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MEDIALAWLETTER

Reporting Developments Through August 30, 2016

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MLRC Media Law Conference

September 21-23, 2016 | Reston, Va.

In addition to the usual timely and topical breakouts and boutiques, this year's conference will feature plenaries commemorating the 25th anniversary of the Rodney King case – looking at both the copyright/ fair use/First Amendment and police/press aspects; a Fred Friendly hypothetical case program starring Washington insiders on the eve of the election; a panel of once active MLRC members who are now federal judges; Floyd Abrams talking about his new book, "The Soul of the First Amendment"; as well as a rousing game of Family Feud: Journalism Edition; and a twist on the Next Big Thing, looking at the hits and misses of NBT sessions of the last ten years.

The full Program is also now available. We hope you will register soon.

MEDIA LAW RESOURCE CENTER

ANNUAL DINNER
WEDNESDAY, NOVEMBER 9, 2016

MLRC will bestow its
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Daniel Ellsberg

The Tension Between National Security and an Independent Media

Apple v. FBI, the Snowden Disclosures, and the 45th Anniversary of the Pentagon Papers Case

Daniel Ellsberg

Max Frankel
Former Executive Editor, New York Times

Noreen Krall
Chief Litigation Counsel, Apple Inc.

Edward Snowden

Moderated by:
Floyd Abrams
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Cocktail Reception at 6:00 P.M.
Sponsored by AXIS PRO

Dinner at 7:30 P.M.

New York Marriott Marquis
Broadway Ballroom—6th Floor 1535 Broadway, between 45th and 46th Streets

RSVP by Friday, October 21, 2016

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ANNUAL DINNER — WEDNESDAY, NOVEMBER 9, 2016

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We appreciate your payment by check; to order please use this form and enclose payment. Individual tickets only may be purchased online at www.medialaw.org; just click on MRLC Annual Dinner.

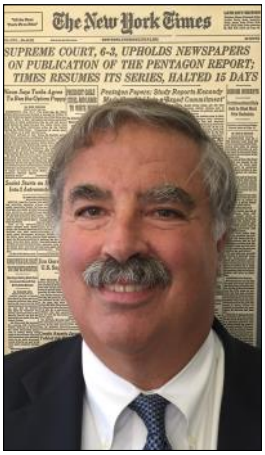
Dietary restrictions/requests: _____

For further information please contact Debra Danis Seiden at dseiden@medialaw.org or 212-337-0200 ext. 204

From the Executive Director's Desk

Campaign Lies: How Should Reporters Expose the Liars?

Presidential campaigns inevitably give rise to many journalistic issues. The current campaign raises more questions than most, the most significant – and under-covered - being how the media should deal with candidates who often lie. That is no small issue, whether you call it a lie, a deliberate falsehood, or as some too diplomatic journalists euphemistically call it, a propensity for exaggeration. And this issue has legal ramifications as well.


The New York Times

SUPREME COURT, 6-3, UPHOLDS NEWSPAPERS ON PUBLICATION OF THE PENTAGON REPORT; TIMES RESUMES ITS SERIES, HALTED 15 DAYS

George Freeman

In 1988, when George Bush 41 campaigned in Boston harbor, he presented himself as "the environmental president". Pictured against a backdrop of a gleaming blue oceanfront, Bush laid out his alleged agenda to protect the environment and criticized his opponent Gov. Michael Dukakis of having presided over a "harbor of shame." He didn't mention – and the pieces reporting on the event barely included – that his campaign had largely been funded by oil interests and that as Vice President he had done, to be kind, perilously little to help the environment. In some reports of the campaign stop, a few quotations were included which questioned his dedication to the environment; in some, perhaps a few sentences, way down in the piece, suggested his party's legislative record on ecology had been poor. But most readers, and certainly all but the most sophisticated and thorough ones, would come away with his hoped-for result: that the electorate would believe – as it turned out, totally incorrectly - that, if elected, he would work for the environment.

One can simply report what public officials and figures say, with little context or interpretation. This was the generally accepted principle until the 1970's when the lies of Vietnam and Watergate caused the media to be far more skeptical than they traditionally had been.

How have the media handled this situation? Roughly speaking, there are three alternative strategies.

First, one can simply report what public officials and figures say, with little context or interpretation. This was the generally accepted principle until the 1970's when the lies of Vietnam and Watergate caused the media to be far more skeptical than they traditionally had been. It was this tenet which allowed Sen. Joe McCarthy to get away with his demagoguery, at least until a brave and revolutionary Edward R. Murrow actually analyzed and drilled down into his accusations. Indeed, back then, a typical New York Times would contain countless articles uncritically rehashing reports of the Department of Agriculture and other bodies of government, since informing the people as to the official duties and reports of government was thought to be the press' prime function.

Of course, the problem with this approach is that it allows public figures to get away with whatever they want to say, without a questioning or skeptical eye being cast their way. While it hews to the traditional principle of objectivity and the press not inserting itself into an issue, it really provides a disservice to the reader. It gives no context and allows the reader to be easily misled. Indeed, one could easily say that the media abdicates their responsibility for truthfulness by this approach.

A second and opposite strategy is for the media to tell it like it is. Follow the false statement with a declarative statement: "That is untrue" or, perhaps more colorfully, " the candidate is a lying s.o.b." That is a strategy which American media have never subscribed to; even the partisan cable channels usually don't go as far as to employ that approach. While it brings the truth home and might even deter lying, it has some weaknesses: first, it would subject the media to the drumbeat of criticism that they are too subjective and biased. Worse, this attack could be made by the lying candidates themselves, thereby perhaps deflecting attention from their falsehoods. In addition, many statements aren't all that black and white, and woe to the media outlet which asserts that a candidate was lying only to receive a thoughtful pushback supporting the original statement.

Therefore, the media has settled on what I would call a compromise approach. It doesn't do nothing and it doesn't outright call the speaker a liar. Typically, the formula is to allow the candidate to make his statement or accusation and then have third persons – not the reporter herself – question it. By putting the criticism in someone else's voice, the media feigns – if that's not too strong a word – that it is not taking sides; it simply is reporting on what other people have to say about the original assertion.

Typically, the formula is to allow the candidate to make his statement or accusation and then have third persons – not the reporter herself – question it. By putting the criticism in someone else's voice, the media feigns that it is not taking sides.

But not only is that to some degree a cop-out, the reporter or editor is choosing what responses to give the statement. Presumably, it could find five commentators who would vouch for the truthfulness of the statement. Or it could include in the article five responders who will waffle. Or it can follow the statement with five quotes clearly shedding severe doubts on the speaker's veracity. Or it can decide on a mixture of the above. But that selection and the placement and weight of the quotes are clearly editorial decisions which less visibly but just as clearly do inject the publisher into the mix and into the ultimate signal it is giving the reader as to the credibility of the original statement. Moreover, by the very act of balancing, the media often gives the false premise more credit than it is due (see the global warming "debate").

So why not end this charade and allow the publisher or broadcaster to weigh in on the key issue of truthfulness. It could say "we have researched the matter and found no support for x's accusation." Or it could say, in its own voice, "this statement totally contradicts the candidate's speech (or position paper) of four months ago." An assertion from the media entity itself certainly would be a stronger way of leading the viewer to the truth. Though it would result in

the same criticisms of subjectivity and bias as described above, those empty accusations are made anyhow, and the current formula, in fact, inserts the journalist into the truth-falsity balance to essentially the same degree. (In certain limited instances, some newspapers have fact -checking staffs which do point out clear falsities, but these are not everyday articles.)

And all this matters. Perhaps because of candidate Trump's rhetoric about lying Hillary or crooked Hillary, the public, in general, seems to believe that both candidate tell untruths in roughly equal amounts. But when there still were 7-8 candidates in the mix, and their truthfulness was analytically measured by experts who researched their statements, of all the candidates, Ms. Clinton was found to have lied the least and Mr. Trump the most – by a whopping margin. This false equivalency could be trumped (sorry) by a more direct approach.

And all this has legal ramifications as well. The legal rules surrounding this paradigm are more muddy and make even less sense than the journalistic guidelines. Thus, what happens if candidate x makes an accusation about candidate y which the news outlet believes is untrue? It can omit it, but journalistically that would be heresy, as the accusation itself is newsworthy. Or it can repeat the statement and then follow it with some third person quotes shedding doubt on the truthfulness of the accusation along with candidate y's denial. Or, if it follows my suggestion, it could more frontally aver that the accusation is untrue.

The legal rules surrounding this paradigm are more muddy and make even less sense than the journalistic guidelines … While broad recognition of neutral reportage would solve the legal enigma, it probably wouldn't have much effect on the more important journalistic issue.

But what if candidate y sues the media for republishing the false accusation about him. In the last iteration, the plaintiff could then argue that the media republished an accusation it believed was false – an easy case of actual malice since the passage saying the accusations are untrue would be Exhibit A in plaintiff's case; the same argument could be made, perhaps not so easily, but still strongly enough, if the accusation were followed with denials and statements shedding doubt on it from "neutral" observers. The plaintiff would have a relatively easy time arguing that the publisher had serious doubts about the truth, or else why include those critical rebuttals?

As readers of this publication certainly are aware, the answer to this dilemma lies in the neutral reportage doctrine, formulated by the 2nd Circuit in 1977. Yet almost 40 years later that doctrine has been adopted by no other Circuits and only Florida and perhaps a few other states. While broad recognition of neutral reportage would solve the legal enigma, it probably wouldn't have much effect on the more important journalistic issue raised above. But the need for wide recognition of the neutral reportage defense seems self-evident, and will be the subject of a later column. And this issue, as well as a broader panoply of questions raised by the current election campaign will be the subject of our Fred Friendly hypothetical with Washington insiders on the first night of our Virginia Conference, and also our Forum on Nov. 9, the day after Election Day, immediately before our Annual Dinner.

What Happens When You Condense a Month of Stories into a Single Article?

The Monthly Daily

An Ongoing Experiment in Drinking from the Firehose

By Jeff Hermes

You can feel things ramping up here at the MLRC as we get ready for the fall events season. We've got Virginia next month, of course; there's a little surprise in Northern California we're cooking up for October (save the afternoon of October 14th if you can get to San Francisco!); then comes the Forum and Annual Dinner in November; and we're already shifting into higher gear for Entertainment in January and Digital next May. As you return to your offices after a well-earned summer break (please tell me some of you took vacations), this is a great time to think about what the MLRC has to offer and how you can get involved.

As for me, this is a great time to write quickly, because there's a lot going on in the world of media law, my deadline is coming up fast, and there's plenty of other work to do...

Supreme Court

I don't know why, but I've got an uneasy feeling that the Court might decide to take *Armstrong v. Thompson*. The case involves a criminal investigator with the U.S. Treasury who was treated as a public official in a defamation claim in the local courts of the District of Columbia; the petition for cert asks the Supreme Court to decide whether all "garden-variety law enforcement officers are 'public officials.'"

I have fewer qualms about the reversal of Jesse Ventura's defamation win by the Eighth Circuit making its way to the Supreme Court. Something tells me the Justices won't care to delve into the evidentiary issues.

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We've also seen an attempt by EFF to get the Court to take *Lenz v. Universal Music* (yes, the dancing baby case), asking that the justices find some teeth in Section 512(f) of the DMCA. My instinct is that the Court would want the case to run its course below—the petition is from a Ninth Circuit opinion upholding a denial of summary judgment—but the critical issue in the case could be lost if Lenz were to win at trial.

Google wants to take a dispute over which party gets the benefit of ambiguity in the meaning of a patent up to the Supreme Court. Less surprise if the Court takes this one, given their apparent willingness to review the Federal Circuit at the drop of a hat.

Finally, Justice Kennedy declined to stay a district court order that allowed enforcement of a Montana attorney disciplinary rule against false statements by and about judicial candidates.

Reporters' Privilege


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A rough month for the reporters' privilege, I'm afraid. A New York supreme court judge has held that a *New York Times* reporter will be required to testify about an interview she conducted with the defendant in the "Baby Hope" trial. In D. Mass., Glenn Beck has been ordered to disclose the identity of two sources in a defamation lawsuit over his coverage of the Boston Marathon bombing. And in D.D.C., controversial website Backpage.com has been ordered to turn over documents on its review process for adult advertising in response to a subpoena from a Senate subcommittee.

Expect all three of these cases to face further review. Beck has refused to comply with the order, leading to a demand that judgment be entered against him. The D.C. Circuit has already granted a stay to allow briefing in the Backpage case, with Backpage asserting that the subpoena intrudes on its editorial judgment.

Meanwhile, efforts are underway in W.D.N.C. to find the identity of a source who leaked a deposition transcript in an environmental case to an AP reporter. And in C.D. Cal., the Justice Department has opposed filmmaker Mark Boal's effort to keep the fight over access to outtakes from his interview with Bowe Bergdahl out of military court; a large coalition of media outlets jumped in with an amicus brief in support of Boal.

One spot of light: the Arizona Court of Appeals quashed a defense subpoena to an *Arizona Republic* author who interviewed the surviving victim in a murder/attempted murder case.

