520 Eighth Avenue, North Tower, 20th Floor, New York, New York 10018 (212) 337-0200

MEDIALAWLETTER

Reporting Developments Through February 25, 2015

MLRC

LIBEL & PRIVACY

From the Executive Director's Desk

By George Freeman

The retirement of Jon Stewart; the deaths of Bob Simon and David Carr; the suspension of Brian Williams: it has been a sad and unfortunate month in the media. There is not much more one can say about the first three. But the Brian Williams saga is continuing, and is worth a few thoughts.

George Freeman

I reach no conclusion on what the suitable punishment for Brian Williams should be, both because I am not sure, and because of the possibility that more evidence will be coming in. As important, the proper balance between his heretofore good reputation and good character and the fibbing episode regarding his helicopter trip in Iraq is a very hard equation to settle. Nonetheless, there are some points, as this scenario unwinds, which are worthy of note. And they focus, in my view, on the two drivers of Mr. Williams' fate: media critics and social media, both of which are fueling the reaction totally out of proportion to their true import.

First, the greatest critics of Mr. Williams have been the media themselves. This self-flagellation has been typical in episodes of this sort. To point this out is not to say that the media shouldn't be transparent and open when it is to blame. Nonetheless, and by the same token, the media don't need to make more of their own frailties then they make of the errors and lies of politicians and other leaders in our society.

This is not to downplay the seriousness of Mr. Williams' mistakes. Nor is it to ignore that honesty and trust are the two most important assets of a journalist and that violations of those values are critical. But sometimes we go overboard. I was at the Boca conference in Scottsdale when the Williams situation was at its height. And whenever I went back to my room and turned on my tv, it was non-stop Brian Williams coverage, mainly with media critics lambasting him, making ominous guesses as to his future and speculating with interviewees about how unsalvageable his situation is.

It reminded me of when four New York Times reporters were putting together an article tracing the missteps of the fraudulent reporter Jayson Blair. Since any masthead or corporate interference was disfavored, I was asked to very lightly vet the article. When I met with the reporters in a room filled with old pizza boxes and reeking of folks who had not left it for days, I asked where they thought the article – which had reached four full newspaper pages - would be placed. One of the reporters looked at me

(Continued on page 4)

(Continued from page 3)

sarcastically and said "it better be on the effing front page; why the hell else have we been here for 72 straight hours."

Indeed, the article did run on the first page, but I wonder whether an article dealing with a similar fraud by a worker in another industry would have merited such prominent positioning and four full pages of analysis. My guess is it wouldn't, and so the question remains, why do we do this to ourselves? Do the other network commentators enjoy beating up on a competitor? I think not: after all, not many journalists are clean as the falling snow, so they must be musing "There but for the grace of God go I." Rather, it is the fascination we have with ourselves, and the interest which we – wrongly – believe the public has with our profession. But the result is self-defeating. It leads to even greater attention and greater misgivings by the public of the media. And the last thing we need, given the already low public opinion ratings of our objectivity and accuracy, is more attention to our missteps.

The greatest critics of Mr. Williams have been the media themselves. This self-flagellation has been typical in episodes of this sort.

I am simply not sure that Dana in Dubuque cares so much that Brian Williams fibbed - once - or would cease watching NBC News because of his error. Yet the constant hammering in the media of the gravity of his misrepresentation might sadly lead her to either not watch the news at all or to switch to another network. While it is true that Mr. Williams' Q rating went down precipitously in the wake of this episode, one wonders whether that was driven by the media commentary more than the transgression itself. And I also wonder whether had he stayed on the air, NBC's ratings would have gone down or, perhaps better put, would have gone down more than the slight bit they already have with his fine substitute.

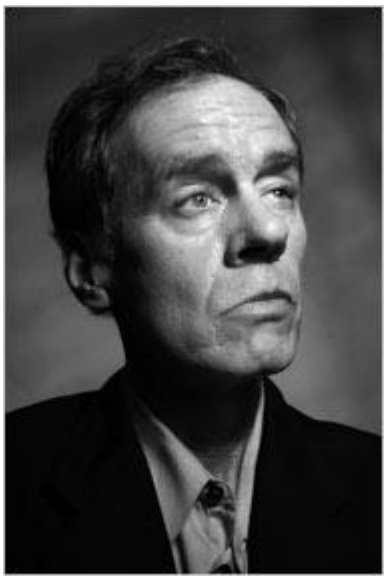
Second, social media has played a role too – and not a helpful one. Thus, the media pick up on the crudest and cruelest social media remarks, which give the belittling of the target a life of its own. I am trying not to be a curmudgeonly old fogy, but why some colorful gratuitous remarks by a few non-experts are worthy of driving coverage - or public opinion as a whole - is beyond me. In the last round of presidential debates, the

(Continued on page 5)

(Continued from page 4)

networks would show tweets of some of the audience immediately after the debates as though the thoughts of a few random people had any real meaning. It's one thing to take a quick public opinion polls to show what the public, as a whole, is thinking, but to give a few often ignorant and usually extreme tweets such attention is akin to going into a bar and quoting the rudest and crudest remarks one hears and making them the subjects of an analysis piece. The only plausible explanation is that "doing social media" is thought to be the way to attract valuable young viewers.

While social media can have a destructive impact in its own right, when it is covered by, and intersects with, mainstream media, the harm is exponentially exacerbated. At the outset, harsh behavior and criticism can multiply rapidly on social networks, fueled by mutual encouragement and validation of the behavior. The result is a pile-on, where the point is not to discuss the target's perceived wrongs in a rational manner, but to boost the posters' self-image through progressively crueler remarks. But worse, when the professional media pick up on the most heinous of these remarks, it elevates their already devastating effect to an entirely new level, rewarding gratuitous criticism with mainstream approval. This perfect storm is what seems to have happened here.



David Carr

In the Williams case the combination of relentless negative media coverage and the social media juggernaut led to Mr. Williams' inevitable undoing. Whether that would have occurred based on the facts themselves and not on our own overcritical analysis of him in conjunction with the social media outcry is a very open question. It's too bad Mr. Williams didn't get the chance to have a fair evaluation of public opinion and the level of the public's trust in him in a more reasonable and calm environment.

In the wake of David Carr's unfortunate death, many people remarked that it was a good thing he – a former cocaine addict – got a second chance. One wonders why Brian Williams was not deserving of a second chance himself.

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

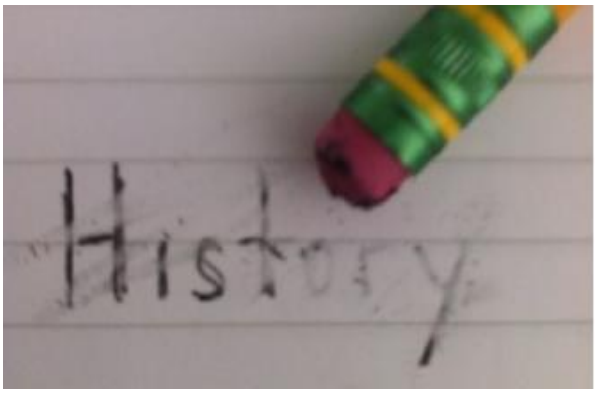
Criminal Erasure Statute Does Not Expose Historically True Reporting To Post-Hoc Tort Liability

"There's No Right To Have Your Arrest Forgotten"

By Michael Beylkin

On January 28, 2015, the Second Circuit issued a decision affirming a trial court's dismissal of Lorraine Martin's lawsuit that had attempted to bring libel and other publication-related claims against media outlets that published accounts of her 2010 arrest, an arrest that was later expunged under the Connecticut Criminal Records Erasure Statute ("Erasure Statute"). *Martin v. Hearst Corp.*, 2015 WL 347052 (2d Cir. Jan. 28, 2015).

The decision, written by Judge Richard C. Wesley for a unanimous panel of the court, addressed whether otherwise factually true reporting of Ms. Martin's 2010 arrest on drug-related charges was subject to publication-related tort liability after those charges against her were subsequently dropped by prosecutors and the criminal record of her arrest "erased." The court noted that the Erasure Statute operates purely in the "legal sphere" – that is, only with respect to an arrestees' relationship with the State – and the statute cannot and does not "wipe from the public record the fact that certain historical events have taken place." The court held that the Erasure Statute does not render tortious historically accurate news accounts of an arrest merely because the subject of those news accounts is later deemed, "as a matter of legal fiction," to never have been arrested, and ultimately affirmed the district court's grant of summary judgment in favor of the media defendants.



Background

On August 20, 2010, Lorraine Martin was arrested after police executed a search warrant and was charged with possession of narcotics, possession of drug paraphernalia, and possession of a controlled substance. A little less than a week later, *The Connecticut Post*, *The Stamford Advocate*, and *The Greenwich Time*, all of which are

(Continued from page 6)

newspapers owned by the Hearst Corporation, published articles in print as well as online, reporting that Ms. Martin was "arrested and charged with numerous drug violations [on] Aug. 20 after police received information that a pair of brothers were selling marijuana in town." News 12 Interactive also published an online article reporting that Ms. Martin was arrested "after police say they confiscated 12 grams of marijuana, scales and trace of cocaine from [her] house" and that she was "freed on bond" and "did not enter a plea."

More than a year after these media entities published these reports of Ms. Martin's arrest, the State of Connecticut decided not to pursue the criminal charges against her, and a *nolle prosequi* was apparently entered in January 2012. Under Connecticut's Erasure Statute, "[w]henever any charge in a criminal case has been *nolled* . . . all police and court records and records of the state's . . . pertaining to such charge shall be erased" and "[a]ny person who shall have been the subject of such an erasure shall be deemed to have never been arrested within the meaning of the general statutes." Conn. Gen. Stat. § 54-142a(c)(1), (e)(3). Thus, because the criminal case against Ms. Martin has been *nolled*, her arrest records were "erased" by legal operation of this statute.

The decision addressed whether otherwise factually true reporting of Ms. Martin's 2010 arrest on drug-related charges was subject to publication-related tort liability after those charges against her were subsequently dropped by prosecutors and the criminal record of her arrest "erased."

Each of the media stories about Ms. Martin's arrest, however, remained available online, even after the charges were *nolled* and even after Ms. Martin's arrest had been allegedly "erased." Thereafter, sometime later in 2012, Ms. Martin apparently submitted a request to the various media outlets to remove the online articles about her arrest, but they declined to do so.

In June 2012, Ms. Martin sued several media outlets, including the Hearst-owned newspapers and Cablevision's News 12 Interactive in state court, claiming that "on or after January 11, 2012" the media's new reports detailing her arrest, which had remained unchanged and available online, became defamatory because Ms. Martin "was deemed never to have never been arrested" by operation of the Erasure Statute.

In addition to the libel claim, Ms. Martin's complaint tacked on tort claims for false light, negligent infliction of emotional distress, and invasion of privacy. She also sought to represent a class composed of "similarly situated individuals" about whom the media defendants "have published and continue to publish" details of arrests in "police blotters and/or news sections" even after the Erasure Statute has "deemed" them to have not been arrested.

