



MEDIA LAW LETTER

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UPCOMING MLRC EVENTS

MLRC/Southwestern Entertainment and Media Law Conference

January 14, 2016, Los Angeles, CA

Legal Issues Concerning Hispanic and Latin American Media

March 7, 2016, Miami, FL

Legal Frontiers in Digital Media May 19-20, 2016, Mountain View, CA

For more, visit www.medialaw.org

From the Executive Director's Desk

Santa's Gift List for Media Players Naughty and Nice

It's the holiday season, and so rather than one of those end-of-the-year reviews or even hopes and predictions for next year, I thought I would get into the Xmas spirit and play Santa Claus. So although it was a year with a few highs and unfortunately many tragic lows, Santa is leaving gifts under the tree for many media players. After checking it twice, here is Santa's, aka the MLRC's, list:

To New York State: An enlightened and broad cameras-in-the-courtroom law, to rescue the media capital of the world from being one of the very few states not to allow tv cameras in its courtrooms

To the United States Supreme Courts and the other federal courts: A regifting of the above

To Brian Williams: A better year than last year

To Jon Stewart: a return

To Joe Montana, Jim Brown, Fred Dryer, Sam Keller, Michael Davis and other football and basketball players making right of publicity claims against video game producers: a Madden '16 video game they can play on Feb 7 during Super Bowl 50,

since they certainly wouldn't watch the big game without paying all the players on the two championship teams for the privilege

To Bill Cosby: Prosser on Torts, wrapped in a cozy sweater, so that he will learn the stupidity of his defamation suit against seven of his alleged rape victims, a case which Santa does not see turning out well for him.

To the World Wide Wrestling Federation: an annex to their Hall of Fame (or Shame) for libel and privacy litigations and plaintiff litigators (see below)

To Jim Risen: JFK's Profiles in Courage, for his unwavering bravery in never compromising or capitulating in his subpoena battle with the Justice Department, which – despite a horrendous 4th Circuit decision which Santa disapproves of – he eventually “won”

To Justice Alito: a copy of the First Amendment

To Student Protestors: a copy of Justice Holmes' dissent in U.S. v. Schwimmer, stating that the most important principle in the



George Freeman



To Hulk Hogan: a PED to keep private parts private.

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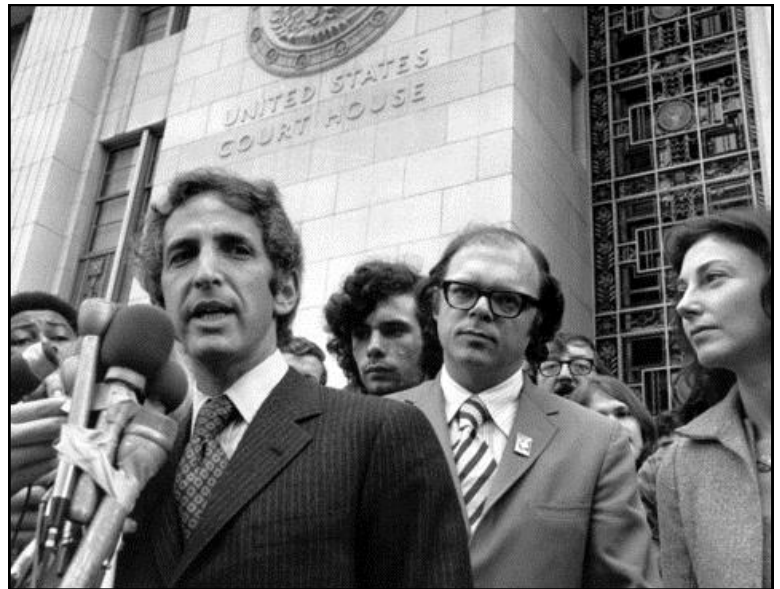
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Constitution “ is the principle of free thought – not free thought for those who agree with us, but freedom for the thought that we hate.”

To the Media Law Consortium: For many years of effort, passage by this ineffective Congress - Santa wants to spank them – of a sparkling and broad federal Shield Law

To Hulk Hogan: a PED which would enable him to keep his private parts private

To Gawker: a new judge who, unlike the current one, based on HER decisions, does not seem to be a tag-team partner of the aforesaid Mr. Hogan in the invasion of privacy case he brought for publication of his sex tape



To Daniel Ellsberg: reflections on the Pentagon Papers case, 45 years ago.

To *Spotlight*: a much deserved Academy Award for Best Picture for accurately portraying the blood, sweat and tears of investigative journalism

To Charlie Hebdo: a case of Chateau Petrus and a barrel of ink, to ensure continuing publication in 2016 and beyond

To Lord Black: a ticket to a reception at our Virginia Conference at the Hyatt Regency in Reston, in return for his hosting the terrific reception in the House of Lords on a moonlit evening on a balcony of the British Parliament overlooking the Thames

To President Barack Obama: a one-way mirror, reflecting his Administration’s views on transparency

To Edward Snowden: an airplane ticket home from Moscow, so public opinion and/or an American jury can decide whether he is hero or villain

To Cynthia McFadden, Erin Lee Carr, Victor Kovner and Marty Baron: a bag of popcorn in recognition for putting on a great program at our “Night at the Movies” Annual Dinner

To Daniel Ellsberg, Jim Goodale, Floyd Abrams and Max Frankel: an autographed copy of an article by the late Bill Safire on the etymology of “surely result in direct, immediate and irreparable damage to our nation,” the prior restraint standard established in the Pentagon Papers case 45 years ago this summer (Sapphire is the symbolic color for a 45th anniversary, and Safire was on the Nixon team during the case.)

To Jesse Ventura: a reversal in his libel case against the Kyle estate for a passage in “American Sniper” claiming that he got punched out, and the hope that, on appeal, he will get pinned with a judicial body-slam

To Aaron Sorkin: a friendship bracelet from the MLRC for his being our principal speaker at our Annual Dinner two years ago, and again participating on a panel next week at our [LA Entertainment & Media Law Conference](#) on the propriety of the media’s publishing the materials from the Sony hacks one year ago

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To *Rolling Stone*: some CD's from their namesake band, signifying that they "Play(ed) with Fire" in publishing their story of rape at the University of Virginia and hoping that they will "Get [some] Satisfaction" in their upcoming legal battles in the ensuing libel cases

To HBO: some soccer balls, but Santa will not say who stitched them and whether the stitchers were under-age or legally paid

To Chicago Mayor Rahm Emmanuel: a copy of the MLRC Model Policy on Police BodyCam Footage, and the phone number of a headhunter

To Donald Trump: continued high poll numbers ensuring he will stay in the Presidential race, thereby enabling newspapers to sell untold and much-needed extra copies, television stations to claim huge numbers of additional viewers, and news websites to receive millions of unexpected hits

To the MLRC Virginia Conference '16: a Presidential Campaign Calendar with no Presidential Debate on the night of one of our programs

To Adblock Plus: { }

To David Ashenfelter: a copy of the Fifth Amendment and a cane, reflecting the 12 year subpoena battle he finally won this year in Detroit on 5th Amendment grounds

To Warner Music: A record of "We Wish You a Merry Christmas", already in the public domain, to commemorate its joining "Happy Birthday to You" which, by settlement of a long-standing copyright case, is just going there

To Jeremy Feigelson: dozens of great answers as questions for beginning his reign as Alex Trebek in Journalism Jeopardy at the Boca Conference

To the FAA: a drone, which will propel them to issue regulations permitting the use of drones for professional photography

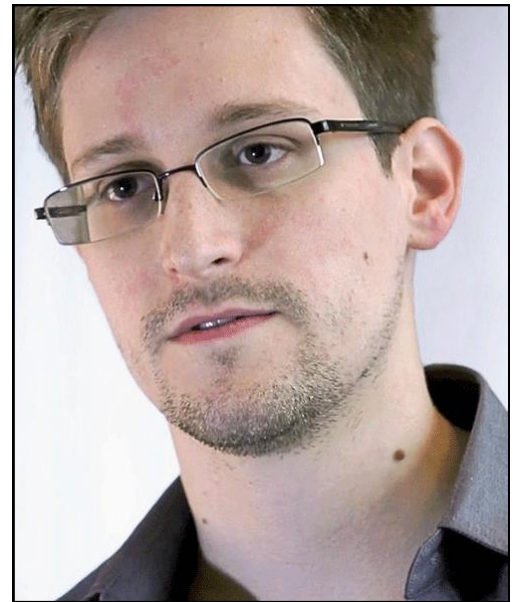
To Anthony Elonis: music lessons

To Journalists in Danger Spots around the World: Good health and safety

To the MLRC Staff: my heartfelt thanks for all your work, effort and loyalty in producing Daily Reports, Legal Letters, Bulletins, 50-State Surveys, Conferences and Committee work every day, and without which we would not be able to give the benefits we do – professional, intellectual, social and fun - to our members

And, finally, I wish all our loyal readers and members a very happy and healthy new year.

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



To Edward Snowden: an airplane ticket home.

Letters to the Executive Director

We received some positive feedback in response to last month's column on [free speech on college campuses](#).

Terrific column about the attack on free speech on campuses. I have been a little stunned by the fact more media are not reporting these events as bizarre, un-American (literally) and simply unacceptable behavior. Toughen up, kids, the world outside of college is much nastier. Try to prepare yourselves for it. Oh, and by the way, try to develop enough self-confidence that you do not flinch anytime someone challenges your view of things.

Lou Colombo, Partner
BakerHostetler, Cleveland

* * *

I'm writing to tell you that your latest Newsletter comments are timely and profound (a word I rarely use).

"Political correctness run amok" is a great phrase, but I do have one observation, which is this: These discussions do have value. At Yale, for example, the administration has affirmed its support for the original email encouraging Halloween sensitivity. The value, in my view, is that gratuitous insults on campus, though allowed, should be discouraged. I recognize that there is a fine line; the Atlantic "coddling" article a few months ago is stomach-turning. However, I found myself thinking that Yale's administration did the right thing when it supported the committee's message.

When Marvin Kalb was at the Shorenstein Center at Harvard, he gave a speech dealing with the Holocaust. I tried to get people to attend, and one woman, a survivor, told me she would never not even consider it. Why? Because Kalb was either the "McCloy professor" or maybe oversaw a program with McCloy's name attached to it, and the Kennedy Center has a scholarship program named after John McCloy. My friend blamed McCloy for the Roosevelt administration's decision not to bomb the tracks to Auschwitz. I remember thinking this was a far-fetched reason not to attend the speech, but I spoke with Kalb about it and he said something to the effect that he was not aware of the issue. Later he wrote me a letter to the effect that he had looked into it and she has a valid point. (I'm not sure whether that story has anything to do with the subject at hand, but I thought you would find it interesting.)

I've given a few talks on campuses this year. From what I can tell, many students think speech should be curbed because "we shouldn't hurt people's feelings." That's pretty scary.

Joseph D. Steinfeld, Partner
Prince Lobel, Boston

* * *

Just read your November "From the Executive Director's desk," and I couldn't agree with you more. Well said! Orwellian is indeed the word to describe the world in which we now live. My 60's and 70's liberal views make me feel today very much a "stranger in a strange land."

Herschel P. Fink, Legal Counsel
Detroit Free Press, Detroit

Slants, Redskins and Other “Disparaging” Trademarks

By Ron Coleman

Item, per NPR News:

An Asian-American rock-band with an eyebrow-raising name has scored a big victory in the Court of Appeals for the Federal Circuit.

[The court ruled](#) that their name—The Slants—is private speech and therefore protected by the First Amendment. The government, the court writes, has no business trying to regulate it by denying the band a trademark.

At issue in the case was [Section 2\(a\)](#) of the Lanham Act, which allows the U.S. Patent and Trademark Office (PTO) to deny or cancel a trademark if it is "disparaging" of persons, institutions or national symbols.

In a 10-2 decision, the court decided parts of that section were unconstitutional. Conferring a trademark, the court argues, does not make the band's name government speech.

Here's the comparison the majority uses: "The PTO's processing of trademark registrations no more transforms private speech into government speech than when the government issues permits for street parades, copyright registration certificates, or, for that matter, grants medical, hunting, fishing, or drivers licenses, or records property titles, birth certificates, or articles of incorporation."

Shortly after I published the blog post about The Slants, I was on the phone with their frustrated trademark counsel, and agreed to accept what turned out to be the opportunity to change the law I was criticizing this series of pieces.

I've been writing about the Redskins football team and the tribulations—and, as it turns out, trials—of their REDSKINS trademark on [“Likelihood of Confusion”](#) since almost the beginning of the time I started blogging on intellectual property and free speech issues in 2005. It wasn't until 2011 that, following up on that theme, I wrote a post about the Patent and Trademark office's refusal to register the trademark THE SLANTS for an obscure “Chinatown dance band” from Portland, Oregon and linking to earlier posts that asked why ethnically “disparaging” marks such as HEEB and NIGGA were deemed unacceptable under Section 2(a)

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MLRC Forum panelists discussing, among other topics, the Slants and Redskins trademark registration cases. Left to right: Jeff Hermes, MLRC; Gayle C. Sproul, Levine Sullivan Koch & Schulz, LLP; Nani Jansen, Media Legal Defence Initiative; Lee Rowland, ACLU's Speech, Privacy and Technology Project; Andrew Losowsky, The Coral Project at Mozilla; and your author Ronald D. Coleman, Archer & Greiner P.C.

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of the Lanham Act despite applicants' claims of "reappropriation" while marks such as DYKES ON BIKES were allowed.

Shortly after I published the blog post about *The Slants*, I was on the phone with their frustrated trademark counsel, and agreed to accept what turned out to be the opportunity to change the law I was criticizing this series of pieces. At the time, however, I hardly anticipated that this was the assignment I was accepting. In retrospect, however, and as I came to understand only when I read the *en banc* decision in *In re Tam*, this outcome—the invalidation of the "disparagement" prong of the statute under the First Amendment—was actually the only way anything useful could be achieved by my efforts.

To understand why I say that, it is helpful to consider what I wrote when the original TTAB decision was issued in the NFL's appeal of the PTO's unprecedented retroactive cancellation of its REDSKINS registrations under Section 2(a) in the Blackhorse *inter partes* cancellation proceeding on Likelihood of Confusion:

The opinion is remarkably thorough and is ultimately grounded in what appear to be mountains of carefully sifted, weighed and analyzed factual evidence developed through years of litigation. In this respect it certainly represents, even if arguably at the high end, the sort of careful evidentiary record that ought to form the basis of a section 2(a) denial. Yet it is significant that the dissenting judge came to a different conclusion from that of the majority about the key issue factual issue as determined by the panel, i.e., whether the registration ran afoul of section 2(a) at the time the mark was registered.