Defamation

There's been plenty written about the Republican nominee's statement that "It is not 'freedom of the press' when newspapers and others are allowed to say and write whatever they want even if it is completely false!" Articles have quite correctly pointed to my all-time favorite Supreme Court case, *U.S. v. Alvarez*. But I'd just like to point out the internal inconsistency – if you're talking about the media being "allowed" to do something, then by definition you're talking about a liberty granted to the press. It would have made more sense had he deleted the phrase "are allowed to."

Pedantic? Totally. But this is a man who wants final say over enactment of federal legislation, and he can't even compose a logical tweet. (And if you're still wondering why *Alvarez* is my favorite, come find me in Virginia and I'll explain.)


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New cases

No comment from me though on Melania Trump's new case in Maryland circuit court over stories describing her as having been "escort" in the 1990's – other than that I trust *Sullivan*'s sorting algorithm will do its work.

Add another case to the list of defamation claims where plaintiffs sue a defendant for calling them liars when the defendant denies the plaintiffs' own public accusations. This time, it's parents of two Americans killed in Benghazi suing Hillary Clinton in D.D.C., claiming that she defamed them when she denied telling them that the Benghazi riots were triggered by the *Innocence of Muslims* video. As with others of the genre, the case seems to be nonsense.

An Atlanta prosecutor sued Fox 5 News in Georgia superior court after a report on his 2015 speeding arrest. Meanwhile, two former prosecutors are suing the *Philadelphia Daily News* over its coverage of Pennsylvania's "Porngate" woes in the Court of Common Pleas; the pair already struck out once in federal court. And speaking of porn-related suits, a former adult film star has sued Facebook in S.D. Tex. for helping to spread a rumor that she used to be male. Expect the follow-up to this story to be covered under Section 230 in a month or two.

Reality TV has made its way to California Superior Court, with Ozzy Osbourne's mistress suing his daughter over accusations that she abused the aging Godfather of Metal. Popcorn is available in the lobby. But don't start throwing it – a radio show was sued in Michigan state court this month for allegedly accusing a Detroit minister of tossing a pot of grits on singer Al Green back in the '70s. The minister says another woman was the hot grit-thrower.

That weird Section 230 case in S.D.N.Y. that I mentioned last month involving super-users on Bleeping Computer's online forum has taken another twist, as the forum operators who failed to escape liability have counterclaimed for defamation against the plaintiff. Great, cross-defamation claims, I love those. Across the river in E.D.N.Y., a judge in Brooklyn is suing the Brooklyn Democratic Party Judicial Screening Committee for $5 million after it declared her unqualified; the *New York Post* picked up the story and ran a scathing article, but is not named in the suit.

And, surprise, we have local businesses upset about reviews and media reports. A twofer from Houston this month: A law firm is suing a student over a Facebook review, and a lounge/cigar bar is suing the *Houston Chronicle* and KHOU-TV over a report of a shooting involving the bar's owner. The former case in particular might be short-lived, as an anti-SLAPP motion has already been filed by pro bono counsel.

Defense Losses

Speaking of online review cases, something's rotten in Maryland, my friends. A Georgia dentist has been caught up in apparent scheme to defraud the courts of the Old Line State by filing a defamation action against a non-existent defendant, culminating in a forged stipulation to a consent order that was used to obtain the removal of negative reviews. The dentist claims he had no idea what was happening, and there are meaningful glances being cast toward the SEO firm that he hired to clean up his search results. Ms. Streisand, that's your cue.

The Oklahoma Court of Civil Appeals has affirmed a ruling that the state's anti-SLAPP law does not apply retroactively, leaving sponsors of a failed grand jury petition stuck defending a bogus libel suit filed by a former DA. And it looks like a suit brought by a former associate dean at U.-Va. against *Rolling Stone* over the "A Rape on Campus" article will proceed to a jury, with a judge in W.D. Va. suggesting that he will deny at least part of the magazine's motion for summary judgment.

In E.D. Mo., a federal judge has sanctioned an advocacy group sued for accusing a St. Louis priest of sexual abuse, directing the jury that the facts alleged by the plaintiff will be deemed established for the purposes of the case. The group had failed to comply with a court order to turn over information about the individuals behind the accusations.

Defense Wins

The California Supreme Court significantly boosted the protection offered by the state's anti-SLAPP law this month, holding that it can apply in cases involving mixed causes of action. That's a spot of clarity on an issue with which I know a lot of us have struggled. Also in California, the Court of Appeal affirmed an anti-SLAPP win in TMZ's favor in a case involving alleged incriminating photos on the phone of Sara Evans' ex-husband.

As mentioned up above, Jesse Ventura is thinking about a Supreme Court run after his defamation win was flipped at the 8th Circuit. The Court of Appeals also rejected Ventura's petitions for rehearing.

A defamation lawsuit in Texas state court over a one-star Yelp review left by a dissatisfied customer of a pet-sitting service drew a lot of attention recently; it has now been dismissed on the defendants' anti-SLAPP motion. Notably, the court also rejected a breach of contract claim based on the service's non-disparagement clause, although the basis for that ruling was not clear.

A long-running battle between a billionaire and a fashion icon was kicked out of New York state court this month, with a ruling that the claims more properly belonged in the Bahamas where the two were neighbors.

An Olympic swimmer's defamation claim against website "Swimming World" over speculation about doping was dismissed in D. Ariz., with the court finding the challenged statements protected as opinion. An Arkansas state judge kicked out a doctor's lawsuit against the *Democrat-Gazette*, though he took a swipe at the paper's ethics in passing. And the website "Quackwatch" also escaped liability in S.D.N.Y. after it labeled two leaders in the "anti-aging" movement as, you guessed it, quacks.

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Miscellaneous

The Seventh Circuit will see an Illinois attorney's defamation case against Gawker proceed, after the company agreed to let the case move forward in the face of the automatic bankruptcy

(Continued on page 35)

Ninth Circuit Upholds Order Denying Anti-SLAPP Motion In Stock Photograph Defamation by Implication Case

By Katherine M. Bolger & Matthew L. Schafer

Last month, the Ninth Circuit Court of Appeals issued an opinion affirming a district court order that denied a publisher's special motion to strike a complaint filed by a former porn star. *Manzari v. Associated Newspapers Ltd.*, No. 14-55329, 2016 WL 3974178 (9th Cir. July 25, 2016). The porn star, Leah Manzari a/k/a Danni Ashe, filed her defamation and false light suit after the Daily Mail used a stock photograph of her to illustrate an article reporting on a moratorium on filming after a porn star tested positive for HIV.

The order, which leaves undisturbed Ninth Circuit case law requiring that a public figure plaintiff in a libel by implication suit first demonstrate that the defendant intended to make the alleged implication, found that at the anti-SLAPP stage, the filing of affidavits by reporters stating that they did not intend to make the implication alleged was not itself sufficient to prevail in light of the article itself and a single evidentiary submission by the plaintiff: "If all a publisher needed to do was to deny the allegation, all implied defamation suits would be dead on arrival."

Danni Ashe, filed her defamation and false light suit after the Daily Mail used a stock photograph of her to illustrate an article reporting on a moratorium on filming after a porn star tested positive for HIV.

Background

In August 2013, the porn industry shut down after an actress tested positive for HIV. The Daily Mail ran a news article reporting on the development under the headline: "PORN INDUSTRY SHUTS DOWN WITH IMMEDIATE EFFECT AFTER 'FEMALE PERFORMER' TESTS POSITIVE FOR HIV." Under the headline, the Mail reported in four paragraphs that "[t]he performer was not immediately identified" and that the actress was "new to the industry." Then it reproduced a stock photograph of the plaintiff posing seductively on a bed in front of a neon sign that read, "IN BED WITH DANNI." A caption on the photograph read: "Moratorium: The porn industry in California was shocked on Wednesday by the announcement that a performer had tested HIV positive." The article continued with more discussion about the moratorium and additional photographs that were similarly suggestive of the adult film industry.

After publication, Ashe demanded that her photograph be removed from the article and the Daily Mail complied. Ashe then brought a complaint in federal district court in Los Angeles for defamation and false light. She originally claimed that the article was defamatory because it implied that 1) she had tested positive for HIV, 2) was unchaste, and 3) was a hardcore porn

star rather than a softcore porn star. The district court dismissed the second and third challenges based on Ashe's extensive career in the porn industry but it denied the Mail's special motion to strike the first, finding that the implication was reasonably read from the arrangement of the article and based on that arrangement it could be inferred at that early stage that the Mail intended that implication. The Mail then appealed.

Ninth Circuit Opinion

The Ninth Circuit affirmed the district court's ruling, holding that Ashe had met the anti-SLAPP statute's "'minimal merit' threshold to avoid outright dismissal of her complaint." Before addressing the merits, the court first found that the Mail "easily satisfied" its burden of demonstrating that the anti-SLAPP statute applied as it "published an article on a topic of public interest (i.e. the public health aspects and safety of a large California industry)." It then noted that the burden shifted to Ashe to "show a reasonable probability of prevailing," which it characterized as "require[ing] only a minimum level of legal sufficiency and triability."

The stock photo at issue (reprinted in the decision).

On the merits, the court began by finding that Ashe was a general purpose public figure. Reinvigorating its statement in *Cepada Cowles Magazine & Broadcasting Inc.*, 392 F.2d 417, 419 (9th Cir. 1968), which it had not cited since deciding that case, the court explained that public figures include "artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done." Based on the extensive factual record compiled by the Mail, the court determined that Ashe was a general purpose public figure despite the fact that she had left the porn industry a decade prior and was not a household name: "[Ashe's] celebrity in the porn world might mean that she is less of a household name than stars in other sectors of the entertainment industry, but that does not make her fame any less pervasive."

The court next turned to the question of whether Ashe had shown a "probability that . . . she can produce . . . clear and convincing evidence" that the article reasonably conveyed the implication that she had HIV and that the Mail acted with actual malice in publishing the article.

On the first point, the court explained, "The bold headline and its content, juxtaposed with her photograph and yet another caption under her picture that said the industry was 'shocked' that a 'performer had tested HIV positive,' was sufficient for a reasonable reader to infer that

[Ashe] was the performer who had tested positive for HIV." It found this "all the more apparent" because the Mail, as an online publisher, should have known that "links to news articles frequently appear in online search engines or other compilations with only a headline and photograph connected to that story."

As such, the court rejected the Mail's counter-arguments that a reasonable reader would not believe that Ashe, the only woman in the article identified—not to mention identified in neon lights—was the *un*identified female performer who tested positive for HIV or that Ashe, a famous porn veteran, was the new-to-the-industry, rookie porn star who tested positive.

On the second, the court held, under the "minimal merit" test, that Ashe had "raised sufficient factual questions for a jury to conclude that the [Mail] acted with reckless disregard for the defamatory implication in its article." In public figure implied defamation cases, the court reaffirmed that a plaintiff cannot recover for "unintentional misstatements or implications." Rather, she must show that the defendant intended the implication and that the intended implication was made with actual malice.

Characterizing this case as "rest[ing] on the 'reckless disregard' prong of actual malice," the Court found that intent may be inferred on just two bases. It explained that "Mail employees actively removed key contextual information from the 'Danni Ashe' photograph as it was presented in the Corbis database" in the form of a Corbis caption explaining the nature of the Ashe photograph. Second, the Mail "failed to include any explanation or disclaimer adjacent to the 'Danni' photograph, which would have informed readers that she was not the subject of the article." Finally, the court rejected as insufficient to stave off an adverse anti-SLAPP ruling the affidavits from Mail employees that they did not intend the implication:

The case underscores the importance of making clear in captions that the photographs used are stock photographs unconnected to the articles' underlying subject matter.

> If, for instance, a newspaper ran the headline: "High Profile Figure Accused of Murder" alongside a photograph of the Mayor of New York, or "Industry Shocked that Grocery Sprayed Veggies with Pesticide" alongside an image of a nationally-known grocery chain, the publishers would be hard-pressed to plausibly claim that they had simply selected a "stock" photograph. The same holds true for a story about the pornography industry, featuring a picture of a world-famous pornographic actress with her name written in neon lights behind her. This sort of willful blindness cannot immunize publishers where they act with reckless disregard for the truth or falsity of the implication they are making.

The court's ruling appears, regrettably, to be another chink in a publisher's anti-SLAPP armor in the Ninth Circuit. This is especially so in light of the continuing protests from a wing

of the Ninth Circuit, led by Judge Kozinski, that the anti-SLAPP statute should not apply in federal court in the first place.

There are, however, a few takeaways. Initially, the case highlights the need to have increasingly detailed affidavits from reporters and editors in cases like this one, as the courts appear less than willing to accept mere denials that a publisher intended an alleged implication—even in the face of a modest evidentiary showing from a plaintiff. Moreover, the case underscores the importance of making clear in captions that the photographs used are stock photographs unconnected to the articles' underlying subject matter. And, it intensifies the need to exercise extreme caution in using stock photographs to illustrate news articles—especially in light of the court's anomalous conclusion that the existence of a defamatory implication may be based on how an article appears in search engines and elsewhere online.

