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# 9th Circuit Asks California SCT to Decide if State's Disabled Persons Act Includes Websites as "Public Accommodations"

### By Thomas R. Burke and Ronald G. London

On February 5, 2014, the U.S. Court of Appeals for the Ninth Circuit issued an opinion and an associated order asking the California Supreme Court to decide whether the California Disabled Persons Act (DPA), which seeks to ensure equal access to places of public accommodation in the state, applies to websites as non-physical "places." *Greater Los Angeles Agency on Deafness v. CNN*, 2014 WL 444237 (9th Cir. Feb. 5, 2014) (Order Certifying Question available here).

#### Background

In 2011, Greater Los Angeles Agency on Deafness, or "GLAD," sued CNN alleging that its failure to closed-caption news videos on CNN.com discriminated against the deaf and hearing impaired under the Unruh Civil Rights Act, and violated the DPA's requirement to provide access to public accommodations.

Notably, GLAD did not allege that CNN violated the federal Americans with Disabilities Act (ADA). GLAD's lawsuit was filed as CNN was busy preparing to commence captioning online videos under the then-recently enacted federal 21st

Century Communications and Video Accessibility Act (CVAA), which at that time was still being implemented by the Federal Communications Commission (FCC). CNN.com has since added captions to its videos in compliance with – and in excess of – what the CVAA requires.

Nonetheless, GLAD's suit has continued, and seeks to recover damages, attorney's fees, and an order requiring CNN.com to caption *all* videos at the site, including those not falling within CVAA requirements.

## **CNN's Anti-SLAPP Motion in the District Court**

CNN responded to GLAD's suit by removing it to federal court and filing a motion to strike the complaint under California's Strategic Lawsuits Against Public Participation or "SLAPP" statute, which seeks to protect those engaged in free speech activities by providing a mechanism by which lawsuits that cannot prevail may be resolved early in the litigation. In such "anti-SLAPP" cases, the complaint will be struck, and the case dismissed, if the lawsuit targets the defendant's conduct in furtherance of exercising free speech

> rights on matters of public concern, and the plaintiff cannot establish a probability of prevailing on its claims.

> CNN's anti-SLAPP motion argued that GLAD's claims steeped in decisions on whether, when and how to caption online videos, arose from conduct in furtherance of CNN's exercise of free speech on matters of public concern, and that GLAD could not establish a probability of prevailing. On the latter point, CNN argued that no Unruh Act claim could succeed due to a lack of intentional discrimination by CNN, and that the DPA does not apply to non-physical places like CNN.com. It also argued that application of the Unruh Act and/or DPA to

force CNN to caption its online videos before federal rules governing the mater took effect was preempted by federal law and rules, prohibited under the Commerce Clause, and would violate the First Amendment.

The district court denied CNN's anti-SLAPP motion. It held that CNN's decision-making relating to closed captions at CNN.com was not in furtherance of free speech rights, especially insofar as the court viewed captioning as a mechanical transcription that does not implicate content or *(Continued on page 4)* 

GLAD sued CNN alleging that its failure to closedcaption news videos on CNN.com discriminated against the deaf and hearing impaired under the Unruh Civil Rights Act, and violated the DPA's requirement to provide access to public accommodations.

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the First Amendment. Although the court acknowledged CNN's constitutional right to publish online news videos, it held that CNN's speech merely "lurked in the background" of GLAD's suit to compel closed captioning. The court also rejected CNN's contention that the relief GLAD sought would deprive CNN of editorial control by forcing it to adopt captioning technology that was error-prone, costly, and would interpose delays in reporting the news online.

Because the district court held that the anti-SLAPP statute did not apply, it did not reach whether GLAD could prevail under the Unruh Act and/or DPA, or CNN's challenges to those claims sounding in federal law. CNN appealed, and the Ninth Circuit vacated the decision denying the anti-SLAPP motion.

### Ninth Circuit Decision

Anti-SLAPP The appellate court, after observing that there was no dispute whether CNN's online videos involved matters of public concern, held CNN had shown that GLAD's claims arise from conduct in furtherance of CNN's rights to report the news, which do not "merely lurk in the background." The court accepted that CNN.com's decision to display videos without captions prior to FCC captioning rules, even if not itself an exercise of free speech, was conduct "in furtherance" of free speech, especially given CNN's concerns about potential costs, delay, and inaccuracies if forced to caption prematurely.

The court noted, in reaching this conclusion, that it did not mean to imply that all suits against media organizations, or any action imposing increased costs against them, fall within the anti-SLAPP law, or that the broad construction anti -SLAPP requires triggers its application in any case marginally related to a defendant's speech. Rather, the court viewed its holding as "more limited," specifically, that where an action "directly targets the way a content provider chooses to deliver, present, or publish news ..., that action is based on conduct in furtherance of free speech rights and must withstand scrutiny under California's anti-SLAPP statute."

<u>Unruh Act</u> Moving on to whether GLAD could establish a probability of success on the merits of its claims, the Ninth

The court held that CNN's decision-making relating to closed captions at CNN.com was not in furtherance of free speech rights, especially insofar as the court viewed captioning as a mechanical transcription that does not implicate content or the First Amendment.

Circuit held the Unruh Act claim could not avoid being struck under the anti-SLAPP statute, as GLAD could not show intentional discrimination based on disability as required by California law. Though CNN's decisions on captioning might have affected the deaf and hearing impaired differently than other members of the public, captions were unavailable to all CNN.com visitors equally. There was, accordingly, no willful, affirmative misconduct to support a claim. The court also rejected GLAD's attempts to have a "deliberate indifference" standard applied in the Unruh Act context, or to proceed based on CNN's supposed knowing failure to act after GLAD demanded captions.

<u>Disabled Persons Act</u> With only the DPA claim remaining, the court reserved judgment and instead, as noted, asked the California Supreme Court to first opine on what the

> Ninth Circuit characterized as an "important and unresolved issue of state law" regarding the DPA's potential reach beyond physical places. This request reflects the extent to which there is no California Supreme Court decision on whether the DPA applies only to physical places of public accommodation, or also covers "non-physical places" like websites.

> However, in referring the case, the Ninth Circuit noted CNN's point that no published appellate decision has interpreted the DPA to apply to a website unrelated to a brick-andmortar business. It is also worth noting that there is a case holding the DPA inapplicable to administration of a standardized test, separate from consideration of the

accessibility of the testing venue. So while there may be scattered lower court dicta that hypothecates that the DPA may apply more broadly, the DPA has thus far only been applied to physical places and to a website connected to a physical space.

A parallel may also be seen in the recent California Supreme Court decision in *Apple v. Superior Court*, which held that the state's Song-Beverly Act, which governing retailers' collection of personal information upon the use of credit cards, does not apply to online transactions. In *Apple*, the Court noted that there was a body of appellate law holding the statute does not apply online, that its plain language makes no mention of or allows allusion to online *(Continued on page 5)* 

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application, and that the California legislature has amended the law several times in the "Internet age" without expanding its scope online – all of which is equally true of the DPA.

This is an important issue with ramifications extending far beyond whether CNN must caption its online news videos, which as noted above it now does. The issue of whether statutes like the DPA, or its federal counterpart, the ADA, applies online, has been taken up by a variety of courts, and is currently the subject of a Department of Justice advanced notice of proposed rulemaking. A decision on this point by the California Supreme Court has the potential to affect far more than whether online streamed video news must be closed-captioned.

<u>Federal Law and Constitutional Issues</u>. The stakes presented by the DPA issue are in some ways heightened by the Ninth Circuit rulings on CNN's defenses based on

constitutional and federal law, which the court reached, and disposed of for anti-SLAPP purposes, in holding that referring the DPA issue to the California Supreme Court was necessary. Though the Ninth Circuit made clear that it decided only for anti-SLAPP purposes, *i.e.*, early dismissal, that GLAD showed enough for its DPA claim to proceed, and that CNN can still prevail on those challenges based on facts found at later stages of the case (if reached), the court made several findings worth noting.

On CNN's challenge that a court order compelling captioning under the DPA (or Unruh Act) would violate the First Amendment, the Ninth Circuit held such a requirement would neither unconstitutionally compel speech, nor act as a prior restraint by keeping CNN.com from posting uncaptioned videos.

The court also found such a requirement (if imposed) would be content-neutral, and "at least minimal merit" in GLAD's showings of a substantial government interest in ensuring equal access to online videos for the hearing impaired, and no undue burden on CNN insofar as compelled captioning would merely require translation of a video's audio track.

The Ninth Circuit also held that a requirement that CNN.com caption online news videos based on California's DPA would not be preempted by federal law. The court held that the closed captioning provisions in the Federal Communications Act, as amended by the CVAA and implemented by FCC regulations, do not occupy the field of closed captioning on the Internet.

It further held that, even if federal captioning obligations occupy the field as to TV, the same is not true for online video, as the federal regime covers only full-length programs previously aired on TV, in the U.S., with captions, after the effective date of the CVAA rules, and does not govern a variety of online video, including clips from TV, videos unique to websites, and user-generated content (though the FCC is reassessing the "clips" question).

Preemption based on a conflict between state and federal law also is not present, the court held, because it is possible both to comply with the CVAA regulations and to caption online videos not covered by them as GLAD seeks, and because such a requirement poses no obstacle to any federal

objective.

On the dormant Commerce Clause, the court held CNN's challenge similarly could not defeat GLAD's DPA claim at this stage of the litigation. The court held that there was enough evidence in the record, even if disputed, to suggest a California-only version of CNN.com could be created to avoid directly regulating interstate commerce via the application of the DPA that GLAD seeks. It also held, again, based only on the parties' initial showings, that the

burdens that such a DPA-based captioning duty would impose could be outweighed by California's interest in ensuring equal access to online news videos.

<u>Conclusion</u>. The Ninth Circuit's referral of *GLAD v*. *CNN* to the California Supreme Court for a determination of whether the DPA applies to online "places" immediately raises the already considerable profile of the case. The constitutional and other federal law holdings may well resonate in cases brought under the ADA and/or under other state laws seeking to compel closed-captions for streamed videos, and to otherwise make websites more accessible. The case now turns to the California Supreme Court to see if it will accept the referral.

Thomas R. Burke, Ronnie London, Janet Grumer and Rochelle Wilcox, all of Davis Wright Tremaine LLP, represent CNN.

The Ninth Circuit noted CNN's point that no published appellate decision has interpreted the DPA to apply to a website unrelated to a brick-and-mortar business.

# Supreme Court Upholds Defamation Immunity for Airlines That Report Potential Threats

## By Jerrold J. Ganzfried

In <u>Air Wisconsin Airlines Corp. v. Hoeper</u>, the Supreme Court upheld an airline's immunity from defamation liability for reporting a potential security threat to the Transportation Security Administration (TSA). Although the case arose in the context of statutory immunity under the Aviation and Transportation Security Act (ATSA), it has multiple significant implications for First Amendment doctrine.

The Court's January 27, 2014 decision (written by Justice Sotomayor) was unanimous in holding that ATSA immunity cannot be denied unless the challenged communication is materially false. In addition, the Court explained – again unanimously – that "materially false" means that there must

be "a substantial likelihood that a reasonable security officer would consider [the alleged falsehood] important in determining a response to the supposed threat."

Although the Court was divided on the application of that standard to the record in this case, a majority of six Justices held – as a matter of law — that judgment should be entered in favor of the defendant airline because any falsehood or inaccuracy in the report to TSA "would not have affected a reasonable security officer's assessment." Three Justices dissented in part, but only

with respect to the application of the settled legal standard to the particular facts of this case.

Congress enacted ATSA to strengthen the security of the nation's aviation system after September 11, 2001. The Act requires airlines to report certain information to TSA, which is charged with the responsibility of assessing potential threats. To ensure that all relevant threat information reaches TSA, the Act confers immunity from all liability, including liability for state-law defamations, to airlines and their employees. The broad statutory immunity is subject only to an exception for statements made "with actual knowledge that the disclosure was false, inaccurate or misleading," or "with reckless disregard as to the truth or falsity of that disclosure." 49 U.S.C. §44941(b).

This case arose from statements Air Wisconsin made to TSA in 2004, expressing concern over the planned air travel of an about-to-be-terminated employee. The employee, a pilot, was a Federal Flight Deck Officer (FFDO) who was authorized to carry a firearm. He had failed three aircraft proficiency tests for certification on the new aircraft in Air Wisconsin's fleet. On a fourth attempt, with termination of his employment inevitable in the event of failure, the pilot became upset, directed angry outbursts at the test administrator, and left to take a flight home without successfully completing the certification process.

> Following a discussion among several supervisory personnel, an Air Wisconsin manager communicated to TSA that the pilot "was an FFDO who may be armed," that the airline "was concerned about his mental stability and the whereabouts of his firearm," and that an "unstable pilot . . . was terminated today." Based on those communications, the sued pilot Air Wisconsin for defamation. Following a jury verdict awarding the pilot more than \$1 million, the judgment was affirmed by the Colorado Court of Appeals and the

Colorado Supreme Court. In upholding the verdict, the majority opinion for a divided Colorado Supreme Court stated that, "we need not, and therefore do not, decide whether the statements were true or false." The majority denied immunity based on a preference for Air Wisconsin to have used slightly different words to express legitimate concern about the pilot's behavior. In the court's view, instead of saying that the pilot was "terminated today," "was an FFDO who may be armed," and that airline employees were "concerned about his mental stability," Air Wisconsin would have been entitled to immunity if it had said that the pilot "knew he would be terminated soon," "was an FFDO (*Continued on page 7*)

statutory immunity under the Aviation and Transportation Security Act , it has multiple significant implications for First Amendment doctrine.

