

MULRC *Media
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MEDIA LAW LETTER

Reporting Developments Through April 30, 2015

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From the Executive Director's Desk

Police Bodycams: Public or Private?

By George Freeman

Times v. Sullivan; the 1968 Democratic Convention in Chicago; Rodney King. And more recently, Ferguson, Mo; Staten Island, NY; North Charleston, SC - - and now Baltimore. These and countless other incidents gave rise to riots, demonstrations and public outcries in reaction to police overreactions and malfeasance. Though most



George Freeman

policemen are brave and responsible, and do an admirable job keeping us safe in the most trying of conditions, when they err or use poor judgment, the consequences can be deadly. Throw race into the mix and the situations become combustible.

A tool of modern technology that could vastly improve this state of affairs is the bodycam. A video camera worn by a cop throughout his working day, the resulting tape would show exactly what happens with police officers on their rounds, from tense altercations to the more mundane traffic stop. The advantages are apparent - - the policeman, knowing his every action is being recorded, is incentivized to behave appropriately; in the case of an altercation, there is a record that will attest to what actually occurred, rather than the

radically divergent accounts we have habitually been given; and the transparency will provide us greater oversight over this branch of government. Seems like a win-win.

But not so fast. While most people have recognized the advantages of bodycams, scores of bills have been introduced in state legislatures, most of which would severely limit what the public could see from these recordings. Most surprisingly, the ACLU, heralded as the protector of civil liberties, has come out with a policy statement strongly limiting access to such tapes. Their reason: the privacy interests of the accused, witnesses and passers-by whose actions would be filmed by the police.

So how to reconcile these competing interests? My answer - - and that of an MLRC State Legislative Committee subcommittee - - is that the balance already resides in the freedom of information laws of the various states. After all, tapes from bodycams are government materials subject to FOIA-type laws, including their exemptions and redactions, just as other government documents are. There is no clear reason to treat them any differently; and I would submit that privacy values, and other interests such as releasing prejudicial information of a pending law enforcement investigation, will be protected by the balances inherent in the exceptions in the current sunshine laws.

The ACLU worries about the privacy interests of all sorts of individuals who might be filmed on police bodycams. But, first, I would think that the gains coming from

greater professionalism on the part of cops who now will be aware that their every move and statement is being recorded greatly outweighs the privacy interests of joggers who might be in the background in such tapes or even defendants or witnesses interviewed by the police in matters, almost by definition, of public concern. Moreover, to the extent there is fear that showing a witness speaking to a cop might lead to retribution, presumably the substance of his interview either would be exempt from disclosure by virtue of the law enforcement proceeding exception or would be publicly available in written form anyhow. Second, the ACLU position seems to ignore the reality - - and the law - - that people can have no expectation of privacy in the great outdoors or even in business settings open to the public, from shopping malls to bars and clubs.

The ACLU is also concerned about bodycams as a vehicle of widespread government surveillance - - a “1984” environment with cameras everywhere.

While I can understand the theoretical underpinning for such a worry, the reality is just the opposite - - that what is being surveilled is police behavior, ie, the government itself, not the rest of us.

The policeman, knowing his every action is being recorded, is incentivized to behave appropriately; in an altercation, there is a record that will attest to what actually occurred; and the transparency will provide us greater oversight over this branch of government.

Privacy concerns are more significant when the police activities occur inside the home. Yet even in that more sensitive situation, where the police enter a home to deal with a domestic violence complaint pursuant to a search warrant, it seems presumptively a matter of public concern, apt for examination by the public. If someone living in the home calls for the police, that would appear to be a form of consent - - though given the way spouses sometimes fight with each other, I suppose one has to beware a call made to the police to set up a spouse for an embarrassing YouTube performance. Notice might be required to be given when the police enter, advising the inhabitants that they are being videotaped. And if someone is undressed or involved in really private behavior having nothing to do with the matter of public concern or of the police’s conduct, such tape presumably would be blurred or

redacted pursuant to the balances in existing privacy exemptions.

A practical problem to me is the intrusion on the police officers even when they are on duty. Giving the police the discretion to turn the bodycam on and off is extremely problematic and could easily lead to decisions not to tape potentially sensitive - - but important - - exchanges. But if, as almost has to be the case, the tape runs throughout an officer’s shift, what about when two policemen are on routine cruising patrol talking to each other about personal matters to pass the time - - or telling dirty jokes. It seems problematic to allow access to those sorts of often embarrassing but not at all newsworthy conversations.

The MLRC subcommittee's position paper takes no view as to whether police departments ought to require or fund bodycams; it, as befits our interest in ensuring the flow of information to the public, deals only with the access and retention issues. (I would note that just a few days ago the DOJ allocated \$20 million for bodycam usage.) And while it seems beyond cavil that bodycams would lead to more professional policing, I don't have the expertise to weigh in on their general use. But if these recordings exist, access to them and the rules for their retention very much fall in our bailiwick.

Retention rules will be thorny, as police departments will justifiably worry about budgetary, space and logistical issues relating to the tapes' maintenance. Presumably, if a tape is of public interest it will be sought fairly quickly, but sometimes victims of abuse do not come forward until some time has passed and an officer's prior behavior does not get called into question until complaint is filed in response to a later incident. But given the volume of tape, it seems reasonable not to mandate a lengthy retention schedule for all recordings (unless storage can be achieved at little or no cost in the cloud). In addition, some sort of restrictions for overly broad requests might be warranted. That is, a request for all bodycam tapes for a 3 month period for the entire Bigtown police force seems overly burdensome, as would a request for all of Sgt. Sullivan's tapes.

But, in the end, it seems clear that this sort of transparency will lead to better policing and will give us more accurate accounts of what indeed transpired in the many volatile situations that are likely to continue into the future. Therefore, the rule ought to be that these tapes are government records to be treated as any others, that there is a presumption of access to them, and that the countervailing interests can be considered in the context of existing exceptions to disclosure in current laws.

As with drones, the new technology has given rise to great improvements in newsgathering and in bringing more detailed and accurate observations and evidence to the public. It would be sadly ironic and disheartening if these advances were not utilized, or worse, would lead to a pushback against greater access. Indeed, the whole point of requiring police to wear body cameras is to have them operate with the knowledge that their conduct is being watched, not only by their fellow officers, but by the public whom they've sworn to protect and serve.

We welcome responses to this column at gfreeman@medialaw.org; they may be printed in next month's MediaLawLetter.

The ACLU is concerned about a "1984" environment with cameras everywhere. While I understand the theoretical underpinning for such a worry, the reality is just the opposite -- that what is being surveilled is police behavior.

D.C. Circuit Affirms Dismissal of Libel Lawsuit By Son of Palestinian Authority President

*Holds D.C. Anti-SLAPP Act
Does Not Apply in Federal Court*

By Shaina Jones Ward

The U.S. Court of Appeals for the D.C. Circuit recently affirmed the dismissal of a plaintiff's libel case against Foreign Policy Magazine and author Dr. Jonathan Schanzer asserted by Yasser Abbas, son of Palestinian Authority President Maumoud Abbas. [*Abbas v. Foreign Policy Group, LLC, et al.*](#), No. 13-7171 (D.C. Cir. Apr. 24, 2015).

The suit arose from a commentary *Foreign Policy* published on its website in June 2012 entitled, "The Brothers Abbas: Are the sons of the Palestinian president growing

The Brothers Abbas

Are the sons of the Palestinian president growing rich off their father's system?

BY JONATHAN SCHANZER

JUNE 5, 2012



Foreign Policy's story, published in 2012.

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 profiting from ties to their father. Abbas claimed that the commentary leveled allegations of corruption against him.

In affirming the district court's dismissal of the complaint, the Court determined that Abbas failed to state a libel claim as a matter of D.C. common law pursuant to Fed. R. Civ. P. 12(b)(6). However, the Court also held that the D.C. Anti-SLAPP Act, under

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which the district court had dismissed the complaint, did not apply to a federal court sitting in diversity. In so holding, the D.C. Circuit disagreed with several other circuits that have applied state anti-SLAPP statutes in federal court.

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.

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's 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. 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.

On September 27, 2013, the district court granted the defendants' motion under the SLAPP statute, and denied the motion to dismiss under Rule 12(b)(6) as moot. Judge Emmet Sullivan held that although the applicability of the Anti-SLAPP Act in federal court had not been addressed by the D.C. Circuit, other circuits have found that similar state statutes apply in federal court, as well as two recent decisions by D.C. district courts.

Finding that defendants made a prima facie showing that Abbas's claim arose from an "act in furtherance of the right of advocacy on issues of public interest," under the

The Court held that the D.C. Anti-SLAPP Act, under which the district court had dismissed the complaint, did not apply to a federal court sitting in diversity.

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statute, 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. Judge Sullivan granted Foreign Policy magazine and Dr. Schanzer's special motion to dismiss under the SLAPP statute and dismissed Abbas's complaint with prejudice.

D.C. Circuit's Ruling

On April 24 2015, the D.C. Circuit unanimously affirmed the district court's dismissal of Abbas's complaint, albeit on an alternative ground. Specifically, the Court found that a federal court exercising diversity jurisdiction may not apply the D.C. Anti-SLAPP Act's special motion to dismiss provision because it conflicts with the pre-trial judgment standards under Federal Rules of Civil Procedure 12 and 56. Relying on the Supreme Court's holding in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), the Court explained that a federal court sitting in diversity should not apply a state law if two prongs are met: (1) a Federal Rule of Civil Procedure "answers the same question" as the state law, and (2) the Federal Rule does not violate the Rules Enabling Act.

The Court noted that the Act's provisions determining when a plaintiff does not have a likelihood of success on the merits "answers the same question" as Rules 12 and 56, but that Rules 12 and 56 do not require a plaintiff to show a likelihood of success on the merits.

Addressing the first prong, the Court noted that the Act's provisions determining when a plaintiff does not have a likelihood of success on the merits "answers the same question" as Rules 12 and 56, but that Rules 12 and 56 do not require a plaintiff to show a likelihood of success on the merits. According to the Court, this "additional hurdle" conflicts with the Federal Rules, and under *Shady Grove*, the Court determined it may not apply the Act's special motion to dismiss provision.

The Court rejected the defendants' four arguments contrary to this conclusion. The Court first held that the Act's provisions are functionally the same as Federal Rule 56's summary judgment test, and that the D.C. Council chose to enact a new provision with a new "likelihood of success on the merits" standard. Although the standard has never been interpreted by the D.C. Court of Appeals, the Court reasoned that it is different and more difficult for plaintiffs to meet than the standards imposed by Federal Rules 12 and 56. As an aside, the Court pointed out that an "interesting issue" could arise if a state's anti-SLAPP statute exactly mirrored Federal Rules 12 and 56, and inquired whether it would still be preempted under *Shady Grove*, but did not answer this question.

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Second, the Court rejected the argument that the special motion to dismiss provision embodies a substantive D.C. right not found in the Federal Rules that is similar to the showing a plaintiff must make to defeat a claim of qualified immunity. Here, the Court found instead that it was more similar to the required showing at the motion to dismiss or summary judgment stages.

Third, the Court held that the Act was not comparable to the Private Securities Litigation Reform Act of 1995, which modified the pleading standards in certain categories of securities cases. The Court reasoned that Congress's decision to enact a heightened standard for one set of cases does not change the fact that Rule 12 and 56 otherwise generally apply.

Fourth, setting aside the fact that several other federal circuits have applied the pretrial dismissal provisions of state anti-SLAPP statutes notwithstanding Federal Rules 12 and 56, the Court instead agreed with the opinion of Chief Judge Alex Kozinski of the Ninth Circuit in *Makaeff v. Trump University, LLC*, 715 F.3d 254 (9th Cir. 2013), that these opinions are "ultimately not persuasive."

Addressing the second prong of the *Shady Grove* test, whether Rules 12 and 56 govern unless they violate the Rules Enabling Act, the Court found that the rules regulate procedure—that is, the "judicial process" for enforcing rights—rather than affect a substantive right, and therefore are valid under the Rules Enabling Act.

Turning to the heart of Abbas's defamation claim, the Court agreed with the defendants that Rule 12(b)(6) required dismissal of Abbas's complaint as a matter of D.C. common law principles. The Court noted that the questions posed in the commentary are not factual representations, and that while D.C. courts have not confronted the issue of whether questions can be defamatory, it is generally settled among other jurisdictions as a matter of defamation law that "questions are questions," and not accusations. Here, the Court observed that "Abbas's theory would thus necessarily ensnare a substantial amount of speech that is essential to the marketplace of ideas and would dramatically chill the freedom of speech in the District of Columbia. We will not usher D.C. law down such a new and uncertain road." Recognizing that the questions as a matter of law do not qualify as false and defamatory statements under D.C. law, the Court held that dismissal with prejudice is appropriate, and affirmed the judgment of the district court.

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

Non-Media Defendant Must Prove Truth in Private Figure Libel Case on Matter of Public Concern

By Jim Hemphill

An intermediate appellate court in Texas has held that allegedly defamatory statements are presumed false, and must be proven true by the defendant, when the plaintiff is a private figure, the defendant is not a member of the media, and the speech is a matter of public concern – declining to extend to non-media defendants a core First Amendment protection recognized and applied to media defendants by the U.S. Supreme Court in *Philadelphia Newspapers v. Hepps*.

Background

The case, [*Cummins v. Bat World Sanctuary*](#), 2015 WL 1641144 (Tex. App. – Fort Worth, April 9, 2015, no pet. h.), grew out of a dispute between Amanda Lollar, who runs a sanctuary for bats in Mineral Wells, Texas¹ and otherwise cares for the airborne mammals, and Mary Cummins, who was once an intern at the bat sanctuary but became disillusioned and eventually conducted a campaign of criticism against Lollar and Bat World.

Cummins’ numerous criticisms included posting “derogatory comments on AnimalAdvocates.us, a website she ran, on Twitter, and on her Facebook page. The comments accused Lollar of donor fraud, tax fraud, animal cruelty, practicing veterinary medicine without a license, and illegal possession of controlled substances.” *Cummins* at *2.

Cummins’ unhappiness was not limited to Lollar and Bat World. According to the opinion, Cummins also posted statements accusing Lollar’s lawyer of unethical conduct, accusing a deposition court reporter of perjury and corruption, accusing the trial court judge of ruling for Lollar as a favor to Lollar’s attorney, and accusing her own lawyer of falling asleep during a deposition. After Cummins called the local bar association to

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1. Mineral Wells is a town of about 17,000 west of Fort Worth with an interesting history. In the early 1900s, the area’s natural mineral springs made the town a trendy destination for Hollywood types and other luminaries, who would soak in the springs and drink the water, which became known as “Crazy Water” for its purported ability to calm the nerves. At its peak, Mineral Wells was host to upward of 150,000 tourists each year. The fad for Crazy Water died off during the Depression, and today the city is something less of a tourist destination. Allegedly the Crazy Water was eventually found to contain abnormally high doses of lithium. See <http://drinkcrazywater.com/cw/crazy-water-full-history/>.

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question her lawyer's competence, the lawyer withdrew, leaving Cummins as a *pro se* litigant (a choice that might have impacted the result of both trial and appellate proceedings). *Id.*

After a bench trial, judgment was entered against Cummins on plaintiffs' libel claim for \$3 million in actual damages and \$3 million in exemplary damages. Plaintiffs also received a judgment and additional damages, and attorneys' fees, on a breach of contract claim based on the internship contract Cummins signed. Cummins was also ordered to remove certain statements from the internet and was enjoined from making certain future statements. *Cummins* at *1.

Appellate Court Decision

The defamation judgment and damages were upheld on appeal. Various procedural defects affected the affirmation of the \$6 million defamation damages award, including Cummins' failure to preserve an argument that exemplary damages should be capped, and her failure to challenge the sufficiency of the evidence of noneconomic defamation damages. *Id.* The trial court's injunction was upheld as applied to its command that statements adjudicated false and defamatory be removed from the internet,

but reversed as applied to future speech, under the authority of *Kinney v. Barnes*, 443 S.W.3d 87 (Tex. 2014). See [Texas Court Says "No" to Post Libel Trial Injunctions, "Yes" to Post-Adjudication Removal](#), MediaLawLetter Sept. 2014.