Yet, as far as the use of stock photographs and tort liability go, the case is distinguishable on one front: it deals with a stock photograph that also happens to be of a "famous" person. As quoted at length above, the court clearly viewed the photograph as different from other run-of-the-mill stock photos, explaining in the margins that in light of the "ubiquity of [Ashe's] image and identity" the photograph "can hardly be relegated to the status of a 'stock' photograph."

The Daily Mail was represented by Katherine M. Bolger and Matthew L. Schafer of Levine Sullivan Koch & Schulz, LLP. Danni Ashe was represented by Steven Weinberg.

Third Circuit Reinstates Libel Suit vs Newspaper Over Stock Photo Illustration

Article Could Be "Of and Concerning" Firefighter in Photo

The Third Circuit reinstated libel and false light claims against the New York Daily News over a January 29, 2015 online article entitled "Heated Sex Scandal Surrounds Philadelphia Fire Department: 'It's Bad Stuff.'" *Cheney v. Daily News, L.P.*, No. 15-2251 (3d Cir., July 19, 2016) (Fisher, Chagares, Barry, JJ.).

The text of the article reported on an official investigation of Philadelphia firefighters accused of having sex with a paramedic while on and off-duty. In addition to the text, there was a photo sidebar with two images that readers could toggle thru. One was a stock photo of the plaintiff with the caption "Philadelphia firefighter Francis Cheney holds a flag at a 9/11 ceremony in 2006." The photograph focused on a patch on the shoulder of Cheney's jacket and his face was out of focus but not blurred.

Last year a federal district court dismissed for failure to state a claim, finding that the article was not "of and concerning" plaintiff. The Third Circuit initially affirmed, but then granted a rare motion for rehearing. Following reargument in June the panel reversed itself and concluded the article could reasonably be understood as about plaintiff.

The Court noted that the "the photograph was placed directly next to the text of the article and underneath the headline introducing the scandal" and "considering that many firefighters were implicated and Cheney's was the only name in the publication, a reasonable reader could conclude that the inclusion of his photograph and name meant to suggest that the text of the article concerned him." In a footnote, the court added that on a motion to dismiss it had to accept as true plaintiff's allegation that he "was flooded with messages from his colleagues, family, and friends after the story was published."

The Court concluded that plaintiff stated claims for defamation and false light, but it affirmed dismissal of the emotional distress claim. Suggesting that a person is involved in a sex scandal is unfortunate, the Court stated, but it does not rise to the level of extreme and outrageous conduct necessary to state a cause of action for intentional infliction of emotional distress under Pennsylvania law.

Plaintiff is represented by James Begley III and James Goslee, Cohen Placitella Roth, Philadelphia. The New York Daily News is represented by Michael Berry and Elizabeth Seidlin -Bernstein, Levine, Sullivan Koch & Schulz, Philadelphia.

Rolling Stone Article Not "Of and Concerning" Three UVA Frat Members

Court Also Rejects Plaintiffs' 'Small Group Libel' Theory

A federal district court in New York recently dismissed a defamation suit against Rolling Stone and author Sabrina Ederly over their discredited 2014 article *A Rape on Campus* as not "of and concerning" the three fraternity member plaintiffs. *Elias v. Rolling Stone LLC*, No. 15-CV-5963 (PKC), 2016 U.S. Dist. LEXIS 83875 (S.D.N.Y. June 28, 2016).

The November 19, 2014 article depicted in harrowing detail a violent gang rape of "Jackie," a University of Virginia freshman, at a UVA Phi Kappa Psi fraternity party. Following questions raised by other media, the story fell apart and ultimately proved to be a complete fabrication by Jackie, the primary source of the story.

The three plaintiffs were undergraduates at UVA and members of the Phi Kappa Psi fraternity when the attack was said to have occurred. They sued Rolling Stone and Ederly for defamation alleging friends, family and colleagues suspected them of being the rapists. None of the plaintiffs were named in the article, but they argued that certain details were sufficient to identify them.

For example, the article stated that Jackie was taken up a flight of stairs to a bedroom – and one of the plaintiffs had a large bedroom on the second floor of the fraternity house. The article stated that the gang rape was part of a fraternity initiation and another plaintiff was the fraternity's rush chair. The article also stated that one of the rapists rode his bike on campus, and the third plaintiff was an avid campus biker. As a matter of law, these statements were insufficient to establish that the article was "of and concerning" plaintiffs.

The plaintiffs also sued Erderly for statements she made on a Slate podcast. There she said, among other things, that the gang rape was "some kind of initiation ritual" and that it "seems impossible to imagine that people did not know about it." In context, though, these statements were all non-actionable opinions, as they were couched as speculation or hypothesis.

Finally, the court rejected plaintiffs' attempt to state a "small group libel" claim. Since the statements in the podcast were speculation, they could not be fairly read as accusing all the members of the fraternity as participating in gang rapes as a fraternity initiation. And nothing in the Rolling Stone article accused all members of the fraternity of being involved in rape or similar behavior as an initiation ritual.

Two other actions against Rolling Stone over the article are pending. A suit filed in Virginia state court by the Phi Kappa Psi fraternity survived a motion to dismiss. A third a suit filed by University of Virginia Dean Nicole Eramo is scheduled to go to trial in October.

Elizabeth McNamara, Davis Wright Tremaine, New York, represents Rolling Stone. Plaintiffs were represented by Alan L. Frank Law Associates, P.C. Jenkintown, PA.

Arkansas Democrat-Gazette Wins Directed Verdict in Doctor's Libel Trial

Article About Prescribing Controlled Drugs Protected by Fair Report Privilege

On August 24, the Arkansas Democrat-Gazette newspaper was granted a directed verdict, dismissing a doctor's defamation case over an article entitled "Board rebukes LR doctor for Rx excesses." *Nayles v. Arkansas Democrat-Gazette* (Pulaski County Circuit Aug. 24, 2016) (Fox, J.).

The June 7, 2013 article reported that at a hearing the day before the Arkansas State Medical Board reprimanded, Dr. Lee Charles Nayles, for "prescribing excessive amounts" of potentially harmful or addictive medications. Two weeks later, the State Medical Board issued a written order stating that Nayles violated Regulation 2.6, "in that he failed to keep accurate records in the monitoring of patients."

Nayles sued the newspaper for defamation and emotional distress, arguing it negligently portrayed him as a "dope-dealing doctor" and that the newspaper should have waited for the Board's written reprimand before reporting on the matter.

The court had previously denied three separate motions for summary judgment which were based on a number of grounds, including public figure status.

Following testimony from the plaintiff, his wife, the newspaper's managing editor, and three other witnesses, the plaintiff rested. The newspaper asked for a directed verdict. Granting the motion, Judge Tim Fox stated that the challenged portions of the article fell under the state's common law fair report privilege. *See, e.g.,* KARK-TV v. Simon, 656 S.W.2d 702, 703-04 (Ark. 1983). "It just doesn't rise to the level of defamatory," the Judge said.

In granting the directed verdict, the judge did admonish and criticize the newspaper for exhibiting a "lack of class" in the manner in which it treated Dr. Nayles. While Nayles hadn't asked for a correction, he did call the reporter and disputed with her the Board's actions. The newspaper never printed a follow up story until after the grant of a directed verdict.

The judge commented that he read the entire transcript of the Medical Board hearing (entered into evidence as a defense exhibit) and found that in context there was considerable evidence of illegal drugs being dispensed by an advanced practice nurse who should have been closely supervised by Dr. Nayles, and for whom Nayles took responsibility.

In addition, it was only one sentence in the article which Dr. Nayles contested. So under Arkansas law regarding the fair reporting privilege the article was not defamatory.

The Arkansas Democrat-Gazette was represented by Philip E. Kaplan and Robert "Alec" Gaines, Williams & Anderson, Little Rock, AK. Plaintiff was represented by Austin Porter Jr., Porter Law Firm, Little Rock, AK.

Newspaper Can Sue Photographer and Agency Over Miscaptioned Photo

In an interesting decision, a New York trial court ruled that the New York Daily News can proceed with a third-party action for contribution against a freelance photographer and photo agencies that licensed a misidentified photo at the heart of a libel suit against the newspaper. *Lederer v. Daily News, L.P.*, 2016 N.Y. Misc. LEXIS 2712 (July 8, 2016) (Bannon, J.).

Former Wall Street trader Jeffrey Lederer is suing the Daily News for defamation and emotional distress over seven articles published in 2015 that mistakenly used his photograph to illustrate stories about Jeffrey Epstein, the billionaire American financier and registered sex offender.

Photo of Jeffrey Lederer at issue in the case.

The photographer and/or agencies mistakenly captioned the photograph of Lederer as: "EXCLUSIVE: Jeffrey Epstein, Billionaire and former pal of Prince Andrew, seen heading into Exclusive NYC Social Club, the Harmonie Club, one of Manhattan's most exclusive social clubs." Apparently the photographer shouted "Jeffrey" to Lederer and took his reaction as confirmation that he was Epstein. Otherwise, according to the decision, they took no other steps to verify the subject of the photograph.

Denying the third-party defendant's motion to dismiss the claim for contribution, the court held that mistakenly captioning a photograph with the name of a known sex offender would result in foreseeable harm. And under the alleged facts, both the photographer and agencies acted in a grossly irresponsible manner by failing to verify the photo and licensing it with a mistaken caption.

A claim for common law indemnification, however, failed because under New York law the party claiming entitlement to indemnity must be without fault. Here the newspaper could not allege that it was entirely without fault. And a claim for contractual indemnification against a photo agency failed because the licensing agreement only warranted against claims for copyright, publicity and other tangible property rights – not accuracy.

California Supreme Court Holds Anti-SLAPP Reaches Distinct Claims

Decision Resolves Split Among Appellate Districts

By Stacey H. Wang

In a watershed opinion, the California Supreme Court resolved a split among appellate districts to make it easier for defendants to win anti-SLAPP rulings when the case involves more than speech.

In *Baral v. Schnitt*, Case No. S225090, 2016 WL 4074081, *1 (Cal. Sup. Ct. Aug. 1, 2016), the Court held that defendants may bring anti-SLAPP motions to strike distinct claims within a cause of action, even if the cause of action itself cannot be dismissed in its entirety.

As a result of the decision, plaintiffs may no longer defeat anti-SLAPP motions by artfully pleading causes of action containing mixed allegations of protected and unprotected activity. The California Supreme Court directed trial courts to scrutinize claims based on protected activity when adjudicating anti-SLAPP motions, and not refuse to dismiss claims, as plaintiffs have commonly argued, because the anti-SLAPP challenge will not dispose of the entire cause of action.

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California's Anti-SLAPP Provision

California's statute providing for expedited dismissals of meritless claims constituting "strategic lawsuits against public participation" (SLAPP) states that: "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . . shall be subject to a special motion to strike, unless the court determines . . . there is a probability that the plaintiff will prevail on the claim." Cal. Code Civ. Proc. § 425.16 (b)(1). In practice, the defendant files an early motion, in which it asserts that one or more causes of action brought against it are protected by the right to petition or of speech. Once the defendant establishes that the cause of action falls under the statute's ambit, the burden shifts to the plaintiff to demonstrate the merit of the cause of action by showing a probability of success.

As the *Baral* Court observed, a "cause of action" usually contains specific allegations upon which the plaintiff relies to establish a right to relief. "If the supporting allegations include conduct furthering the defendant's exercise of the constitutional rights of free speech or petition, the pleaded cause of action — 'aris[es] from' protected activity, at least in part, and is subject to the special motion to strike authorized by section 425.16(b)(1)."

Lower courts have been split on how to handle causes of action supported by allegations of activity that is protected under the anti-SLAPP statute and activity that is not. One line of cases, followed by the lower courts in *Baral*, interpreted the statute to mean that courts may only dismiss an entire "cause of action," not just the allegation of protected activity. *See, e.g., Mann v. Quality Old Time Service, Inc*., 120 Cal. App. 4th 90 (2004). By that reasoning, where a cause of action includes both allegations of protected and unprotected activity, the motion must be denied because no cause of action can be stricken.

Other cases have more recently held that the allegations of protected activity may be stricken from a cause of action without affecting the allegations of unprotected activity. *See, e.g., City of Colton v. Singletary*, 206 Cal. App. 4th 751 (2012); *Cho v. Chang*, 219 Cal. App. 4th 521 (2013).

Baral's Claims and the Lower Court Rulings

The facts of the case are unremarkable, but presented the classic "mixed" cause of action in which protected and unprotected activity are alleged in support. The plaintiff, Robert Baral, owned and managed a company together with the defendant, David Schnitt. Baral's complaint asserted breach of fiduciary duty, constructive fraud, negligent misrepresentation and declaratory relief. Among the allegations was the accusation that Schnitt hired and gave false information to an accounting firm in its audit and investigation of possible misappropriation of corporate assets by Baral. Baral contended that Schnitt controlled the audit and deliberately prevented Baral from participating in his own defense.

Lower courts have been split on how to handle causes of action supported by allegations of activity that is protected under the anti-SLAPP statute and activity that is not.

