]' the dismissal of Gilman's case and, in the next breath, accuse the *Journal* of 'fail[ing] to note' Gilman's case," the panel held. Although Mr. Gilman claimed that knowledgeable readers would connect the challenged statements to him, the Second Circuit held that such readers in fact "would be *less* likely to believe that he was one of the employees Spitzer referenced."

Regarding the second challenged statement, the court held that the reference to "Marsh and its employees" was too general to be considered a statement regarding Mr. Gilman personally. The court reaffirmed the settled principle that a statement referring to a large group, such as Marsh's 50,000 employees, cannot defame an individual within that group. "Such a broad reference to an organization cannot give rise to a defamation claim by one of its constituent members," the panel wrote.

The Slate Group, LLC, and Eliot Spitzer were represented by Eric Lieberman and James McLaughlin of Slate's affiliate, The Washington Post, and by Lee Levine, Jay Ward Brown, Katharine Larsen, and Matthew E. Kelley of the Washington, D.C., and Philadelphia, Pennsylvania, offices of Levine Sullivan Koch & Schulz, LLP. William Gilman was represented by David I. Greenberger, Jeffrey L. Liddle, and James W. Halter of Liddle & Robinson, L.L.P, New York, New York.



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# Summary Judgment for *Chicago Tribune* in Mistaken Identity Defamation Case

By James A. Klenk and Gregory R. Naron

The Circuit Court of Cook County granted summary judgment dismissing a defamation claim against the Chicago Tribune on actual malice grounds. The case, <u>Edward Arnett "Eddie" Johnson v. Chicago Tribune Company, et al.</u>, No. 13 L 743 (Cir. Ct. Cook Cty.) involved sports page editors' misreading of a wire service report about a sexual assault arrest as referring to a local basketball legend, when in fact it concerned another former NBA player by the same name. The court accepted Tribune's arguments that the mistake was at most merely negligent, and plaintiff could not meet his burden of proving *New York Times* actual malice.

The plaintiff in *Johnson*, Eddie Johnson, grew up in Chicago and achieved fame playing basketball in the City high school league, at the University of Illinois, and professionally. After a long and successful career in the NBA ("Sixth Man of the Year" was among his accolades), Johnson went into broadcasting, and currently provides color commentary for the Phoenix Suns' telecasts.

On August 8, 2006, Tribune's overnight sports staff was reviewing wire service reports for material to include in the following day's print edition. One of those reports (an Associated Press story titled "Ex-NBA Star Johnson Accused in Sex Rap") stated that "former NBA All-Star Eddie Johnson" had been arrested for burglary and sexually assaulting a minor in Ocala, Fla. Tribune's staff believed that there was only one "Eddie Johnson" who played in the NBA -- the plaintiff -- and given his local ties, decided to include a very abbreviated version of the wire report in the next day's paper (captioned "Former NBA Illini Star Accused of Sexual Assault"), noting that Johnson was an "Illinois standout."

Unfortunately, there is in fact another "Eddie Johnson" who played in the NBA, and it was that individual, not the plaintiff, who had been arrested. The error was caused by a copy editor's failure to read the final paragraph of the wire service report, which stated that the Johnson who was arrested played for Auburn University, not the University of Illinois. When the error was discovered -- the day the item was published -- Tribune promptly retracted the item, contacted the plaintiff to personally apologize, and published a lengthy apology.

Plaintiff did not dispute that he was a public figure subject to the actual malice standard. On summary judgment, Tribune pointed out that neither "sloppy" journalism nor a "failure to investigate" is sufficient to prove actual malice as a matter of law (*e.g.*, *Harte-Hanks Commc'ns*, *Inc.* v. *Connaughton*, 491 U.S. 657, 688 (1989); *Costello v. Capital Cities Commc'ns*, *Inc.*, 125 Ill. 2d 402, 421 (1988)), and that all the undisputed evidence could support was negligence. Tribune cited cases such as *Time*, *Inc.* v. *Pape*, 401 U.S. 279 (1971) and *Kipper v. NYP Holdings Co.*, *Inc.*, 12 N.Y. 3d 348 (2009), for the proposition that a factual error borne of misreading documents or other source material cannot constitute actual malice as a matter of law. Tribune further noted the plaintiff's admission that the complained-of Tribune item was not the first time Plaintiff had been confused with the other Eddie Johnson who attended Auburn University.

Cook County Circuit Judge Frank Castiglione agreed with Tribune that the reporters and editors had an honest belief as to the truth of the statements reported, and that there was "absolutely no evidence before the Court that the Tribune acted with actual malice"; instead, what the evidence showed was that "the editors working on the story neglected to read the entire AP press release. While the editors' actions deviated from professional publication standards, the record is simply devoid of evidence that anyone working for the Tribune purposely avoided learning the truth." Opinion and Order, p. 4.

In so ruling, the court noted that the night staff was under deadline pressure, and credited the Tribune copy editor's testimony that he only read the beginning of the wire report "because the 'who, what, when, where and why' of the story is typically 'taken care of right up front." *Id.* at 4-5. In short, the court held, "this was a case of mistaken identity, which Plaintiff admitted himself has occurred before with the troubled Johnson." *Id.* at 5. Accordingly, the court granted summary judgment in Tribune's favor on all counts (defamation, false light, negligence) for failure to establish actual malice.

Plaintiff filed a Notice of Appeal from the ruling on September 27, 2013.

The Chicago Tribune was represented by James A. Klenk, Natalie J. Spears, Gregory R. Naron, and Kristen C. Rodriguez, of Dentons in Chicago, Illinois. Plaintiff was represented by Robert H. Rosenfeld, of Robert H. Rosenfeld & Associates, Lincolnwood, Illinois, and William R. Coulson, of Gold & Coulson, Chicago, Illinois.

## **CBS Prevails In Philadelphia Defamation Case**

#### By Michael Berry

On September 4, 2013, the Philadelphia Court of Common Pleas granted summary judgment in favor of CBS Broadcasting Inc., one of its anchors, and a reporter in a case brought by one of New Jersey's largest churches and its prominent pastor. *Gordon v. CBS Broadcasting Inc.*, January Term 2012 No. 1974 (Phila. Cty. C.C.P. Sep. 4, 2013). The case arose from a news report on KYW-TV about the arrest of one of the Church's preachers on child molestation charges. The plaintiffs claimed that the report implied that the person arrested was the Church's senior pastor and that the crime had a significant connection to the Church. The court, Judge Rosalyn K. Robinson presiding, rejected those claims, holding both that the CBS broadcast could not reasonably be understood to suggest that the senior pastor had been arrested and that the reporting about the church's connection to the crime was not false.

#### **Background**

On September 19, 2011, the Camden County, New Jersey Prosecutor's Office issued a press release announcing that Archie Bolger, "a preacher at St. Matthew's Baptist Church," had been "arrested for child molestation." A reporter for CBS's Philadelphia station, Elizabeth Hur, confirmed the information contained in the press release with the Prosecutor's public information officer and immediately went to St. Matthew's. There, she spoke to the Church's security guard, who, among other things, told her that Bolger was "a minister" at St. Matthew's and that no one else from the Church was available to talk with her. Hur then went to Bolger's neighborhood, where one of Bolger's neighbors informed her that Bolger was a minister.

