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MEDIALAWLETTER

Reporting Developments Through October 25, 2013

LIBEL & PRIVACY

INTERNATIONAL

MLRC NOVEMBER EVENTS

Wednesday, November 13

MLRC Annual Meeting
2:30 p.m.

MLRC Forum
Red, Hot and Crowded: Ad Networks, Exchanges and the Media Business
3:45 p.m. - 5:45 p.m.

MLRC Annual Dinner
Featuring a Conversation with Aaron Sorkin

Aaron Sorkin
Screenwriter,
Playwright

Chris Matthews
Host of MSNBC's
Hardball with Chris Matthews

Events above to be held at the Grand Hyatt, New York, NY

Thursday, November 14

Media Law Conference Planning Meeting
Dentons, New York, 8:00 a.m.

Defense Counsel Section Annual Meeting & Lunch
Proskauer Rose, New York, 12:00 p.m. - 2:00 p.m.

Court Dismisses Billionaire GOP Donor's Defamation Lawsuit Against Democratic Group

Hyperlink to Article Sufficient for Fair Report Privilege to Apply; References to "Tainted" and "Dirty" Money Are Opinion; Attorneys' Fees Granted under Nevada anti-SLAPP Statute

By Matthew E. Kelley and Gayle C. Sproul

A hyperlink to a news article describing a court filing is sufficient attribution for an online publication to be considered a fair report of the filing, a federal judge held in dismissing a defamation case by a billionaire Republican donor against a Democratic political group. *Adelson v. Harris*, 2013 WL 5420973 (S.D.N.Y. Sept. 30, 2013). U.S. District Judge J. Paul Oetken also held that the law of Nevada – the domicile of the plaintiff, casino magnate Sheldon Adelson – applied to the case, that challenged portions of the publication were protected opinion, that Adelson's lawsuit should be also dismissed under Nevada's anti-SLAPP statute, and that Adelson must pay the defendants' attorneys' fees under that law.

Background

Adelson, who reportedly spent more than $100 million in support of Mitt Romney, Newt Gingrich and other Republican candidates in the 2012 election, sued the National Jewish Democratic Council and two of its leaders three months before voters went to the polls. In July 2012, the NJDC had posted a petition on its website calling upon Romney and other GOP candidates to refuse Adelson's contributions, calling Adelson's money "tainted" and "dirty" based on a number of published "reports" about his activities (the "Petition"). In particular, the suit took issue with this statement in the Petition: "this week, reports surfaced that ... Adelson 'personally approved' of prostitution in his Macau casinos."

Embedded in the words "personally approved" was a hyperlink to an article by the Associated Press regarding a declaration filed in a Nevada court by a former top executive of the Macau subsidiary of Adelson's Las Vegas Sands Corp. (LVSC). The fired executive, Steven Jacobs, had sued LVSC for breach of contract and other claims and filed the declaration in support of his contention that LVSC had failed to produce documents in its possession. Jacobs's declaration said, among other things, that he had been told that Adelson approved a "strategy" of allowing prostitutes to ply their trade in the Sands' Macau properties – an allegation that, as the AP article noted, a company spokesman denied.

> "The hyperlink is the twenty-first century equivalent of the footnote for purposes of attribution in defamation law, because it has become a well-recognized means for an author o[n] the Internet to attribute a source," the court held.

Shortly after the NJDC posted the Petition, Harvard Law School professor Alan Dershowitz, a "close friend" of Adelson, called NJDC president David Harris and, according to Adelson's complaint in the subsequent defamation action, claimed that not only was the declaration false, but that Jacobs knew that Adelson did not approve of prostitution in his company's casinos. Eight days after posting the Petition, NJDC removed it from its website and released a statement saying that "we stand by everything we said" but that the group had decided to take down the petition "in the interest of *shalom bayit* (peace in our home / community)" (the "Statement").

That did not mollify Adelson, whose attorney contacted the NJDC six days after the Statement was published, demanding that the group and its leadership apologize, in a form pre-approved by Adelson. The NJDC declined and, on Aug. 8, 2012, Adelson filed suit against NJDC, Harris and NJDC Board Chairman Marc Stanley. The defamation action, filed in the U.S. District Court for the Southern District of New York, sought at least $10 million in compensatory and at least $50 million in punitive damages.

(Continued on page 6)

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Motion to Dismiss

Defendants filed a motion to dismiss under Rule 12(b)(6) and a motion pursuant to the District of Columbia's Anti-SLAPP statute, also seeking dismissal. After Judge J. Paul Oetken sought supplementary briefing from the parties regarding the potential application of Nevada (rather than D.C.) law, defendants additionally moved for dismissal under Nevada's anti-SLAPP statute. In their 12(b)(6) motion, defendants contended that the Petition's reference to "reports" regarding prostitution were protected by the fair report privilege of either the District of Columbia or Nevada, and that the references to "dirty" and "tainted" money based on that allegation, and others, were constitutionally protected opinions. For his part, Adelson moved for discovery to assist with his opposition to the motion under the Nevada anti-SLAPP law.

Choice of Law Issues

The court granted the defendants' motion on September 30. Dealing initially with the choice of law question, Judge Oetken noted that the issue was particularly difficult under the circumstances of this case. Under New York choice of law rules in multistate defamation cases, the court applies the law of the jurisdiction with "the most significant interest in 'the specific issue raised in the litigation.'" The presumption in a defamation case, he explained, is that the law of the plaintiff's domicile – in this case, Nevada – applies because that is where the harm is presumed to occur.

However, the defendants had argued that District of Columbia law should apply because the NJDC and Harris were domiciled there and the District has a significant interest in cases involving speech regarding a presidential campaign. The court disagreed, noting that the presidential campaign takes place nationwide and that, although the agency regulating federal campaign expenditures is located in Washington, the challenged statements were not directed at federal regulation. The court also rejected as inapposite precedent applying the law of the defendant's home state in multistate defamation cases. Ultimately, Judge Oetken concluded that the District of Columbia's specific interest in this case – protecting the First Amendment rights of its citizens – could not overcome Nevada's "significant and incontrovertible" interest in providing its citizens with redress for reputational injuries.

Hyperlink and Fair Report Privilege

Judge Oetken then moved on to the substantive aspects of defendants' motions and observed that "[b]ecause a defamation suit 'may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself,' courts should, where possible, resolve defamation actions at the pleading stage." He then granted defendants' Rule 12(b)(6) motion. He held that the Petition's hyperlinked statement that Adelson had reportedly "personally approved" of prostitution in his company's Macau casinos was protected by the fair report privilege. To qualify for the absolute privilege that Nevada grants to reports of judicial proceedings, the report must, through context or attribution, indicate to the reader that it is drawing from official documents or proceedings, and must provide a fair and accurate account of those proceedings. The court held that the Petition did both.

First, the Court held, the hyperlink embedded in the challenged text of the Petition provided the attribution necessary for the fair report privilege to apply. Adelson's counsel had conceded at argument that the AP report to which the Petition linked was protected by the fair report privilege, but argued that, while a footnote citing that article would constitute an acceptable attribution, a hyperlink did not. The court disagreed, holding that anyone with experience navigating the Internet understands that a hyperlink, when clicked, immediately connects the reader with another website.

"The hyperlink is the twenty-first century equivalent of the footnote for purposes of attribution in defamation law, because it has become a well-recognized means for an author o[n] the Internet to attribute a source," the court held. Moreover, the court explained, the Petition's repeated use of the terms "reported" and "reportedly," in conjunction with the hyperlinked phrase "personally approved," "make plain that the hyperlink connects to a source suggesting that Adelson 'personally approved' prostitution in Macau." Hyperlinks are actually a less onerous form of attribution than a footnote, the court added, because they allow the reader to view the source material immediately, rather than undertaking "a sojourn to the library."

(Continued on page 7)

(Continued from page 6)

In addition, the court concluded that it is "good public policy" to "shield[] defendants who hyperlink to their sources," although that "makes it more difficult to redress defamation in cyberspace . . . . Internet readers have far easier access to a commentator's sources. It is to be expected, and celebrated, that the increasing access to information should decrease the need for defamation suits." The court also rejected plaintiff's contention that reliance on an article about the Jacobs declaration rather than on the declaration itself doomed the fair report argument. It noted that the Petition's reliance on a "knowledgeable intermediary" actually gave the reader "a more balanced view of the allegations in the Jacobs Declaration."

Second, Judge Oetken held that the Petition provided a "fair and accurate account" of the Jacobs declaration by means of the AP article. The NJDC had posted and removed the Petition and issued its Statement before Adelson's company had filed a response to the Jacobs declaration in the Nevada court. Thus, Judge Oetken concluded, "it cannot be seriously maintained that the Petition unfairly presented a one-sided view of the action."

Opinion Defense

Turning to the Petition's characterization of Adelson's money as "dirty" and "tainted," the court held that those terms were constitutionally protected statements of opinion because they were incapable of being proven true or false. The Petition's context – a "patently partisan and political" statement "in the midst of" a hotly contested presidential campaign – indicated to readers that "tainted" and "dirty" were statements of opinion. Further, the court found that those opinions were based on disclosed facts, once again relying on hyperlinks.

The Petition's context – a "patently partisan and political" statement "in the midst of" a hotly contested presidential campaign – indicated to readers that "tainted" and "dirty" were statements of opinion.

To the extent that the references to "dirty" and "tainted" money relied on the reports about prostitution, that link was supplied and, in addition, the Petition contained embedded links to other reports regarding criticism that Adelson was channeling "foreign money" (*i.e.*, profits made from operations in China) into the election and that his company engaged in anti-union and "corrupt" business practices. Finally, the court concluded that describing money as "dirty" and "tainted" is metaphorical speech which, although unquestionably carrying negative connotations, does not have a precise, factually verifiable meaning.

Judge Oetken also rejected Adelson's claim that the Statement was a defamatory republication of the Petition. Merely referring to a defamatory publication is not a republication of the underlying defamation, the court said, and, even if it were, in this case it would be protected for the same reasons that the challenged portion of the Petition was protected.

Nevada Anti-SLAPP Statute

The court then turned to the motion under Nevada's anti-SLAPP statute, which it determined was not moot because, if its provisions were satisfied, under the Nevada law defendants would be entitled to a mandatory award of their attorneys' fees. The Nevada statute provides immunity for "any good-faith communication" made "in furtherance of the right to petition" and lists several categories of such statements, including those aimed at procuring an "electoral action, result or outcome." A "good-faith communication" under the statute is one that is either true or made without knowledge of its falsity.

Nevada law allows defendants to challenge such SLAPP lawsuits with a special motion to dismiss, which, if granted, acts as an adjudication on the merits, entitles defendants to reimbursement of their attorneys' fees, and provides defendants with the option of pursuing an independent action for compensatory and punitive damages, as well as the attorneys' fees and costs of bringing the separate action.

At the outset of its discussion of the anti-SLAPP statute, the court dismissed Adelson's *Erie*-based argument that the Nevada law does not apply in federal court. Adelson relied in part on a concurring opinion in a recent Ninth Circuit case in which Chief Judge Alex Kozinski urged his colleagues to reject application of California's anti-SLAPP statute in federal court. *Makaeff v. Trump Univ., LLC*, 715 F.3d 254 (9th Cir. 2013).

Even if Judge Kozinski's view of the California statute were correct, Judge Oetken reasoned, that case was

(Continued on page 8)

(Continued from page 7)

distinguishable because of the availability under the Nevada statute of an independent cause of action, an award of attorneys' fees and the imposition of a different, more onerous substantive burden on plaintiffs – *i.e.*, the requirement that they prove falsity and knowledge of falsity in order to prevail. This, Judge Oetken concluded, necessitated a finding that the Nevada statute was substantive, not procedural, and thus applicable in federal court.