In response to Schnitt's anti-SLAPP motion to strike all references to the audit as protected communications in a pre-litigation investigation, the trial court "ruled that the motion to strike applied only to entire causes of action as pleaded in the complaint, or to the complaint as a whole, not to isolated allegations within causes of action..." The California Court of Appeal affirmed the denial of the anti-SLAPP motion to strike. Although it found that the audit arose from protected activity, "anti-SLAPP relief was not available because no cause of action enumerated in the second amended complaint would be eliminated if the allegations of protected activity were stricken."

The *Baral* Holding and Its Implications

The California Supreme Court reversed, holding that the anti-SLAPP statute should apply. The Court stated in the key language to its decision:

> [I]t is not the general rule that a plaintiff may defeat an anti-SLAPP motion by establishing a probability of prevailing on any part of a pleaded cause of action. Rather, the plaintiff must make the requisite showing as to each challenged claim that is based on allegations of protected activity.

In fact, the Court held that an anti-SLAPP motion may operate like a conventional motion to strike, *i.e.*, it may be used to strike parts of a cause of action. In so holding, the Court disapproved of *Mann.*

The Court ended its opinion by providing some guidance to litigants and lower courts. A defendant making an anti-SLAPP motion must first identify "all allegations of protected activity, and the claims for relief supported by them." At this stage, any allegations of unprotected activity are disregarded. If the relief sought is based on protected activity, then the burden shifts to the plaintiff to "demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." If not, the allegations of protected activity are stricken from the complaint, unless they otherwise support another claim on which the plaintiff can show a probability of prevailing.

Baral likely will lead to an increase in anti-SLAPP motions against causes of action supported by both protected and unprotected activity. Its holding could provide more early opportunities to limit discovery in future cases. Moreover, the motion provides the added benefits of staying discovery altogether pending adjudication of the motion while simultaneously forcing the plaintiff to substantiate its claims. Finally, partial wins under the holding in *Baral* may lead to more attorney's fees awards for defendants, which are mandatory under the anti-SLAPP statute.

Stacey H. Wang is a partner with the Los Angeles office of Holland & Knight LLP.

Third Circuit Dismisses Cosby Appeal as Moot

Documents Already Released to the Public Cannot Be Re-Sealed

By Elizabeth Seidlin-Bernstein

The U.S. Court of Appeals for the Third Circuit has rejected Bill Cosby's request to re-seal documents that were already released to the public and covered extensively in the media, dismissing the entertainer's appeal as moot. *Constand v. Cosby*, No. 15-2797, 2016 WL 4268941 (3d Cir. Aug. 15, 2016). The documents, which revealed Cosby's deposition testimony about giving women Quaaludes during extramarital sexual encounters, were obtained by the Associated Press in July 2015 after languishing under seal for more than eight years.

Background

The sixteen documents at issue were discovery filings from a 2005 lawsuit brought in the Eastern District of Pennsylvania in Philadelphia by Andrea Constand, a former Temple University employee who accused Cosby of drugging and sexually assaulting her at his home. District Judge Eduardo C. Robreno initially denied Cosby's motion for a blanket protective order in June 2005 but, in November of that year, once the parties became embroiled in discovery disputes, issued an interim order temporarily sealing the parties' discovery motion papers.

The documents were obtained by the Associated Press in July 2015 after languishing under seal for more than eight years.

The AP had contemporaneously filed a motion to intervene to oppose sealing, but the court denied the motion without prejudice pending the conclusion of depositions. The court explained that it intended to review the materials that had been temporarily sealed after depositions were concluded to determine whether continued sealing was warranted, and that, unless a permanent sealing order was entered, the seal would lapse. The court never conducted the promised review, however, because the matter settled before the parties concluded their depositions. The parties' settlement agreement contained lengthy confidentiality provisions but was not submitted to the court for approval. The case was closed in November 2006, and neither party sought to have the temporary seal on the discovery motions converted to a permanent one.

In late 2014, as more women came forward with accusations similar to Constand's and public interest in the allegations of sexual misconduct by Cosby was growing anew, the AP renewed its efforts to obtain the long-sealed documents. Eastern District of Pennsylvania

Local Rule 5.1.5 requires the court to review any sealed documents two years after the conclusion of a case, but that review had never taken place in the Cosby case. The AP requested that the court undertake that review and was permitted to intervene in order to advocate for unsealing. Cosby objected to unsealing on the grounds that the subject matter of his deposition testimony was private and its release would cause him embarrassment. Constand did not take a position on the matter.

In July 2015, after briefing and argument, Judge Robreno ordered that the documents be unsealed. *Constand v. Cosby*, 112 F. Supp. 3d 308 (E.D. Pa. 2015). He concluded that, under Third Circuit precedent, the presumption of access did not apply to discovery motions, *see United States v. Wecht*, 484 F.3d 194 (3d Cir. 2007); *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157 (3d Cir. 1993), and instead applied the "good cause" standard governing protective orders under Federal Rule of Civil Procedure 26(c). In *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994), the Third Circuit set forth a number of factors, "which are neither mandatory nor exhaustive," for district courts to weigh in assessing the propriety of protective orders: (1) privacy, (2) legitimate or improper purpose, (3) embarrassment, (4) public health and safety, (5) promotion of fairness and efficiency, (6) whether the party benefiting from confidentiality is a public official or entity, and (7) public interest.

In applying *Pansy*'s public interest and privacy factors, Judge Robreno borrowed from the limited public figure analysis for defamation articulated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), concluding that Cosby had "donned the mantle of public moralist and mounted the proverbial electronic or print soap box to volunteer his views on, among other things, childrearing, family life, education, and crime," and thus had "voluntarily narrowed the zone of privacy that he [was] entitled to claim."

Judge Robreno also examined the other relevant *Pansy* factors and concluded that Cosby had failed to make any showing that disclosure of the documents would cause him "particularly serious" embarrassment and that any reliance by Cosby on the parties' confidentiality agreement was unjustified because that agreement had never been approved by the court.

In an omission that likely proved fatal to his appeal, Cosby had not prospectively asked the district court to stay its order, should it decide to lift the seal. Indeed, as soon as the court entered its order directing the Clerk to unseal the documents "forthwith," the documents were made available to the public via PACER, and the AP and other news outlets immediately began downloading the documents and reporting on their contents. Cosby's counsel, evidently unaware that the documents had already been made public, sent a letter to the district court within 45 minutes of the issuance of the unsealing order requesting a stay of the order, arguing that if the documents became public before an appeal, the appeal would be "pointless." By that time, however, it was too late: the contents of the usealed motions were being reported around the globe. The district court did not respond to the request.

Third Circuit Appeal

Notwithstanding his own counsel's admission that an appeal would be "pointless," Cosby appealed the unsealing order to the Third Circuit. The AP initially moved to dismiss the appeal as moot, noting that the appellate court could provide no effective relief to Cosby because news organizations around the world had reported extensively on the contents of the unsealed documents in the months since the district court's order. In fact, after the unsealing order, *The New York Times* had obtained a complete, unfiled copy of Cosby's deposition transcript directly from the court reporter and made numerous excerpts available online.

By the time the appeal was heard, at least seven separate lawsuits had been filed by women who alleged sexual misconduct against Cosby, and dozens of other women had made such allegations in the media. Additionally, a Pennsylvania district attorney had charged Cosby with aggravated indecent assault based on the same allegations by Constand that were the basis for her civil case a decade earlier.The motions panel, however, denied the motion without prejudice and referred the matter to the merits panel.

In his merits brief, Cosby argued that the district court had misapplied the *Pansy* factors and, in particular, took issue with what he called the court's "'public moralist' doctrine," which he argued, in sum, would discourage celebrities from speaking out on matters of morality. Cosby also argued that the order was an unconstitutional content-based restriction on speech.

In opposition, the AP argued that the district court's analysis was consistent with *Pansy*, which affords broad discretion to district courts confronting the unique circumstances of particular cases, and noted the widely accepted impact of the public figure doctrine in the context of privacy. The AP also renewed its mootness argument and addressed Cosby's First Amendment argument by noting that the district court's ruling did not restrict or punish speech in any way.

In his reply, Cosby contended that the appeal was not moot because re-sealing the documents would limit their dissemination to some extent and might affect whether they could be used against him in other litigation. He also argued, relying on a line of cases originating with *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), that if the Third Circuit found the appeal to be moot, it should vacate the district court's unreviewable decision so that it would have no legal consequences. The AP had argued that the court should exercise its discretion not to vacate because Cosby's failure to request a stay in advance of the district court's decision had contributed to the mootness and because vacatur would not serve the public interest.

In a unanimous, precedential opinion written by Judge Thomas L. Ambro, the Third Circuit agreed with the AP that Cosby's appeal was moot. After testing out various metaphors involving cats, horses, genies, and toothpaste at oral argument, the court settled on one of its own: "the feathers of the pillow are scattered to the winds." The court explained, "nearly everyone in America (and many more around the world) with access to a computer either know

what Cosby has admitted to doing or could find out with a few clicks, and this will remain true even if we order the documents resealed."

Furthermore, any evidentiary effect that re-sealing might have on other legal proceedings against Cosby were "simply not enough to present a live controversy in this appeal." Nor could the court "issue an advisory opinion simply to 'make clear' to the news media that the District Court's order does not entitle them to access any documents beyond those already unsealed."

Notably, the court looked beyond the record on appeal in reaching its mootness conclusion, observing that "a Google search for 'Bill Cosby deposition testimony' yields as of August 12, 2016, 81,200 results, some of which include full copies of the documents bearing the District Court's PACER imprint."

The Third Circuit did, however, determine that it was appropriate to vacate the district court's decision under the circumstances. Although Cosby failed to seek a stay in advance of the district court's ruling, his counsel did so "within an hour of receiving the District Court's order, and while this proved to be too late to prevent the documents from becoming public, there is certainly no evidence that it was part of any attempt to manipulate the judicial system." The court emphasized that it was not expressing any view on whether the documents should have been unsealed, but nevertheless ended with a footnote containing classic *dictum* that seemed designed to broker consensus: "if we could review it, we would have serious reservations about the District Court's 'public moralist' rationale."

Appellate courts cannot reverse the public dissemination of previously sealed documents, regardless of whether their unsealing was proper in the first place.

Conclusion

The Third Circuit's decision strongly affirms what most media lawyers instinctively assume to be true: at least in civil cases, appellate courts cannot reverse the public dissemination of previously sealed documents, regardless of whether their unsealing was proper in the first place. And, as Cosby's counsel admitted at oral argument, even though the district court's order unsealing the documents has now been vacated, any effort to re-seal the documents in the district court would run into the same mootness problem.

Gayle C. Sproul and Elizabeth Seidlin-Bernstein of the Philadelphia office of Levine Sullivan Koch & Schulz, LLP and Mara J. Gassmann of the firm's Washington, D.C. office worked on behalf of the Associated Press in this case. Bill Cosby was represented by Patrick J. O'Connor and George C. Gowen of Cozen O'Connor, P.C., in Philadelphia.

From the Next Gen Committee

Illinois AG: Public Employee's Personal Emails Can Be Public Records

By Drew Shenkman

The Chicago Police Department must conduct a search of the private email accounts of the twelve police officers involved in the October 2014 shooting of teenager Laquan McDonald, the Illinois Attorney General ruled in a binding opinion responding to an appeal submitted by CNN.

McDonald was shot 16 times by a Chicago police officer, an incident documented by police dash-cam footage withheld from public view for nearly a year after the shooting. The decision clarifies that the private communications of public employees are public records if they pertain to the conduct of public business, even if they are not retained by the public body.

CNN's FOIA Request

In January 2016, CNN submitted an Illinois FOIA request seeking all communications to and from the officers who responded to the scene of the shooting, including any communications sent by officers on their personal email accounts or mobile devices. While the Chicago Police Department responded to CNN's request with a large number of unresponsive emails sent on city servers, the response contained no emails sent by the officers from either their public or personal email accounts.

In an appeal submitted to the Illinois Attorney General's Public Access Counselor, CNN argued that the Chicago Police Department violated Illinois FOIA by refusing to search for records transmitted by officers on personal email accounts.

During the appeal, the city contended that it had no obligation to search for private emails because they did not fall within the definition of a "public record," and doing so would violate the officers' privacy rights. It was also revealed during the appeal that the city only conducted an automated search for "Laquan McDonald", failing to capture potentially responsive emails that did not contain the shooting victim's full legal name.

CNN argued that personal emails were in fact "public records" if they contained discussions of public business, and that if the city's narrow reading of the FOIA were to be adopted, "public officials would have an incentive to avoid FOIA by deliberately communicating about sensitive or controversial topics on private email."

In a thirteen-page decision, Illinois Attorney General Lisa Madigan and counsel Michael J. Luke rejected the Chicago Police Department's position, finding that CPD violated Illinois FOIA, and ordering CPD to conduct a search of the private emails of the officers as requested by CNN.

The binding opinion held that all "communications pertaining to the transaction of public business," are "public records" accessible under Illinois FOIA. It rejected the department's personal privacy concerns, stating that any emails exchanged about the shooting of Laquan McDonald "presumably pertain to those employees' public duties and therefore accessing them would not constitute an unwarranted invasion of personal privacy."