That night, Bolger's arrest was reported by CBS as the lead story on its 11 o'clock news. At the start of the show, CBS broadcast a photograph of Bolger with the headline "Preacher Arrested," but did not mention his name:



One of the anchors, Natasha Brown, then introduced Hur's report by saying: "Tonight a local preacher is facing disturbing charges – he is under arrest for alleged child molestation. The <u>pastor</u> works at St. Matthew's Baptist Church in Williamstown, Gloucester County, and that is where Eyewitness News reporter Elizabeth Hur is standing by live." (Emphasis supplied.)

Hur then reported lived from the Church, and her prerecorded package followed. The package displayed background footage showing the sign at St. Matthew's main entrance and one of its vans, both of which included the name of the Church's senior pastor, Dr. Raymond M. Gordon, under the name of the Church:

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A pre-recorded package displayed background footage showing the sign at St. Matthew's main entrance and one of its vans, both of which included the name of the Church's senior pastor, Dr. Raymond M. Gordon.

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While those images appeared, Hur reported that "a preacher here at St. Matthew's Baptist Church must now fight charges of sexual assault, endangering the welfare of a child, and related offenses. Prosecutors say the preacher is accused of sexually molesting a female younger than 18 years old."

Hur then identified Bolger by name for the first time. The station proceeded to broadcast images of Bolger's home, to report the name of the street where he lived, and to display a graphics with his photograph and name:

#### The Lawsuit

Four months after the broadcast, St. Matthew's and Pastor Gordon filed suit against CBS, Hur, Brown, and another anchor. (Plaintiffs later voluntarily dismissed their claims against the other anchor.) Their complaint claimed that CBS had defamed them and cast Pastor Gordon in a false light. Specifically, Pastor Gordon alleged that CBS had falsely implied that he was "the person arrested for the criminal sexual assault" or that he was otherwise "involved in Bolger's alleged crimes." The Church, in turn, alleged that its reputation is "synonymous with Pastor Gordon's" and that it was defamed because the broadcast implied that Pastor Gordon "is a criminal pedophile" and that the crime "had significant connection to St. Matthew's." The complaint further alleged that Bolger was not a preacher at the time of his arrest and had not served in that volunteer position for several years. Plaintiffs also claimed that St. Matthews' employs only one pastor, Pastor Gordon.



The arrestee identified by name.

Plaintiffs focused their claims on two elements of the broadcast: (i) Brown's

inadvertent reference to Bolger as "the pastor" who "works at St. Matthew's Baptist Church," a reference plaintiffs contended could, in the Baptist faith, only refer to the head of the Church; and (ii) the footage of the Church's sign and van, which included Pastor Gordon's name. Their complaint emphasized that these elements appeared before CBS identified Bolger by name. Plaintiffs further alleged that Church members, public officials, and other people were led to believe that Pastor Gordon had been arrested.

CBS responded to the lawsuit by filing preliminary objections, Pennsylvania's version of a motion to dismiss, arguing that the broadcast could not reasonably be understood to state that anyone other than Archie Bolger had been arrested. The court, however, denied the preliminary objections in a one-sentence order with no explanation.

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Following the close of discovery, CBS filed a motion for summary judgment. While the motion was pending, the court scheduled a trial for mid-October. It also assigned the motion to Judge Robinson, who had not ruled on any previous motions in the case.

#### The Court's Decision

After hearing oral argument, Judge Robinson issued an opinion and order granting summary judgment in defendants' favor. Judge Robinson first considered whether to apply Pennsylvania or New Jersey law. Throughout the case Pastor Gordon and St. Matthew's pushed strongly for Pennsylvania law, which they viewed as more favorable to defamation plaintiffs, but the court held that New Jersey law governed their claims. While plaintiffs stressed that the broadcast was seen by many more people in Pennsylvania than in New Jersey, Judge Robinson explained that this greater viewership did not mean that plaintiffs' "reputation suffered the most damage there." The court noted that defamation law reflects a state's interest in protecting the reputations of its citizens and, in this case, after applying the "interest analysis" test, concluded that New Jersey law should control because plaintiffs had far more contacts with New Jersey than Pennsylvania. Specifically, Judge Robinson noted that both plaintiffs are New Jersey domiciliaries and the vast majority of the Church's members are from New Jersey.

Judge Robinson next turned to the merits of plaintiffs' claims, ruling that when the broadcast is viewed as a whole, a reasonable viewer would understand that Bolger was the person charged with child molestation. As she explained,

Viewing the broadcast as a whole, it is impossible to conclude that any person could walk away thinking that Pastor Gordon had been arrested. Archie Bolger's name is uttered repeatedly. It appears in writing on the screen repeatedly. Multiple pictures of Bolger are shown. A picture of Bolger's home is shown. Bolger's hometown, which is not Pastor Gordon's hometown, is mentioned.

Judge Robinson rejected plaintiffs' argument that Pastor Gordon's name had appeared on screen by countering that these images must be viewed in context and noting that CBS had not typed Pastor Gordon's "name onto a screenshot like it did with Bolger's name." Rather, it showed Pastor Gordon's name because it "happened to appear wherever St. Matthew's was advertised because he decided to put his name in several places on church property that are meant for the public to see."

The court also rejected plaintiffs' contention that the single use of the word "pastor" in the report's introduction could reasonably cause someone to believe that Pastor Gordon had been arrested. Judge Robinson explained that CBS never uttered Pastor Gordon's name and a reasonable viewer would have learned that Bolger was the person arrested by watching the remainder of the broadcast. Accordingly, she reasoned that even someone who understands the word "pastor" to refer only to the head of a church would simply conclude that the broadcast had applied a technically inaccurate label to Bolger, not that it had stated that the Church's senior pastor had been arrested.

The Church's arguments fared no better. As the court held, "[n]o phrase in the broadcast was untrue as it related to St. Matthew's. While being mentioned in a report about an accused child molester is perhaps not exactly the kind of publicity a church craves, mere mention that Bolger was a preacher at the church does not amount to defamation." In Judge Robinsons view, "St. Matthew's was only mentioned in the context of providing biographical facts about Bolger," noting that discovery revealed that Church personnel refer to Bolger as a minister.

At bottom, the court concluded, "when the broadcast is viewed in context, it is both materially true and does not suggest that Pastor Gordon had any involvement in Bolger's criminal activity at all."

Plaintiffs have not indicated whether they intend to appeal from the judgment entered against them.

CBS Broadcasting Inc., Natasha Brown, and Elizabeth Hur were represented by Anthony Bongiorno and Andrew Nieh of the CBS Law Department and Michael Berry, Katharine Larsen, and Paul Safier of the Philadelphia office of Levine Sullivan Koch & Schulz, LLP. Plaintiffs were represented by Richard A. Sprague, Tom Sprague, and Tom Groshens of Sprague & Sprague.

# Plaintiff's Criminal Record Not "Erased" for Purposes of Libel and Privacy Claims

#### By Cameron Stracher

In 1984, George Orwell depicted a totalitarian regime with the power to change historical truths by simple decree. In Martin v. Hearst Corp., et al., plaintiff argued that the Connecticut legislature had erased her criminal record in a similar fashion so that news reports about it that were accurate when published were no longer true. Fortunately, the court rejected plaintiff's attempted doublespeak, and granted defendants' motion to dismiss her claims. See Martin v. Hearst Corp., et al., No. 3:12cv1023 (D. Conn. Aug. 5, 2013).