Although the case

arose in the context of

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pilot," and "had acted irrationally at the training three hours earlier and 'blew up' at the test administrators."

The United States Supreme Court granted certiorari to decide "whether ATSA immunity may be denied without a determination that the air carrier's disclosure was materially false." On that question, the Court was unanimous in holding that immunity could be denied only for falsehoods that were material. As the Supreme Court explained, Congress modeled the ATSA immunity provision on the language of *New York Times v. Sullivan*, the landmark defamation decision from 1964. For decades, the *New York Times* "actual malice" standard has embodied not only a requirement of falsity, but also a requirement that the falsity must be "material."

Since the Colorado jury in this case had not been instructed on the issue of materiality – and, thus, made no finding on this essential element – the Supreme Court unanimously held that the judgment could not be affirmed.

In the context of this case, the Court concluded that a falsehood "cannot be material for purposes of ATSA immunity, absent a substantial likelihood that a reasonable security officer would consider it important in determining a response to the supposed threat."

But the Court's analysis did not stop there, although this is the point at which the unanimity ended. A majority of six Justices

applied the legal standard to the facts and concluded that "even if a jury were to find the historical facts in the manner most favorable to Hoeper, Air Wisconsin in entitled to ATSA immunity as a matter of law." Three Justices disagreed on this point (Justice Scalia, joined by Justice Thomas and Justice Kagan) because, in their view, the factbound questions were better left to the lower courts and because the facts could be interpreted to support a finding for the plaintiff.

The disposition of this case could have significant ramifications for defamation law generally. Of particular interest is the Court's focus, in it materiality analysis, on the "relevant" audience. That is, based on an objective standard, would the difference between the actual facts and the challenged inaccuracy be a matter of consequence to the relevant reader or listener?

As second point of interest for future cases flows from the Court's conclusion that Air Wisconsin is entitled to judgment as a matter of law. Based on this decision, it may become marginally easier for defamation defendants to obtain dismissal or summary judgment. Even where three members of the Court considered the facts to be susceptible of supporting plaintiff's claim, the majority concluded -- and, therefore, the Court *held* – the case could be terminated as a matter of law with judgment in favor of the defendant, Air Wisconsin.

Jerrold J. Ganzfried is with the Washington D.C. office of

Holland & Knight LLP. He and Judith R. Nemsick, with the firm's New York City office, filed an amicus curiae brief for DRI-The Voice of the Defense Bar in support of Air Wisconsin. Petitioner Air Wisconsin was represented by Jonathan F. Cohn, Peter D. Keisler, and Eric D. McArthur of Sidley Austin LLP in Washington D.C.; Donald Chance Mark, Jr. of Fafinski Mark & Johnson, P.A. in Eden Prairie, MN; and David H. Yun of Jaudon & Avery LLP in Denver, CO. Respondent William L. Hoeper was represented by Kevin K. Russell and Thomas C. Goldstein of Goldstein & Russell, P.C. in Washington, D.C.; Scott A McGath and Jason P. Rietz of Overturf McGath Hull & Doherty, P.C. in Denver,

CO; and Pamela S. Karlan and Jeffrey L. Fisher of The Stanford Law School Supreme Court Litigation Clinic in Stanford, CA.

An amicus curiae brief supporting Air Wisconsin was filed by Robert Corn-Revere, Ronald G. London and Alison B. Schary of the Washington, D.C. office of Davis Wright Tremaine LLP, Rochelle L. Wilcox of the firm's Los Angeles office, and Bruce D. Brown and Gregg P. Leslie of Arlington, VA on behalf of The Reporters Committee for Freedom of the Press and Fifteen News Media Organizations. An amicus curiae brief supporting Air Wisconsin was filed by Gary L. Bostwick, Jean-Paul Jassy and Kevin L. Vick of Bostwick & Jassy LLP in Los Angeles, CA.

Of particular interest is the Court's focus, in it materiality analysis, on the "relevant" audience. That is, based on an objective standard, would the difference between the actual facts and the challenged inaccuracy be a matter of consequence to the relevant reader or listener?

# Seventh Circuit Reinstates Trademark and Publicity Claims Over Sports Illustrated Page

Supermarket's Page Congratulating Michael Jordan Ruled Commercial Speech

The Seventh Circuit this month held that a magazine page designed by a Chicago-area supermarket to commemorate Michael Jordan's induction into the Basketball Hall of Fame was commercial speech and potentially actionable. *Jordan v. Jewel Food Stores, Inc.*, No. 12-1992 (7<sup>th</sup> Cir. Feb. 19, 2014) (Flaum, Skyes, Randa, JJ.).

The Court reinstated Jordan's trademark and publicity

claims, which had been dismissed by the trial court on First Amendment grounds. The Court wrote that "The notion that an advertisement counts as 'commercial' only if makes an appeal to purchase a particular product makes no sense today, and we doubt it ever did."

Instead looking at the content and context of the page, the Court held it was "a form of image advertising aimed at promoting the Jewel-Osco brand."

### Background

In 2009, *Sports Illustrated* published a special commemorative issue to honor Michael Jordan on the occasion of his induction into the Basketball Hall of Fame.

Publisher Time Inc. asked businesses to design pages paying tribute to Jordan for the special issue.

Defendant Jewel-Osco, a Chicago-area supermarket chain, designed a page for the issue. Time did not charge for the page, instead, Jewel-Osco agreed to sell the commemorative issue at its stores in a special display for approximately three months. The magazine page entitled "A Shoe In!" contains a pair of basketball shoes with Jordan's number 23, the store's logo, and the following message:

After six NBA Championships, scores of rewritten record books and numerous buzzer beaters, Michael Jordan's elevation in the Basketball Hall of Fame was

> never in doubt! Jewel-Osco salutes #23 on his many accomplishments as we honor a fellow Chicagoan who was "just around the corner" for so many years.

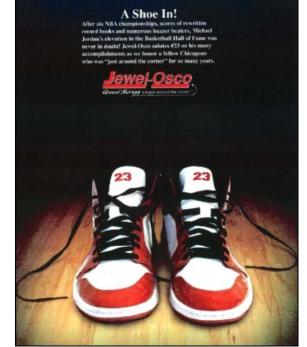
"Just around the corner" was part of the store's slogan: "Good things are just around the corner."

Jordan sued Jewel-Osco in state court, alleging the unauthorized use of his name violated the Illinois Right of Publicity Act, the Lanham Act, the Illinois Consumer Fraud and Deceptive Trade Practices Act, and the common law tort of unfair competition. Jewel-Osco removed the case to federal court. (Jewel-Osco also filed a third-party suit against Time for indemnification

and contribution.)

The district court held that the page was not commercial speech. *See <u>Jordan v. Jewel Food Stores</u>*, No. 10 C 340, 2012 WL 512584 (N.D. Ill. Feb 15, 2012) (Feinerman, J.). The court later granted summary judgment to Jewel-Osco,

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holding that Jordan's lawsuit was barred by the First Amendment.

Analyzing whether the page was commercial speech, the district court concluded that the page celebrated Jordan, the page did not highlight the supermarket, and the logo merely identified the speaker. Using part of the store's slogan was simply a "play on words." "It is difficult to see how Jewel's page could be viewed, even with the benefit of multiple layers of green eyeshades, as proposing a commercial transaction."

The district court also rejected Jordan's claim that the supermarket's profit motive made the page commercial speech. Anything done by a corporation presumably has a profit motive, thus the economic motivation for speech is insufficient to automatically make it commercial speech. Finally, even if the page contained some commercial elements, "that element is intertwined with and overwhelmed by the message's noncommercial aspects, rendering the page noncommercial as a whole." *Citing Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001).

#### Seventh Circuit Reverses

Reversing, the Court began by observing that whether speech proposes a commercial transaction is only a starting point in determining whether the speech is "commercial" for First Amendment purposes.

We know from common experience that commercial advertising occupies diverse media, draws on a limitless array of imaginative techniques, and is often supported by sophisticated marketing research. It is highly creative, sometimes abstract, and frequently relies on subtle cues. The notion that an advertisement counts as "commercial" only if it makes an appeal to purchase a particular product makes no sense today, and we doubt that it ever did. An advertisement is no less "commercial" because it promotes brand awareness or loyalty rather than explicitly proposing a transaction in a specific product or service. Applying the "core" definition of commercial speech too rigidly ignores this reality. The Court found it clear that Jewel-Osco's page had an unmistakable commercial function: to enhance its brand in the minds of consumers. The district court erred in looking at whether the page invited readers to buy a specific product. Instead, the page promotes brand loyalty and invites consumers to buy whatever they need from their local Jewel-Osco store.

The Seventh Circuit panel also faulted the district court for finding that the use of defendant's logo on the page merely identified it as the speaker. This ignored the significance of the logo – and the store slogan – as advertising tools. A contrary holding, the Court explained, would have "sweeping and troublesome implications for athletes, actors, celebrities, and other trademark holders seeking to protect the use of their identities or marks."

The district court also erred in applying the "inextricably intertwined" doctrine. That doctrine properly understood:

applies only when it is legally or practically impossible for the speaker to separate out the commercial and noncommercial elements of his speech. In that situation the package as a whole gets the benefit of the higher standard of scrutiny applicable to noncommercial speech. But simply combining commercial and noncommercial elements in a single presentation does not transform the whole into noncommercial speech.

The Ninth Circuit in *Hoffman* simply got it wrong, according to the panel. "[N]o law of man or nature prevented the magazine from publishing a fashion article without superimposing the latest fashion designs onto film stills of famous actors." Likewise, according to the Court, any noncommercial elements in the Jewel-Osco page could have been separated out. But how those non-commercial elements can be published as protected speech remains a puzzle given the Court's encompassing view of "image advertising."

The case was remanded to the district court to consider the merits of the Lanham Act and related state law claims.

Michael Jordan is represented by Clay A. Tillack, Frederick J. Sperling, and Sondra A. Hemeryck of Schiff Hardin LLP in Chicago. Jewel is represented by Anthony Richard Zeuli of Merchant & Gould P.C. in Minneapolis and David E. Morrison and Oscar L. Alcantra of Goldberg Kohn Ltd. in Chicago.

# **Oklahoma Appeals Court Affirms Dismissal of Libel in Fiction Claim**

Plaintiff Can't Draw Blood for Same Named Character in Vampire Novels

In an apparent case of first impression in Oklahoma, an appellate court has affirmed dismissal of a "libel in fiction" claim. *Bates v. Cast*, No. 111739 (Okla. App. Dec. 5 2013). The court ruled that plaintiff did not have an actionable claim for defamation over a same-named character in a series of

vampire novels. The plaintiff also lost her claims for invasion of privacy, misappropriation of her name, false light and intentional infliction of emotional distress.

### Background

Plaintiff Erin Bates, now in her late 20s, met defendant Phyllis Cast at the high school in which Cast was a teacher and Bates was a student. Bates also worked for Cast as a personal assistant for a time. Cast and her daughter, Kristin Cast, co-authored a series of books about "vampyres" published by St. Martin's Press. One of the characters in the series is named Erin Bates.

Bates sued the authors and St. Martin's Press for defamation and a variety of privacy claims. Plaintiff alleged the book character was "of and concerning" her because, among other things, at a promotional event, Phyllis

Cast said that there was a real Erin Bates living in Tulsa and that many of the characters were based on former students. Bates also claimed she was injured by negative online comments made by book fans about the vampire character.

Defendants argued that the Erin Bates character was fictional and, as a matter of law, the statements regarding this character could not be defamatory and an invasion of privacy. Bates, however, argued that the promotional event showed that the book character was about her. Bates also suggested that the negative online comments showed the defamatory sting of the statements about the character to her reputation.

The defendants also argued that the plaintiff could not prove an essential element of her name misappropriation

> claim: that the name of Erin Bates had any inherent, intrinsic or commercial value. Bates countered that alleging value in her name was not required to survive a motion to dismiss. The defendants also argued that using Bates' name for a fictional character was not so extreme and outrageous to constitute intentional infliction of emotional distress.

The trial court granted a motion to dismiss against all of Bates' claims.

### **On Appeal**

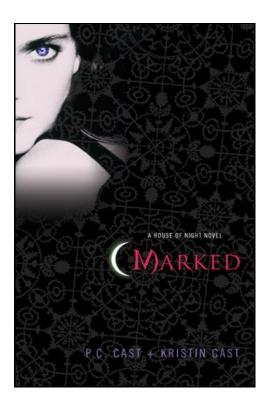
The Oklahoma Court of Civil Appeals first noted that there is no Oklahoma precedent about a claim of defamation arising from a work of pure fiction.

Under the Restatement (Second) of Torts, a plaintiff can be defamed by a work of fiction if the plaintiff is sufficiently identified in the fictional work, and a reasonable reader of the

work would understand the fictional character to refer to the plaintiff. The Court noted that other jurisdictions have held that plaintiffs in libel in fiction cases must show that, in "viewing the work of fiction as a whole, the fictional character depicts the plaintiff, and the test is whether a reasonable reader would understand" that the depiction of the fictional character was how the plaintiff conducted herself.