The Attorney General also found that CPD's search was inadequate because it failed to search for personal emails. In addition, the ruling found that the search term "Laquan McDonald" itself was inadequate as it failed to account for other possible references to the teenager in the emails, particularly given that Mr. McDonald's name may not have been widely known at the time of the shooting, as well as the unique spelling of his first name. CPD was ordered to conduct a more thorough search for personal emails, and to use more-expansive search parameters.

All "communications pertaining to the transaction of public business," are "public records" accessible under Illinois FOIA.

This opinion comes on the heels of a favorable earlier trial court ruling in the Chicago Tribune's ongoing litigation against Chicago Mayor Rahm Emmanuel's Office, with that court making a similar finding that the mayor's city-related communications are subject to Illinois FOIA even if they are made on personal devices.

A binding opinion issued by the Attorney General carries the force of law. The Chicago Police Department has 35 days to appeal the decision by filing suit in state court.

Drew Shenkman is Counsel with CNN in Atlanta, and co-chair of the MLRC Next Gen Committee. He represented CNN on its appeal to the Public Access Counselor. The Illinois Attorney General is Lisa Madigan, with Michael J. Luke, counsel, and Sarah L. Pratt, Public Access Counselor. The Chicago Police Department was represented by its general counsel Charise Valente.

D.C. Circuit Rules Terrorism Victims Can't Attach Countries' Internet Domains

Foreign Sovereign Immunities Act Will Not Reach Iranian, Syrian, and North Korean Domains

By Brian J. Goodrich

The U.S. Court of Appeals for the D.C. Circuit has held that country code top-level domains ("ccTLDs") are not attachable foreign property under the Foreign Sovereign Immunities Act ("FSIA"). *Weinstein v. Islamic Republic of Iran*, No. 14-7193 (D.C. Cir. Aug. 2, 2016).

The plaintiffs — victims of terrorist attacks and their family members — held substantial unsatisfied money judgments against defendants Iran, Syria, and North Korea arising out of claims brought under FSIA.

In an opinion occupied by a technical explanation of how the internet functions, Judge Karen L. Henderson for a unanimous D.C. Circuit panel found that allowing the plaintiffs to attach ccTLDs would affect parties unrelated to the lawsuit and jeopardize the Internet Corporations for Assigned Names and Numbers' ("ICANN") management of internet domain registration.

A unanimous D.C. Circuit panel found that allowing the plaintiffs to attach ccTLDs would affect parties unrelated to the lawsuit and jeopardize "ICANN."

Background

In 2002, the U.S. District Court for the District of Columbia found Iran liable for its role in a 1996 terrorist bombing in Jerusalem. The family of one of the victims, Susan Weinstein, sued Iran and obtained a default judgment in 2003. The plaintiffs then moved to attach Iranian property pursuant to the Foreign Sovereign Immunities Act (FSIA) and the Terrorism Risk Insurance Act (TRIA). To satisfy the judgments, the plaintiffs sought to attach Iranian Internet data managed by ICANN, a California non-profit corporation that is responsible for coordinating the maintenance and procedures related to the introduction of new TLDs, and the operation of root name servers, and, accordingly, served writs of attachment on ICANN. On ICANN's motion, the district court quashed the writs, finding the ccTLDs not to be "property" under District of Columbia law.

Top-level domains (TLDs) form part of the foundation of internet connectivity. All internet users come into contact with TLDs. The most commonly-known TLD is ".com." A ccTLD is a TLD that is associated with a particular country or political association — for example, ".us" for the United States and ".ir" for Iran, ".sy" for Syria and ".kp" for North Korea. ICANN, a non-profit corporation based in California, manages ccTLDs pursuant to a contract with the

U.S. Department of Commerce. ICANN's responsibilities include selecting and approving qualified entities to operate the different ccTLDs.

Court of Appeals' Opinion

The D.C. Circuit agreed with the District Court's holding that the plaintiffs could not attach the ccTLDs at issue (.ir, .sy, and .kp), but on different grounds. Assuming that the ccTLDs constitute "property," Judge Henderson found that attachment could not be permitted because attachment would affect a number of third parties unrelated to the suit — grounds under FSIA for a court to set aside a claim.

Specifically, Judge Henderson noted that requiring ICANN to delegate management of the .ir ccTLD to plaintiffs via court order would mean that anyone seeking a new .ir website name would have to request the new website from plaintiffs, and that the plaintiffs could charge a fee for all new .ir websites. Requiring ICANN to delegate .ir to plaintiffs would also bypass ICANN's credentialing process, which is designed to ensure TLD managers have the technical competence to manage the TLD.

The D.C. Circuit also recognized that allowing plaintiffs to attach a ccTLD risked disrupting the entire arrangement under which the internet operates:

Allowing plaintiffs to attach a ccTLD risked disrupting the entire arrangement under which the internet operates.

> ICANN occupies its position only because "the global community allows it to play that role." Appellants' Br. at 34. "[T]he operators of . . . top level domains" can "form a competitor to ICANN and agree to refer all DNS traffic to a new root zone directory." *Id.; see also* Br. for United States as Amicus Curiae at 13 ("As a technological matter, nothing prevents an entity outside the United States from publishing its own root zone file and persuading the operators of the Internet's name servers to treat that version as authoritative instead."). This result, known as "splitting the root," is widely viewed as a potentially disastrous development; indeed, some regard it as the beginning of "ultimate collapse of Internet stability" — a "doomsday scenario for the globally accessible" network and, thus, for ICANN.

Weinstein v. Islamic Republic of Iran, No. 14-7193 (D.C. Cir. Aug. 2, 2016), at pages 26-27. Unusually, the U.S. government submitted an amicus brief arguing that, while deploring acts of terrorism, the government could not support the seizure the ccTLDs from states that support terrorism given the massive ramifications on global internet stability. The State Department and the Department of Commerce jointly signed an amicus brief underscoring the disruption the attachment of ccTLD's could cause.

Conclusion

While the Court of Appeals carefully analyzed the practical ramifications of finding ccTLDs to be attachable foreign property, it sidestepped the larger question whether ccTLDs should be deemed "property" at all. The answer to that question, which may have even larger ramifications, will have to await another case.

Brian J. Goodrich is an associate with Holland & Knight LLP in Washington, D.C.

MLRC Media Law Conference

September 21-23, 2016 | Reston, Va.

Registration for the MLRC Media Law Conference is now open.

In addition to the usual timely and topical breakouts and boutiques, this year's conference will feature plenaries commemorating the 25th anniversary of the Rodney King case – looking at both the copyright/fair use/First Amendment and police/press aspects; a Fred Friendly hypothetical case program starring Washington insiders on the eve of the election; a panel of once active MLRC members who are now federal judges; Floyd Abrams talking about his new book, ""The Soul of the First Amendment"; as well as a rousing game of Family Feud: Journalism Edition; and a twist on the Next Big Thing, looking at the hits and misses of NBT sessions of the last ten years.

The full Program is also now available. We hope you will register soon.

Georgia Court Quashes Subpoena for Unpublished News Footage

Request for In Camera Review an Improper 'Fishing Expedition'

By Meghan Claiborne & Amy Gross

A Georgia trial court held that requiring disclosure of raw, unpublished footage of defendant's arrest filmed during the production of a FOX 5 news report would be tantamount to a "disclosure" under the Georgia Reporter's Privilege, and thus could not be required absent a showing sufficient to overcome the privilege. *State v. Spurlock*, Case No. 16SC140434 (Fulton Cty. Super. Ct. Aug. 8, 2016) (Brasher, J.).

FOX 5 and the Spurlock Arrest

On January 13, 2016, WAGA-TV FOX 5, a television station belonging to New World Communications of Atlanta, Inc. ("FOX 5"), aired an investigative report concerning drones being used to illegally smuggle contraband into Georgia prisons. During the segment, the reporter stated that a drone had been recovered in a prison yard with fingerprints allegedly belonging to defendant.

The Court held that requiring FOX 5 to submit to an in camera review of the raw footage would be improper.

The report then showed numerous law enforcement personnel at a staging area preparing to make the "first arrest" of someone using a drone to smuggle contraband into prison, and then footage of defendant in custody being asked by an officer if he did, in fact, try to smuggle contraband into prison via a drone. The FOX 5 news report is publicly available.

Once under arrest, defendant admitted to having drugs stored in a blue bucket in a cabinet in the kitchen of the apartment in which he was arrested. The police report indicated that before entering the apartment where defendant had been staying, consent was obtained from the lease holder of the apartment. The police report further indicated that the police reviewed a copy of the lease to ensure the alleged lease holder had authority to allow them to enter. The police discovered drugs in the spot exactly as described by defendant, and testing on the drugs came back positive as methamphetamines. Defendant was subsequently charged with felony drug trafficking.

Motion to Quash

Defendant subpoenaed FOX 5 for "any and all . . . 'edited' and 'unedited' video recordings of the police activities involving [Defendant]." FOX 5 filed a motion to quash the subpoena on

Screenshot from report. Click to view.

the grounds that the raw, unpublished footage was protected by Georgia's Reporter's Privilege.

This privilege protects from disclosure "any information, document, or item obtained or prepared in the gathering or dissemination of news." *See In re Paul,* 270 Ga. 680, 684 (1999); O.C.G.A. § 24-5-508. To overcome the privilege, the subpoenaing party must show either that the privilege has been waived, or that that the material sought: "(1) Is material and relevant; (2) Cannot be reasonably obtained by alternative means; and (3) Is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item." *Id.*

Defendant argued he was seeking video from two separate events: (1) the pre-arrest staging meeting, and (2) the subsequent search of the apartment. Defendant argued that the pre-arrest staging meeting was of "great interest" because FOX 5 "may have recorded statements from the officers regarding their interest in searching Defendant's apartment and the lack of a search warrant." Defendant further argued that the conversations during both events might be useful for subsequent impeachment purposes or might contain exculpatory evidence.

Judge Brasher granted FOX 5's Motion to Quash. The Court based its decision on defendant's failure to sufficiently overcome the Georgia Reporter's Privilege.

The Court held that defendant could not meet his burden as to any footage from the pre-arrest staging meeting because "statements of law enforcement officers before the search are neither material nor relevant in determining whether the search itself was lawful." *See also,* O.C.G.A. § 24-5-508; *State v. Ladner*, Indictment No. 15-CR-0174 (Cherokee Cty. Super. Ct. June 25, 2015).

The Court found that defendant had not identified any information that would be obtained from the raw footage that he believed would be necessary to the "proper preparation or presentation" of his case that was not already in the Court's record.

The Court further held that mere "speculation" that the raw video might contain information useful for impeachment is "simply insufficient" to overcome the privilege. A moving party must proffer more than a "possibility" that the footage *might* reveal useful or exculpatory evidence to pierce the Georgia Reporter's Privilege.

The Court stated that *even if* defendant had identified specifically what raw video footage was material, relevant and necessary, defendant still would not have been able to defeat FOX 5's privilege because defendant had failed to demonstrate that the information could not "reasonably be obtained" from alternative, non-media sources, as there were other witnesses. Plaintiff failed to show he had exhausted all of his alternative sources.

Most significantly, the Court held that requiring FOX 5 to submit to an *in camera* review of the raw footage, as defendant had requested, would be improper because it would be "tantamount to a 'disclosure' under the Georgia Reporter's Privilege." Defendant argued that an *in camera* inspection was an alternative way for the Court to balance his Fourth and Sixth Amendment rights with FOX 5's statutory privilege. However, as explained by the Court, the Georgia Reporter's Privilege does not make a distinction between "disclosure" to a court for *in camera* review, versus "disclosure" to a subpoenaing party. *See Vance v. Krause*, 1990 WL 272727 at *4 (DeKalb Cty. Sup. Ct. Nov. 21, 1990); *State v. Presley*, Case No. 15SC132914 (Fulton Cty. Sup. Ct. May 11, 2016).

While it is not surprising that a defendant would *like* access to the actual videotape footage to search for anything law enforcement agents *may* have said or observed before the arrest or during the search, the court said that such a fishing expedition is specifically precluded by the Georgia Reporter's Privilege. *Giddens v. Advantage Mobility Solutions LLC*, 2008 WL 4947726, 36 Med. L. Rptr. 2524, 2526 (DeKalb Cty. State Ct. 2008) (rejecting party's attempt to obtain "actual tape recording" of a conversation from a news organization just because it is the "best and highest evidence available" because doing so "would eviscerate the statutory privilege").

As recognized by the Court, neither the fact that it was a criminal case, nor the seriousness of the charges facing defendant seeking the disclosure affect the privilege analysis, and therefore cannot reduce defendant's burden of proof in demonstrating that disclosure is warranted. *See, e.g., Stripling v. State*, 261 Ga. 1, 9 (1991) (holding the murder defendant failed to meet his burden under the Georgia Reporter's Privilege); *Presley*, Case No. 15SC132914 (Fulton Cty. Super. Ct. May 11, 2016) (holding capital murder defendant failed to meet burden under the Georgia Reporter's Privilege). Thus, the Court established that when a defendant cannot otherwise satisfy the elements necessary to pierce the privilege during the evidentiary hearing, defendant similarly fails to justify disclosure via *in camera* review.