In determining the proper standards for liability and burden of proof, the appellate court conducted a thorough survey of the U.S. Supreme Court's constitutionalization of libel law, from *New York Times v. Sullivan* in 1964 through 1986's *Philadelphia Newspapers v. Hepps*. The court noted that *Hepps* held that a private-figure libel plaintiff has the burden of proving falsity when suing a media defendant on speech regarding a matter of public concern. However, the court added, the question of who



Defendant animal welfare website accused plaintiff of cruelty and fraud.

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bears the burden on truth/falsity in private figure/public concern/non-media defendant cases “has not been answered by the Supreme Court.” *Id.* at *7.

The Court of Appeals held that, in the absence of controlling authority from either the U.S. or Texas Supreme Court, the common-law presumption of falsity applied, and thus *Cummins* – as a non-media defendant (even though many of the defamatory statements were posted on a website and social media) – had the burden of proving truth. *Id.* at 10. The court noted, however, that the outcome of the case would be the same even if the plaintiffs were required to prove falsity, because sufficient evidence was introduced that many of the statements were false. *Id.*

The court’s acceptance of different standards for media and non-media defendants is unusual. Judge Sack’s libel treatise notes:

The Court of Appeals held that, in the absence of controlling authority from either the U.S. or Texas Supreme Court, the common-law presumption of falsity applied.

The *Hepps* Court’s indication that there may be a distinction between cases involving media and nonmedia defendants is anomalous. Six Justices in *Greenmoss* said that constitutional principles cannot tolerate a press/nonpress distinction in defamation cases. ... However unlikely the distinction, though, the Supreme Court has not yet explicitly decided whether the Constitution also shifts the burden of proof from defendants to plaintiffs when the speech is of legitimate public interest but the defendant is not a member of the press.

Lower courts nonetheless routinely apply the rule in *Hepps* to nonmedia cases. *Sack on Defamation* at 3-9 through 3-10 (3d ed. 1999)

The decision in *Cummins v. Bat World Sanctuary* apparently places at least one Texas appellate court in the minority on this issue. Given the nature of the case – especially the challenges presented by various procedural waivers – it remains to be seen whether the Texas Supreme Court may grant review, or even be asked to do so. A motion for rehearing in the Court of Appeals was filed on April 24, 2015; thus there is currently no deadline for seeking review in the state Supreme Court.

Jim Hemphill is a shareholder at MLRC member firm Graves Dougherty Hearon & Moody, PC in Austin, Texas, and is co-chair of the MLRC DCS Litigation Committee. Neither he nor Graves Dougherty was involved in the Cummins case.

Photographer's First Amendment Right to Create and Sell Art Prevails Over Neighbors' Privacy Interest

By Nancy Wolfe and Scott Sholder

The New York Supreme Court Appellate Division, First Department, solidifying a victory for the First Amendment rights of artists, unanimously affirmed the dismissal of a right of privacy action against New York-based fine art photographer Arne Svenson in which the plaintiffs had sought, *inter alia*, to prevent the display, promotion, or sale of certain photographs from Svenson's much-publicized series "The Neighbors." [*Foster v. Svenson*](#), No. 651826/13 (App. Div. 1st Dep't Apr. 9, 2015).

The decision upheld the Supreme Court's dismissal of the plaintiffs' privacy and intentional infliction of emotional distress claims, *see Foster v. Svenson*, 2013 NY Slip Op 31782(U) (Sup Ct. NY County 2013), reaffirming the narrow scope of New York's Civil Rights Law §§ 50 and 51 ("NYCRL 50/51") and definitively recognizing, for the first time at the appellate level, that photographs advertised and sold as prints are expressive works entitled to full First Amendment protection, and are excluded from NYCRL 50/51 alongside newsworthy articles and other items of public interest and importance.

Background

The full history of this case and the lower court decision was previously reported in the [MediaLawLetter in August 2013](#). By way of summary, in 2012, after inheriting a friend's telephoto lens, Svenson, a well-recognized fine art photographer began taking pictures of the Mondrian-like framed glass-walled luxury apartment building directly across from his TriBeCa studio. He was interested in the visual mystery of those who live behind the glass, and the balance of light shadows and shapes that emerge from the windows. Over the course of a year, Svenson secretly documented his neighbors going about their lives, for example, cleaning the floor, holding a pair of scissors, or sitting in a rocking chair.

The resulting works – large-scale color photographs, cropped to intensely focus on his mostly obscured subjects – became "*The Neighbors*", a series of limited-edition prints exhibited by Svenson's Los Angeles and New York galleries in 2013. The promotion and exhibition of "*The Neighbors*" in New York provoked vigorous debate

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about the tension between freedom of artistic expression and the right to privacy and quickly drew national media attention.

Martha and Matthew Foster – plaintiffs in the case – recognized two of the photographs as depicting Mrs. Foster and their two young children. Despite his removing the photographs from his website and exhibition as a courtesy, the Fosters filed suit against Svenson seeking monetary compensation and a permanent injunction, alleging, *inter alia*, that the continued news coverage of the images constituted advertising of the exhibition and photographs in violation of NYCRL 50/51. (The complaint also included a cause of action for intentional infliction of emotional distress.)

In response to Plaintiffs’ motion for a preliminary injunction, Svenson cross-moved to dismiss the action, arguing that the promotion and sale of the limited edition prints in “The Neighbors” did not constitute “advertising or trade” within the meaning of NYCRL 50/51. Because New York has no common law right of privacy, plaintiffs were required to fit within the narrow confines of that statute – which prohibits the use of a living person’s name, image or likeness, within the state of New York, for purposes of advertising or trade, without his or her consent – in order to obtain relief.

In denying the plaintiffs’ motion for a preliminary injunction and granting Svenson’s motion to dismiss the case in its entirety, Justice Eileen A. Rakower of the New York Supreme Court recognized that “in order to avoid a conflict between an individual’s right to be free from unwarranted intrusions and the First Amendment,” NYCRL 50/51 has “a limited application.” Justice Rakower went on to rule that Svenson’s photographs are protected by the First Amendment as artwork and shielded from NYCRL 50/51. Further, “since art is protected by the First Amendment, any advertising that is undertaken in connection with promoting that artwork is permitted.” Accordingly, the



Martha and Matthew Foster – plaintiffs in the case – recognized two of the photographs as depicting Mrs. Foster and their two young children.

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use of the Fosters' likenesses was not a use for purposes of advertising or trade under NYCRL 50/51.

Plaintiff's Appeal

The plaintiffs appealed the lower court's decision, and the case was heard by a five-judge panel of the Appellate Division, First Department. The court, in a 23-page opinion which chronicled the history of New York privacy law, affirmed that the photographs in "*The Neighbors*," as works of art, are outside the scope of the privacy statute under the same rationale that newsworthy matters and issues of public concern are exempt. Like the press, the court held that artists should have broad leeway to disseminate works and ideas in which there is a strong public interest. The court explained that artists are permitted to propagate "images, aesthetic values and symbols contained in the art work" and to convey to the public valuable expressive and artistic ideas through works of art such as photographs, assuming that the First Amendment purpose is not merely incidental to the image's commercial purpose.

The court did not need to decide how to define "art" or independently analyze whether the photographs in "*The Neighbors*" constituted art because the plaintiffs had conceded the point in the proceedings below. The court accordingly held that Svenson's purpose in disseminating the photographs was not advertising or trade as those terms are understood in the context of the privacy statute, but rather was for the expressive purpose of disseminating constitutionally protected works of art, which is exempted from NYCRL 50/51. Moreover, the court reiterated that under the purview of the First Amendment, because the photographs constituted works of art, any advertising made in connection with the promotion of the artwork is also permitted. The court emphasized that "the fact that profit might have been derived from the sale of the art work does not diminish the constitutional protection afforded by the newsworthy and public concern exception."

Svenson's use of the photographs as published works of art not only did not constitute the type of conduct that is prohibited by the statutory right of privacy, but the court explained that the methods by which he took the photographs were not, themselves, unlawful and did not rise to the level of the "extreme and outrageous" conduct necessary to state a claim for intentional infliction of emotional distress. The Appellate Division accordingly affirmed the Supreme Court's dismissal of that tort claim as well.

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Both the Supreme Court and the Appellate Division holdings serve to further illuminate the limited scope of the New York privacy statute and distinguish the purpose and use of an image from the method in which the image was created. Furthermore, the courts' opinions settle a point which had been left hanging since *Nussenzweig v. DiCorcia*, 11 Misc.3d 1051(A) (2006) was decided on a statute of limitations defense and not on the merits on appeal: that photographers who exhibit and sell their photographs – including those taken outside the context of a public street – are entitled to the same First Amendment protection afforded to the news media, sculptors, or other artists, under NYCRL 50/51. The Appellate Division has placed, on the books, an opinion consistent with other New York state and federal courts' interpretation of the

limited New York privacy statute, and delineated clear boundaries for its application while, at the same time, calling upon the Legislature to consider modern privacy concerns in rethinking the State's laws.

If legislators in Albany decide to answer the court's call to action, they will likely face an uphill battle crafting statutory language that would effectively balance the limited expectation of privacy of those people living in crowded urban settings with the comparatively strong First Amendment rights granted to artists.

First, after the *Svenson* opinion, it is clear that NYCRL 50/51 does not, in fact, deal with *how* one takes a picture, and if the legislature takes on this particular issue, it should be prepared to address far more sophisticated technology than just telephoto lenses, such as drones with the capability of carrying cameras. In fact, many states are already dealing with privacy and First

Amendment issues in drafting drone-regulating legislation. For

example, California updated its invasion-of-privacy law by banning the use of camera drones in circumstances in which the subject of the photograph has a reasonable expectation of privacy. Oregon addressed privacy rights by creating a cause of action for landowners of private property against drone operators who fly their devices under 400 feet over the owner's property, after having received notification of the landowner's non-consent. Tennessee, North Carolina, Texas, and Idaho restrict drones' ability to film or photograph private property and ban the use of drones for surveillance. It remains to be seen whether any of these statutes will be struck down on First Amendment grounds.

Photographers who exhibit and sell their photographs – including those taken outside the context of a public street – are entitled to the same First Amendment protection afforded to the news media, sculptors, or other artists, under NYCRL 50/51.

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Since New York does not recognize a common law right of privacy, any new legislation that might restrict photographic methods or the use of any devices will require an examination of when one has a reasonable expectation of privacy. In crowded urban areas like Manhattan line-drawing will be particularly difficult. If one does not have a reasonable expectation of privacy while walking on a public street, when does that expectation arise? Only when one lives on a floor too high up to be visible to the naked eye? What about those residents on lower floors? And how would the law account for legal methods of vision enhancement such as binoculars and telescopes, which would allow people to see far beyond the range of their own sight?

Another component of legislative line-drawing will be to determine when a line is crossed: what would a reasonable person consider to be intrusive or offensive? In the age of social media, this analysis could prove to be as difficult, if not harder, than the expectation of privacy calculus. In the era of Facebook, Instagram, Twitter, Vine, and Vimeo, publicly posted images depicting people – including children – are more common and more ingrained in social norms than ever before.

Images like the ones at issue in *Foster v. Svenson* can routinely be found on Facebook, and the legislature will tread on dangerous ground in attempting to appease the social norms of plaintiffs such as the Fosters who were deeply offended by a photographic “intrusion” that may not seem surprising or disturbing to others who freely share images using social media. New York does not have any law comparable to California Civil Code § 1708.8(b), which provides for liability based on constructive invasion of privacy for capturing images of personal activity through the use of any device in a manner that is offensive to a reasonable person, under circumstances in which the plaintiff had a reasonable expectation of privacy.

While the Fosters argued for an interpretation of NYCRL 50/51 that would be more in line with this California statute, the vastly different topography and the strong celebrity culture of California – in particular Los Angeles – leads to a privacy jurisprudence very different from that of the close-quarters, First-Amendment friendly New York. In the event the legislature tackles a new privacy law, it will require significant scrutiny as it would be a significant departure from New York’s century-old single-statute privacy regime and, based on the above considerations, would likely end up resembling content-neutral time, place, and manner restrictions that traditionally survive constitutional scrutiny even in Manhattan.

Nancy E. Wolff and Scott Sholder of Cowan, DeBaets, Abrahams & Sheppard, LLP, New York, represented defendant in this case. Plaintiffs were represented by Richard G. Menaker, Menaker & Herrmann LLP, New York.

Texas Legislature on Course to Adopt Third Party Allegation Rule as Law

Media Worked to Remedy Result of Neely v. Wilson Decision

By Laura Lee Prather

In 2013, the Texas Supreme Court handed down the *Neely v. Wilson* decision questioning 25 years of free speech precedent in Texas. *Neely v. Wilson*, 418 S.W.3d 52 (Tex. 2013), reh'g denied (Jan. 31, 2014). The case involved a broadcast station's report about a neurosurgeon sanctioned by the state medical board for self-prescribing drugs. The trial court granted summary judgment in favor of the media defendants, and the court of appeals affirmed the ruling holding that the report was substantially true and was, among other things, an accurate report on third party allegations. The court of appeals invoked a long line of Texas cases beginning with *McIlvain v. Jacobs*, 794 S.W.2d 14 (Tex. 1990) and its progeny which held that when a media defendant accurately reports on allegations made by a third party, they qualify for the substantial truth defense so long as they accurately report the allegations being made. Historically, under this doctrine, the media has not been required to prove the truth of the underlying allegations.

At the *Neely* oral argument before the Texas Supreme Court, counsel for Neely repeatedly argued there was no third party allegation defense in Texas, and that if one were to exist it should be codified in Chapter 73 of the Texas Civil Practice & Remedies Code, and, thus, the Texas Legislature was the appropriate venue for relief. A heavily divided court (with a vehement dissent by the Chief Justice) agreed with Neely and, in dicta, questioned whether any third party allegation rule ever existed in Texas.

A motion for rehearing was filed, with extensive amicus support. The Court ultimately denied the motion for rehearing and issued a corrected opinion which appeared to further confuse the issue. In the body of the opinion, the Court stated: "We created no such rule... and the facts of this case likewise do not require us to create such a rule" (*Id.* at 56), but in a newly added footnote, the Court said:

Briefing submitted in support of rehearing construes our opinion as foreclosing such a rule and as affirmatively requiring the underlying allegation be proven substantially true to prevail on the truth defense. That interpretation, however, misconstrues our holding.... we must, leave open the question of whether a broadcast whose gist is merely that

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allegations were made is substantially true if the allegations were accurately repeated.

Id. at n. 3. Further, Justice Lehrmann dissented in the denial of rehearing explaining the critical problem with leaving the law unsettled in this area. She wrote:

[I]t is inherent in the nature of investigative reporting that some allegations will be reported that are later discovered to be untrue. Shielding media defendants from defamation liability for accurately reporting such allegations is a critical and well-settled practice, yet the Court's opinion declines to recognize as a definitive statement of Texas law. Because I would grant rehearing in this case to clarify that this statement correctly describes Texas law, I respectfully express my dissent. ... Because the Court's opinion may lead to uncertainty in this critical area of the law, and as a result may have a chilling effect on the press, I would grant rehearing.

Legislative Initiative

With this backdrop, the Texas Legislature entered its 84th legislative session in January. The media sought to remedy the unsettled nature of the law by advocating for the codification of the third party allegation rule. Because our legislature meets for only 140 days every other year, much of the preparatory work on any proactive effort has to be done while the legislature is not in session.

During the interim, we sought out sponsors for the legislation and developed a database of stories that had come to light based on third party allegations – the most compelling of which involved subsequent governmental investigations and/or legislative reform. We wanted examples of instances in which the media was the first to report on matters that resulted in subsequent public outcry. It was not difficult to find a plethora of examples.

In seeking out sponsors for our bill, we were fortunate to obtain support from the powerful chair of the House Calendars committee, Rep. Todd Hunter (R-Corpus Christi), and the Chair of the Senate State Affairs committee, Sen. Joan Huffman (R-Houston). Chairman Hunter has been a staunch supporter of our Texas free speech efforts for many sessions and was instrumental in the passage of the Texas reporter's privilege, the Texas anti-SLAPP statute, and the Texas retraction statute. Free speech

The media sought to remedy the unsettled nature of the law by advocating for the codification of the third party allegation rule.

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advocates have no better champion than Chairman Todd Hunter in Texas. Further, this year, we were able to garner support from former judge turned lawmaker and chair of the committee to which our bill would be assigned, Senator Joan Huffman. The combination of the two was about the best we could have asked for going into the legislative session.