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Here, though, the use of former students' names for characters and the online comments about the Erin Bates character do not point to "plaintiff as the subject of scorn," the Court said. "Considering in its totality, defendants' fictional work of fantasy about a school for vampyres, populated by vampyre students, we are hard-pressed to say, even viewing the evidentiary materials in the light most favorable to plaintiff, that any reasonable reader would conclude that the book's fictional 'Erin Bates' character actually depicts plaintiff conducting herself as depicted in the book," the Court wrote. The Court also rejected the false light and emotional distress claims. The novel's subject matter is "utterly fictitious and fantastic," so there can be nothing so "utterly false or outrageous" in the novel to support those claims.

Finally, the court agreed that Bates did not need to plead value in her name to state a claim for misappropriation. But her claim failed because no rational reader would conclude an otherworldly book about vampires was a depiction of plaintiff.

Plaintiff was represented by Daniel E. Smolen, Smolen, Smolen & Roytman, P.L.L.C., Tulsa, OK. Defendants were represented by Robert D. Nelon and Jon Epstein, Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C, Oklahoma City, OK.

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February 2014

# MLRC MediaLawLetter

# California Court Applies Anti-SLAPP Statute in Case Arising From Reader Comments

# By Matthew L. Schafer

In a published opinion, the California Court of Appeal for the Fourth District affirmed the striking, under the state's anti -SLAPP statute, of a lawsuit against the *Orange County Register* that arose from a back-and-forth between two readers who posted comments to a *Register* article. <u>Hupp v.</u> <u>Freedom Comme'ns, Inc.</u>, 221 Cal. App. 4th 398, 163 Cal. Rptr. 3d 919 (2013).

The opinion appears to be only the second of its kind in California, reaffirming that website hosts can obtain dismissal of claims arising from third party comments under the state's

anti-SLAPP statute. (The other is *Wong v. Tai Jing*, 189 Cal. App. 4th 1354 (2010), where the court held that the website Yelp, which hosted a negative review about the plaintiff dentist, was entitled to the anti-SLAPP statute's protections).

### Background

The plaintiff, Paul Hupp, filed his complaint against both the *Register* and a fellow *Register* reader, Mike Bishop, who engaged in the "comment war" with Mr. Hupp. Mr. Hupp and Mr. Bishop both

posted comments, along with several others, to a *Register* story about the propriety of Orange County's public pensions. The two men disagreed with each other, and the online argument between them escalated. According to Mr. Hupp, Mr. Bishop levied "personal attacks" at him and posted private information about him in violation of the *Register*'s User Agreement. He complained about Mr. Bishop asking him if he was "a vexatious litigant" and if he would "abuse our courts for [his] own purposes," among other comments. As an example of what he meant, Mr. Bishop posted a link to another website containing a Ninth Circuit brief Mr. Hupp had filed calling several judges "ass clowns," "bitches," and "cock suckers."

Unlike in many cases brought against online commenters, who often post anonymously, the plaintiff knew Mr. Bishop's identity. Mr. Bishop made the comments to the *Register*'s website by using its embedded "Facebook Comments" plugin, where users can make comments to news articles after signing into Facebook. Because Facebook has a "real name" policy for its users, the name and photo of "Mike Bishop" was reflected with each of his posts. Mr. Hupp was still forced to subpoena Facebook, however, to obtain Mr. Bishop's address for service of process, which he successfully did.

> Mr. Hupp then sued Mr. Bishop for invasion of privacy, violating the User Agreement, intentional infliction of emotional distress, and negligence. He asserted the same claims against the *Register* for allegedly refusing to remove the comments (which refusal he said also violated the User Agreement), and added a claim for fraud contending that the Register's User Agreement, which prohibits certain kinds of posts, fraudulently induced him into posting on the website.

### **Anti-SLAPP Motion to Strike**

The *Register* filed a special motion to strike under California's anti-SLAPP statute, which provides for early dismissal and attorney's fees in cases arising from a defendant's conduct "in furtherance of [its] right of . . . free speech" on a matter of public interest. *See* Cal. Civ. Proc. Code § 425.16(b)(1).

It argued that its conduct in publishing a story about public pensions and hosting reader comments that discussed that issue, and the issue of vexatious litigants, qualified for the anti-SLAPP statute's protection – no matter how Mr. Hupp labeled his claims – because it facilitated free speech (Continued on page 13)

The opinion appears to be only the second of its kind in California, reaffirming that website hosts can obtain dismissal of claims arising from third party comments under the state's anti-SLAPP statute.

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#### (Continued from page 12)

and the exchange of ideas and opinions on the Internet. In support, the *Register* filed lengthy docket sheets and two federal court orders adjudicating the plaintiff a vexatious litigant. The court agreed with the *Register*, holding that "[m]aintaining a forum for discussion of issues of public interest is a quintessential way to facilitate [free speech] rights." *Hupp*, 221 Cal. App. 4th at 405, 163 Cal. Rptr. 3d at 924.

The court then went on to dismiss the action because Mr. Hupp could not establish a probability of prevailing on the merits as required by the statute. Citing Barrett v. Rosenthal, 40 Cal. 4th 33, 51 Cal. Rptr. 3d 55 (2006), the court held that Section 230 of the Communications Decency Act "prohibits 'distributor' liability for Internet publications" and "completely bars this type of lawsuit against an Internet publisher." In reaching this conclusion, the court implicitly rejected Mr. Hupp's argument that because his action was fundamentally one for "contract/quasi contract," it did not "arise from speech" as required for the anti-SLAPP statute to apply and did not "treat" the Register as a "publisher" as would be required for the Register to be entitled to Section 230 immunity.

The court's holding is noteworthy given the apparent tension between its two fundamental holdings. On the one hand, the court concluded that the *Register* was acting in furtherance of its constitutional free speech rights in connection with a public issue, thus satisfying the first prong of the anti-SLAPP analysis. On the other hand, the court held that, because the challenged speech was posted by a third party, and not the *Register* itself, the newspaper was entitled to protection under Section 230. The court was untroubled by this tension, however, properly recognizing that the liberty of circulation is as fundamental to exercising the right of free speech as the speech itself.

The *Register* obtained an award of its attorneys' fees against Mr. Hupp under the anti-SLAPP statute's fee-shifting provision. Mr. Hupp's appeal of that award is pending.

Freedom Communications, Inc., the publisher of the Orange County Register, was represented in this matter by James E. Grossberg and Ashley I. Kissinger of Levine Sullivan Koch & Schulz, LLP, who were assisted by law clerk Matthew L. Schafer. The plaintiff represented himself.



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# MLRC MediaLawLetter

# California Appeals Court Affirms Denial of Celebrity Website's SLAPP Motion Court Reinstates Publicity Claims

The California Court of Appeal affirmed the denial of an anti-SLAPP motion made by celebrity website X17 seeking to strike defamation and privacy claims over videotaping Lindsey Lohan and plaintiff, Lohan's sobriety coach. <u>Dice v.</u> X17, Inc., B243910 (Cal. App. Jan. 10, 2014) (unpublished). The court held there was sufficient evidence to show that the video falsely suggested the parties engaged in a drug transaction to withstand a motion to strike. The Court also reinstated plaintiff's right of publicity claim, finding evidence of knowing falsity sufficient to overcome defendant's newsworthiness defense.

### Background

Plaintiff Peter Dice is actress Lindsey Lohan's sobriety coach. Defendant X17 is a celebrity news and gossip website. Photographers affiliated with X17 shot video of Lohan outside of a Venice Beach restaurant sitting on a bench with Brice and another man. The video shows the men studying and exchanging a small plastic bag; and later Lohan handing another man something which he puts in his pocket. The video records the photographers saying the words "cocaine" and "droga" while they were recording the transaction.

X17 published the video and still

photographs with the statements, "Lindsay Lohan Makes Purchase in Venice," "Lindsay makes purchase on the street in Venice," and "EXCLUSIVE VIDEO—LINDSAY LOHAN MAKES A PURCHASE ON VENICE STREET." The accompanying article also stated that, "At one point, Lindsay can be seen taking a bag from a friend. Her friend checks out the contents of the bag and eventually, Lindsay takes a different bag from another guy and hands over the cash to pay for it."

The bag did not contain drugs but "healing crystals."

Dice sued X17 and its owner, Francois Navarre, for defamation, violation of his right of publicity and intentional

infliction of emotional distress. Defendants moved to strike under California's anti-SLAPP statute.

In considering the anti-SLAPP motion, the trial court first concluded that the publication was a matter of a public interest because it involved possible drug use by a celebrity. The court held that plaintiff was a private figure. "Approaching Lindsay Lohan on a busy public street, in front of paparazzi, with a bag containing a crystalline substance can be fairly characterized as a regrettable decision—but not one which transformed plaintiff into a limited public purpose figure (or the rare 'involuntary' limited public purpose public figure).""

There was sufficient evidence that the defendants were negligent in their publication for the defamation claim to proceed, but the court dismissed plaintiff's publicity claim under the newsworthiness defense.

### **Anti-SLAPP** Appeal

The California Court of Appeal affirmed the denial of the anti-SLAPP motion and also reinstated the right of publicity claim.

First, the Court agreed that Dice was a private figure. While it was foreseeable that he would be photographed in the ambit of his celebrity client, "his conduct in

approaching her and handing her companion a small plastic bag, however, does not show an attempt to influence the resolution of a public controversy or voluntarily invite attention and comment regarding a public controversy. Instead, Dice wants no part in any public controversy concerning Lohan and drug use and never sought to influence public opinion on the subject."

The court further concluded that the words "cocaine" and "droga" on the recording were statements of fact not questions. While "cocaine" was stated in an inquisitive manner, "droga" was repeated without such a tone and *(Continued on page 15)* 

evidence to show that the video falsely suggested the parties engaged in a drug transaction .... The Court also reinstated plaintiff's right of publicity claim, finding evidence of knowing falsity sufficient to overcome defendant's newsworthiness defense.

There was sufficient

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suggested a statement of fact. Thus plaintiff could have been defamed by the alleged factual assertion that he was involved in an illegal drug purchase.

Reinstating the right of publicity claim, the Court agreed that Dice's claim for violation of publicity rights arose from protected activity and that discussion of criminal activity is generally always a matter of concern to the public. But the court held that Dice showed a probability of prevailing on the claim. He presented sufficient evidence to overcome the news exception for liability for violating publicity rights with evidence that defendants published the statements knowing they were false or with reckless disregard for their truth or falsity.

"The video recording, viewed in its entirety, arguably provides no reasonable support for the statement that Lohan made a purchase or, specifically, that she purchased illicit drugs either from the man in the cap or from Dice," the Court concluded. "We conclude that the video recording itself is evidence that the statements made in the recording and the article were published with reckless disregard for their truth or falsity."

The plaintiff is represented by the Law Offices of James R. Balesh. Christopher W. Alredge and John Tehranian represent the defendants.

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# MLRC MediaLawLetter

# Video Camera Operator Shown in Porn DVD Wins Right of Publicity Claim

# But Damages Limited to \$1,000

The Illinois Appellate Court ruled that a plaintiff, who filmed and edited porn DVDs, is entitled only to a statutory award of \$1,000 because he did not establish that the profits earned from that adult material derived from the unauthorized use of his image. *Doe v. Flava Works, Inc.*, No. 1-12-1491 (Ill. App. Ct. Feb. 4, 2014).

#### Background

In 2005, the plaintiff worked as a video camera operator, videographer and video editor on a production of two adult DVDS. The plaintiff's face, body and voice appeared in the footage while he was acting in the capacity of a camera operator and director. The plaintiff asserted that he never gave the defendants permission to use his likeness or voice, including footage of his face and body, in the DVDs.

The plaintiff said the defendants violated Illinois' Right of Publicity Act because the DVDs included his likeness and his voice without his consent and were used for commercial purposes. The plaintiff also claimed that his privacy was violated by the public disclosure of a private fact: his occupation in the adult film industry.

The plaintiff had sought approximately \$70,000 in damages based upon the profits made from the DVD sales, as well as punitive damages. The plaintiff did not seek actual damages.

During a bench trial, the trial judge found that the Right of Publicity Act was violated by the inclusion of the plaintiff's voice and images, but that the plaintiff was only entitled to nominal damages. The judge also said she was "'hard-pressed to say the plaintiff prevailed by getting a thousand dollars," and, in her discretion, attorney fees should not be awarded.

#### **On Appeal**

In an unpublished decision, Justice John B. Simon, writing on behalf of the court, held that the trial court did not err by limiting plaintiff's recovery under the Right of Publicity Act.

One of the ways that the Act makes parties liable is for "profits derived from the unauthorized use," Judge Simon said. But under the statute's plain language, a plaintiff is only entitled to profits from the unauthorized use of his or her image or likeness, not "profits derived from a product in which the unauthorized use is found. As such, the plaintiff was required to establish a connection between the DVD profits and the improper use of his identity and show that the DVD profits were directly attributable to the unauthorized use of his image."

Separately, the court held that the trial court did not abuse its discretion by denying the plaintiff and his counsel attorney fees. A prevailing party is not automatically entitled to receive attorney fees. "While plaintiff is technically the prevailing party in this case, he has only achieved de minimis success," the court said. "Plaintiff has not proved that he suffered any actual damages from the use of his identity or that defendants derived any profits from the unauthorized use."