Meghan Claiborne and Amy Gross are associates at Duane Morris LLP, and are both members of the Media & Communication Law subgroup of Duane Morris's Trial Group. FOX 5 was represented in this matter by Cynthia Counts and Chris Kanne of the Atlanta Office of Duane Morris LLP.

(Continued from page 11)

stay. Meanwhile, it looks as if Gawker is close to settling with Mail Online in a rare media-on-media defamation case against the bankrupt company.

The "pink slime" defamation suit in South Dakota circuit court has been trimmed back a bit, with the plaintiffs dropping ABC News, reporter David Kerley, and a few others from the suit; the ABC network and other network personnel remain in the case.

And how's this for ridiculous: the Sheriff of Terrebone Parish in Louisiana raided a police officer's home to search for evidence that the officer was an anonymous blogger who accused the Sheriff of corruption. Some hack parish judge granted this thug a search warrant in connection with charges of, you guessed it, criminal defamation. Besides having his digital life explored by gun-toting hooligans, the officer was suspended for "conduct unbecoming"; thankfully, he was later reinstated and an appellate court ruled the warrant flatly unconstitutional in light of blisteringly clear appellate precedent.

Privacy

So, Gawker.com is done, the rest of Gawker is now part of Univision, Nick Denton has filed for bankruptcy, Peter Thiel continues to believe (wrongly) he's helping journalism, and most people (present company excluded) don't seem to care. Despite rumblings of settlement talks, I'm still hoping for an appeals court victory—even if a Pyrrhic one—for Gawker at the end of this mess.

Rights of Publicity

Chuck Yeager sued Clear Channel Outdoor in county court in Texas, alleging that the use of his name and a reference to his Mach 1-breaking flight on billboards in Texas airports violated his rights of publicity. This one seems like it should be pretty close to the fair use line (wherever that is in ROP cases).

The Sixth Circuit rejected student athletes' right of publicity claims against ESPN over sports broadcasts, holding that the Tennessee statute specifically excluded such broadcasts from the right and that the state had never recognized common law protections.

Pop icon Darlene Love gave up on a right of publicity claim in the Northern District of California over the use of her performance of "Christmas (Baby Please Come Home)" by HGTV. (It's rare to see a *Zacchini*-style performance-based ROP claim these days, isn't it?) In the same court, an attorney dropped his misappropriation claim against legal marketplace Avvo.

Disclosure of Private Information

The federal Intimate Privacy Protection Act is working its way forward, with some interesting by-play as Peter Thiel attempted to co-opt the bill for his own narrative. Rep. Jackie

Speier wasn't thrilled with that, but others pointed out that the bill might well have applied to the Hogan article.

A petition for review by the Vermont Supreme Court is now pending from a superior court ruling that scuttled the state's revenge porn law on First Amendment grounds.

In W.D. Mich., *Rolling Stone* is facing a lawsuit over its alleged sale of subscriber information to third parties, which plaintiffs claim violates Michigan's Video Rental Privacy Act (which is not limited to videos). In N.D. Cal., a bride has sued her videographer after her groom's embarrassing behavior at the wedding, and her reaction, became the subject of a viral video.

And in California, a pending bill passed the state Senate that would give actors a right to prevent employment websites from disclosing their ages. I sympathize with the actors, but when you start passing laws that enshrine a societal dysfunction, you're going down a dark path.

Access/FOIA

New Cases

The University of Kentucky must be trying for some kind of record. Last month I mentioned a lawsuit filed against a former student to block the release of records related to the school's Medical Services Foundation. This month, we have two more suits, one against the school's student paper to prevent the release of documents related to a professor who resigned after sexual harassment allegations, and one against the *Lexington Herald-Leader*, which had obtained a ruling from the state AG that the school violated the Ky. Open Meetings Act.

Turning to efforts to *gain* access, we have a handful of new cases driven by the election cycle, including: a suit in D.D.C. by the Republican National Committee looking for Bill Clinton's post-presidency schedules; a motion by Gannett and the *New York Times* to unseal Donald Trump's divorce records in New York; and a motion by a media coalition to unseal video of a deposition that Trump provided in a business dispute in D.C. superior court.

In addition: The First Amendment Coalition sued the government of Los Angeles over missing (and possibly destroyed) records relating to a former councilman; a new suit was filed by Judicial Watch in D.D.C. for documents relating to the State Department's editing of video of a 2013 press briefing regarding nuclear talks with Iran; and a reporter in Wisconsin has sued a state representative for access to searchable electronic versions of correspondence regarding water issues.

Access Granted

Some bad news for celebrities this month. Bill Cosby's attempt at closing the barn door post-equine exodus failed before the Third Circuit, with the Court of Appeals holding that the contents of court documents that Cosby wished to "reseal" were already widely known.


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Meanwhile, Randy Travis's bid to keep a police video of his DWI arrest under wraps ran aground in Texas' appellate courts, with a ruling that Travis's privacy was adequately protected by redactions to obscure his nudity at the time.

The Clinton email scandal continues to generate rulings, with a judge in S.D. Fla. giving the State Department until September 13th to produce relevant materials from the Benghazi era for public inspection. Meanwhile, a judge in D.D.C. has directed Clinton to answer written questions about her private email server in another FOIA dispute by mid-September.

The New Hampshire Supreme Court held that the annulment of a defendant's case does not exempt police and prosecution documents from the state's public records law. The District of Massachusetts held that the FBI had to release documents relating to Massachusetts' Joint Terrorism Task Forces. An Illinois circuit judge ordered the Naperville police to release dashcam video from an officer accused of trying to run over a man. A Florida circuit court held that the UCF student newspaper was entitled to student government association files.


CC BY 2.0 Kevin Case

Some helpful decisions outside of the courts as well. The New York Committee on Open Government opined that NYC Mayor Bill de Blasio cannot hide his communications with non-governmental political consultants as if they were government employees. Illinois' Attorney General ruled that emails concerning public business on the private accounts of Chicago Police Department officers were subject to disclosure. Iowa's Department of Administrative Services has dropped its policy of allowing bidders on public contracts to redact information from publicly filed versions of bids.

Access Denied

While the media are still trying to get a peek at Trump deposition video in D.C., an effort in S.D. Cal. to access video depositions in the Trump University case has taken a bad turn. Not only has the media been denied access to the video (in part because it was not attached to any dispositive motion or introduced as evidence), but video can now only be filed with the court under seal and there is an order barring its dissemination to the media. And a judge in S.D.N.Y. has denied a motion to unseal documents that would purportedly reveal a settlement agreement in a case where Trump was alleged to have hired illegal workers to build Trump Tower.

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In the Ninth Circuit, journalists have dropped an effort to gain access to the allegedly racist emails of a Montana federal judge. A district judge in Oklahoma barred release of police video of the arrest of a man accused of killing his 21-month-old daughter (the video apparently depicts the victim, as well as the suspect strenuously resisting arrest, but no word on the possibility of redaction).

After a suit by North Jersey Media Group against the Bergen County Prosecutor's Office, the New Jersey Appellate Division has authorized state agencies to provide a *Glomar* response

in any case where revealing the existence of responsive documents would undermine the purpose of the public records exemption pursuant to which records might be withheld. Ugh. To make it even more fun, there's some fairly vague discussion of the N.J. statute's catch-all exemption in there too.

NJMG also hit a wall in the Appellate Division in connection with its "Bridgegate" investigation. The company had sought the names of individuals in the Christie administration who had asked for legal representation; the court held the information was shielded by attorney -client privilege.

Pending Cases


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Undaunted, NJMG's efforts in the Bridgegate case continue in federal court, with letters to both the District of New Jersey and the Third Circuit. The letters ask the lower court to lift or modify the existing protective order in the case, and the Court of Appeals to narrow its stay of a district court disclosure order to apply only to the list of unindicted co-conspirators that is the subject of the appeal.

In the Southern District of New York, the Treasury Department was ordered to better explain its efforts to search for documents connected to a warrantless surveillance program, although the court denied the *New York Times'* motion to be allowed to take depositions. The same court has rejected the U.S. Trade Representative's claim that national security concerns sufficed to withhold drafts of the Trans-Pacific Partnership agreement from the public, while denying cross-motions for summary judgment in a case brought by Intellectual Property Watch.

The Dallas Police Department has asked the state's Attorney General to allow it to deny FOIA requests related to the department's use of a bomb-laden robot to end an armed standoff, arguing that much of the information requested is not subject to mandatory disclosure on the grounds that it is "embarrassing" or of no public interest.

Legislation

Oregon's attorney general is pushing for amendments to that state's law that would include deadlines for compliance and better tracking of invoked exemptions. Texas legislators are trying to find a way to restore public access after a 2015 Texas Supreme Court ruling allowing businesses dealing with government agencies to seal away information they provide to the state.

Meanwhile, the Pentagon wants a new FOIA exemption for unclassified military tactics, techniques and procedures. That is to say, basically every unclassified record it possesses – and you can bet that this will be followed by internal procedures restricting voluntary disclosure of such records. So tell me, what's the point of classification?

Newsgathering

Drones

Y'know, I usually start this section with persecution/prosecution of journalists, but let's talk about something a bit more fun first. On August 29th, the FAA's new regulations for commercial use of small drones went into effect – hooray! Be safe out there, kids. CNN's already on it, with its new CNN Aerial Imagery and Reporting, or "CNN AIR" (groan), project. But if you're trying to catch drone footage of Robert Duvall at his Virginia home, watch out for his neighbors...

The FAA also granted one drone start-up company permission to conduct "beyond visual line-of-sight" flights. Between that and another company receiving permission to fly fleets of drones at night, is the FAA perhaps working up to considering drone delivery systems?

Credentialing & Access to Places/Events

The entirety of Mexico's National Commission of Physical Culture and Sports had their Olympic press credentials yanked for posting a video of a Mexican gymnast to social media. So much for national pride at the Olympic Games. A sports journalist was also kicked off Twitter for tweeting three GIFs from Rio.

More seriously, things got rough in Milwaukee this month after the shooting of a black man by police. Reporters were caught up in the violent protest, with several journalists chased by a crowd and at least one assaulted. News organizations began pulling their people out of the immediate area as a result.

And the Trump campaign has launched its print pool rotation; the media refused to allow Trump to select the composition of the pool, so many of the outlets previously blacklisted by the campaign are participating. Not that it helped when Trump decamped to Mexico at the very end of the month without any of his press corps.

Persecution of Sources

The DOJ lawyer who tipped off the media about post-9/11 warrantless surveillance was publicly censured by D.C.'s top court, though the court acknowledged his motives were pure. Meanwhile, the 4th Circuit has revived First Amendment claims brought by a deputy sheriff, who told the media his suspicions that the sheriff's office was covering up evidence that gunshot wounds he suffered were caused by friendly fire. The Court of Appeals held that he'd stated a claim against the sheriff for retaliatory termination.

Legislation

California being California, the Planned Parenthood sting video incident has naturally resulted in new legislation designed to protect privacy by criminalizing undercover videos. Needless to say, the press is not thrilled.

Prior Restraint

Rebecca Tushnet described a very interesting decision from the D.C. Circuit this month that should give trademark lawyers some pause. The case involved the Federal Election Commission's ban on the use of candidate names in website titles and on social media pages by unauthorized political committees; the law had an exception for situations where such use would not be confusing or misleading. So, more or less like trademark law. But here, the Court of Appeals found that the FEC rule violated the First Amendment as a content-based prohibition on speech that was not narrowly tailored, because disclaimers can work wonders to prevent confusion.

We also had a few gag order cases this month. A New Hampshire superior court judge declined to issue a preliminary injunction against a defamation defendant to keep him from speaking about the plaintiffs during the pendency of the case. Meanwhile, attorneys for five 9/11 defendants potentially facing the death penalty in military tribunals are fighting against a gag order that prevents their clients from speaking to anyone outside of their defense teams, and prevents the defense teams from sharing what they hear with anyone else.

And while we're talking about national security, a recent order from D.D.C. directs the FBI to schedule periodic reviews of the gag orders attached to National Security Letters to see if they are still necessary. Previously, the recipient of an NSL had to repeatedly challenge the order in court to determine if compliance was still required.

Broadcast/Cable/Satellite

A setback for supporters of municipal broadband this month, as the Sixth Circuit holds that Congress did not explicitly grant the FCC authority override state bans on city-operated broadband networks. A coalition of U.S. mayors has objected to the decision, but the FCC has decided that it will not appeal (although the affected cities still might). I can hear my old colleagues at the Berkman Klein Center gnashing their teeth.

The FCC's had quite a bit on its plate, though. It just ruled in favor of Comcast on a discrimination complaint, and received a favorable D.C. Cir. ruling on an LPTV challenge to the agency's spectrum incentive auction (which isn't going as well as the FCC had hoped). The agency is also dealing with the Copyright Office's criticism of its set-top-box plan (for which the Copyright Office is itself taking some heat), the NAB is blasting the FCC for its decision to keep cross-ownership rules in effect, Comcast is on the FCC's back to reject rules that would allow broadband companies from charging higher fees to subscribers who opt out of behavioral advertising, and the Senate Commerce Committee is reportedly cooking up an oversight hearing for September.