In the process of educating lawmakers about the importance of the needed reform, we explained that one of the most significant services the media provides to the public is acting as a watchdog through investigative reporting and informing the public about potential wrongdoing. Frequently the media is the first to uncover problems that are subsequently investigated and, oftentimes, for which legislative reform is initiated. By the Texas Supreme Court's new logic, a media organization would report on matters that are not under current investigation at their peril. We provided compelling examples of reports that had come to light based on third party allegations, including:

- Allegations of prosecutorial misconduct in the Anthony Graves/Michael Morton cases that were reported long before the ultimate finding of truth of those allegations. The media's ability to bring public attention to these matters had significant impact on the ultimate discovery of the truth.
- Allegations of improper government bidding for the 21CT contract. Had this story gone unreported, Texas citizens would have paid \$110 million for a contract it had no knowledge existed.
- Recent reporting on significant problems in how the Veteran's Administration has been run and the lives that have been lost as a result.

The bill, if enacted, will provide an affirmative defense for the newspapers, periodicals and broadcasters when accurately reporting on third party allegations about matters of public concern.

Despite these very significant examples of demonstrated need, media bills are never met with favor from the Texas Trial Lawyers Association, and this bill was no different. However, after many twists and turns, significant encouragement by the bill sponsors to come to an agreement and countless negotiation sessions with TTLA, we were able to get agreed upon language that passed unanimously out of the Senate on April 21st. In fact, the TTLA testified in favor of the House bill before the House Committee for Judiciary and Civil Jurisprudence on April 21st, and, the bill was voted unanimously out of the House committee on April 23rd.

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The bill, if enacted, will provide an affirmative defense for the newspapers, periodicals and broadcasters when accurately reporting on third party allegations about matters of public concern. It would not require that there be a pending investigation, just that the topic is one of a public concern, and that the media accurately report those allegations. In the end, lawmakers have recognized that this type of reporting saves lives and money, leads to governmental investigations and legislative reform and CSSB 627/CSHB 1766 would ensure the ability of the media to continue to help uncover wrongdoing and initiate reform.

The bill has been recommended for the Local and Consent Calendar in the House, and we hope to have it out of that committee by early May. If the bill continues on its current path, it could go into immediate effect upon the Governor's signature, likely in mid-June.

Laura Lee Prather is a partner at Haynes & Boone in Austin, Texas.

MLRC Anti-SLAPP Task Force

We Need Your Help

MLRC and its Anti-SLAPP Task Force are supporting efforts in Congress to introduce a federal anti-SLAPP bill. We are seeking examples/anecdotes to support the need for federal legislation.

In particular, we are looking for examples where private people were threatened or sued by corporations for posting online reviews of hotels or restaurants; as well as examples of consumers being asked to sign non-disclosure contracts to bar them from writing about or reviewing their transactions.

Please send any information to medialaw@medialaw.org.

For resources on state anti-SLAPP laws check [MLRC's Anti-SLAPP Topics Page](#)



Libel in Fiction Claim Dismissed on Anti-SLAPP Motion

By Kelli L. Sager, Deborah A. Adler, and Dan Laidman

In a victory for all authors of fiction, a screenwriter of the film “What Maisie Knew” has successfully defended a lawsuit that sought to hold him liable for defamation based on the portrayal of a character drawn from an 1897 Henry James novel. *Blakley v. Cartwright*, No. BC543217 (Cal. Super. January 20, 2015) (Ongkeko, R. JJ.).

The case highlights the unusual legal questions raised by defamation claims arising from fictional works. In “libel in fiction” cases, the real-life plaintiff simultaneously claims that he or she is actually portrayed in a fictional work, but also that the portrayal contains some false characteristics or events that are defamatory. Such counterintuitive claims pose a special risk of chilling artistic expression, by discouraging writers from addressing subjects that overlap with their own personal experience. The January 20, 2015 ruling, which granted writer Carroll Cartwright’s SLAPP motion and dismissed plaintiff Ronee Blakley’s libel in fiction lawsuit, reinforces the strict First Amendment barriers to such actions.

Libel in Fiction Case Law

Defamation cases involving fictional works are nothing new, and have involved many classic works, including the novel and film “Anatomy of a Murder” (*Wheeler v. Dell Publishing Co.*, 300 F.2d 372 (7th Cir. 1962)); and the novel and movie “From Here to Eternity” (*New York ex rel. Maggio v. Charles Scribner’s Sons*, 205 Misc. 818, 821 (New York City Magis. Ct. 1954)), among others.

The key legal issue in most libel in fiction cases is whether a reasonable reader or viewer would believe that the allegedly defamatory statements are actually about the plaintiff. This constitutionally based “of and concerning” standard requires that “a reasonable person ... would understand that the fictional character ... was, in actual fact, the plaintiff acting as described.” *Tamkin v. CBS Broadcasting, Inc.*, 193 Cal. App. 4th 133, 146 (2011).

Consequently, although there have been successful libel plaintiffs in cases involving fictional works, the cases tend to involve circumstances where the plaintiff and the purportedly fictional character shared highly unusual characteristics that were readily identifiable. For example, in *Fetler v. Houghton Mifflin Company*, 364 F.2d 650 (2d Cir. 1966), the plaintiff’s brother wrote a novel based on their unique family featuring “a minister father and thirteen children in which the third, fourth and eighth are girls and

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the eldest a son with great responsibility, who toured Europe in a bus in the 1930s giving family concerts.” And in *Bindrim v. Mitchell*, 92 Cal. App. 3d 61 (1979), the plaintiff and main character were both therapists in California who conducted nude therapy sessions, and the author had based passages on actual transcripts from sessions that she attended with the plaintiff pursuant to a non-disclosure agreement.

In more recent years, however, a series of appellate decisions in California have rejected defamation claims arising from the portrayal of fictional characters in films and television shows. For example, in *Aguilar v. Universal City Studios, Inc.*, 174 Cal. App. 3d 384 (1985), the plaintiff had the same name (“Bertha”) as a character in the movie “Zoot Suit” and she had participated in real-life events depicted in the film. Similarly, in *Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal. App. 4th 318 (1997), the screenwriter of the film “The Sandlot” knew the plaintiff; a character in the film had a similar background and virtually identical name; and as a child, the plaintiff physically resembled the character “right down to [his] eyeglasses and the color and design of his shirt.” And in *Tamkin*, a writer for the TV show “CSI” used the plaintiffs’ real names and occupations for characters in a draft script, and characters in the episode that ultimately was broadcast had similar names and characteristics. Yet in each of these cases, the courts found that the similarities were too generic or non-specific to establish that the fictional work actually depicted the plaintiff.

Blakely v. Cartwright Litigation

The *Blakley v. Cartwright* litigation arose from “What Maisie Knew,” a 2013 film starring Julianne Moore about a resilient six-year-old girl enmeshed in a bitter custody battle. Adapted from a 113-year-old Henry James novel, the film updated the story to take place in modern-day New York, but otherwise kept most of the novel’s key plot points and characters. Mr. Cartwright, the co-author of the film’s screenplay, had a child in 1988 with Ms. Blakley, an actress who was known for her roles in “Nashville” and “Nightmare on Elm Street,” and the pair had a long-running and acrimonious custody dispute.

Ms. Blakley sued Mr. Cartwright in April 2014, claiming that she was portrayed by the character of Maisie’s mother in the film, and had been falsely depicted as a bad parent. Among other things, Ms. Blakley alleged that the character’s name, “Susanna,” resembled her middle name, “Sue”; she claimed that she and the character both wore red plaid shirts and had similar hair; they were both musicians; and she claimed that some of the circumstances of the real-life and fictional custody disputes were alike. She also pointed to public statements that Mr. Cartwright made in connection with the film, in

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which he mentioned his personal experiences and daughter, and she presented declarations from several of her friends claiming that they believed the film was meant to portray her.

Mr. Cartwright's SLAPP Motion pointed out, among other things, that the alleged similarities were too superficial or generic to state an actionable claim, and that any similarities were outweighed by stark differences, including the film's central plot point, in which Maisie's mother and father both re-marry, only to see their new spouses become romantically involved with each other. (Ms. Blakley did not allege any such real-life events; to the contrary, she acknowledged that she was single while her daughter was growing up.) Mr. Cartwright also noted that Maisie's father was a selfish and unsympathetic character, which undercut the notion that the film was intended to portray events from Mr. Cartwright's own past. His SLAPP Motion also pointed out that courts have rejected the use of declarations to determine what a "reasonable viewer" would have believed; in this case, the declarants were plaintiff's friends who claimed to have watched the film with her.

The trial court judge agreed with Mr. Cartwright, and granted a special motion to strike Ms. Blakley's complaint pursuant to California's SLAPP statute, which provides for the early dismissal of claims targeting free speech. In a 14-page ruling issued January 20, 2015, Judge Ongkeko concluded that the alleged similarities were "either tenuous or common, non-unique occurrences," and that as a matter of law, the "statements and alleged similarities cannot reasonably be interpreted as referring to Blakley." Judge Ongkeko also found that Ms. Blakley's own evidence revealed "areas in which her life diverges from the plot" of the film, and that, read in context, Mr. Cartwright's public statements were a description of his creative process and not an admission that the character of Maisie's mother was based on Ms. Blakley.

In her opposition papers, Ms. Blakley had tried to downplay the fact that the film was based on a century-old novel, calling it a "literary devise for disguising [the] ulterior purpose of defaming Blakley." But the SLAPP Motion included extensive evidence showing that the film was presented to the public as an adaptation of the Henry James book, a point emphasized in nearly all of the media coverage and reviews of the film. In its ruling, the court also noted that plot points "taken directly from the novel are precisely the incidents plaintiff alleges are the defamatory statements."

The plaintiff had pointed to 19 such "statements," which were actually scenes from the film or character traits of the Julianne Moore character that she claimed falsely

Mr. Cartwright's SLAPP Motion pointed out, among other things, that the alleged similarities were too superficial or generic to state an actionable claim, and that any similarities were outweighed by stark differences.

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portrayed her as a bad mother. The SLAPP Motion argued that these snippets from the film could not be isolated and taken out of context to create a defamatory meaning, and that other portions of the film showed the Julianne Moore character as a loving if flawed mother. The court agreed that the work “must be taken as a whole and evaluated,” and under that standard the plaintiff could not show a probability of prevailing on her claims. Consequently, the judge struck the complaint with prejudice. (Ms. Blakley has filed an appeal of the trial court’s ruling.)

Mr. Cartwright’s victory is particularly significant because there were indications that the plaintiff’s legal team (which initially included three sets of lawyers) viewed the case as an opportunity to expand the scope of liability for libel in fiction claims. Her Complaint quoted from a book written by one of her lawyers, Rod Smolla, that argued that there were “two relatively ‘safe’ courses of action” for an author who creates a fictional character that resembles a real person: (1) “the author may make little or no attempt to disguise the character, but refrain from any defamatory and false embellishments,” or (2) the author may add negative traits “but make substantial efforts to disguise the character ... to avoid identification” with the real person. However, the Complaint quoted Smolla’s view that “[w]hen an author takes a middle ground ... neither adhering perfectly to the real person’s attributes and behavior nor engaging in elaborate disguise, there is a threat of defamation liability.” (Quoting Smolla, *Law of Defamation* at § 4:48 (2d ed. 2013)).

Mr. Cartwright argued in his SLAPP papers that such an expansive view of liability runs counter to the current, constitutionally based standard that requires a libel-in-fiction plaintiff to show that “a reasonable person ... would understand that the fictional character ... was, in actual fact, the plaintiff acting as described.” *Tamkin*, 193 Cal. App. 4th at 146.

The broader test advocated by the plaintiff and her counsel would have created a classic chilling effect by discouraging authors from writing about any topic that overlaps with their own personal experience for fear that someone they once knew might come forward with a defamation claim, even if a work is clearly fictional. As former California Supreme Court Chief Justice Rose Bird wrote in her concurring opinion in *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal. 3d 860, 869 (1979), “[n]o author should be forced into creating mythological worlds or characters wholly divorced from reality. Such a course would inevitably chill the exercise of free speech -- limiting not only the manner and form of expression but the interchange of ideas as well.”

Kelli L. Sager, Deborah A. Adler, and Dan Laidman of Davis Wright Tremaine represent Mr. Cartwright in this matter. Plaintiff is represented by Alexander Rufus-Isaacs of Rufus-Isaacs Acland & Grantham LLP, Neville Johnson of Johnson & Johnson LLP and Professor Rod Smolla, Widener Law Delaware.

Illinois Court Dismisses “Double Dipping Doctor” Defamation Dispute

By **Damon E. Dunn** and **Seth A. Stern**

An Illinois appellate court affirmed dismissal with prejudice of a surgeon’s defamation case against a public watchdog and media outlets, upholding reports that, while on an unpaid leave, the doctor was paid over \$100,000 by the public hospital which employed him as Chief of Orthopedic Surgery. The court held that the doctor’s pleadings failed to establish falsity and that the public interest in the use of taxpayer funds trumped any privacy interest with respect to his compensation. [*Kapotas v. Better Gov’t Ass’n*](#), 2015 IL App (1st) 140534

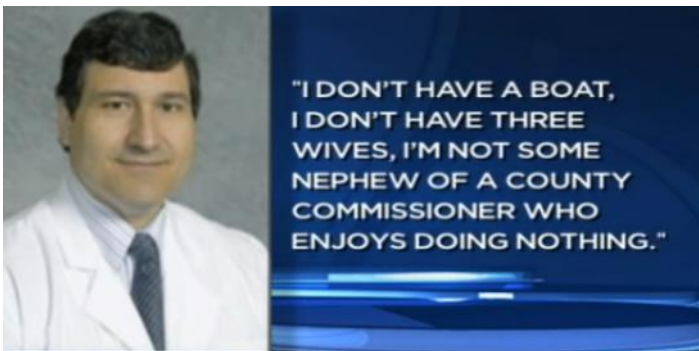
Background

Dr. James Kapotas took an unpaid leave of absence from John H. Stroger Cook County Hospital in April of 2011 to work for a private practice in Indiana. During this

supposedly unpaid leave, however, the hospital continued to pay him through direct deposits into his checking account. In November, 2011, shortly after the Better Government Association (BGA) began enquiries, the hospital instructed the doctor to submit a letter of resignation and refund the overpayments.

Shortly after Dr. Kapotas resigned and refunded almost \$80,000, NBC Subsidiary (WMAQ-TV) published a report in

collaboration with the BGA entitled “Cook County Doc Gets Big Payout for No Work” and the Chicago Sun-Times published a similar BGA report headlined “Cook County doctor overpaid \$80,000 while on leave.” Both reports quoted the doctor’s explanation that he was unaware of his checking account balance before he was contacted and cited several sources attributing the overpayments to a County payroll error. In May, 2012, NBC followed up with a report entitled “Double Dipping Doctor Still on Inspector General’s Radar.”



Screenshot from the NBC report. [Click to view.](#)

Trial Court Proceedings

As reported in February, 2014, Dr. Kapotas’ Complaint (which he amended twice) alleged multiple defamation based claims but Dr. Kapotas also was forced to admit that

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he did receive direct deposits, totaling almost \$80,000 after taxes, while on an unpaid leave and working in private practice in Indiana. The Complaint further acknowledged that the payments violated hospital policy, but contended that Dr. Kapotas did not ask to be paid and ultimately refunded the money.

Despite these admissions, the Complaint alleged defendants implied that Dr. Kapotas engaged in fraud or embezzlement, citing, among other things, the characterization of him as a “double dipping doctor” and references to the Inspector General’s investigation. It also alleged that the defendants defamed Dr. Kapotas by failing to report that, after he returned the money, the hospital partially offset the improper payments by paying out substantial back pay due upon resignation.

Judge Daniel T. Gillespie of the Circuit Court of Cook County dismissed the case with prejudice after finding the complaint “fail[ed] to identify any false statements in the news articles” and “Plaintiff’s own inferences from the true statements . . . do not transform them into false statements actionable as defamation.” In sum, the defendants adequately explained that overpayments resulted from the county’s error.

The Circuit Court further found that the defamation *per se* claim was defeated by the Illinois “innocent construction” rule whereas the *per quod* claim failed for lack of special damages. Moreover, the plaintiff was an undisputed public figure who, given his admission to receiving over payments, could not establish actual malice. The tortious interference claim failed, not only because the reports were true, but also because Dr. Kapotas could only allege a telephone inquiry from a recruiter, which did not create a sufficient business expectancy. His privacy claims were dismissed because compensation of County employees is a matter of public record.