District Court

After the media defendants removed the case to the federal district court in Connecticut, they moved to dismiss the complaint, arguing that their news accounts were substantially true. According to the media defendants, under the single publication rule, all of Plaintiff Martin's claims accrued at the moment of the media defendants' print and online publications – in August 2010, rendering the analysis of the truth of the reporting dependent solely on the facts as they existed at that time. And, the media defendants pointed out that Ms. Martin did not deny the fact of her arrest in 2010, nor allege that the media defendants' news reports were inaccurate at the time of publication, but rather, her complaint was premised on a novel theory that the Connecticut Erasure Statute retroactively turned their true news reports into falsehoods.

Not only did the limited case law interpreting the Erasure Statute and other similar statutes in other states not support Plaintiff's theory, the media defendants further argued that if her reading of the Erasure Statute were to be given effect, it would impermissibly invade the First Amendment protections for press and speech – especially on historically accurate reporting of facts related to the government's enforcement of criminal law.

The media defendants further argued that if her reading of the Erasure Statute were to be given effect, it would impermissibly invade the First Amendment protections for press and speech.

In opposition, Ms. Martin did not dispute that the news reports were true when they were published, but instead contended that because her arrest record qualified for erasure, and because the Erasure Statute "deemed [her] to have been never arrested" in the first instance, the *legally*-operative fact of her non-arrest was now a matter of true *historical* fact. As such, the media defendants' reporting on her arrest, though true at the time, were now purportedly false and subject to tort liability.

After converting the motions to ones for summary judgment, the court rejected Plaintiff Martin's formulation of the Erasure Statute, finding her view was neither a plain and sensible reading of the text of statute, nor an interpretation that was permissible under "basic canons of statutory construction."

First, the district court noted that the express language of subsection (e)(3) of the Erasure Statute was qualified to only effect a change with respect to the fact of one's arrest "within the meaning of the general statutes," and merely allowed such individuals "lawfully to deny the fact of the arrest in court and other official proceedings." And while the Erasure Statute was silent as to how broad a concept of an erasure "within the meaning of the general statutes" was to be, the court found compelling that the text merely discussed "[e]rasure of criminal records" after a subject of an arrest is acquitted,

the charge dismissed, or receives a pardon. The court moreover noted that the statute is "addressed to court and law enforcement personnel" by imposing restrictions as to their conduct and their retention of records, but "[n]othing in the statute, however, suggests any intent to impose requirements on persons who work outside courts or law enforcement agencies." The court concluded that there was simply no evidence from the text of the Erasure Statute that the Connecticut legislature intended to constrict the conduct of private individuals who might otherwise have obtained the underlying arrest information.

Second, the court found that Plaintiff Martin's "history-altering" interpretation of the Erasure Statute would otherwise raise significant "constitutional infirmities." Even if the Erasure Statute had been ambiguous on its effects (or lack thereof) on private parties, the court found that if such "erasure laws operated to allow defamation liability to be imposed on true and newsworthy statements, it would run afoul of the First Amendment" protection for truthful statements in the public domain.

There was nothing in the Erasure Statute that evinced "any intent to impose requirements on persons who work outside courts or law enforcement agencies, and nothing suggests any intent to mandate the erasure of records held by such persons."

Indeed, the district court noted that this was not the first time such an interpretation had been rejected both as a matter of textual interpretation and First Amendment principles, and quoted the Connecticut state trial court's decision in *Martin v. Griffin*, 2000 WL 872464, at *12 (Conn. Super. Ct. June 12, 2000) (emphasis added):

The erasure statute operates in the legal sphere, not the historical sphere. That is, the erasure statute is designed to return a person's criminal record to the status quo when that person is found not guilty as a consequence of a final judgment, or a charge is dismissed. The erasure statute does not, and could not, purport to wipe from the public record the fact that certain historical events have taken place. Only in a totalitarian system could law purport to have such a sweeping effect.

Because Plaintiff Martin's four claims all hinged on a finding that the media defendants' reporting of her arrest was historically false, which is was not, the court granted judgment to the media defendants as a matter of law.

Plaintiff Martin then appealed the district court's decision to the Second Circuit.

Second Circuit

On appeal to Second Circuit, Ms. Martin recapitulated her argument that by operation of the Erasure Statute, once her arrest had been "erased in January 2012, the

media defendants' reports became false. She also nuanced her prior argument that even if the media defendants' reporting remained true after her arrest was "erased," their failure to update their news accounts to include the fact of her arrest's erasure gave rise to a claim for defamation by implication. The Second Circuit rejected both of these arguments and largely adopted the district court's thorough analysis.

While recognizing that the Erasure Statute was intended to "wipe[] the slate clean" for an arrestee, the Second Circuit noted that all the statute could accomplish was a "legal fiction" – that in the eyes of the state government, the individual is no longer considered to have been arrested. Thus, the government (and only the government) is prohibited from relying on such "erased" records in a later trial against that individual, or to enhance a sentence for a subsequent criminal offense. But, as the Second Circuit quoted the district court's opinion, there was nothing in the Erasure Statute that evinced "any intent to impose requirements on persons who work outside courts or law enforcement agencies, and nothing suggests any intent to mandate the erasure of records held by such persons."

Historically accurate reporting will likely not be subject to tort liability, even when states are increasingly inclined to impose legal fictions to protect their citizens' reputations from a perceived stigma.

The Second Circuit avoided any discussion of the constitutional implications of a broader erasure provision, holding instead that the statute at issue, like others across the country, simply did not render historically accurate news accounts of an arrest subject to defamation-related liability merely because the subject of those accounts is later deemed by the state as never having been arrested. Nor did the Court find that the media's news reports imply any fact about Ms. Martin that was not true, as "reasonable readers understand that some people who are arrested are guilty and that others are not" and there can be no requirement to avoid liability that true reporting be updated to include all manners of the eventual resolution of such arrests.

In what is likely just an opening salvo in an attempt to import a "right to be forgotten" akin to what is spreading from the European Union, the Second Circuit's decision, though avoiding the thorny First Amendment question, signals clearly that historically accurate reporting will likely not be subject to tort liability, even when states are increasingly inclined to impose legal fictions to protect their citizens' reputations from a perceived stigma.

Indeed, as the Court succinctly noted:

> [T]he uncontroverted fact is that Martin was arrested on August 20, 2010, and that the reports of her arrest were true at the time they were published. Neither the Erasure Statute nor any amount of

(Continued from page 10)

wishing can undo that historical truth. The Moving Finger has written and moved on.

Jonathan R. Donnellan and Courtenay O'Connor represented defendant-appellee Hearst Corporation on the appeal. David A. Schulz, Cameron Stracher and Michael Beylkin of Levine Sullivan Koch & Schulz, LLP represented defendant-appellee News 12 Interactive, Inc. Eugene Volokh of the UCLA School of Law First Amendment Amicus Brief Clinic filed an amicus brief in support of the media defendants-appellees on behalf of the Reporters Committee for Freedom of the Press. Plaintiff-appellant was represented by Ryan O'Neill and Mark Sherman of The Law Offices of Mark Sherman, LLC.

First Amendment Does Not Bar Police Officers' Claims Against Newspaper's Use of "Personal" DMV Information

By Gregory R. Naron

The Seventh Circuit recently issued an opinion adopting an "expansive" view of the federal Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. § 2721 *et seq.* ("DPPA"), that would potentially subject journalists to civil penalties under the statute for unauthorized acquisition and disclosure of purportedly "personal information" from Department of Motor Vehicles ("DMV") records in the course of their reporting. *Dahlstrom v. Sun-Times Media LLC*, No. 14-2295, 2015 WL 481097 (7th Cir. Feb. 6, 2015).

The parties complaining about publication of purportedly personal information were Chicago police officers, and the information pertained to an investigation of possible favoritism toward a well-connected criminal suspect. The court rejected an "as-applied" First Amendment challenge to the statute, holding, among other things, that the Supreme Court's decision in *Bartnicki v. Vopper*, 532 U.S. 514 (2001) did not apply because the journalists "unlawfully" acquired the "personal information."

Background

The reporting at issue in *Dahlstrom* involved an incident in which Richard Vanecko—the nephew of Chicago's former mayor Richard Daley—struck and killed a man on Chicago's Rush Street before fleeing the scene. The Sun-Times (along with other news media) ran of a series of investigative reports questioning why the police declined to seek charges even after detectives knew Vanecko landed the fatal blow. The police had defended their failure to act by claiming that eyewitnesses failed to pick Vanecko out of a lineup.

After obtaining a photograph of the lineup through FOIA, the Sun-Times published an article, entitled "Daley Nephew Biggest On Scene, Not In Lineup," reporting that the police officers selected for the unsuccessful lineup bore unusually close physical resemblances to the suspect. The article showed that officers picked for the lineup were

(Continued on page 13)

(Continued from page 12)

even bigger than the 6'3" Vanecko, and compared the participants' appearances, including ages, height, weight, eye and hair color. This investigative journalism exposed official corruption and ultimately led to the appointment of a special prosecutor.

The plaintiffs in the *Dahlstrom* case are the police officers that participated in the lineup that factored into the decision not to charge Vanecko. Acting in their official capacity, the officers were clearly participants in a matter of great interest to the public. Yet, they moved to suppress the lineup article. Unsuccessful in Illinois state court (the Circuit Court of Cook County twice refused motions to enjoin the article), plaintiffs pursued a federal theory and forum. They brought a one-count complaint asserting that the lineup article's information about their approximate ages and physical appearance was derived from Illinois DMV records, and that its publication violated the DPPA, which prohibits knowingly obtaining or disclosing "personal information" from a DMV record. They sought an injunction compelling the Sun-Times to withdraw the article and bar future reports, plus unspecified compensatory and punitive damages.

Motion to Dismiss and 7th Circuit Ruling

The Sun-Times moved to dismiss the complaint, arguing that the published information does not constitute "personal information" within the meaning of the DPPA, or, alternatively, that the statute's prohibition on acquiring and disclosing personal information from DMV records violates the First Amendment's free speech and press guarantees. The district court denied the Sun-Times' motion, and on interlocutory appeal, the Seventh Circuit affirmed and remanded for further proceedings.

Notably, the DPPA's definition of "personal information" does not list the disputed characteristics here—the officers' height, weight, hair and eye color, and approximate age. 18 U.S.C. § 2725(3). Instead, the Act defines "personal information" as "[i] nformation that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information . . . ."

Nevertheless, the Seventh Circuit adopted an "expansive" reading of "personal information" under the DPPA (motivated, the court said, by the statute's anti-stalking purpose), holding "that each Officer's approximate date of birth, height, weight, hair color, and eye color fall within the range of 'personal information' to which the DPPA's protections apply. Sun-Times therefore violated the Act when it knowingly obtained the

(Continued on page 14)

(Continued from page 13)

Officers' personal details from the Illinois Secretary of State and proceeded to publish them." *Dahlstrom*, 2015 WL 481097 at *5.

The court opined that its reading "does not strain the DPPA's plain meaning, directly advances its underlying legislative goals, and has been implicitly adopted by several courts"; it rejected the Sun Times' vagueness argument, holding that information "including age, hair color, eye color, weight, and height falls squarely within the universe of information that 'identifies' an individual and, therefore, our interpretation is 'clear and precise enough to give a person of ordinary intelligence fair notice about what is required of him.'" *Id*. at *6.

Court's First Amendment Analysis

Turning to the First Amendment challenge, the court divided its analysis into two parts: DPPA's prohibition on (1) obtaining, and (2) publishing personal information.