#### **Background**

Lorraine Martin was arrested Stamford, Connecticut, and charged with various drug offenses on August 20, 2010. Following her arrest, defendants Hearst, News 12 (owned by Cablevision) and Main Street Connect published several articles online detailing her arrest and the subsequent charges filed against her. Plaintiff did not claim that any of these news reports were false when published. Instead, plaintiff asserted that defendants defamed her, caused her emotional distress, and invaded her privacy (false light and misappropriation) because the original news reports remained

accessible on defendants' websites after January 11, 2012, when she was "deemed to have never been arrested" by operation of the Connecticut Erasure Statute, Conn. Gen. Stat. 54-142a. Plaintiff sought to bring her claims on behalf of a class of persons whose arrests remained reported online even after those arrests were "erased" by operation of the statute.

The Connecticut Erasure Statute, like those in many states, provides that under certain circumstances criminal records may be expunged from official records so that they are no longer available in public court files, and the person charged may be "deemed to have never been arrested" by operation of law. Plaintiff claimed that the purpose of the

statute was to "protect people from the harmful consequence of a criminal charge which is subsequently dismissed in Superior Court."

Under the statute, according to plaintiff, once a charge is dismissed "the wrongfully accused may breathe a sigh of relief, and attempt to move forward with her life, putting the erased arrest behind her – that is, of course, until she "Googles" her name and finds the now-defamatory accusation alive and well online." The issue in the case, plaintiff asserted was "whether the wrongfully accused have any hope of stopping the dissemination of information that [the] legislature has deemed to be false; whether they have any recourse against those who profit from disseminating

such misinformation; and whether they have any hope of moving on in their life without the taint of a wrongful arrest.

After Hearst removed the case to federal court under the Class Action Fairness Act, defendants moved to dismiss. argued that Connecticut Defendants followed the "single publication rule," and that under the rule any claim arising from the reports accrued on the dates they were first published. Because plaintiff did not contend the reports were false unprivileged on their date of publication, or that defendants acted with any fault, plaintiff failed to state a claim. Defendants argued

that nothing in the language or legislative history of the Erasure Statute showed that the Connecticut legislature intended to render true publications retroactively false.

Indeed, both the plain language of the statute and its history indicated the statute was intended to impose an obligation only on government entities but not on private parties like the media. Moreover, any other reading would run afoul of the First Amendment under *Florida Star, Daily Mail*, and *Landmark Communications*. Finally, the highest courts in both New Jersey and Massachusetts had addressed similar arguments under those states' expungement statutes and held that they did not erase the historical fact of a

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Plaintiff argued that the Connecticut legislature had erased her criminal record in a similar fashion so that news reports about it that were accurate when published were no longer true.

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criminal conviction. See GD v. Kenny, 15 A.D.3d 275 (N.J. 2011); Rzeznik v. Chief of Police, 373 N.E.2d 1128 (Mass. 1978).

Plaintiff countered that Connecticut applied the multiple publication rule, and that even under the single publication rule plaintiff may select any individual date as the date of publication for her civil action. Moreover, under the single publication rule defendants' failure to remove the articles after receiving plaintiff's retraction demand constituted a republication. Finally, plaintiff argued that she was not seeking to impose retroactive liability on defendants but, rather, prospective liability for defendants' posting of the articles on January 11, 2012.

Prior to issuing its ruling, the court indicated it was converting defendants' 12(b)(6) motion into a motion for summary judgment, and requested that defendants submit true and correct copies of the reports at issue, and that plaintiff indicate whether she contended anything in the publications was false on the date they were first published. Plaintiff subsequently acknowledged that the news reports were not false when published on August 26 and 27, 2010. The court then granted defendants' motion.

#### **District Court Ruling**

In ruling for defendants, the District Court court held that the plain language of the statute indicated that "the legislature had something more modest and more technical in mind than the sweeping, history-altering design perceived by Ms. Martin." Specifically, the court found, the statute was limited in its scope, deeming a person whose record was expunged to have never been arrested "within the meaning of the general

statutes.'" (quoting statute; emphasis by the court). In other words, according to the court, the purpose of the statute was to permit persons "to deny the fact of the arrest in court and other official proceedings."

In addition, the statute was directed to court and law enforcement personnel and imposed restrictions and duties on them, but not on other parties outside the courts and law enforcement agencies. Thus, the court concluded, the statute was intended to "ensure that those who maintain the sources of information about criminal records – principally, government employees – treat persons who qualify for erasure as if they have never been arrested." There was no evidence, the court held, that the legislature intended "to change history."

In addition, the court held, if the statute were interpreted as plaintiff contended, to permit liability on true and newsworthy statements, it would run afoul of the First Amendment. Thus, even if the statute were ambiguous, the court would construe it so as not to "expose publishers of historically accurate statements to liability." The court dismissed plaintiff's "tag-along" claims, finding that because plaintiff could not establish falsity, she could not establish the elements of her claims for false light and negligent infliction of emotional distress, nor could she establish a claim for misappropriation for the publication of a true newsworthy report about her arrest.

Plaintiff has filed an appeal to the Second Circuit.

Jon Donnellan and Courtney O'Connor at Hearst Corporation represented the Hearst defendant and Dina Sforza at Cablevision represented News 12, both together with David Schulz and Cameron Stracher of Levine, Sullivan, Koch & Schulz. Plaintiff was represented by Mark Sherman and Stephen Seeger.



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## **MEDIA PRIVACY LAW 2013-14**

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

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## Florida Court Vacates Prior Restraints

"A government may

not prohibit or punish

the publication of the

information once it

falls into the hands of

the press unless the

need for secrecy is

'manifestly

overwhelming."

#### By Timothy J. Conner

A Florida trial court in Jacksonville has vacated two separate prior restraint orders against the media from publishing unredacted information in a police report that contained an alleged confession by a criminal defendant. *See Florida v. Tadros*, 16-2013-CF-08026 (Fla. Cir., Sep. 11, 2013). In a lengthy order, the Court examined the "irresistible Constitutional right of the free press with the immovable Constitutional right of the defendant to a speedy and public trial by an impartial jury" and concluded that the heavy burden for issuance of a prior restraint set out by *Nebraska Press v. Stuart* and other precedent could not be met.

On August 23, 2013, James Patrick Tadros, was arrested and charged with attempted murder, false imprisonment, and criminal mischief. He had lured a 9 year old girl into a

restroom at a Best Buy and then attacked her. Best Buy employees who heard the girl scream busted into the restroom just in time to save the girl, and then held Tadros until the police arrived. A portion of the police report recorded a statement made by Tadros effectively confessing to the crime and how he lured the girl into the restroom.

Under Florida law, confessions are exempt from disclosure. The police report was released to the media with the confession redacted. A local Post NewsWeek station, WJXT-TV4, however, called their lawyer regarding the report. The

lawyer then accessed an on-line service for viewing case files and found an unredacted copy of the police report. Currently, that on-line service is available to lawyers, but not the general public. The lawyer then handed over to WJXT a copy of the unredacted report. WJXT decided to lead that evening's 6:00 p.m. broadcast with a story regarding the confession, but then called the State Attorney's Office to advise that it had an unredacted copy of the police report and intended to make it the lead story that night. The Public Defender's Office was then advised as well, and on behalf of Tadros filed an emergency motion to prohibit the broadcast. The Judge

convened an emergency hearing, and ordered that WJXT not broadcast the confession.