Following denial of his motion for reconsideration, Dr. Kapotas appealed.

The Appellate Opinion

The appellate court heard oral argument for nearly two hours before issuing a particularly thorough opinion. Ultimately affirming dismissal of the case, the court first rejected the notion that the headlines— particularly NBC’s reference to “double dipping” — might be read in isolation. Noting that the headlines did not even name Dr. Kapotas, the court explained that he could not establish that they were even “about him” without introducing the full text of the underlying reports. Yet each report was consistent with the fundamental undisputed fact that he received compensation to which he was not entitled.

The court first rejected the notion that the headlines— particularly NBC’s reference to “double dipping” — might be read in isolation.

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Because Dr. Kapotas simultaneously received payments from the County and his private practice, he could not establish that the term “double dipping,” was untrue or defamatory. Nor was the statement that the plaintiff “was still on the Inspector General’s radar” defamatory when the full report went on to explain that the investigation centered on other hospital employees responsible for the overpayments besides Dr. Kapotas.

Next, setting aside for the moment its determination that the reports were true, the court alternatively ruled that the reports were not defamatory *per se* because they did not impute commission of an indictable crime or a lack of professional ability. Rejecting the contention that defendants implied Dr. Kapotas committed crimes of theft or embezzlement, the court noted that “the articles . . . read in their entirety, do not expressly accuse plaintiff of either offense” and that merely reporting the receipt of improper payments did not indicate that they were obtained through criminal acts. With respect to Dr. Kapotas’ professional competence, the court held that the pleadings failed to “identify any statement in any of the articles that impute that plaintiff lacks ability as [a] medical professional or violated any rule of medical ethics.”

The court also affirmed the circuit court with respect to a third backstop: that the *per se* claims failed under the Illinois innocent construction rule, which requires courts to adopt reasonable innocent constructions of the statements even where a defamatory construction also is available. The court explained that the defendants actually published quotes from the doctor himself, as well as hospital officials, blaming the payments on hospital payroll errors. It consequently concluded that the reports “could also be reasonably construed as reporting the incident consistently with the facts as alleged by plaintiff”.

Rejecting the defamation *per quod* claim, the court found Dr. Kapotas’ allegations that he “can no longer expect valid business relationships to form with patients and potential employers” and that he did not receive a job interview despite a recruiter’s inquiry did not amount to the requisite special damages. Although Dr. Kapotas argued on appeal that the news reports caused him to resign from the hospital, the court noted that his resignation actually predated publication of the reports.

The court next addressed the “ancillary” claims for false light invasion of privacy and intentional interference with a prospective economic advantage, holding that they could not survive the dismissal of the underlying defamation claim based on substantial truth. The interference claim also failed because, as with the *per quod* claims, “the hope of receiving a job offer is not a sufficient expectancy.” Moreover, the Court found no basis

The court also affirmed the circuit court with respect to a third backstop: that the *per se* claims failed under the Illinois innocent construction rule.

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from which to infer that the defendants published their reports with the intent of interfering with Dr. Kapotas' alleged job search rather than with the intent to publicize misspent public funds.

Finally, the court affirmed dismissal of the publication of private facts count. It held that neither the amount nor the method of compensation was sufficiently private, and defendants sought to address legitimate matters of public concern. Citing precedent, the court explained that "the receipt of State funds by physicians creates a public interest in the physicians' activities regarding the use of those funds" and that such activities are "a matter of legitimate public concern, far outweighing any personal privacy right of those providers to whom public funds are disbursed."

Damon E. Dunn and Seth A. Stern of Funkhouser Vegosen Liebman & Dunn Ltd. represented Sun-Times Media, LLC. Natalie J. Spears and Kristen C. Rodriguez of Dentons represented the BGA and NBC defendants. Scott J. Larsen represented the Plaintiff.



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MLRC Administrator: Debra Danis Seiden

Assistant Administrator: Andrew Keltz

MLRC Institute/WSJ Free Speech Fellow: Dorianne Van Dyke

MLRC Legal Fellow: Brittany Berckes

Update: Illinois Appellate Court Affirms Dismissal of Professor's Libel and Privacy Claims

Professor Sued Over News Coverage of Student's Sexual Harassment Lawsuit

By Steven Mandell, Natalie Harris, Catherine Gibbons and Tina Salvato

The Illinois Appellate Court affirmed dismissal of Northwestern University philosophy professor Peter Ludlow's defamation and false light invasion of privacy complaint against the *Chicago Sun-Times*, Fox Television Stations, Inc., and Cumulus Broadcasting LLC over a report about a federal lawsuit filed by Ludlow's former student claiming the professor sexually assaulted her. The Court held that because the report did not name the professor, it could be innocently construed as "of and concerning" someone other than Ludlow. [*Ludlow v. Sun-Times Media, LLC, et al.*](#), No. 1-14-2370, 2015 IL App (1st) 142370-U (Ill. App. Ct. 1st Dist. April 17, 2015). See also [MediaLawLetter July 2014](#) reporting on the trial court's dismissal of the complaint.

Background

On February 10, 2014, Ludlow's former student, Ms. Yoona Ha, filed a Title IX lawsuit in federal court against Northwestern University alleging discrimination and retaliation in response to her reports that Ludlow had sexually harassed and sexually assaulted her. The same day, the *Chicago Sun-Times* published an article about the lawsuit featuring the headline: "Student allegedly raped by professor suing Northwestern University" on its media wire service. Chicago-based television station WFLD Fox 32 and talk radio station WLS AM 890 picked up the story and re-published the wire service article verbatim.

The article did not identify Ludlow by name, referring only to a "tenured professor" at Northwestern who taught a philosophy class. recount several allegations from Ms. Ha's complaint, including her claims that the professor plied her with alcohol until she became intoxicated and blacked out; that she regained consciousness in an elevator to the professor's apartment where he was "furiously" making out with her; that she

The article did not identify Ludlow by name, referring only to a "tenured professor" at Northwestern who taught a philosophy class.

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begged him to stop and he told her it was “inevitable” they would have sex and that she lost consciousness and later woke up in his bed with his arms around her. The article did not link to the federal complaint or reference the party names or case number.

Ludlow sued all three media companies, citing their use of the word “rape” in the article headline despite the absence of any allegation of sexual intercourse in Ms. Ha’s federal complaint. The circuit court dismissed Ludlow’s complaint based on the innocent construction rule, finding the article could be reasonably interpreted as referring to someone other than Ludlow. In addition, the court also held that the article was a fair report of Ms. Ha’s federal complaint because “the terms ‘rape’ and ‘sexual assault’ are synonymous,” and therefore the word “raped” in the article headline was a fair abridgement Ms. Ha’s sexual assault allegations in the complaint.

Ludlow appealed and the appellate court affirmed solely on innocent construction grounds. The court held that “[t]he ‘of and concerning’ requirement is basically the same as the innocent construction rule; if the statement can reasonably be construed as referring to someone other than plaintiff, then it is not ‘of and concerning’ him and not actionable.”

Ludlow was not identified by name anywhere in the article, and only extrinsic facts (i.e. Ms. Ha’s federal complaint) could tie the article statements to him. The court held that because a reader would have had to discover Ha’s complaint on his or her own in order to identify Ludlow as the subject, the article was reasonably capable of an innocent construction. The appellate court did not address the circuit court’s conclusion that “rape” was a fair abridgment of the sexual assault allegations in Ms. Ha’s complaint. Neither the circuit court nor the appellate court addressed the wire service defense raised by the re-publisher defendants, which has not yet been recognized in Illinois.

Sun-Times Media, LLC was represented by Damon E. Dunn and Seth A. Stern of Funkhouser Vegosen Liebman & Dunn Ltd., Chicago. Cumulus Broadcasting, LLC was represented by Floyd A. Mandell, Carolyn M. Passen, and Eugene E. Endress of Katten Muchin Rosenman LLP, Chicago. Fox Television Stations, Inc. was represented by Steven P. Mandell, Natalie A. Harris and Catherine L. Gibbons of Mandell Menkes LLC, Chicago. Peter Ludlow was represented by Kristin M. Case, Kathleen O. Sedey, and Kendra L. Kutko of The Case Law Firm, Chicago.

Georgia Court Grants Motion For Summary Judgment In Hip Hop Reality Show Defamation Case

By S. Derek Bauer

On April 9, 2015 Judge Robert C.I. McBurney of the Superior Court of Fulton County, Georgia issued an Order granting summary judgment to broadcaster VH1, two production companies and reality television star Kimberly “K. Michelle” Pate in a defamation case arising from allegedly defamatory statements made on the hit VH1 reality television show, *Love and Hip Hop Atlanta* (“LHHA”). [*Wright v. Pate*](#), (Ga. Super. April 9, 2015).



In an in depth twenty-page opinion, Judge McBurney granted summary judgment to all defendants, dismissing the case in its entirety.

Background

The case arose from statements made during the first season of *LHHA* by R&B singer Kimberly Michelle Pate p/k/a K. Michelle, regarding her ex-boyfriend, Mickey Wright p/k/a Memphitz, who was a record executive with the label where K. Michelle received her first recording deal. In certain episodes of season one, K. Michelle asserted that Memphitz physically abused her and mismanaged record label funds that should have been allocated to advancing her career, to instead purchase “chains and rings.” Although Memphitz was never identified by name on *LHHA*, he claimed that he was immediately recognizable to the general viewing public as the subject of K. Michelle’s comments.

Shortly after *LHHA* premiered, and in response to K. Michelle's comments, Memphitz launched a media campaign in an effort to clear his name, using social media and interviews with prominent radio stations to declare that K. Michelle’s statements

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about him were false. Ultimately, Memphitz filed a lawsuit against K. Michelle, Viacom International Inc. – the parent company of VH1, and Monami Entertainment and NFGTV (now known as Eastern TV) – the two production companies responsible for filming, editing and delivering complete episodes of *LHHA* to VH1 for broadcast. The lawsuit alleged that the defendants defamed Memphitz by publishing K. Michelle’s statements.

Court’s Decision

In an in depth twenty-page opinion, Judge McBurney granted summary judgment to all defendants, dismissing the case in its entirety. The Court identified three categories of statements that Memphitz alleged to be defamatory: (1) statements related to a threatening text message that Memphitz allegedly sent K. Michelle; (2) statements related to Memphitz’s alleged mismanagement of K. Michelle’s career; and (3) statements related to Memphitz’s alleged physical abuse. Judge McBurney found that neither category of the statements were actionable for several independent reasons.

Lack of Publication

The Court dismissed Memphitz’s claim based on the threatening text message, holding that K. Michelle’s statements on that topic were never published as a part of *LHHA*. Although K. Michelle did allege that Memphitz sent her a threatening text message, on *LHHA* her comments were edited with an auditory “bleeping” sound, which prevented the audience from hearing those comments. The Court rejected Memphitz’s argument that the comments were published despite the bleeping because the audience could discern what K. Michelle had said by reading her lips.

Substantial Truth

In regard to the statements related to Memphitz’s financial mismanagement of K. Michelle’s career and physical abuse, Judge McBurney found that those statements were substantially true and thus not actionable. During his deposition, Memphitz made several admissions that the Court deemed to be fatal to Memphitz’s case. On the issue of financial mismanagement, Memphitz admitted that “he bought jewelry for himself and others out of record label budgets, including jewelry purchases for [K. Michelle] out of [her] budget . . . and that “he would ‘withdraw money out of one artist’s account and put it towards another’ with ‘computer shifts.’”

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These admissions the Court found showed that K. Michelle's statements that Memphitz bought "chains and rings" out of her recording budget and other statements related to financial mismanagement were "not sufficiently demonstrably false" to sustain a claim for defamation.

The Court also found that K. Michelle's broadcast statements relating to Memphitz's physical abuse were substantially true. K. Michelle stated repeatedly during season one of *LHHA* that Memphitz "beat my ass." Memphitz and his attorneys took that statement to mean that K. Michelle was alleging that Memphitz punched or otherwise beat K. Michelle by striking her, which he vehemently denied. Memphitz did however admit that during his relationship with K. Michelle, the two got into a physical altercation in a Memphis hotel room during which he grabbed her and the two ended up on the ground with him covering her mouth with his hand, a towel, or both to prevent her from screaming.

Other witness testimony, also revealed that on the night of the altercation, Memphitz admitted that once he let K. Michelle up from the ground during the altercation, she ran out of the hotel room screaming "he's trying to kill me, he's trying to kill me." The Court held that, even though the hotel altercation may not conjure up traditional images of "beat my ass," that it nevertheless constituted a potent form of domestic violence that caused K. Michelle to fear for her life and was arguably more severe than a "'mere' beating."

The Court held that the "pleaded truth" of Memphitz's admissions were more repugnant than what was actually broadcast and that the broadcast statements therefore would not have produced a different effect on the mind of a viewer's perception of Memphitz than the truth. Accordingly, the Court found that K. Michelle's statements regarding Memphitz's physical abuse, if not literally true, were at a minimum substantially true and not a sufficient basis for a claim for defamation.

Even though the Court could have disposed of the case based on its findings related to the truth of K. Michelle's broadcast statements, it went a step further and held that Memphitz was a public figure.

Opinion and Rhetorical Hyperbole

In addition to finding that K. Michelle's statements surrounding Memphitz's financial mismanagement of her career were substantially true, Judge McBurney also found that those statements were not actionable because they were nothing more than opinions and rhetorical hyperbole. During the show, K. Michelle stated that Memphitz (although not named) "bought, chains, rings, everything out of my recording budget.

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Over \$2 million, with nothing to show for it. no album, no music, no anything.” The Court held that those statements were “studded with the same type of exaggeration, overstatement and personal opinions” that Georgia Courts have found are not actionable.

The Court reasoned that in the context of a reality television show, *LHHA* viewers would have understood K. Michelle’s statements to be “figurative and exaggerative language” expressing “her strong, emotional, and negative views of [Memphitz] and his impact on her career – as opposed to making a literal assertion of fact.” Such “hyperbolic, figurative expressions,” the Court held, are protected from defamation liability.

Public Figure

Even though the Court could have disposed of the case based on its findings related to the truth of K. Michelle’s broadcast statements, it went a step further and held that Memphitz was a public figure, triggering the onerous “actual malice” standard. In finding that Memphitz was a public figure, the Court pointed to numerous facts showing that Memphitz had lived a life in the public spotlight for many years before *LHHA* ever premiered, including that Memphitz had appeared on the covers of magazines, previously been the host of an internationally broadcast hip hop television show on BET, and appeared in reality television shows, even having his courtship, engagement and wedding to his wife internationally televised.

Moreover the Court explained that “the hallmark of a general purpose public figure is his access to a platform to respond to bothersome speech” and that in this case, Memphitz “immediately and effortlessly interjected himself into the public discourse by responding to [K. Michelle’s] statements via media interviews and through Twitter and other social media.” With Memphitz’s status as a public figure cemented, the Court held that the defendants had not acted with actual malice in publishing K. Michelle’s statements on *LHHA*.

Indeed, the Court held that Viacom, Monami and NFGTV had exercised due diligence in investigating the truth of K. Michelle’s allegations regarding Memphitz’s physical abuse, that they reasonably believed that K. Michelle was truthful and took steps to ensure that Memphitz’s perspective was presented during *LHHA* by having other cast members present his “side of the abuse story.”

Memphitz has already filed a notice of appeal.

Viacom International Inc. was represented by S. Derek Bauer and Christopher L. Cottrell of McKenna Long & Aldridge, LLP; K. Michelle was represented by Cynthia Counts of the Counts Law Group; and Monami and NFGTV were represented by Christy Eikhoff and Jonathan Parente of Alston & Bird, LLP.

Court Grants Summary Judgment to Voice Media Group Dismissing Larry Klayman Libel Suit

By Sanford L. Bohrer and Scott D. Ponce

Voice Media Group obtained the entry of summary judgment against Larry Klayman in federal court in Ocala, Florida. [*Klayman v. City Pages*](#), 2015 WL 1546173 (M.D. Fla. April 3, 2015).

Klayman, representing himself, sued the defendants for defamation and defamation by implication arising from articles published in *City Pages* (Minneapolis) and *Phoenix New Times* reporting child custody and support proceedings between Klayman and his ex-wife, and unrelated Florida Bar proceedings against Klayman.