The question of going back in time to make such determinations is inherently rife with problems, and the TTAB did not really wrestle with them. Arguably it was not within their scope of review to do so. While the goal of avoiding offense by government actions such as trademark registration is laudable, achieving that goal seems more than ever to embroil

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agencies and judges in deciding highly-politicized and sensitive issues that are arguably not appropriately determined by either. Adding “time travel” to their task only makes it more onerous.

Moreover, not all section 2(a) refusals merit the level of factual inquiry and careful analysis of evidentiary issues on display in the REDSKINS appeal. Most applicants have neither as much at stake the Washington Redskins did here nor the budget to apply to defending their registration. The care and effort invested in the TTAB’s decision here reflected these unusual factors, but unfortunately not every 2(a) dispute that comes to it can expect such well-developed treatment of the issues and evidence.

Finally, the policy question of whether a registration should be revoked retroactively, after decades of use by the registrant following allowance and evidently with no time limit—as long as the evidence is found to support a contemporaneous finding of disparaging meaning—is probably one that Congress should address. Its application in this case, regardless of the merits under the standards applied by the TTAB, is certainly troubling.

It’s not too daring to suggest that after *In re Tam*, this analysis can only stand on firmer ground. Speculation abounds, of course, as to just how firm, and whether the Fourth Circuit, where Blackhorse is now pending, will go as far as the Federal Circuit did in *In re Tam*; and, whether it does or not, what the ultimate fate of both or either decisions will be.

I write now to bury neither case but to praise one. I am, of course, biased, but not in the way I thought I would be when I began this adventure, or even when I began reading the en banc opinion in *In re Tam* despite knowing the outcome.

Now, first, it must be said that there are many problems related to the practical application of Section 2(a) policy and practice that are not addressed by the majority opinion in *In re Tam*. The academic literature is rich with discussion of them, but for easier reading, *see*, Ronald D. Coleman, “The Policy and Constitutional Challenges to Contemporary Application of Section 2(a) of the Lanham Act,” CLE Supplement, PTO Day Program—Trademark Track, Session: Federal Registration of Disparaging, Immoral and Scandalous Marks, March 10, 2015, (available at <http://www.jdsupra.com/legalnews/the-policy-and-constitutional-challenges-12146/>) . It is also worth looking at the concurrence of Judge O’Malley, who deals with some of the constitutional “vagueness” issues raised in the majority opinion as First Amendment problems in the Fifth Amendment context, which is are getting insufficient attention in the popular and even the legal press. These are serious concerns, especially for people with trademarks and lawyers who people engage to protect them. These issues are beyond the scope of this essay, however.

And what would be the basis for the Fourth, or any other federal circuit court, to depart from the Federal Circuit’s direction on an issue of trademark law?

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Most of the commentary being published on the question of the day—how will “the Slants case” affect “the Redskins case”—appears to be a variation on this formulation: “The Federal Circuit is very prestigious / influential / persuasive on trademark matters, but the Fourth Circuit is not bound by it one little bit, and a split is possible. And if that occurs—and it probably will, then Supreme-Court-ho!”

For some reason, “if that occurs” in these analyses always seems to become “it probably will.” This is, evidently, something people write to make their blog posts or newspaper columns exciting. But while reasonable people may disagree with the reasoning of the majority opinion *In re Tam*, it is hard to see how exactly the Fourth Circuit would find a way to justify concurring with the new holding of the Federal Circuit. While, as a threshold matter, the vast majority of appeals from district courts are (for better or worse) affirmed, this is a case of considerable prominence, in which a sister circuit, and a highly respected and influential one, has spoken definitively. And what would be the basis for the Fourth, or any other federal circuit court, to depart from the Federal Circuit’s direction on an issue of trademark law? Notwithstanding the truism that each circuit is independent in its own realm, at the same time every circuit that has ruled on this issue has, even if citing its own precedent, ultimately done so on the basis of *In re McGinley*, 660 F.2d (C.C.P.A. 1981).

But *McGinley* was, of course, decided by the very court that is now called the Federal Circuit. And it is no longer good law. Moreover, the fundamental reason it is no longer good law is not, with all due respect to the “wither *stare decisis*?” plaint of Judge Louie in dissent, not a result of an arbitrary policy decision by the *en banc* majority. Rather, it is a result of vast changes in First Amendment jurisprudence originating in the United States Supreme Court, not in the Federal Circuit.

The Federal Circuit’s reconsideration and abrogation of *McGinley* is also premised on changes to the Lanham Act that affect the way the Trademark Office is funded, which has, since the time *McGinley* was decided, changed from a “taxpayer-funded” to a “user-funded” basis. This technical distinction is significant, because the *McGinley* court relied on it. It may yet turn out to be an important part of future appellate consideration of *In re Tam*, *Blackhorse*, or some consolidated version of the two cases. Either way, this, too, is an ineluctable fact with which no court could disagree, reasonably or otherwise.

So on what basis, exactly, could the Fourth Circuit going to base its disagreement with at least the outcome in *In re Tam*?

One should be not be naïve. Courts, as we see, can be full of surprises. But from a flat-footed survey of the jurisprudential landscape, far from assuming an impending circuit split, the presumption should be the opposite. It is not clear from what well the Fourth Circuit would be drawing in rejecting the holding of *In re Tam*—how it could rely on the very precedent that

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that case rendered invalid and leapfrog over the considerable body of First Amendment jurisprudence on which the majority based its opinion.

What, then, about the concurrence and the dissents? By most lights, in these are to be found raw material the PTO and the *Blackhorse* will use to sway the judges on the Fourth Circuit that the Federal Circuit was wrong about its own precedent. How exactly those arguments could be reworked for the benefit of the *Blackhorse* plaintiffs, who are not in identical shoes to those of the government in *In re Tam*, remains to be seen. But for purposes of this discussion, and given my limitations in discussing the details of legal arguments our client may yet have to submit, I would rather come back to my opening comments, and the passage from my earlier post. For in the course of this process I came to learn why this is, after all, not the administrative law, intellectual property or law of evidence appeal that I thought it was. Ironically, however, to see why I say this requires some familiarity with the underlying procedural history of *In re Tam* and the underlying PTO record.

To understand what is at work in *In re Tam* and in the battle of Section 2(a), one has to dig deeper even than the first round of Federal Circuit briefing, where, as a matter of decorum, the appellate team decided to tread more lightly than we had at the agency level. Thus we omitted passages such as these, which were included in the brief submitted to the TTAB (emphasis added):

The Examining Attorney's rationale turned the entire policy justification for Section 2(a) on its head. It was a refusal to register based on the ethnic background of Applicant and his associates that was offensive. Unless reversed by the Board this formulation inevitably will involve the Patent and Trademark Office in inappropriate and constitutionally suspect inquiries concerning the ethnicity of applicants, their associates and their activities. . . .

The refusal here was explicitly, and improperly, premised on the ethnic identity of Applicant and the other members of his band. "Here," wrote the Examining Attorney, explaining the "association" between the mark and the Asian community, "applicant is a founding member of a band . . . composed of members of Asian descent. . . . [The] association of the term SLANTS with those of Asian descent is evidenced by how Applicant uses the mark – as the name of an all Asian-American band." By the Examining Attorney's logic, the same exact application submitted by a non-Asian would be entitled to registration. THE SLANTS, the PTO admits, is not inherently offensive, as, for example, HEEB and SQUAW are. THE SLANTS could be registered as a trademark – just not by Asians. It should go without saying that the law does not support refusal of registration based on the ethnic descent of an applicant, such as occurred here.

The Lanham Act is silent as to how many Asian members of The Slants would need to be fired from the band to avoid offending Asians by registration of this trademark.

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Indeed, it is no less troubling that the Examining Attorney noted that there was no “rebuttal” to his assertion that The Slants were an “all Asian-American” band. The only possible “rebuttal” would have been a submission proving that the band was not entirely Asian and hence entitled to registration, a patently offensive proposition. In any case, the standard to which such “evidence,” if submitted, would have been applied is unclear, for the Lanham Act is silent as to how many Asian members of The Slants would need to be fired from the band to avoid offending Asians by registration of this trademark.

This language is gone, but the point did remain through the first round of briefing in the Federal Circuit.

Now, there is another, related point: The entire basis of the finding that THE SLANTS was disparaging—whether the supposed statements of Simon Tam; his ethnic identity; the makeup of his “Asian-American band”; the ethnic-associated use of THE SLANTS—was anywhere in the evidentiary record of the application to register THE SLANTS from which the appeal that *In re Tam* originated. It all was from a previous application, alluded to vaguely in the opinion, which does not address, however, the fact that all the evidence on which its finding of disparaging meaning was premised is found in that original, abandoned, 2010 application.

The back story: When The Slants called me up in 2011 because of the blog post, I looked at their pending (2010) application, and knew that it was doomed under Section 2(a). This view was not one I came to in spite of my blog writing about disparaging marks but **because** of what I had observed in the process of researching and writing them, as well as considering cases that had come my way from prospective clients related to the issue. I saw how the PTO was treating “disparaging” marks and it was clear to me that there was inconsistency and what could only be described as an essentially “politically correct” agenda, permitting “reappropriation” for some groups and not for others.

Indeed, I had written a blog post called “Jiggering it out at the PTO,” which focused on the PTO’s rejection of an application by *Heeb* magazine to register the mark HEEB on the grounds that it was disparaging to Jews, despite their “reappropriation” argument and despite the fact that the same applicant already had a live registration for other goods of the trademark... HEEB. (Found at <http://www.likelihoodofconfusion.com/jiggering-out-the-pto/>). It was clear to me, I wrote, that while once-disparaging terms for homosexual and other people could be reappropriated, this could never be the case for ethnic and racial slurs for the simple reason that the PTO was, quite understandably on a certain level, building a wall around the one trademark it absolutely, positively could never register:

In short, *bubbele*, the PTO — which has found a way to register numerous terms once considered derogatory when referring to those, fabulous or otherwise, who have adopted non-standard sexual practices — can’t open this Pandora’s box. The PTO acknowledges, implicitly, the objectively demonstrable fact that words that once shocked and offended are

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now ironic, defiant playthings of the hip, comfortably assimilated (in a multi-culti way) descendants of the former targets of some kinds of opprobrium. But the PTO ignores this fact when it comes to trademarks for kikes, *shvartsers* and the rest of us.

Get the point? “Hip.”

Well, it doesn’t ignore it, or the inconsistency involved, so much as hide behind a thick lens of pretended obtuseness, relying on “proof” of offensiveness such as outdated dictionaries and statements by such cultural barometers as the Anti-Defamation League.

No, it’s okay to “get it” when it comes to alternative-lifestyle terminology. But the PTO is, as we said, boxed in on the issue of racial slurs. For it is above all terrified of the prospect of what would happen politically if it issued a NIGGA or NIGGER trademark registration for anything, anyone, any time.

And if they can’t have theirs, the Jews can’t have ours, either. Sorry, my heeb.

And that, it seemed, was the way it was. For while later in my career I have had some good moments fighting off baseless trademark infringement claims based on what were essentially free speech claims clothed in trademark language—i.e., “no one could be confused by this”—in cases such as *Boarding Sch. Review, LLC v. Delta Career Educ. Corp.*, 108 U.S.P.Q.2d 1785 (S.D.N.Y. 2013) and *deVere Group GmbH v. Opinion Corp.*, 877 F. Supp. 2d 67 (E.D.N.Y. 2012)—I had given up I gave up trying to throw the First Amendment at the Lanham Act after my unpleasant experience in *Jews for Jesus v. Brodsky*, 993 F.Supp. 282 (D.N.J.), *aff’d*, 159 F.3d 1351 (3d Cir.1998).

In any event, if there was going to be a fight, it was way over the horizon. The lawyerly approach was to let this application die, and file a new one—with no Chinese imagery. “Slants” is a word, and it’s an English word. You’re a band, I told Simon Tam, and it’s your band’s name. Let’s just put in your application for a band called The Slants, use some generic specimens, and get you your registration. That I was willing to do pro bono.

Little did I know that the PTO would not let Simon Tam and the Slants abandon their previous application. And I was astonished when TTAB held, on appeal, that the PTO could determine “trademark use” based on the ethnic identity of the applicant himself and the members of those who use his trademark with him—because, after all, that’s who he really was, and the PTO knew what he really meant when he was applying the second time.

Little did I know, as events developed, that it would take a constitutional wooden stake through the heart of Section 2(a) to kill at least this part of it, right through that frosty morning

I was astonished when TTAB held, on appeal, that the PTO could determine “trademark use” based on the ethnic identity of the applicant himself and the members of those who use his trademark with him—because, after all, that’s who he really was, and the PTO knew what he really meant when he was applying the second time.

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in Washington when I almost overslept my appearance before the three-judge panel that sprung the constitutional issue on us, to my astonishment.

But now I am quite convinced that this way—the First Amendment based invalidation of the statute—is, indeed, the only way the thing could die, and that is has to die for just these reasons. The PTO could have easily given Simon Tam’s second application a fair shake, but doing so would have, after all, resulted in generation of fresh evidence that he was, in fact, using the mark, THE SLANTS, in exactly the same way as he had been using it at the time of the the first mark—in connection with an Asian-themed band. This is his message. The PTO was sloppy, and insensitively so, in using his ethnic identity, and that of his bandmates, as a shorthand for these facts.

And it is not quite right that the procedural errors and shortcuts we identified in the examination process were not acknowledged by the TTAB or the Federal Circuit which, in its en banc opinion, merely “reinstated” the finding of disparaging meaning based on these errors—which, ultimately, is getting at something of an empirically meaningful ... something ... about a mainly, but perhaps not entirely, obscure ethnic slur—even if the PTO had not come close to meeting its burden to prove it.

No small part of the constitutional problem with Section 2(a) is that it generates just so much procedural legerdemain. It should surprise no one whose experience in advocacy extends beyond hornbooks that the procedural course necessary to get the statute in the appellate sights has itself involved some judicial sleight of hand; the advocates, for our part—and by now it has become quite the team effort—have merely held on to this juridical toboggan, including as it has the unusual and most pleasant, for us anyway, experience of a *sua sponte* vacatur and remand, for dear life with each twist and turn.

And all this is why the Redskins should win in the Fourth Circuit, joining the Federal Circuit and acknowledging that Section 2(a) has provided thrills and spills enough. This is supposed to be trademark law. The courts should, and by the Constitution are bound to, uphold *In re Tam*, eliminate the “disparagement” bar and return the trademark experts of the Patent and Trademark Office to the task for which they are trained and at which they excel, examining trademarks, and relieving them from the hopeless effort of examining hearts.

Ron Coleman is a partner at Archer & Greiner PC and represented *The Slants* in this matter. This article is based in part on his [“Likelihood of Confusion”](#) blog post entitled “How about those Redskins”

The courts should, and by the Constitution are bound to, uphold *In re Tam*, eliminate the “disparagement” bar and return the trademark experts of the Patent and Trademark Office to the task for which they are trained and at which they excel, examining trademarks, and relieving them from the hopeless effort of examining hearts.