The court then held that the Petition and Statement qualified for immunity under the Nevada statute because they were aimed at procuring an electoral outcome, one of the three categories of protected activities under the statute. The court said that "[i]t strains credulity" to argue, as Adelson had, that the statements at issue were not meant to produce a particular "action, result or outcome" in the presidential election.

Adelson had argued that the statute only protected communications made directly to a government entity or aimed at influencing votes in the election, but the court rejected both arguments. The court held that "a common-sense reading of the Petition, viewed in context, supports the conclusion that it was ultimately aimed at influencing an electoral outcome—and thus *votes*—both indirectly through its ostensible call for reduced financial support to Republicans, and more directly by highlighting issues for voters and activists."

Judge Oetken also rejected Adelson's arguments – based in part on a recent Nevada Supreme Court ruling – that the law only immunized statements made directly to the government. *See John v. Douglas County School Dist.*, 219 P.3d 1276 (Nev. 2009). Indeed, the court explained, the statute's legislative history indicates that the Nevada legislature intended to immunize speech outside of the government context. For these reasons, Judge Oetken concluded that the prong of the statute that protects speech meant to influence an electoral outcome was satisfied in this case.

By the same token, the court rejected the other grounds for application of the statute proposed by defendants: namely, that the speech at issue was "made in direct connection with an issue under consideration by a . . . judicial body" – specifically, the issues raised in the Jacobs lawsuit – or that it was in connection with an issue under consideration by an executive body – specifically, issues such as campaign finance reform.

The court concluded that the Petition was "insufficiently related to" such issues to trigger application of the Nevada statute.

In addition, the court was persuaded that, on the face of the Complaint, there could be no showing that the statements at issue were made with the knowledge of falsity required to defeat application of the anti-SLAPP statute. As noted, the Nevada law protects "good-faith communication[s]," which are defined as communications that are either truthful or made without knowledge of falsity. The court held that Adelson's failure even to plead knowledge of falsity doomed his action for purposes of the Nevada statute. The complaint's allegation that the defendants acted in "reckless disregard" of the truth was insufficient to establish liability under the Nevada statute as a matter of law.

Moreover, because Adelson affirmatively pleaded that defendants relied on the AP article and the Jacobs declaration, which the court construed as judicial admissions, he could not show the requisite knowledge of falsity needed to defeat application of the statute in any event. As Judge Oetken explained, reliance on a sworn statement and an article from a reputable news organization are is insufficient to establish liability even under the less exacting standard of reckless disregard; thus, there was no possibility of proving that the statement at issue was made with actual knowledge of falsity.

Moreover, because the Petition's references to "tainted" and "dirty" money are statements of opinion that cannot be proven false, the court concluded, there can be no satisfactory allegation that they were published with knowledge of their falsity. The court also denied Adelson's request for discovery on the issue of knowledge of falsity, noting that "discovery is not appropriate where it is demonstrably unnecessary."

Finally, Judge Oetken granted defendants' request for attorneys' fees under the Nevada statute and ordered defendants to file a statement of their "reasonable fees and costs," which is now under consideration by the court.

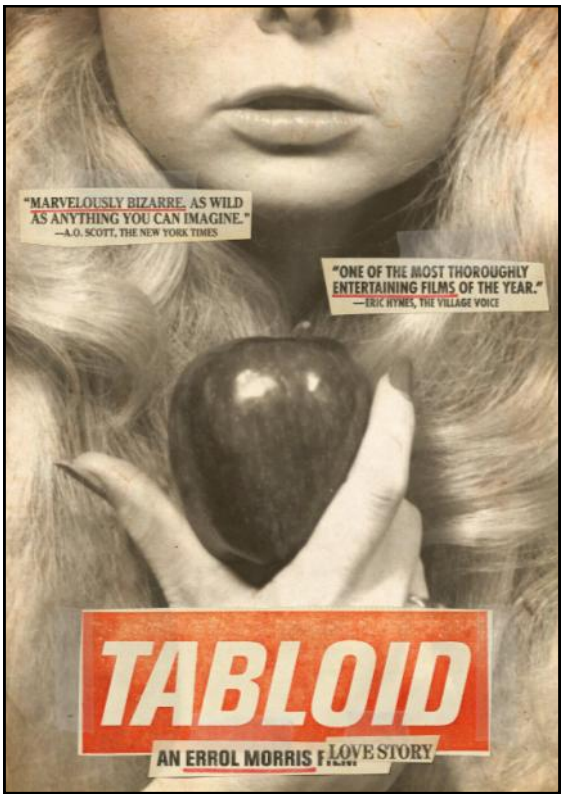
Lee Levine, Gayle Sproul, Seth Berlin, Chad Bowman and Rachel Strom of the D.C., Philadelphia and New York City offices of Levine Sullivan Koch & Schulz, LLP represented David Harris, Marc Stanley and the National Jewish Democratic Council. Sheldon Adelson was represented by L. Lin Wood, Amy Stewart and Jonathan Grunberg of Wood, Hernacki & Evans, LLC, Atlanta and David Olasov of Olasov + Hollander LLP, New York City.

RETURN TO TABLE OF CONTENTS

California Court Affirms Anti-SLAPP Win for Documentary Filmmaker

Women Profiled in 'Tabloid' Cannot Succeed on Defamation and Related Claims

A California appellate court affirmed a motion to strike defamation and privacy claims against documentary filmmaker Errol Morris and the producers of the film "Tabloid." *McKinney v. Morris*, 2013 Cal. App. Unpub. LEXIS 7342 (Cal. App. 2d Dist. Oct. 15, 2013) (Grimes, Bigelow and Flier, JJ.). The court affirmed that plaintiff was a limited purpose public figure who provided insufficient evidence of actual malice to support her libel and privacy claims. In addition, plaintiff's misappropriation claim was barred by the public interest or newsworthiness exception.



Background

The plaintiff, Joyce McKinney, was the subject of an English tabloid frenzy in the late 1970s in a scandal dubbed the "Manacled Mormon" story. The documentary used plaintiff and this incident to explore the themes of celebrity and tabloid culture. McKinney was a Brigham Young University student and former beauty pageant contestant. In 1977, she flew to London and allegedly kidnapped her former boyfriend Kirk Anderson, chained him to a bed and forced him to have sex with her over a period of three days. McKinney claimed that Anderson, a Mormon missionary, was her fiancé, that she traveled to England to rescue him, that their tryst was consensual, and that Anderson was brainwashed by the Mormon Church into making false claims about her. McKinney fled England after being released on bail and the UK never pursued her extradition.

Back in the United States, McKinney reemerged in the public eye briefly; once in the 1980's for allegedly stalking Anderson outside his office; and in 2008 she made the news for having her pit bull cloned.

Morris and his production team decided to showcase McKinney's story as the heart of their documentary, including showing how two British tabloids published sharply differing accounts of the incident. *The Daily Express* portrayed McKinney mainly in a positive light, including her allegations about the Mormon Church. *The Daily Mirror*, in contrast, referred to McKinney as a "sex hostess" who earned thousands of dollars selling herself and claiming that's how she earned money to travel to England.

Upon agreeing to participate in the documentary, McKinney signed two releases: one regarding a Showtime television series that was scrapped and one for a feature-length documentary film. McKinney attended several premieres and made joint appearances with Errol Morris. However she later soured on the documentary, claiming she was blackmailed into cooperating with a film that falsely portrayed her.

McKinney sued Morris and the producers for defamation, misappropriation, intrusion, false light, intentional infliction of emotional distress, as well as fraud and breach of contract claims. Defendants brought an anti-SLAPP motion limited to dismissing the defamation and privacy claims.

The trial court granted the anti-SLAPP motion, finding the documentary film was made in furtherance of the

(Continued on page 10)

(Continued from page 9)

defendants' First Amendment rights, concerned matters of public interest – tabloid journalism and the Mormon faith – and plaintiff could not show a reasonable likelihood of success on any of her libel or privacy claims. The emotional distress claim was dismissed insofar as it related to her libel and privacy claims, but the court noted that emotional distress claims relating to her fraud and contract claims could survive the motion.

Appellate Court Decision

The California Court of Appeal, Second Appellate District, affirmed that McKinney was a limited public-purpose figure who was unable to show with clear and convincing evidence that Morris and his codefendants acted with actual malice.

The court found that plaintiff's participation in the documentary, the continuing media interest in her story, and her own belief in the continuing public interest in her story all contributed to make her a public figure for purposes of the lawsuit.

As for fault, the plaintiff argued that one of the film's producers, Mark Lipson, was hostile toward her regarding the death of her dog, the handling of her personal materials used for the film and in getting her to sign the release agreements. But the court said that "assuming it is true that Lipson was insensitive, even boorish regarding plaintiff's service dog, her purportedly missing personal items, and the efforts to obtain plaintiff's signature on the 2010 Release, that does not demonstrate Lipson, Morris, or anyone involved in creating *Tabloid* harbored doubts about the accuracy of the material presented in the film."

Plaintiff claimed some of Morris's statements showed he subjectively believed the film was false. Morris, for example, stated he was less interested in attempting to ascertain the whole truth, and more interested in telling the story of how the tabloids portrayed plaintiff. He explained those portrayals — one of her as a whore, the other as a virgin — were both not true. However, none of his comments amounted to actual malice.

"The movie presents, in essence, an open-ended, unresovable question about what actually happened, how the truth can be manipulated or obscured, or even innocently altered by each narrator's own subjective view of the circumstances," the Court of Appeal said.

"The movie presents, in essence, an open-ended, unresovable question about what actually happened, how the truth can be manipulated or obscured, or even innocently altered by each narrator's own subjective view of the circumstances," the Court of Appeal said.

Plaintiff also argued that a comment made by Morris on Twitter was evidence of actual malice. He had written "I prefer the truth with a little varnish on it." But plaintiff failed to show that this Tweet was made in relation to plaintiff or the film. And in any event the court noted it was "simply a colorful statement of opinion that does not assist plaintiff."

Plaintiff's misappropriation claim also failed. She alleged the defendants used her personal photographs and videotapes in the film. The court noted that "*Tabloid* concerns a subject of widespread public interest. The public interest or newsworthiness exemption is properly applied here to defeat plaintiff's claims."

The plaintiff was represented by Steven G. Tidrick and Andrew L. Youkins of The Tidrick Law Firm. The defendants were represented by Gail E. Kavanagh, John F. Stephens and Chantal Z. Hwang of Sedgwick LLP.

First Circuit Affirms Dismissal of Fraud Claim Against Medical Journal and Authors

Complaint Failed to Meet Plausibility Standard of Iqbal and Twombly

The First Circuit this month affirmed dismissal of an unusual fraud lawsuit brought by medical malpractice plaintiffs against the publisher of a medical journal and individual authors. *A.G. v. Elsevier, Inc. et al.*, No. 12-1559 (Oct. 16, 2013) (Thompson, Selya, Lipez, JJ.).

The plaintiffs alleged that a false medical journal article caused them to lose their malpractice trials. The Court found this theory "imaginative but unpersuasive" and dismissed the complaint for failing to reach the plausibility standard required by *Iqbal* and *Twombly.*

Background

The plaintiffs had lost separate medical malpractice actions in Illinois and Virginia over brachial plexus (nerve) injuries allegedly caused during childbirth by the negligent use of traction devices. At both trials, the malpractice defendants introduced a case report published in the American Journal of Obstetrics and Gynecology, a peer-reviewed obstetrical journal. The gist of the report was that brachial plexus injuries could occur without the use of traction.

After losing the malpractice actions, the plaintiffs joined together and sued the medical journal, its publisher, and individual authors in federal court in Massachusetts. They alleged the case report was false and that the false report caused them to lose their malpractice claims.