In a thirty-four page order that quotes liberally from *Alice's Adventures in Wonderland*, Chief United States District Judge Anne C. Conway entered summary judgment in favor of the defendants, and against Klayman, because there was no clear and convincing evidence of constitutional actual malice.

The Order explains at length the difference between common law malice and constitutional actual malice, and why arguments relating to common law malice do not preclude the entry of summary judgment against public figures who assert claims for defamation. As the court wrote:

[N]o amount of repeating the word “malice” will overcome the constitutional requirement that Plaintiff must provide evidence that Defendants made the statements at issue with knowledge as to their falsity or with reckless disregard to their truth—the standard of actual malice—with convincing clarity.

Sanford L. Bohrer and Scott D. Ponce of Holland & Knight LLP in Miami, Florida represented Voice Media Group.

Wrestling with Preemption: **The Eighth Circuit Declares Copyright the Winner**

By Joseph E. Martineau and Sarah A. Milunski

Increasingly, persons depicted in a copyrighted work, such as a movie, television show or sporting event, seek to claim they should be compensated when those who have lawfully acquired rights in that work display that work. Typically, they base their claims on common law theories that the display of the work misappropriates their name or likeness or infringes their right of publicity without their consent.

Copyright owners, of course, question why they should have to pay persons who

collaborated in the creation of the work, knowing it was being recorded, and who often already were paid for that collaboration. As owners of the recording, shouldn't they be protected by their copyright ownership? What good is copyright ownership if they cannot use the material without fear of being sued in state court by persons wanting money for a recording they previously agreed to?

This issue was squarely presented in a recent decision out of the Eighth Circuit Court of Appeals in St. Louis. In [*Ray v. ESPN*](#), 2015 WL 1810486 (8th Cir. Apr. 22, 2015), the Court held a state law misappropriation/right of publicity claim based on the mere act of re-broadcasting previously recorded wrestling



Because Ray's likeness simply could not be detached from his copyrighted, filmed wrestling performances, he could not escape the "subject matter" prong of copyright preemption.

performances fell squarely within the scope of copyright. Rejecting plaintiff Steve "Wild Thing" Ray's efforts to distinguish a copyright holder's rights from those of an individual in his name and likeness, the Court held that Ray's "attempts ... to recast his claims to evade copyright preemption [were] unavailing" and affirmed the dismissal of his lawsuit.

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Round 1 (The Match Begins)

Steve “Wild Thing” Ray began his professional wrestling career in the early 1990s with the Universal Wrestling Foundation (UWF). His long blond hair and muscular build made him an attractive performer for such events. With his agreement, Ray’s wrestling performances were telecast live and recorded for future use and display. Yet, when ESPN obtained the recordings of Ray’s wrestling matches and re-telecast them throughout North America and Europe, Ray sued ESPN in Missouri state court for common law invasion of privacy, misappropriation of name, infringement of the right of publicity, and interference with prospective economic advantage.

Ray did not claim he had any copyright interest or other ownership rights in the

recordings; in fact, he didn’t. But he argued he should be compensated because he had never consented to ESPN’s use of the recordings containing his likeness and performances. He also claimed ESPN’s re-telecast of the recordings interfered with his post-wrestling livelihood of promoting healthcare products and weightlifting supplements, though he never identified how.

The Court held a state law misappropriation/right of publicity claim based on the mere act of re-telecasting previously recorded wrestling performances fell squarely within the scope of copyright.

Round 2 (ESPN’s Takedown)

ESPN removed the case to federal court and then moved to dismiss on the basis of preemption under the Federal Copyright Act and failure to state a claim. It argued that Ray’s state law claims (two of which, invasion of privacy and misappropriation of name, are actually the same tort under Missouri law) were all based

on ESPN’s single act of re-telecasting a recorded performance of Ray’s previous wrestling matches—which, it argued, falls squarely within the scope of the Copyright Act. Under well-established Eighth Circuit Court of Appeals precedent, and the law everywhere else, ESPN argued such claims are preempted by the Federal Copyright Act if: “(1) the work at issue is within the subject matter of copyright as defined in §§ 102 and 103 of the Copyright Act, and (2) the state law created right is equivalent to any of the exclusive rights within the general scope of copyright as specified in § 106.” *Nat’l Car Rental Sys., Inc. v. Computer Assocs. Int’l, Inc.*, 991 F.2d 426, 428 (8th Cir. 1993).

Ray responded by arguing that it was not the video recording, but his “likeness” that was the “focal point of this case.” Because Ray’s likeness was not an “original work[] of authorship fixed in any tangible medium of expression,” he argued, it did not fall within the subject matter of the Copyright Act. Nor, he continued, were the rights protected by

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misappropriation of name or the right of publicity equivalent to any of the exclusive rights within the scope of the Copyright Act. Ray claimed that his state law causes of action sought to protect his identity and his right to control the commercial use of his identity, and therefore, his claims were different than copyright.

Round 3 (ESPN is Declared the Winner)

The District Court for the Western District of Missouri and the Eighth Circuit Court of Appeals each rejected Ray's claims. District Court Judge, Hon. Scott O. Judge Wright, granted ESPN's motion to dismiss, holding that:

[Ray's] wrestling performances were part of the copyrighted material, and his likenesses could not be detached from the copyrighted performances that were contained in the films. . . . [Ray] has not alleged that his name and likeness were used to promote or endorse any type of commercial product. Rather, [Ray] complains about ESPN airing wrestling performances that have been captured on video. Thus, [Ray's] complaints are based solely on ESPN airing video recordings depicting him in a "work of authorship," which is plainly encompassed by copyright law.

Ray cited several cases in an attempt to "recast his claims to evade copyright preemption," but the Court rejected each of these as "factually distinguishable or inapposite authority."

Ray v. ESPN, 2014 WL 2766187 *5 (W.D. Mo. 2014).

On Ray's appeal, Judges Smith, Benton and Shepherd, writing per curiam for the Eighth Circuit, agreed with Judge Wright. In analyzing the first element of copyright preemption—whether the work at issue is within the subject matter of copyright—the Panel found that "[t]he filming of Ray's wrestling performances clearly generated an "original work[] of authorship," that was "'fixed' in a tangible medium of expression" and could be "perceived, reproduced, or otherwise communicated," thus, bringing the films within the subject matter of copyright law. Because Ray's likeness simply could not be detached from his copyrighted, filmed wrestling performances, he could not escape the "subject matter" prong of copyright preemption.

In regards to the second "equivalency" prong of copyright preemption, the Court again noted that "the crux of Ray's case is that ESPN re-telecast Ray's filmed performances." Ray's state law rights, therefore, were allegedly infringed by the mere

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act of reproduction, performance, distribution or display—the equivalent of a copyright owner’s right to distribute copies of copyrighted work to the public.

Ray cited several cases in an attempt to “recast his claims to evade copyright preemption,” but the Court rejected each of these as “factually distinguishable or inapposite authority.” For instance, Ray relied on the holding in *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001), a case that involved, among other things, a retail clothier’s use of a photograph of the plaintiff surfer taken during a 1965 surfing event in Hawaii. The photographer, who owned the copyright in the photograph, sold the rights to the clothier which used it in advertisements to promote its products. The court upheld the surfer’s right of publicity claim and rejected a copyright preemption claim because the photograph was used in a manner to which the surfer never consented—for advertisements implying his endorsement of the clothier’s products. Ray’s reliance on cases such as *Abercrombie* was unavailing because Ray’s state law claims were based solely on ESPN’s rebroadcast of a copyrighted film exactly as intended and not for some collateral purpose.

Because Ray did not and could not allege that ESPN had unlawfully acquired the recorded performances and could not assert any copyright claim himself in those recorded performances, and because he could not show that the recordings were used in a manner contrary to their originally intended use, the Court held ESPN had every lawful right to re-telecast them and affirmed the dismissal of Ray’s case.

Joseph E. Martineau, a partner, and Sarah A. Milunski, an associate, at Lewis Rice, LLC, St. Louis, Missouri, represented ESPN in both the trial and appellate courts.

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Drone Journalist Can Sue Policeman Who Got Him Suspended

But Court Says No First Amendment Right to Hover Over Accident Scene

By Charles D. Tobin

A Connecticut federal judge has held that a TV journalist can sue a police officer for violating his civil rights by asking the station to suspend him for flying an unmanned aerial vehicle (UAV) over an accident scene. [*Rivera v. Foley*](#), No.14-cv-00916 (D. Conn. March 23, 2015).

District Judge Vanessa L. Bryant, however, in a 25-page ruling on the officers' motion to dismiss asserting qualified immunity, threw out all of the journalist's other claims. The court strongly condemned both the journalist's use of the UAV, or "drone," to hover over a police investigation and an officer's vindictive conduct in threatening the station after the incident.

Background

Claiming he was flying as a hobbyist and not for the station, Pedro Rivera, who works as a photographer and editor for WFSB-TV in Hartford, flew his UAV and took images over the scene of a February 1, 2014, fatal highway accident. Officers surrounded him and ordered him to stop and leave the area. While Rivera told police that he was not filming for work, according to the complaint, "he does, from time to time, forward the video feed" to the station.

The complaint also alleges that one of the officers contacted the station after Rivera left and told his supervisor that Rivera he had interfered with the accident investigation. The officer "requested" or "suggested" that the station discipline Rivera, or else the station would risk the police department's "goodwill."

Rivera was suspended from work for one week. In addition to the city, he sued the officers under 42 U.S.C. § 1983 alleging violations of his First and Fourth Amendment rights on grounds that police:

- Subjected him to an unreasonable detention;

The court strongly condemned both the journalist's use of the UAV, or "drone," to hover over a police investigation and an officer's vindictive conduct in threatening the station after the incident.

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- Unlawfully restrained him from filming police activity;
- Unlawfully order him to leave the accident site;
- Unlawfully retaliated against him by seeking his suspension from work;
- Subjected him to an unlawful prior restraint in making that phone call.

The court rejected all claims except the prior restraint.

Detention “Objectively Reasonable”

The court dismissed Rivera’s unlawful detention claim finding that, under the facts pleaded, officers had reasonable suspicion that he “was engaged in unlawful behavior” that warranted “a brief investigative stop.”

The court permitted Rivera to proceed on the remaining claim that the officer’s call to the station constituted a First Amendment prior restraint on his ability to work as a journalist.

Plaintiff’s operation of an unusual and likely unidentified device into a cordoned-off area at the scene of a major motor vehicle accident and ongoing police investigation provides arguable reasonable suspicion that Plaintiff was interfering with police activity. At the very least, the facts alleged in the Complaint are sufficient to establish that police officers of reasonable competence could disagree on the legality of Officer Yergeau’s actions.

No Right to Record Police at Accident Using UAV

The court also dismissed Rivera’s claim that police unlawfully prevented him from recording their activity using the drone, finding under qualified immunity law that the photographer had not alleged a clearly established right.

The Second Circuit, the district court noted, has not yet addressed whether the First Amendment provides a right to citizens to record police activity. The court also noted that those circuits recognizing this right have concerned cases “involv[ing] use of a handheld device to photograph or videotape at a certain distance from, and without interfering with, the police activity at issue”.

The court – in unfortunately loose language – distinguished Rivera’s conduct from the precedent and described it as “trespassing”: “By contrast, here, Plaintiff directed a flying object into a police-restricted area, where it proceeded to hover over the site of a major motor vehicle accident and the responding officers within it, effectively trespassing onto an active crime scene.”

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No Right to Bring UAV to Accident Scene

The court recast, then dismissed, Rivera's claim that he was unlawfully ordered to leave the scene. The court held that, even if the public has a right to assemble near an accident scene, Rivera offered no support for the proposition of a clearly established right "to assemble at the scene of an active police investigation and fly an unidentified object into a designated crime scene."

In the opinion's harshest words for the journalist, the court held that the officers had a reasonable basis to believe it was within their authority:

. . . to require Plaintiff, who based on the facts alleged was trying to access an area from which the public was prohibited and behaving in a manner likely to disrupt or distract law enforcement officers at an active crime scene, to disperse from the accident site. . . . [Police] had a reasonable belief that Plaintiff's conduct at the accident scene posed a risk to the integrity of the crime scene or of interference with the responding officer.

No Retaliation Against a First Amendment Right

The court made short work of the retaliation issue. It found that because Rivera failed to demonstrate that his conduct was protected by the First Amendment, he had no valid retaliation claim "regardless of whether Plaintiff has alleged the requisite motive" for the officer's behavior in calling the station and asking for his suspension.

Police Call to Station May Constitute a Prior Restraint

The court, however, permitted Rivera to proceed on the remaining claim that the officer's call to the station constituted a First Amendment prior restraint on his ability to work as a journalist.

Plaintiff has alleged sufficient facts to support a claim that Officer Foley acted to suppress Plaintiff's right to freedom of the press when he contacted Plaintiff's employer and threatened to withhold the "goodwill" of the Department if Plaintiff was not "disciplined," resulting in Plaintiff's suspension from his job as a photographer and editor. Unlike Officer Yergeau's restraints upon Plaintiff's conduct at the accident site, which did not implicate constitutionally protected activity, Officer Foley's alleged actions after Plaintiff left the crime scene operated as a restraint on Plaintiff's subsequent right to work as a member of the press and therefore to gather and report on

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the news. It is beyond dispute that this activity is protected under the First Amendment, and indeed, "basic to the existence of constitutional democracy."

The court focused with disapproval on the police argument that the officer had behaved appropriately by calling the station once Rivera left the scene.

In this context, qualified immunity is not appropriate, as Defendants cannot credibly contend that it was "objectively reasonable" for Officer Foley to believe that he was not violating Plaintiff's First Amendment right when he allegedly contacted Plaintiff's employer to compel Plaintiff's suspension. Nor is it plausible to suggest that, on the face of the Complaint, officers of reasonable competence could disagree on the legality of such an action. Accordingly, the Court finds that Officer Foley is not entitled to qualified immunity on these allegations, and Plaintiff's claim on these facts will be sustained.

Charles D. Tobin is a partner with Holland & Knight LLP in Washington, D.C.



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Media Coalition to FAA, NTIA: Let News Drones Fly Now

Survey Shows Some Changes to Proposed Rules Needed

By Charles D. Tobin and Mickey H. Osterreicher

A news media coalition of nearly two dozen companies and professional associations has [urged the Federal Aviation Administration](#) (FAA) to enact regulations as soon as possible authorizing the use of unmanned aerial vehicles (UAVs) to gather news.

The coalition, which includes MLRC, also submitted comments to the [National Telecommunications and Information Administration](#) (NTIA) asserting that state laws provide adequate privacy protections while balancing First Amendment rights, and that no new federal privacy regulations are necessary to address UAVs, commonly known as “drones.”

Meanwhile, a [new survey](#) conducted under the leadership of the National Professional Photographers Association (NPPA) indicates that those answering favor a micro unmanned aerial system (mUAS) rule be implemented as soon as possible and that flights of such vehicles and other small UAVs be exempted from some of the currently proposed restrictions.

FAA Comments Largely Supportive, But Changes Needed

The FAA in February issued its long-awaited notice of proposed rulemaking outlining new regulations for commercial use of UAVs flying at 500 feet or less. Commercial UAV use is currently banned in the United States unless an operator receives a special exemption. The proposed rule would govern UAVs under 55 pounds, and the FAA also invited comment as to whether it should enact a separate rule governing UAVs less than 4.5 pounds. Canada has a special rule for that size of smaller UAVs.

In its comments on the proposed rule, the news media coalition reinforced that the FAA must take the unique role of journalism into close account in enacting regulations:

The News Media Coalition firmly believes that the development of a legal environment for safe [UAV] newsgathering will further the public's First Amendment interest in the timely receipt of information on matters of public concern.

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The News Media Coalition firmly believes that the development of a legal environment for safe [UAV] newsgathering will further the public's First Amendment interest in the timely receipt of information on matters of public concern, and the First Amendment rights of journalists to gather news. [UAVs] provide the safest, most practical form of aerial newsgathering, which is safer and more efficient than helicopters or other manned aircraft, as are commonly employed by news organizations currently.

The news media coalition's comments were largely supportive of the proposed rule.

For example, the proposal would require special certification for UAV operators but no pilot's license or special medical checkup, as FAA exemptions have required.