SDNY Dismisses Copyright Suit Against Playwright And Producers

Who's On First? Transformative Use, Naturally

In another strong fair use decision from within the Second Circuit, a New York federal district court dismissed a copyright suit against the author and producers of the Broadway play *Hand to God* for copying a short excerpt of the famous Abbott & Costello comedy skit "Who's on First?" [*TCA Television Corp., et al. v. McCollum, et al.*](#), No. 15-4325 (S.D.N.Y. Dec. 17, 2015) (Daniels, J.). The court concluded the use was transformative and therefore fair as a matter of law.

Background

"Who's on First?" was created in 1938 as a three minute radio comedy skit and expanded in subsequent movies to as much as nine minutes. *Hand to God* is a dark comedy first performed off-Broadway in 2011. The main character is a Christian teenager in the Bible Belt who becomes possessed by a demonic sock puppet. The play uses 67 seconds from "Who's on First?" in dialogue between the teen and his sock puppet.



The play, *Hand to God*, uses 67 seconds from Abbott & Costello's "Who's on First?" in dialogue between a teen and his sock puppet.

Motion to Dismiss

Defendants disputed plaintiffs' claim of ownership, but the court found that plaintiffs pled sufficient facts to establish their rights in "Who's On First?" at least to survive a motion to dismiss. However, on the merits of the infringement claim plaintiffs failed to reach first base.

Under the fair use factors, the nature of the copyrighted work and the amount used favored plaintiffs. But the use of the copied dialogue was not likely to harm the market for "Who's on First?" Most importantly the purpose and character of the use favored defendants as it was clearly transformative. Defendants use did not need to comment on the original. Instead, in the context of the play the copied dialogue had a new meaning or message – "among other things, a darkly comedic critique of the social norms governing a small town in the Bible Belt. Thus, Defendants' use of part of the Routine is not an attempt to usurp plaintiff's material in order to "avoid the drudgery in working up something fresh."

Plaintiffs were represented by Davis & Gilbert in New York and Leopold Petrich & Smith in Los Angeles. Defendants were represented by Mark Lawless, New York.

2d Cir. Affirms Dismissal of Libel Claims Against Conde Nast and Other Publishers

Public-Figure Defamation Plaintiffs Must “Plausibly” Allege Actual Malice

By Max Mishkin

The U.S. Court of Appeals for the Second Circuit recently affirmed the dismissal of libel claims against Condé Nast and its investigative journalist David Grann arising from an in-depth feature in *The New Yorker* about controversial art authenticator Peter Paul Biro, as well as claims against other media entities that commented about that story. [*Biro v. Condé Nast*](#), No. 14-3815-CV, 2015 WL 8103736 (2d Cir. Dec. 8, 2015).

The ruling is notable for its clear holding that a public figure defamation plaintiff in federal court must plead facts sufficient to allege a plausible theory of actual malice. In a separate summary order, the court also affirmed that Biro’s efforts to seek fame qualified him as a limited purpose public figure and upheld the dismissal of related claims against Global Fine Art Registry LLC and Theresa Franks.

The Article

The principal article at issue, “The Mark of a Masterpiece: The man who keeps finding famous fingerprints on uncelebrated works of art,” ran in the July 12, 2010 issue of *The New Yorker* magazine. The piece explores the high-stakes and sometimes mysterious practice of art authentication, with a focus on Biro – the self-described “leading authority” on “the use of fingerprint technology” to determine the provenance of artworks. The article discusses the techniques that Biro employed, the reputation he developed in a field dominated by traditional art “connoisseurs,” and the allegations of professional misconduct raised against him by former customers. The article specifically

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The principal article at ran in the July 12, 2010 issue of The New Yorker magazine. Click to read.

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details how the fingerprint-based “authentications” by Biro of two paintings – one purportedly the work of Jackson Pollock, the other of Leonardo da Vinci – have come under scrutiny.

The Lawsuit in District Court

In June 2011, Biro filed suit in the U.S. District Court for the Southern District of New York against Grann and Condé Nast, publisher of *The New Yorker*, claiming that more than two dozen passages in the article were false and defamatory. Subsequent versions of the complaint added claims against others who had circulated or commented on the article, including Yale University Press, Louise Blouin Media Inc., Paddy Johnson, Global Fine Art Registry LLC, and Theresa Franks (which the court dubbed the “republiishers”).

On August 9, 2012, Judge J. Paul Oetken dismissed Biro’s claims as to all but four statements in the article. *Biro v. Condé Nast*, 883 F. Supp. 2d 441 (S.D.N.Y. 2012). Judge Oetken found that the vast majority of the challenged statements were either true, non-actionable opinion, not capable of the defamatory meaning alleged by Biro, or privileged reports of public records. Biro’s allegations concerning the “overall impact” of the article were dismissed as well.

Following the partial dismissal order, various republisher defendants filed their own motions to dismiss, which asserted that Biro was a public figure and had failed plausibly to allege actual malice. Grann and Condé Nast then joined those motions and separately moved for an order declaring Biro to be a public figure and for judgment on the pleadings dismissing the remaining four claims for failure to plead facts plausibly demonstrating the existence of constitutional malice.

The ruling is notable for its clear holding that a public figure defamation plaintiff in federal court must plead facts sufficient to allege a plausible theory of actual malice.

On August 1, 2013, Judge Oetken found in favor of the defendants on both of these points. The court first determined that Biro was a limited-purpose public figure under the four-part test articulated in *Lerman v. Flynt Distributing Co.*, 745 F.2d 123 (2d Cir. 1984). As a result, Biro was required to plead – and, ultimately, prove – that defendants published the article with actual malice. The court then determined that Biro failed to state facts plausibly alleging actual malice, falling short of the standards set out by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007). Judge Oetken dismissed Biro’s claims against Condé Nast, Grann, and all of the republisher defendants. [For a more thorough account of the district court’s decisions, please see “Defamation Claims Brought by Canadian Art Expert Dismissed,” by Julia C. Atcherley in the August 2013 MediaLawLetter.]

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The Second Circuit Appeal

Biro appealed the August 2013 order to the Second Circuit. The centerpiece of his argument was that the district court erred in applying *Iqbal/Twombly* pleading standards to his allegations of actual malice. Biro pointed to Rule 9(b), which states that “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” Biro further asserted that by not allowing him to take discovery on the issue of actual malice, the district court made his pleading burden “impossible to meet” and thus “the courthouse door is automatically closed.” Biro also challenged the district court’s finding that he was a limited-purpose public figure.

The Second Circuit squarely rejected these arguments, holding that “malice must be alleged plausibly in accordance with Rule 8.” Slip Op. 9. In so doing, the Second Circuit joined the First, Fourth, and Seventh Circuits in finding that the *Iqbal/Twombly* pleading standard applies to an allegation of actual malice in a public figure libel case. *See Schatz v. Republican State Leadership Comm.*, 669 F.3d 50 (1st Cir. 2012), *Mayfield v. NASCAR*, 674 F.3d 369 (4th Cir. 2012), and *Pippen v. NBCUniversal Media*, 734 F.3d 610 (7th Cir. 2013). As explained by Judge Raymond J. Lohier, Jr., “whether actual malice can plausibly be inferred will depend on the facts and circumstances of each case,” but the pleading standard remains the same: “a public-figure plaintiff must plead plausible grounds to infer actual malice by alleging enough facts to raise a reasonable expectation that discovery will reveal evidence of actual malice.” *Id.* at 11, 13.

Addressing Biro’s concerns that such a holding would impose an unreasonably heavy burden on public figure plaintiffs, the court observed that requiring actual malice to be plausibly alleged “has not doomed defamation cases against public figures.” *Id.* at 12. It noted that “district courts in and out of our Circuit have inferred actual malice at the pleading stage from allegations that referred to the nature and circumstances of the alleged defamation or previous dealings with the defendant.” *Id.*

Turning to the pleadings in this case, the court agreed that Biro failed to plausibly allege actual malice on the part of any defendant. The court found the allegations against the *New Yorker* defendants insufficient because none of the four passages still at issue relied entirely on “information from unverified and anonymous sources,” Biro pled no facts “that would have prompted [defendants] to question the reliability of any of the named or unnamed sources” at the time of publication, and “Grann’s decision to focus on Biro’s controversial authentications, while ignoring both his other authentications and his satisfied clients, does not plausibly

In the separate summary order, the panel held that Biro was properly found to be a limited-purpose public figure, as he “invited public scrutiny of his forensic methods to authenticate art.”

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suggest that Grann entertained serious doubts as to the truth of his publication.” *Id.* at 12-13 (internal quotation marks omitted).

The panel then noted that “nearly all of Biro’s allegations against the republisher defendants ... Louise Blouin Media Inc., Paddy Johnson, and Yale University Press are conclusory” – and that “the remaining nonconclusory allegations against these defendants are inadequate to state a plausible claim for relief.” *Id.* at 13. As such, it affirmed the dismissal of these claims as well.

In the separate summary order, the panel held that Biro was properly found to be a limited-purpose public figure, as he “invited public scrutiny of his forensic methods to authenticate art,” particularly in “agreeing to frequent interviews” about those methods and “resorting to the press to defend his positions on various controversies relating to his work.” [*Biro v. Condé Nast*](#), No. 14-3815-CV, 2015 WL 8202599, at *1 (2d Cir. Dec. 8, 2015). The summary order affirmed dismissal for Franks on jurisdictional grounds and of Global Fine Art Registry on fault pleading grounds.

As of this writing, Biro has not moved for rehearing by the panel, sought en banc review, or filed a petition for writ of certiorari to the U.S. Supreme Court.

Condé Nast, a division of Advance Magazine Publishing, Inc., and David Grann were represented by David A. Schulz and Chad R. Bowman of Levine Sullivan Koch & Schulz, LLP, and Richard A. Bernstein of Sabin Bermant & Gould LLP, together with the General Counsel for the New Yorker magazine, Fabio Bertoni. Yale University Press was represented by Floyd Abrams and Brian T. Markley of Cahill Gordon & Reindel LLP. Louise Blouin Media Inc. was represented by Diane Boenig Cavanaugh and Desmond C.B. Lyons of Lyons McGovern, LLP. Global Fine Art Registry LLC and Theresa Franks were represented by Anthony N. Gaeta and William A. Friedman of Levine DeSantis, LLC. Paddy Johnson was represented by Darren W. Johnson, Lynn B. Bayard, and Danielle B. Polebaum of Paul, Weiss, Rifkind, Wharton & Garrison LLP. The plaintiff, Peter Paul Biro, was represented by Richard A. Altman.

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Court Affirms Dismissal of Defamation Lawsuits by Founder of BOSTON

“More Than A Feeling,” the Articles Regarding Suicide Were Protected Opinion

By Joseph D. Lipchitz

The Massachusetts Supreme Judicial Court recently affirmed the dismissal of two defamation lawsuits brought by Tom Scholz, the co-founder of the 1970's rock band “BOSTON,” arising from reporting on the suicide of the band's lead singer, Brad Delp. [*Scholz v. Delp, et al.*](#) 473 Mass. 242 (2015). Scholz had separately sued Micki Delp, the former wife and mother of Brad Delp's children, and then the Boston Herald as well as two of its longtime columnists, asserting they had impliedly “blamed” him for the suicide of Brad Delp.

The lower court dismissed Scholz' claims on summary judgment. On November 25, 2015, the Supreme Judicial Court affirmed those dismissals and held that the articles and statements at issue were protected opinion under the First Amendment. The Court also affirmed the entry of over \$132,000 in costs assessed by the lower court against Scholz.

Background

On March 9, 2007, Brad Delp, the original lead singer of the band BOSTON, committed suicide in his New Hampshire home. He left several suicide notes, including one to Micki Delp, one to his children, one to his fiancée, and one for the public. On March 15, 2007, the

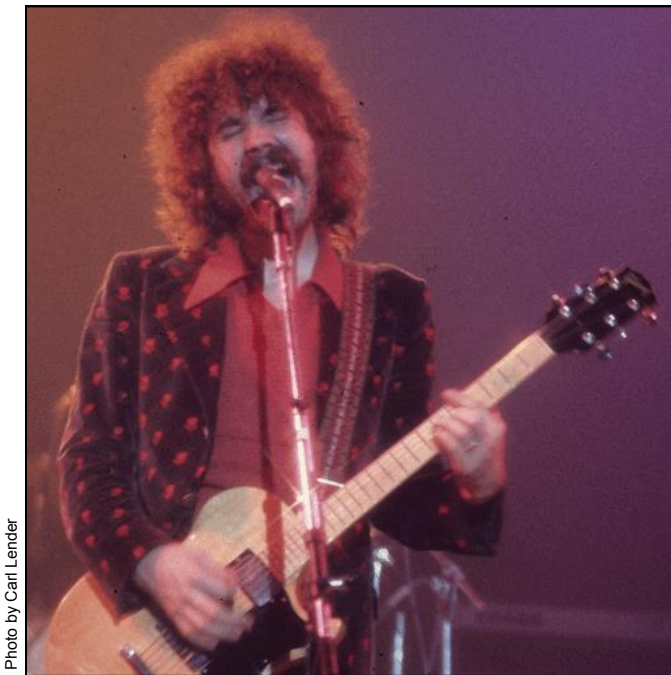


Photo by Carl Lender

Brad Delp, original lead singer of BOSTON

Herald published an article concerning Brad's suicide, which appeared in the newspaper's entertainment news column, the “Inside Track.” The article, based on information from individuals close to Brad and to his friends, reflected the views of those close to Brad who felt that his suicide may have been the result of Brad being caught in the middle of the bitter relationship between Scholz, whom Brad continued to work for, and the other former original members of the band, who were not only Brad's close friends but who had a fierce falling out with Scholz. The article also reported that the situation was complicated because Barry

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Goudreau, the original guitarist, was Brad's brother-in-law because his wife was Micki Delp's sister.

Later that day, Micki Delp agreed to be interviewed by the Herald's Inside Track columnist, Gayle Fee. In that interview, she expressed the view that Brad had severe stage anxiety and was losing his ability to hit the high notes of the classic Boston songs, and was in despair because his longtime friend and back-up singer, Fran Cosmo, had been disinvited from an upcoming summer tour. Following the interview, Fee sent an email to Scholz' publicist, recording that Micki told her, "Brad was in despair because Cosmo was disinvited from the summer tour," and asking for comment. Scholz responded by stating that the decision to fire Cosmo was a "group decision." On March 16, 2007, the Herald published another article, this one reporting on Micki's views on her former husband's suicide. The article provided Micki's verbatim quotations to the newspaper, which she later confirmed that she made to the Herald and that the Herald had accurately quoted her.

Thereafter, Scholz separately sued Micki Delp and then the Herald, asserting that they had impliedly "blamed" him for Brad's suicide. The two cases were consolidated and the trial court granted separate motions for summary judgment for each of the defendants. One judge ruled that Micki Delp's statements that were quoted verbatim in the March 16th article were not "of and concerning" Scholz and did not defame him. Another judge ruled that the Herald articles were non-actionable opinions concerning matters that could not be objectively verified as fact.