While perfunctorily acknowledging the Supreme Court's comment in *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972), that "news gathering is not without its First Amendment protections," the Seventh Circuit emphasized that the Court "has repeatedly declined to confer on the media an expansive right to gather information," and cited cases such as *Cohen v. Cowles Media Co*., 501 U.S. 663 (1991) for the proposition that the press have no "constitutional right of special access to information not available to the public generally." *Dahlstrom*, 2015 WL 481097 at *6.

The court gave the back of its hand to the Supreme Court's access to governmental proceedings cases.

The court gave the back of its hand to the Supreme Court's access to governmental proceedings cases—holding "there is no corresponding need for public participation in the maintenance of driving records, which can hardly be described as an "essential component" of self-government" (*id.* at *7)—and cited its prior opinion in *Travis v. Reno* for the proposition that "[p]eering into public records is not part of the 'freedom of speech' that the first amendment protects. 'There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy.'" 163 F.3d 1000, 1007 (7th Cir. 1998) (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978)).

The court also rejected the Sun-Times' reliance on the Seventh Circuit's recent decision in *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), holding that, unlike the eavesdropping statute in *ACLU*, which amounted to a "total ban" on recording police officers, the DPPA only prohibited "the acquisition of personal information from a single, isolated source"—with unintentional irony, noting

(Continued on page 15)

(Continued from page 14)

that the supposedly private information here "can be gathered from physical observation of the Officers or from other lawful sources. . . ." *Dahlstrom*, at *8. The court also found privacy interests in the DPPA information that it said were absent in *ACLU*.

Having found the DPPA's prohibitions did not "trigger heightened First Amendment scrutiny and instead require[] only rational basis review," the court "easily" found the prohibitions "rationally related to the government's legitimate interest in preventing 'stalkers and criminals [from] acquir[ing] personal information from state DMVs. . . .'" *Id.*

Regarding the DPPA's "disclosure" (publication) prohibition, the court rejected the Sun-Times' reliance on the *Daily Mail/Florida Star/Bartnicki* line of cases because there is "no authority for the proposition that an entity that acquires information by breaking the law enjoys a First Amendment right to disseminate that information. Instead, all of the many cases on which Sun-Times relies involve scenarios where the press's initial acquisition of sensitive information was lawful." *Id.* at *10.

"Even in *Bartnicki*," while "the press had reason to know that the initial interception was unlawful, the press's 'access to the information … was obtained lawfully.'" "Although Sun-Times claims that, in acquiring and disclosing truthful information, it engaged only in 'perfectly routine, traditional journalism,' it cannot escape the fact that it acquired that truthful information *unlawfully*." *Id.* at *10-11 (italics in original).

There is "no authority for the proposition that an entity that acquires information by breaking the law enjoys a First Amendment right to disseminate that information."

Possibly the most press-hostile section of this generally hostile opinion is the one in which the court negotiates the question left open in *Bartnicki*—whether publication of unlawfully obtained truthful information could be punished. Here, the court emphasizes that the DPPA's limitations on disclosure are content-neutral and do not express a "preference for one category of speech over another," and finds the statute's "underlying public safety goals" justified what it deemed "incidental" restrictions on speech: "Although the Sun-Times article relates to a matter of public significance" the court opined that "the specific details at issue are largely cumulative" and "the value added by the inclusion of the Officers' personal information was negligible. . . . Therefore, Sun-Times's publication of the Officers' personal details both intruded on their privacy and threatened their safety, while doing little to advance Sun-Times's reporting on a story of public concern." *Id.* at *13.

And while *Bartnicki* did not accept "deterrence" as a justification for punishing the journalists who obtained information from a third party wrongdoer, "that is not our case. Here, there is no intervening illegal actor: Sun-Times itself unlawfully sought and

(Continued on page 16)

(Continued from page 15)

acquired the Officers' personal information from the Secretary of State, and proceeded to publish it. Where the acquirer and publisher are one and the same, a prohibition on the publication of sensitive information operates as an effective deterrent against the initial unlawful acquisition of that same information." *Id.* at *12.

The Court of Appeals closed by noting that the challenge here was as-applied, and its holding "limited to the facts and circumstances of this case. We do not opine as to whether, given a scenario involving lesser privacy concerns or information of greater public significance, the delicate balance might tip in favor of disclosure. We hold only that, where members of the press unlawfully obtain sensitive information that, in context, is of marginal public value, the First Amendment does not guarantee them the right to publish that information." *Id.* at *14. However, given the facts of this case, it is difficult to conceive another one in which the privacy interests would be more insubstantial, or the purpose of the publication much more newsworthy.

Possibly the most press-hostile section of this generally hostile opinion is the one in which the court negotiates the question left open in Bartnicki—whether publication of unlawfully obtained truthful information could be punished.

On February 20, the Sun-Times filed a Petition for Rehearing *En Banc* (Case No. 14-2295, Doc. 32), arguing that the Panel's decision "opens the door for the press to be punished and enjoined for publishing truthful information regarding a matter of public concern" and in doing so "contradicted years of jurisprudence" by the Seventh Circuit and Supreme Court. In particular, the Petition flags the Panel's denial of First Amendment protection to material that "judges determine [is] 'marginal'" to a news story – in contradiction to Supreme Court holdings in cases such as *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011) (funeral picketers protected by First Amendment even though their "contribution to public discourse may be negligible").

The Petition also emphasized that the Panel's construction of the statute ignored Seventh Circuit and other precedent "warning against vague, non-exhaustive lists of speech prohibitions," and that "the press should assume it is entitled to publish information voluntarily provided by the government, as was the case here." Since the statute was clearly "susceptible" to a construction that would have avoided the thorny Constitutional issues raised by Plaintiffs' lawsuit (including questions "still-open" under *Bartnicki*), such a construction should have been adopted.

Gregory R. Naron is Counsel at Dentons in Chicago. Dentons filed a media amicus brief in this case in support of the Sun Times. The Sun-Times is represented by Damon Dunn, Funkhouser Vegosen Liebman & Dunn Ltd. in Chicago.

Court Affirms Summary Judgment Dismissing Coal Magnate's Libel Suit

Calls on State to Adopt Anti-SLAPP Protection

By John C. Greiner

In *Murray v. Chagrin Valley Publishing Company*, (Ohio App. Dec. 11, 2014) the Ohio Court of Appeals for the Eighth District correctly granted summary judgment to several defendants in a libel suit brought by Robert E. Murray and several of his affiliated coal companies. More important than the decision in the case before it, however, was the court's one paragraph conclusion which called for the Ohio legislature to adopt an anti-SLAPP statute. The *Murray* case presents a compelling argument in support of the court's call to action.

Background

Robert Murray owns Murray Energy Corp., the largest privately owned coal company in America. The day after President Obama's 2012 re-election Murray Energy fired 158 employees. In a personal "prayer" delivered to employees the day of the firings, Mr. Murray said: "Lord, please forgive me and anyone with me in the Murray Energy Corp. for decisions we are now forced to make to preserve the very existence of any of the enterprises that you have helped us build."

More important than the decision in the case before it, however, was the court's one paragraph conclusion which called for the Ohio legislature to adopt an anti-SLAPP statute.

An organization called "Patriots for Change" organized a protest in front of Murray Energy's Chagrin Falls headquarters in December of 2012. Protestors accused Murray of being a bully, and held up signs that included statements such as "Mr. Murray stop intimidating your coal mining employees."

Chagrin Valley Times reporter Sali McSherry reported on the protest, quoting several demonstrators, but also quoting verbatim Murray's official statement calling Patriots for Change a "militant unionist labor group."

The Valley Times also published an editorial written by Editor Emeritus David Lange taking Mr. Murray and Murray Energy to task for its spotty safety record and challenging the truth of certain statements Mr. Murray had made regarding his alleged lack of knowledge of a 2007 partial mine collapse.

(Continued on page 18)

(Continued from page 17)

The Valley Times editorial cartoonist Ron Hill chimed in with a cartoon depicting a snowman made of lumps of coal, holding a sack of money in each hand. The cartoon also featured lyrics to the tune of "Frosty the Snowman" that included "Murray the coal-man … meant to hoard away his pay."

In response, Murray and his affiliated companies sued Patriots for Change, Chagrin Valley Publishing Co., Sali McSherry, David Lange, Ron Hill and assorted others for libel and false light invasion of privacy. The trial court granted summary judgment in defendants' favor on all claims, and the appellate court affirmed.

Court of Appeals Decision

It appears Murray did not seriously contest his public figure status or that of his affiliated companies. The appellate court thus considered whether the trial court correctly applied the actual malice standard.

This case illustrates the need for Ohio to join the majority of states in this country that have enacted statutes that provide for quick relief from suits aimed at chilling protected speech.

With respect to the McSherry news report, the court of appeals agreed the trial court correctly found no actual malice. And while this was a correct result, the appellate court's reasoning may not be exactly what media practitioners would like.

The plaintiffs argued that McSherry demonstrated actual malice by "failing to properly investigate" the claims of the protestors presented in the article. While a "failure to investigate" does not constitute actual malice as a matter of law, the appellate court seemed to adopt this standard. In affirming the trial court's summary judgment, the appellate court pointed to evidence establishing McSherry did investigate and corroborate the claims.

While the result is nice, the court should have focused on Murray's lack of evidence that McSherry entertained doubts about the accuracy of the story, rather than on evidence of how McSherry prepared the report.

As to Lange's editorial and Hill's cartoon, the appellate court correctly applied Ohio's law on opinion, which is more protective of the First Amendment than the federal standard announced in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). In Ohio, pursuant to the *Vail v. Plain Dealer Publishing Co.*, 72, Ohio St.3d 279 (1995) the question is not merely whether the particular statement constitutes a verifiable fact, but rather whether the statement, in the context of the entire piece, conveys an opinion. Pursuant to this contextual analysis the appellate court ruled the editorial and the cartoon constituted non-actionable opinion.

(Continued on page 19)

(Continued from page 18)

For similar reasons, the court upheld the summary judgment on the false light claim as well. It also affirmed the summary judgment in favor of Patriots for Change.

And while in most cases, the court would have stopped with its dispositive ruling, here the court added some color commentary. In its conclusion, the court said:

> This case illustrates the need for Ohio to join the majority of states in this country that have enacted statutes that provide for quick relief from suits aimed at chilling protected speech. … The fact that the Chagrin Valley Times website has been scrubbed of all mention of Murray or this protect is an example of the chilling effects this has. … Ohio should adopt an anti-SLAPP statute to discourage punitive litigation designed to chill constitutionally protected speech."

Good advice from Ohio's judicial branch. Let's hope the legislative branch pays attention.

John C. Greiner is a partner at Graydon Head in Cincinnati, OH. The newspaper was represented by J. Michael Murray and Lorraine R. Baumgardner, Berkman, Gordon Murray & Devan, in Cleveland, OH. Plaintiff was represented by Mark Stemm, L. Bradfield Hughes, Porter, Wright, Morris & Arthur, L.L.P. Columbus, OH; Kevin Anderson, Fabian & Clendenin, P.C., Salt Lake, Utah.