But the rule also would limit UAVs to daylight flights and forbid flights beyond the line of sight of the operator. It also would continue the ban of flights over people.

The coalition urged the FAA to relax restrictions even further, asserting that the FAA should:

- Measure the 500-foot height limit not only above the ground, but also above any buildings or other tall obstacles, to better anticipate news operations in cities or over forested land;
- Allow operations at night with certain safeguards, suggesting that navigational lighting, transponders, and other technology can

be used to ensure safety.

- Allow flights beyond the operator's line of sight, again with the use of technology, such as triangulation of a UAV's location through cellphone towers or GPS, which would ensure tracking and safety.
- Allow flights over people, so long as the drone remains at an altitude of at least 50 feet.

The coalition also endorsed the concept of a "micro" category of UAVs weighing under 4.5 pounds. The coalition also called on the FAA to authorize that category of use for newsgathering immediately, rather than awaiting enactment of a final rule. The final rule is not expected to be in place until late 2016 or 2017 at the earliest.

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Ever since Kodak introduced the Brownie, the world's first portable camera, in the 1880s, American society has worked through initial public hysteria accompanying the development of each new form of technology.

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Coalition Tells NTIA No New Privacy Regulation Needed

The FAA has repeatedly resisted calls from Congress for new privacy regulations, telling lawmakers that the agency lacks the authority or expertise in that area. To address congressional pressure, the Obama Administration directed NTIA, a component of the U.S. Department of Commerce, to convene meetings of UAV stakeholders to discuss voluntary best practices standards.

In response to the NTIA's request for comments about the scope of those upcoming meetings, the news media coalition submitted a letter arguing that "robust, extensive and well-established state privacy laws already protect privacy."

The coalition's comments to the NTIA pointed out that ever since Kodak introduced the Brownie, the world's first portable camera, in the 1880s, American society has worked through initial public hysteria accompanying the development of each new form of technology. The comments noted state privacy laws and court decisions have continuously kept pace with technology, and that – from Peeping Tom laws to eavesdropping statutes, to common law intrusion precedent – modern state laws provide remedies that protect privacy regardless of the newsgathering platform.

The coalition also noted that these state laws have carefully balanced the constitutional interests in newsgathering:

State laws also safeguard the First Amendment rights of journalists to gather the news, and the public's right to receive the news, by firmly protecting visual journalism in public places. Federal and state courts applying these state laws have thus developed a robust body of case law balancing the right to privacy against the constitutional protections for the free press.

Because "the existing framework of state laws will apply equally well to" UAVs, the news media coalition concluded, new federal privacy protections would not be "warranted or wise."

The coalition consists of: Advance Publications, Inc.; A.H. Belo Corp.; American Broadcasting Companies, Inc.; the American Society of Media Photographers; The Associated Press; Cable News Network, Inc.; Capitol Broadcasting Co.; Cox Media Group, LLC; Fusion Media Network, LLC; Gannett Co., Inc.; Getty Images (US), Inc.; Gray Television Group, Inc.; Media Law Resource Center; National Press

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Photographers Association; MPA – The Association of Magazine Media; NBCUniversal Media, LLC; The New York Times Company; Reporters Committee for Freedom of the Press; The E.W. Scripps Company; Sinclair Broadcast Group, Inc.; Society of Professional Journalists; Thomson Reuters (Markets) LLC.

Survey of Journalists

On March 13, 2015 the National Press Photographers Association (NPPA) distributed a survey for news gatherers concerning the *FAA Notice of Proposed Rule Making (NPRM) Regarding Operation and Certification of Small Unmanned Aircraft Systems (sUAS)*. The survey also included a few questions on privacy related to a Notice

for Comment in the Federal Register by the National Telecommunications and Information Agency (NTIA) concerning *Privacy, Transparency, and Accountability Regarding Commercial and Private Use of UAS*.

The survey remained open until April 11, 2015 during which time it received 428 responses. Of those who answered almost thirty percent (30%) were independent journalists while twenty-two percent (22%) were staffers for news organizations. Of the twenty percent (20%) who answered “other” most were also independent photographers. Forty-four percent (44%) had greater than twenty (20) years’ experience in their profession.

Not all respondents completed every question, but of those that did:

Coalition members believe the privacy protections provided by many state laws adequately balance those concerns with First Amendment newsgathering rights, and that no new NTIA issued privacy guidelines are needed.

- Ninety percent (90%) favor an expedited Section 333 process for standard applications and COA approval process.
- Eighty-two percent (82%) were at least satisfied with the five hundred foot (500’) ceiling.
- Seventy-seven percent (77%) favor an exception for newsgathering coverage of a weather event under certain restrictions.
- Seventy-five percent (75%) of respondents say they are knowledgeable or better on the topic of UAVs.
- Seventy-five percent (75%) of respondents have had at least some conversation about privacy and UAVs in their newsroom or within their organization.

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- Seventy-two percent (72%) were unsatisfied with the daylight only rule.
- Seventy-two percent (72%) expressed varying degrees of dissatisfaction with regulations requiring each sUAS to be registered.
- Sixty-five percent (65%) of respondents say they are very confident that UAVs will be a useful tool in the newsroom.
- Sixty-one percent (61%) are very concerned about the state's privacy efforts.
- Fifty-eight percent (58%) say they have at least some skill with a UAV.
- Fifty-six percent (56%) of respondents are very concerned that the FAA's rules will restrict newsrooms from using UAVs.
- Fifty-three percent (53%) are very concerned about the president's privacy efforts.
- Fifty-one percent (51%) are very concerned about legal protections for privacy.
- Fifty percent (50%) favor a micro unmanned aerial system (mUAS) category with a vehicle weight of 6 lbs. or less and of those twenty-four percent (24%) support a vehicle weight of 4.4 lbs. or less.
- Forty-two percent (42%) favor sUAS operation Beyond Visual Line of Sight (BVLOS) using First-Person View (FPV).

Conclusion

Overall the coalition members believe the privacy protections provided by many state laws adequately balance those concerns with First Amendment newsgathering rights, and that no new NTIA issued privacy guidelines are needed.

With regard to safety issues the coalition members, supported by the NPPA survey findings, favor a micro drone rule – to be implemented as soon as possible. They also support a change in some of the currently proposed FAA restrictions on the use of small and micro drones to provide greater operational flexibility commensurate with their size and weight.

Charles D. Tobin is a partner with Holland & Knight LLP in Washington D.C. Mickey H. Osterreicher is General Counsel of the National Press Photographers Association. Holland & Knight represents the News Media Coalition in the comments to the FAA and NTIA.

California's Eraser Law: Erasing a Minor's Past to Save His Future

By Eric Ball

Hector recently graduated from U.C. Berkeley and is anxious about his upcoming job interview. He's about to enter the adult world. But he's also got a bigger problem. When he was 17, he was not as wise as he is now at the ripe ol' age of 22. Back then, he posted unfortunate photos of himself drinking at high school parties and made comments on the message boards of news websites that he'd like to take back. Even worse, these pictures and comments will be the top search results when his future employers search for his name on Google. What can he do about his teenage indiscretions?

On January 1, 2015, California seemingly came to Hector's rescue with its Eraser Law (officially known as the "Privacy Rights for California Minors in the Digital World" [Cal. Bus. & Prof Code Sections 22580-22582](#)). The law requires website and mobile app operators ("Operators") to provide anyone under 18 with (i) the ability to remove or request removal of content that the minor posted on the website or mobile app; (ii) notice and clear instruction on how to do so; and (iii) notice that such removal may not remove all traces of such posting. While the law has understandable goals, it raises a number of uncertainties for both Hector and Operators.



When Can a Minor Request Removal?

The law fails to define when a user can request removal of postings he made as a minor. Can Hector, at 22, request removal? Or has he waived any right since he's no longer a minor? The most natural reading is that a user may only request removal while he is a minor. But that requires minors to make adult decisions and know what they should and should not be posting. This is contrary to the law's intent to protect minors from the mistakes of their youth.

Who Can Request Removal?

Only "registered users" can take advantage of the law, but the law does not define what a "registered user" means. Could registered users mean someone who posts a

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comment on a news article and provides his real name (and email address)? Or is a more formal sign-up process required? Operators should be cautious not to read the “registered users” provision too narrowly.

Does the Law Apply to Parties Outside of California?

If non-California Operators have to comply with the law, because California minors are using their websites, the law is likely unconstitutional. This reading of the law would violate the Dormant Commerce Clause doctrine, which says that only Congress can regulate interstate commerce. But even if the law applies only to California Operators, it would still have national implications, since most Internet companies are in California. The more ambiguous situation is if an Operator only has a small California office not related to its website operations, or if only some of its servers—which do not contain Hector’s posts—are in California. Would the law still apply in this context? Without jurisdictional guidance from the law, an Operator with some California connection should evaluate the cost of compliance versus the risk and cost of a future lawsuit.

Is the Law Necessary?

Major social media providers, like Twitter and Facebook, already allow users—both young and old—to remove their content. They did not need a new law to require this existing business practice. Unfortunately, the law may have collateral and *in terrorem* effects beyond existing practices, similar to what we see with DMCA takedown requests. Operators may play it safe and remove content that is not required to be removed, e.g., posts about one minor by another minor or a full comment thread. This type of response stifles the variety and openness of voices that is a beneficial hallmark of the Internet.

These issues with California’s Eraser Law are only a sampling of the questions the law raises. We need a willing defendant to test the limits of the statute and to answer these questions. It will, however, often be easier for Operators to voluntarily comply than to litigate and find out the answer.

Eric Ball is an associate at Fenwick & West LLP and a member of the MLRC's Next Generation Committee.

District of Connecticut Denies Section 230 Protection to Online Ad Network

By Jeff Hermes

On March 5, 2015, the U.S. District Court for the District of Connecticut ruled on the liability of LeadClick, the operator of an online advertising network, in a lawsuit brought by the Federal Trade Commission. The case, [*FTC v. LeanSpa LLC*](#), involved a series of misleading advertisements created by LeadClick's third-party affiliate marketers. The district court granted summary judgment in favor of the FTC and rejected LeadClick's defense under Section 230 of the Communications Decency Act, in a decision that stretches the definition of an "information content provider."

Background

At the outset, the district court had little difficulty in finding that the fake news sites contained material misrepresentations, brushing off LeadClick's arguments that materiality was a jury issue.

The marketing program at issue involved "purported weight-loss and colon-cleanse" products sold by co-defendant LeanSpa LLC. In 2010, LeanSpa entered into the first of ten contracts with LeadClick to handle online marketing for the company's products. LeadClick carried out its obligations through its affiliate marketing network, which connected mercantile customers with third-party publishers and marketers ("affiliates"). These affiliates in turn promoted the customers' goods through e-mail, banner ads, search engine placement, and other methods. LeadClick provided the technology by which clicks on affiliate advertising would be tracked and routed back to merchant websites. LeadClick selected the affiliates participating in its network, controlled which customers worked with which affiliates, and had review authority over the advertising they created.

Some network affiliates generated what the FTC termed "fake news sites" to promote LeanSpa products. These websites could include claims of independent product testing or analysis, statements about weight loss results, comments appearing to come from independent consumers, and logos of genuine news organizations. There were, of course, no independent tests, no independent consumers, and no associations with news organizations.

Some LeadClick employees were aware of the use of fake sites, and LeadClick became involved with the content of these sites on at least two occasions. In one case, LeanSpa's CEO directed an officer of LeadClick to pass along instructions to affiliates

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to include a particular pair of products as the subject of a fake review. In a separate occurrence, a LeadClick employee discussed with an affiliate which products the affiliate mentioned on a fake news site. It is not clear from the court's discussion whether LeadClick itself selected or suggested the products in either case.

LeadClick did suggest changes or provide information for other affiliate-created websites, although the court did not identify whether these were fake news sites. In one such instance, a LeadClick employee told the affiliate that it would be a good idea not to identify a page as a "news site," and to call it an "advertorial" instead. As part of its services, LeadClick also purchased banner ad space on websites (including sites operated by genuine news outlets) and then resold that space to affiliates. In some cases, this resulted in a direct link between a genuine news site and a "fake news" site via a banner ad.

District Court Decision

The FTC, together with the State of Connecticut, sued both LeanSpa and LeadClick (as well as a number of other institutional and individual defendants) in federal court for violations of the FTC Act and the Connecticut Unfair Trade Practices Act ("CUTPA"). On cross-motions for summary judgment by LeadClick and the government, the district court rejected LeadClick's proffered defense under Section 230 and granted summary judgment for the plaintiffs.

At the outset, the district court had little difficulty in finding that the fake news sites contained material misrepresentations, brushing off LeadClick's arguments that materiality was a jury issue. *FTC v. LeanSpa LLC*, No. 11-cv-01715-JCH, slip op. at 17-21 (D. Conn. Mar. 5, 2015). The court also found that LeadClick's ability to control the acts of the third-party affiliate marketers was sufficient to hold them liable under the FTC Act and CUTPA:

LeadClick had the authority to not hire affiliates using fake news sites, to instruct them not to use such sites after hiring them, and to remove them if they continued to do so. Just as LeanSpa would be liable for approving requests to advertise with fake news sites, LeadClick, as LeanSpa's agent, is liable for its own decision to effectuate that decision.

Slip op. at 24-25.

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1 Trick of a Tiny Belly: Reporter Loses Her "Belly" Using 1 Easy Tip
 As part of a new series: "Diet Trends: A look at America's Top Diets" we examine consumer tips for dieting during a recession

AS SEEN ON:      



Julie investigates the Acai Berry diet to find out for herself if this super diet works.

(Piscataway) - Acai berries are the latest weight loss fad. These so called Super Foods that you take as a supplement to lose weight have been getting a lot of international attention. And like you have probably already seen; they are all over the internet in blogs and success stories of people who have apparently used the pills and lost a ton of weight.

But we here at News 6 are a little skeptical and aren't sure that we've seen any real proof that these pills work for weight loss. So we decided to put these products to the test. What better way to find out the truth than to conduct our own study?



Julie Ayers, our Health and Diet columnist, recently put the Acai and Coffee Diet to the test.

Some network affiliates generated what the FTC termed "fake news sites" to promote LeanSpa products. These websites could include claims of independent product testing or analysis, statements about weight loss results, comments appearing to come from independent consumers, and logos of genuine news organizations.

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The court also pointed to LeadClick's resale of banner space to affiliates using fake news sites and its instructions to affiliates to pair certain LeanSpa products in their advertisements as direct participation in deceptive activity. *Id.* at 25-26.

The court separately analyzed whether LeadClick's involvement was sufficient to overcome its affirmative defense under 42 U.S.C. § 230, and noted that:

The degree to which an entity must be involved in the creation of the content to make that entity "responsible" is somewhat unclear. On one hand, it is well established that notice of the unlawful nature of the information provided is not enough to make it the service provider's own speech. ... On the other hand, courts have held entities to be information content providers when the nature of the service provider's product virtually requires, or makes extremely likely, that users will create unlawful conduct. *Id.* at 27-28 (internal citations and quotation marks omitted).

The court looked to three cases for guidance: *FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009), in which the Tenth Circuit held that an information search service could be held responsible for soliciting affiliates to supply it with data about individuals that could not be obtained legally; *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008), in which the Ninth Circuit held

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that an online housing marketplace could be held liable for the results of providing a form for creation of housing ads that suggested use of illegal discriminatory criteria; and the unpublished opinion in *Doctor's Associates, Inc. v. QIP Holder LLC*, No. 06-cv-01710 (D. Conn. Feb. 19, 2010), in which the District of Connecticut held that sandwich shop Quiznos could be responsible for false assertions about rival Subway in materials submitted by customers as part of a marketing promotion, when Quiznos encouraged customers to assert that Subway used less meat in its sandwiches.

Notably, the district court did not discuss or cite the Sixth Circuit's more recent decision in *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398 (6th Cir. 2014), which held that the defendant could not be held liable for defamatory comments submitted in response to a solicitation for negative, but not necessarily illegal, content.

Considering these precedents, the district court held that that “[n]o reasonable jury could deny that LeadClick was an ‘information content provider’”:

LeadClick solicited and hired the affiliate marketers to advertise LeanSpa's products, knowing that affiliates used fake news pages. LeadClick continued paying ... affiliates running fake news pages for their referrals to LeanSpa's website. ... LeadClick communicated with LeanSpa and with affiliates running fake news pages regarding which products should be advertised as the “Step 1” and “Step 2” products purportedly under independent investigation. ... LeadClick also screened advertisements according to merchants' preferences. ... LeadClick's media buying also materially contributed to the unlawful nature of the fake news sites by providing affiliates running fake news sites with a way to direct consumers from genuine news sites to fake news sites. *LeanSpa*, slip op. at 29 (internal citations omitted).