The Supreme Judicial Court held that "statements even arguably attributing responsibility for Brad's suicide to Scholz were statements of opinion and not verifiable fact."

The Supreme Judicial Court's Decision

On November 25, 2015, the Supreme Judicial Court issued its 23-page decision affirming summary judgment for both the Herald and Micki Delp. The Court's decision focused exclusively on whether the articles and statements were non-actionable opinions or conveyed verifiable assertions of fact. The Court began with the observation that:

[O]rdinarily, ascertaining the reason or reasons a person has committed suicide would require speculation; although a view might be expressed as to the cause, rarely will it be the case that even those who were close to the individual will know what he or she was thinking and feeling when the final decision was made.

The Court went on to recognize that "anyone is entitled to speculate on a person's motives from the known facts of his behavior."

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In holding that the statements at issue “could not have been understood by a reasonable reader to have been anything but opinions regarding the reason Brad committed suicide,” the Court also focused on the context and circumstance surrounding the articles. First, the Court observed that articles used cautionary terms such as “may have” and “reportedly” to convey to the reader that the authors were engaging in speculation.

Second, the articles dealt with a subject matter that was inherently unverifiable – the reason why a deceased individual may have been driven to commit suicide.

Third, the articles appeared in the Herald’s “Inside Track,” which is an entertainment column about celebrities. The Court noted that “while not in the op-ed pages of the newspaper, the articles were replete with rhetorical flair,” further establishing that the articles were protectable opinion.

The Court also rejected Scholz’ argument that the articles implied the existence of undisclosed defamatory facts. In so doing, it held that “the logical nexus between the facts and the opinion was sufficiently apparent to render unreasonable any inference that the derogatory opinion must have been based on individual facts.” The Court also concluded for the same reasons that the Herald articles were non-actionable, Micki’s statements, as contained in the March 16th article, were likewise non-actionable.

The Court Affirms \$132,000 Award of Costs Against Scholz

Scholz’ lawsuit against the Herald was the latest lawsuit in a long line of lawsuits brought by Scholz against former band members, record companies, accountants and managers. *Rolling Stone* magazine to publicly refer to had publicly described Scholz as a “litigation machine,” “with his lawsuits threatening to outnumber his album releases.”

After entering summary judgment, the trial court awarded the Boston Herald \$132,163.89 in court costs, and, in so doing, took note of Scholz’ litigiousness and its impact on “the free expression of thoughts and opinions.” Specifically, the trial court noted that the “threat of expensive litigation could put litigious persons of public interest beyond media commentators because of the feared expense. This court favors allowing costs in this case in order that the expenses that occurred here not ‘induce an unnecessary and undesirable self-censorship.’”

In affirming the lower court’s award of costs, the Supreme Judicial Court noted that the “judge’s decision on the motion for costs reflects careful evaluation.” The Court’s affirming this significant award of costs in a defamation case brought by a public figure highlights the seriousness in which courts view the impact of expensive libel lawsuits on First Amendment

In awarding costs, the trial court noted that the “threat of expensive litigation could put litigious persons of public interest beyond media commentators because of the feared expense.”

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rights. It is also a good reminder for defense counsel to closely track reimbursable costs so that they can be sought at the end of a case.

Jeffrey S. Robbins and Joseph D. Lipchitz of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. in Boston, Massachusetts represented the Boston Herald, Inc., Gayle Fee and Laura Raposa. Kathy Weinman of Collora, LLP in Boston represented Micki Delp in the appeal before the Supreme Judicial Court. Plaintiff was represented by Nicholas Carter of Todd & Weld in Boston, Massachusetts.

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Seventh Circuit Vacates Post-Trial Defamation Injunction as Too Broad

Judge Posner Sympathetic to Permanent Injunctions Against Judgment-Proof Defendants

In a non-media defamation case involving a bitter dispute over the control of a religious order, a Seventh Circuit panel held that a permanent injunction violated the First Amendment by prohibiting the defendants from making a wide variety of statements. [*McCarthy v. Fuller*](#), Nos. 14-3308, 15-1839 (7th Cir. Dec. 18, 2015) (Posner, Williams, Sykes, JJ.). But the judges split over whether post-trial injunctions in defamation cases are ever appropriate. Judge Posner expressed sympathy for permanent injunctions against judgment-proof plaintiffs if narrowly drawn. Judge Sykes disagreed, writing that this approach “wrongly implies that a core liberty secured by the First Amendment—the right to be free from prior restraints on speech—does not protect people who lack the means to pay a judgment.”

Background

The plaintiffs sued defendants over multiple statements accusing them of theft, bribery and other misconduct. The case went to trial and ended with a jury verdict for plaintiffs. The jury instructions listed the alleged defamatory statements, but the jury was not asked to decide whether each of the statements was defamatory. Instead they reached a general verdict that defendants defamed plaintiffs. On post trial motion, the court permanently enjoined defendants from publishing the statements listed in the jury instructions “as well as any similar statements that contain the same sorts of allegations or inferences, in any manner or forum.”

“The injunction in this case had the potential to harm nonparties to the litigation because enjoining speech harms listeners as well as speakers.”

Seventh Circuit Analysis

All of the judges on the panel agreed the permanent injunction was too broad because the jury made no specific findings about each of the alleged defamatory statements. The trial court judge therefore had “no basis in the jury’s verdict for issuing an injunction that tracked the instruction. Nor had he, without making his own factual determinations, authority to enjoin defamatory statements that the jury had not been asked to consider in deciding on its verdict.”

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Judge Posner noted that vague terms in the injunction such as “similar” and “same sorts” provided no guidance as to what was covered. Moreover, the injunction ordered one defendant to take down his website, with no findings whether everything published on the website defamed plaintiffs.

Procedurally the defendants failed to timely object to the request for a permanent injunction and their objections on appeal could have been considered untimely. But Posner noted that “the injunction in this case had the potential to harm nonparties to the litigation because enjoining speech harms listeners as well as speakers.”

Judge Posner, however, appeared sympathetic to the issuance of permanent injunctions against judgment-proof defendants. Without such a remedy “an impecunious defamer [is] undeterrable.” He acknowledged that the constitutionality of such injunctions has not been decided by the Supreme Court and there was no need to do so in this case. He added: “An injunction against defamatory statements, if permissible at all, must not through careless drafting forbid statements not yet determined to be defamatory, for by doing so it could restrict lawful expression.”

The majority ordered the case remanded to allow the trial court judge to consider whether to issue an injunction under this standard.

Concurrence

In a lengthy concurrence, Judge Sykes agreed that the injunction was too broad. But he faulted the majority for giving the trial court an opportunity to narrow it. His concurrence provides a thorough summary of recent case law on the constitutionality of post-trial defamation injunctions. He disagreed with the results in several recent state court cases upholding the constitutionality of injunctions barring defendants from repeating specific statements found to be false and defamatory. “A permanent injunction as a remedy for defamation does not account for constantly changing contextual factors that affect whether the speech is punishable or protected. If factual circumstances change in a way that affects the defamation calculus, the person enjoined must risk contempt or seek the court’s permission to speak. As the Court said emphatically in *Near*, “this is the essence of censorship.”

Michael A. Swift, Maginot, Moore & Beck LLP, Indianapolis, represented plaintiffs.
Marilyn A. Cramer, Cramer Law Group, represented defendants.

From the Next Gen Committee:

The Frailty of New York CPLR § 301

Personal Jurisdiction over Defendants in New York

By Matthew L. Schafer

We know that personal jurisdiction over nonresident defendants is a bit of a strange bird in New York—one that can present problems for plaintiffs who prefer to sue for defamation in New York. Most notably, the State’s long-arm statute, [CPLR § 302](#), contains some exemptions for defamation claims, forcing plaintiffs to look elsewhere for a jurisdictional hook. Recent developments, however, have drawn into doubt one such alternative.

Historically, defamation plaintiffs could turn to the general jurisdiction statute, [CPLR § 301](#). *See, e.g., Realuyo v. Abrille*, 93 F. App’x 297, 298 (2d Cir. 2004) (defamation plaintiff arguing for jurisdiction over nonresident under CPLR § 301). It codified Judge Cardozo’s common law view: The out-of-state defendant must be “doing business” in New York, “not occasionally or casually, but with a fair measure of permanence and continuity.” *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267 (1917). Unlike CPLR § 302, this formulation of course contained no exemptions for defamation actions and allowed for general jurisdiction even over nonresidents defendants.

The doctrine slowly evolved over the next century, but it recently underwent a radical shift. In 2014, in *Daimler AG v. Bauman*, the Supreme Court clarified the outer boundaries of general jurisdiction, noting that a corporation was subject to jurisdiction only in those states where it was “at home”: “With respect to a corporation, the place of incorporation and principal place of business are ‘paradig[m] ... bases for general jurisdiction.’” 134 S.Ct. 746, 760 (2014).

This narrow view ran headlong into Judge Cardozo’s “doing business” formulation. As the Second Circuit pointed out a few months after *Daimler AG*, “Not every company that regularly ‘does business’ in New York is ‘at home’ there.” *Sonera Holding B.V. Cukurova Holding A.S.*, 750 F.3d 221, 224 n.2 (2d Cir. 2014). This left the court to nudge: “*Daimler*’s gloss on due process may lead New York courts to revisit Judge Cardozo’s well-known and oft-repeated jurisdictional incantation.”

And they did, mostly. The First Department silently incorporated the *Daimler AG* definition into CPLR § 301 without repeating Judge Cardozo’s incantation. *See, e.g., D & R Glob. Selections, S.L. v. Pineiro*, 128 A.D.3d 486, 487 (1st Dep’t 2015). And one supreme court, finally eulogized this August, “In *Daimler*, the Supreme Court brought an end to ‘doing business’ jurisdiction, holding that a corporation must be ‘at home’ in a state in order to assert

Doing business jurisdiction may not yet be out of business, but its age is showing.

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general jurisdiction over it.” *Norex Petroleum Ltd. v. Blavatnik*, 48 Misc. 3d 1226(A) (Sup. Ct. N.Y. Cnty. 2015).

Yet some are not so sure, choosing instead to stick to the incantation and protesting that even under *Daimler AG* it may be possible for New York courts to exert general jurisdiction over nonresidents in some limited circumstances. *Transasia Commodities Ltd. v. Newlead JMEG, LLC*, 45 Misc. 3d 1217(A) (Sup. Ct. N.Y. Cnty. 2014).

Doing business jurisdiction may not yet be out of business, but its age is showing. Certainly, the arc of the lower courts’ recent opinions show just how frail CPLR § 301 became after *Daimler AG*. And in light of New York’s protections for nonresident defamation defendants elsewhere in the CPLR, *see, e.g., SPCA v Am. Working Collie Ass’n*, 18 N.Y.3d 400, 405 (2012), those instances where jurisdiction can be asserted over these kinds of defendants continue to narrow.

Matthew L. Schafer is an associate with Levine Sullivan Koch & Schulz in Washington, D.C.



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FAA Treats “Commercial” Newsgatherers and Citizen Journalists Differently

By Justin S. Wales and Jorge A. Pérez Santiago

More than 1 million small, unmanned aerial vehicles (UAVs) (also known as “Unmanned Aircraft Systems (UAS) or “drones”) have been sold during the 2015 holiday season. Most of these commercially available UAVs weigh less than seven pounds and have built-in cameras that allow their operators to take high-definition aerial photographs and videos. The most popular models sell for less than \$1,000, and starter UAVs can be purchased for just a few hundred dollars. Given the growing popularity of UAVs, the Federal Aviation Administration (FAA) has adopted or proposed regulations that ensure the safety of U.S. airspace.

Unfortunately, in doing so, the agency has crafted a regulatory scheme that distinguishes between commercial and non-commercial UAV operators in a way that may run afoul of the U.S. Constitution and chill newsgathering activities.

The impact of UAVs can be seen across multiple industries, including the domestic real estate, energy, and insurance markets. However, the anticipated ubiquity of UAVs may have the greatest consequence on the gathering and dissemination of news by both traditional media organizations and unaffiliated citizen journalists. In much the

same way that advances in mobile technology have decreased the cost of newsgathering by arming every citizen and reporter with a pocket camera, and social media platforms and inexpensive webhosting have provided a venue for anyone to publish newsworthy content, UAVs further democratize newsgathering by providing a low-cost and more versatile alternative to the traditional piloted news helicopter.

The FAA’s initial attempts to regulate UAVs and integrate small aerial vehicles into the national airspace have led the agency to adopt a hardline and perhaps untenable distinction between UAVs operated for a “hobby or recreational use” and those flown for a “commercial” purpose. Under the agency’s rules, non-commercial UAV operations are unregulated, while all UAV uses that benefit, in any form, a business, no matter how remotely, are deemed commercial and subject to FAA regulations. The distinction is a consequence of the Federal



The anticipated ubiquity of UAVs may have the greatest consequence on the gathering and dissemination of news by both traditional media organizations and unaffiliated citizen journalists.

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Aviation Administration Modernization and Reform Act of 2012 (“the Act”), which the U.S. Congress enacted to require the FAA to implement regulations regarding commercial drone use. However, the Act expressly prevents the agency from promulgating any rule or regulation regarding “model aircrafts,” defined as any aircraft under 55 pounds flown for hobby or recreational purposes. PUB. L. NO. 112-95, §§ 333, 336 (Feb. 14, 2012).

The Act requires “commercial” UAV operators to apply for an exemption under Section 333 of the Act and to demonstrate to the Secretary of Transportation that they can operate their UAVs “safely in the national airspace system.” Commercial operators that receive a Section 333 exemption are then required to follow strict operating and registration requirements, which include obtaining an airworthiness certification or certificate of authorization, before piloting their vehicle. In March 2015, the FAA announced it would grant “blanket” authorization to Section 333 exemption holders that would allow commercial UAV operations below 200 feet, subject to operational restrictions such as daytime only flights and visual line of sight requirements. As a practical matter, however, these regulations, and the continued need to seek a Section 333 exemption prevents “commercial” newsgatherers from using UAVs to gather newsworthy information. (See <https://www.faa.gov/news/updates/?newsId=82245>)

Despite a concerted effort by media organizations, the FAA has refused to recognize a “newsgathering” exception to its regulations or to consider newsgathering by freelance reporters or media entities as anything other than “commercial.” As a result, the FAA has crafted a system whereby UAV newsgathering by a freelance reporter or photojournalist, or on behalf of a media organization, is subject to strict regulations while the exact same act remains unregulated when committed with a “non-commercial” intention. For example, suppose two drone operators happen on a fire in a wooded area after nightfall. Neither has previously applied for or received a Section 333 exemption. The first operator flies his drone over the fire for the intended purpose of taking an aerial photo of the scene to send to his local newspaper either because he is employed by the paper or a freelance photojournalist. The second operator, standing feet away and operating the same type of aerial vehicle, flies her drone over the fire simply to take a picture of the scene for her own personal collection, but upon seeing the photo decides to sell it to her local newspaper.