Meanwhile, this section has seen more than the usual degree of new non-FCC court activity this month. Washington State has filed a $100 million consumer protection claim against Comcast for charging consumers for service calls that were supposed to be free. DirectTV is on the receiving end of a RICO suit in C.D. Cal. for allegedly selling residential-class TV service to businesses, and then smacking them with penalties for ordering services for which they didn't qualify. Showtime sued Charter in New York state court, accusing it of attempting to dodge license fees through the mechanics of its recent merger; Charter is also facing an amended race bias complaint in the Central District of California.

Comcast did score a win at the 5th Circuit, however, with a ruling that its property the Golf Channel did not need to repay $5.9 million that it innocently acquired in the course of a convicted swindler's Ponzi scheme.

Internet/New Media

Section 230

Well, it looks like the Ninth Circuit is sticking by its *Internet Brands* decision. It just reversed a pre-*Internet Brands* ruling dismissing a "failure to warn" claim against Match.com under Nevada law. I keep hoping that these cases will right themselves on summary judgment, when it becomes clear that the only role that could give rise to a duty to warn is these sites' publishing function.

The California Court of Appeal's disastrous Section 230 decision in *Hassell v. Bird* (I say Section 230, but I can only assume that the court was looking at Section 230 of some statute other than the CDA) also continues keep media companies and digital platforms up at night. More than 40 companies, including the MLRC, and more than a dozen law professors sent letters to the California Supreme Court asking the justices to fix it.

Some sanity in other Section 230 cases, though. A judge in N.D. Cal. kicked out one of those lawsuits against Twitter by families of victims of ISIL; although he granted leave to amend, it seems like that's just postponing the inevitable based on the court's reasoning.

And last month I reported on a case involving the so-called "Reverse Streisand" effect; we'll call this next case the "Recursive Streisand." The plaintiff sued nine defendants alleged to provide search engine services because, he claimed, search results related to his past litigation caused him to be unemployable. And now that a judge in W.D. Pa. has dismissed this new case, it too will show up in his results.

Anonymity

Not every California appellate panel is as blinkered as the *Hassell* court. (No, seriously, it's a *really bad decision*.) In another recent case, the court granted a nice win for anonymous

speech in a case where a visual effects company sued a Doe defendant for libel. The claim was based on pseudonymous e-mails purporting to "whistle-blow" on the company.

Net Neutrality

Bad news for net neutrality activists who were looking to the FTC to augment FCC regulation: The Ninth Circuit has held that the FCC's reclassification of broadband as a common carrier service exempted ISPs from FTC regulation entirely, and not only with respect to activity covered by the FCC's net neutrality regulation. The result is that the FTC had no authority to pursue a claim against AT&T Mobility for throttling.

Terms of Service

According to a judge in S.D.N.Y., Uber wasn't clear enough in delivering its Terms of Service to a user suing for antitrust violations for the court to enforce an arbitration clause. As Prof. Eric Goldman points out, the case doesn't specifically say mobile is different, but does raise questions about clarity of presentation of ToS and acceptance thereof on mobile devices. Eric also continues to cover the ongoing chaos around standards for online contract formation more generally, including a number of notable recent decisions; his survey article is worth a read.

Hate, Terror, and Other Internet Nastiness

New York's governor ordered the state correctional department to make it a parole violation for sex offenders to play online games. Driven by the Pokémon Go craze (such as it is), the measure is intended to prevent use of the games to lure children to particular locations. Meanwhile, some N.Y. legislators want developers of augmented reality games to prevent game assets from being located near sex offenders' homes.

Twitter is rolling out filtering options so that users can only see mentions from people they've already chosen to follow – an option that will limit network-building but clean up one's feeds. Instagram, on the other hand, introduced a customizable filter where users can identify particular words they do not want to see. (Asking users to identify every word to which they don't want exposure seems like an exercise designed to teach people about the difficulty of implementing content-based censorship.)

Twitter is still playing whack-a-mole with terrorism-related activity, reporting suspension of 235,000 separate accounts. Not to worry, says Donald Trump, repeating his line that he'll just turn off the terrorists' internet access. Facebook and Instagram were under pressure from Senator Markey this month over peer-to-peer gun sales across the site. And a 2015 New York lawsuit seeking to force Facebook to block social media posts that allegedly incite violence against Israeli citizens was revived and removed to E.D.N.Y., after a long stay following the death of the original lead plaintiff.

Finally, there was some controversy arising out of an armed standoff with police in Maryland, where the suspect was livestreaming to Facebook. Police asked Facebook to shut down the live feed and Facebook complied, moments before the suspect was shot and killed.

Internet Governance

Another very interesting ruling from the D.C. Circuit this month, this time involving country -code top level domains (you know, like .ca for Canada, .fr for France, and, infamously, .ly for Libya). Plaintiffs who obtained judgments against Iran, North Korea, and Syria for damages caused by those countries' support of terrorism issued writs of attachment for those countries' TLDs (.ir, .kp, and .sy) as property to satisfy the judgments. (Why? Think how much, say, online marketplace Etsy.com might pay to control the URL "et.sy" for its website, or Delta might pay for "a.ir," and then multiply that accordingly.) But, held the D.C. Circuit, permitting the attachments would have a potentially catastrophic effect on the organization of the internet. There's a nice piece on this decision elsewhere in this issue of the LawLetter, which I recommend you read.

If you want a big shift in internet governance, though, the net is getting ready for one as the U.S. government prepares to release its grip on the Internet Corporation for Assigned Names and Numbers (ICANN) on October 1st. Control is intended pass to a multi-stakeholder, non-governmental group.

Miscellaneous

Minnesota's new law that allows individuals to transfer digital assets (like social media accounts) upon death went into effect this month. Meanwhile, Minnesota's top court held that buying geographic terms as advertising keywords can support a finding of personal jurisdiction.

Pennsylvania has launched its "Netflix tax," which imposes a 6% sales tax on digital downloads. That looks like a litigation engine.

Fantasy sports games are back in New York, after Governor Cuomo signed a bill legalizing the games.

And in Ohio, a man was acquitted by a jury of felony charges for disrupting public services for his publication of a parodic Facebook page making fun of the Parma Police Department. The parodist also his apartment raided by a SWAT team, though he wasn't home at the time. (Unfortunately, his roommate – who was, ahem, indisposed at the time – *was* there; that's going to be an awkward apartment meeting.)

Internet Privacy

Hacking

So, Matthew Keys has sought clemency from the President. There's a lot that's weird about this case, but somehow I think the White House will decide that Keys can serve the 24 months

and get on with his life. Also, Keys has filed his appellant's brief at the Ninth Circuit, arguing a lack of the damage required to trigger Computer Fraud and Abuse Act penalties.

Meanwhile, the team of pro bono counsel who represented Andrew "weev" Aurenheimer in the Third Circuit in his CFAA case has stepped up with a petition for rehearing of *Facebook v. Power Ventures* (or is it *Facebook v. Vachani*?). The Court's decision that visiting a website after being told not to constitutes "unauthorized access" under the CFAA has drawn a fair bit of criticism, including from the EFF and ACLU, which filed an amicus brief.

LinkedIn, however, would probably like the *Facebook* decision to stand; it filed a complaint this month under the CFAA against Doe defendants using bots to scrape data about the site's users.

Over in the Sixth Circuit, a manufacturer of online surveillance tools faces a lawsuit for wiretapping. The Court of Appeals held that the company could be subject to a secondary liability claim after its product was used by a husband to intercept another man's messages to his wife.

The *New York Times* and other news organizations have been targeted by hackers recently; Russian intelligence is suspected. Separately, a powerful iPhone hack has been used to target journalists and activists, and Yahoo is investigating a black hat hacker's claim that he's offering over 200 million user accounts for sale.

And what happens when tech companies hack one another? Google will pay $5.5 million in settlement in answer to that question, resolving claims that it circumvented privacy protections in Apple's Safari browser to serve ad-tracking software to users back in 2012.

Control of Personal Information

Kudos to GameStop's attorneys for their careful drafting of the electronic gaming store's privacy policy for its online magazine. The Eighth Circuit dismissed claims based on sharing of browsing history and Facebook IDs used to access the magazine, finding that the data in question was unambiguously excluded from the definition of protected PII.

A new complaint was filed against the Golden State Warriors claiming that their official app eavesdrops on nearby conversations. Meanwhile, the makers of Pokémon Go responded to concerns voiced by Sen. Al Franken last month about their data collection practices.

This is a problem I haven't seen in a while: Online employer review site Glassdoor recently sent out a notice of updates to the site's Terms of Service, but accidentally copied 600K e-mail addresses into the cc: field, revealing them to all recipients. A lawsuit in C.D. Cal. naturally followed. Yeah, that's a whopping blunder, but I have to ask – by 2016 shouldn't any reasonable e-mail product pop up a warning or confirmation dialog when it detects 600,000 cc:'s?

Speaking of e-mail, we've had a few cases about automatic scanning of electronic mail messages with recent updates. There are two cases against Google in N.D. Cal.; in one, the court denied a motion to dismiss on the merits, but in the other, the court denied certification of

a class of plaintiffs. Another class action in the same court over email scanning by Yahoo has resulted in what is being called a quite lenient settlement.

WhatsApp recently decided to share data with its parent company, Facebook. A coalition of privacy activists has filed a complaint with the FTC in the U.S., while European data protection authorities are undertaking their own inquiry.

A Chicago hospital is being sued by the family of a murder victim in Illinois' state courts, after a nurse tweeted pictures from the victim's room where he was treated before he died. This one has a quick settlement and termination of the employee written all over it.

Expect a bigger battle in Florida state court over an ESPN reporter's tweet of NFL player Jason Pierre-Paul's medical records, after the court denied ESPN's motion to dismiss on the basis of "common decency" and the "feelings of the individual." The Florida court made a hash of *Bartnicki* in particular.

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Intrusion

A new complaint in N.D. Cal. alleges that the producers of Pokémon Go should be held liable for causing people to be nuisances, due to unwanted flash crowds near private property and public landmarks. This is one that will be solved by boredom, not the courts. More persistent are the problems faced by a family who recently filed a lawsuit in the District of Kansas. Their home was incorrectly targeted by a glitch in a geolocation company's mapping software, leading to years of visits by police officers and angry civilians looking for stolen vehicles and other property. The family has sued the geolocation company for compensation.

Internet Surveillance

We've learned that the Foreign Intelligence Surveillance Court actually does put the brakes on the FBI from time to time. Recently released court documents reveal an extended back and forth between the court and the agency over the FBI's use of material gathered while monitoring phone calls. But another recently released FISA opinion held that it was legal for the government to capture "post-cut through" dialing with a pen register (think the digits you enter into a dial-by-name directory). Such information had previously been considered content, not metadata.

A system established by ISPs and the National Center for Missing and Exploited Children to scan e-mail for potential child pornography was conducting "searches" under the Fourth Amendment, held the Tenth Circuit.

The Center for Democracy and Technology has raised concerns about a pending federal bill that might allow the government to search innocent people's computers in order to destroy malware linking them to hacker-controlled "botnets." The problem: what else the government might "inadvertently" find in "plain view."

And the Department of Homeland Security is planning what must be described as a half-baked effort to gain access to the social media information of visitors to the United States. The usual groups are pointing out the obvious flaws.

Transatlantic Privacy

The EU-U.S. Privacy Shield is up and running, and accepting its first sign-ups from U.S. companies. Dozens of organizations are already on the list.

Intellectual Property

Copyright – New Cases

Blame "Blurred Lines" for the fact that we've had a ton of music copying lawsuits out of the Central District of California lately. This month, we have: a suit against pop songster Ed Sheeran for allegedly copying Marvin Gaye's "Let's Get It On" in "Thinking Out Loud"; a suit against Ariana Grande over "One Last Time"; a suit by Blind Melon alleging that Mandy Jiroux falsely claimed she had a license to borrow from "No Rain" in her song "Insane"; and a suit against Demi Lovato for allegedly sampling from the Sleigh Bells's "Infinity Guitars" for her song "Stars." Atlantic Records has also filed a petition in N.Y. state court to get Reddit to unmask a user who allegedly leaked a pre-release version of a single by Twenty One Pilots; Reddit is resisting.

Getty Images was hit with another lawsuit over licensing images that it doesn't own, with a claim in S.D.N.Y. over 47,000 sports photos. Richard Prince was sued yet again; this time in C.D. Cal. for lifting a model's Instagram selfie. The copyright in the screenplay for "Friday the 13th" is up for grabs in D. Conn., as an attempt to terminate a copyright grant runs up against a claim that the script was a work for hire. ESPN was sued in N.D. Miss. after it allegedly breached a deal to use footage from a football documentary in its own production. And Riot Games, publisher of popular game "League of Legends," has sued hackers and cheaters in C.D. Cal. for copyright violations.