The court also rejected the defendants' appeal of their unsuccessful motion for a directed verdict, finding they waived that issue by presenting evidence in support of their defense after the trial judge ruled against them.

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# Defamation and Privacy Suit Over "Double Dipping" Doctor Headline Dismissed

Reports Were True; Subject Matter Not Private

## By Natalie Spears and Kristen Rodriguez

The Circuit Court of Cook County recently granted a motion to dismiss a defamation, false light, tortious interference with business relationships, and publication of private facts complaint brought against the Chicago affiliate of NBC, The Chicago *Sun-Times*, and the Better Government Association ("BGA") by the former Chief of Orthopedic Surgery at a public Cook County hospital. *Kapotas v. BGA*, No. 12 L 09864 (III. Cir.)

### Background

The case, involved a series of reports in which the defendants exposed that the plaintiff had continued to receive paychecks via direct deposit while he was supposed to be on an unpaid leave. The County admitted that the \$100,000 in overpayments were a "clerical error." Plaintiff alleged that he was unaware of the payments and that he promptly refunded the money to the County when it was brought to his attention.

The defendants reported these facts in a series of broadcasts and articles that were titled "Cook County Doc Gets Big Payout For No Work" and "Cook County Doctor Overpaid \$80,000 While On Leave." Subsequently, after the Illinois Inspector General reviewed the circumstances surrounding the overpayments, NBC and BGA did a follow up broadcast and posted an article titled "Double Dipping Doctor Still on Inspector General's Radar."

In his lawsuit, plaintiff alleged that defendants had defamed him and placed him in a false light by accusing him of theft and embezzlement, and by insinuating he was involved in a scheme to defraud the County. Plaintiff further claimed that as a result of the reports, a recruiter for another hospital did not offer him an interview and that he no longer could expect business relationships to form with patients or future potential employers. Finally, plaintiff claimed that the articles disclosed "private facts" regarding his salary and the payroll at the County Hospital.

### Motion to Dismiss Granted

In an extensive order granting the defendants' motion to dismiss, Judge Daniel T. Gillespie agreed with defendants that based on plaintiff's own allegations, all of the articles' statements were in fact true, concluding that "Plaintiff's own inferences from the true statements in the news articles do not transform them into false statements actionable as defamation."

The court also adopted defendants' additional arguments that the articles did not impute that plaintiff had committed a crime or that he lacked ability or integrity in his profession, as required to state a claim for defamation *per se* under Illinois law. The court went further to find that the "double dipping" reference in the headline of one of the articles, when read in conjunction with the remainder of the article, also could be innocently construed as "a figurative way to summarize the content regarding overpayment to the Plaintiff."

As for the remainder of the claims, the court dismissed the false light allegations because plaintiff "failed to allege the most basic element of [the claim]: that the statement was false."

The truthfulness of the articles also led the court to dismiss the tortious interference claim because the claim was based solely on the alleged defamatory statements.

Finally, the court dismissed the publication of private facts count because as a public employee, the plaintiff's salary was public information, and because the "financial dealings of a government institution are of legitimate public concern" and not "private matters."

Kapotas has filed a notice of appeal.

Natalie J. Spears, and Kristen C. Rodriguez, of Dentons in Chicago, represented NBC and BGA. Erik Bierbauer of NBCUniversal also represented NBC. The Chicago Sun-Times was represented by Damon Dunn and Seth Stern, of Funkhouser Vegosen Liebman & Dunn in Chicago. Plaintiff James Kapotas was represented by Scott Larsen of Chicago.

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MLRC MediaLawLetter

# **Court Dismisses Dentist's Defamation Case on Statute of Limitations and Truth Grounds**

## By Matthew L. Schafer

In an order issued in January, a Denver District Court judge dismissed claims against KMGH-TV arising from the posting online of a news report discussing medical files found strewn about a local parking lot. *See* Order Granting Defendant Scripps Media Motion to Dismiss, *Larscheid v. Scripps Media, Inc.*, No. 13-cv-33746 (Colo. Dist. Jan. 13, 2014). The court found that plaintiff's defamation claim was time barred and dismissed the other tag-along claims because "even when viewed in the light most favorable to Plaintiff, the Complaint fail[ed] to sufficiently allege that the report was false."

A dentist, Daniel Larscheid, filed the complaint against KMGH-TV after it reported that confidential patient records from Larscheid's former dental office were found scattered by a grocery store's dumpster. According to Larscheid, who had sold his dental practice prior to the incident, the report falsely implied that he had been negligent in storing his records and was the subject of a police investigation into the incident. He asserted claims for defamation, disparagement, outrageous conduct, and intentional interference with prospective economic advantage. He also filed a motion for a preliminary injunction to force KMGH-TV to remove the online version of the report from the TV station's website.

KMGH-TV moved to dismiss the defamation claim on the ground that it was barred by Colorado's one-year statute of limitations for such claims. The station argued that because the defamation claim was barred, the remaining claims, all of which stemmed from the report, should similarly be barred. KMGH-TV also argued that the report was both true and privileged as a fair report of an ongoing law enforcement investigation.

The court held that the defamation claim was barred by the statute of limitations. Citing *Pippen v. NBCUniversal Media*, *LLC*, 734 F.3d 610, 615 (7th Cir. 2013), the court rejected Larscheid's argument that the availability of the report online amounted to a recurring publication and held that the single publication rule applied. The court also rejected Larscheid's argument that he did not discover the extent of his injury until less than a year before he filed suit when he allegedly discovered he was unable to obtain employment. Even if Larscheid failed "to fully comprehend the extent of the injury" until long after publication, the court explained, such uncertainty does not toll the statute of limitations when a plaintiff is aware of the challenged statements at the time of publication.

The court went on to hold that Larscheid's tag-along claims were not subject to the one-year statute of limitations for libel claims, but nonetheless found that, construed in a light most favorable to the plaintiff, the report was true and, therefore, the tag-along claims were barred by the First Amendment. "The news report did not state that police were investigating Plaintiff; rather it stated that the police were investigating how the documents came to be dumped in public." As such, the court held, it could not form the basis of a disparagement claim. The court then dismissed the outrageous conduct and tortious interference claims "because they [were] predicated on the publication of constitutionally protected statements." *Citing New York Times, Co. v. Sullivan*, 376 U.S. 254, 269 (1964). The court did not reach the fair report argument.

KMGH-TV filed an application for mandatory attorney fees under § 13-17-201, C.R.S., which allows defendants to recover reasonable attorney fees in an action arising from alleged injuries to a person as the result of a tort where such an action is dismissed prior to trial under Rule 12 of the Colorado Rules of Civil Procedure. The plaintiff intends to appeal the district court order dismissing his complaint.

Scripps Media, Inc. d/b/a KMGH-TV was defended in this matter by Steven D. Zansberg, Ashley I. Kissinger and Matthew L. Schafer of Levine Sullivan Koch & Schulz, LLP. The plaintiff was represented by Steven A. Klenda, Esq. of Adroit Advocates, LLC.

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# Third Circuit Affirms False Light Damage Award Over Medical Association Newsletter

The Third Circuit affirmed a \$196,000 false light damage award in favor of a medical doctor over a report in the American Association of Orthopaedic Surgeons newsletter reporting on a grievance proceeding against the plaintiff. *Graboff v. American Academy of Orthopaedic Surgeons*, No. 13-2229 (3d Cir. Feb. 20, 2014) (Jordan, Vanaskie, Greenberg, JJ.).

In a published non-media private figure decision, the Court affirmed the jury verdict which found the article was not false, but portrayed plaintiff in a false light and awarded damages. Rejecting defendant's argument that the verdict was inconsistent, the Court reasoned that the verdict form reflected the jury's conclusion that plaintiff was either defamed or placed in a false light because the article omitted facts and therefore harmed plaintiff.

### Background

The plaintiff is a California-based orthopaedic surgeon who also serves as an expert witness in medical malpractice cases. This case arose out of plaintiff's agreement to act as an expert witness for The Colleran Firm, a Philadelphia medical malpractice law firm. Plaintiff submitted a preliminary draft report that was used in litigation without plaintiff's approval. Plaintiff was later accused of violating professional standards because of an incomplete analysis in his draft expert report. He was suspended from the American Academy of Orthopaedic Surgeons (AAOS), and the grounds of the suspension were reported in the association's member newsletter.

Plaintiff sued the AAOS for a variety of claims, including defamation and false light. Those two claims ultimately went to trial. The gist of plaintiff's case was that the AAOS newsletter falsely implied he gave false and inaccurate court testimony.

The jury verdict form included the following questions and answers:

1) Did plaintiff prove that the statements in the newsletter about him were false? NO.

2) Did the newsletter portray plaintiff in a false light? YES.

3) Did AAOS act in reckless disregard of the truth or portray plaintiff in a false light? YES.

4) Did plaintiff prove that the statements in the newsletter that were false or portrayed him in a false light caused him harm? YES.

The jury then awarded \$196,000 in damages for injury and loss of business. The trial court treated the verdict as a false light award and denied defendant's post-trial motion for judgment as a matter of law or for JNOV.

On appeal from these post-trial motions, the AAOS argued the verdict was internally inconsistent because the jury's finding that the publication was not false contradicted the jury's finding that the article portrayed plaintiff in a false light.

### Third Circuit Decision

The Third Circuit held the verdict was not inconsistent and could have supported either a false light or defamation award under a libel by implication theory. To this extent, the trial court erred by treating the judgment as solely for false light, though the error was harmless.

The Court held that under Pennsylvania law literally accurate statements may be actionable in defamation "where the implication of the communication as a whole is false." Similarly in false light, a plaintiff can establish falsity by showing that a defendant "selectively printed or broadcast true statements or pictures in a manner which created a false impression."

In troubling dicta, the Court also observed that a jury instruction placing the burden of proving truth on defendant was proper. MLRC understands that the instruction was agreed to by defendant, which did not argue that the burden of demonstrating falsity in this case is properly placed on the plaintiff given the public interest in medical grievance proceedings pursuant to *Hepps v. Philadelphia Newspapers, Inc.*, 475 U.S.767 (1986).

Plaintiff was represented by Clifford Haines and Lauren Warner, Haines & Associates, Philadelphia, PA. Defendant was represented by Daniel Rhynhart and Christopher Guth, Blank Rome, Philadelphia, PA.

# MLRC MediaLawLetter

# Teacher's Libel Suit Over 'Sexual Predator' Label Dismissed

# Arbitrator's Disciplinary Ruling Not the Last Word on Truth

In a case the presiding judge said never should have been brought, a teacher listed in a news article as one of a number of "sex predators" allowed to keep working in New York City schools was not defamed as a matter of law. <u>Rosado v.</u> <u>Daily News, L.P.</u>, No. 157674/13 (N.Y. Sup. Jan. 31, 2014). The judge also ruled that an arbitrator's finding that the plaintiff did not act in a "sexual manner" was not binding on journalists for purposes of plaintiff's defamation suit.

#### Background

The *New York Daily News* published an article on June 23, 2013, titled, "Sex predators remain in NYC schools thanks to discipline system, group finds," and subtitled, "Many school workers busted for creepy behavior have been able to hang onto their jobs because of a cumbersome disciplinary process, says statewide group, the Parents Transparency Project." Plaintiff Peter Rosado was one of the teachers named in the story.

Three female students complained about inappropriate conduct by Rosado, a math teacher at a Bronx school. The article reported that "he was accused of tickling kids, rubbing their legs and bizarrely telling one girl, 'I slept with your mother last night."

The special commissioner for investigations for the New York City School District substantiated allegations that Rosado had inappropriately touched as well as made inappropriate comments to the students. The commissioner recommended Rosado be fired.

An arbitrator with the authority to discipline Rosado sustained the allegations that he had touched the hair of female students. The arbitrator concluded that it was an unwelcome sign of affection and that it continued even after students told Rosado to stop.

But the arbitrator also concluded that Rosado did not act in a sexual manner. The arbitrator did not terminate Rosado because of his contrition and a finding that the teacher was "very unlikely" to act that way again. However, the arbitrator fined Rosado \$10,000 for engaging in "misconduct serious enough to warrant discipline."

### **Motion to Dismiss**

Judge Arthur F. Engoron agreed with the newspaper that plaintiff's complaint must be dismissed as a fair and true report of an officially proceeding, because the headline was a "fair index" of the entire article, and because the term "sexual predator" is a non-actionable statement of opinion.

The plaintiff pointed out that the arbitrator found that he did not act in a sexual manner, but the defendants countered that the entire point of the article was that the arbitration system allows teachers who engage in "creepy" behavior to remain in classrooms.

The judge said the opinion of the arbitrator was not binding on the newspaper, considering plaintiff's misconduct in touching female students. "The arbitrator had the final word in the disciplinary hearing; but his finding is not binding on journalists, who, in fact, did not mischaracterize his conclusions," Judge Engoron said.

While it is problematic to imply that Rosado is a sexual predator and "one can feel sorry for what happened to him," a newspaper is permitted some drama in headlines, as long as they a fair index of the article in its entirety. "Sex Predators' surely is more dramatic than delicate, and meant to grab the reader's attention, but that is exactly what the case law allows."