Under FAA regulations, the first operator has violated the law because he failed to apply for and obtain a Section 333 exemption prior to flight. He is subject to a significant fine. Even had

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he obtained an exemption, he would still be in violation of FAA regulations because he operated his UAV at night with a “commercial” intent. The second operator, on the other hand, has violated no FAA regulation.

From a Constitutional perspective, the FAA’s regulations and their differential treatment of commercial and non-commercial speech are concerning for at least two fundamental reasons. First, because the act of gathering news, by whatever instrumentality, is at least partially protected by the First Amendment, *see Branzburg v. Hayes*, 92 S. Ct. 2646 (1972), and the mere fact that a newsgatherer or distributor charges for content does not turn the act of gathering or distributing news into a commercial act, *see New York Times v. Sullivan*, 84 S. Ct. 710 (1964), the FAA’s attempt to regulate UAV activity, specifically as applied to newsgathering, likely implicates the First Amendment rights of both traditional media and unaffiliated citizen journalists to gather information.

A second issue arises due to the U.S. Supreme Court’s decisions striking down regulations that treat disseminated commercial speech differently from distributed non-commercial expression when the form of expression produces identical harms. *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1994). For example, do recreational “model aircrafts” produce a lesser threat to the security of our national airspace than commercially used UAVs? Assuming newsgathering on behalf of a corporation or for a fee were constitutionally distinguishable from what the FAA recognizes as recreational information gathering, which is questionable, recent Supreme Court decisions, including *Sorrell v. IMS Health*, 131 S. Ct. 2653 (2011), which struck regulations that treat commercial speakers differently from non-commercial speakers, suggest that the distinction the agency draws may no longer be constitutionally defensible. Under *dicta* by some of the Justices in *Discovery Network*, a more constitutionally defensible (although not necessarily preferable) regulation may be to enact a total ban on drones instead of trying to distinguish between commercially and non-commercially used UAVs where, as here, commercially used UAVs do not produce different or more significant harms than those used for non-commercial reasons.

The FAA’s regulation and its commercial and non-commercial distinction is also vague in that it fails to give any practical guidance to the droves of people that take videos or photographs with UAVs and publish them to their personal blogs or YouTube accounts, which are, to some degree, supported by ad revenue. In a memorandum entitled “*Media Use of UAS*,” the FAA punted such questions concerning the rights of individuals to use model aircrafts to gather news, stating only that the agency’s operative concern was the operator’s “true intentions in conducting the operation” and that it “would have to consider each case on its own merit.” The ambiguous nature of the FAA’s standard may have the effect of chilling

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individual newsgatherers from gathering or self-publishing their content for fear of being investigated and fined by the Agency.

In February 2015, the FAA published a Notice of Proposed Rulemaking which, if enacted, would permit “non-hobby or non-recreational” operators of small unmanned aircrafts weighing less than 55 pounds to operate UAVs without obtaining a Section 333 exemption or other requirements such as an airworthiness certification or certificate of authorization, as required under current law. 14 C.F.R. 21, 43, 45, et al. (Feb. 23, 2015). While in many ways the proposed rule streamlines the registration process for commercial UAV operators, it once again fails to provide a “newsgathering” exception and subjects non-hobby or non-recreational newsgatherers to strict operational guidelines that prohibit them from, among other things, operating their aircraft outside of their visual line of sight, operating their aircraft above the head of any persons not directly involved in the operation; and operating their aircraft after sundown.

The proposed regulation also requires non-hobby and non-recreational UAV operators to pass a battery of tests, including an aeronautical knowledge test at an FAA-approved knowledge testing center and recurrent aeronautical knowledge test every 24 months, and to register with the Transportation Security Administration and obtain an unmanned aircraft operator certificate with a small UAS rating. The FAA estimates the registration costs associated with lawfully operating a drone for non-hobby and non-recreational purposes under its proposed rule at \$6,803.10, an amount that will likely preclude freelance citizen journalists from participating in “commercial” newsgathering activities.

The proposed regulation retains the Act’s commercial/non-commercial distinction and continues to treat identical behavior differently based solely on the actor’s identity and intent. It provides no added clarity as to the classification of citizen journalists such as those described above, and requires those wishing to engage in an act of freelance reporting to bear a high and, in many instances, preclusive upfront cost or risk a large fine.

Following publication of its proposed rule, the FAA entered into a public comment period during which it received nearly 4,500 comments, including calls to relax its regulations on newsgathering activities and to eliminate or revise its prohibitions on nighttime UAV operations and piloting vehicles outside the operator’s visual line of sight. The FAA also announced that it has partnered with various industry groups and businesses, including CNN, to

The current and proposed regulations employ an illogical and potentially unconstitutional distinction between commercial and non-commercial acts that does not effectively make our skies safer and threatens to chill newsgathering activities and expressive rights.

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prepare to draft a final rule to explore how UAVs might be safely used for newsgathering in populated areas. A final rule is not expected before late 2016.

In December 2015, the FAA enacted an interim final rule regarding the registration and marking requirements for small unmanned aircrafts, which differ depending on the drone's use. (See Registration and Marking Requirements for Small Unmanned Aircrafts, *available at* http://www.faa.gov/news/updates/media/20151213_IFR.pdf.) The interim final rule provides an alternative process that drone owners may use to comply with the statutory requirements for aircraft operations under 49 U.S.C. § 44102, which requires aircrafts to be registered prior to operation. All drones weighing between 0.55 and 55 pounds must register. See 14 C.F.R. § 48.15. As a practical matter, this forces all operators of unmanned aerial vehicles outside of the "spy" class of UAVs, to register with the FAA.

The interim rule regulates both commercially used and non-commercially used UAVs, purportedly under the FAA's authority to promulgate regulations and rules to promote safe flight of civil aircraft in air commerce. The rule has been criticized by UAV hobbyist groups and will likely face a challenge, since it is unclear whether the interim rule conflicts with the 2012 FAA Modernization and Reform Act's express prohibition on the promulgation of rules related to non-commercial model aircrafts. Further, despite applying broadly to both commercial and non-commercial UAVs, the interim rule once again distinguishes between those individuals and corporations intending to use the drones for commercial purposes, subjecting commercial use operators to a registration fee per UAV, while allowing recreational users to pay a flat fee for their entire fleet. See 14 C.F.R. § 48.30.

The FAA is charged with ensuring our national airspace remains safe, and it is evident from the sudden increase in the number of UAVs sold over the last few years and the sales projections of UAVs over the next several, that hordes of unmanned vehicles pose an actual danger to air travel, necessitating reasonable regulations. Due to the FAA's inability to practically regulate UAVs used non-commercially, the current and proposed regulations employ an illogical and potentially unconstitutional distinction between commercial and non-commercial acts that does not effectively make our skies safer and threatens to chill newsgathering activities and expressive rights.

Justin S. Wales and Jorge A. Pérez Santiago are attorneys in the Miami office of the law firm of Carlton Fields Jorden Burt.

Court Holds Threats Against Credit Card Companies Violated First Amendment

By Lisa B. Zycherman

In a victory for the First Amendment and internet speech, the U.S. Court of Appeals for the Seventh Circuit held that Cook County, Illinois's sheriff violated the First Amendment rights of classified-ads website Backpage.com by pressuring credit card companies to stop processing ad sales on the site. [*Backpage.com v. Dart*](#). The court of appeals rejected Sheriff Thomas Dart's contention that he was merely exercising his First Amendment right to express personal distaste for Backpage.com. Instead, the court of appeals held that Dart's actions amounted to an unconstitutional prior restraint under *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), and it directed the district court to preliminarily enjoin Dart's actions..

Backpage.com sued the sheriff's office in July after Dart send a letter to Visa and MasterCard urging them to "cease and desist from allowing your credit cards to be used to place ads on websites like Backpage.com." The sheriff's letter alleged that the site "promote[s] prostitution and facilitate[s] online sex trafficking." Dart's staff engaged in aggressive follow-up, urging the card companies to take action in time for a press conference the sheriff's office scheduled. Within two days of the demand letter, Visa and MasterCard announced they would no longer process transactions for Backpage.com customers. Dart's office crowed about their decision in a press release captioned, "Sheriff Dart's Demand to Defund Sex Trafficking Compels Visa and MasterCard to Sever Ties With Backpage.com."

Backpage.com accused Dart of censoring its legal conduct and sought a temporary restraining order and preliminary injunction to stop the sheriff from going after other payment processors and to force Dart to rescind his letters to Visa and MasterCard. After granting Backpage.com's request for TRO, the district court denied Backpage's preliminary injunction motion, finding that while Dart's letter could be interpreted as a threat, there was not enough evidence that the reason Visa and MasterCard pulled the plug on Backpage.com was for fear of reprisal from the sheriff's office.

Backpage.com sought and obtained expedited review of the preliminary injunction denial before the Seventh Circuit, and was joined by an amici brief from the Center for Democracy & Technology, Electronic Frontier Foundation and Association of Alternative Newsmedia, as well as an amici brief by the Cato Institute, Reason Foundation, and DKT Liberty Project. At oral argument, the panel was sharply critical of the government's arguments. Judge Diana Sykes pointed out, for example, that both Visa and MasterCard terminated their relationship

Of great importance to all First Amendment advocates, the court's opinion addresses the issue of trying to put pressure on intermediaries to regulate speech that is disfavored by the government.

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with Backpage.com within 48 hours of receiving the letter from Dart. Judge Richard Posner was even more pointed in his questioning of Dart's counsel. "The tone of this is so unprofessional," Posner said in reference to the letter, adding that it was "ridiculous" to suggest that the credit card companies did not act on the letters because officials from the companies testified that they had not based their decisions on the sheriff's threat. "What do you expect them to say?" Posner asked. "Anybody who sees an official communication from a sheriff is going to see it as a threat."

Argument took place Friday morning, November 13, and on the following Monday the court granted the injunction, ordering Dart to stop taking any action – formally or informally – that seeks to persuade credit card companies not to do business with Backpage.com. The injunction further directed Dart to send a copy of the court's order to Visa, MasterCard, and any other recipients of his June letter. In a subsequent disclosure required by the court, Dart's office submitted a list of 413 recipients of the letter, including various personnel at the card companies, other government agencies, and members of the press.

Two weeks later, writing for a unanimous panel, *Backpage.com LLC v. Dart*, -- F.3d --, 2015 WL 7717221 (7th Cir. Nov. 30, 2015), Judge Posner delivered a lively opinion for the court. The court determined that Dart's "campaign" to "crush Backpage's adult section – crush Backpage, period, it seems – by demanding that firms such as Visa and MasterCard prohibit the use of their credit cards to purchase any ads on Backpage, since the ads might be for illegal sex-related products or services, such as prostitution" violated the First Amendment. Judge Posner wrote that "the sheriff decided to proceed against Backpage not by litigation but instead by suffocation, depriving the company of ad revenues by scaring off its payments service providers." He compared it to "killing a person by cutting off his oxygen supply rather than by shooting him."

Judge Posner rejected Sheriff Dart's argument that his letter was protected by the First Amendment as his own, personal request to the credit card companies. The letter, beginning "As the Sheriff of Cook County, a father and a caring citizen," went on to "request" that Visa and MasterCard "immediately cease and desist from allowing your credit cards to be used to place ads on websites like Backpage.com." The Court found it important that Dart was "sheriff first," and observed that "if all the sheriff were doing to crush Backpage was done in his capacity as a private citizen rather than as a government official (and a powerful government official at that), he would be within his rights. But he is using the power of his office to threaten legal sanctions against the credit-card companies for facilitating future speech, and by doing so he is violating the First Amendment unless there is no constitutionally protected speech in the ads on Backpage's website – and no one is claiming that."

The court rejected the argument that the sheriff had his own First Amendment right to engage in "government speech," stating: "A government entity, including therefore the Cook County Sheriff's Office, is entitled to say what it wants to say – but only within limits. It is not permitted to employ threats to squelch the free speech of private citizens."

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The court concluded that Dart's claims that Backpage.com's adult section is promoting illegal sex services did not justify what it described as "pressure tactics" designed to shut it down. Judge Posner found the Sheriff's letter was "a letter from a government official containing legal threats and demands for quick action and insisting that an employee of the recipient be designated to answer phone calls or respond to other communications from the sheriff. It was within days of receiving the letter that the credit card companies broke with Backpage. The causality is obvious."

Judge Posner rejected the conclusion of the district judge that the credit card companies were not coerced, and likewise rejected the argument that the credit card companies were acting on new information brought to their attention by the sheriff. Instead, the court found that the sheriff's communications made the credit card companies "victims of government coercion," in that the letters threatened them with criminal culpability when there was no clear basis for asserting that Backpage was in violation of the law for providing the forum for the ads. Judge Posner said the point of the communication was clear – the letter to Visa and MasterCard "intimated" that "two of the world's largest credit card companies may be criminal accomplices."

Judge Posner debunked Sheriff Dart's hyperbolic assertions that every service offered on Backpage.com's adult section implicated illegal conduct. He wrote the sheriff was not "on solid ground" in suggested that "**everything** in the adult section of Backpage's website is criminal, violent, or exploitive. Fetishism? Phone sex? Performances by striptease artists? (Vuglar is not violent.)" (Emphasis is original).

Judge Posner's opinion took the district court to task for denying the motion for preliminary injunction. The court found: "Unwittingly the judge was suggesting a formula for permitting unauthorized, unregulated, foolproof, lawless government coercion. The formula consists of coupling threats with denunciations of the activity that the official wants stamped out, for the target of the denunciation will be reluctant to acknowledge that he is submitting to threats but will instead ascribe his abandonment of the activity to his having discovered that it offends his moral principles. The judge was giving official coercion a free pass because it came clothed in what in the absence of any threatening language would have been a permissible attempt at mere persuasion."

Of great importance to all First Amendment advocates, the court's opinion addresses the issue of trying to put pressure on intermediaries to regulate speech that is disfavored by the government. Backpage.com has maintained that if Sheriff Dart is not enjoined his tactic would be adopted by many others.

Backpage.com, LLC was represented by Robert Corn-Revere, James C. Grant, Ambika Doran, Ronald G. London and Lisa B. Zycherman of Davis Wright Tremaine LLP, and Christopher F. Allen of Paul Hastings LLP. Sheriff Thomas Dart was represented by Hariklia Karis of Kirkland & Ellis LLP, and Jill V. Ferrara, Kent Ray, Sisavanh Baker and Daniel Gallagher of the Cook County State's Attorney's Office.