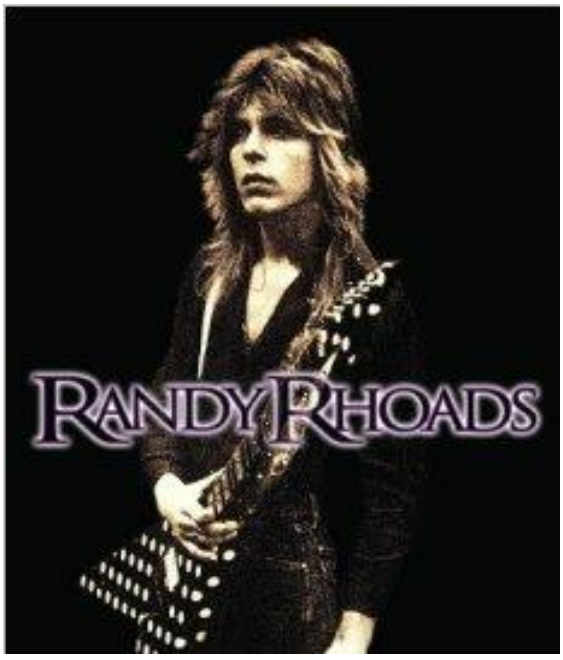
Anti-SLAPP Ruling: First Amendment Applies to Celebrity Biographers

One Breach of Contract Claim Left for Remand

By Lou Petrich and Jamie Frieden

The California Court of Appeal, Second District, held that claims for fraud, misappropriation, and unfair competition arising out of a book about heavy metal guitarist Randy Rhoads should have been stricken under California's Anti-SLAPP statute. *Rhoads v. Margolis*, 2015 WL 311932 (Cal.App. 2 Dist. January 26, 2015) (unpublished). It remanded to the trial court a sole remaining breach of contract claim against one of the four defendants.

Background



The case arose out of a biography written and published by defendants.

The case arose out of a biography, "Randy Rhoads" ("Book") written by defendants Steven Rosen and Andrew Klein, edited by defendant Peter Margolis, and published by defendant Velocity Publishing Company. Margolis had been a fan and guitar student of Randy and approached the Rhoads family about making a documentary film ("Documentary") about their son, a well-known guitarist with Quiet Riot and later with Black Sabbath who suffered an untimely death in a plane crash.

The Rhoads family agreed and entered into a contract assigning their Life Story Rights. In order to secure funding for the production, Margolis assigned the Life Story Rights to third party Dakota Entertainment North, Inc. In the process of making the Documentary, Margolis was approached by Rhoads fan Andrew Klein, who volunteered his time and money to help with the Documentary. Klein transcribed almost a hundred interviews and purchased licenses to use various photos in the Documentary with his own money. At the same time, Klein also purchased licenses to use various photos in a potential book about Rhoads.

(Continued on page 21)

(Continued from page 20)

When the Rhoads family disapproved of an early version of the Documentary, Margolis and Klein left the Documentary project. Klein decided to publish his own biography about Randy. Klein tried to get the Rhoads family's support for the Book, but they refused. Klein then set out to write the Book without the Rhoads family's support, hiring defendant Steven Rosen, a rock and roll journalist, to write the book and having Margolis serve as an editor. Klein created the company, defendant Velocity Publishing Group, Inc., to publish. Shortly after the Book was published, the Rhoads family sued.

Anti-SLAPP Motion

Defendants made a special motion to strike the action pursuant to California's Anti-SLAPP Statute, California Code of Civil Procedure Section 425.16 ("The Statute"). The Statute has two prongs. Under the first, the defendant must show that the challenged cause of action is one arising from an act in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue. Cal. Code of Civil Procedure § 425.16(b)(1). After the first prong is established, the burden shifts to the plaintiff to prove a probability of prevailing (evidence to support a *prima facie* case) on each of the alleged causes of action. *Id.*

The court of appeals opinion affirms that all the causes of action, under whatever manner Plaintiffs chose to label them, arose out of conduct in furtherance of the publication of the Randy Rhoads book.

The trial court denied most of the motions to strike, holding that only Rosen should be dismissed, because he was not involved with the Rhoads family or the Documentary at all, and only became involved when Klein decided to create his own Book. (Another alleged cause of action, misappropriation of Randy's name and likeness under California Civil Code Section 3344.1, was voluntarily dismissed in response to the Anti-SLAPP motion.)

Court of Appeals Decision

The court of appeals found that although the lawsuit alleged seven causes of action, the "principal thrust" of each of the claims was premised on the allegation that the defendants, in researching, writing, and publishing the Book, used the Rhoads family's proprietary material provided solely for the purpose of the documentary.

(Continued on page 22)

(Continued from page 21)

It further held that, as to the second prong of The Statute, Plaintiffs failed to meet their burden on all but one of the claims, a breach of contract claim against Margolis.

The court of appeal found that as to the contract claim, factual inquiries are necessary to determine 1) whether Margolis remained bound by the Margolis/Rhoads agreement under the specific terms of the assignment provision and 2) whether the Rhoads family can successfully established that the use of materials provided pursuant to the agreement were otherwise unavailable to Margolis.

It further found that for the fraud cause of action against Margolis and Klein, Plaintiffs provided no evidence that Margolis contemplated writing a book based on the Rhoads material before he executed the agreement for the Documentary, and neither Klein nor Velocity was involved with Margolis when the Rhoads/Margolis agreement was executed.

As to the misappropriation causes of action, the court of appeal applied the First Amendment defense to the publication of matters in the public interest, as well as Civil Code § 3344(d)'s statutory defense for the use of a name or likeness in connection with news or public affairs.

It also noted that relatives and associates of public persons generally have no claim for invasion of their right of publicity or privacy so long as the disclosure bears a reasonable relationship to the ties the relative had to the public person. Finally, when considering the Rhoads' claim for unlawful business practices, the court reasoned that the Rhoads family could not meet their burden because it had not articulated an actionable manner in which the public was likely to be deceived by the Book or that consumers suffered substantial injury.

The court of appeals opinion affirms that all the causes of action, under whatever manner Plaintiffs chose to label them, arose out of conduct in furtherance of the publication of the Randy Rhoads book and that such activity should be protected except where the Rhoads family met their burden of showing remaining triable issues of fact.

Plaintiffs' petition for rehearing was denied. Defendants also filed a petition for rehearing or clarification because the court's opinion had recited that each party was to bear its own costs. Defendants pointed out that because they had prevailed on the SLAPP motion they are entitled to recover attorney fees. The court agreed and remanded to the trial court for consideration of defendants' motion for attorneys fees.

Louis P. Petrich and Jamie Frieden, Leopold Petrich & Smith, Los Angeles, represented defendants. Alan G. Dowling, Santa Monica, represented plaintiffs.

Georgia TV Station Seeks High Court Review of Cramped SLAPP Ruling

Petition Supported by Media Amicus

A tragic train crash at a Midland, Texas veterans' parade led a Georgia veteran to file suit for his injuries and a Georgia television station to report that he had been revealed as a Purple Heart poseur. After being arrested and charged with false swearing in connection with his application for a Purple Heart license plate, the vet sued the station for defamation.

The station invoked Georgia's anti-SLAPP in its defense but the trial court demurred, ruling the statute inapplicable based on its conclusion that the broadcasts, which the court called "sensational" and "not air[ed] ... to prompt official actions," were merely incidental to official proceedings *Shane Ladner v. New World Communications of Atlanta, Inc. d/b/a FOX 5 ATLANTA*, Civil Action File No. 14A50915-1 (State Court of DeKalb County, Georgia, Oct. 8, 2014) (Alvin T. Wong, J.).

The station's interlocutory review application was denied by the Georgia Court of Appeals but is now pending before the Georgia Supreme Court and has been supported by amici the Reporters Committee for Freedom of the Press, the Associated Press, Gannett and the Georgia Press Association.

Although the trial court stopped short of declaring the anti-SLAPP statute inapplicable to media defendants – a conclusion at variance with prior Georgia precedent but one that plaintiff urged below and has asked the Georgia Supreme Court to adopt should it accept review – FOX 5 argues that the trial court's "subjective" refusal to apply the statute "encourages other trial courts to make equally subjective value determinations that may well serve as a pretext for arbitrary and constitutionally impermissible decisions based on whether the trial court 'approves of' the speech at issue."

Reviewing the history of anti-SLAPP statutes across the country as well as in Georgia, *amici* urged the Supreme Court to grant FOX 5's interlocutory review application. "News reports in connection with official proceedings, including Petitioner's news reports regarding the Respondent, … are emphatically within the ambit of the Georgia anti-SLAPP statute and the trial court's refusal to so recognize demonstrates the need for this Court to intervene and so rule."

The Georgia Supreme Court's decision on whether to accept the application is expected within the next two months.

New World Communications of Atlanta, Inc. d/b/a FOX 5 ATLANTA is represented by Cynthia L. Counts, Counts Law Group. The media amicus was filed by the Reporters Committee for Freedom of the Press and Peter Canfield of Jones Day. Plaintiff Shane Ladner is represented by Randolph A. Mayer of Mayer & Harper LLP.

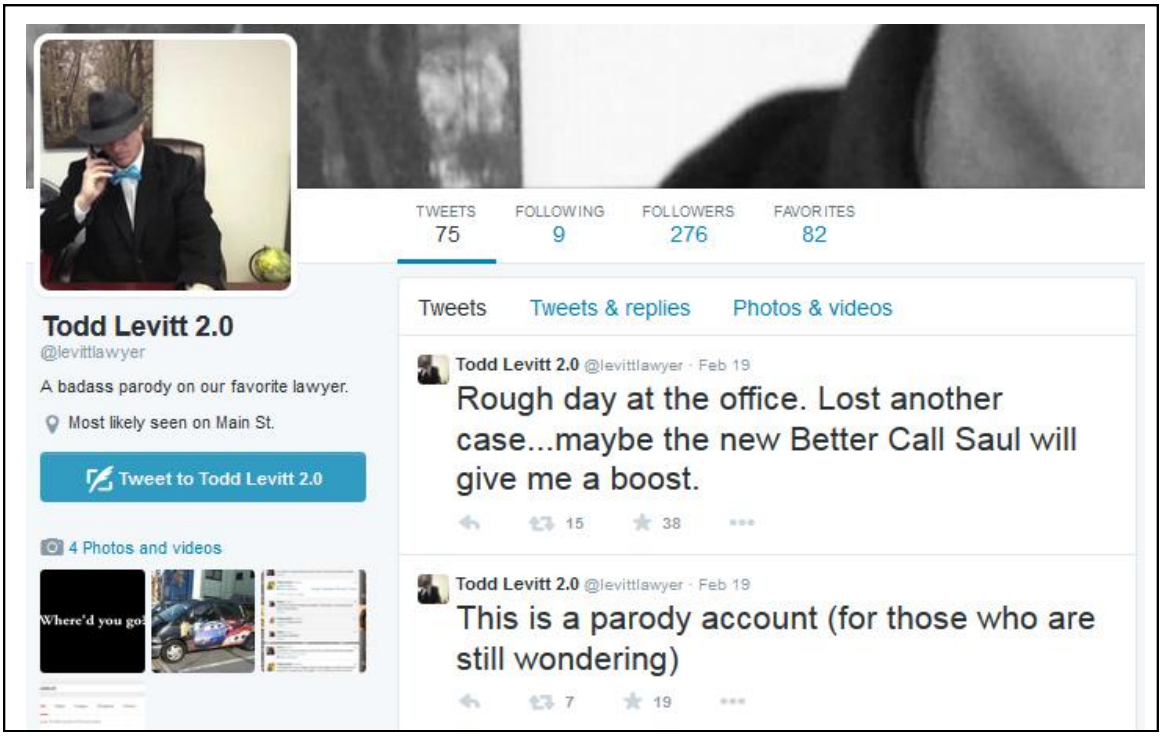
Twitter Account Mocking Lawyer Protected By First Amendment

A Twitter account using plaintiff's name and photograph was held to be a parody protected by the First Amendment. *Levitt and Levitt Law P.C. v. Felton*, No. 14-11644 (Mich. Cir. Feb. 19, 2015) (Chamberlain, J.).