Iqbal / Twombly Analysis

Affirming dismissal, the Court found that plaintiffs' pleading of causation was "wholly speculative" and implausible under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

The Court explained that the plausibility inquiry under *Iqbal* and *Twombly* is a two-step analysis. First a court must separate the complaint's factual allegations (which must be accepted as true) from conclusory legal allegations (which need not be credited). Second, a court must determine whether the factual content allows a reasonable inference that the defendant is liable for the misconduct alleged.

The district court found that the complaint failed to adequately allege causality and the First Circuit agreed. "The complaint's bald assertion that 'but for' the Case Report the plaintiffs 'would have been successful' at the malpractice trials is exactly the type of conclusory statement that need not be credited at the Rule 12(b)(6) stage," Judge Selya wrote.

The Court rejected plaintiffs' claim that they raised a question of fact that entitled then to take discovery. Judge Selya explained that "the plausibility standard demands that a party do more than suggest in conclusory terms the existence of questions of fact about the elements of a claim." Moreover, nothing in the complaint suggested how discovery would even assist in developing facts to support a theory of causality.

The Court also rejected plaintiffs' argument that the element of causality should not be subject to *Iqbal* and *Twombly,* "it is neither necessary nor desirable to balkanize the plausibility standard element by element.... Rather, the plausibility standard should be applied to the claim as a whole."

Elsevier, Inc. was represented by William S. Strong, Kotin, Crabtree & Strong, LLP, Boston, MA. Plaintiffs were represented by Kenneth M. Levine and Sheila E. Mone, Kenneth M. Levine & Associates LLC .

RETURN TO TABLE OF CONTENTS

California Appeals Court Affirms Libel Damage Award for Online Posts

A California appellate court affirmed a $24,000 bench damage award, including $4,000 in punitive damages, for defamatory online postings. *Sanders v. Walsh*, 219 Cal. App. 4th 855 (Cal. App. 4th Dist. 2013) (Ikola, Bedsworth, Moore, JJ.). While acknowledging that defamation claims over online insults, rants, and raves have failed, the court held that the statements at issue here were expressions of fact not opinion

Background

At issue in the case were postings made to Ripoffreport.com, Yelp.com, and MerchantCircle.com following a dispute between the parties over the purchase of a wig.

The plaintiff's mother purchased a wig from defendant, sought to return it, then stopped payment. Defendant sued for payment in small claims court and lost.

After the loss in small claims court, defendant criticized plaintiff on Ripoffreport.com, writing that plaintiff had used an unauthorized check to purchase the wig and fabricated a letter from FedEx showing she tried to return the hairpiece. Defendant admitted to posting these statements. But other anonymous postings were most central to the case.

On Yelp.com, an anonymous poster criticized the Anaheim City Planning Department and wrote: "We hope that people like Cheryl Sanders are investigated, audited and brought to justice!!!!!!" On MerchantCircle.com, an anonymous poster wrote, among other things, "'Thank you Cheryl Sanders for hurting the community by giving all the construction business in Anaheim for a under the table bribe. I hope that an investigation takes place soon and you end up behind bars.'"

During the bench trial, plaintiff testified that these anonymous statements were false and humiliating and harmed her prospects for promotion. Defendant denied making the anonymously posted statements, but admitted that the email address linked to the postings was hers. The trial judge awarded plaintiff $10,000 for intentional infliction of emotional distress, $10,000 on her defamation claim, and $4,000 in punitive damages.

Appellate Decision

The California Court of Appeal, Fourth Appellate District, affirmed the judgment against defendant because the specific, false factual allegations were published and caused damage to the plaintiff.

Defendant sought to rely on California cases that emphasized the looser communication style of the Internet. See, e.g., *Krinsky v. Doe 6*, 159 Cal.App.4th 1154 (2008). In *Krinsky*, the court ruled that postings on an online financial bulletin board calling plaintiff and other company executives crooks, cockroaches and scumbags were not defamatory. The *Krinsky* court noted that on the Internet "Hyperbole and exaggeration are common, and 'venting' is at least as common as careful and considered argumentation." The court here, however, found that there are limits to the "anything goes" approach to the Internet. "The Yelp.com posting mentioned Cheryl Sanders in connection with awarding city contracts to friends and family members and taking under the table money, i.e., bribes," the court said. "The MerchantCircle.com article was even more explicit, accusing Cheryl Sanders of 'giving all the construction business in Anaheim for a under the table bribe.' These statements are not mere opinion."

The court here, however, found that there are limits to the "anything goes" approach to the Internet. ... "These statements are not mere opinion."

The panel concluded there was substantial evidence to support the trial court's award and finding of malice by defendant. "The patently false nature of the claims, Walsh's false denial that she posted the statements, and Walsh's hostile attitude toward plaintiff are substantial evidence to support the trial court's finding of malice," the panel said.

Plaintiff was represented by Timothy P. Miller. Defendant was represented by Chandler A. Parker and Kevin Doran of the Law Offices of Chandler Parker.

RETURN TO TABLE OF CONTENTS

Indiana Supreme Court Vacates Grant of Appeal in Anonymous Speech Case

Newspaper Sought to Shield Identity of Commenter

By Steven M. Badger

A recent decision by the Indiana Supreme Court leaves news organizations and journalists without needed guidance in Indiana on the procedure for appealing orders compelling disclosure of unpublished or un-broadcast information subpoenaed by a litigant. *In re Indiana Newspapers, Inc. v. Miller*, 49S02-1305-PL-311 (Ind. Oct. 3, 2013) ("Miller II").

In a closely-watched case involving Gannett's *Indianapolis Star*, the Indiana Supreme Court reinstated a lower court ruling that conditioned the right to an immediate appeal of such orders upon the discretionary approval of the trial court judge of either an interlocutory appeal or the express entry of a final judgment under Rule 54(B). *See* 980 N.E.2d 852 (Ind. App. 2012).

Background

Timing is everything, particularly when it comes to an appeal from a court order to disclose notes, outtakes, sources and the like. An appeal in the normal course of litigation – that is, after trial – is too late for news organizations or journalists facing an immediate court-ordered deadline to produce newsgathering material. Unless the news organization or journalist is prepared to face the potentially harsh consequences of defiance of the order, an appeal must be initiated immediately.

If the trial court permits the appeal and stays its order, there is no question that the news organization or journalist may proceed with an appeal. The difficulty arises, however, when trial court judges refuse to allow the immediate appeal of their own orders. Judges have wide discretion in granting leave for an "interlocutory appeal" and likewise in directing entry of a final judgment upon a ruling disposing of less than all claims or parties.

The Indiana Supreme Court's October 3, 2013, ruling rejected a request by the *Indianapolis Star* for the Court to review an order from the Marion County Superior Court compelling the Star to produce information identifying an anonymous commenter who posted an allegedly defamatory statement on the Star's website. After hearing oral argument of the Indianapolis Star's appeal, the Supreme Court changed course and decided not to render a decision in the case. The Court's order stated, without further explanation, that the Court "determined that it should not assume jurisdiction over this appeal." Justice Rush dissented from the Order.

The Supreme Court's order expressly "reinstated" the Indiana Court of Appeals' decision last December dismissing the *Indianapolis Star's* appeal because the *Star* did not first receive the trial court's imprimatur for an immediate appeal. 980 N.E.2d 852. The *Indianapolis Star* and the Hoosier State Press Association Foundation, as *amicus curiae*, had argued, among other things, that a right to an immediate appeal existed under the Indiana appellate rules interpreted in light of the constitutional protections for free speech and free press.

Protection for Anonymous Speech

The Supreme Court's order leaves undisturbed the Indiana Court of Appeals' original decision in February of 2012, *In re Indiana Newspapers Inc. v. Miller*, 963 N.E.2d 534 (Ind.Ct.App. 2012) ("*Miller I*"), adopting a multi-factored test for the protection of anonymous posts. In *Miller I*, Indiana adopted a modified *Dendrite* standard that requires, among other things, efforts to notify the anonymous commenter of the subpoena, proof that the claimant seeking to identify the anonymous poster has a meritorious claim for defamation that would survive summary judgment, and a balancing of free speech interests against the claimant's need for the information.

The Marion County judge determined last summer that the test had been satisfied by the plaintiffs, Jeffrey and Cynthia Miller. The *Indianapolis Star* filed a second appeal in the case arguing that the trial court misapplied the standard adopted in *Miller I*.

Steven M. Badger, Senior Counsel at Benesch, Friedlander, Coplan & Aronoff LLP in Indianapolis, Indiana, represented the Hoosier State Press Association Foundation.

RETURN TO TABLE OF CONTENTS

Michigan Law School Loses Libel Suit Against Plaintiff's Firm

Criticism of Employment Stats and "Enron" Accounting Hypberbole; No Actual Malice

Thomas M. Cooley Law School was not defamed by negative online comments made by plaintiffs lawyers researching a lawsuit over post-graduate law school employment data, a federal judge in Michigan ruled in granting summary judgment for the defendants on all counts. *Thomas M. Cooley Law School v. Kurzon Strauss, LLP*, 2013 U.S. Dist. LEXIS 150443 (W.D. Mich. Sept. 30, 2013) (Jonkler, J.).

Background

Thomas M. Cooley Law School has four campuses in Michigan and a campus in Tampa Bay, Florida. The law school sued two New York-based attorneys for online comments criticizing the school's post-graduate employment data and its overall value as a legal education institution.

Defendant Jesse Strauss was one of the two members of Kurzon Strauss, and defendant David Anziska was of counsel to Kurzon Strauss for a period of time in 2011. In the wake of negative publicity about the poor employment prospects for law school graduates due to the recession, Anziska began to explore suing over law schools' post-graduate employment data, including Thomas M. Cooley's data.

The law school sued two New York-based attorneys for online comments criticizing the school's post-graduate employment data and its overall value as a legal education institution.

Anziska wrote on the website JD Underground, in part, that:

> "these schools are preying on the blithe ignorance of naïve, clueless 22-year-olds who have absolutely no idea what a terrible investment obtaining a JD degree is. Perhaps one of the worst offenders is the Thomas Cooley School of Law, which grossly inflates its post-graduate employment data and salary information. More ominously, there are reports that … students are defaulting on loans at an astounding 41 percent, and that the school is currently being investigated by the U.S. Department of Education [DOE] for failing to adequately disclose its students' true default rates."

Anziska also wrote that "most likely schools like Thomas Cooley will continue to defraud unwitting students unless held civilly accountable."

When Thomas M. Cooley sent a cease and desist letter, Strauss posted a statement retracting Anziska's allegations, including that others had published reports about Thomas M. Cooley graduates' default rate on their loans and that the law school faced a DOE investigation.

However, shortly afterwards Anziska posted online a proposed class-action complaint against Cooley stating that it "blatantly misrepresented and manipulated its employment statistics to prospective students, employing the type of 'Enron-style' accounting techniques that would leave most for-profit companies facing the long barrel of a government indictment and the prospect of paying a substantial criminal fine." Anziska's proposed complaint also said that Thomas M. Cooley "grossly inflates its graduates' reported mean salaries."

Cooley sued the lawyers for defamation, tortious interference with business relations, breach of contract and false light.

Summary Judgment Motion

The district court first found that Thomas M. Cooley Law School is a limited public figure for the public controversy over the "challenging job market recent college graduates, and recent law school graduates, confront in the

(Continued on page 15)

(Continued from page 14)

aftermath of the financial crisis of 2008." The school participates in the discourse on the controversy by having the largest enrollment of any law school accredited by the American Bar Association and communicating through its websites, advertising and other means, the court reasoned. The public controversy even reached the White House. "President Obama himself recently addressed the issue, proposing that law school be reduced from three years to two," the court said.