Second Circuit Affirms Acquittal of “Cannibal Cop”

Court of Appeals Also Takes Narrow View of Computer Fraud & Abuse Act

By Jeff Hermes

On December 3, 2015, the U.S. Court of Appeals for the Second Circuit issued a ruling in the high-profile case of [*U.S. v. Valle*](#), Nos. 14-2710-cr, 14-4396-cr (2nd Cir. Dec. 3, 2015). The case has received extensive coverage in the media – including a documentary featured at the MLRC’s Annual Dinner in November -- due to its lurid facts, involving a former New York Police Department officer’s online discussions about kidnapping and cannibalizing women.

In a split decision, the Court of Appeals affirmed a ruling of the Southern District of New York acquitting Gilberto Valle on a charge of conspiracy to kidnap over a jury’s decision to convict. The primary legal issue was whether the defendant’s online communications were mere fantasy or reflected an actual intent to carry out the crimes discussed, and has been described as a battle over “freedom of thought.” The Court upheld the district court’s ruling that a reasonable jury could not have found that Valle intended to act on his plans, seeing no distinction between online conversations that the government decided were mere “fantasy” and those that it categorized as “real.”

The Court also reversed the jury’s guilty verdict on a second count for violation of the Computer Fraud & Abuse Act, based upon Valle’s use of a law enforcement database in a clear violation of NYPD rules. Broadening a split between the federal circuits, the Court held that misuse of data to which one has been granted access is not “exceeding authorized access” under the CFAA.

The Court upheld the district court’s ruling that a reasonable jury could not have found that Valle intended to act on his plans, seeing no distinction between online conversations that the government decided were mere “fantasy” and those that it categorized as “real.”

Background

Valle was charged with conspiring to kidnap five different women with three different individuals with whom he communicated through an online community called Dark Fetish Network. These communications were part of a larger pattern of online behavior, during the course of which Valle discussed plans for kidnapping, torturing, raping and cannibalizing up to one hundred different women with a much larger group of forum participants. The level of detail in these discussions varied, although they contained similar elements in terms of the

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specific role Valle would play in such plans and the time, place and manner in which the plans would be carried out.

Valle never followed through on any attacks, although he took certain actions that the prosecution argued were in furtherance of these schemes. Most significantly, he used his position as a police officer to access restricted law enforcement databases in order to search for information about one of the five named targets of the alleged conspiracy; this act formed the basis of the CFAA count. In addition, Valle conducted independent online searches for information about how to kidnap people, how to make chloroform, and how to restrain and to cannibalize people.

In the real world, Valle on one occasion visited the block on which one of the five named women lived, two days after allegedly agreeing with a co-conspirator to kidnap that woman. The evidence presented at trial supported a finding that Valle's account of his reasons for being there were false. On another occasion, he and his then wife visited a former college classmate in Maryland for lunch. Both Valle's ex-wife and the college classmate were named potential victims, and the visit happened five days after Valle informed another alleged co-conspirator that he would be traveling to see a potential target. Although the alleged co-conspirator asked for the Maryland woman's address, Valle never provided it.

A jury convicted Valle on both the conspiracy and CFAA charges in March 2013. Judge Paul G. Gardephe of the Southern District of New York overturned the conspiracy conviction in June 2014, finding no basis on which the jury could have reasonably concluded that Valle's online activities reflected any more than a disturbed fantasy without an actual intent to commit any of the acts described. Judge Gardephe also conditionally granted a new trial on the conspiracy count, finding that the prosecution's consistent references to Valle as a police officer and its suggestion that "it is not ok" for a person in that position to engage in dark fantasies raised a question as to whether Valle's conviction was the product of "disgust and revulsion" coupled with holding Valle to a higher standard because of his position.

Judge Gardephe let Valle's Computer Fraud & Abuse Act conviction stand, however. He held that while Valle had been granted access to law enforcement databases, his use of those databases for improper purposes "exceeded authorized access" under the CFAA. Valle was sentenced to 12 months in custody (effectively a sentence of time served, as he had been in



The case has received extensive coverage in the media – including a documentary featured at the MLRC's Annual Dinner in November

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pretrial detention for 20 months at that point), one year of supervised release, and a \$25 special assessment.

The government appealed the acquittal on the conspiracy count, while Valle appealed the CFAA conviction.

The Line Between Fantasy and Reality

On appeal, the Second Circuit defined its standard of review as follows:

The ultimate question is not whether we believe the evidence adduced at trial established the defendant's guilt beyond a reasonable doubt, but whether any rational trier could reasonably reach that conclusion. ... The standard does not mean that if there is any evidence that arguably could support a verdict, we must affirm. ... If the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt.

Valle, slip op. at 12-13. With respect to the conspiracy count, the Court focused on the government's burden to prove that Valle intended to carry out the offense that was the subject of the conspiracy, i.e., kidnapping.

In particular, the Court looked closely on the government's determination as to which of Valle's plots were pure fantasy and which, it believed, he had a real intent of carrying out; the Court noted the particular danger of convicting Valle for mere thoughts, however vile:

This is a case about the line between fantasy and criminal intent. Although it is increasingly challenging to identify that line in the Internet age, it still exists and it must be rationally discernible in order to ensure that a person's inclinations and fantasies are his own and beyond the reach of the government. ... We are loathe to give the government the power to punish us for our thoughts and not our actions. ... That includes the power to criminalize an individual's expression of sexual fantasies, no matter how perverse or disturbing.

Id. at 4.

Examining the content of Valle's chats in detail, it found that "the 'real' chats ... contain[ed] the same core elements as the chats the Government concedes are 'fantasy,'" such as

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photographs, financial arrangements, tools to be used, specific contributions by Valle, and graphic descriptions of planned activities. *Id.* at 14. Moreover, the “fantastic” chats often lacked any explicit statements that they were not real, while the “real” chats contained “numerous other indicia of fantasy,” such as an impossible “agreement” to kidnap three people in three widely separated locations on two continents on the same day. *Id.* at 14-15.

As a result, the Court found that it “need look no further than the prosecution’s own work product to find reasonable doubt”:

The prosecution divided the exchanges into two groups and undertook to convince the jury to convict Valle on the theory that one group was fantasy and the other proved criminal intent. This exercise failed because the distinction the prosecution urged does not exist in this case. ... We do not believe that the prosecution satisfies the proof beyond a reasonable doubt standard by relying upon a distinction that is untethered to reason or common sense.

Id. at 16-17. The Court further rejected the government’s argument that it had been undecided on the reality of the “fantasy” chats, finding that testimony introduced in large part through the direct examination of the government’s own witnesses showed that the FBI and the U.S. Attorney’s Office had worked together to make specific distinctions between reality and fantasy. *Id.* at 17-19.

The government also argued, to no avail, that the “fantasy” chats were essentially irrelevant and that comparing one set of chats to the other was not necessary for the jury to find that Valle intended to carry out the “real” threats. The Second Circuit replied,

This contention proves too little. Once the Government constructs its case around the theory that a certain group of chats permits the inference of conspiratorial intent while another group of essentially similar chats is consistent with non-criminal behavior, some adequate explanation must be forthcoming. Where, as here, none is, the non-criminal chats are a powerful indicator that a reasonable juror must necessarily entertain reasonable doubt about the prosecution’s case.

Id. at 20. In other words, by setting up the distinction between the two sets of online conversations, the government undermined its own case; the jury could not reasonably ignore both the government itself admitting that some chats were fantasies *and* the fact that there was no real distinction between the two sets.

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The Court also found that the import of Valle's actions beyond the forum conversations was at best equivocal. With respect to Valle's online search for additional information about conducting kidnappings, it held that such searches "show that he was *interested* in committing acts of sexualized violence against women," but that interest alone was not enough to prove intent. *Id.* at 21. Similarly, his "false exculpatory explanation for being on [one alleged victim's] block is insufficient proof on which to convict where other evidence of guilt is weak." *Id.* at 22 (internal quotation marks omitted). Finally, the court held that Valle's lunch with another potential victim in Maryland could not, in context, have been taken as evidence of intent: "[T]he chats between Moody Blues [another forum participant] and Valle leading up to and following the lunch make it impossible to conclude, without speculation, that the lunch was 'surveillance' in furtherance of a genuine conspiracy." *Id.* at 26. The Court recognized that a jury could read the pattern of Valle's behavior in an inculpatory manner, but held that this was not enough:

We are in accord with the prosecution and our dissenting colleague that a jury might be able to distill some incriminating evidence from all of this. But "some" evidence is not the test. ... If the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt.

Id. at 26-27 (internal quotation marks omitted).

Beyond the issue of Valle's intent, the Court also found that there was insufficient evidence to support a finding of intent on the part of Valle's alleged co-conspirators. In contrast to the evidence with respect to Valle, the government introduced no evidence of the co-conspirators' conduct outside of the chat room; and just as it held that the "real" chats were indistinguishable from fantasy with respect to Valle, it found that they could not indicate conspiratorial intent with respect to the other end of the conversation. *Id.* at 27. Because a conspiracy charge in the Second Circuit requires bilateral agreement, the Court held that a lack of intent on the part of the co-conspirators was fatal to the charge against Valle, regardless of Valle's own state of mind. *Id.*

"Exceeding Authorized Access" or "Exceeding Authorization"?

The Court then turned to the second count, "exceeding authorized access" to a U.S. government computer under the Computer Fraud and Abuse Act. The specific provision of the

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CFAA at issue imposes criminal liability on one who “intentionally accesses a computer without authorization or exceeds authorized access and thereby obtains information ... from any department or agency of the United States.” 18 U.S.C. § 1030(a)(2)(B). “Exceeds authorized access” is defined in the statute as meaning “to access a computer with authorization and use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter.” 18 U.S.C. § 1030(e)(6).

The Court found that Valle’s misuse of a federal law enforcement database presented them directly with a question upon which other federal circuits were sharply divided: For the purpose of a charge of “exceeding authorized access” to a computer, must the defendant obtain access to information that he is not authorized to access, or is it enough that the defendant use computer information use information to which access has technically been granted in an unauthorized manner? *Id.* at 29-31. In other words, is the term “unauthorized” limited to technical access, or does it incorporate the reasons why access is granted?

Six federal circuits had previously addressed this question, albeit not all in the specific context of access to government data; the definition of “exceeds authorized access” is shared by different crimes identified in the CFAA, *see* 18 U.S.C. § 1030(a)(2). Two circuits had adopted the more limited construction urged by Valle, while four adopted the construction urged by the prosecution. *Contrast U.S. v. Nosal*, 676 F.3d 854 (9th Cir. 2012) (limited construction); *WEC Carolina Energy Solutions LLC v. Miller*, 687 F.3d 199 (4th Cir. 2012) (same) *with U.S. v. John*, 597 F.3d 263 (5th Cir. 2010) (broad construction); *U.S. v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010) (same); *Int’l Airport Ctrs., L.L.C. v. Citrin*, 440 F.3d 418 (7th Cir. 2006) (same); *EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577 (1st Cir. 2001) (same).

The Second Circuit adopted the minority view, joining the Fourth and Ninth Circuits in holding that “unauthorized access” requires more than misuse of computer data accessible to the defendant. While acknowledging that neither the statutory definition nor the common language interpretation of “authorization” resolved the issue presented by Valle’s actions, the Court found clues in the structure of 18 U.S.C. § 1030(a)(2) itself:

The contested language is not “exceeds authorization,” however such authorization may be defined, but the seemingly more limited “exceeds authorized *access*.” 18 U.S.C. § 1030(a)(2) (emphasis added). Moreover, because “without authorization” most naturally refers to a scenario where a user lacks permission to access the computer at all, one sensible reading of the statute is that “exceeds authorized access” is complementary, referring to a scenario where a user has permission to access *the computer* but proceeds to

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“exceed” the parameters of authorized access by entering an area of the computer to which his authorization does not extend.

U.S. v. Valle, slip op. at 30 (emphasis in original). The Court further found that the legislative history of the CFAA reflected a general intent that the statute address electronic “trespassing,” with statutory revisions suggesting that “authorization” should be understood in spatial terms. *Id.* at 31-34.

Noting that the split between the circuits demonstrated that reasonable minds could differ about the statute’s meaning, it invoked the “rule of lenity,” compelling the adoption of the more restrictive reading of an ambiguous criminal statute in order to ensure that it is Congress rather than the courts that define criminal conduct. *Id.* at 35. In doing so, the Court voiced significant concern about the far-reaching effects of the government’s urged interpretation of the CFAA:

The Government asks that we affirm Valle's conviction, which requires us to accept its construction of the statute. But our construction of the statute impacts many more people than Valle. It will not only affect those who improperly access information from a government computer—a result some readers might find palatable—but also those who improperly access “any protected computer” and thereby obtain information. 18 U.S.C. § 1030(a)(2)(C).

...

It is precisely for this reason that the rule of lenity requires that Congress, not the courts or the prosecutors, must decide whether conduct is criminal. We, on the other hand, are obligated to “construe criminal statutes narrowly so that Congress will not unintentionally turn ordinary citizens into criminals.” *Nosal*, 676 F.3d at 863. While the Government might promise that it would not prosecute an individual for checking Facebook at work, we are not at liberty to take prosecutors at their word in such matters. A court should not uphold a highly problematic interpretation of a statute merely because the Government promises to use it responsibly.

Noting that the split between the circuits demonstrated that reasonable minds could differ about the statute’s meaning, it invoked the “rule of lenity,” compelling the adoption of the more restrictive reading of an ambiguous criminal statute.

Id. at 37-38.

Accordingly, having affirmed the district court’s judgment of acquittal on the conspiracy count, the Second Circuit reversed Valle’s conviction under the CFAA.

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A Bitter Dissent

Judge Straub forcefully took issue with the entirety of the majority's analysis:

Because the majority opinion seeks to enshrine all the conduct in this case in an academic protective halo, I find it necessary to offer the realistic context of this controversy.

This is not a case about governmental intrusion on one's personal inclinations and fantasies nor is it a case about governmental punishment of one's thoughts. It is, instead, a jury's determination of guilt for a conspiracy based on definitive conduct. This is not a case of confused, accidental, or otherwise inappropriate use of a law enforcement database. It is, instead, a police officer's use of the official database to obtain, outside the boundaries of his official duties, data about a woman whom he knew.

Dissenting Opinion of Straub, J., *U.S. v. Valle*, Nos. 14-2710-cr, 14-4396-cr (2nd Cir. Dec. 3, 2015) at 1.

With respect to the conspiracy claim, Judge Straub reviewed the plain text of Valle's statements and his additional conduct, and found the jury could have taken Valle's expression of intent in the "real" chats at face value supported by outside acts and levels of detail in the planning. He accused the majority of confusing the concept of ambiguity of evidence with the jury's role to draw reasonable inferences as to the meaning of evidence:

The majority opinion takes pains to conjure innocent explanations for this evidence. ... These are perspectives on the evidence that the jury conceivably could have found persuasive but did not. It was the jury's sole prerogative to decide how to interpret the evidence presented, and the majority's notions of how the evidence should instead have been interpreted are incompatible with our obligation to respect the jury's fact-finding role by viewing the evidence in the light most favorable to the government and drawing all reasonable inferences in its favor.