The judge also concluded the disciplinary proceeding was an official matter, so the allegations in the underlying proceeding were privileged. The newspaper's account was a fair and true report of that proceeding under the case law's "unexacting standard" for fair reports composed in good faith under deadline.

The Daily News was represented by Matthew A. Leish, vice president and assistant general counsel. Rosado was represented by Kushnick Pallaci of Melville, NY.

MLRC MediaLawl	Letter
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# Climate Scientist's Libel Suit Over Criticism Survives Motion to Dismiss

# Column Could Reasonably Be Read to Accuse Plaintiff of Fraud

A high profile libel suit filed by climate scientist Michael Mann against global warming skeptics survived a motion to dismiss. *Mann v. National Review*, No. 2012 CA 8263 B (D.C. Sup. Jan. 22, 2014). The D.C. Superior Court denied a motion to strike the complaint under the District's anti-SLAPP statute, or for failure to state a claim, finding that reasonable readers could find plaintiff was accused of engaging in fraudulent research which "can be proven true or false."

### Background

Michael Mann is a Professor of Meteorology at Penn State. After email exchanges between climate scientists were leaked to the public, the University investigated and cleared Mann over allegations that he had manipulated climate data.

At issue is a <u>blog post</u> by Rand Simberg of the Competitive Enterprise Institute and its subsequent republication in a National Review <u>blog post</u> by conservative columnist Michael Steyn.

Simberg characterized the Penn State investigation as a "whitewash" and analogized it to Penn State's in-house investigation over the Jerry Sandusky child molestation scandal. Simberg wrote:

Mann could be said to be the Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet.

Michael Steyn later reprinted this comment and added:

Not sure I'd have extended that metaphor all the way into the locker-room showers with quite the zeal Mr Simberg does, but he has a point. Michael Mann was the man behind the fraudulent climate-change "hockey -stick" graph, the very ringmaster of the tree-ring circus. Mann sued *National Review*, Steyn, CEI, and CEI's Rand Simberg for defamation. The first complaint survived a motion to dismiss last year in a decision by D.C. Superior Court Judge Natalia Combs Greene. Mann amended his complaint to add claims for libel per se against all the defendants. Defendant moved to dismiss under the D.C. anti-SLAPP statute, and or for failure to state a claim.

### Motion to Dismiss Denied

Denying the motions, Judge Frederick H. Weisberg noted that some of the statements, including the comparison of plaintiff to Jerry Sandusky, are opinion and/or rhetorical hyperbole.

But "Accusing a scientist of conducting his research fraudulently, manipulating his data to achieve a predetermined or political outcome, or purposefully distorting the scientific truth are factual allegations. They go the heart of scientific integrity. They can be proven true or false."

A reasonable reader, including those not within the scientific community, could interpret the statement, and its republication in the *National Review*, "as an allegation that Dr. Mann had committed scientific fraud, which Penn State University then covered up, just as some had accused the University of covering up the Sandusky scandal," the judge further noted. In addition to republishing Simberg's post, Steyn himself described Mann as "the man behind the fraudulent climate-change 'hockey-stick' graph."

The National Review is represented by James B. Moorhead, Michael A. Carvin, Shannen W. Coffin, Molly Bruder-Fox, Thomas M. Contois, Anthony J. Dick, and Christopher Moeser of Steptoe & Johnson. Competitive Enterprise Institute and Rand Samberg are represented by Mark I. Bailen, Bruce D. Brown, Andrew Grossman and David B. Rivkin Jr. of BakerHostetler. Marc Steyn is proceeding pro se. Mann is represented by Peter Fontaine, Bernard Grimm, Catherine Rosato Reilly and John B. Williams of Cozen O'Connor. February 2014

# New Hampshire Reverses Blogger's Conviction for Recording Calls to Police, School Officials

The New Hampshire Supreme Court reversed a blogger's conviction for violating that state's wiretapping law for recording without permission his calls to two school officials and a police official. *New Hampshire v. Mueller*, No. 2012-644 (N.H. Feb. 11, 2014).

#### Background

Blogger Adam Mueller, the founder of Copblock.org, was convicted of violating New Hampshire's wiretapping law for recording without permission calls to two school officials and a police official over an incident at a high school involving a student and a police officier. The defendant videotaped himself making the calls and posted them on the blog without asking the officials for their consent or without informing them that he was recording the conversations.

Mueller was convicted of three counts of felony wiretapping. Mueller represented himself at trial.

On appeal, Mueller argued that the trial court incorrectly instructed the jury on the mental state needed for a conviction. The trial judge instructed that the felony wiretapping statute requires a mental state of "purposely." While Mueller, who represented himself at trial, did not object to the jury instruction on mens rea, he said on appeal that it was in plain error. The statute specifically identifies "willfully" as the applicable mental state.

Prosecutors agreed that the jury was incorrectly instructed, but argued that the evidence would have permitted the jury to infer that the defendant did know his recordings were unlawful, and therefore the incorrect jury instruction did not affect the outcome of the trial.

The New Hampshire Supreme Court held that wiretapping instruction was plain error.

### Supreme Court Reverses

The New Hampshire Supreme Court held that wiretapping instruction was plain error. Under the instruction, the state did not have to "prove that the defendant was either aware or recklessly ignored the fact that recording the conversations without consent was against the law, the very proof that was required in order to establish that he acted willfully," the court said.

The defendant did have the conscious object to record the conversations without the consent of his counterparties. But there was minimal evidence whether the defendant knew or was recklessly ignorant of the fact that his conduct was unlawful, the court opined.

Substantial rights were affected by the erroneous jury instruction, the court also concluded. There was a "very real prospect" that the defendant would have been found innocent because "the evidence of the defendant's willful mental state at the time he recorded the conversations was far from overwhelming."

New Hampshire was represented by Lisa L. Wolford of the Attorney General's office. Mueller was represented by the Law Office of Brandon D. Ross, PLLC.

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# Florida Court Upholds A Constitutional Right to Public Records in Criminal Court Proceedings

## By Jennifer A. Mansfield

In November, 2013, Morris Publishing Group LLC, d/b/a The Florida Times-Union ("The Florida Times-Union"), and Multimedia Holdings Corporation and Gannett River States Publishing Corporation, d/b/a WTLV/WJXX First Coast News ("First Coast News") sought to intervene in the State's prosecution of Michael Dunn. The case involved the murder trial of Dunn, a white male, who shot a black teenager in Jacksonville, Florida, during a dispute about loud rap music.

Florida has a long history of open public records, with case law affirming the public's right to public records going back to 1906. The Florida legislature first enacted the Public Record Act in 1967, and that right was later elevated to a

constitutional right in Article I, section 24(a) of the Florida Constitution. Under the Public Records Act, once the State releases discovery to a criminal defendant, the materials become public records subject to disclosure upon request.

After jail-house letters were released by the State in compliance with Florida's Public Records Act, and then reported in the local media, the trial judge *sua sponte* entered an order requiring that all future discovery be

first disclosed to the court, who would then hold the materials for thirty days in order to determine whether the materials should be released.

Exacerbating the illegality of the closure order, was the fact that it was entered only four months before the scheduled trial date. With no date by which the State or defendant was required to submit the discovery material to the judge, in order to trigger the 30-day review period, there was a real possibility that the order would effectively close off the records from disclosure until used during the trial.

The trial court also expanded an prior order of a previous judge in the case, which withheld the identities of witnesses until each were deposed, sealing the identities of all witnesses until the trial began. The trial court did not conduct an evidentiary hearing or make findings of fact to support the closure orders before they were imposed. When The Florida Times-Union and First Coast News learned of the orders, they moved to intervene in the case and have the court set aside its orders. The trial judge granted the media's motion to intervene, but then declined to modify its order withholding discovery for a 30-day review.

The media filed an appeal with the First District Court of Appeal ("1st DCA") on November 25, 2013. The appellate court immediately issued an order to show cause, and after the responses were received held oral argument on December 17, 2013. On the following day, December 18, 2013, the appellate court issued an order reversing the trial court.

The 1st DCA vacated the trial court's *sua sponte* orders, and specified that any documents which either party -- or the

court -- sought to seal must be the subject of an immediate evidentiary hearing with findings of fact and conclusions of law establishing that closure is necessary in order to prevent a real and imminent threat to the fair trial rights of the defendant. It ordered that the parties, or the trial court itself, should file a motion to seal those materials they sought to hold back, and that the trial court should hold an immediate evidentiary hearing on such a motion.

Despite the appellate court's December 18th order, nothing happened. Neither the State nor the Defendant filed a motion, and the court did not schedule a hearing regarding the prior discovery held back.

Thus, the media filed a motion with the trial court on January 7, 2014, to make public all documents previously sealed and open the public record, including jail house recorded conversations, in hopes that such a motion would spur the trial court and parties into action.

However, the media then encountered difficulty in obtaining the trial court's cooperation in scheduling a hearing on its motion. Therefore, the media's counsel attended the next regularly scheduled hearing for the case, seeking to be heard. At the hearing, the trial court refused to schedule a hearing before January 24th, over the objections of the media's counsel, despite the fact that the trial was due to *(Continued on page 24)* 

The case involved the murder trial of Dunn, a white male, who shot a black teenager in Jacksonville, Florida, during a dispute about loud rap music.

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begin on February 3rd. Thus, on January 16, 2014, the TU filed an emergency motion with the 1st DCA to enforce its prior order. The appellate court granted the motion the next day, holding:

The effect of this Court's order was to require immediate release of all such public records unless a motion was made, including by the trial court on its own, to prevent disclosure of specified records followed by an immediate evidentiary hearing and prompt written order for possible appellate review. Absent such a motion, the media was entitled to immediate access to the disputed records, which had the appropriate legal process been followed from the outset last year—would have been resolved

months ago. Yet thirty days have now passed with no judicial or other action on our order, a delay that has-in effect-amounted to an improper de facto continuation of the previouslyvacated orders. Under these circumstances, it is necessary that we enforce our prior order by compelling what the law has required from the outset of this case, but which has yet to occur, which is the disclosure of the public records at issue, subject to an immediate evidentiary hearing on any motion that seeks to prevent disclosure these records, followed by of expeditious appellate review.

In response, the trial court held the evidentiary hearing two days after the 1st DCA's January 17 Order. But neither the State nor defendant entered any evidence at all into the record let alone evidence that would support closure. As a result, the trial court ordered the release of all the public records, including audio tapes of the defendant's jailhouse conversations.

Unfortunately, that did not mark the end of the delay tactics. When the State Attorney offered to provide the tapes, it came with a \$6,000 price tag, and a down payment of \$3,000 in order for the State Attorney to determine what parts of the recordings should be held back from the media.

The review, the State insisted, would take 9-10 weeks -long after the criminal trial would be completed. The TU challenged the State Attorney's terms as unreasonable and violative of both the appellate court's and trial court's prior orders, and appealed (for a third time) to the appellate court. But the appellate court remanded the issue for the trial court to determine in the first instance whether the State's demands violated the trial court's order that the recordings be produced, and ordered once again that the trial court conduct an immediate hearing.

Despite the appellate court's order requiring an immediate hearing, the trial court refused to take it up. At some point during the three days between the appellate court's remand order and the hearing scheduled by the trial court, the trial judge decided that he no longer had jurisdiction of the matter. Noting that the case law interpreting Florida's Public

Records Act occurred in civil cases seeking mandamus relief, the trial judge concluded that he did not have jurisdiction to determine public records matters in the context of a criminal case.

And although he jettisoned the media's motion seeking the trial court to enforce its own order, with instructions to file a separate lawsuit seeking civil mandamus relief, on the basis of a lack of jurisdiction, he nonetheless wrote an advisory opinion that the media's requested relief should be denied.

The media then filed another emergency motion with the 1st DCA to enforce its prior order.

On January 31, 2014, the appellate court reversed the trial court for a third time, holding that the trial court had inherent authority to enforce its own orders and that it erred in holding that it lacked jurisdiction to take up the media's motion. The appellate court again ordered an immediate hearing, but because the trial was to begin in only two days, it then suggested that the chief judge of the circuit appoint a magistrate to conduct the necessary hearing. The Chief Judge appointed a former prosecutor, who now serves as a family law magistrate, to conduct the hearing and issue a report and recommendation to the trial judge.

The issues before the Magistrate were twofold:

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appellate court reversed the trial court for a third time, holding that the trial court had inherent authority to enforce its own orders and that it erred in holding that it lacked jurisdiction to take up the media's motion.

On January 31, 2014, the

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(1) Whether the State waived any further review of the recordings to find materials to exempt from disclosure when it failed to present any such issues by motion or submit evidence during the evidentiary hearing to support closure; and (2) whether the State's demand for \$6,000 and 9-10 weeks to review the recordings for exempted material were reasonable under the circumstances. After the evidentiary hearing, the Magistrate issued a report and recommendation

holding that it was not unreasonable to pay the State attorney's costs to review the recordings from scratch for exempted social security numbers and financial account numbers. The media have ten days to object to the report and recommendation. The Florida Times-Union and First Coast News have filed an objection. The time to object has not yet expired, and another television station may still file its own objection.