Copyright – Plaintiffs' Victories

The judge in a closely watched case in E.D. Va. over ISP liability for user infringement has refused to overturn BMG's $25 million verdict against Cox Communications. Cox has appealed to the Fourth Circuit.

The Fourth Circuit, meanwhile, held that the U.S. government's seizure of file-sharing baron Kim Dotcom's overseas assets was legitimate; his refusal to face charges in the U.S. rendered him a "fugitive," said the court. The Third Circuit upheld an award of actual damages for infringement that included a multiplier based on the "scarcity and exclusivity" of the plaintiff's stem cell photos. And the Seventh Circuit reversed a defense verdict over a

newspaper's use of the plaintiff's portrait of Louis Farrakhan, holding that the district court inappropriately placed the burden on plaintiff to prove lack of authorization.

In E.D. Mich., a court denied a motion by Fox and the creators of "Empire" to dismiss a copyright claim asserted by an author who claimed the character of Cookie Lyon was based on her memoir; the court did, however, dismiss a right of publicity claim. In D. Md., an online real estate service failed to escape claims that it reproduced a photo without permission and attached a false copyright notice. Finally, a judge in C.D. Cal. held that lawyers for Led Zeppelin couldn't recover their attorneys' fees after their recent win at trial.

Copyright – Defense Victories

The Second Circuit denied the RIAA's petition for rehearing of the Court's recent decision that the Digital Millennium Copyright Act applies to pre-1972 sound recordings. On the other coast, the Ninth Circuit gave Live Nation another chance to prove that its unauthorized use of a photographer's images of Run-D.M.C. on merchandise was not willful, reversing summary judgment on that issue.

Famed composer Hans Zimmer defeated a claim that he copied music from a commercial library for the principal music of "12 Years a Slave," with the plaintiff dropping the case voluntarily and sending a written apology. It took longer for Brad Paisley and Carrie Underwood to fight off an infringement claim in M.D. Tenn. over "Remind Me," but they succeeded this month. Tattoo artists failed to register their copyright in LeBron James' tattoo, rendering them ineligible for statutory damages in a case in S.D.N.Y. against the publishers of videogame NBA 2K16. Beyoncé defeated a recent copyright claim over the trailer for her HBO "Lemonade" special, with an explanation of the ruling yet to come.

Looking at fee awards, plaintiffs were denied their attorneys' fees in a lawsuit over the illegal download of a little-known Adam Sandler movie, after judge in the District of Oregon held that a consent judgment against a single downloader in a file-sharing case did not warrant burdening that one individual with fees for the entire litigation campaign. Defense attorneys also picked up: $315K in fees in the "Walk of Shame" lawsuit in C.D. Cal.; $15K in fees in S.D. Tex. for successfully defending country singer Jason Cassidy; and $22K in S.D. Ind. in a case alleging infringement of a photograph of the Indianapolis skyline.

The big winners though were the attorneys who fought in C.D. Cal. to show that "Happy Birthday" is in the public domain; they were awarded a full third of the $14 million settlement in fees, with the judge lavishing praise upon their efforts against a powerful opponent.

Copyright – Pending Appeals

All eyes on the Ninth Circuit. The first briefing in the "Blurred Lines" case has hit, with Thicke, Williams, and T.I. receiving the support of more than 200 musicians in an amicus brief. Streaming company FilmOn X took on pretty much the entire world of broadcasting in oral argument, arguing for its entitlement to a compulsory license. And the monkey selfie case

continues to generate headlines and puns – though Naruto may be in trouble, because one of his "next friends" has dropped out of the case and left PETA's standing in doubt.

Might I suggest a replacement friend?

Copyright – Miscellaneous

Other bits and pieces of copyright news in August:

- A motion for a second new trial in the Oracle v. Google API saga in N.D. Cal. has apparently piqued the interest of Judge Alsup, who has ordered the parties to submit sworn declarations relating to information allegedly withheld in discovery. Because what everyone needs is a *third* trial.
- The Department of Justice has left its consent decrees with ASCAP and BMI over music licensing in place, except for adding a new and controversial requirement that the organizations must offer "100% licensing" – i.e., that they must be able to license all parts of the song, and not just the percentage interest controlled by artists with which they are affiliated.
- Lawyers representing the alleged operator of massive filesharing site Kickass Torrents have demanded that criminal charges be dropped on the basis that there is no such thing as secondary criminal liability for copyright infringement under U.S. law.

Patent

BlackBerry, apparently transitioning from a technology company to a patent licensing entity, has started to scout out a bridge as it files three new lawsuits in the Southern District of Florida and the Northern District of Texas. Guys, a tip: Don't wait for the third goat.

British Telecom is suing videogame giant Valve Corp. in D. Del. in an effort to lock down several core online gaming technologies, including patents covering online computer or video gaming platforms, digital distribution services, and personalized access to online services and content. In E.D. Tex., a software company is suing BuzzFeed and other media companies for infringement of a shareware patent.

Facebook and WhatsApp succeeded in an AIA inter partes review before the PTAB, which invalidated the claims of a third party's electronic messaging patent. And podcasting patent troll Personal Audio is fighting for its life before the Federal Circuit, after EFF succeeded last year in having Personal Audio's core patent declared invalid.

Trade Secret & Misappropriation

Warner Bros. is stuck in a case in California superior court, after a judge denied a motion to dismiss claims that the studio breached an implied contract with an artist who pitched concepts for the upcoming "Kong: Skull Island."

Commercial Speech

Trademark

New cases:

- Up above, I mentioned the counterclaims filed by Bleeping Computer against Enigma Software after Bleeping failed to escape defamation liability under Section 230. Bleeping has also filed a cybersquatting claim against Enigma after the software company allegedly began registering domain names including its name.
- A carpet cleaning business is the latest to tilt at the Olympic windmill, filing a declaratory judgment action in D. Minn. to establish its right to tweet about the Olympics in the face of ridiculously restrictive rules.
- And it's not exactly a trademark claim, but the FTC sued 1-800 Contacts for antitrust violations, alleging that it illegally over-enforced its trademarks to suppress others' keyword advertising.

There was a rare keyword advertising win (or at least, not immediate loss) for a plaintiff in D. Conn. this month, in a claim between competitors in "chocolate and fruit-based gift packages."

In other plaintiffs' wins, we've got a judge in C.D. Cal. reversing his earlier decision that a spoof of "Dirty Dancing" in a TD Ameritrade ad was not infringing. In M.D. Fla., a judge ruled that a founder of the Commodores did not own the band's name in a case brought by the other band members; questions of infringement remain. Burberry won a preliminary injunction in S.D.N.Y. to stop a rapper from using the name "Burberry Perry." But in C.D. Cal., it was the performers (loosely defined) winning against a manufacturer, with the Kardashians granted an injunction against the use of their name by Kardashian Beauty. And threesome app "3nder" changed its name, and apparently its raison d'être, in the wake of a lawsuit by dating app Tinder.

I'm glad to report that the silly lawsuit between Citigroup and AT&T over the mark "THANKYOU" was dropped after a judge in S.D.N.Y. refused Citigroup an injunction and explained in detail why the case was going nowhere.

Oh, and if you'd like an interesting read, there's a law professors' amicus brief in the appeal of the *Louis Vuitton v. My Other Bag* case pending in the Second Circuit raising a direct First Amendment challenge to trademark dilution law.

False Advertising/Deception

The FTC has announced that it intends to take a hard line against sponsored celebrity posts on social media that are not labeled as such. One might disagree with the FTC's lack of flexibility on this topic, but the basic concept isn't that hard to grasp – so I can't say I have

much sympathy for anyone who gets caught in the forthcoming dragnet. Particularly not the Kardashians, who are the subject of a new FTC complaint.

Slingbox manufacturer Sling Media defeated a false advertising claim in S.D.N.Y., with a judge finding that there was no evidence that the company lied about its intent to add advertising to its mobile streaming service. And an attempt by a Trump hotel to use a false advertising claim to suppress a labor union's invocation of the Orange One's "Make America Great Again" motto on their protest banners fell flat in the District of Nevada, with the court finding the banners weren't commercial speech.

Professional Speech

The Sixth Circuit has reversed a district court decision dismissing a dentist's First Amendment challenge to an Ohio rule banning him from calling himself an "endodontist." Even though the dentist is, indeed, a qualified endodontist, Ohio prohibited him from promoting himself as such unless he restricted his practice to that field.

The American Psychiatric Association warned its members this month about indulging in the almost irresistible temptation to opine on what the hell is wrong with Donald Trump (and, why not, other candidates), finding that doing so would be unethical and irresponsible. The rest of us are free to continue.

Attorneys are facing a separate issue though, with the American Bar Association urging state bars and courts to adopt the following disciplinary rule:

> It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. ... This paragraph does not preclude legitimate advice or advocacy consistent with these rules.
>
> Discrimination and harassment . . . includes harmful verbal ... conduct that manifests bias or prejudice towards others. ...
>
> Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. ...

Professor Volokh has gone into detail about the problems with this rule, but from the perspective as a First Amendment lawyer in particular, I have to wonder whether attorneys representing clients with repugnant viewpoints in free speech cases are going to be facing a raft of complaints. I know it says "This paragraph does not preclude legitimate advice or advocacy

consistent with these rules," but the words "legitimate" and "consistent with these rules" leave a lot of room for mischief.

Well, at least Texas lawyers now know they can use their rivals' names in keyword advertising, thanks to an opinion of the Texas Ethics Commission.

Judges got a break in the Sixth Circuit, with a ruling holding that some of Kentucky's restrictions on judges' speech in elections violated the First Amendment. But that doesn't help Judge Olu Stevens, who was suspended after he took to social media to make some nasty comments about a prosecutor.

Miscellaneous

Academia

So, you can't be forced to recite the U.S. pledge of allegiance, we know that. But according to the Fifth Circuit, you *can* be forced to recite the *Mexican* pledge of allegiance for a school exercise where you're not actually expected to mean what you say and everyone present knows that. Jeff says "hmm…"

Government Licensing & Public Fora

The Third Circuit held that a Philadelphia prohibition against non-commercial advertisements at the airport was unconstitutional. No big surprise there. The Seventh Circuit explored the issues raised by applying a town's signage laws to the inflatable rats and cats used by labor unions, though it avoided a final ruling due to a potential mootness issue; Judge Posner, with a lengthy dissent, would have found a violation of the union's First Amendment rights.

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And a Tennessee county settled a First Amendment suit in E.D. Tenn. for $41,000, after its sheriff found religion on a county-operated Facebook page and started deleting negative comments.

Political Speech

The D.C. Circuit held this month that a case can proceed seeking an injunction against the IRS to prevent the agency from targeting political groups for heightened scrutiny in their applications for tax-exempt status. I personally was more concerned about the wringer that the agency had been putting journalism non-profits through, but the new decision is still a good thing.

The California Supreme Court held that a public official's vote was an act protected by the state's anti-SLAPP law. Interestingly, the Court held it did not matter if the vote itself was not protected by the First Amendment per the U.S. Supreme Court's 2011 decision in *Nevada Commission on Ethics v. Carrigan*, because the vote was "in furtherance of" political debate that *was* constitutionally protected.

Donald Trump's got a remarkably appropriate defender in bizarre litigation specialist Roy Den Hollander, who has sued every media outlet he could think of for RICO violations for their reporting on the candidate.

And it's hard to believe that it was only this month that Trump made his infamous comment about Second Amendment people. Raise your hand if, as a First Amendment lawyer, you had to respond patiently to questions from friends and family about why Trump wasn't arrested. Bonus points if you quoted the sentence, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," or specifically cited *Brandenburg*.

Hollywood Hijinx

Comedian and TV host Steve Harvey is continued to be embroiled in a dispute in N.D. Tex. over ownership of about 120 hours of tape of Harvey's performances at a Dallas club. A summary judgment motion narrowed the claims, but core contractual issues survived the cut.

Just like Lucious Lyon, Fox seems to be having a lot of problems with its "Empire" lately. The latest lawsuit comes from N.D. Ill., which claims that residents of a juvenile detention center were improperly treated when the facility was locked down to allow the show to film on site.

We all knew this, but apparently the former Mrs. Mel Gibson didn't: You can waive your First Amendment rights by contract, including in a divorce settlement agreement. So no surprise that a California appellate panel held that she forfeited substantial financial benefits under such an agreement after she violated a non-disclosure clause therein.

The True Miscellany

Ms. Grigorieva wasn't the only one to lose big for violating confidentiality. Matt Bissonnette, the ex-SEAL who wrote a book about the killing of Osama bin Laden, will fork over $6.8 million for failing to get permission from the Pentagon, according to filings in the Eastern District of Virginia.

We'll end this month with a ruling from the Northern District of Illinois, where a judge relieved renowned artist Peter Doig from an attempt to declare him the creator of a work of art held by the plaintiff. After a bench trial, the judge declared that the artwork was clearly created by another person.

Conclusion

And that's a wrap on summer. I'll be taking a break from this column due to our conference next month, but will return with a double-header for September and October.

Hope you enjoyed your Labor Day, everyone, and I'll see you in Virginia!