The plaintiff, Michigan lawyer Todd Levitt, sued the creator of a Twitter account called "Todd Levitt 2.0" for defamation, false light and related claims. In addition to using plaintiff's name, defendant's Twitter account used a photograph of plaintiff as the Twitter "avatar" and used plaintiff's law firm logo.

In granting summary judgment to the defendant, the court held that in context defendant's Twitter site could not reasonably be interpreted as anything other than a parody. Among other things, the site referred to plaintiff as "a bad ass lawyer," and contained posts about smoking weed, and partying – subjects plaintiff discussed on his own Twitter account. Moreover, the "Todd Levitt 2.0" Twitter account stated it was a parody, as did several individual tweets.

As the court wrote, "It would be quite foolish for an attorney to outright state by way of self-promotion that he wants college students to drink and use illegal drugs so he can increase his income by defending them in court. Instead, it is much more likely that a reasonable person would see these Tweets as attempts to ridicule and satirize plaintiff's own Tweets that discuss alcohol and marijuana use."



Defendant's Twitter account. Click to read.

Nebraska Court: Calling Plaintiff a "Total Idiot" Not Defamatory

In a detailed discussion of the opinion defense under Nebraska law, the state's supreme court affirmed that an email calling plaintiff a "total idiot" was not actionable. *Steinhausen v. Home Services of Nebraska*, 289 Neb. 927 (Jan. 23, 2015).

At issue in the case was an email sent by a real estate agent to other agents complaining about plaintiff's work as a home inspector. The email in total stated: "He did an inspection in Seward for the agent that sold one of my listings. I will never let him near one of my listings ever again!!! Total idiot."

The email was sent to a listserv of local realtors, but a printed copy was sent anonymously to plaintiff. He sued for defamation and false light, alleging the email cost him nearly $800,000 in present and future earnings. The trial court granted summary judgment to defendant, holding her email was qualifiedly privileged and she had not abused the privilege.

Exercises in "name calling" generally fall under the category of rhetorical hyperbole

On appeal, plaintiff argued the court should have first determined whether the email was capable of a defamatory meaning – arguing that it was a factual assertion that he was "a stupid person or a mentally handicapped person." Affirming summary judgment, the court marshalled case law from around the country to state:

> Exercises in "name calling" generally fall under the category of rhetorical hyperbole. For example, courts have held that "'idiot,' raving idiot,'"[i]diots [a]float,'" and more vulgar variants were rude statements of opinion, rather than lay diagnoses of mental capacity. Similarly, courts have held that statements calling the plaintiff "stupid," a moron," and a "nincompoop" were not actionable. Courts have also held that statements potentially referring to the plaintiff's mental health, such as "raving maniac'"; "pitiable lunatics'"; "wacko," "nut job," and "hysterical'"; "crazy"; and "crank," were statements of opinion.

Vanity Fair Prevails in Libel Suit Brought by Oleg Cassini's Widow

By Elizabeth A. McNamara & Alison Schary

Oleg Cassini, the designer who created Jacqueline Kennedy's iconic styles, had been linked or married to the most beautiful women of his day – Grace Kelly, Marilyn Monroe, Anita Ekberg, Gene Tierney, among countless others. But Cassini's death in 2006 revealed a bombshell: unbeknownst to nearly everyone, Cassini had been married for the past 30-plus years to the woman he regularly introduced as his "assistant," Marianne Nestor.

His death kicked off a bitter estate battle between his no-longer-secret third wife (now widow) and Cassini's daughter from a previous marriage, Christina Belmont Cassini, which continues to play out in the courtroom and on Page Six to this day.

In August 2010, *Vanity Fair* ran an article by Maureen Orth titled "Cassini Royale," exploring Oleg's colorful career, the ongoing battles over the Cassini estate, and the woman to whom he had been married for over three decades. Among other reminiscences, a movie producer who had lived with one of Marianne's sisters noted that the three Nestor sisters "put the Gabor sisters to shame, "as "[e] very one of them latched onto big guys." A real estate attorney who had dated Marianne's other sister recalled "parties the Nestor sisters threw in the 60s in a Fifth Avenue apartment where there were only a few other girls and lots of older guys looking for actions." He observed: "The game the three Nestor sisters had was to hang out with rich guys, many of them if they could – the guys who could write the checks."

FAMILY FEUDS

Cassini Royale

By the time he died, in 2006, designer Oleg Cassini had seduced the "top top girls" of his day, from Grace Kelly to Marilyn Monroe to Anita Ekberg, married Hollywood stunner Gene Tierney, and shaped the look of the absolutely toppest girl of all, Jacqueline Kennedy. But, for all Cassini's success with women, the battle over his estate, between his daughter Tina and his last (and secret) wife, Marianne Nestor, suggests a chilling calculation behind the dashing image.

By Maureen Orth

In 2010, Vanity Fair ran an article titled "Cassini Royale," exploring Oleg's colorful career.

Unhappy with her portrayal in the *Vanity Fair* piece (for which she had declined to be interviewed), Marianne filed a complaint against *Vanity Fair* on the day before her one-year statute of limitations expired under New York law. She challenged numerous statements from the article, but emphasized her concern with the anecdote about parties in the 1960s. Then, she served *Vanity Fair* 124 days later, four days after the statutory period for service had lapsed.

(Continued on page 27)

(Continued from page 26)

Vanity Fair moved to dismiss the complaint for failure to state a claim and for failure to timely serve. In response, Marianne amended her complaint and moved for a retroactive extension her time to serve, claiming that she had miscalculated 120 days as equivalent to four months. While she admitted there was no good cause for the delay in service, Marianne claimed that the extension should be granted under the broader "interest of justice" standard in CPLR 306-b based on the merits of her action.

In particular, Marianne claimed that the quote referencing the Nestor sisters' 1960s parties with "lots of older guys looking for action" portrayed her as a "prostitute." She also objected to a passage suggesting that she was aware Cassini was carrying on extramarital affairs in their home during their secret marriage, claiming that it imputed unchastity and sexual immorality to her.

Court Dismissed for Failure to State a Claim

On April 19, 2013, the New York County Supreme Court dismissed the suit, finding that the complaint failed to state a claim for libel or infliction of emotional distress, and that for the same reasons, no extension of time to serve was warranted in the interests of justice.

Plaintiff appealed, and on February 10, 2015, the First Department of the New York Supreme Court, Appellate Division, unanimously affirmed the lower court's dismissal. *Cassini v. Advanced Publications*, 2015 NY Slip Op 01171.

The appellate court explained that "[c]ontrary to plaintiff's contention, the allegedly defamatory statements, including a quoted statement that plaintiff and her sisters used to throw parties in the 1960s that were attended by many wealthy 'older guys looking for action,' do not imply that plaintiff was a prostitute and lacked sexual morals." While brief in its reasoning, the opinion will be helpful going forward as yet another example of courts refusing to read implications of sexual immorality into G-rated (or even PG-rated) language.

While brief in its reasoning, the opinion will be helpful going forward as yet another example of courts refusing to read implications of sexual immorality into G-rated (or even PG-rated) language.

Elizabeth A. McNamara and Alison Schary of Davis Wright Tremaine, LLP, in New York, represented Vanity Fair in this case. Plaintiff was represented by Christopher Kelly of Reppert Kelly, LLC in New York.

Paris's Defamation Complaint Against Fox News: What We Know

This month, the City of Paris reportedly filed with a French court a defamation complaint seeking to hold Fox News Network responsible for statements about so-called "no-go zones" in Paris. The following is a report of what we know about the suit now, and what we expect to happen next.

The Challenged Reporting

In the wake of the January 7, 2015, terrorist attacks on the offices of the publisher of *Charlie Hebdo*, Fox News and another U.S.-based cable news network aired information about certain predominantly Muslim areas in France—described as "no-go zones"—which, out of fear, local police reportedly do not enter.

In response, the Mayor of Paris, Anne Hidalgo, stated during a January 20 interview on CNN that the City of Paris would "have to sue" Fox News for these reports, stating that the news channel had "insulted" the City. "When we're insulted, and when we've had an image, then I think we'll have to sue, I think we'll have to go to court, in order to have these words removed," Hidalgo told Christiane Amanpour. "The image of Paris has been prejudiced, and the honor of Paris has been prejudiced."

The City's Complaint

According to a report by France24.com, during a February 18 appearance in Washington D.C. at a summit on countering violent extremism, Mayor Hidalgo confirmed that the French capital city had in fact filed a legal complaint with a Paris court. Other news reports indicated that the Paris City Council approved the suit before it was filed.

(Continued on page 29)

(Continued from page 28)

The City of Paris's complaint is not publicly available, and no details have been revealed about its contents. Under French law, not even Fox News is entitled to access any documents underlying the suit at this stage.

The Current State of Proceedings

It may be months before any additional information about the suit becomes available. Usually, when complaints of this nature are filed in French courts, the next step is for an appointed "investigation judge" to conduct an investigation, through the use of police, to determine who is responsible for the allegedly defamatory statements.

If this process, which could take between three and nine months, goes forward, the expectation would be for certain companies or individuals in the United States thereafter to receive some kind of formal notice of the proceedings.

In the United States, a municipality cannot bring suit for defamation. As the Supreme Court held—in its landmark free-speech decision in *New York Times Co. v. Sullivan*—the "proposition" of a municipality suing for defamation "has disquieting implications for criticism of government conduct," and thus, "[f]or good reason, no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in American system of jurisprudence." 376 U.S. 254, 291 (1964) (citing *City of Chicago v. Tribune Co.*, 307 Ill. 595, 601, 139 N.E. 86, 88 (1923)).

Punishing Journalists for Using Hidden Cameras Violates Article 10

ECHR's First Decision on the Use of Hidden Cameras

By Peter Noorlander

In its first judgment on the use of hidden cameras in investigative journalism, the European Court of Human Rights has laid down a strong marker in favor of press freedom. *Haldimann and others v. Switzerland*, application no. 21830/09, 24 February 2015 (judgment available only in French)

Background

In its first judgment on the use of hidden cameras in investigative journalism, the European Court of Human Rights has laid down a strong marker in favor of press freedom.

The case concerned the conviction of four journalists for broadcasting an interview with an insurance broker that had been taped using a hidden camera. The interview was part of a television documentary that reported on misleading advice provided by life insurance brokers, an issue of public debate in Switzerland at the time. The broker filed for an injunction but failed and when the program was broadcast, filed a police complaint for violation of privacy – a criminal offence under Swiss law.