Second, the court found that a jury could not find by clear and convincing evidence that the defendants acted with actual malice. There was no evidence that Anziska or his codefendants had subjective knowledge that the statements about Thomas M. Cooley were false. Instead, the court noted that Anziska read many articles, including those penned by law professors, corresponded with law-school academics and visited legal blogs before posting his statements.

The defendants, in fact, went ahead and filed a lawsuit based upon the proposed complaint, undercutting any indication they subjectively believed that their statements were false or likely false. (The defendants, though, lost their putative class action against Thomas M. Cooley at the motion to dismiss stage.)

"Cooley contends that Mr. Anziska should have investigated more thoroughly before publishing any of the challenged statements, but this presumes incorrectly that a reasonably prudent person standard, not a subjective standard, applies," the court said.

Third, the court rejected Thomas M. Cooley's request for summary judgment in its favor over the statement "there are reports that … students are defaulting on loans at an astounding 41 percent, and that the school is currently being investigated by the [U.S. Department of Education] DOE for failing to adequately disclose its students' true default rates." The statements were qualified and the defendants retracted the statements after the law school requested it, the court said. There also is a lack of evidence that the defendants "subjectively doubted the veracity" of those statements weigh against any reasonable juror finding actual malice, let alone a finding by clear and convincing evidence."

> The district court first found that Thomas M. Cooley Law School is a limited public figure for the public controversy over the "challenging job market recent college graduates, and recent law school graduates, confront in the aftermath of the financial crisis of 2008."

Fourth, the court also found that the Anziska's statements that Thomas M. Cooley employed Enron-style accounting techniques and that schools like Thomas M. Cooley would continue to defraud students unless held "civilly accountable" were protected hyperbole. Moreover, the statement that Thomas M. Cooley grossly inflates the reported average salaries of its graduates may be substantially true, the judge opined.

The court also dismissed the law school's additional claims for tortious interference with business relations, breach of contract, and false light, finding all of them "necessarily fail along with the defamation claim."

Further Developments

Following the grant of summary judgment, the defendants moved to unseal several filings that are subject to a stipulated confidentiality order. The defendants argue that relief is necessary because the law school is still arguing publicly that it was defamed and unsealing would allow the public to evaluate the law school's claims. The defendants also argue that the media would be interested in having more detailed information on post-graduate employment statistics and related information to evaluate the law school's claims.

In response, the law school argues that the stipulated confidentiality agreement survives the grant of summary judgment and that defendants are seeking to use discovery materials to continue a "personal public relations campaign against Cooley." The motion was referred to a magistrate judge.

The law school has filed a notice of appeal from the grant of summary judgment.

Thomas M. Cooley Law School was represented by Brad H. Sysol, Michael P. Coakley and Paul D. Hudson of Miller Canfield Paddock & Stone PLC in Detroit, and Cherie Lee Beck and James B. Thelen of Thomas M. Cooley Law School's Lansing, Mich., campus. Defendant Kurzon Strauss was represented by Strauss of Strauss Law P.L.L.C. in New York and Steven Mark Hyder of the Hyder Law Firm P.C. in Monroe, Mich. Defendant Anziska was represented by Strauss, himself and Hyder.

Libel Suit by Son of Palestinian Authority President Dismissed

D.C. Anti-SLAPP Statute Protects Foreign Policy Magazine and Author

By Shaina Jones

Judge Emmet Sullivan of the U.S. District Court for the District of Columbia recently granted an anti-SLAPP motion asserted under the District of Columbia's relatively new statute, dismissing a libel lawsuit against Foreign Policy Magazine and author Dr. Jonathan Schanzer asserted by Yasser Abbas, son of Palestinian Authority President Mahmoud Abbas. *Abbas v. Foreign Policy Magazine, et al.*, No. 1:12-cv-01565 (D.D.C. Sept. 27, 2013).

The suit stemmed from a commentary *Foreign Policy* published on its website in June 2012 entitled, "The Brothers Abbas: Are the sons of the Palestinian president growing rich off their father's system?" The piece, written by Dr. Schanzer of the Foundation for the Defense of Democracies, raised questions about whether Abbas and his brother were enriching themselves by virtue of their familial ties, and whether some of their wealth could be traced to U.S. tax dollars. Abbas claimed that the commentary leveled unfounded allegations of corruption against him.

> The invitation in the Commentary for the reader to form her own opinion is not libel, rather it "is the paradigm of a properly functioning press."

Background

Plaintiff Yasser Abbas is a prominent international businessman, an active participant in Palestinian political affairs, and the son of Palestinian Authority president Mahmoud Abbas.

Along with pursuing his business interests, for more than a decade Abbas has simultaneously played a prominent role in Palestinian political affairs, including regularly serving as a political emissary for his father to other countries and at international gatherings. Since its formation in the 1990s, the Palestinian Authority has long been the subject of allegations of corruption, both under President Arafat and President Mahmoud Abbas. As concerns of corruption in the Palestinian Authority increased, so too did public scrutiny over the younger Abbas' business and political activity.

On June 5, 2012, Foreign Policy published Dr. Schanzer's report titled "The Brothers Abbas, Are the sons of the Palestinian president growing rich off their father's system?" The commentary included approximately thirty-one words or phrases that were hyperlinked to various previously published articles or sources. Dr. Jonathan Schanzer, author of the commentary, is the Vice President for Research of the Foundation for Defense of Democracies, which focuses on national security and foreign policy, and has published several books and numerous articles about Middle Eastern affairs. The commentary detailed the extent of the Abbas brothers' financial interests, and posed several questions about whether the Abbas brothers profited from their familial ties at the expense of ordinary Palestinians and U.S. taxpayers.

In September 2012, Abbas filed a complaint against Foreign Policy Magazine and Dr. Schanzer alleging that the article falsely accused Abbas of corruption, and pointing to a number of the statements in the commentary regarding his business interests and political activity that were allegedly false and defamatory. Foreign Policy magazine and Dr. Schanzer jointly moved to dismiss all claims under Federal Rule of Civil Procedure 12(b)(6) and the D.C. Anti-SLAPP Act, contending that Abbas failed to state a claim of defamation as a matter of law, and also failed to show a likelihood of success on the merits of his defamation claim under the Act.

The Court's Ruling

On September 27, 2013, the Court granted the defendants' motion under the SLAPP statute, and denied the motion to dismiss under Rule 12(b)(6) as moot. The court first addressed the threshold issue of the applicability of the SLAPP statute in federal court. Judge Sullivan held that

(Continued on page 17)

(Continued from page 16)

although the applicability of the Anti-SLAPP Act in federal court had not yet been addressed by the D.C. Circuit, other circuits have found that similar state statues apply in federal court, as well as two recent decisions by D.C. district courts.

The Court next found that the commentary fit within the definition of an "[a]ct in furtherance of the right of advocacy on issues of public interest" under the statute for three reasons. First, the commentary was published on the Internet, which the Court held was "in a place open to the public or a public forum in connection with an issue of public interest," under the statute, and the issue of corruption in the Palestinian Authority was an issue of public interest. Second, the court found that the commentary fit within the definition because Abbas was a limited purpose public figure regarding discussion of Palestinian politics and the controversy surrounding his wealth. Third, Dr. Schanzer's statements while testifying before Congress regarding many of the same issues contained in the commentary were "written or oral statements" made "in connection with an issue under consideration or review by a legislative, executive, or judicial body" and therefore fit within the definition for this reason as well.

The Court also noted that, as the defendants detailed in their anti-SLAPP motion, Yasser Abbas has a history of threatening and filing defamation suits against critics who question his wealth. Indeed, a London lawyer representing Abbas had demanded a retraction from Foreign Policy prior to instituting suit, and had expressly touted his client's history of filing or threatening defamation suits in Israel, the Gulf and elsewhere.

Finding that defendants made a prima facie showing that Abbas' claim arose from an "act in furtherance of the right of advocacy on issues of public interest, the Court then determined that Abbas was unable maintain his burden of proving that he was likely to succeed on the merits of his defamation claim in order to survive the SLAPP motion. The Court first noted that Abbas had narrowed considerably his defamation claim in his opposition to defendants' motion to dismiss because he did not contest their showing that none of the factual statements about his business were materially false. As a result, the Court focused only on a few remaining statements at issue, primarily what Abbas characterized as "libelous questions" about the source of his wealth that the commentary raised.

The Court held that such questions were just questions, and thus incapable of implying a defamatory meaning or assertions of objective facts. Relying on *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993) and other similar cases concerning whether questions can be actionable, the Court pointedly observed: "That Mr. Abbas would prefer that readers do not answer the questions in the affirmative is not sufficient to support his defamation claim. Indeed, the invitation in the Commentary for the reader to form her own opinion is not libel, rather it "is the paradigm of a properly functioning press."

Furthermore, the Court held that even if the questions the commentary posed were capable of implying a defamatory assertion of fact, they were statements of opinion protected by the First Amendment supported by disclosed facts. Here, the Court noted that the commentary hyperlinked to its source material in the form of articles in other publications, company websites, and interviews given by Abbas, which the Court found gave the reader the opportunity to draw their own conclusions and further put the reader on notice that the piece was one of opinion.

The Court further supported this conclusion by noting that the commentary was published in the "Arguments" section of the *Foreign Policy* website.

Finally, the Court held that other challenged statements in the commentary referred to Abbas's father, and were thus not "of and concerning" him as required to state a defamation claim, or were simply not defamatory as a matter of law.

Because Abbas failed to demonstrate a likelihood of success on the merits of his defamation claim, Judge Sullivan granted Foreign Policy magazine and Dr. Schanzer's special motion to dismiss under the SLAPP statute and dismissed Abbas' complaint with prejudice. The Court further ordered that the defendants could file a motion to recover their attorneys' fees and costs pursuant to the SLAPP statute, which provides that the Court "may" award fees to a prevailing defendant. The parties are currently litigating defendants' motion for attorneys' fees and costs, and Abbas has appealed the dismissal to the U.S. Court of Appeals for the D.C. Circuit.

Jonathan Schanzer is represented by Nathan Siegel, Seth Berlin, and Shaina Jones of the Washington, D.C. office of Levine Sullivan Koch & Schulz, LLP. Foreign Policy Magazine is represented by Kevin Baine, Adam Tarosky, and Elise Baumgarten of Williams & Connolly, LLP. Plaintiff is represented by S. Dwight Stephens, Louis G. Adolfson, Rania Shoukier, and Michael Panayotou of the New York firm Melito & Adlofsen P.C.

ECHR Rules That News Portal Can Be Held Responsible for User Comments

Estonian Ruling Not a Breach of Article 10

By Tim Pinto and Mark Dennis

The owner of an online news portal had been found liable by the Estonian courts for defamatory user generated comments posted on that portal, even though it removed the comments promptly upon notification. The European Court of Human Rights has held, pending any appeal to the Grand Chamber, that the Estonian courts' decision was within Estonia's margin of appreciation and was not a violation of Article 10 ECHR (the right to freedom of expression).

Facts

The applicant, Delfi, owns one of Estonia's largest internet news portals, publishing up to 330 articles a day. Readers could post comments under the articles. Delfi received about 10,000 comments daily. It did not require posters to register or give a real name or an email address. The majority of comments were posted under pseudonyms. Delfi did not pre- or post-moderate comments.

The website featured (i) a disclaimer advising posters that they, not Delfi, were responsible for their comments; (ii) an automatic filter for certain swear words; and (iii) a notice-and-take-down system which allowed readers to click on a button to request that a comment be removed, and the comment was removed quickly by Delfi.

In 2006, Delfi published an article reporting how a ferry company's routes had delayed the opening of some ice roads by several weeks. The article attracted 185 comments, about 20 of which were defamatory of the company's majority shareholder, "L", calling for him to be lynched or killed and using offensive (including anti-Semitic) language.