The overall impression is that the court is holding LeadClick responsible for its knowledge, combined with its “exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content.”

But *Accusearch*, *Roommates.com*, or *Doctor's Associates* all rested on specific findings that the defendants “in some way specifically encourage[d] development of what [was] offensive about the content.” *Accusearch*, 570 F.3d at 1199. In contrast, the connection between LeadClick and the content of the “fake news” sites is attenuated.

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Indeed, the district court is remarkably circumspect about its language. It states that LeadClick recruited affiliate marketers “knowing that affiliates used fake news pages,” but is not clear whether this knowledge related to the specific affiliates being recruited. The court avoids stating that LeadClick’s affiliates were hired with the expectation that they would create fake news sites. The court finds that LeadClick continued paying affiliates running fake news pages and screened advertisements as directed by LeanSpa, but does not explain how that conduct “specifically encouraged *development* of what was offensive about the content.” It states that LeadClick communicated with LeanSpa and the marketers about which products to include, but not whether the ultimate instructions came from LeanSpa (a separate third party information content provider) or, again, how selection of the products affected the illegality of the content.

The court acknowledges that the defendant’s knowledge of illegal material is not enough to overcome Section 230 protection, *LeanSpa*, slip op. at 27-28. Nevertheless, the overall impression is that the court is holding LeadClick responsible for its knowledge, combined with its “exercise of a publisher’s traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content.” *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). This is barred by Section 230. *Id.*; see also *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (“[T]he exclusion of ‘publisher’ liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message.”); *Ben Ezra, Weinstein, and Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 985-86 (10th Cir. 2000) (Section 230 protected defendant engaging in traditional publisher functions by editing stock quotations provided by third party); *Blumenthal v. Drudge*, 992 F. Supp. 44, 51-53 (D.D.C. 1998) (America Online did not become “information content provider” by paying third party Matt Drudge to supply “gossip and rumor”).

The last fact to which the court cites – LeadClick’s resale of banner space – raises a closer question. The court noted, “The alleged deception in this case is the representation that independent testing was being conducted by genuine news reporters; LeadClick’s media buying contributed to that deception by providing consumers with yet another reason to think that the news site was genuine.” *LeanSpa*, slip op. at 29. If LeadClick did materially enhance the credibility of a misrepresentation by connecting a lie to a legitimate source, then it might indeed have “specifically encouraged development of what was offensive about the content.” But this seems a slender thread on which to hang liability, given that most reasonable users of online services understand that banner advertisements and content linked thereto are not the product of

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the site on which the ad appears. At the very least, the impact of such links does seem like it should be a question for a jury.

LeadClick filed a notice of appeal on April 2, 2015. As a final note, it is unlikely that Second Circuit's recent Section 230 opinion in [*Ricci v. Teamsters Union Local 456*](#), No. 14-1732 (Mar. 18, 2015), decided two weeks after *LeanSpa*, would have changed the result in the District of Connecticut. *Ricci* involved a claim against website host GoDaddy based upon content that the plaintiff conceded was created solely by third parties; GoDaddy thus clearly fell within the scope of Section 230's protection. Slip op. at 7.

While the decision was notable as the first Second Circuit opinion to apply Section 230 and for holding that Section 230, nominally an affirmative defense, could properly support a defendant's motion to dismiss, *id.* at 7-8, the Second Circuit was not confronted with any of the nuances of interpretation raised by *LeanSpa*.

Jeff Hermes is a Deputy Director at the MLRC.



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- Preparing for the Next Round in Net Neutrality
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- Probing the Outer Limits of Section 230
- Has The Transformative Use Doctrine Transformed Copyright Law For Better or Worse?
- Recent Developments in Digital Privacy and Data Security

Social Media Accounts Can Be “Property” in Bankruptcy

By Marc Fuller

Addressing an issue of first impression in Texas, a bankruptcy court in Houston held that social media accounts can be the property of a bankruptcy estate. See [*In re Ctli, Inc.*](#), No. 14-33564, 2015 WL 1588085 (S.D. Tex. Apr. 3, 2015). The former owner of the Debtor, a gun store and shooting range, argued that a Facebook Page and Twitter account bearing the name of the business belonged to him and were used for personal communications. The court disagreed, holding that the accounts belonged to the business and therefore were the property of the bankruptcy estate.

Background

Prior to filing for Chapter 11 reorganization, the Debtor, Ctli, LLC, did business as Tactical Firearms, a gun and ammunition store near Houston. It was formed and originally owned solely by Jeremy Alcede and his then-wife Sarah Alcede. Mr. Alcede recruited his friend, Steven Coe Wilson, to invest in the business. Wilson helped the store buy a large building, and thereafter Tactical Firearms was able to advertise itself as the “finest indoor firing range in the country.”

The relationship between Alcede and Wilson soon soured, as Wilson accused Alcede of improperly diverting cash obtained through sales of used shells from the gun range. Eventually, the Debtor defaulted on several loans and filed a Chapter 11 petition. Wilson proposed a reorganization plan, which the court approved. The court’s order required Alcede to “deliver possession and control” of “passwords for the Debtor’s social media accounts, including but not limited to Facebook and Twitter” to Wilson on behalf of the reorganized Debtor.

Alcede refused, claiming that all social media accounts at issue belonged to him, not the Debtor. In addition, he argued that he could not be forced to turn over the passwords for these accounts without violating his individual proprietary and privacy rights in them. After Alcede equivocated about whether the issue should be delegated to a neutral third party to segregate the business and personal content in these accounts, the bankruptcy court decided it would resolve the dispute itself.

The court noted that the determination of whether the accounts at issue constituted “property of the estate” under the Bankruptcy Code required an analysis of the underlying state law. No Texas court has yet considered the issue of whether social media accounts are property interests, but the Bankruptcy Court for the Southern

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District of New York has treated such accounts as property, similar to customer and subscriber lists. *See In re Borders Grp., Inc.*, No. 11-10614, 2011 WL 5520261, at *13 (Bankr. S.D.N.Y. Sept. 27, 2011). The court rejected the argument that the ability of customers to “unlike” or otherwise opt out of future contact deprived the accounts of the value necessary to constitute a property interest. *But see Mattocks v. Black Entm’t Television LLC*, 43 F. Supp.3d 1311, 1321 (S.D. Fla. 2014). The question, therefore, was whether the accounts were property of the business or of Alcede personally.

Legal Analysis

The court’s analysis of whether the Facebook page and the Twitter account at issue were personal or business property began with an overview of both social media platforms. Moving to the Facebook Page at issue, the court noted that Alcede separately maintained his own user profile, but had created the Tactical Firearms Page for the business. According to the court, the use of a Page, which Facebook states are for “business, brands, and organizations,” raised a presumption that it belonged to the business. This characterization was cemented by Alcede’s use of the Page to promote business-related events and information, such as the store’s Black Friday sale. Alcede also granted an employee of the business access to post on the Page through the business’s Constant Contact account, and he separately allowed a business associate access to his personal Facebook login so that the associate could post status updates promoting the store’s products on the Page.

The court rejected Alcede’s attempts to characterize the Facebook Page as an extension of himself, dedicated to his own interests and “likes.” Alcede had attempted to buttress his argument by explaining that he had created the Tactical Firearms Page because he had reached the limit of 5,000 friends of his personal profile, causing new friend requests to be declined automatically. The court was skeptical of this story, however, noting that Alcede had only 4,423 friends at the time of the hearing and had made no showing of a decline from a previously-higher total.

Most importantly, the court rejected Alcede’s attempt to characterize posts and tweets about his enthusiasm for firearms and his pro-gun politics as “personal” messages:

The court rejected the argument that the ability of customers to “unlike” or otherwise opt out of future contact deprived the accounts of the value necessary to constitute a property interest.

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The very nature of social media dictates that its best use for business is somewhat more subtle than other forms of marketing. . . . Mr. Alcede himself has stated to this Court: ‘I don’t mean to toot my own horn, but I’m a PR genius....’ [July 11 H’rg Tr. 125:16–17]. This Court finds that Mr. Alcede’s political messages on the store’s marquee and via social media were a manifestation of this genius. Given this context, regarding overtly political posts and tweets, the Court agrees with the Plan Agent’s counsel, who stated: ‘[I]t’s very hard for me to stipulate that anything on this page is not business related due to the nature of the business and the fact that this type of business is frequently affiliated with a particular political affiliation.’

Most importantly, the court rejected Alcede’s attempt to characterize posts and tweets about his enthusiasm for firearms and his pro-gun politics as “personal” messages:

Similarly, the court rejected the argument that transfer of control over the Facebook Page and Twitter account would misappropriate the individual goodwill Alcede had cultivated through his posts and messages. The court noted that personal friends and store customers would be free to follow him to another Facebook Page or to a new Twitter account in his own name. And Alcede’s personal privacy argument also did not impress the court, which held that he had no cognizable personal privacy interest in content shared through accounts that belonged to the business.

Based on this analysis, the court awarded control of the accounts to the reorganized Debtor and ordered Alcede to turn over passwords and to cease posting and messaging through these accounts. (Notably, Alcede refused to comply with the court’s order and was held in contempt. As of April 27, he remains in custody.)

Marc Fuller is counsel at Vinson & Elkins in Dallas. Kimberly Anne Bartley, Waldron & Schneider, LLP in Houston represents the Debtor.

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Court Unseals Arrest Warrant Affidavit in Brutal Spousal Murder Case

By Steven D. Zansberg

Without resolving whether the public's right of access to an arrest warrant affidavit is guaranteed by the First Amendment or merely under the common law, Colorado state trial court Judge James Boyd unsealed the arrest affidavit for Arturo Navarette-Portillo, who stands accused of the first-degree murder of his wife in Carbondale, Colorado.

Car Crash Leads to Confession

On the morning of February 15, 2015, Navarette-Portillo crashed his car into the back of a cattle truck on a rural highway not far from Aspen, Colorado. As he was being flown by a "flight for life" helicopter to a medical center on Colorado's western border, Navarette-Portillo told the medical team that he had killed his wife earlier that morning, before the car wreck. That afternoon, Carbondale Police checked the apartment building where Navarette-Portillo lived, and discovered his wife's body. After conducting the autopsy the county coroner issued a press release stating the cause of death was homicide as a result of "multiple sharp force injuries." The sheriff's department and local police issued several press releases setting forth the facts above, which were thereafter the subject of numerous local press reports.

On February 24th, while still in the hospital recovering from the car crash, Navarette-Portillo was charged with first-degree murder. The affidavit of probable cause supporting his arrest was placed under seal. At a hearing on March 10, 2015, the prosecutor stated that the state's investigation was far enough along that continued sealing of the arrest affidavit was no longer needed, and he asked the judge to unseal it.

The Public Defender objected and asked for time to file a formal opposition to the People's motion to unseal. The court gave the Public Defender until March 23rd to file its objection. The Public Defender filed its objection under seal. On March 25th, the *Glenwood Springs Post Independent* filed a motion asking the court to unseal both the affidavit of probable cause and the Public Defender's March 23rd objection to unsealing the affidavit. Judge Boyd convened a hearing on the unsealing motions on March 31, 2015.

The Public Defender argued, the right to inspect judicial records, as opposed to attend judicial proceedings, is not guaranteed by the First Amendment but merely by the common law.

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Defendant Argues Fair Trial Right Prejudiced

Arguing against unsealing the affidavit of probable cause in support of her client's arrest, Public Defender Elise Myer stated that public disclosure of the arrest warrant affidavit would be "incredibly prejudicial" to Navarette-Portillo's fair trial rights. While the prosecution may have completed its investigation back on March 10th, Ms. Myer argued, the defense team had only recently begun to investigate the facts to prepare the defendant's case. Unsealing the arrest warrant affidavit now, she argued, would compromise *the defendant's investigation* and therefore undermine his fair trial rights.

Furthermore, the Public Defender argued, the right to inspect judicial records, as opposed to attend judicial proceedings, is not guaranteed by the First Amendment but merely by the common law. Thus, the court in its discretion could maintain the sealing of the arrest affidavit so long as the balance of interests justified continued sealing.

Finally, the Public Defender chastised the newspaper's motion as a "stock brief that, on information and belief, had been filed in largely the same format in prior criminal cases."

Counsel for the *Glenwood Springs Post Independent* admitted that the motion they had filed had, in fact, been filed in largely the same format in numerous previous cases in Colorado, eight of which were cited in the motion itself, and in all eight cases the courts had unsealed arrest warrant affidavits after criminal defendants had been arrested and charged. Among such cases were a high-profile sexual assault case against a Denver Broncos football player, and the Aurora theater shooting case against James

Egan Holmes.

In all of those cases, Colorado courts had uniformly recognized that the right to inspect judicial records in criminal cases, including arrest warrant affidavits after the warrant has been executed and returned, was protected by the First Amendment. Thus, a proponent of sealing an arrest warrant affidavit must demonstrate that unsealing would pose a substantial likelihood of injury to a defendant's fair trial rights, that continued sealing would be effective, and that no reasonable alternative means are available to adequately protect the defendant's fair trial rights. No such showing had been made, nor could be made, under the facts of this case, particularly where so much information concerning the homicide of the defendant's wife was already a matter of public record.

Judge Boyd noted that substantial press attention generally provides a salutary effect on the search for truth and fairness of trial proceedings.

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Judge Orders Unsealing - Public Learns Gory Facts

After hearing argument from the prosecution, defendant, and the press, Judge Boyd ruled from the bench and ordered both the Public Defender's opposition brief and the arrest warrant affidavit unsealed. Judge Boyd pointed out that in the small community of the Roaring Fork Valley, where this criminal case is venued, many felony crimes receive extensive press coverage, so the fact that this was the first homicide in Carbondale in twelve years did not render the case "unique."

Judge Boyd noted that substantial press attention generally provides a salutary effect on the search for truth and fairness of trial proceedings. Judge Boyd also noted that in Colorado it is extremely uncommon to keep arrest warrant affidavits under seal after there has been an arrest. While recognizing that the defendant enjoys the right to a fair and impartial jury, the court found there had been no showing that a substantial probability of harm to his rights would result from the unsealing of the arrest warrant affidavit in this case. Thus, the court stated, "whether I apply a simple balancing test or the more rigorous test of the First Amendment, it is not appropriate to keep the arrest warrant sealed any longer."

The following day, the affidavit for Navarette-Portillo's arrest was unsealed, and the public, for the first time, learned that the defendant has stabbed his wife multiple times with a machete in a gruesome homicide.

The Glenwood Springs Post-Independent was represented by Steve Zansberg, Tom Kelley, and Chris Beall of Levine Sullivan Koch & Schulz, LLP in Denver. The People were represented by Assistant District Attorney Matthew Barrett; Navarette-Portillo was represented by Colorado State Public Defenders Sarah Steele and Elise Myer

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Executive's Right to Be Forgotten Request Rejected by Dutch Court

Google Spain Not Meant to Suppress News Reporting

By Joran Spauwen

In the fall of 2014 an Amsterdam Court was offered a chance to shed light on the interpretation of the Google Spain (*Costeja*) decision of the European Court of Justice, which created a 'right to be forgotten.' The court [then ruled](#) that Google was right to refuse a request from a convicted criminal to remove certain links. To our knowledge, this was the first decision in its kind.

In February, the Amsterdam court ruled on yet another request to be forgotten. [Plaintiff v. Google](#), No. C/13/575842 / KG ZA 14-1433 SP/LO. The court again found in favor of Google and this time decided that the right of removal is not meant to suppress links to unpleasant news reporting.

Background

The plaintiff, an executive with KPMG, asked the Court of Amsterdam to apply the *Costeja* decision after Google refused to remove links to news reports about his dispute with a building contractor. The initial [story in Dutch daily newspaper De Telegraaf](#) reported that plaintiff was camping on the grounds of his renovated country estate in a storage container because the contractor changed all the locks on the house after plaintiff refused to pay the contractor's bill. Other media picked up the story and, according to some, the affair was symbolic of the culture within big accounting firms. Understandably, the KPMG partner was not pleased that his private concerns were the subject of press coverage. He wanted to end this by invoking the *Costeja* decision.