Although the journalists were acquitted at first instance and an injunction to prevent the broadcast failed, they were convicted on appeal and sentenced to a fine on the grounds that the use of a hidden camera had not been strictly "necessary" for the program. The journalists appealed to the Swiss Federal Court, and from there to the European Court of Human Rights.

ECHR Judgment

The Court's judgment first runs through its "general principles" on freedom of expression and invasion of privacy, emphasizing the importance of the right to freedom of expression as well as the duty on journalists to behave ethically. In cases concerning the invasion of privacy of public figures, six criteria in particular are relevant: (1) the extent to which the story contributed to a debate of general interest; (2) the reputation of the person concerned and the purpose of the report; (3) the past behavior of the

(Continued on page 31)

(Continued from page 30)

individual reported on; (4) the method by which the information was obtained; (5) the report's content, form and impact; and (6) the severity of the sanction imposed.

The Court also reaffirmed its holding, controversial still amongst many, that reputation is protected as part and parcel of the right to privacy if the attack on reputation raises such a level of harm as to interfere in the "private sphere".

Applying these criteria to the case, the Court found that while the insurance broker was not a public figure, the journalists had clearly sought to report on an issue of general interest: the improper sale of insurance schemes. In this, their aim was not attack the broker individually but rather to use him as an example to illustrate the wider issue. The impact of the story on the reputation of the dealer was therefore limited and the Court took this into account in its assessment of the case. The Court also recognized that the issue of insurance mis-selling was an issue of public interest. It criticized the holding of the Swiss Federal Court which had said that the report had not really furthered this debate by including the hidden camera footage: this was beside the point, the European Court said, what mattered was that the issue reported on was one of public interest.

The ECHR criticized the holding of the Swiss Federal Court which had said that the report had not really furthered this debate by including the hidden camera footage: this was beside the point, the European Court said, what mattered was that the issue reported on was one of public interest.

At the same time, the Court held that the broker did have a reasonable expectation of privacy. He was not a public figure and he had not consented to being filmed. This was counterbalanced, however, by the fact the he was not the sole focus of the report, which instead focused on the mis-selling of insurance schemes generally, and that he had not been interviewed in his own offices. This meant that while the filming had constituted an 'interference' with his privacy, this interference was at the lower end of the scale.

The Court went on to consider the crucial element of the case from a jurisprudential perspective – the method by which the information had been obtained. It first reaffirmed that while journalists have considerable leeway in their reporting on issues of public interest, they must do so in good faith, on an accurate factual basis and they have to strive to provide "reliable and precise" information in accordance with the ethics of journalism.

The Court noted that the use of hidden cameras is somewhat of a grey area under Swiss law: it is not explicitly prohibited but can be allowed under certain conditions which are set out in the Code of Ethics of Swiss journalists. The journalists had interpreted the insurance scam report as falling within the parameters of when the use of hidden cameras is allowed, and while an injunction had been refused and the Swiss court of first instance had agreed with them the courts of appeal had not – they had

(Continued on page 32)

(Continued from page 31)

convicted the journalists. The European Court held that this demonstrated that their reporting had been in good faith – or at least not necessarily in bad faith. There was a debate to be had on the question whether or not the use of the hidden camera had been within the rules of ethics, even among the Swiss courts, and as far as the European Court was concerned the journalists should be given the benefit of the doubt in this.

The Court then considered the way in which the report had been broadcast. It took into account that the broker's face had been pixelated and his voice disguised, that he had not been interviewed in his own offices and that his suit was nondescript (as one would expect from an insurance broker). The Swiss government argued that tens of thousands might have recognized the man, but the European Court held that in reality the level of interference with the broker's privacy was minimal and certainly did not outweigh the public interest in the story.

Not only is it the Court's first decision on the use of hidden cameras ... it also represents a significant push back to those who would claim that privacy considerations trump freedom of expression.

Finally, the Court took into account the severity of the sanction. While in financial terms the penalty was light, the Court held that the use of the criminal law had been disproportionate. This in itself could have a tendency to discourage journalists from reporting on issues of public interest. The Court flagged this up as a strong issue in and of itself.

Comment

For some time now, it has been said – in the context of media law – that "privacy is the new defamation." Across Europe, privacy law is being used to resist legitimate journalism or, as happened here, to impose criminal sanctions (invasion of privacy is a criminal act in many continental European countries). This trend manifests itself through the ongoing practice of seeking privacy injunctions, push back against FOIA requests and, in Member States of the European Union, through the increasing dominance of data protection law and the right to be forgotten. There is a strong European tradition of protecting of privacy. The Council of Europe adopted its first Convention on the Protection Personal Data in 1981, and the European Union legal order has from the 1990s onwards viewed data protection as primary right to which freedom of expression is an exception. This has begun to change only recently with the formal acceptance of the full range of human rights, including the right to freedom of expression, into the EU legal order.

Against this background, what might seem like an open and shut case to First Amendment lawyers takes on a strong significance in the European context. Although

(Continued on page 33)

(Continued from page 32)

the European Court of Human Rights had been a relatively pro-speech court in the 1980s and 1990s, its freedom of expression case law went through somewhat of a dip in the mid-2000s, notably when it allowed defamation convictions of journalists who had exposed racists to stand (in Lindon and others v. France), from which it is still recovering. Over the last five years, it has decided a sequence of cases featuring the Monaco royal family and minor German TV actors in which it has emphasized that public interest journalism trumps privacy interests.

While this has been a positive development, at the same time the Court has also allowed a "right to reputation" to be developed even through the drafters of the European convention explicitly left it out.

This decision must therefore be hailed as a strong marker for press freedom. Not only is it the Court's first decision on the use of hidden cameras – a hugely significant issue across Europe, and which prompted the London-based Media Legal Defence Initiative to intervene in the case on behalf of several media and human rights organizations – it also represents a significant push back to those who would claim that privacy considerations trump freedom of expression.

The European Court of Human Rights

It is not the end of the journey. This Spring, the Court will hear yet another case involving a member of the Monaco Royal family (concerning reigning monarch Prince Albert, his extramarital lover and their child). The case has been accepted for a re-hearing by the Court's Grand Chamber and will see interventions by a number of groups including the Media Legal Defence Initiative (unusually, a request to intervene on behalf of the MLRC, New York Times and other media groups was denied). The decision in that case is expected to further refine the Court's privacy law, but is not expected before 2016. Until then, the Court's decision in Haldimann marks a giant step forwards for the protection of the rights of journalists across Europe.

Peter Noorlander is the Chief Executive Officer of Media Legal Defence Initiative in London. Mark Stephens, Howard Kennedy, represented MLDI in its intervention to the ECHR.

FAA's Proposed Drone Rules Offer Hope, But Some Limits for Journalists

By Alicia Wagner Calzada

Faced with shrinking budgets and too many deadly helicopter accidents, journalists needing aerial photography have been clamoring to use small unmanned aerial systems (sUAS), commonly called drones, which have become more affordable and accessible in recent years. But the FAA has been interfering with such uses, sending cease and desist letters and telling the public that it is illegal to use sUAS for commercial or business purposes, including news gathering.

In mid-February, however, the FAA offered a ray of hope as it announced its long-awaited proposed rules for the regulation of small UAS, under 55 lbs. The proposed rules were far less restrictive than some possibilities that had been tossed about by speculators, bloggers, and others behind the scenes, and initial reactions from journalism advocates were cautiously optimistic. But the proposal would provide limits, and the rules do not go into effect right away, so it will still be some time before journalists will be able to operate unmanned aircraft with the blessing of the FAA.

The rules do not go into effect right away, so it will still be some time before journalists will be able to operate unmanned aircraft with the blessing of the FAA.

Under the proposed rules, sUAS operators, who must be 17 or older, would be required to pass an initial aeronautical knowledge test at an FAA-approved center; be vetted by the Transportation Security Administration; obtain an sUAS operator certificate which never expires, unless revoked; and pass a recurrent test every 24 months. An individual with a private pilot's license will still need to obtain an sUAS operator certificate to pilot a UAS. Once certified, the operator can pilot any type of UAS for any commercial purpose. The FAA has long considered news photography to be a "commercial" enterprise for the purposes of its rules on sUAS. People who are only using sUAS for recreational purposes would not be required to get certification from the FAA.

The FAA proposes that sUAS flights will only be permitted during daylight hours, cannot go more than 500 feet above ground level, and cannot be operated "over any persons who are not directly involved in the operation." The restriction on operating above persons could interfere with journalists who would otherwise use sUAS to document news events that involve large (or small) crowds, from spot news to protests, to festivals. While operation of sUAS from boats would be allowed, they could not be operated from other moving vehicles or airplanes.

(Continued on page 35)

(Continued from page 34)

The rules will require that the operator is able to see the craft at all times (called the visual-line-of-sight requirement), unaided by anything other than standard glasses and contact lenses. However, the operator can use the help of a "visual observer". Remote cameras would not satisfy the visual-line-of-sight requirement but could be used as long as the sUAS were still within the line of sight of the operator or observer.

The proposed rules also noted that the FAA is considering a "micro UAS" category for UAS under 4.4 pounds. Micro UAS could be operated over people not involved in the operation and FAA would not require operators to pass a test to become certified to operate a micro UAS. To qualify, micro UAS would have to be made of material that would break apart or yield if there was a collision and would be limited to 400 feet above ground level. The DJI Phantom, a popular UAS among journalists, would likely qualify as a micro UAS.

The FAA will be accepting public comments on the proposed rules until at least until April 24, 2015. The new rules won't go into effect until after the rulemaking period is over. Until then, the FAA considers its current onerous guidelines, which essentially ban drone use by journalists, to be the rule of law.

The entire proposed rules can be viewed here.

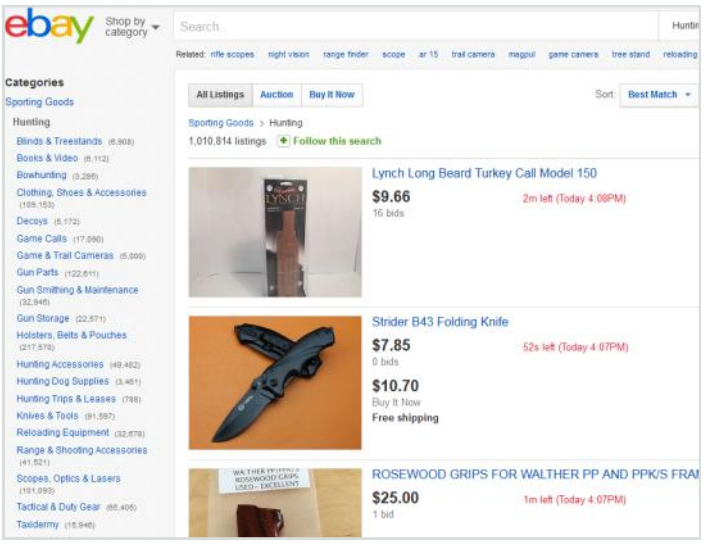
Alicia Calzada is an associate in the San Antonio office of Haynes and Boone, LLC, and is a member of the MLRC NextGen Committee.