WJXT, however, used a screen shot of the police report during the broadcast which showed the unredacted portion and which was readable by viewers. The next day, the defense filed a motion to hold WJXT in contempt of court. Complicating matters were allegations that the unredacted report was not lawfully obtained. The Court then held an evidentiary hearing on that motion, open to the public, at which a reporter for the local daily newspaper, *The Florida Times-Union*, was present to report on the proceedings. During the hearing the broadcast was introduced into evidence in open court. Noticing that a reporter was present, and at the urging of both the defense and the State, the Judge then ordered that the reporter not publish what they may have

seen or heard regarding the portion of the evidence related to the confession.

A few days later the Court issued an order concluding that the broadcast of the unredacted information from the police report by WJXT had not been an intentional violation of the Court's order prohibiting publication. Accordingly, the Court denied the motion to hold WJXT in contempt. The Court also concluded that the lawyer for WJXT had broken no law or ethical rule regulating the Bar in providing a copy of the unredacted report that had been obtained, and thus the unredacted report had been

lawfully obtained.

The prior restraints against publication, however, remained in place. The Court then issued an order inviting the media to attend a hearing regarding the prior restraints. *The Florida Times-Union* and First Coast News (WTLV and WJXX, a Gannett duopoly), filed a motion to intervene, and briefed the prior restraint issues. Other media outlets appeared at the hearing. The Court heard from the media interests in opposition to the prior restraints, and from the State and defense as to why the prior restraints should

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continue in place. Two days later, the Court issued its order vacating the prior restraints.

The Court framed its analysis as requiring it to answer whether "[i]n its responsibility to ensure the Defendant's impenetrable constitutional right to a fair trial, is the Court legally permitted to restrain the media from broadcasting or publishing information it has already obtained through notunlawful means? To be clear, the question before the Court is not if the public will learn of the contested information, but simply when." The Court then considered the First Amendment right to freedom of the press, a right that the Court wrote is "embedded into the very DNA of our Republic" and balanced it against the individual's Sixth Amendment right to a fair trial. The Court stated that while "a government may deny access to information and punish its theft, a government may not prohibit or punish the publication of the information once it falls into the hands of the press unless the need for secrecy is 'manifestly overwhelming.""

The Court then considered whether other measures short of a prior restraint would adequately protect the Defendant's fair trial right. The Court determined that other means of protecting that right existed, and that the passage of time "may resolve any challenges presented by the publishing of the" confession. The Court stated that "[s]hould the Defendant elect to preserve his Constitutional right to a speedy trial, the Court will extensively question prospective jurors so as to empanel an impartial jury in the County in which the alleged crime was committed. In the unlikely event this should prove unfruitful, a change of venue may need to be considered by the Court if requested by the parties. Time will tell. Yet this Court concludes that one of these options provides an alternative means to the Court to ensure the Defendant's right to fair trial. This conclusion renders any order of prior restraint imposed upon the press unconstitutional."

Timothy J. Conner is a partner in the Jacksonville, Florida, office of Holland & Knight LLP, and represented The Florida Times-Union and First Coast News in this matter.



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## **Court Enjoins Internet Streaming Service**

## DC Becomes Second Court To Reject Technology-Based Exception To The Copyright Act

#### By Amy M. Gallegos

On September 5, Judge Rosemary Collyer of the District of Columbia issued a preliminary injunction barring billionaire Alki David's FilmOnX service from streaming copyrighted broadcast television programs over the Internet without authorization from the copyright owners. *Fox Television Stations, Inc. et al. v. FilmOn X LLC.*, No. 13-758 (D.D.C. Sept. 5, 2013). The opinion marks a significant victory for copyright owners in their fight against unlicensed streaming services. FilmOnX's defense was that its system was technologically the same as Aereo, another unlicensed

streaming service that was nonetheless found to be legal by the Second Circuit earlier this year. Because Aereo uses mini-antennas and digital copies to send each viewer watching live television on Aereo an individualized transmission from a purportedly "unique" copy, the Second Circuit held that Aereo's transmissions are not a "public performance" under the Copyright Act. WNET Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013). FilmOnX is important not only because it halted a service that was infringing copyrights on a massive scale, but also because the Court explicitly rejected Aereo, holding that under the Copyright Act's plain language, Aereo-like systems publicly perform the programs they transmit to subscribers over the Internet and are therefore committing copyright infringement

if they operate without permission from the copyright owners.

#### FilmOn and Aereo

FilmOnX originated in 2010 as FilmOn, a streaming service that allowed viewers to watch live and recorded television over the Internet, including local broadcast channels. FilmOn did not have license to transmit copyrighted broadcast programming to its customers, and was

quickly enjoined. The case settled in 2012, with FilmOn stipulating to a consent judgment and permanent injunction.

The original FilmOn case was barely a blip on the radar of copyright law. However, in another courtroom in New York, the networks were battling Aereo, an unlicensed Internet streaming service backed by media mogul Barry Diller. Events in the Aereo case would eventually give the FilmOn service a new life.

Aereo claimed it had developed a technological workaround allowing it to retransmit live television broadcasts to subscribers without having to pay for a license

from the owners of copyrights in the programs. This argument - and the design of Aereo's system - was based on the Second Circuit's holding in Cartoon Network LP LLLP v. CSC Holdings, Inc., 536 F.3 121 (2d Cir. 2008) ("Cablevision"). In that case, the Second Circuit held that a cable provider could offer a remote DVR service (i.e., where the programs recorded by viewers were stored on a shared, remote server instead of on individual set-top boxes) without having to take a second license to cover the transmissions from the remote server that occurred when the subscribers played back the recorded programs. The analysis was that these playback transmissions were private, because they emanated from unique copies made by subscribers, and each transmission

could only be received by the subscriber who had copied the program. Thus, according to the Second Circuit, these one-to-one transmissions from the recordings to the viewers were not a public performance under the Copyright Act.

To fit within *Cablevision*, Aereo built a system that uses a collection of dime-sized antennas to capture over-the-air broadcasts. Every time a subscriber logs onto Aereo to watch television, Aereo's computers randomly assign one of the antennas to capture the broadcast channel she selected. The

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The Court made its disagreement with the Second Circuit explicit, noting that the Aereo court had misinterpreted the Copyright Act by wrongly focusing on the individual transmissions instead of whether the transmitter was publicly performing the copyrighted work.

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Judge Collyer's

thorough, well-

reasoned opinion is

expected to be very

influential as these

issues wind their way

through the courts.

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signal is then routed through Aereo's computer system and copied before it is streamed to the subscriber. This all occurs "under the hood" and is invisible to the subscriber, who simply logs on, selects a program currently being broadcast from a program guide, and then watches it live on her Yet it allowed Aereo to argue that, when subscribers watch television on Aereo, there is no public performance because the transmissions are "one-to-one" just like in Cablevision - after all, each Aereo transmission emanates from a "unique" copy and can only be received by a single subscriber.