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# **Court Orders Nassau County Police Department to Release Documents Pursuant to FOIA Law**

Court Grants Newsday's Petition and Awards Attorneys' Fees and Costs

# By Alia L. Smith

On January 16, 2014, New York Supreme Court Justice Daniel Palmieri gave the Nassau County Police Department ("NCPD") 30 days to turn over to Newsday documents the newspaper had been seeking for more than a year in four separate Freedom of Information Law ("FOIL") requests. *Newsday v. Nassau County Police*. Finding that "in almost all cases there was no reasonable basis for the [NCPD's] denials," the court ordered NCPD to pay Newsday's attorneys' fees in the FOIL litigation. The court, however,

declined Newsday's request to find that NCPD had engaged in a "pattern and practice" of improper responses to FOIL requests, holding that the department's misconduct could only be redressed by fee awards.

# NCPD's Initial Denials of Newsday's FOIL Requests

In 2012 and 2013, Newsday submitted a

series of FOIL requests to the NCPD in connection with its reporting on various law enforcement issues. At issue in this lawsuit were requests for (1) "incident tracking" information, i.e., information showing the types of data collected by the NCPD, (2) information (arrest reports, case reports, etc.) concerning four specific criminal defendants (the "four criminal cases" request), (3) information about payments made to confidential informants (without disclosing the identities of any confidential informants) (the "CI payments" request), and (4) information related to Leatrice Brewer, a high-profile criminal defendant who was charged with killing her children.

The NCPD initially denied each of these requests in full, without elaboration. Instead of explaining its reasons for denying the requests, the NCPD simply provided Newsday with a list of FOIL exemptions it claimed applied.

In 2012 and 2013, Newsday submitted a series of FOIL requests to the NCPD in connection with its reporting on various law enforcement issues.

## **Administrative Appeals**

Newsday brought administrative appeals on each of the denials, and NCPD failed to respond to any of them within the 10-day period prescribed by FOIL. Eventually, NCPD denied each of the first three appeals (the "incident tracking" request, the "four criminal cases" request, and the "CI payments request), again without explaining *why* the exemptions it invoked supposedly applied.

With respect to the "Brewer" request, the County

Attorneys' Office (which addressed the appeal on behalf of the NCPD) agreed that the initial denial had been insufficiently specific, and remanded the matter to NCPD for an explanation of its denial or for production of documents. On remand, however, the NCPD again denied the request in full, and again failed to provide any factual basis for the denial. Newsday then filed a second administrative appeal, and in response, the County Attorney's Office, for

the second time, sent the matter back to the NCPD asking it to reconsider. Finally, after two remands and five months, the NCPD produced 39 "case reports." But the reports were heavily redacted, and the NCPD explained only that the redactions were based on "privacy" concerns, without any further elaboration. Thus, for the third time, Newsday submitted an administrative appeal. This time, the County Attorney's Office approved the NCPD's use of heavy redactions and denied Newsday's administrative appeal.

## Newsday's Lawsuit

Frustrated with the NCPD's decisions on these specific requests, frustrated with the NCPD's repeated failure generally to explain the reasons for FOIL denials, and frustrated with the NCPD' repeated failure generally to *(Continued on page 27)* 

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decide administrative appeals within the required timeframe, Newsday filed suit. It brought a hybrid "petition/complaint" against the NCPD, alleging violation of Article 78 in connection with the denial of the four specific FOIL requests, and seeking declaratory relief in connection with its claim that NCPD engaged in a "pattern and practice" of (1) insufficiently explaining FOIL denials and (2) failing to respond to administrative appeals on time. Newsday also sought attorneys' fees and costs.

## The Court's Decision on the FOIL Requests

In a 20-page decision, Justice Palmieri reiterated the central tenets of FOIL that the burden is "on a resisting

agency or department to explain how a given request for records fits under one of the statutory exemptions, which are to be narrowly construed to provide maximum access to the public." The court emphasized that agencies must provide evidentiary support of a denial of a FOIL request. Given this "well-established law," the court found that the NCPD's denial of records to Newsday "was not adequately supported."

Specifically, the court found that the NCPD's response to the "incident tracking" request was improper because it simply restated the claimed statutory exemptions, without explanation. The court rejected the NCPD's argument – which was not made during the administrative process – that release of this data could somehow allow for

a person to "reverse engineer" or otherwise hack into the system, finding that NCPD had offered no proof from an information technology professional that such hacking was even possible. It likewise rejected the argument (also improperly made for the first time in litigation) that release of the data would cause the vendor of the incident tracking software competitive disadvantage. Such "claims are unsupported by proof and thus constitute no more than conclusions and speculation, which are insufficient," the court wrote.

With respect to the "four criminal cases" request, the court dismissed NCPD's argument that the release of criminal records would necessarily violate the privacy of the alleged criminals. It was concerned, however, about the fact that the names of undercover officers might appear in the records. Accordingly, it "directed NCPD to produce the requested documents, redacted to protect the names of undercover officers." The court left open the option for Newsday to request *in camera* inspection of the unredacted document should it "believe that the redactions were not made in good faith."

The court made a similar ruling in connection with the "CI payments" request, holding that NCPD must produce documents related to payments to confidential informants, redacted to protect the identities of the CIs. The court found that the NCPD's argument that the "records sought are highly sensitive" was "unsupported by any detail as to why and how records of payments to unidentified informants could result in

the identification of such persons and the resultant risk."

Finally, the court found that the NCPD's heavy redactions to the Brewer documents were improper because NCPD had not shown any "safety concerns" or that any of the information redacted (including names) fell "within one of the six examples of 'unwarranted invasion of personal privacy' set forth in" FOIL § 89(2)(b). It therefore ordered NCPD to produce the unredacted documents to Newsday (allowing, however, that NCPD could redact the name of the a person who may have been the subject of an order of protection). The court also required that NCPD release to Newsday its records related to 911 calls involving Brewer. Although recordings of the calls themselves

are exempt from disclosure under County Law § 308(4), other records related to 911 calls (e.g., records of "a municipality's dispatches") are not exempt.

# The Court's Decision on the "Pattern and Practice Claim"

The court declined to declare that NCPD engaged in a "pattern and practice" of violating FOIL by "use of form denials, lack of particularized justifications, and untimely responses to administrative appeals," finding that such a declaration would be "establishing a new cause of action," a *(Continued on page 28)* 

reiterated the central tenets of FOIL that the burden is "on a resisting agency or department to explain how a given request for records fits under one of the statutory exemptions, which are to be narrowly construed to provide maximum access to the public."

Justice Palmieri

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task better left to appellate courts. In any event, the court stated, "violations . . . can be redressed by the assessment of costs and fees."

### Costs and Fees

Finding that Newsday had "substantially prevailed," that "in almost all cases there was no reasonable basis for the denials," and that "responses to requests and appeals were beyond the statutory period," the court ordered NCPD to pay "the reasonable costs, including attorney's fees, incurred by [Newsday]" in connection both with its administrative appeals and litigation. The court noted that an award of fees was particularly appropriate here because "the material sought was of interest to the general public, as it concerned the functioning of its police and related services."

A hearing to determine the amount of the cost and fee award is currently set for March.

Newsday was represented by David Schulz and Alia Smith of Levine Sullivan Koch & Schulz, LLP, and Dina Sforza, inhouse counsel with Newsday. The NCPD was represented by Jeremy Zenimlan and Brian Libert of the Nassau County Attorney's Office.



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# **European Court of Justice Rules on Hyperlinks and Copyright Liability**

How Does Decision Compare to US and Canadian Approaches?

The Court's ruling means

that, where works are

made freely available

online, rights holders

cannot control how users

of their content access

that content.

## By Paul Joseph and Adam Cusworth

The European Court of Justice this month issued an important decision on copyright liability for hyperlinking to online content. See <u>Svensson v. Retriever Sverige AB</u> (Feb. 13, 2014).

## Background

Svensson and a number of other journalists wrote press articles that were published in the Göteborgs-Posten, a Swedish newspaper, and on its website. Retriever Sverige, a separate website, provided its users with a list of hyperlinks to articles published by other websites,

including those of the journalists.

The journalists brought an action against Retriever Sverige before the Stockholm District Court alleging infringement of their exclusive right to make their respective works available to the public. The action escalated to the Swedish Court of Appeal, which stayed the proceedings and referred a number of questions to the Court of Justice of the European Union (**ECJ**) for a preliminary ruling. The substance of three of those questions was:

- whether the supply of a hyperlink constitutes a communication to the public (and so a copyright infringement) within the meaning of the Copyright Directive;
- whether the assessment under question 1 is affected if access to the work to which the link refers is restricted in some way (for example, if it sits behind a paywall); and
- whether the assessment under question 1 is affected if the impression given after clicking the link is that the work appears to be on the same website as the link (what is often referred to as 'framing').

**Svensson Decision** 

Referring to its previous decision in *TVCatchup* (C-607/11 *ITV Broadcasting Ltd v TVCatchup Ltd* [2013] ECR), the Court noted that a communication to the public requires two criteria to be fulfilled: (1) an act of communication of a work; and (2) the communication of that work to the public.

It is an established principle of EU law that the first requirement, an act of communication, must be construed broadly. See Copyright Directive, recitals 4 and 9 and Joined Cases C-403/08 and C-429/08 [2011] ECR 1-9083 FAPL v QC Leisure.

More interestingly however, the Court also ruled that for there to be an act of communication it is sufficient that a work is made available to the public, irrespective of whether the public actually access the work. This seems to leave no room to distinguish the act of communication with the act of making available, even though the Copyright Directive refers to them separately (albeit both within Article 3). In the circumstances, the provision of hyperlinks by Retriever Sverige was an act of communication of a

work.

In relation to the second requirement, the Court again followed its interpretation of the 'public' in *TVCatchup*: "an indeterminate number of potential recipients which implies a fairly large number of persons". The communication of the hyperlinks by Retriever Sverige was aimed at all potential users of the site, which were indeterminate and of fairly large number, and therefore constituted a public. However, EU caselaw has provided that a communication, communicated by the same technical means as the original work (here, over the Internet), must also be directed to a 'new public'. This means a public not taken into account by the copyright holders when they authorised the initial communication to the public. See case C-306/05 SGAE [2006] ECR 1-11519, *(Continued on page 30)* 

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paragraph 43. In the circumstances, the public targeted by the initial communication of the works consisted of all potential visitors to the newspaper website who were the same potential visitors to the hyperlinks contained on the Retriever Sverige website. As a result, there was no 'new' public. Whether the hyperlinked to content appeared 'framed' in Retriever Sverige's website was also not relevant to whether there was a new public.

The Court noted one circumstance (though there are others) where a hyperlink could constitute a communication to a new public: where the hyperlink makes it possible for users of a website on which the hyperlink is contained to circumvent restrictions put in place by the host site on which the protected work appears, if those users would not otherwise be able to access the protected work.

# Impact on Rights Holders and Linkers

The Court's ruling means that, where works are made freely available online, rights holders cannot control how users of their content access that content. As a result, the ability of rights holders in the EU to monetise their content, for example through the use of advertisements on the site which hosts the content, will be adversely affected in circumstances where users can access that content through third party websites which 'frame' that content without including those advertisements.

This could represent a boon for aggregation websites (websites such as Retriever Sverige that aggregate online content through hyperlinks to a range of content), where the linked-to content does not itself infringe any rights. Rights holders can be expected to respond by making content less 'freely available', for example by placing content behind paywalls limiting access to pre-approved members.

Where there was previously uncertainly over whether hyperlinks which frame content, or indeed any kind of hyperlink, could constitute a breach of the communication to the public right under the Copyright Directive, the Court has created a good degree of certainty. (With respect to the previous uncertainty see, for instance, the judgment in *Paramount v Sky* [2013] EWHC 3479 (Ch).)

### **Remaining Uncertainty in the EU**

The meaning of 'freely available', i.e. the extent of the restriction on availability of content required to render a hyperlink to that content a communication to a new public, is likely to be the subject of future debate. Would there, for instance, be a 'new public', where copyright works were first published on an obscure, infrequently visited blog, and then linked to by a major newspaper publisher's website? The jury's still out on this type of factual scenario.

What is also not yet clear in the EU is whether linking to content which *does* infringe copyright would constitute a communication to a new public. In this scenario the website which hosts the content is clearly committing an infringement by communicating the work to a new public, but is the website which links to that content also responsible for this? In *Paramount v Sky*, [2013] EWHC 3479 (Ch), Mr Justice Arnold noted that it is "arguable that it makes no difference whether the source of the copyright work to which the hyperlink links is licensed by the copyright owner."

#### The US Approach in Perfect 10

When the European Court of Justice does come to consider this question, it may choose to follow the approach of the United States Court of Appeals for the Ninth Circuit in *Perfect 10 v Amazon*. Perfect 10 was the publisher of photographs in a 'members' area' behind a paywall. Some third-party websites republished those images without Perfect 10's authorisation. Google crawled, cached and indexed those images from the third party websites (but not from Perfect 10's website) so that when a user clicked on an image, Google linked to the website containing the image, but also framed the image within its own website.

Although Google was prima facie liable for direct copyright infringement for storing thumbnail copies of the images, Google ran a successful 'fair use' defence. Further, the framing of and linking to the thumbnail images in its search function was held not to be an infringement of copyright, despite the fact that the framed and linked to content was itself infringing. The reason was quite technical:

"When a user clicks on a thumbnail image, the user's browser program interprets HTML instructions on Google's webpage... [which] gives the user's browser (Continued on page 31)

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the address of the website publisher's computer that stores the full-size version of the thumbnail. By following the HTML instructions to access the thirdparty webpage, the user's browser connects to the website publisher's computer, downloads the full-size image, and makes the image appear...on the user's screen."