When to Remove?

In its judgment the Amsterdam Court repeated the criteria formulated by the Court of Justice: "*pursuant to the Costeja judgment [it is] important whether, in view of all the circumstances of the case, the information obtained is inadequate, not relevant or not relevant anymore (irrelevant), or excessive in relation to the purpose of the processing concerned by Google Inc.*"

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The next question that needs answering is whether under the circumstances the search results are indeed irrelevant. The judgment underlines that this does not concern the news articles themselves: “When applying the so-called ‘right of removal’ this particularly relates to – briefly put – the relevance of the search results found, rather than whether the contents of (in this case) the articles found are themselves inadequate, irrelevant or excessive.”

The plaintiff argued that the ‘container story’ is no longer relevant. According to him, this concerned a private matter that occurred two and a half years ago. Before the judge gave its ruling, she emphasized that the removal of search results may not be abused in order to suppress news: “The [right of removal] is not meant to remove articles which may be unpleasant, but not unlawful, from the eyes of the public via the detour of a request for removal to the operator of a search machine.”

do 10 mei 2012, 05:45 | lees voor

Topman KPMG bivakkeert in container

door Bart Mos

NAARDEN - Een topman van KPMG kan niet verhuizen naar zijn opgeleverde luxueuze woonboerderij bij Naarden, omdat de bouwverzekering uit wraak voor een onbetaalde rekening van 200.000 euro alle sloten van de villa heeft vervangen. Hierdoor is topaccountant Ewald van Hamersveld gedwongen om in drie containers op zijn eigen landgoed te kamperen.

Grootverdiener Van Hamersveld en zijn partner zijn ontevreden over de kwaliteit van het schilderwerk van de aannemer, zo blijkt uit navraag. Bovendien zouden ze 'emotionele schade' claimen wegens het langer dan geplande verblijf in de containers. Maar om daarvoor een rekening van dik twee ton onbetaald te laten, wat neerkomt op een derde van de totale aanneemsom, is ongekend.

[Lees er alles over in De Telegraaf van vandaag.](#)



Ewald van Hamersveld

Foto: TLG

Container Story Is Still Relevant

The judge concluded that the search results are not irrelevant at this moment. An important indication for the relevance is that the affair was still mentioned in articles published near the end of last year. With respect to the duration of the relevance, the judge was of the opinion that the ‘container story’ cannot be compared to the facts of the *Costeja* decision. The announcement in which Costeja’s name was mentioned dated back 16 years.

The judge noted that the search results could be considered irrelevant in the future:

“With regard to the relevance in time the question is when a search result may be deemed to be recent. Google Inc has brought forward that after investigation it has concluded that in any case at this moment the search results are still considered to be recent now that they have been published in the period 2012-2014, but that within a number of years this might be different. In this respect, the Court in preliminary relief proceedings follows the position of Google Inc”.

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The Importance of This Judgment

As the judge emphasized that the purpose of the right of removal is not to suppress unpleasant news, the judgment provides solid support to the media. Moreover, the judgment underlines the importance of search engines to make news available online. In a way, the judgment helps remedy the lack of attention given in *Costeja* to the media's interest in being found on the internet (via search engines). This aspect of the freedom of speech seems to have been somewhat overlooked by in the *Costeja* decision and played no apparent role in the assessment of the Court of Justice. As a result, there was fear that following the *Costeja* decision, national courts could order Google to suppress results to news articles.

The Court of Amsterdam steers away from that scenario. However, the last word is yet to be said on the subject. After all, the Court implies that there could be room for removal of search results that are less recent.

Other 'Serious Grounds'?

The plaintiff also contended that there were other serious grounds that merit removal of search results. His friends and business relations apparently continued to go on about the 'container story.' The judge, however, let the freedom of speech prevail over this nuisance: "The fact that the claimant does not like it that he is still confronted by his acquaintances or business contacts with the 'container story' is very understandable. However, this does not outweigh the right of freedom of information of Google Inc." This reveals a more nuanced approach than that adopted by the EU Court of Justice, which only acknowledged an economic interest of Google.

The Amsterdam Court concluded that the search results could remain online (at least for the time being).

On a final note, the judgment also clarifies that a request for removal must, of course, relate to personal data. This was not the case with the search term "top executive of KPMG." Further, a request for removal may not lead to "collateral damage": "the article 'Accountants Loosing their Roots' [does] not strictly relate to the 'container story', but relates to KPMG partners or top executives in a broader context, and the 'container story' is only mentioned indirectly. For this reason too, removal of this URL is too far-reaching."

Joran Spauwen is a lawyer with Kennedy Van der Laan in Amsterdam.

Landmark UK Judgment on Privacy and Data Protection

Decision Illustrates Ascent of Data Privacy Rights

By Anya Proops

The question of how privacy rights should play out within the online world is one of the most interesting and difficult issues of our modern networked age. Less than a year ago, the Court of Justice of the European Union delivered a judgment in which it concluded that privacy rights, as refracted through European data protection legislation, included the right to have one's online history 'forgotten' by internet search engines such as Google (see further the Court's judgment in the *Google Spain v Agencia Española de Protección de Datos & Mario Costeja González*). The effect of the Court's judgment was that even information which was true and lawfully present on the internet could potentially be cast into e-oblivion.

Now, in [*Vidal-Hall & Others v Google Inc*](#) [2015] EWCA Civ 311, the United Kingdom Court of Appeal has handed down a landmark judgment which similarly suggests that e-privacy rights are firmly in the ascendant.

Background

In *Vidal-Hall*, the claimants had brought proceedings against Google Inc in the English High Court in connection with the latter's secret tracking of the internet browsing habits of Google users. In particular, the claimants claimed that the secret tracking of their browsing activities by Google amounted to both a misuse of private information and a breach of the UK Data Protection Act 1998 (DPA). A preliminary issue arose as to whether Google Inc, a US-based corporation, could properly be served with proceedings. In order to decide that preliminary issue, the English High Court had to determine a number of sub-issues including in particular:

- (a) whether the claim for misuse of private information was properly to be characterised as a tort (in which case proceedings could be served on Google in the US) or as an equitable claim for breach of confidence (in which case proceedings could not be served);

Adopting a wide approach to the definition of 'personal data', it concluded that Google's entire business model was predicated on Google 'individuating' users by tracking their browsing habits.

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(b) whether the claimants had reasonable prospects of establishing that the browser generated data in issue (BGI) amounted to ‘personal data’ so as to engage the DPA and

(c) whether, even if the DPA was engaged, the claimants’ claims under the DPA were in any event bound to fail because the claimants were only claiming compensation for mere distress, and the DPA generally permitted recovery of compensation for distress only where the individual had also suffered pecuniary loss.

The High Court resolved all of these issues in the claimants’ favour. Thus, it held: that misuse of private information was now properly to be characterised as a tort, rather than an equitable wrong; that the claimants had reasonable prospects of establishing that the BGI was personal data under the DPA and, further, that, taking into account the effects of the European Data Protection Directive (the DP Directive), the DPA had to be construed as permitting data subjects to recover compensation for mere distress.

Court of Appeal Decision

Google appealed against all of these conclusions. The English Information Commissioner intervened in the appeal, adopting a position on the data protection issues which was closely aligned with that of the claimants. Google’s appeal was heard by the Court of Appeal, presided over by the Master of the Rolls, Lord Dyson, in March 2015. The appeal was dismissed.

In a judgment with very wide-ranging implications, the Court of Appeal held that, whatever the circumstances of its birth, the civil wrong of misuse of private information was now very clearly to be classified as a tort, rather than as an equitable claim. In reaching this conclusion, the Court rejected arguments advanced by Google to the effect that such a conclusion was pure heresy when considered against the backdrop of the leading jurisprudence in this area, including the House of Lords’ judgment in *Campbell v MGN Newspapers* [2004] 2 AC 457 and the Court of Appeal’s judgment in [*Douglas v Hello \(No 3\)*](#) [2006] QB 125.

The Court was also not persuaded by Google’s case that the BGI was anonymous, impersonal data which necessarily did not engage the provisions of the DPA. On this issue, Google had argued that the BGI did not amount to personal data because it was gathered from individual devices in circumstances where the relevant users of those devices were completely unknown to Google. Google contended that, since it could not

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identify the individuals who stood behind the relevant devices, the BGI was essentially impersonal, anonymous data.

The Court of Appeal was not impressed with this line of argument. Adopting a wide approach to the definition of ‘personal data’, it concluded that Google’s entire business model was predicated on Google ‘individuating’ users by tracking their browsing habits, with a view to enabling advertisements to be specifically targeted at those users. It also had regard to the fact that, through the use of cookie technology, Google would not only know how to access those individuated users but also when they were present online. The Court concluded that these factors taken together meant that the claimants had a reasonable case that the BGI was sufficiently identifying so as to amount to personal data for the purposes of the DPA.

Finally, the Court of Appeal rejected Google’s case that, under the applicable data protection legislation, claimants could only recover compensation for distress in circumstances where they had also suffered pecuniary loss. The Court held that the DP Directive did not envisage that there would be any such restriction on the recovery of compensation for breach of data protection rights. It specifically noted in this context that the DP Directive was fundamentally concerned with the protection of privacy rights, rather than economic rights.

Referencing relevant provisions of the European Charter of Fundamental Rights, the Court went on to conclude that insofar as the DPA adopted a more restrictive approach to the recovery of compensation than the DP Directive, the restrictions in the domestic legislation could and should be disapplied by the court. Thus, in effect, the Court held that, insofar as there was a conflict between the domestic legislation and the fundamental data protection rights afforded under European law, the latter rights prevailed.

The judgment has seismic implications not only in terms of the evolution of e-privacy rights but also because it heralds a new dawn in data protection litigation. Where once data subjects may simply have wrung their hands in response to a distressing breach of their data protection rights, now they will routinely be considering whether claiming for compensation may yield valuable fruit. This is a matter which all data controllers, ranging from the leviathans of the Tech world to the smallest media organisation will now have to factor into their litigation risk analyses.

Anya Proops is a barrister at 11KBW specialising in information law. She appeared on behalf of the English Information Commissioner in Vidal-Hall v Google and is a co-founder of panopticonblog.com. Google was represented by Antony White QC and Catrin Evans, instructed by Bristows LLP. Claimants were represented by Hugh Tomlinson QC and Ben Silverstone, instructed by Olswang LLP.

Patch Reporter Wins Appeal to Protect Confidential Source

By Joe Roselius and Ken Schmetterer

The lifeless bodies of two young men, Eric Grover and Terrance Rankins, were found strangled in a house in Joliet Illinois, after they were lured into the house to be robbed for money to buy alcohol and cigarettes. The four perpetrators discussed dismembering the bodies to hide their crime and having sex on the dead bodies. In early 2013, reporter Joseph Hosey – drawing on police reports that had not otherwise been released to the public – described these and other gruesome details in a series of articles, titled “Nightmare on Hickory Street,” for online news service, Patch.com.

One of the defendants, Bethany McKee, served a subpoena on Hosey, demanding that he reveal his confidential source and turn over his reporter’s files. Hosey moved to quash the subpoena based on two grounds: (1) the Illinois statutory reporter’s privilege, 735 ILCS 5/8-901, which bars courts from compelling reporters to divulge confidential sources unless certain conditions are satisfied and (2) the common law “special witness doctrine,” which protects reporters from testifying unless the information sought is essential to the case and cannot be secured by other means.

McKee responded by filing a petition to divest Hosey of his reporter’s privilege and to secure a gag order preventing the parties, attorneys, police, and court personnel from discussing certain aspects of the case. The judge entered the gag order and required all counsel and the Joliet Police Department to submit affidavits from their employees certifying that they were not Hosey’s confidential source. All affiants stated that they were not the source.

In her petition to divest Hosey of his reporter’s privilege, McKee argued that the leak and Hosey’s stories violated her right to a fair trial and prevented her from testing whether any of the affiants committed perjury by averring that they were not the source. The trial court granted the petition and ordered Hosey to identify his source and submit for *in camera* inspection all documents that he received from the source or that would identify the source. If no such documents existed, he was ordered to identify his source and explain the circumstances surrounding his ability to obtain the police records.

Hosey refused to reveal the identity of his source or turn over his files, and the trial court held him in contempt, imposing a daily fine and ordering that Hosey be jailed if he continued to refuse to identify his source.

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The court justified its ruling on several rationales: that an attorney may have violated discovery rules, that someone may have violated the secrecy of the grand jury, or that someone may have provided a false affidavit. The court also observed in its ruling that a reporter could reap financial gains from writing books and screenplays about high profile cases based on confidential sources. The court recognized “its duty and obligation to protect the First Amendment Rights of the reporters,” but also stated that it “cannot envision where those rights are superior to the fair trial rights of individuals charged by the State with the most serious criminal offenses.”

Hosey refused to reveal the identity of his source or turn over his files, and the trial court held him in contempt, imposing a daily fine and ordering that Hosey be jailed if he continued to refuse to identify his source.

Appellate Court Decision

Hosey appealed, arguing that the identity of his confidential source was not relevant to the merits of a claim or defense in the underlying case, but only relevant to collateral matters. Hosey – noting that police reports were public records and that no gag order was in effect when he obtained the reports – also argued that disclosure of his source was not necessary to protect an important public interest, and that McKee failed to pursue sufficient efforts to obtain the information by some other means, as required by statute. Finally, Hosey argued that the Special Witness Doctrine should protect him from testifying to the matters that the judge had ordered.

The Illinois Appellate Court – focusing solely on the relevance issue raised by Hosey – agreed and reversed the trial courts order. [*People v. McKee*](#), 2014 IL App (3d) 130696 (Dec. 15, 2014).

The appellate court recognized the importance of the statutory reporter’s privilege “to assure reporters access to information, thereby encouraging a free press and a well-informed citizenry.” As the court explained, the relevancy requirement depends on the type of proceeding in which the information is being sought. “[A] fact is ‘relevant’ if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

In other words, confidential source information is relevant if the information sought is material to proof of an element of the offense charged, to proof of the defense asserted by the accused, to a reduction in the gradation of the charge, or to a mitigation of the penalty associated with the charge. When the information is only relevant to collateral

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matters, such as violation of court rules or a witness's credibility, that is not enough to overcome the protections afforded by the Illinois Reporter's Privilege.

Although the First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom ... of the press," attempts to rely on the First Amendment to protect reporters from testifying about their investigation and confidential sources have been limited by the United States Supreme Court.

In *Branzburg v. Hayes*, the Supreme Court declined to protect reporters from being forced to testify about crimes being investigated that they had witnessed or written about in the course of their work as journalists. At least in that instance, the Supreme Court chose not to recognize a constitutional testimonial privilege for reporters different from that of other citizens.

In response to the Supreme Court's failure to recognize more stringent First Amendment protections for reporters, many state legislatures passed statutory reporter's privilege or shield laws to provide additional protections to reporters and confidential sources. In other states, state courts created similar privileges. These statutory and common-law protections run the gamut from absolute privileges allowing reporters to refuse to testify, to qualified privileges of varying strengths.

While there are efforts in the United States Congress to pass a federal shield law, it is unclear when, or if, such a federal statute will be enacted. Until then, the resulting patchwork of state protections demands that reporters, confidential sources, and the attorneys representing them carefully examine the protections available in their state and any states in which they work. The Reporters Committee for Freedom of the Press has created [a helpful guide](http://www.rcfp.org/reporters-privilege) (<http://www.rcfp.org/reporters-privilege>) that will help practitioners navigate the various statutes and state laws.

Courts are all too often willing to weaken the freedom of the press (a freedom that, reporters argue, would be eviscerated if confidential sources feared being revealed) when they believe it is essential to protect the constitutional rights of criminal defendants. Advocates representing the press must understand the protections and rights afforded to reporters, prosecutors, defendants, and civil litigants across the various jurisdictions in which they practice. A journalist's right to disseminate news reflects a corresponding right to gather news – a right that is threatened if reporters are forced to divulge confidential sources without some compelling justification and as anything other than a last resort. The freedom of the press is not just important to reporters; it also ensures an active, well-informed public. As Thomas Jefferson declared, "our liberty depends on the freedom of the press, and that cannot be limited without being lost."

Joe Roselius is a senior associate, and Ken Schmetterer is a partner in the Chicago office of DLA Piper