Aereo's argument would not work without Cablevision as precedent. Under the Copyright Act, "to perform a work publicly" means, among other things, "to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the

performance or display receive it in the same place or in separate places and at the same time or at different times." This language is commonly known as the "Transmit Clause." Notably, the Transmit Clause states that it is public performance to transmit a performance (i.e., an audiovisual rendering) of the work to the public, by means of any device or process. And "device" and "process" are defined in the statute as including devices and processes "now known or later invented." There is no

exception for systems constructed of mini-antennas and digital copies.

Aereo initially launched only in New York, so that if it were sued Cablevision would be controlling. On April 1, 2013, the Second Circuit held in a split decision that under Cablevision, Aereo could legally retransmit broadcast programming over the Internet without a license. Judge Denny Chin filed a blistering dissent, characterizing Aereo's system as a "sham" and a "Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law." Newspapers reported that cable and satellite companies were considering converting to Aereo-like systems so they could operate unlicensed like Aereo and avoid paying retransmission fees.

FilmOn was paying attention to the Aereo case. Just weeks after the preliminary injunction was denied in Aereo, FilmOn resumed its live streaming service, announcing that it was now using an Aereo-like system of miniature antennas and digital copies to "legally" retransmit broadcast television signals without a license. To capitalize on the publicity garnered by its competitor Aereo, FilmOn renamed its service "Aereokiller" and its website "BarryDriller.com."

#### The California Lawsuit And Injunction

The networks sued FilmOn again in the Central District of California. This case presented the first opportunity for the networks to challenge an Aereo-like system in a circuit where Cablevision was not controlling. (The Aereo appeal was pending when the California action was filed.) The California Court declined to follow the Second Circuit, holding that using an Aereo-like system to retransmit copyrighted

> programs to the public is a public performance. Fox Television Systems, Inc. v. BarryDriller Content Systems, PLC, 915 F. Supp. 2d 1138 (C.D. Cal. 2012). The court issued a preliminary injunction against FilmOn, but limited the scope of the injunction to the Ninth Circuit.

#### The District of Columbia **Lawsuit and Injunction**

Because the BarryDriller injunction was geographically limited, the networks had to sue FilmOn again, this time in the District of Columbia. As in California, FilmOn urged the court to adopt the Second Circuit's interpretation of the Transmit Clause, and the networks argued the Court should reject it because it was inconsistent with the statute.

The District of Columbia agreed with networks and the California Court, and issued a preliminary injunction against FilmOn's streaming service (which had by then been renamed FilmOnX after being sued by Barry Diller). In a 35page opinion, the FilmOnX court joined BarryDriller in rejecting the Second Circuit's interpretation of the Transmit Clause, holding that "[t]he provisions [of the Copyright Act] that protect Plaintiffs' work are clear: FilmOn X's service

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violates Plaintiffs' exclusive right to perform the copyrighted work publicly."

The FilmOnX Court declined to follow Cablevision and Aereo because it concluded that these cases misread the statute and produced results contrary to what Congress intended when it enacted the 1976 Copyright Act. The Court explained that by making copyrighted broadcast television programs available to any member of the public who goes on the FilmOnX website, FilmOn X transmits a performance the work to the public, by means of any device or process, and therefore falls squarely within the Copyright Act's definition of public performance. The Court further explained that the definitions of "device" and "process" are "facially broad" (i.e., any device or process now known or later developed) and "encompass FilmOnX's convoluted process for relaying television signals." The Court concluded that "nothing about the 1976 Act or its legislative history suggests that Congress intended a commercial entity that rebroadcasts copyrighted material for consumption to the public . . . to avoid liability for infringement of the copyright holders' exclusive right of public performance."

The Court made its disagreement with the Second Circuit explicit, noting that the *Aereo* court had misinterpreted the Copyright Act by wrongly focusing on the individual transmissions instead of whether the transmitter was publicly performing the copyrighted work. "When the analysis shifts to whether FilmOnX permits multiple persons to watch a

single performance, i.e., the same television show," the Court wrote, "it is immediately clear that the artifice of one-to-one is baldly wrong."

The Court preliminary enjoined FilmOn from, among other things, streaming copyrighted broadcast programming over the Internet via the FilmOnX service or by means of any other device or process. The injunction applies nationwide except for within the geographic boundaries of the Second Circuit.

#### **Stay Tuned**

FilmOnX is likely not the final installment in the battle against internet streaming services that attempt to free-ride on copyrighted content. Appeals are pending in both FilmOnX and BarryDriller, lawsuits against Aereo are being litigated in New York and Boston, and commentators have predicted that these cases are on a course for the Supreme Court. Judge Collyer's thorough, well-reasoned opinion is expected to be very influential as these issues wind their way through the courts.

Amy M. Gallegos is a partner in the Los Angeles office of Jenner & Block LLP. She represented Fox Broadcasting and related companies together with Paul Smith, Julie Ann Shepard, and Richard Stone with Jenner & Block. FilmOnX was represented by Ryan G. Baker, Baker Marquet LLP, Los Angeles, CA; and Kerry J. Davidson, Silver Spring, MD.

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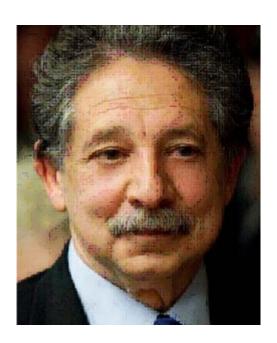
# Wisconsin Federal Court Finds Satirical T-Shirt of Mayor Is Fair Use

A Wisconsin photographer lost his copyright infringement lawsuit over the use of one of his photographs on a satirical T-shirt. *Kienitz v. Sconnie Nation*, No. 12-464 (W.D. Wisc. Aug. 14, 2013) (Crocker, J.). Citing to the Second Circuit's recent decision in *Cariou v. Prince*, 714 F.3d 694 (2nd Cir. 2013), the court held that the use of the photograph was "transformative" and a fair use of plaintiff's work.

#### **Background**

Plaintiff Michael Kienitz is a professional photographer. In 2011, he photographed Madison, Wisconsin Mayor Paul Sogin and gave permission to the Mayor's office to use the photograph for noncommercial purposes, including political activities and for noncommercial uses by news organizations. The city of Madison used the photograph of the mayor on its website with a credit to Kienitz.

In 2011, a local controversy developed over a Madison street party. The street party started in the 1960's. Mayor Sogin sought to





Left, plaintiff's photograph; right, defendant's parody t-shirt

end the street party, although he had participated in it as a student protest leader in the 1960s.

Defendants produce novelty T-shirts and promotional items. In response to the street party controversy, they produced for sale T-shirts and tank tops featuring Mayor Sogin's picture with the phrase "Sorry for Partying." Defendants used Kientiz's photograph of the Mayor which they found on the City of Madison website. The picture was altered so that Soglin's face was lime green against a black background; his face was outlined in bright blue; and his face was surrounded by the phrase, "Sorry For Partying," printed in blue, green and pink.

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#### Fair Use Analysis

Granting summary judgment to defendants, the court held that three of the four fair use factors favored the defendants, while one was a wash between the plaintiff and the defendants. Kienitz, whose work has included war photography, said that he would never license a photograph that satirized or disparaged his subjects.