In summary, Google did not communicate the images to the user, it simply provided HTML instructions directing a user's browser to access a third-party website.

Google was also not liable, as a matter of contribution or vicariously, for the copyright infringement committed by the third party websites which hosted the images.

It will be interesting to see if the European Court of Justice adopts the same approach as the US Courts of Appeal in *Perfect 10* in subsequent judgments, particularly on the question of whether it matters whether the linked to content is itself infringing.

### **A Canadian Perspective**

In the Canadian Supreme Court decision in *Crookes v Newton* [2011] SCC 47, the question was not whether there was an infringement of copyright, but rather whether an article entitled "Free Speech in Canada" defamed the claimant. The article contained hyperlinks to two websites which contained allegedly defamatory material about the claimant. The claimant contended that the inclusion of the hyperlinks amounted to publishing the allegedly defamatory material, which the defendant was therefore liable for.

The court held that a hyperlink by itself is not a publication of the material to which it refers, but it could be a publication when a hyperlink presents content from the hyperlinked material in a way that repeats the content. This is the case even where the linked to material is defamatory, and where the hyperlinker adopts or endorses the material accessed via the hyperlink, so long as the hyperlinker does not actually repeat the defamatory material. Hyperlinks are, using the Canadian Supreme Court's analogy, like footnotes: they are a communication that something exists. They are content neutral. What is really remarkable in *Crookes* is that the court held that a hyperlink that repeats the content to which it links would be a publication and could therefore be defamatory. How this can be aligned with the EU and US positions on framing in the copyright area is tricky. For example, had the hyperlink framed the allegedly defamatory material, would that equate to publishing?

The US line of reasoning in *Perfect 10* suggests that it would not, because the framing of content does not involve the framer replicating the content, but rather consists of the execution of HTML instructions on behalf of the user accessing the link. This technical analysis of what is actually going on when content is framed, if applied to the facts of *Crookes, could* mean that framing defamatory material does not involve a repetition of that content.

Although the court in *Crookes* did not consider whether framing content involves replication of that content and therefore whether framing content could give rise to liability under the laws of defamation, the case neatly displays the need for consistency in future decisions on linking and framing across the spectrum of legal rights.

### Conclusions

Svensson is decided under a different framework of copyright law to *Perfect 10*, and so neatly avoids the technical arguments which consumed the US Courts of Appeal in Perfect 10. Instead, the European Court of Justice looked to who could access the hyperlinks, asking whether they were the same public the linked to content owner envisaged when it communicated the work. In *Svensson*, the Court focussed on the intention of the copyright holders and created a framework around which their intention could be protected.

Juxtapose this with *Perfect 10*, where the intention of the copyright owners meant nothing. Even though the public interest in allowing Google to continue to make available to the public a highly beneficial function of "improving access to information on the Internet" is worthy of protection, the intention of the rights holders should not so easily have been cast aside.

Paul Joseph is a partner and Adam Cusworth, an associate, at RPC in London. Counsel in the case are listed in the hyperlinked opinion.

# Ninth Circuit Navigates Purple Haze Shrouding Damages Award in Hendrix Trademark Suit

Rejects Reduction of Jury's Award But Remands for New Damages Trial

# By Hajir Ardebili

In a trademark dispute over the commercial use of legendary guitarist Jimi Hendrix's name, image, and likeness, the district court and the Ninth Circuit agreed there was a dearth of evidence to support the jury's damages award for the plaintiffs. Although the appellate court reversed the decision below to strike most of the award, the majority agreed with the lower court's alternative ruling for a new trial on damages. The dissenting judge disagreed that a new trial

was warranted, however, and would have instead reinstated the jury's full award. *Experience Hendrix L.L.C. v. Hendrixlicensing.com*, Nos. 11-35858, 11-35872 (9th Cir. Jan. 29, 2014) (Ebel, Fletcher, Rawlinson, JJ.).

### Background

After Jimi Hendrix ("Hendrix") passed away, his sole heir formed two companies, plaintiffs Experience Hendrix, L.L.C. and Authentic Hendrix, L.L.C. (collectively, "Plaintiffs"). Plaintiffs own trademarks associated with Hendrix, including the names "Hendrix" and "Jimi Hendrix,"

Hendrix's signature, and related logos. Plaintiffs use these marks to sell and license Hendrix-related apparel, posters, and artwork, among other merchandise.

In March 2009, Plaintiffs sued defendants Andrew Pitsicalis and his company, Hendrixlicensing.com (collectively, "Defendants") for trademark infringement under the Lanham Act, and unfair or deceptive trade practices in violation of Washington's Consumer Protection Act ("WCPA"). Plaintiffs alleged that Defendants licensed Hendrix-related merchandise that infringed Plaintiffs' trademarks, and used infringing websites (hendrixlicensing.com and hendrixartwork.com) in doing so. Defendants brought counterclaims seeking a declaratory judgment that the Washington Personality Rights Act ("WPRA") did not provide Plaintiffs with post-mortem publicity rights.

### **District Court Decision**

The district court determined, as a matter of law, that Defendants infringed several of Plaintiffs' trademarks, and issued a permanent injunction to halt Defendants' infringing

> activity. At trial, the jury found that Defendants' conduct also constituted unfair or deceptive trade practices under the WCPA, and awarded Plaintiffs damages under both the Lanham Act and WCPA totaling over \$1.7 million. That damage award was comprised of \$60,000 for the Defendants' profits from licensing infringing goods, \$306,650 for Plaintiffs' lost profits resulting from Defendants' infringement, and \$1,365,650 in damages under the WCPA's laws prohibiting unfair or deceptive trade practices.

> Defendants challenged the jury's award, as a matter of law, pursuant to Federal Rule of Civil Procedure 50(b)(3). Finding the

award to be unsupported by the evidence, the district court reduced the jury's award from \$1.7 million to \$60,000 (representing Defendants' profits). The court ruled, alternatively, that if the appellate court decided that reducing the award was in error, then a new trial on damages would be warranted under F.R.C.P. 59.

On Defendants' counterclaims, the court decided that the WPRA provisions giving Hendrix's heir post-mortem publicity rights violated Defendants' due process rights, the Full Faith and Credit Clause, and the dormant Commerce Clause, and are therefore unconstitutional.

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In a trademark dispute over the commercial use of legendary guitarist Jimi Hendrix's name, image, and likeness, the district court and the Ninth Circuit agreed there was a dearth of evidence to support the jury's damages award for the plaintiffs.

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The court awarded Plaintiffs attorney's fees under the WCPA, but reduced the requested fee from \$504,673 to \$50,000, because (among other reasons) the WCPA claim was only one of Plaintiffs' six claims against Defendants (and only one of two claims which Plaintiffs won), and Plaintiffs did not establish any unique damages under the WCPA.

The parties cross-appealed the district court's rulings to the Ninth Circuit.

### Ninth Circuit Opinion

*WPRA's constitutionality.* Based on a de novo review, the Ninth Circuit reversed the district court's ruling that the WPRA is unconstitutional. It determined that Washington had sufficient contacts with the controversy, which involved the loss of sales in Washington of goods licensed by Defendants. The court further found that applying the law to the controversy at issue would not give the WPRA an extraterritorial reach or impermissibly burden interstate commerce. Accordingly, it remanded Defendants' claims with instructions to enter judgment for Plaintiffs.

*Trademark infringement.* Defendants argued that their use of hendrixlicensing.com and hendrixartwork.com were protected nominative fair use. Because nominative fair use applies where a defendant uses the plaintiff's mark to describe the *plaintiff's* product, however, the Ninth Circuit agreed with the district court's rejection of that defense, and upheld its determination regarding infringement.

*Permanent injunction.* Plaintiffs argued that the district court's injunction was unclear as to which acts were and were not restrained. The appellate court acknowledged that two of the injunction's provisions seemed inconsistent, with one provision prohibiting the use of certain marks, brands and logos, but another allowing Defendants to use Hendrix's images or likenesses. Accordingly, the Ninth Circuit concluded that the injunction was sufficiently vague to be vacated and remanded for clarification.

Damages and attorney's fees. Plaintiffs sought reinstatement of the jury's entire \$1.7 million damages award. Reviewing the district court's decision de novo, the appellate court noted that, in deciding a Rule 50(b)(3) motion for judgment as a matter of law, the jury's award must be upheld if there was any legally sufficient basis to support it, after considering all of the evidence and drawing all reasonable inferences in favor of Plaintiffs, the nonmoving parties.

Applying the foregoing legal standard, the court found the evidence sufficient to permit a reasonable juror to calculate Plaintiffs' lost profits, damage to reputation, and good will. The court cited, *e.g.*, evidence of Plaintiffs' declining licensing revenues during Defendants' infringement, and an exhibit reflecting Plaintiffs' "net income." The court also reasoned that, because much of Plaintiffs' revenue was licensing revenue, there were likely no incremental expenses to deduct from revenue to calculate profits, or such incremental costs would be accounted for in Plaintiffs' "net income." Thus, the Ninth Circuit reversed the district court's decision to strike most of the award.

Turning to the district court's alternative ruling for a new trial on damages under Rule 59, the Ninth Circuit noted that the determination whether to grant a new trial was governed by a different legal standard than the Rule 50(b)(3) motion. On a Rule 59 motion, the district court can weigh the evidence, make credibility determinations, and grant a new trial for any reason necessary to prevent a miscarriage of justice. The appellate court also pointed out that the standard of review applicable to an order on a Rule 59 motion (abuse of discretion) was also different from that applicable to a Rule 50(b)(3) motion (de novo).

The Ninth Circuit acknowledged the district court's concerns that (1) there may have been expenses to be deducted from Plaintiffs' licensing revenue in calculating lost profits; and (2) the jury's award of (a) lost profits under both the Lanham Act and the WCPA, and (b) damages for both loss of reputation and loss of good will, may have been duplicative.

Therefore, in deferring to the district court's decision to grant a new trial, the appellate panel affirmed that ruling. Further, because many of the factors on which the court below based its decision regarding attorney's fees had changed, the court also vacated the award of attorney's fees under the WCPA. The court remanded the case for further proceedings.

*The dissent.* Judge Rawlinson wrote separately, concurring in part and dissenting in part. He agreed that the district court should not have reduced the jury's damage award, but disagreed that a new trial on damages was warranted. He observed that the majority's conclusion that sufficient evidence supported the jury's award for purposes of *(Continued on page 34)* 

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Defendants' motion for judgment as a matter of law appeared to undermine its opposite conclusion as to the basis for a new trial. He pointed out that, even if the damages award was duplicative, the reviewing court could remand for its correction, rather than requiring a new trial. Accordingly, Judge Rawlinson would have remanded for reinstatement of the damages awarded by the jury, along with an award of attorney's fees to Plaintiffs.

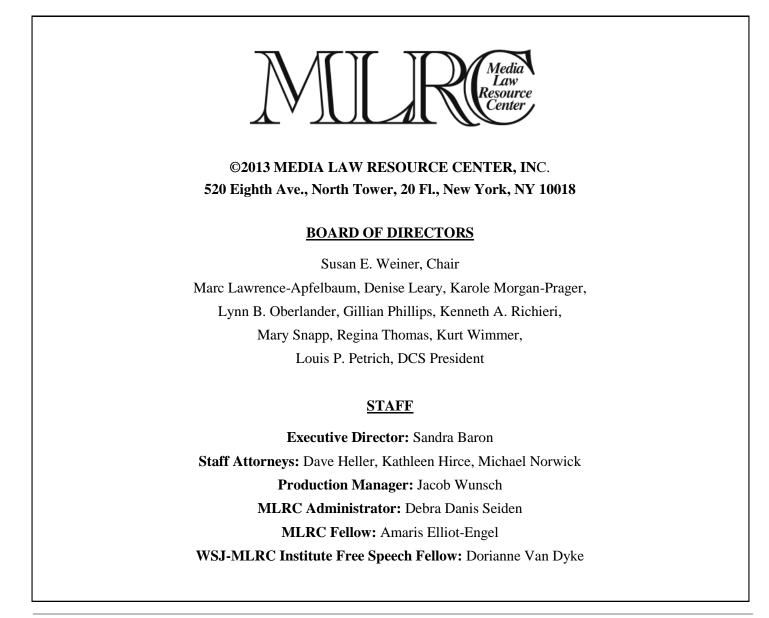
### Conclusion

*Experience Hendrix* illustrates that, where the evidence on two distinct motions is identical, the application of different

legal standards can lead to seemingly inconsistent results.

The application of different standards of review on appeal can further complicate matters, as demonstrated by the Ninth Circuit's decision to reverse the district court's reduction of the damages award, but to affirm its alternative ruling granting a new trial on damages.

Hajir Ardebili is an intellectual property, entertainment, and business litigator in the Los Angeles office of Kelley Drye & Warren LLP. Plaintiffs were represented by John D. Wilson, Jr. and Alfred E. Donohue, Wilson SmithCochran Dickerson, Seattle, WA; Michael Madden, Bennett Bigelow & Leedom, Seattle, WA. Defendants were represented by Thomas T. Osinski, Jr., Osinski Law Offices, P.L.L.C., Tacoma, WA.