Court Bars Tort Claims Against eBay Under Communications Decency Act

By Grayson McDaniel

A Mississippi federal court recently held that the Communications Decency Act barred tort-based claims brought against online auction website eBay Inc. ("eBay"), stemming from a plaintiff's purchase of allegedly recalled hunting equipment, because eBay neither created nor developed the content at issue.

On December 9, 2014, in an opinion by the Honorable Keith Starrett, the Court granted eBay's motion to dismiss with prejudice in light of the "broad immunity" granted to interactive computer service providers under the CDA. *Hinton v. Amazon.com.DEDC, LLC*, No. 2:13cv237-KS-MTP, 2014 WL 6982628 (S.D. Miss. Dec. 9, 2014).



Background

In 2013, Plaintiff Marsha Hinton purchased hunting equipment that she alleged had been recalled by the Consumer Product and Safety Commission using several websites, including eBay. Hinton was not injured by the equipment and did not intend to use it; she sought the equipment because her son had been killed in an accident involving recalled hunting equipment, and she wanted to make a point that recalled hunting equipment is available for purchase online.

Hinton filed suit against defendants Dick's Sporting Goods, Inc., American Sportsman Holdings Co., Bass Pro Outdoors, Amazon.com, and eBay in the Circuit Court of the Second Judicial District of Jones County, Mississippi, seeking to enjoin them from selling the allegedly recalled products and claiming compensatory and punitive damages for negligence, failure to warn, and breach of warranty.

Defendants removed the case to the United States District Court for the Southern District of Mississippi. Hinton filed an amended complaint, which added a claim under the Mississippi Consumer Protection Act. eBay moved to dismiss Hinton's amended

(Continued on page 37)

(Continued from page 36)

complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that Hinton sought to hold it liable for content created and developed by a third party, and that such claims were barred by Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230.

Hinton claimed that eBay was not protected by the CDA because selling recalled products was a violation of 15 U.S.C. § 2068, a provision of the federal Consumer Product Safety Improvement Act ("CPSIA"), which carries a criminal penalty under 15 U.S.C. § 2070, and the CDA does not impair the enforcement of criminal law.

Analysis on Motion to Dismiss

The district court granted eBay's motion. In a twelve-page order, Judge Starrett held that CDA immunity barred the claims alleged against eBay.

Hinton's claims against eBay were based on her allegation that eBay "allowed" third-party sellers to advertise and sell her allegedly recalled equipment on eBay's website. eBay argued that Plaintiff had failed to allege any facts to support these conclusory assertions. eBay provided its User Agreement, which Plaintiff had incorporated by reference into her Amended Complaint, which stated that eBay is not a "seller" and is not engaged in a "joint venture" with its third-party users. To support its claim of immunity, eBay relied on the following language, found in section 230(c) of the CDA:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C. § 230(c).

A Mississippi federal court recently held that the Communications Decency Act barred tort-based claims brought against online auction website eBay, stemming from a plaintiff's purchase of allegedly recalled hunting equipment.

The court noted that Plaintiff failed to allege any facts to disprove eBay's claims in its response to the motion to dismiss, and failed to show any facts that eBay participated in the creation or development of the post at issue, manufactured the equipment at issue, or ever physically possessed the equipment. The court then determined that Plaintiff's claims against eBay therefore "ar[o]se or stem[med]" from the "publication of information [on www.ebay.com] created by third parties," *Hinton*, 2014 WL 6982628 at

(Continued on page 38)

(Continued from page 37)

*3 (internal quotation marks omitted), and in the absence of a statutory exception were therefore barred by the CDA.

Hinton argued that a statutory exception did exist—namely, the CDA's provision that it has "no effect on criminal law," and that nothing in § 230 "shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute." *Hinton*, 2014 WL 6982628 at *4 (quoting 47 U.S.C. § 230(e)(1)). Hinton argued that allowing the CDA to bar her claims against eBay would impair the enforcement of a criminal statute: the criminal penalty imposed on the sale of recalled products by the CPSIA. *See* 15 U.S.C. § 2070 ("[A] violation of section 2068 of this title is punishable by imprisonment for not more than 5 years for a knowing and willful violation of that section; a fine determined under section 3571 of title 18; or both.").

Plaintiff's claims against eBay were based on her allegation that eBay "allowed" third-party sellers to advertise and sell her allegedly recalled equipment on eBay's website.

eBay argued that barring Hinton's claims would not run afoul of § 230(e)(1) because Hinton did not seek to impose criminal penalties on eBay—she sought damages and injunctive relief. eBay argued that multiple courts had held that § 230(e)(1) did not apply to civil suits. *See, e.g.*, *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, *21 (E.D. Tex. Dec. 27, 2006) (stating that § 230(e)(1) applies only to "criminal prosecutions for violations of federal criminal statutes, not private civil suits based on alleged violations of such statutes."). Moreover, even if she wanted to enforce the criminal penalty, eBay argued, Hinton had no standing to do so.

The court agreed with eBay. It reasoned that the CDA's bar of Hinton's civil claims would not impair enforcement of a federal criminal statute because Hinton did not seek to enforce criminal law, nor could she. *Hinton*, 2014 WL 6982628 at *4 (citing *Balawajder v. Jacobs*, 220 F.3d 586, 2000 WL 960065, at *1 (5th Cir. 2000) ("A private party has no right to enforce federal criminal statutes.") (citations omitted); *Doe v. Bates*, No. 5:05–CV–91–DF–CMC, 2006 WL 3813758, at *5, 22 (E.D. Tex. Dec. 27, 2006) ("Congress decided not to allow private litigants to bring civil claims based on their own beliefs that a service provider's actions violated the criminal laws."); *Obado v. Magedson*, Civil No. 13-2382 (JAP), 2014 WL 3778261, *8 (D.N.J. Jul. 31, 2014) ("[T]he CDA exception for federal criminal statutes applies to government prosecutions, not to civil private rights of action[.]")). The court held that Hinton's claims thus "fail[ed]

(Continued on page 39)

(Continued from page 38)

to trigger the statutory exception to CDA immunity found under § 230(e)(1)." *Hinton*, 2014 WL 6982628 at *4.

In closing, the court analyzed eBay's request that Plaintiff's claims against it be dismissed with prejudice. Though ordinarily a claimant is given leave to amend her complaint, the court noted that dismissal with prejudice is appropriate if amendment would be futile. *Hinton*, 2014 WL 6982628 at *5 (citing *Washington v. Weaver*, No. 08 –30392, 2008 WL 4948612, at *3 (5th Cir. Nov. 20, 2008)). The court noted that even though Hinton had amended her complaint once, she had still failed to plead facts to suggest that she could overcome eBay's CDA immunity. *Id.* The court held that further amendment would thus be futile, dismissing Hinton's claims against eBay with prejudice.

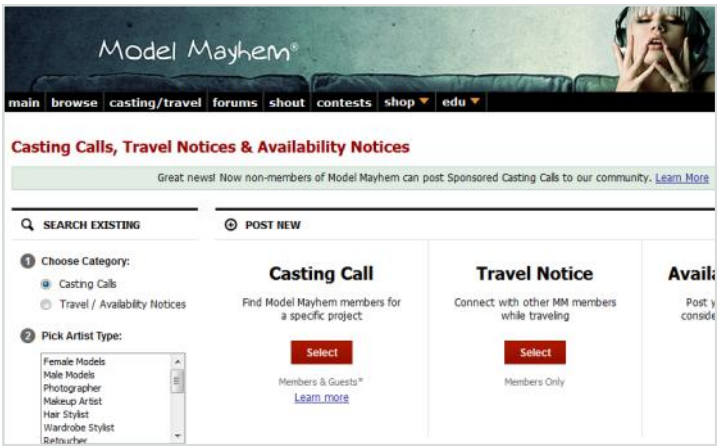
Grayson McDaniel is an attorney with Vinson & Elkins L.L.P in Austin, Texas. Joseph Anthony Sclafani, attorney at Brunini, Grantham, Grower & Hewes, PLLC, and Thomas S. Leatherbury, Christopher V. Popov, Marc A. Fuller, and Grayson McDaniel, attorneys at Vinson & Elkins LLP represent eBay, Inc. Lawrence E. Abernathy, III, attorney at Abernathy Law Office, and Leslie D. Roussell represent plaintiff.

Ninth Circuit Grants Rehearing in *Doe v. Internet Brands*

Panel Held Sec. 230 Did Not Apply to Failure to Warn Claim

On February 24th, the U.S. Court of Appeals for the Ninth Circuit announced that it was withdrawing its September 2014 opinion in *Doe v. Internet Brands, Inc.*, No. 12-56638, and will rehear the case on March 18, 2015.

The case involves whether Internet Brands, the owner of a networking website for models called *Model Mayhem*, can be held liable for failing to warn its users that profiles posted on the site were being used by a pair of sexual predators to target victims. Internet Brands allegedly learned of the predators' behavior shortly after purchasing the website from its original developers but failed to notify its users about this danger, leading to the rape of the plaintiff. While the complaint is clear that the plaintiff herself had posted a profile, it is arguably ambiguous as to whether the predators posted any content to *Model Mayhem* in order to contact the plaintiff, alleging only that she was contacted "through" the site.



The plaintiff sued Internet Brands in the U.S. District Court for the District of California for negligence under California law. Internet Brands moved to dismiss on the basis of the Communications Decency Act, 47 U.S.C. § 230, asserting that the plaintiff's claim attempted to hold it liable as the "publisher or speaker" of content provided by a third party. The district court granted the motion, finding that notwithstanding the characterization of the plaintiff's claim as a "failure to warn" issue, the plaintiff was "essentially asking Defendant to advise its users of known risks associated with content provided by third parties on its website" and that liability would therefore derive "solely from its status as a publisher of that content." *Doe v. Internet Brands, Inc.*, Docket No. 2:12-cv-03626-JFW-PJW, slip op. at 4 (C.D. Cal. Aug. 16, 2012).

The lower court relied primarily upon two earlier cases, the decision of the Fifth Circuit in *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) and an almost identical

(Continued on page 41)

(Continued from page 40)

case from the California Court of Appeal, *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561 (2009). Both cases involved claims that MySpace negligently failed to prevent minors from using its services, and that MySpace should therefore be liable for the consequences of sexual predators finding victims through the site. In both cases, the courts rejected those claims under Section 230, finding that the argument boiled down to holding MySpace responsible for facilitating the communications between predator and victim that took place on its service.

In its now-withdrawn opinion, the Ninth Circuit reversed the district court's ruling in favor of Internet Brands, finding that the plaintiff

> does not seek to hold Internet Brands liable as a "publisher or speaker" of content someone posted on the Model Mayhem website, or for Internet Brands' failure to remove content posted on the website. [The assailants] are not alleged to have posted anything themselves. The Complaint alleges only that "JANE DOE was contacted by [her assailants] through MODELMAYHEM.COM using a fake identity." Jane Doe also does not claim to have been lured by any posting that Internet Brands failed to remove. *Doe v. Internet Brands, Inc.*, No. 12-56638, slip op. at 8 (9th Cir. Sept. 17, 2014).

The case involves whether Internet Brands can be held liable for failing to warn its users that profiles posted on the site were being used by a pair of sexual predators to target victims.