Id. at 15-16. Straub concluded, "For each assessment of the evidence made by the majority in contravention of the jury's finding of guilt, there is a contrary light through which the evidence can be viewed—in fact, *must* be viewed—that supports the jury's conclusion." *Id.* at 17.

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On the CFAA count, Judge Straub found no ambiguity in the statute, only a broad sweep that was perhaps a subject for Congressional debate but not a restrictive interpretation. *Id.* at 26-29. He rejected the suggestion that the statute could be held ambiguous for the purposes of a lenity analysis due to the split between the federal circuits, noting that “the Supreme Court has explained that a statute is not ambiguous for the purposes of lenity merely because there is a division of judicial authority over its proper construction.” *Id.* at 31-32 (internal quotation marks omitted).

Conclusion

It is difficult to imagine that, in future conspiracy cases, the defendant would be able to successfully mount a roleplaying defense. Even in Valle’s own case, the Court’s ruling turned on how the prosecution presented its evidence; the “thought crimes” aspect of the case arose primarily because the government admitted that it was delving into the realm of possible fantasy. By the Court’s logic, a different result might have been reached had the government introduced only the “real” set of conversations and left the “fantasy” chats for the defense to present, or if the government’s witnesses had testified that the “real” conversations were just the subset the government had decided to investigate in detail without characterizing the remainder.

As others have commented, the Computer Fraud and Abuse Act claim, while less grotesque, might have a greater effect on the law by setting up a potential appeal to the Supreme Court. The circuit split is well defined, and the implications for the scope of federal power to control online activity are profound regardless of whether one views the issue as one for the courts or the legislature. Nevertheless, given that Valle has already fully served his (quite mild) sentence on the CFAA conviction, the direct practical effect of petitioning the Supreme Court on this issue would be limited.

Jeff Hermes is a Deputy Director of MLRC.

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USPS Wrestles With Mailing Newspapers Containing Marijuana Ads

By Steven D. Zansberg

At present, four states (Alaska, Colorado, Oregon, and Washington), have legalized the sale of marijuana for [recreational use](#), and 23 states have legalized the sale of marijuana for medicinal use. As a result, in all those states individuals and businesses are engaged in large-scale cultivation growing, packaging, distribution, and sales of marijuana. And, like other consumer-oriented industries, to succeed, those business enterprises must market their products to the public, including through advertisements in newspapers. (Thus far, out of concern about possible [enforcement actions by the FCC](#), no FCC-licensed television or radio station has broadcast advertisements for either medicinal or recreational marijuana.)

But, while states are free to decriminalize the sale of marijuana under state law, marijuana remains a Schedule I controlled substance under the federal Controlled Substances Act, and, federal law remains “the Supreme Law of the Land.” Thus, while the sale of marijuana may be legal under state law, it remains illegal –indeed, a felony – under federal law.

In August 2013, the United States Attorney General’s Office, through Assistant Attorney General James Cole, issued a much publicized [memorandum](#), (“Cole Memo”) that provided Guidance to all U.S. Attorneys in exercising their prosecutorial discretion when enforcing the federal Controlled Substances Act concerning marijuana sales. While the Cole Memo reiterated that U.S. Attorneys retain authority and discretion to pursue federal criminal charges against sellers of marijuana, it urged U.S. Attorneys in states that have adopted well-regulated schemes for medicinal and recreational use, to refer such matters to state authorities for potential prosecution under state law, unless certain identified federal interests were implicated:

consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity.



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*(Continued from page 45)***Postmasters in Oregon and Colorado Turn Their Attention to Newspaper Ads**

In late November 2015, the postal District Office in Portland, Oregon, issued a single-page [advisory](#) declaring that the mailing of any print advertisement for the sale of marijuana is in violation of the federal Controlled Substances Act. Accordingly, the Portland office opined, any newspaper carrying an advertisement for the sale of marijuana is “non-mailable” under U.S. postal regulations. The Oregon Press Association contacted the Oregon congressional delegation, who asked the Postmaster General of the United States, Megan Brennan, to clarify whether the advisory issued by the Portland office accurately reflected the position of U.S. Postal Service.

In a [letter](#) to the Oregon congressional delegation dated December 15, 2015, the Executive Vice President and General Counsel of U.S.P.S., Thomas J. Marshall, set forth the official position of the United States Postal Service (the “Marshall Letter”). Mr. Marshall agreed with the position of the Portland district that the Controlled Substances Act prohibits persons from placing “in any newspaper, magazine, handbill, or other publications, any written advertisement knowing that it has the purpose of seeking or offering illegally to receive, buy, or distribute a Schedule I controlled substance,” and from using the mail to facilitate “the commission of any act or acts constituting a felony” under the Controlled Substances Act. *See* 21 U.S.C. § 843. Furthermore, Mr. Marshall stated, the provisions cited above “express Congress’ judgment that the mail should not be used as a means of transmitting advertisements for the sale of marijuana, even if that sale is allowed under state law.”

Having validated the Portland district’s statement regarding the “non-mailable” status of printed marijuana advertisements, however, Mr. Marshall set forth the U.S. Postal Service’s “national policy that will be applied in all postal districts:” Even though mail containing advertisements for marijuana are technically “non-mailable” under U.S.P.S. regulations,

While states are free to decriminalize the sale of marijuana under state law, marijuana remains a Schedule I controlled substance under the federal Controlled Substances Act, and, federal law remains “the Supreme Law of the Land.”

mailers are responsible for complying with both postal and non-postal laws which may apply to their mailings . . . Postmasters and Managers of Business Mail Entry are reminded that they are not authorized to decide whether written, printed, or graphic matter is – solely because of its content – non-mailable. Further, Postmasters and Managers of Business Mail Entry are not permitted to deny entry to such matter or exclude it from the mail.

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The Marshall Letter instructed that when a Postmaster or postal employee believes that mail being posted contains “non-mailable” matter, the postal employee “should advise mailers about applicable mailing standards [including] the Controlled Substances Act. After being so informed, if the mailer insists on depositing written, printed, or graphic matter, the mailing must still be accepted unless it is not otherwise properly prepared for mailing.” Postal employees who identify matter that appears to be “non-mailable,” must “send a report to the local Inspection Service serving the facility, and the matter would then be turned over to the responsible law enforcement agencies for investigation if appropriate.”

The bottom line, then, under the official national policy of the U.S.P.S., is that postal employees must accept and process (*i.e.*, deliver) newspapers and other print materials that contain advertisements for marijuana, notwithstanding the fact that the mailing of such advertisements is prohibited by federal law. If a postal employee observes such material being deposited in the U.S. Mails, (s)he must notify the local postal inspector, who then may or may not refer the matter to law enforcement officials in that jurisdiction for possible prosecution.

In states that have legalized marijuana for either medicinal or recreational purposes, state officials are responsible for enforcing the state laws and regulations governing such advertisements. The U.S. Attorney for the federal judicial district is the law enforcement official with authority to prosecute violations of the Controlled Substances Act. Thus, so long as the local U.S. Attorney adheres to the Guidance of the Cole Memo, he or she should forebear from prosecuting conduct that is in compliance with the applicable state law.

Nevertheless, out of concern that placing marijuana advertisements in the U.S. Postal Service subjects the sender to potential federal prosecution, several newspapers that mail their papers have discontinued running marijuana ads. *See, e.g.* <http://www.wweek.com/2015/12/17/u-s-postal-service-expands-its-marijuana-advertising-ban-to-all-50-states/>.

The bottom line is that postal employees must accept and process (*i.e.*, deliver) newspapers and other print materials that contain advertisements for marijuana, notwithstanding the fact that the mailing of such advertisements is prohibited by federal law.

A Colorado Postmaster Misinterprets the Policy

Less than one week after the issuance of the Marshall Letter, a local postmaster in the small mountain town of Craig, Colorado, advised the local newspaper, *The Craig Daily Press*, that should that newspaper continue to run advertisements, as it had in the past, for local marijuana dispensaries, she would refuse to process and deliver those newspapers. The Craig postmaster,

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Mary McClellan, said she was acting in conformity with a U.S.P.S. Business Mail Acceptance advisory dated December 18, 2015, which accurately summarized the national policy set forth in the Marshall Letter. Even though Ms. McClellan was provided a copy of the Marshall Letter, she steadfastly refused to change her position. Indeed, she informed the editor of *The Craig Daily Press* that should the next edition of the newspaper contain either an advertisement or even a *news article* mentioning marijuana, Ms. McClellan would deem such newspaper “non-mailable” and would refuse to mail those newspapers.

Notified of this stated position by the local postmaster, counsel for the Colorado Press Association and *The Craig Daily Press* sent an email to Thomas J. Marshall explaining the situation and urging the U.S.P.S. law department to please instruct Ms. McClellan to abide by the national policy he had announced in his letter—*i.e.*, to not refuse to process and deliver newspapers containing advertisements for marijuana. The email noted that should Ms. McClellan carry through on her announced plans to refuse to process and deliver the next edition of *The Craig Daily Press*, she would be in violation of 18 U.S.C. § 1703(b), which makes it a federal crime for any postal employee to delay or interfere with the delivery of a newspaper deposited in the U.S. mails.

Within an hour of the email to Mr. Marshall, a lawyer in the Salt Lake City, Utah office of the U.S.P.S. contacted Ms. McClellan and [instructed her to abide by the Marshall Letter](#). Thus, the next edition of *The Craig Daily Press*, including advertisements for marijuana dispensaries, was processed and delivered on December 23, 2015.

Request for Notice and Opportunity to Cure

Because the Marshall Letter requires postmasters and other postal employees to notify the local Inspection Service of “non-mailable” newspapers and other print publications containing marijuana advertisements for possible criminal prosecution, on December 23, 2015, the Colorado Press Association (CPA) sent a letter to the United States Attorney for the District of Colorado, asking to be given notice of any such referrals and also to provide the newspaper in question the opportunity to discuss the U.S. Attorney’s concerns and to discontinue any alleged violation of federal policy objectives. Providing such notice, the letter stated, would advance the policies in the Cole Memo, and simultaneously provide newspapers with some assurance that if they fully comply with state regulations of print advertisements for marijuana, they need not fear being charged with federal crimes. As of this writing, the U.S. Attorney’s Office in Colorado has not yet responded to the CPA’s request.

Steven D. Zansberg is a partner with Levine Sullivan Koch & Schulz in Denver, CO. He represented the Colorado Press Association and Craig Daily Press.

2015 DCS Annual Meeting

MLRC Members Review Accomplishments and Plans for 2016



The annual meeting of the Defense Counsel Section was held on Thursday, November 12 at Proskauer Rose.

DCS President Sam Fifer led the meeting, which saw the election of Jay Brown of Levine Sullivan Koch & Shulz as DCS Treasurer. Sam welcomed Charles Tobin as the incoming DCS president. George Freeman gave the Executive Director's report on MLRC's projects and plans (see the report in the November MediaLawLetter). And Committee Chairs then gave reports on their accomplishments and plans for 2016.

ADVERTISING AND COMMERCIAL SPEECH

Chairs: Brendan Healey, Julie Xanders

Vice-Chair: Michelle Doolin

In 2015, the committee leadership (Brendan Healey, Julie Xanders and Michelle Doolin) continued to focus on developing the committee as a practice resource and forum for exchanging knowledge among MLRC members who advise clients on advertising and commercial speech issues. We used committee meetings in 2015 to host substantive presentations by members and outside speakers on current developments and issues of concern to advertising law practitioners. Presenters and topics included: Harold H. Kim and Kristina Seseck from the U.S. Chamber of Commerce, who spoke on the FCC's TCPA Omnibus Declaratory Ruling and Order, which was released on July 10; and Natalie Harris from Mandell Menkes, who spoke on sweepstakes and contests in the context of social media platforms (Facebook, Pinterest, YouTube, and Instagram). Chuck Sennet, Assistant General Counsel for

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Tribune Media Company, is scheduled to speak in mid-November on the FCC's newly released (mid-September) revisions to the Contest Rules. We also intend to schedule a presentation in December discussing ADA compliance and websites.

In 2016, we intend to keep our members abreast of new legal and regulatory developments relating to social media and behavioral advertising. We hope to have presentations every other month, and we also intend to update the "Checklist on Advertising Content." The update would focus on advertising of marijuana (and related services and products), e-cigarettes, guns, hard liquor, Internet gambling (including daily fantasy leagues and Internet betting on horse racing), pharmaceutical drugs from other countries, as well as native advertising and business issues such as rate cards. We are trying to schedule a meeting to keep the ball rolling on this. Our committee continues to stay nimble and, as quickly as technology is changing and creating new legal issues, our committee follows topics as they develop and attempts to find speakers at the core of these issues to talk about them.

ALI TASK FORCE

Chair: Thomas S. Leatherbury

The ALI continues to be fairly quiet with respect to issues affecting the media. The working group on the Restatement of Torts (Third) is not now considering those portions of the Restatement on libel and privacy. Moreover, the working group on Privacy is focusing on data privacy and consumer privacy rather than privacy issues that regularly crop up in representing media companies and journalists. Finally, the project concerning the Restatement of the Law of Copyright has just released a first preliminary draft. I will be reviewing this draft and submitting comments, if appropriate, before the next project group meetings on December 3 and 4. If you would like to be involved, please let me know. If you are interested in ALI membership, I would be pleased to walk you through the process.

CALIFORNIA CHAPTER

Chairs: Jeff Glasser, David Snyder, Sarah Cronin

The MLRC California Chapter is in the midst of another busy year exploring major legal developments in copyright, hacking and data breaches, the boundaries of rights of publicity, and the California anti-SLAPP statute.

The Chapter's first meeting, held on March 18 at Sheppard Mullin's Century City offices, focused on the legal issues raised by the hack into Sony Picture Entertainment's internal company emails, unreleased films and some 47,000 social security numbers. The panelists discussed Bartnicki and the risks posed by publishing information released by the hackers, and gave some best practices for collecting, storing and using sensitive consumer or employee

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information. Kent Raygor of Sheppard Mullin, Karl Olson of Olson, Cereghino & Kopczynski, David Quinto of Kupferstein Manuel & Quinto, and Tracey Freed of DME Law LLP headlined the panel.

The second meeting, held on June 24 at Kelley Drye & Warren's Los Angeles offices, delved into rights of publicity issues faced by media and entertainment companies when licensing photos of college athletes or celebrities. The panel discussed *Davis v. Electronic Arts* and *Maloney v. T3 Media*, and went through First Amendment defenses and possible preemption of right of publicity claims by copyright law. Heading the panel were Jennifer Rothman of Loyola Law School (Los Angeles), Lou Petrich of Leopold, Petrich and Smith, and Karen Henry, counsel at Davis Wright Tremaine.