But "in what may be a frustrating paradox to a copyright holder, the farther from his original purpose, character and audience a subsequent use deviates, the more likely this use will be deemed fair because it is anything but a substitute for the copyrighted creation," the court stated.

Here the purpose and character of the use weighed in favor of the defendants. While the use was for a commercial venture, the defendants' use also was to poke "fun at the mayor by spotlighting what they viewed as a curmudgeonly flip-flop on the block party. The fact that Kienitz or perhaps Mayor Soglin may have been offended by this soft jab does not mean that the shirts cannot be deemed a fair use," the court said.

Further, defendant did not supplant the commercially valuable use of the photograph made by Kienitz depicting Soglin with gravitas, the court said, because the defendants "used Kienitz's photograph as a raw material to create something entirely new with a different aesthetic, message and meaning."

The nature of the work factor did not favor either side. The court acknowledged that the photograph contained creative elements, but defendants did not usurp Kienitz's right of first publication.

The amount and substantiality of the use favored the defendants, the court concluded, because the heart of Kienitz's work was not taken when the defendants used "a negative image and outline of the photograph and figuratively reversing the tenor of the image. .... As a result the artistic elements claimed by Kienitz (e.g., the lighting, expression and pose) fade to insignificance on the SFP shirts, if they do not evanesce completely."

Finally, the effect of the defendants' use on the market for the plaintiff's photograph weighed in favor of the defendants. The image used on the shirts would not function as a substitute in the market for a portrait depicting the mayor with gravitas, the court said. "Anyone seeking a photographic portrait—or even just an accurate representative image—of the mayor would not even consider the garish image of the mayor splashed onto defendants' SFP shirts."

The judge did not reach another of the defendants' arguments: that First Amendment consideration of free political speech and discourse weigh in favor of fair use.

Plaintiff was represented by James D. Peterson and Jennifer L. Gregor, Godfrey & Kahn, S.C., Madison, WI. Defendants were represented by Eric Hatchell and Jeffrey Simmons, Foley & Lardner LLP, Madison, WI.

# Red, Hot and Crowded: Ad Networks, Exchanges and the Media Business

Wednesday, November 13, 2013, 3:45 - 5:45 p.m.

(Immediately preceding MLRC Annual Dinner cocktail hour) Grand Hyatt New York, 109 East 42nd Street at Grand Central Station

with

Ted Lazarus, Legal Director, Google Advertising Platforms Josh Cohen, Senior Business Product Manager, Google Advertising Platforms Joshua N. Pila, Senior Counsel, LIN Media

RSVP: forum@medialaw.org

# Aliens and Cowpokes Invade a Texas Federal Court

#### By Alicia Wagner Calzada

With a bit of flair, a federal judge ruled - on multiple grounds - that the copyright in an eleven-page comic, which was self-published by an Austin man in the mid 1990's, was not violated by the making of the 2011 film Cowboys & Aliens or the graphic novel on which it was based. *Busti v. Platinum Studios*, No. 11-cv-01029 (W.D. Tex., Aug. 30, 2013) (Sparks, J.).

#### **Background**

The blockbuster motion picture Cowboys & Aliens, and the graphic novel on which it was based, came about as a result of Scott Rosenberg, who - as a child - would play "cowboys and aliens" while other children were playing "cowboys and Indians." Rosenberg's childhood fantasy evolved into a comic book idea and, after he became a success in the comic book industry, he set to work turning his idea of cowboys and aliens into a reality – or at least a Graphic Novel. The process of developing the Cowboys and Aliens saga and turning it into a graphic novel took many years. In 2006, the graphic novel was published and landed on *The New York Times*' Best Seller list and the motion picture followed in 2011.

Unbeknownst to Rosenberg, an independent comic book author from Texas self-published a short comic, also called "Cowboys and Aliens," in the mid-1990's. That author was Steven John Busti, an eccentric who owns two businesses on Austin's famous Sixth Street, including The Museum of the Weird and Lucky Lizard Curios and Gifts. After the film Cowboys & Aliens was released in 2011, Busti registered his comic with the U.S. Copyright Office and filed suit against Universal Studios, Dreamworks, Platinum Studios and Rosenberg, claiming copyright infringement.

A case like this is bound to invoke some creativity from a judge and U.S. District Judge Sam Sparks is no exception. The decision began with a quote from the Johnny Cash song (*Ghost*) Riders in the Sky, cited with the parenthetical, "(aliens added)".

#### Background

"An old cowpoke went ridin" out, one dark and windy day. Upon a ridge he rested as he went along his way. When all at once a [flying saucer, zooming above] he saw, a-plowing through the ragged skies, and up a cloudy draw." JOHNNY CASH, (Ghost) Riders in the Sky, on SILVER (Columbia Records 1979) (aliens added).

#### **No Factual Copying**

After discussing the contents of the works, Sparks addressed factual copying, which can be proved either by access and probative similarity, or by striking similarity - in which the works are so strikingly similar as to preclude the possibility of independent creation.

#### No Access

The court found that there was scant evidence of access. Busti's access allegation was based on the fact that, in 1994, a trade publication called *Comic Shop News* ran an article about Busti's comic on the same page that it ran an article about Scott Rosenberg

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and a merger between his former company, Malibu, with comic giant Marvel. *Comic Shop News* is a free publication handed out at comic book stores. However, the story about Busti's comic never even stated that the comic was called "Cowboys and Aliens" and the article merely described the general idea of cowboys and aliens, meaning that even if Busti could prove that Rosenberg saw the article, it was not evidence of access to the comic itself. As the court put it, "Busti effectively invites the Court to pile conjecture upon speculation in order to find access" asking the court to presume that Rosenberg read the story that referenced him, then read the story about the comic, simply because it was on the same page, and subsequently that Rosenberg tracked down a copy of the comic when it was finally published five months later. The court declined to make such a presumption.

Busti also claimed that he "might" have given Rosenberg a copy of the comic at a comic book convention. But his only evidence was his claim that he had attended a number of conventions and that it was his practice to pass his comic out to fellow attendees. Busti argued that if he had met Rosenberg at one of these conventions, it was likely that he would have provided him with a copy of his work. Again the court rejected this "rank speculation" and "chain of conjectures," as there wasn't even evidence that Busti and Rosenberg had ever attended the same comic book convention at the same time.

The court also rejected Busti's suggestion that access could be found based on distribution of the comic, finding that there was no evidence that the comic was widely disseminated. Although he claimed "international" distribution, Busti had not provided any information on how many copies were distributed or where they were distributed.

#### No Striking Similarity

The court then found that the graphic novel was not strikingly similar to the comic. Although they had some similar elements, the court found that they were "in fact strikingly different, rather than similar." The comic had a "retro, pen and ink" style, while the Graphic Novel was in vivid full color. The tone of the works was also different: the comic was campy while the graphic novel was modern, serious in tone, and even thought provoking. The court found that the content was also not strikingly similar and therefore the similarities that existed did not preclude independent creation in a manner that would prove access.

During the discovery period, Busti requested evidence on prior versions of the movie script, because of his theory that there might have been substantial similarity at various stages of the movie development, but the defense argued that he wasn't entitled to it, and the judge did not order that the different movie versions be produced.