The Court of Appeals did not discuss the 5th Circuit's *Myspace* decision, but did distinguish the California Court of Appeal's similar decision, finding that the tort duty ascribed to Internet Brands "does not arise from an alleged failure to adequately regulate access to user content." Id. at 12-13.

Internet Brands petitioned for rehearing, both by the panel and en banc. They were supported by an amicus brief filed by Wilmer Cutler Pickering Hale and Dorr on behalf of the Computer and Communications Industry Association, the Internet Association, and several individual digital media organizations.

The amicus brief challenged the reasoning in the September decision in several respects, including the argument that the "special relationship" allegedly giving rise to a duty to warn implicitly relied upon Internet Brands' role as publisher of Doe's profile:

> The only "relationship" that the parties had … was the interactive service that Internet Brands provided, which enabled Doe to disseminate her profile information to ModelMayhem.com's large base of users, and

(Continued on page 42)

(Continued from page 41)

> which the assailants in turn used to obtain enough information about Doe to be able to create and transmit back to her fraudulent messages to persuade her to meet them. Thus, Doe's claim inherently depends on treating Internet Brands as a publisher or speaker of third-party content—her profile and/or the assailants' fraudulent messages.

Brief for Amicus Curiae at 7, *Doe v. Internet Brands, Inc.*, No. 12-56638 (9th Cir. Nov. 10, 2014). The amici brushed aside the Court's focus on the fact that the assailants had not used *Model Mayhem* to contact the plaintiff, arguing that (1) the complaint could be read to indicate that the assailants did in fact contact the plaintiff on the website platform, and (2) it did not matter, because Section 230 does not require "that an interactive computer service provided by the party claiming immunity be the only service (or even one of the services) through which the third-party communications were exchanged." Id. at 9. The amici also illustrated the disastrous effect that the September decision could have on Internet communication and commerce, including a discussion of past claims found to be barred by Section 230 that might have been alternatively pleaded as "failure to warn" cases. Id. at 12-19.

The panel granted Internet Brands' petition for rehearing and denied the petition for rehearing en banc as moot. *Doe v. Internet Brands, Inc.*, No. 12-56638 (9th Cir. Feb. 24, 2015). The September opinion was withdrawn, with new argument scheduled for Wednesday, March 18, 2015, at 2:30 p.m. Amici who were previously granted leave to file a brief will be permitted to address the court, but only if Internet Brands agrees to share a portion of its time for argument.

Republication of 9/11 Photo Not a Fair Use

Use of Image With Iwo Jima Photo Not Transformative

The republication of an iconic 9/11 photo on the Facebook page of a cable news talk show was not a fair use, according to a recent decision from a federal court in New York. *North Jersey Media Group Inc. v. Pirro and Fox News Network, LLC*, No. 13-7153 (S.D.N.Y. Feb. 10, 2015) (Ramos, J.). The court denied summary judgment to Fox News and host Jeanine Pirro, holding that the use could not be deemed "transformative" as a matter of law.

Plaintiff North Jersey Media, publisher of The Record and Herald News, is the copyright owner of a photograph taken at the ruins of the World Trade Center showing three firefighters raising the American flag. Defendant Jeanine Pirro is the host of Fox News's program *Justice with Judge Jeanine.*

On September 11, 2013 a Fox News production assistant did a Google image search and found a cropped image of plaintiff's 9/11 photo juxtaposed with the classic World War II photo of four U.S. Marines raising the American flag on Iwo Jima. The assistant posted this combined image to the Facebook page of Pirro's program, together with the hashtag "never forget" as part of Fox News' social media participation on the anniversary of 9/11.

The "casual observer may believe that he is simply viewing the Work with only the hashtag added."

North Jersey Media ("NJM") sued Pirro and Fox News for copyright infringement. Defendants argued that the use of the combined image constituted a fair use. This month a New York federal court denied the defendants' motion for summary judgment.

Fair Use Analysis

The court began by considering the purpose and character of the use and whether it was "transformative" under the Second Circuit's decision in *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) and other Circuit precedent. The court acknowledged that Fox did not copy the 9/11 photograph wholesale. Instead, it used a cropped, low resolution version of the work, juxtaposed with an iconic World War II photograph, and published the combined image with a social media hashtag to commemorate 9/11. But the court concluded all these alterations were minor. The combined image did not have an

(Continued on page 44)

(Continued from page 43)

entirely different aesthetic than plaintiff's original photo and Fox's use was unoriginal since the combined image and neverforget hashtag "was a ubiquitous presence on social media that day." The "casual observer may believe that he is simply viewing the Work with only the hashtag added."

Moreover, a question of fact existed as to whether Fox posted the combined image to comment on 9/11 or to promote the Jeanine Pirro program. In a footnote, the court observed that by commenting that we should not forget 9/11 "Fox News was also consciously associating itself with a view indisputably regarded favorably by most if not all of its target audience. Such uncontroversial commentary arguably generates goodwill for, and therefore serves to promote, the Program."

The effect of the use on the market for the original photograph also weighed against fair use. The court noted that North Jersey Media had obtained more than $1 million in licensing revenue from the photograph, and still actively licenses the photograph for editorial uses such as using the photograph to commemorate the anniversary of 9/11.

Fox News has filed a motion for reconsideration. Among other things, the brief argues that the court's reference to a "target audience" for Fox News was not supported by any record evidence; and the court erred in assessing the significance of this in its fair use analysis. "All news or commentary programs——and indeed all television programs and all other forms of communication—aspire to connect with an audience. This obvious fact does not make their First Amendment-protected speech any more "commercial.'" Defendants' Brief for Reconsideration at p. 8.

North Jersey Media Group Inc. is represented by William Dunnegan, Dunnegan & Scileppi LLC in New York. Fox News Network, LLC is represented by Dori Hanswirth, Nathaniel Boyer, Benjamin Fleming, and Patsy Wilson of Hogan Lovells USA LLP.

A New Foundation-Based Initiative for Online Freedom: Is Code the Answer?

By Jeff Hermes

On February 11th, I had the opportunity to attend "NetGain: Working Together for a Stronger Digital Society," an event hosted by the Ford Foundation at its offices in New York. The event marked the launch of a new partnership between Ford, the Knight Foundation, the Open Society Foundations, the Mozilla Foundation, and the MacArthur Foundation to coordinate philanthropic efforts in the digital sphere. But beyond voicing a general commitment to fostering public participation in civil society, developing technology to amplify the voices of the oppressed, and support for international equality and justice, the goals of this partnership were somewhat unclear.

This was, in fact, deliberate. In a show of humility, the foundations acknowledged that, as legacies of the pre-digital world, many of them were not in a position to identify major problems in digital communication. Instead, they solicited comment from stakeholders and scholars on "the most significant challenges at the intersection of the Internet and philanthropy." The foundations participating in the NetGain partnership each committed to substantial funding of work on one or more of these challenges, and to act as "talent spotters" for those who could take the lead on these challenges on a long-term basis.

It is disturbing to think that major foundations might believe that code will allow an end-run around complex legal and policy debates.

Several pre-selected participants took to the stage with presentations on their particular areas of concern, although this was not intended as a comprehensive list of challenges to be addressed. Presenters included: Emily Bell (need to educate journalists and citizens in the use and structure of the online information environment); Alicia Garza and Heba Marayef (need to curtail surveillance of online spaces used as platforms for protest); Sunil Abraham (need to encourage tech development and overcome IP-related cost barriers to deployment of software and connected devices in the developing world); Chip Pickering (calling for bipartisan support for strong net neutrality rules); Laura Poitras and Chris Soghoian (need for encryption tools for journalists and activists that are stronger, easier to use, and more widely adopted); and Brewster Kahle (need to rebuild the World Wide Web on a more distributed and encrypted model to increase resilience against censorship and data decay).

(Continued on page 46)

(Continued from page 45)

Certain themes recurred throughout the day's presentations. There was clearly frustration with legal and policy approaches to data security issues, particularly in the wake of the Snowden revelations. Participants expressed a sense of betrayal by government but also by corporations gathering personal information with inadequate notice. Knight Foundation President Alberto Ibargüen, among others, stated that foundations should focus on freedom of speech as a right rather than a license from the state.

This last statement, of course, will be a position that MLRC members can appreciate. However, this orientation appeared to be leading foundations away from legal or normative initiatives, to focus instead on technology-based solutions. Code – and encryption technology in particular -- was discussed as a way to take control of online spaces away from overreaching governments, and shield them from private surveillance. The ability of small groups of skilled technologists to force change was celebrated. Joi Ito, director of the MIT Media Lab, invoked Larry Lessig's statement "code is law" – i.e., the principle that software design shapes online behavior just as legal precepts, market forces, and normative pressures do – as a basis for urging the architects of communications technology to build protection for freedom of expression into their systems without asking permission of traditional power structures.

To be sure, this particular event was more about cheerleading than detailed policy development, and some degree of oversimplification was only to be expected. Nevertheless, it is disturbing to think that major foundations might believe that code will allow an end-run around complex legal and policy debates. While technology is an essential part of social change, technological measures also present a ready target for government regulation when the consequences of that change are frightening or unpredictable. Consider the recent calls for restrictions on strong encryption in the U.S. and the U.K., in response to fears of crime and terrorism. Similarly, look at the U.S. government's attempts to surveil and to criticize the Tor anonymity network, itself originally a U.S. government project. If regulators feel that technology is blocking their efforts to curb online behavior, they are quite willing to turn their sights on the technology itself.

As other commentators have noted, this can result in awkward situations when nations such as China or Russia pursue similar regulations for very different reasons. The product is something like President Obama's conflicted stance on encryption and

(Continued on page 47)

(Continued from page 46)

his unhelpfully recursive suggestion that the "patriots" of Silicon Valley can code the country's way out of the policy dilemma. (Silicon Valley does not necessarily agree that the President's dilemma should be its problem, as indicated by Tim Cook's recent statements on the topic.)

Notwithstanding the foregoing, the general sentiment at the event was correct, that developers (foundation-supported or otherwise) should not need to seek official sanction before introducing new technology to protect speech. Apart from the fact that the concept is offensive, it is – "tech magical thinking" aside -- likely impossible to create tools that are both effective and also would satisfy a cautious government. But given that ambivalent (or hostile) governments and public skepticism in democratic nations can impair the adoption and effectiveness of new technology worldwide, foundations must prepare for the social, legal, and political environments into which new technology will be introduced.

Mitchell Baker, executive chair of the Mozilla Foundation, stressed the importance of building not only new technology but communities and policies that support these advances:

> We … particularly at Mozilla, try to engage large numbers of people, including young people … and to popularize some of the issues and the mission and to make the issues more connected to daily life. There's a policy role, which is a very specific policy role aimed at government, there [are] very specific leadership roles, and we try to build a movement of people who have experienced the openness and freedom of the web, what openness and technology feels like, and have taken advantage of it, so that there's a wave of people moving forward[.]

Sir Tim Berners-Lee, inventor of the World Wide Web and founder of the World Wide Web Foundation, also cautioned against relying on code in contexts where legislative or legal efforts might be more straightforward.

However the NetGain initiative plays out, it is clear that major foundations are prepared to invest heavily in measures to promote open access to the Internet and its role as a tool for democratic governance. With luck, this will involve not only enthusiasm for radical solutions, but serious thought regarding how to gather support for change.

Jeff Hermes is a Deputy Director at MLRC.