We had a packed audience for the third meeting, held at NBCUniversal in Studio City on September 18. The panel concerned recent developments in copyright law. The panelists primarily discussed two cases: (1) Ninth Circuit's en banc decision in *Google v. Garcia*, concerning an injunction requiring Google to remove the film "The Innocence of Muslims" from all of its platforms; and (2) *Williams v. Bridgeport Music*, concerning the alleged infringement of the copyright in Marvin Gaye's 1977 hit song "Got to Give it Up," by Robin Thicke, Pharrell Williams and T.I. Timothy Alger of Perkins Coie, Seth Miller of King, Holmes, Paterno & Soriano and David Fink of Kelley Drye & Warren helmed the panel.

The fourth meeting in December will cover developments in California anti-SLAPP law in 2015.

EMPLOYMENT

Chairs: Tanya L. Menton, Tom Wilson

The Employment Committee has had a significant improvement in attendance for its quarterly calls. No doubt the topics we covered generated that attendance. We addressed the significant developments related to unpaid interns in the media industry. We also authored an article for the MLRC newsletter on this topic. We addressed issues related to media employees' use of social media. We also made a presentation on this topic to the Internet Law Committee. Unfortunately, we continue to address issues related to violence and its impact on media employees. We hope to publish in 2016 an updated version of our article on media employers sending employees into harm's way. This version will have more of a domestic U.S. view than did the prior version published in 2012. The other issues we addressed in our calls included the lower salary test for FLSA exemptions as applied to the media, independent contractor legal developments and the impact on the media, and joint and single employer law as applied to affiliates of media of companies.

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ENTERTAINMENT LAW

Chairs: David Cohen, Brad Ellis

The mission of the Entertainment Law Committee is to keep its members apprised of key cases and the latest legal developments in areas of interest to our membership. To that end, the Committee meets telephonically for an hour the first Wednesday of every month. In preparation for each meeting, the Committee Chairs review a variety of publications and assemble approximately 20 items of interest. About a week ahead of each meeting, the Chairs circulate a list of these items to the Committee, from which members can select which items they would like to volunteer to present. A final meeting agenda with links and attachments is distributed 3-5 days before the call. Agenda items are selected with an eye toward currency, significance, balance and entertainment value.

Some of the specific topics discussed this past year include: Is copyright available to unsigned directors, bit actors and/or photogenic monkeys; the issues surrounding intern class actions against studios; and the usual (and unusual) array of right of publicity, trademark and idea submission cases.

Plus, there is often a Reality Television or other production-based matter to fill out the agenda (and remind us that people really are crazy). We also monitor previously discussed items and provide updates as warranted.

The Committee is comprised of approximately 65 lawyers, both in-house and outside counsel, from around the country, and includes many of the leading lawyers in the entertainment and media arenas. Approximately 20 Committee members actively participate on each month's call. The monthly calls create opportunities for broad participation, foster in depth analysis and discussion, and allow Committee members to get better acquainted with each other.

INTERNATIONAL MEDIA LAW

Chairs: Robert D. Balin, Gillian Phillips and Julie Ford

Our committee conducts regular conference calls to learn about media law issues across the world. We focus on hot spots and hot topics, and we often have guest speakers join our calls to describe the challenges they face in their countries. From a law professor in India, we learned the basics of Indian defamation, privacy and contempt of court laws, and a little about the problems they have with corruption in their court system. Overcoming even greater time zone differences, we heard from a media law expert in Japan about developments in that country, including “right to be forgotten” claims. We heard from journalists in Russia on the risks of investigative journalism in that country, and about hot issues in Hungary, the Czech Republic and Northern Ireland from media experts from those countries.

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Our own members have a great deal to share in these calls, and we have talked about the aftermath of the Charlie Hebdo tragedy; about how to keep our journalists safe, and recent developments in Canada.

We regularly hear from our UK members, who have led discussions on the “misuse of personal data” tort and abuses of UK’s data protection laws, as well as privacy issues, including using photos of children and anonymity in rape cases. We also had a discussion comparing the restrictions placed on news reporting of criminal proceedings in the UK, Europe and the U.S. Then, after a year of telephone and email contacts, many of us had a chance to visit in person at the MLRC London conference, and over drinks at the House of Lords, of all places!

INTERNET LAW

Chairs: Katherine Surprenant, Jeremy Mishkin

The Internet Committee worked hard in the first quarter of 2015 to complete the bi-annual update to the "Practically Pocket-Sized Guide to Internet Law." In so doing, we removed certain dated chapters and added the following topics of particular relevance to the MLRC membership: "Who Qualifies as a Journalist Today for Legal Protections?;" "Data Privacy;" and "Net Neutrality." Our Committee members also provided new materials to supplement the Guide's chapters on user-generated content, Internet speaker anonymity, CFAA, access to government e-mails, government access to text messages, e-discovery and ESI, portable electronic devices in the courtroom, accessing and using digital records, ISP's duties to prevent infringement, and content aggregation.

We had a timely Committee discussion of the potential legal deficiencies and implications of the FCC's adoption earlier this year of new "Internet neutrality" rules that reclassified broadband from an information service to a Title II telecommunications service. The Committee also discussed the impact of recent labor and employment decisions on media employers' control over their Internet-based content, including social media accounts. We are in the process of scheduling another call before year-end to review pressing data privacy concerns, such as the transfer of personal data from the EU to the US in light of the CJEU's October decision invalidating the FTC's safe harbor framework, and the data practices most recently targeted by class action plaintiffs under federal and state privacy statutes.

LEGISLATIVE AFFAIRS

Chairs: Leita Walker, Shaina Jones Ward

Leita Walker of Faegre Baker Daniels and Shaina Jones Ward of Levine Sullivan became

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new co-chairs this summer when their predecessors both left private practice. The committee will be focused in the coming months on recruiting members and assigning members to systematically monitor and report on key legislative issues.

LITIGATION

Chairs: Amelia Brankov, James A. Hemphill

The Litigation Committee has begun a series of every-other-month phone meetings to promote more interaction among committee members, and to provide a forum for more immediate exchanges of ideas and news. Each conference call begins with one or two members giving a brief presentation on a recent case or current issue relating to media litigation topics. Participants then have an open forum to discuss the presentations and to raise any practical or theoretical issues related to media litigation. Finally, participants discuss the status of ongoing larger projects, such as reports and white papers for the entire DCS membership, and kick around ideas for future projects. The committee has come up with some promising project ideas that it is currently pursuing. The committee is also continuing work on the long-overdue update to the MLRC expert witness bank; we would welcome any members who'd like to volunteer to help push this project across the finish line.

MEDIA COPYRIGHT AND TRADEMARK

Chairs: Maya Windholz, Nancy Wolff

MLRC's Copyright and Trademark Committee was established in 2013 to keep the MLRC membership current on cases and trends in the areas of copyright and trademark law, particularly for those who do not practice in these specialties on a day-to-day basis. The Committee holds one-hour teleconference meetings every other month, with meetings open to all MLRC members. A typical meeting agenda includes two or three brief presentations by experts in IP matters, followed by discussion, with a focus on timely issues and recent key cases, in both the news and entertainment arenas. Discussion areas in 2015 included topics such as the preliminary injunction action filed over the Aretha Franklin documentary, the TTAB action involving the band The Slants, and the trial over the song Blurred Lines. The Committee chairs also circulate a bi-monthly email, outlining other "recent developments" in the field, generally with links and cites to recent cases of interest or relevant articles. The plan for 2016 is to continue this format for meetings and other communications, with a specific focus on counseling clients that have business interests on both sides of these IP issues. This format appears to be successful as the bi-monthly calls are well attended with lively discussion.

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MEDIA LAW LETTER

Chairs: Russell Hickey and Michael Berry

The MediaLawLetter Committee serves as a resource for Dave Heller and the MLRC staff. The committee works to identify topics and write articles for the monthly MediaLawLetter and provides advice as needed about the MediaLawDaily. Over the past year, the MediaLawLetter has featured articles from NextGen Committee members. In addition, the MediaLawLetter now includes a regular column written by the MLRC's Executive Director, George Freeman covering topical developments and MLRC programs and events. The MediaLawLetter also features monthly articles on digital media law and IP developments by Jeff Hermes, one of MLRC's deputy directors. In the coming year, the Committee would like to expand the MediaLawLetter's coverage of international issues and will continue to work on improving the MediaLawLetter and MediaLawDaily.

NEWSGATHERING

Chairs: Cynthia Counts, Mark Flores

The Newsgathering Committee has had a successful 2015 addressing various issues from the use of drones to the updating of the Panic Book to open access issues. First and foremost, a number of the bi-monthly calls held this year discussed the development of Federal Aviation Administration ("FAA") regulations related to the use of unmanned aircraft vehicles or drones. The Newsgathering Committee decided to form a subcommittee on drones to further look into these policies and provide input regarding these regulations. Over the summer, the subcommittee had the opportunity to review and provide suggestions to Comments provided on behalf of various media outlets to the FAA as part of the rulemaking process. The Newsgathering Committee and its drone subcommittee intends to continue to stay involved in observing and, when necessary, intervening in the process to ensure that these new regulations do not put too many restrictions on these newsgathering tools in the name of public safety or privacy.

The Newsgathering Committee has also completed its update of the Panic Book. All authors have completed their chapters. The Committee will be compiling these chapters shortly and hopes to submit the completed project before the end of the year. Of course, one of the Panic Book's most notable features are the sample briefs that are included in the various sections. To that end, the Newsgathering Committee welcomes the submission of any briefs dealing with newsgathering from across the MLRC.

In the upcoming year, the Newsgathering Committee will look to update the Model Newsgathering Brief. It will also continue to keep a watchful eye on both the FAA regulations

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related to drones as well as state and municipal responses to the uptake in drone activity.

NEXT GENERATION MEDIA LAWYERS

Chairs: Drew Shenkman, Rachel Strom, Christine Walz

Based on a survey of our membership conducted in early 2015, the MLRC Next Generation Committee established three initiatives to focus our attention on in 2015: (1) seeking out writing opportunities for committee members, (2) hosting webinars with a “next-gen” topic supported by NextGen committee member speakers, and (3) establishing a mentoring program for committee members.

More specifically, our efforts included:

- Committee members wrote monthly articles in the MediaLaw Letter on timely topics, including the right to be forgotten, drone regulations, and recent decisions addressing the scope of the Communications Decency Act.
- In July, our committee hosted a webinar on native advertising, which was attended by more than 90 MLRC members. This webinar gave attendees an overview of the regulations governing a topic of growing importance for media entities and allowed our speakers to share their expertise with an interested audience and to build their presence in the media law community.
- In late October, we held the first “circle-mentoring” brown-bag lunch in NYC with NextGen committee members and a mentoring DCS partner to discuss how to build a media practice and other issues of the day. We are also planning a similar lunch in D.C. and will look for opportunities to plan similar events in other regions.
- We hosted happy hours in New York and L.A. to give committee members the opportunity to meet each other and to strengthen their relationships and connections in the media bar.
- We are also beginning organizing our committee with subcommittees to address the professional interests of our members. Our first subcommittee will be an L.A. subcommittee to help NextGen lawyers in the area connect, headed up by Jon Segal. We are also working on organizing an NextGen in-house counsel subcommittee.

In 2016, we will continue to work on these initiatives. For example, NextGen members Anna Kadyshovich, Adrianna Rodriguez, and Elizabeth Seidlin-Bernstein are planning an upcoming webinar in early on reporting on hacked materials.

The NextGen Committee, which is primarily targeted to those lawyers within the first ten years of their media law practice, is always looking for new members. If you work with anyone in this demographic interested in getting involved with MLRC, please have them

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contact any of the co-chairs.

PRE-PUBLICATION/PRE-BROADCAST REVIEW

Chairs: Dana Rosen, Lisa Zyberman

In its monthly conference calls, the committee had speakers who led discussions on a variety of legal issues and current cases, such as:

- Chanko v. ABC, a suit in which the widow of a man whose death was aired on an episode of “NY Med” was seeking emotional distress damages.
- Recent developments in SLAPP laws, including (1) the Washington Supreme Court’s decision in Davis v. Cox to invalidate that state’s anti-SLAPP statute; (2) the Oregon Court of Appeals’ decision in Mullin v. Meredith Corp.; and (3) the circuit split on the applicability of SLAPP statutes in federal court.
- The en banc decision of the Ninth Circuit in Google v. Garcia, which overturned the earlier Ninth Circuit decision holding that an actress held a copyright over her five-second appearance in a movie trailer uploaded to YouTube.
- A discussion on the legal vetting of the HBO film “The Jinx.”

The committee is also working on two pending projects regarding the Official Report Privilege and Occupations and Public Figures.

STATE LEGISLATIVE

Chairs: Elizabeth Allen and Robin Luce Herrmann

Vice-Chair: Jean Maneke

The MLRC State Legislative Committee is now in its fifth year of existence.

During the last year, the State Legislative Committee continued to work with more than thirty-five of the nation’s lead government relations attorneys who represent the First Amendment interests in more than half of the jurisdictions in the United States. We have identified and tracked legislative trends impacting the media and have exchanged ideas for how to most effectively combat legislative attempts to encroach upon the First Amendment and how to most persuasively get new legislation adopted to expand upon First Amendment protections. We are also maintaining the Committee’s website page.

Some of the areas of legislation we are working on include: “paparazzi”, drone, “ag-gag”, anti-SLAPP, open government, public notice, right of publicity, and more. Our committee has

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set up a webpage on the MLRC's website with draft legislation, current model bills, existing statutes, talking points and articles to assist the entire MLRC membership.

We typically meet once a month during the legislative session and recess for the summer. On our monthly calls, we keep each other informed on what is going on in the various states. Between monthly meetings, we exchange emails with inquiries, draft legislation and calls to action. Our goals for the upcoming year include soliciting more members from the government relations departments of more on-line organizations as well as some of the more strategic states that are not currently represented on the committee.

Report of the Body-Cam Subcommittee (chaired by Jean Maneke): During the last year, a number of bills arose in state legislatures around the country relating to law enforcement use of body cameras. It became clear that media lawyers needed to have available suggestions as to how the records created by those cameras should be treated in terms of public record access and retention. A subcommittee of the State Legislative Affairs Committee was formed to investigate and address this arising issue. We looked at a number of proposals coming out of various state legislators and compiled a report which addressed the history of the issue and the justifications for creation of a model policy on retention of and public access to police body-cam recordings. The basis of that model policy was that existing exemptions for confidential informants, personal privacy interests, trade secrets and related issues existed to adequately protect persons whose activities are captured in such recordings. Therefore, the Model Policy includes a set of principles to address any legislative reform activities. It clearly set out in its introduction the case law basis on which its various principles were rooted. The Model Policy contains three principles regarding availability of such recordings, including six elements of inclusion that should be in any state's policy regarding release of such recordings. A copy of the policy is [available on the MLRC website](#).