#### **Probative Similarity**

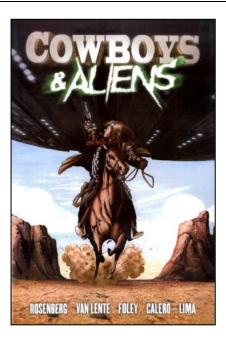
Having found that Defendants were entitled to judgment as a matter of law on the grounds of no fact issue on factual copying, because there was no evidence of access and no showing of striking similarity, the court continued the copyright analysis. The court found that if there had been proof of access, there would have been sufficient probative similarity to find copying. However, the court noted in a footnote that the showing of some probative similarity was weak, and insufficient to raise a fact issue on copying given the complete absence of access.

#### No Substantial Similarity

But, of course, even if there had been factual copying, Plainitff was still required to demonstrate substantial similarity in order to prevail on his copyright claim. Addressing that as an alternative ground for summary judgment, the court found that the two works were not substantially similar. Many of the similarities that could have led to a finding of probative similarity, had there been access, were unprotectable ideas, and unprotectable *scenes a faire*. Ideas are not protectable in copyright, only the expressions of ideas are, and Judge Sparks found that the similarities that did exist between the two works, such as aliens first appearing on a descending ramp, were stock scenes, common to many works of this type, and that the execution of the scenes were different. The court found

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Left: Plaintiff's Panel with zoom. Right: Defendants' graphic novel cover with spaceship. The court found that scenes of a flying saucer overhead were unprotectable scenes a faire.

(Continued from page 33)

that the depiction of Native Americans hiding behind a place of concealment, a flying saucer overhead, and cowboys using lassos are all the kind of stock scenes that are unprotectable.

#### **Independent Creation**

Finally, after finding no actionable copying, and no substantial similarity, the court found that the Defendants were entitled to summary judgment as a result of the "overwhelming, conclusive evidence" of the independent creation of the graphic novel and subsequent film. The defense submitted substantial evidence of prior works that contained the concept of cowboys and aliens operating in the same universe. In addition, the defense presented an extensive set of development notes and sketches that showed how Rosenberg and others on his team collaborated to develop the graphic novel. "These exhibits reveal something of the creative design process." The court found that Rosenberg had conceived of the concept in 1975, had seen the general idea in several other publications, and then worked with a business partner over many years to develop the concept. As a result, the court alternatively granted summary judgment on this ground as well.

The Cowboys & Aliens case is a great study on the elements of copyright infringement, from access to substantial similarity to independent creation, as it methodically addresses and disposes of each of the potential elements required to prevail on in a copyright case. The development in this case of the elements of "striking similarity" "probative similarity" and "substantial similarity" make the opinion a good example of the differences between the three legal terms.

Defendants Platinum Studios, Inc., Scott Mitchell Rosenberg, Universal Pictures, Inc., d/b/a Universal Studios, and Dreamworks II Distribution Co., LLC were represented by Laura Lee Prather, Catherine Robb, Alicia Calzada and William Nash of Haynes and Boone, LLP. The Plaintiff was represented by Joshua G. Jones.

# **Court Relies on Forum Selection Clause to Dismiss Claims against Reality TV Producers**

#### By Cameron Stracher

After a wild flurry of legal proceedings, including a temporary restraining order issued against defendants' motion to dismiss, a motion to quash defendants' motion to dismiss, and a motion to compel discovery prior to adjudication of defendants' motion to dismiss, a Louisiana district court finally granted defendants' motion to dismiss for improper venue based on a forum selection clause in the release signed by plaintiff, the subject of a reality television show on Spike TV. Draughn v. Eugene "Tat 2 the Bounty Hunter" Thacker, et al., No. 718982, 24th Judicial District Court, Orleans Parish, Louisiana.

#### **Background**

Everette Draughn was a fugitive from justice who was wanted for a bail violation. He was being pursued by defendant Eugene Thacker a.k.a. "Tat - 2 The Bounty Hunter" ("Tat2"), a bail enforcement agent. Tat2's efforts were the subject of the real life television series Big Easy Justice

produced by defendants Al Roker Entertainment, along with defendants Jennifer Lopez and her production company Nuyorican Productions and defendant Bodega Pictures, and broadcast by defendant Spike TV owned by defendant Viacom Media Networks (the "Program").

On or about October 10, 2012, Tat2 and his associates tracked Draughn to his residence and arrested him. The arrest was filmed by a camera crew working for Roker. Following his arrest, plaintiff signed a written release. In the release, in exchange "for good and valuable consideration," plaintiff assumed all risks of participating in the Program, including the risk of "non-consensual physical contact" that "may otherwise constitute an actionable tort," and he released all claims "that may occur in connection with [his] participation,

inclusion (or potential inclusion) in the Program." Most relevant, the release specifically provided that "any dispute concerning this Release or the matters covered hereunder will be resolved under New York law, in New York County."

Footage of plaintiff's apprehension and arrest was included in an episode of the Program that was broadcast on Spike TV on April 10, 2012. Plaintiff then filed suit in Jefferson Parish, asserting claims for assault and battery, defamation, and negligent infliction of emotional distress, arising from his arrest and the subsequent broadcast of the Program. Defendants filed a motion to dismiss for improper venue (called a "Declinatory Exception of Improper Venue" in Louisiana), citing the release plaintiff signed that required

> him to bring his claims in New York.

> In opposition defendants' motion, plaintiff claimed he had been forced "at gunpoint" to sign the release, and the forum clause subpoena Louisiana

therefore selection invalid. He attempted to serve a defendants' counsel seeking outtakes to prove his case. When his subpoena was rejected for improper service, he filed a motion for a temporary restraining order, enjoining defendants'

Plaintiff then served discovery requests on defendants, seeking the outtakes and related materials. objected to the discovery on the same grounds advanced in their motion to dismiss: The only issue before the court was the validity of the forum selection clause itself, not the entire release, and therefore discovery was irrelevant and premature. Because plaintiff did not contend the forum selection clause was obtained by duress, his arguments about his entitlement

motion until he received the discovery he sought. The court

granted the TRO ex parte, but quickly vacated it when

defendants argued that it was improperly granted.

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to discovery and the invalidity of the release must be adjudicated in New York.

The court heard argument on defendants' motion, but because the original trial judge was on a one-month medical leave, deferred decision until the judge returned and could take up the motion himself. In the meantime, the court ordered the parties to "cooperate" on discovery. Prior to the rescheduled hearing on the motion to dismiss, plaintiff filed a "motion to quash" defendants' motion on the grounds that defendants had failed to comply with the court's "order" compelling discovery.

#### **Plaintiff Challenged Validity of Release**

At the rescheduled hearing, plaintiff once again argued he

had been forced to sign the release at gunpoint, and therefore the forum selection clause was invalid. He claimed that the outtakes, which defendants refused to provide, would prove his allegations.

As support for his position, he cited cases holding that where a plaintiff's signature is fraudulently obtained on a release (by forgery, for example), the parties' choice of forum is invalid. The court held, however, that plaintiff had not claimed his signature had been fraudulently obtained. Therefore, because plaintiff failed to show that the forum selection clause was obtain through coercion or duress, defendants' motion to dismiss should be granted.

Plaintiff was represented by Ferdinand F. Valteau III. Defendants were represented by Lori Mince of Fishman Haygood Phelps Walmsley Willis & Swanson, LLP, and Cameron Stracher.