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# **Court Throws Out Hundreds of Copyright Infringement Claims Against Textbook Publisher**

# By Mara J. Gassmann

Judge Katherine Polk Failla of the Southern District of New York granted summary judgment to John Wiley & Sons, Inc. ("Wiley") with respect to nearly all of the 316 instances of copyright infringement alleged by stock photography provider DRK Photo ("DRK"). *John Wiley & Sons, Inc. v. DRK Photo*, No. 11cv5454 (S.D.N.Y. Feb. 21, 2014) (hereafter, "Mem. Op.").

In a 57-page ruling, the Court held, *inter alia*, that certain purported transfers of copyright were insufficient to confer standing under the Copyright Act (the "Act") to DRK and that the statute of limitations in a copyright infringement action runs from the date the alleged infringement occurred, rather than when it was discovered.

### Background

DRK is a stock photo agency that enters into representation agreements with photographers, thereby securing rights to their images, primarily on a non-exclusive basis. It then licenses those images in its collection to third parties, including textbook publishers. Beginning around 1992, DRK began licensing photographs to Wiley, a publisher of educational materials, for use in Wiley's educational

textbooks. The licenses generally contained print-run limitations, limiting the number of copies that Wiley could produce of books containing DRK-licensed photos. The licenses sometimes included additional restrictions relating to where and in what languages the books could be distributed.

Beginning in 2008, DRK began filing actions against other publishers, asserting copyright infringement claims for alleged print overruns of books containing photographs from DRK's collection. In preparation for bringing suits, DRK asked the photographers to execute form assignment agreements that purported to grant to "DRK all copyrights

This decision joined the growing majority of courts in the Southern District of New York applying the injury rule to copyright infringement claims, while the courts just about everywhere else apply the discovery rule.

and complete legal title" in the respective photographs for the pendency of litigation.

The assignment agreement stipulated that "'DRK agrees to reassign all copyrights and complete legal title back to the [photographer] immediately upon completion of the registration of the Images ... and resolution of infringement claims brought by DRK relating to the Images." *Id.* DRK agreed to evenly split with photographers who entered these agreements the proceeds resulting from any subsequent settlement or judgment.

After DRK accused Wiley of committing infringement in connection with the parties' transactions over the previous 20 years, Wiley initiated a declaratory judgment action pursuant to 28 U.S.C. § 2201, seeking a declaration of non-

> infringement with respect to 316 instances in which DRK had claimed that Wiley had infringed photographs it licensed from DRK. DRK thereafter asserted counterclaims alleging that Wiley had committed infringement by exceeding the terms of DRK's licenses.

> Following discovery, the parties filed cross-motions for summary judgment. Wiley argued, in the main, that it was entitled to judgment because DRK lacked standing to bring copyright infringement claims on behalf of the photographers who

had created the photos, notwithstanding the assignment agreements. Wiley also argued that almost all of DRK's claims were time-barred. For its part, DRK sought judgment as to 88 of the claimed instances of infringement.

### Decision

After assessing both parties' motions, the Court held that all but 23 of the 316 instances of alleged infringement raised

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in Wiley's pleadings were either non-actionable for lack of standing or barred by the applicable statute of limitations.

First, the Court found that DRK lacked standing with respect to most of the images. Wiley had argued that because DRK was not the copyright owner, author or exclusive licensee, it could not, consistent with the Act and Article III, proceed in place of the photographers, nor could it conjure standing through sham assignment agreements manufactured for purposes of litigation. DRK had responded that it was the exclusive owner, or the beneficial owner, of copyright rights in the images as a result of its business relationship with the photographers. In DRK's view, because it had the right to license the photos and was entitled to an income stream from licenses it extended, it should be deemed a "beneficial owner" of the copyright.

Rejecting that argument, the Court observed that DRK's non-exclusive right to license the photographs in its collection, outlined in its representation agreements, was insufficient to give it an ownership interest. Mem. Op. at 20-26. The Court concluded that the concept of beneficial ownership extended to former owners of the copyright who gave up their ownership in exchange for a right to receive royalties, but not to someone who merely held a non-exclusive right to license the works at issue. *Id.* at 26-28.

Critically, the Court agreed with Wiley that the assignment agreements also failed to confer standing on DRK. The Court looked beyond DRK's representations that the assignment agreements effected a transfer of copyright, albeit temporarily, and considered the substance of the agreements as a whole as well as correspondence produced during discovery demonstrating that the photographers never intended to transfer their rights under Section 106 of the Act, but instead entered into these assignments solely for the purposes of enabling DRK to bring litigation. *Id.* at 35-38.

The Court found that notwithstanding that they contained language purporting to transfer the copyright, the agreements did not convey ownership, "but rather only the bare right to sue"—which is not an exclusive right under Section 106, and is insufficient for standing under the Act. *Id.* at 29. Accordingly, neither the representation agreements nor the agreements purporting to transfer copyright ownership to DRK provided a basis for DRK to bring copyright infringement claims on the photos.

Second, the Court found that most of DRK's remaining instances of alleged infringement, many of which were decades old, were barred by the Copyright Act's three-year statute of limitations. 17 U.S.C. § 507(b). In so holding, the Court applied the "injury rule," pursuant to which a claim accrues for purposes of the limitations period when the alleged infringement-here, distribution beyond the license terms-in fact occurs. Mem. Op. at 38-43. DRK had argued that the limitations period on its claims did not run until it discovered, or had reason to discover, the alleged infringement by Wiley, but the Court rejected the "discovery rule," as neither the text of the Copyright Act nor Supreme Court precedent militated in favor of its application in infringement actions. Id. Likewise, the Court found DRK offered no evidence in support of tolling the statute of limitations. Id. at 42.

Accordingly, DRK's clock to sue began to run from the moment of each alleged infringement by Wiley, rendering most remaining claims untimely. *Id.* at 43. This decision joined the growing majority of courts in the Southern District of New York applying the injury rule to copyright infringement claims, while the courts just about everywhere else apply the discovery rule.

"Having dismissed claims for the majority of" DRK's alleged instances of infringement "on standing or timeliness grounds," the Court granted DRK summary judgment on only three of the 88 instances of alleged infringement on which DRK moved, finding Wiley had exceeded the scope of distribution permitted under the licenses. *Id.* at 43. Of the 316 instances of alleged infringement initially put at issue by the parties' pleadings, only 20 remain viable following the Court's resolution of the parties' cross-motions for summary judgment.

Mara J. Gassmann is an associated at Levine Sullivan Koch & Schulz, LLP in New York. John Wiley & Sons, Inc. was represented by Robert Penchina and Christopher P. Beall of Levine Sullivan Koch & Schulz, LLP, along with Joseph Barker of John Wiley & Sons, Inc. DRK Photo was represented by Christopher Seidman, Maurice Harmon, and Adam DiLeo of Harmon & Seidman LLC.

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# **Online Rankings and Opinion**

Recent Cases Explore Fact-Opinion Distinction for Content Curators

### **By Amaris Elliott-Engel**

In a brimming information society and an era of "listicles," curators of content, including online ratings sites, play an important role in informing the public. They also have been the targets of pushback in court. Recent cases show how courts continue to grapple with the opinion versus fact distinction over lists, rankings, and online reviews and the challenges courts face in interpreting such consumer information in the context of defamation suits.

## **Tripadvisor's Hotel Review**

In an important decision, the Sixth Circuit held that Tripadvisor's "dirtiest hotel" list was protected opinion.

*Seaton v. Tripadvisor*, No. 12-6122 (6th Cir. Aug. 28, 2013) (Moore, Clay, White, JJ.). Kenneth Seaton, the owner of the Grand Resort Hotel and Convention Center in the Great Smoky Mountain region of Tennessee, sued TripAdvisor after his hotel was rated number one on the travel website's "2011 Dirtiest Hotels" list.

TripAdvisor's ranking of plaintiff's hotel included a photograph of a ripped bedspread, a quote that "there was dirt at

least <sup>1</sup>/<sub>2</sub>" thick in the bathtub which was filled with lots of dark hair," and a thumbs-down image beside the statement "87% of reviewers do not recommend this hotel." Plaintiff argued that the list connoted assertions of fact because TripAdvisor claims to give the "World's Most-Trusted Travel Advice" and to "share the whole truth about hotels."

The Sixth Circuit held the complaint was properly dismissed. "No reader of TripAdvisor's list would understand Grand Resort to be, objectively, the dirtiest hotel in all the Americas, the North American continent, or even the United States," the court said. The Sixth Circuit also rejected the plaintiff's argument that TripAdvisor's methodology in creating the list was flawed. Any method of compiling its the court said.

user reviews was inherently subjective and not verifiable fact,

### BBB

In contrast, a California court allowed a claim against a local Better Business Bureau to proceed. *Budget Van Lines v. Better Business Bureau of Southland*, No. B235338 (Cal. App. Aug. 20, 2013) (unpublished) (affirming denial of anti-SLAPP motion).

The BBB gave Budget Van Lines an "F" grade. The website explained that an F grade could be given when: "We strongly question the company's reliability for reasons such as that they have failed to respond to complaints, their

advertising is grossly misleading, they are not in compliance with the law's licensing or registration requirements, their complaints contain especially serious allegations, or the company's industry is known for its fraudulent business practices."

Budget alleged this explanation was false and defamatory. Among other things, plaintiff alleged it was a "moving broker" not a moving company and was in

compliance with all relevant state regulations. The BBB argued that the explanation was a hypothetical explanation of how a company could earn an "F" grade and the statements were not specifically about Budget.

The court held that Budget demonstrated a probability of success to survive an anti-SLAPP motion to strike. The statements were not hypothetical, but were provably false statements of fact about plaintiff. This was particularly so because the "BBB holds itself out as an expert on the professionalism and trustworthiness of businesses."

It was a closer question, the court said, whether Budget could demonstrate the probability of prevailing on its claim it was defamed solely by the "F" grade. Grading systems are (Continued on page 38)

In a brimming information society and an era of "listicles," curators of content, including online ratings sites, play an important role in informing the public.

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generally considered to be non-actionable opinions, the appeals court said. But because Budget showed a probability of prevailing on the other statements, the panel said that it need not resolve whether the "F" itself was protected opinion.

### Yelp and Angie's List

A recent high profile case showed the risk that consumers may face after posting negative online reviews. A Virginia contractor sued a homeowner over negative reviews on Yelp and Angie's List. See *Dietz Dev LLC. v. Perez*, No. CL 2012-16249 (Va. Cir. Jan. 31, 2014). Dietz sued Perez for defamation seeking \$750,000 for loss of reputation and loss of business. Among other statements in her reviews, Perez said her townhome was left damaged, that she was invoiced for work not performed, and jewelry had gone missing from

her home at a time when Dietz was the only other person with a key. "Bottom line do not put yourself through this nightmare of a contractor," Perez said on Yelp. Dietz responded in online reviews by accusing Perez of stealing from him by not paying him.

The case went to trial in January and the jury found the parties had defamed each other and no one got damages. The

parties' back-and-forth was factual and not mere opinion. Nevertheless, Public Citizen's Paul Levy observed that the *Dietz* case could be seen as a vindication of consumers' rights to criticize businesses. But Levy also noted the verdict also "told the parties, a pox on both your houses" and might serve as a reminder to aggrieved businesses not to run to the courthouse.

The plaintiff, however, is seeking a post-trial injunction to order defendant to remove her defamatory reviews. That appears to be an issue of first impression in Virginia – at least in the Internet era – whether the traditional common-law rule that equity will not enjoin a libel will give way to allowing post-judgment injunctions after speech has been found to be defamatory.

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Press center				
In the news				
Press releases	1. Grand Resort Hotel & Convention Center - Pigeon Forge, Tennessee			
Survey insights	2. Jack London Inn - Oakland, California			

#### Conclusions

Plenty of Section 230 case law has developed to protect online review sites from liability over third-party submitted reviews. But the website's own rankings and reviews fall outside the scope of Section 230 and defamation claims may be tested by common-law protections for opinion. These recent cases show some of the distinctions courts may seize on when addressing the fact-opinion distinction, including the nature of the website and the form and content of the statements.

These are not the only cases to consider libel claims over online reviews.

In Castle Rock Remodeling, LLC v. Better Business Bureau of Greater St. Louis, Inc., No. ED96214 (Mo. App. Nov. 1, 2011), the Missouri Court of Appeals dismissed a door-and-window installer's claims for libel/slander and

> tortious interference with business expectancy against the BBB. The BBB gave plaintiff a "C" grade based on 17 complaints filed against the business and "advertising issues." A rating or grade cannot be the basis of a defamation claim, the court concluded, because they "cannot be objectively verified as true or false and thus, are opinion accorded absolute privilege."

Similarly a New York appellate court affirmed summary judgment for Zagat in a defamation case over summarized consumer opinions. *Themed Rests., Inc. v. Zagat Survey, LLC*, 2005 NY Slip Op 06860 (N.Y. App. Div. Nov. 16, 2005). The curated reviews were constitutionally protected opinion. It did not matter that Zagat compiled diners' opinions. The court noted that restaurant ratings and reviews "almost invariably constitute expression of opinion."

Thus there is strong case law to protect "listicles" and consumer review sites involving the publication of qualitative judgments and opinions. The Sixth Circuit noted that information consumers are literate and know that the placement "within the bulk" of Top 10 lists "constitutes opinion, not a provable fact."

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