Six weeks later, L's lawyers wrote to Delfi requesting that the 20 comments be removed and seeking damages of about €32,000 (US$44,000). Delfi removed the comments on the same day and denied liability for damages.

L sued Delfi in the Estonian courts. Delfi relied on the Estonian equivalent of the hosting exemption in Article 14 of the E-Commerce Directive (2000/31/EC). The Estonian Supreme Court held that Delfi was a publisher of the comments and could not rely on Article 14, and so had to pay damages of €320 (about US$440).

Delfi applied to the European Court of Human Rights (the "ECtHR"), arguing that the domestic court's decision breached its right of freedom of expression guaranteed under Article 10 of the Convention.

Judgment of the ECtHR

The ECtHR held that there had been no violation of Article 10. The domestic court's finding that Delfi was liable and had to pay €320 was prescribed by law, pursued a legitimate aim (viz. the protection of L's reputation) and was a proportionate restriction on Delfi's right to freedom of expression.

This decision appears to have based on six main findings:

- Even though Delfi's own article was balanced, Delfi should have realised that the article might cause negative reactions against the ferry company and its managers, especially given the portal's alleged reputation for having defamatory reader comments.

- The comments were published to a wide audience and Delfi had an economic interest in the number of readers and comments which helped its advertising revenue.

- The posters could not modify or delete their comments once they were posted. Only Delfi could do this. Delfi could have moderated the comments before or after they were posted. As such, it had "*a substantial degree of control*" over comments on the portal, even if it did not fully exercise that control in practice.

- The measures put in place by Delfi were insufficient to fulfil "*its duty to avoid causing harm to third parties' reputations*". While the notice-and-take-down system was easily accessible and convenient, and Delfi had

(Continued on page 19)

(Continued from page 18)

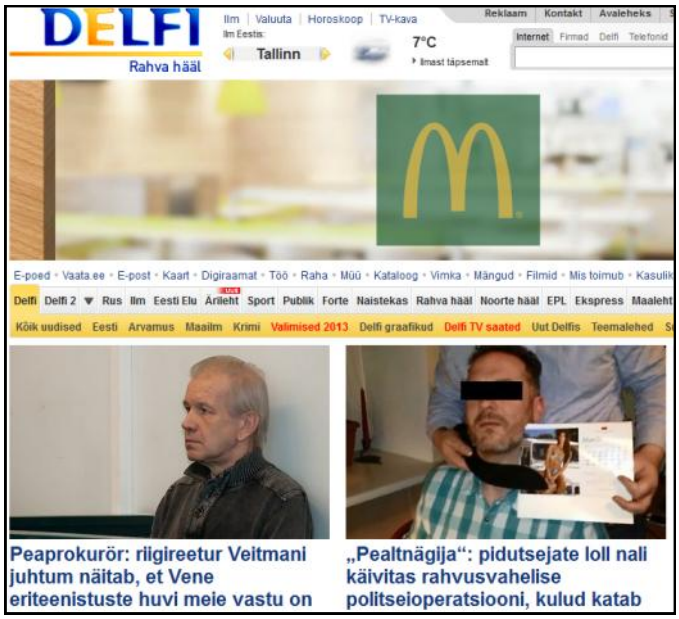
removed the comments without delay upon receiving notice, the comments had already been online for six weeks by that point.

- It would be very difficult for the claimant to identify and sue the anonymous posters. Posters were not required to register with the site nor state their real name or email address. The Estonian courts had to decide where to apportion blame and what remedy to award.

- The domestic courts had imposed a moderate sanction (damages of €320) against Delfi and made no specific order as to how Delfi should ensure the protection of third party rights in future.

Comment

On first impressions, this judgment does not appear to sit comfortably with the notion of free speech for intermediaries and, in particular, the EU hosting exemption under the E-Commerce Directive. In summary, this states that, in return for taking down illegal third party content promptly upon notice, a relevant intermediary should not be held liable in damages for that content.



Delfi is one of Estonia's most popular news websites.

However, it is important to appreciate that this is a judgment of the ECtHR in Strasbourg and not the Court of Justice of the EU ("CJEU") in Luxembourg.

The role of the ECtHR is to ensure that a Convention State has appropriate laws and is applying them in a legitimate and proportionate manner in light of Convention rights. The ECtHR allows states a margin of appreciation (i.e. discretion), since the ECtHR has a supervisory capacity and its role is not to replace national courts. Moreover, its role is not to interpret EU legislation. That is the role of the CJEU. The ECtHR stresses in the judgment that it is not interpreting domestic and European law in order to decide Delfi's liability. In this case, Estonia had implemented the Article 14 exemption and its courts applied that law.

Even though the ECtHR's judgment refers to several Estonian laws which protect an individual's reputation, suggesting that Estonia may be quite a claimant-friendly jurisdiction, Delfi was only ordered to pay damages of €320. It appears that, in weighing up all the various factors, the ECtHR concluded that the Estonian court's decision in awarding damages of €320 was proportionate in the circumstances and was within the margin of appreciation afforded to national authorities in fulfilling the Convention obligations.

While the ECtHR largely side-steps a detailed analysis and application of the EU hosting exemption, it summarises CJEU case law relating to Article 14, noting that a service provider may only rely on Article 14 where its role is neutral, in the sense that its conduct is merely technical, automatic and passive, and it "*has not played an active role of such a kind as to give it knowledge of, or control over, the data stored*": *Google France* (C-236/08).

It is a shame that the Estonian Supreme Court had not felt the need to refer the interpretation of Article 14 to the CJEU. However, the interpretation of Article 14 is reasonably clear and the key domestic issue was the application of that law to the facts. Nonetheless, the key question that the ECtHR had to consider – namely, how to balance protecting reputation and free speech where the UGC is anonymous and the website could have predicted defamatory comments resulting from its own article, did not require user registration and did not pre- or post-moderate the UGC – would be worth further consideration. In this regard, hopefully, the ECtHR Grand Chamber will also consider the matter, as the decision is provisional pending any further appeal.

Tim Pinto and Mark Dennis are lawyers with Taylor Wessing in London.

Argentina Supreme Court Protects Online Reposting

Intermediary Liability Doctrine: Same Wine in New Bottle?

By Eduardo Bertoni

Like other Latin American countries, Argentina does not have specific laws governing liability for online intermediaries for third party posted content. The absence of specific laws on intermediary liability has become particularly problematic in defamation and invasion of privacy cases, with judges applying laws passed in an era when the Internet was not even imagined. In some cases, judges have ordered intermediaries to pay damages for third party content, but other cases have held the opposite.

A recent decision from the Argentina Supreme Court may provide some help. The Court applied an old doctrine to decide that an intermediary should not be liable. Sujarchuk Ariel Bernardo c/Warley Jorge Alberto s/daños y perjuicios" –SC, S.755, L.XLVI.

Background

The facts of the case are simple. The defendant, Mr. Warley, posted on his blog an article written by another person. The article, according to the plaintiff Mr. Sujarchuk harmed his reputation and he claimed for damages against Mr. Warley, who, besides posting the article, added as a title to the post containing the word "sinister" which was not in the original article.

Plaintiff won the case at the First Instance Judge and also at the Court of Appeal. However, the Argentinean Supreme Court reversed the decision, applying the doctrine known as "Campillay" (Fallos 308:789). The name of the doctrine came from a case decided in the 1980s, and the holding relevant for the "Sujarchuk" case is: a journalist or a publisher is not liable for the content published if he or she mentioned clearly the source from where the content is taken and also he or she has not contributed substantially to the content that was published.

The Supreme Court followed the arguments of the Attorney General when she gave her opinion in the case. After highlighting the importance of freedom of expression as a basic human right and its importance for democracy, the Attorney General cited the Campillay doctrine and noted that in the instant case the content of the article at issue was not written by the defendant but only posted to his blog.

Regarding the title created by the defendant, the Attorney General considered that this didn't change substantially what the article itself said, so it did not defeat the Campillay doctrine: defendant merely reproduced content written by a third party and identified the source.

The Sujarchuk case could have a great impact in a decision pending before the Supreme Court where the intermediaries are not bloggers but important search engines (Google and Yahoo). Though the case "Da Cunha Virginia c/Yahoo de Argentina SRL y Otro s/ daños y perjuicios" –S.C., D.544, L.XLVI.- is not decided yet, the Attorney General in her opinion of the case noted that the "Campillay" doctrine is applicable in cases where the search engines only indicate the place where information is available on the Internet.

As I said at the beginning, in Argentina we don´t have legislation like Section 230 of the Communications Decency Act or the DMCA. However, there is strong advocacy in Argentina to clarify and to modernize the law in the country. However, in the meantime, an old doctrine may provide a safe harbor for intermediaries. In other words, some Judges understood that some old wine may fit in a new bottle.

Eduardo Bertoni is Global Clinical Professor at New York University - School of Law and Director of the CELE, the Center for Studies on Freedom of Expression at University of Palermo School of Law in Argentina.

RETURN TO TABLE OF CONTENTS

Wall Street Journal Succeeds in Lifting UK Reporting Injunction

Four Day Ban on Libor Scandal Reporting

By Jason P. Conti, Jacob P. Goldstein

Prosecutors from Britain's Serious Fraud Office raced to court on October 17 to obtain an injunction prohibiting the publication of details of their investigation into alleged manipulation of benchmark interest rates. *Matter of R v. Tom Hayes*

Meanwhile, The Wall Street Journal published on its website an article, "U.K. Expected to Name Alleged Co-Conspirators in Libor Scandal," revealing the names of several implicated traders and brokers. British prosecutors had privately identified roughly two dozen uncharged, alleged co-conspirators as they prepared for an October 21 court hearing in the criminal cases against Tom Hayes, Terry Farr, and James Gilmour. This was the latest step in a massive, global investigation of more than a dozen banks that has so far yielded billions of dollars in settlements and several prosecutions related to the London interbank offered rate and other benchmarks.

MARKETS

U.K. Expected to Name Alleged Co-Conspirators in Libor Scandal

Fraud Prosecutors Seen Identifying Roughly Two Dozen Traders and Brokers

Email Print Save 0 Comments A A

By DAVID ENRICH and JENNY STRASBURG CONNECT

Updated Oct. 17, 2013 5:06 p.m. ET

Editor's note, Oct. 21, 2013, 12:29 p.m. ET: This article was originally published on Oct. 17 and was removed from WSJ.com later that day to comply with a court order issued by an English judge. The article has been republished after the judge allowed the order to expire without renewal on Oct. 21. Prosecutors had planned to publicly name nearly two dozen brokers and traders they believe were involved in a plot to manipulate benchmark interest rates in indictments against three defendants. In a court hearing on Oct. 21, the judge agreed to demands by lawyers representing the alleged co-conspirators to withhold the names of alleged co-conspirators from two of the indictments, which had still been in draft form. The other defendant's indictment, however, contains some of the alleged co-conspirators related to his charges.

LONDON—British fraud prosecutors next week are expected to publicly name roughly two dozen traders and brokers who they believe were involved in a plot to manipulate benchmark interest rates, according to people familiar with the plans.

Lawyers representing the U.K.'s Serious Fraud Office are due to appear in a London courtroom Monday for a hearing about their criminal-fraud cases against a former bank trader and two former brokers. At that hearing, the lawyers plan to publicly identify other traders and brokers who allegedly conspired with the defendants to rig the London interbank offered rate, or Libor, these people say.

The planned naming of the alleged co-conspirators, who haven't been charged, will expand

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A few hours after the Journal published, the Honorable Mr. Justice Cooke enjoined the Journal and its UK-based European banking editor from publishing in England and Wales the names and details of uncharged, alleged co-conspirators of Hayes, Farr, or Gilmour. The judge further ordered that "any existing internet publication thereof be deleted." The order threatened the editor, David Enrich, the Journal, and any third party with imprisonment, fine and asset seizure for any breach of its terms.