## MLRC November Events

November 13, 2013

## **MLRC Annual Meeting**

Grand Hyatt, New York, NY RSVP: khirce@medialaw.org

#### MLRC Forum

Red, Hot and Crowded: Ad Networks, Exchanges and the Media Business

Grand Hyatt, New York, NY RSVP: forum@medialaw.org

# MLRC Annual Dinner A Conversation With Aaron Sorkin

Grand Hyatt, New York, NY **Download Invitation** 

November 14, 2013

### Planning Meeting for the 2014 MLRC/NAA/NAB Media Law Conference

Dentons, New York City

RSVP: medialawconference@medialaw.org

#### Defense Counsel Section Annual Meeting & Lunch

Proskauer Rose, New York, NY **Download Invitation** 

# Fourth Circuit Rejects Alcohol Advertising Ban in College Newspapers

A divided Fourth Circuit panel ruled that a ban on alcohol ads in Virginia college student newspapers fails the *Central Hudson* test and violates the First Amendment. <u>Educational Media Co. v. Insley</u>, No. 12-2183 (4<sup>th</sup> Cir. Sept. 25, 2013) (Thacker, King, Shedd, JJ.). The majority found that the ban could not survive an as applied constitutional challenge because the state regulation was not appropriately tailored to the state's interest in combating underage drinking and associated problems.

**Background and Prior Proceedings** 

Virginia Tech's Collegiate Times and the University of Virginia's Cavalier Daily challenged a section of the Virginia administrative code which precludes college student newspapers from printing alcohol advertisements. See 3 Va. Admin. Code § 5-20-40(A)(2) (2010). The newspapers initially brought a facial challenge to the law. At the trial court level, the newspapers and the state presented conflicting experts on the question of whether bans on alcohol advertising reduced underage student The district court granted drinking. summary to the newspapers on a facial

challenge to the code. The Fourth Circuit reversed, holding that the newspapers failed to sustain a facial challenge to the code. *See Educational Media Co. v. Swecker*, 602 F.3d 583 (4<sup>th</sup> Cir. 2010).

After the case returned to the district court, the parties crossed moved for summary judgment on an as applied challenge to the code. The district court granted summary judgment to the state, and the newspapers appealed.

#### **Fourth Circuit Decision**

On appeal, the newspapers asked the Fourth Circuit to apply a strict scrutiny standard to the Virginia code. The majority found it unnecessary to decide whether heightened scrutiny applied because the code violated the *Central*  Hudson test. Under Central Hudson a restriction on commercial speech can be upheld where 1) the speech involves lawful activity and is not misleading; 2) the restriction is supported by a substantial governmental interest; 3) the restriction directly advances that substantial governmental interest; and, 4) it is not more extensive than necessary to serve the government's interest.

The majority acknowledged that the ban on alcohol advertising directly and materially advanced the state's interest in combating underage, excessive drinking on college

campuses. "Given the general correlation between advertising of a product and demand for that product, it follows that a decrease in alcohol advertising on college campuses will necessarily result in a decrease in alcohol consumption by college students."

However, the ban was more extensive than necessary to serve the state interest because it affected large numbers of students over the age of 21 who are legally allowed to consume alcohol. The record showed that over 60% of the readership of both newspapers consisted of students over the age of 21. "Thus the college newspapers have a protected interest in printing non-

misleading alcohol advertisements, just as a majority of the college newspapers' readers have a protected interest in receiving that information," the majority said.

In dissent, Judge Dennis W. Shedd wrote that the ban reasonably fit the state's goal of reducing underage, abusive drinking on college campuses. Underage, problematic drinking is associated with motor vehicle crashes, including fatal ones, vandalism, suicide attempts, homicides, sexual violence, physical injuries and unprotected sex, the dissenting judge said. Judge Shedd described the ban as "a minor limitation on such advertising in college newspapers as part of a comprehensive plan to address a very serious problem."

Plaintiffs were represented by Rebecca K. Glenberg, ACLU of Virginia, and supported by a number of amici including the Student Press Law Center.

The majority found that the ban could not survive an as applied constitutional challenge because the state regulation was not appropriately tailored to the state's interest in combating underage drinking and associated problems.

# Fourth Circuit Gives First Amendment Protection to a Facebook 'Like'

## Facebook Like is Both Pure Speech and Symbolic Speech

A Facebook 'like' can be protected public employee speech, the Fourth Circuit ruled in the case of several former sheriff's deputies who sued for reinstatement to their old jobs after they supported their boss's electoral opponent. <u>Bland v. Roberts</u>, No. 12-1671 (4<sup>th</sup> Cir. Sept. 18, 2013) (Traxler, Thacker, Hollander, JJ.).

Circuit Chief Judge William Byrd Traxler Jr. said that the district court wrongly concluded that merely "liking" a statement is not enough speech to trigger the protection of the First Amendment. Instead, the Facebook "like" is both pure speech and symbolic speech entitled to protection. "Clicking on the 'like' button literally causes to be published the statement that the user 'likes' something, which is itself a substantive statement," Judge Traxler said.

#### **Background**

B.J. Roberts, the sheriff in Hampton, Va., was up for reelection in 2009. He was opposed by and defeated his former number three, Jim Adams. After the election, Roberts reappointed 147 of 159 employees. The six plaintiffs were among those who were not reappointed. They sued Roberts alleging he retaliated against them in violation of their First Amendment rights because they

supported his electoral opponent. Among other things, some of the plaintiffs visited Jim Adam's campaign Facebook page and left statements of support. One plaintiff, specifically "liked" the page and added a message of encouragement.

The district court granted summary judgment to the defendant, holding that the plaintiffs had not engaged in expressive speech and/or speech on a matter of public concern.

#### **Fourth Circuit Decision**

With respect to plaintiffs' free speech claims, the Court held that clicking a Facebook "like" button is both pure speech and symbolic speech. Facebook participated on appeal as an amicus and submitted a brief detailing the process and significance of its "like" function. Citing to Facebook's brief, the Court explained that "once one understands the nature of what [plaintiff] did by liking the Campaign Page, it becomes apparent that his conduct qualifies as speech."

"Clicking on the 'like'
button literally causes
to be published the
statement that the
user 'likes' something,
which is itself a
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Traxler said.

"In the context of a political campaign's Facebook page, the meaning that the user approved of the candidacy whose page is being liked is unmistakable. That a user may use a single mouse click to product that message that he likes the page instead of typing the same message with several individual key strokes is of no constitutional significance."

As to the merits of the retaliation claims, the Court found that two of the plaintiffs were acting as private citizen expressing matters of public concern. On the record, their interest in engaging in political speech outweighed the state's interest in providing effective and efficient services to the public. Thus their claims could proceed under Connick v. Myers, 461 U.S. 138 (1983), Pickering v. Board of Education, 391 U.S. 563 (1968), and related Fourth Circuit case law.

Plaintiffs were represented by James Shoemaker, Jr., Patten, Wornom, Hatten & Diamonstein, LC, Newport News, VA. Facebook was represented as an amicus by Aaron M. Panner, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., D.C. Defendant was represented by Jeff W. Rosen, Pender & Coward, PC, Virginia Beach, VA.