The Journal removed the article from its website, replacing it with a note about the court order, and published a story about the injunction, which it decried as "a serious affront to press freedom." The Journal also printed the disputed article in the newspaper's U.S. and Asia editions and prepared to fight the injunction in court.

On October 21, after hearing from lawyers for the Journal, the prosecutors and barristers for several anonymous clients seeking to cloak their identities, Justice Cooke ruled that there was "no basis" for the injunction and let it expire.

So what led him to prohibit publication for nearly four days and to order, moreover, that the published article be "deleted" from the internet?

Contempt of Court and Reporting Restrictions

In the week before the previously scheduled October 21st hearing in the prosecution of Hayes et al., the U.K. Attorney General circulated a bulletin to news organizations urging caution in reporting on the proceedings, a friendly reminder of the general legal constraints on reporting about court cases.

Under English law, the Contempt of Court Act 1981 makes punishable by fine or imprisonment any publication "which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced." The prohibition, which is a strict liability offense, applies only to "active" proceedings—from whenever an arrest warrant is issued or a defendant arrested until the proceedings end, with acquittal or sentencing. In 2011, for example, the Sun and the Daily Mail were found guilty of contempt and fined for publishing online a photograph of a murder defendant holding a gun.

The law also authorizes judges to impose reporting restrictions to postpone or prohibit news coverage of court

(Continued on page 22)

(Continued from page 21)

proceedings, even fair and accurate reports, in order to ensure a fair trial: "[T]he court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose."

On October 17, after learning that the Journal was working on a story about the alleged co-conspirators, prosecutors called Enrich to draw his attention to the Attorney General's bulletin, which had not been sent to the Journal. The Serious Fraud Office also made clear its view that the names of the uncharged individuals in the indictments should not be published before Monday's hearing, at which time the judge would consider whether to impose reporting restrictions. The Journal later reported that the Serious Fraud Office was in the process of pushing "for other suspects to agree to serve as cooperating witnesses, dangling possible anonymity as an incentive for their help."

Ex Parte, Prior Restraint Hearing

Without making any assurances about publishing plans, the Journal went about its work. The Journal prepared a story out of its London bureau, confident that there was significant public interest, and no risk of prejudice as the article pointed out that being an unindicted co-conspirator did not amount to an accusation of wrongdoing or suggest any arrest or charges would follow. Later that Thursday afternoon, the prosecutors applied for the prior restraint "to maintain the status quo" of confidentiality until the court's Monday hearing. The Journal was unable to participate in the emergency hearing because the prosecutors provided only 25 minutes' notice and were unclear on the location.

While formally adopting a "neutral position," the prosecutors explained that these individuals had been named in the indictments against Hayes, Farr, or Gilmour in order to provide those defendants with necessary details of the charges against them.

However, as the alleged co-conspirators have not been charged and may never be accused of wrongdoing, disclosure of their identities could cause "financial prejudice, reputational damage and unfairness." The prosecutors' submission to the court noted that "the risk of prejudice is all the greater" because this is "such a high profile case." They also laid out several arguments against any restriction on the press, including the counter-argument that the "considerable public interest" here supported transparent proceedings.

Nevertheless, because any publication of the names would frustrate the court's consideration of reporting restrictions on Monday, Justice Cooke agreed to issue an injunction "on an interim basis until the determination of an application to impose reporting restrictions" could be heard.

As Justice Cooke and the prosecutors discussed the appropriate wording of the order, they learned that the Journal had just published its article, naming eight alleged co-conspirators. Finding that "the continued existence of that publication would also frustrate the litigation in relation to publicity," the court revised its order to mandate that "any existing internet publication thereof be deleted."

The Journal complied with the order and prepared to fight it at Monday's hearing.

> The judge further ordered that "any existing internet publication thereof be deleted." The order threatened the editor, David Enrich, the Journal, and any third party with imprisonment, fine and asset seizure for any breach of its terms.

The Order Expires; No Basis for Any Prejudice

In addition to several procedural objections to the order, the Journal argued that a finding of "substantial risk of prejudice" in any "pending or imminent" proceedings was impossible. Nobody was suggesting that revealing the identities of the alleged co-conspirators would prejudice the active prosecutions of Hayes, Farr, and Gilmour. And there were no pending or imminent proceedings against the alleged co-conspirators as they had not been arrested or, in some cases, even interviewed. Any proceedings against them would be so far removed that publicity now could not possibly be sufficiently prejudicial to justify an injunction.

Moreover, given the substantial reporting on the Libor scandal, several of these individuals had already been

(Continued on page 23)

(Continued from page 22)

publicly identified – not to mention the various reports and tweets of the Journal's latest article that remained accessible online even after the Journal took the article itself down from its website. The Libor investigation has been the subject of extensive, world-wide press coverage. In light of the public interest in unfettered reporting on these proceedings as well as the inability of the court to restrain the significant amount of reporting by news outlets outside its jurisdiction, the Journal also argued that an injunction would be inappropriate and ineffective. The Journal further stressed that the individuals' reputational concerns could not support the order because of the rule against prior restraints of allegedly defamatory statements.

Lawyers for several anonymous clients nevertheless urged the court to keep their identities out of the public record.

At the hearing, Justice Cooke seemed rather unsympathetic towards the Journal, calling its Thursday publication a deliberate attempt to subvert the court's power to decide on reporting restrictions. He demanded to know what materials the Journal had obtained to report on the secret names and what the Journal intended to publish, to which the only response was a declaration of our intention to publish fair and responsible reports. Justice Cooke noted that the Journal must have known that a breach of confidence led it to learn the identities.

Regardless, Justice Cooke let his order expire and found "no basis" for any reporting restrictions, concluding that any proceedings would be so distant that there was no risk of serious prejudice. The Journal promptly re-published the article on its website, with a revised editor's note. Justice Cooke also said the named individuals were free to pursue claims for injunctive relief, but they would have to make new applications in the civil courts. None has done so.

Jason P. Conti, Jacob P. Goldstein Dow Jones & Company, Inc. was represented by Adam Wolanski, 5RB, and Caroline Kean, Wiggin LLP. Jonathan Scherbel-Ball, One Brick Court, represented a coalition of news organizations opposed to the order. Mukul Chawla QC, 9-12 Bell Yard, represented the Serious Fraud Office.

Fifth Circuit Court of Appeals Vacates Website Takedown Order as Prior Restraint

By Dan Zimmerman and Mary Ellen Roy

The United States Fifth Circuit Court of Appeals recently vacated an order that required a website maintained by the plaintiffs in an ongoing action "to be closed and removed immediately, ceasing all operation and publication."

In *Marceaux v. Lafayette City-Parish Consolidated Government*, 2013 WL 5431473 (5th Cir. 9/30/13), a number of current and former police officers for the City of Lafayette, Louisiana had filed suit against the City, their chief of police and other governmental officials. The Complaint contained lurid allegations of misconduct, civil rights violations and favoritism in the Lafayette Police Department, and it alleged a "Code of Silence" pursuant to which police officers who reported misconduct by other officers were subject to punishment while those who overlooked such misconduct were rewarded with promotions or better assignments.

Plaintiffs engaged in an extensive media and social media campaign to publicize their claims. Plaintiffs' counsel created a website, www.realcopsvscraft.com (James Craft is Lafayette's Chief of Police and a defendant in the case) that contained an image of Chief Craft, quotes from newspaper articles and the Complaint that describe the Lafayette Police Department as "rotten," and hyperlinks to multiple recordings of conversations within the police department "that were obtained surreptitiously by some of the plaintiffs."

The defendants moved for a protective order, seeking various relief including requiring the plaintiffs to take down the website. The Court issued a gag order requiring that "the parties and their attorneys shall have no contact or communication with the media, or postings over the internet. . . regarding the allegations in this lawsuit, or in any way related to the subject matter of this lawsuit until this Court has had the opportunity to rule on the outstanding Motion for Protective Order." 2012 WL 6042614 (W.D. La. 12/3/12). The hearing on the motion for protective order began on Friday September 14 but was not completed until Monday, September 17. During the weekend break, ownership of the website was transferred from plaintiffs' counsel to one of the plaintiffs.

United States Magistrate Judge Patrick Hanna was clearly upset with the plaintiffs for seeking to "try this case in the press." Judge Hanna described the website as "patently offensive on its face as a means of producing information rather than being an objective source of information supposedly created for the protection of the litigants." While denying much of the relief the plaintiffs sought, Judge Hanna continued the gag order in effect and further ordered that "the website www.realcopsvscraft.com shall be closed and removed immediately, ceasing all operation and publication." 2012 WL 4194521 (W.D. La. 9/19/12).

> The takedown order thus was "not 'narrowly tailored' to excising matters with a sufficient potential for prejudice to warrant prior restraint."

Judge Hanna explained that he did "not intend to gag the press, but rather the litigants and their lawyers to the same extent that the lawyers would be ethically prohibited from making extra-judicial comments under the Code of Professional Responsibility Rule 3.6 which provides: (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

While recognizing that "a gag order . . . must be 'sufficiently narrow to eliminate substantially only that speech having a meaningful likelihood of materially impairing the court's ability to conduct a fair trial,'" Judge Hanna concluded that "the website . . . is and has been used as a vehicle by which to disseminate inappropriate information to the media and the public" and ordered the website to be taken down.

District Judge Richard Haik, Sr. affirmed Judge Hanna's Order in a one-paragraph ruling that merely stated that he

(Continued on page 25)

(Continued from page 24)

"agrees with the findings made by the Magistrate Judge and with the Ruling." Plaintiffs filed for an interlocutory appeal.

The Fifth Circuit first held that it had jurisdiction under the collateral order rule, which it has "repeatedly found . . . applies in cases in which pre-trial orders arguably infringe on First Amendment rights." Turning to the merits, the Court first noted that the police officers had stated that they were willing to be abide by Rule 3.6 (even though the Rule only applies to attorneys), so the Court focused only on "the portion of the order addressing removal of the entire Website."

Because Judge Hanna's order "explicitly restricts the expression of attorneys and parties in this litigation as it relates to the media and prevents the Officers from expression in the Website," the Court easily found the order to be a prior restraint.

Applying the standard it set in *United States v. Brown*, 218 F.3d 415 (5th Cir. 2000), for gag orders in criminal cases, the Court required a showing of "a substantial likelihood of prejudice" to justify the takedown order. Despite the evidence of extra-judicial comments by the plaintiffs and their counsel, there was no showing of a "nexus between the comments and the potential for prejudice to the jury venire through the entirety of the Website." The takedown order thus was "not 'narrowly tailored' to excising matters with a sufficient potential for prejudice to warrant prior restraint." The Court vacated the takedown order and remanded the case to the district court.

While the takedown order was on appeal, Judge Haik adopted Judge Hanna's recommendation to dismiss most of the claims and most of the parties, leaving pending only six plaintiff's claims for the alleged violation of their First Amendment free speech rights. 921 F.Supp.2d 605 (W.D. La. 2013). It appears that the website, www.realcopsvscraft.com, is no longer active.

Plaintiff police officers are represented by John Alexander, Sr., Stanley Spring, II, and Richard Alexander. Defendants are represented by Michael Corry, Patrick Briney, and Hallie Coreil, Briney Foret Corry, Lafayette, LA. Ms. Roy is a partner and Mr. Zimmerman a staff attorney at Phelps Dunbar, LLP.

New California Law Protects Journalists' Records

By Jonathan Segal and Thomas R. Burke

Journalists in California must now receive advanced notice if their records are being subpoenaed either directly from them or through a subpoena issued to a third party. California's new law—an amendment to California Civil Procedure Section 1986.1—was the California Legislature's unified response to what was seen, by many, to be an abuse of power by federal investigators. The law enhances existing notice requirements for California's journalists who are protected by California's shield law.

The new law, Section 1986.1, requires that at least five days' notice be given to journalists when subpoenaing records that belong to the journalist or if the records are maintained by third parties. Such records include cell-phone records, web-based email like Gmail or Yahoo Mail, or cloud based data storage like Google Docs, iCloud, Microsoft Skydrive, or Dropbox, commonly used by today's journalists.

The notice must include "an explanation of why the requested records will be of material assistance to the party seeking them and why alternate sources of information are not sufficient to avoid the need for the subpoena." Under the new law, five days' notice must be given to the journalist and the publisher of the newspaper, magazine, or other publication or station that employs or contracts with the journalist" in both civil and criminal cases except in "circumstances that pose a clear and substantial threat to the integrity of the criminal investigation or present an imminent risk of death or serious bodily harm."

Before this amendment, anyone issuing a subpoena was required to give reporters, publishers, and broadcasters five days' notice, absent "exigent circumstances," before subpoenaing records or requiring their appearance at a proceeding. Section 1986.1 was originally enacted after Tim Crews, a publisher and editor in Northern California, fought a pre-trial criminal subpoena seeking to compel him to disclose the identity of confidential sources. Since then, Section 1986.1's five-day notice requirement has had a powerful practical effect: many subpoenas are not issued at all or are withdrawn when counsel for the journalist has time to intervene and object and explain how the information being subpoenaed is protected by California's shield law.

The legislation, SB 558, passed both houses of the California Legislature unanimously, and was signed by Gov. Jerry Brown on Oct. 3, 2013. It was authored and introduced by California State Senator Ted W. Lieu (D. Marina del Ray) and sponsored by the California Newspaper Publishers Association ("CNPA"). In a press release issued after the bill was unanimously passed, Sen. Lieu observed that "Today's bipartisan vote makes it clear: California will protect the First Amendment." Lieu wrote and introduced the bill to address concerns that arose after the federal government secretly obtained records from Associated Press and Fox News. In the aftermath of those incidents, the Justice Department instituted new guidelines to prevent secret acquisition of reporters' records in possession of third parties. California's new law mirrors those guidelines.

Jim Ewert, CNPA's General Counsel, led the effort to have the legislation enacted into law and is thrilled to see this new protection for California's journalists. "Ever since Section 1986.1 has been on the books, lawyers who seek to subpoena journalists in California are required to give advanced notice before they issue a subpoena. The practical effect of requiring such notice is that media lawyers have time to act to potentially convince the lawyer issuing the subpoena to withdraw it. With this change, a more stringent notice protection is imposed and the law will safeguard against subpoenas that seek access to journalists' records maintained by third-parties."

The existing law "prohibits a publisher, editor, reporter, or other person connected with or employed by a newspaper, magazine, or other periodical publication, or by a press association or wire service, from being held in contempt for refusing to disclose the source of any information procured for publication while so connected or employed." Legislative Digest, SB 558. "The law also prohibits any of those persons from being held in contempt for refusing to disclose any unpublished information obtained or prepared in gathering, receiving, or processing information for communication to the public." *Id.*

The law becomes effective on January 1, 2014.

Jonathan Segal is an associate and Thomas R. Burke a partner at Davis Wright Tremaine LLP in California.

RETURN TO TABLE OF CONTENTS

Vermont Newspaper Wins Access to Investigation Records on Police Use of Porn

Public Interest Trumps Privacy Rights of Public Employees

By Matthew B. Byrne

The Vermont Supreme Court held that documents about the use of pornography by police officers and public employees at work were records that the public has a right to review. *Rutland Herald v. City of Rutland*, 2013 VT 98 (Oct. 11, 2013). The opinion brought to light new facts that had previously been obscured from public view. For example, "internal investigation records reveal[ed] that one employee downloaded between 5,000 to 10,000 pornographic images onto his work computer, including possibly child pornography, and an investigator estimated that it would take one week of constant viewing to review all of the images." *Id.* at ¶ 14.

In reaching its decision that the records should become public, the Court reviewed the competing interests in government accountability and the privacy rights of public employees. The Court found no abuse of discretion in the trial court's balancing of the interests. The Vermont Supreme Court held that balance of interests "tips in favor of disclosure." *Rutland Herald*, 2013 VT 98, ¶ 22.

In evaluating the interest in government accountability, the Court approved of the trial court's analysis, noting that "there is a significant public interest in knowing how the police department supervises its employees and responds to allegations of misconduct." *Id.* ¶ 14. The Court agreed that there was little weight to be accorded to the privacy interests of public officials watching pornography on public computers during work hours. "The privacy interests at stake are far less weighty. Certainly, one cannot reasonably expect a high level of privacy in viewing and sending pornography on work computers while on duty at a public law enforcement agency." *Id.* ¶

In evaluating the interest in government accountability, the Court approved of the trial court's analysis, noting that "there is a significant public interest in knowing how the police department supervises its employees and responds to allegations of misconduct."

The Vermont Supreme Court also affirmed the trial court's decision not to redact the names of the employees involved. "As stated above, the court found information about the investigations, including the penalties imposed, to be vital to the public's ability to scrutinize both the employees' behavior and the management's response to that behavior. Additionally, it found that redacting the employee's names would cast suspicion over the whole department and minimize the hard work and dedication shown by the vast majority of the police department." *Id.* ¶ 17.

The case represents the latest chapter in a series of cases brought by the Rutland Herald involving the viewing of pornography by both state and local police offices in the State. *See Rutland Herald v. City of Rutland*, 2012 VT 26; *Rutland Herald v. Vermont State Police*, 2012 VT 24. In these case, the Court held that records of criminal investigations were categorically exempt from disclosure. *See id.* As a result of the earlier litigation, the General Assembly revised the Public Records Act to make it easier to get certain criminal investigation records. *See* 1 V.S.A. § 319(d).

Robert B. Hemley and Matthew B. Byrne of Gravel and Shea P.C. in Vermont represented the Rutland Herald.

RETURN TO TABLE OF CONTENTS

Freedom of Information Survey Finds Fewer Resources Devoted to FOIA and Open Government Issues

By Amaris Elliott-Engel

A recent Survey has found a substantial decline over the last two to five years in the amount of resources devoted by media organizations to FOIA and open government issues, according to a joint survey of 153 MLRC Defense Counsel Section members and members of the National Freedom of Information Coalition (NFOIC), based at the Missouri School of Journalism.

The 2013 survey shows the continuation of a trend reported two years ago in a prior survey of people in the field who see a decrease in legal resources being applied to FOIA and open government issues. This year 46.2 percent of surveyed MLRC attorneys ("media attorneys") said media organizations had decreased those legal resources substantially, while 35.6 percent of NFOIC representatives indicated the same.

In 2011, 23.37 percent of surveyed media attorneys reported that open government lawsuits had decreased substantially, while 25.5 percent of those surveyed from NFOIC reported the same.

According to the jointly administered 2013 survey:

- 46.2 percent of the surveyed media attorneys said media organizations had decreased those resources substantially, while 35.6 percent of NFOIC representatives indicated the same.
- 24.6 percent of media attorneys said such resources had decreased slightly, while 25.4 percent of NFOIC representatives indicated the same.
- 3.1. percent of media attorneys said the resources had stayed about the same in contrast to the 20.3 percent of NFOIC representatives who said such resources had stayed on the same level.
- The numbers of respondents in both groups who view that such resources had increased slightly or increased substantially were closer in percentage.

More media attorneys than NFOIC respondents reported that interventions on behalf of media clients on open government issues has decreased:

- 26.2 percent of media attorneys said such intervention has decreased substantially in the last two to five years, and 27.9 percent said such intervention has decreased slightly, while no NFOIC respondents found a substantial decrease and only 3.6 percent found a slight decrease.
- The reason for the decrease in such legal action by media organizations is due to lack of funds or resources for litigation, 83.3 percent of media attorneys and 56.9 percent of NFOIC respondents said.
- Another reason for the decrease is a decline in the kind of reporting that requires an assertive legal posture to access information, 29.3 percent of NFOIC respondents said and 13.3 percent of media attorneys said.

(Continued on page 29)

(Continued from page 28)

- Only a small percent from each group said that legal actions by media organizations are not continuing to decrease.

A higher percent of NFOIC members reported seeing an increase in government efforts to comply with open government laws:

- 10.4 percent of media attorneys said governmental compliance in providing access to citizens and to comply with open government laws had stayed about the same in the last two to five years, while 33.3 percent of NFOIC members had that view.

- 32.8 percent of media attorneys said such governmental compliance had decreased slightly, but 20 percent of NFOIC representatives saw a slight decrease.

- Those freedom of information advocates and media attorneys who said that such efforts had stayed about the same were closer in percentage: 34.3 percent of media attorneys and 31.7 percent of NFOIC members said compliance efforts had stayed on an even keel.

Media attorneys and NFOIC attorneys were also surveyed on which types of government agencies are the most difficult for private citizens and journalists to get information from:

- Municipal government: 47.5 percent of media attorneys and 38.6 percent of freedom of information professionals said municipal government is the most difficult to obtain information from.

- County government: 27.9 percent of media attorneys and 22.8 percent of freedom of information professionals said county government is the most difficult to obtain information from.

- State government: 31.1 percent of media attorneys and 29.8 percent of freedom of information professionals said state government is the most difficult to obtain information from.

- Federal government: 29.5 percent of media attorneys and 12.3 percent of freedom of information professionals said federal government is the most difficult to obtain information from.

- Quasi-public governmental bodies: 24.6 percent of media attorneys and 45.6 percent of freedom of information professionals said quasi-public governmental bodies are the most difficult to obtain information from.

- Public universities: 29.5 percent of media attorneys and 43.9 percent of freedom of information professionals said public universities are the most difficult to obtain information from.

- Police departments: 45.9 percent of media attorneys and 57.9 percent of freedom of information professionals said police departments are the most difficult to obtain information from.

- Local school boards: 21.3 percent of media attorneys and 49.1 percent of freedom of information professionals said local school boards are the most difficult to obtain information from.

(Continued on page 30)

(Continued from page 29)

Media attorneys and NFOIC members were on the same page that state government agencies tend to the most transparent:

- 53.1 percent of media attorneys said state-government agencies were the most transparent, while 57.8 percent of NFOIC respondents reported the same.
- Municipal-government entities are the most transparent and cooperative, according to 30.6 percent of media attorneys and 44.4 percent of NFOIC respondents.
- County governments are the most transparent according to 20.4 percent of media attorneys and 35.6 percent of NFOIC members.
- The federal government is the most transparent governmental agency, according to 22.4 percent of media attorneys and 17.8 percent of NFOIC respondents.
- Police departments are the most transparent governmental agencies, according to only 8.2 percent of media attorneys and 20 percent of NFOIC respondents.
- Local school boards are the most transparent governmental agencies, according to only 4.1 percent of media attorneys and 11.1 percent of NFOIC respondents.
- Public universities are the most transparent governmental agencies, according to only 8.2 percent of media attorneys and 8.9 percent of NFOIC respondents.
- Finally, quasi-governmental bodies were reported to be the most transparent by only 4 percent of attorneys and by no NFOIC members.

Both media attorneys and freedom of information professionals reported at a high rate that "emerging forms of public data and proactive disclosures" have not made their services and resources less needed over the last two to five years:

- 20 percent of media attorneys said their services are much more needed with the rise of public data and proactive disclosure by governmental entities, while 33.9 percent of NFOIC correspondents indicated the same.
- 18.3 percent of media attorneys said their services are slightly more needed, while 21.4 percent of NFOIC respondents indicated the same.
- Fifty percent of media attorneys said there was no change, while 41.1 percent of NFOIC respondents indicated the same.

More NFOIC respondents than media attorneys reported that enforcement mechanisms for noncompliance by governmental officials with open government rules were ineffective:

- 33.9 percent of NFOIC respondents said enforcement measures were not effective at all, while 16.4 percent of media attorneys reported the same thing.

(Continued on page 31)

- 32.2 percent of NFOIC members said enforcement measures were somewhat effective, while 42.6 percent of media attorneys reported the same thing.
- The number of media attorney and NFOIC respondents who said enforcement measures were somewhat ineffective was very close with 21.3 percent of media attorneys reporting that and 22.0 percent of NFOIC correspondents reporting that.

Other highlights of the survey include:

- The majority of media attorneys and NFOIC respondents said that "disingenuous rationalization" was the most common reason why government officials deny access to information. Interpretations of statutory language and "inappropriate game-playing" were the next most common reasons for governmental officials to deny access to information, those surveyed reported.

- The media attorneys and NFOIC members agreed that the three most common obstacles presented by the government in accessing information are: the citation of invalid exceptions, lack of response or delayed responses, and unreasonable fees.

- Many more media attorneys than NFOIC respondents said the changing landscape of government access has affected the quality of news coverage in their area: 49.2 percent of media attorneys compared to 25.0 percent of NFOIC members.

Amaris Elliott-Engel is MLRC's 2013-14 Legal Fellow.

Ninth Circuit Lacks Appellate Jurisdiction to Review Reporters' Request for PACER Fee Exemption

The Ninth Circuit has ruled that it does not have the power to review a district judge's administrative order denying two California reporters an exemption from the fees charged for electronic access to federal court records. *In re Gollan*, 728 F.3d 1033 (9th Cir. Cal. 2013) (O'Scannlain, Hurtwitz, Piersol, JJ.).

Background

Journalists Jennifer Gollan and Shane Shifflett, of the non-profit Center for Investigative Reporting, sought a four-month exemption from the electronic access fees in March 2012 in order to analyze the "'effectiveness of the court's conflict-checking software and hardware to help federal judges identify situations requiring their recusal.'"
At the time of the application, Gollan and Shifflett were employees of The Bay Citizen.

The Judicial Conference of the United States is authorized by Congress to support the Public Access to Court Electronic Records (PACER) system by charging fees as well as to exempt certain classes of users from the fees if they are an unreasonable burden to those users. The PACER fee schedule in 2012 called on district courts to consider exempting, among others, users who are poor and not-for-profit organizations. The same fee schedule said that members of the media, among others, should not be exempted.

While the journalists argued that categorically excluding members of the media from fee waivers could be unconstitutional discrimination against the press, the conference clarified in its 2013 fee schedule that judges can consider exempting all non-profits, including journalism non-profits. But the conference also said that judges should exercise caution on granting exemptions for members of the media as media organizations typically have the ability to pay PACER fees.

Ninth Circuit Decision

In an August 29 opinion, the panel said that under 28 U.S.C. § 1291, which sets out circuit courts' appellate authority, the district court's decision was not a final, reviewable decision. Instead, the district court decision was an administrative one, the panel said, including because the decision arose from a non-adversarial proceeding and the application for an electronic access fees exemption is disconnected from any pending litigation.

The panel also said a lawsuit by the journalists seeking to enjoin the fee schedule could lead to a reviewable decision.

In a special concurrence to his own opinion, Judge Diarmuid F. O' Scannlain said that the '"elephant in the room'" is who can review an appeal when applications for exemptions from PACER fees are denied. "Assuming ordinary PACER-fee determinations are not reviewable by the judiciary's administrative apparatus, it will be up to Congress to decide whether to fashion an appellate-review mechanism, or whether to leave them within the exclusive purview of district courts," the special concurrence said.

Applicants were represented by Rochelle L. Wilcox and Thomas R. Burke of Davis Wright Tremaine LLP in San Francisco. The U.S. Department of Justice, which argued the case for the Administrative Office of the United States Courts as amicus curiae, was represented by H. Thomas Byron III, of the DOJ's Civil Appellate Division, Stuart F. Delery, a DOJ Principal Deputy Assistant Attorney General, U.S. Attorney Melinda L. Haag for the Northern District of California, Matthew M. Collette of the DOJ's Civil Appellate Division, and Robert K. Loesche and Sigmund Adams, of the Administrative Office of United States Courts.

RETURN TO TABLE OF CONTENTS

New California Law Criminalizes Photography of Celebrities' Children

California has increased the criminal penalties for harassment directed toward the children of celebrities or other children harassed because of their parents' or guardians' line of work. The new statute increases the crime of general harassment as well as sets up a derivative civil cause of action.

Senate Bill 606, which was signed into law in late September, now makes intentional harassment a crime that can be punished by imprisonment in county jail for up to a year, with a fine of up to $10,000, or a combination of imprisonment and a fine. Previously, the intentional harassment of children on the basis of their parents' or guardians' employment was punishable by only six months in jail or a fine of $1,000 or less.

According to the statutory definition, harassment:

> "means knowing and willful conduct directed at a specific child or ward that seriously alarms, annoys, torments, or terrorizes the child or ward, and that serves no legitimate purpose, including, but not limited to, that conduct occurring during the course of any actual or attempted recording of the child's or ward's image or voice, or both, without the express consent of the parent or legal guardian of the child or ward, by following the child's or ward's activities or by lying in wait. The conduct must be such as would cause a reasonable child to suffer substantial emotional distress, and actually cause the victim to suffer substantial emotional distress."

California has increased the criminal penalties for harassment directed toward the children of celebrities or other children harassed because of their parents' or guardians' line of work.

The definition of harassment was expanded to "include conduct occurring during the course of actual or attempted recording of the child's image or voice without express consent of the child's parent or legal guardian, by following the child's activities or by lying in wait," according to the bill's analysis.

A second violation of the law would now be punishable by a fine up to $20,000 and county-jail imprisonment of at least five days but not more than one year. A third violation of the law would be punishable by a fine up to $30,000 and county-jail imprisonment of at least 30 days but not more than one year.

Opponents of the bill included the California Broadcasters Association, the California Newspaper Publishers Association, and the National Press Photographers Association. Mickey H. Osterreicher, the NPPA's general counsel, wrote in a letter that the definitions are vague and "susceptible to subjective interpretation." The law also burdens substantially more speech than is necessary to advance a governmental interest.

"We believe the increased penalties and liabilities related to such actions improperly abridges First Amendment protected activity occurring in traditional public forums and other places where a person normally has no reasonable expectation of privacy," Osterreicher wrote.

The CNPA joined in the NPPA's First Amendment concerns raised by NPPA and also argued that the bill would "sanction nuisance lawsuits by disgruntled subjects of news photographs," according a bill analysis.

Supporters of the bill included the California Medical Association, the California National Organization for Women, Crime Victims United, the California Psychological Association, the Screen Actors Guild, American Federation of Television and Radio Artists, and five law enforcement groups.

Two celebrities, actresses Jennifer Garner and Halle Berry, testified in favor of the legislation in August.

Garner described having "a gang of shouting, arguing, law-breaking photographers who camp out everywhere we are, all day, every day." A mentally ill stalker, who Garner said threatened to cut her baby out of her belly, was arrested waiting among a throng of paparazzi gathered at Garner's

(Continued on page 34)

(Continued from page 33)

older daughter's playschool. Another family's three-year-old was knocked over in another incident at the playschool, Garner also testified.

"We're not just whiny celebrities," Berry testified. "We're moms who are just trying to protect our children. It's not about me. Take my picture. I get it. But these little innocent children … they're not actors. They didn't ask to be thrown into this game."

The law also allows for celebrity parents to bring civil lawsuits on the basis of alleged violations of the harassment law. Remedies under the new statute are: actual damages, punitive damages, reasonable attorney fees, costs, disgorgement of any compensation derived from the dissemination of a celebrity's child's image or voice, and injunctive relief.

However, the law immunizes the transmission, publication or broadcast of a child's image or voice. The bill's analysis said that the prior statute was adopted to protect children of health care employees who work at abortion clinics, and the new law would also protect the children of law enforcement officials.

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

Prosecutors' Online Posts and Leaks Grounds for New Trial in Murder Case

Use of Social Media and Leaks Prejudiced Fair Trial Rights

Describing it as a "bitter pill to swallow," a federal judge granted a new trial to five former New Orleans police officers convicted of murder and civil rights violations in the aftermath of Hurricane Katrina. *United States v. Bowen*, 2013 U.S. Dist. LEXIS 134434 (E.D. La. Sept. 17, 2013) (Engelhardt, J.).

In what the judge called a "bizarre and appalling turn of events," federal prosecutors in New Orleans and Washington, D.C., were found to have posted dozens of pseudonymous messages on the Times Picayune website during pretrial and trial proceedings. The messages repeatedly asserted that defendants were guilty and that the New Orleans police department was corrupt. The court also found that prosecutors leaked confidential case information to the newspaper and Associated Press. The comments and leaks not only violated professional conduct rules but created a "poisonous atmosphere" that prejudiced defendants' fair trial rights.

Background

The defendants, five former New Orleans police officers, were involved in the notorious Danizger Bridge shootings in the days after Hurricane Katrina struck the city. They were convicted in 2011 of shooting and killing two unarmed men trying to cross the bridge and then trying to cover up those murders.

The defendants moved for a new trial arguing that 1) online postings by the prosecution inflamed public opinion against the defendants and prejudiced their rights to a fair trial; and 2) that leaks to the *Times-Picayune* and the Associated Press improperly disclosed "the government's theories regarding the defendants' alleged guilt, the status of plea negotiations, and the upcoming guilty plea" of a cooperating witness in violation of the professional rules for federal prosecutors.

A special investigation into alleged prosecutorial misconduct revealed that federal prosecutors in New Orleans and at the Justice Department in Washington had been posting dozens of messages about the case on Nola.com, the website of the Times-Picayune newspaper. Many of the postings are detailed in the courts 129 page opinion. Among the many, Assistant U.S. Attorney Sal Perricone in New Orleans, himself a former New Orleans police officer, frequently accused the New Orleans police department of corruption, commented on trial testimony, and asserted that defendants were guilty.

The government argued, among other things, that no actual prejudice occurred because the comments were pseudonymous and there was no evidence the comments were read or influenced anyone on the jury. The court, however, found that under the circumstances actual prejudice on the jury need not be shown because of the extensive and deliberate misconduct. But the court went on to find that actual prejudice was in fact established where seven of twelve jurors were readers of Nola.com. The judge said it was difficult to conceive that the defendants' constitutional right to a fair trial with an impartial jury could withstand the "ferocity" of the multiple online comments made by prosecutors. Prosecutors have appealed the ruling to the Fifth Circuit.

Press Issues

In dicta, the judge wrote that the news organizations should have been pressed to disclose the identities of commenters and sources of the leaks. Citing to the recent Fourth Circuit decision in the James Risen reporters privilege case, U.S. v. Sterling, the judge suggested that any assertion of journalistic privilege would have been inapplicable. Earlier in the proceedings, the Department of Justice decided not to pursue a subpoena it issued to Nola.com seeking the identity of online commenters.

More recently, the *Times-Picayune* and Associated Press filed motions to intervene in the case to obtain access to certain sealed and undocketed filing. The judge found the access request "ironic" in light of news organizations' decision to keep information "hidden" from the public. Moreover, the judge suggested that by withholding information about commenters and leakers, the news organizations supported by implication the criminal defendants' prosecutorial misconduct claims.

RETURN TO TABLE OF CONTENTS