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Reporting Developments Through January 25, 2014

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2014 MLRC/Southwestern Law School 11th Annual Media and Entertainment Law Conference

On January 16, 2014, MLRC members and friends gathered in Los Angeles, California at the Los Angeles Times Building for the eleventh annual MLRC/Southwestern Law School Biederman Institute Conference on Media and Entertainment Law Issues. The Conference included sessions on Fair Use, Right of Publicity, and legal issues surrounding Apps.



Aggregating Entertainment Content: How Much Re-Use is Fair Use

Left to right: **Charles Steinberg**, The Walt Disney Co.; **Jody Zucker**, Warner Bros. Television; **Jordan Gimbel**, Yahoo! Inc.; **Regina Thomas**, AOL/Huffington Post

Additional materials from conference panels can be <u>accessed here.</u>
Full conference program can be <u>accessed here.</u>

Photos courtesy of Southwestern Law School



Right of Publicity Litigation: Sports Videogames Go Down: Will Hollywood Be Saved by the First Amendment?

Left to right: **Deborah Drooz**, Southwestern Law School; **Michael Rubin**, Altshuler Berzon LLP; **Jessica Kantor**, Legendary Entertainment; **Alonzo Wickers**, Davis Wright Tremaine LLP



App-Titude: Legal Issues On Apps That Matter

Left to right: **Jonathan H. Anschell**, CBS Television; **Bryony Gagan**, Netflix; **David S. Figatner**, Microsoft Corporation (Microsoft Studios); **Sheila Jambekar**, Zynga Inc.

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Legal Issues Concerning Hispanic and Latin American Media March 10, 2014 | Miami, FL

> Legal Frontiers in Digital Media May 15-16, 2014 | Mountain View, CA

MLRC/NAA/NAB Media Law Conference September 17-19, 2014 | Reston, VA

MLRC Annual Dinner November 12, 2014 | New York, NY

DCS Annual Lunch & Meeting November 13, 2014 | New York, NY

More information at medialaw.org or medialaw@medialaw.org.

Legal Issues Concerning Hispanic and Latin American Media



Media Law Resource Center / University of Miami School of Communication and School of Law

March 10, 2014 | University of Miami

The Conference will provide lawyers from North America and Latin America a unique opportunity to meet and educate one another on the issues that arise in cross-border content creation, newsgathering and distribution.

Opening Speaker: Myriam Marquez

Editor of el Nuevo Herald

Cross Border Libel, Privacy and Newsgathering Issues

Moderators:

Gary Bostwick, Bostwick Law Ashley Messenger, Associate General Counsel, NPR

Interactive discussion on pre and post-publication issues surrounding gathering and publishing news and information.

Lunch and Speaker Isaac Lee

President of News for Univision Communications Inc. and CEO Fusion

Cross Border Licensing and Distribution

Moderators:

Beatriz Roth, VP, Chief Counsel, Reuters
Jose Sariego, Senior Vice President, Business & Legal Affairs,
Telemundo Media

Interactive discussion on practical issues for cross border deals, including IP issues and fair use boundaries.

Hispanic and Spanish-Language Advertising Platforms

Moderator: Lynn Carrillo, Vice President Media Law, NBCUniversal

Panel and discussion on custom content deals, integrations, cross-platform material and executing contests and sweepstakes.

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DC Circuit Strikes Down FCC's Open Internet Rules

But the FCC Will Live to Fight Another Day

By Judith Endejan

On January 14, and to much attention, the D.C. Circuit Court of Appeals struck down the FCC's so-called Net Neutrality rules. *Verizon v. FCC*, (D.C. Cir. Jan. 14, 2014) (Tatel, Rogers, Silberman, JJ.).

The brouhaha over the decision striking down the FCC's open Internet rules boils down to buckets. Long ago the FCC adopted rules that distinguish between "telecommunications," services and "enhanced" services. The former placed services that involve a "pure transmission" into the "basic" services bucket. The latter, "enhanced" services bucket cover services that involve "computer processing applications used

to act on the content, code, protocol, and other aspects of the subscriber's information." The Commission placed services needed to connect to the Internet in the "enhanced" services bucket.

The FCC exempted "enhanced" service providers such as broadband providers (including cable, DSL and wireless) from Title II common carrier obligations. A common carrier is required to offer service indiscriminately and on general terms to the public.

Enter the Internet Age. Congress adopted §706 of the 1996 Telecommunications Act, directing the FCC to encourage the deployment of broadband telecommunications capability. The Commission views §706 as a grant of authority to adopt rules to protect "the virtuous circle of innovation" that had long driven the growth of the Internet. (Open Internet Order, 25 F.C.C.R. 17905 (2010) at 17910-11.) The FCC claimed that this circle arises when Internet openness spurs investment development by edge providers (i.e. Netflix), which leads to increased user demand for broadband access, which leads to increased investment in broadband network infrastructure and technologies (which in

turn leads to further innovation and development by edge providers).

In the Open Internet Order the FCC adopted three rules to protect this virtuous circle for fixed and mobile broadband providers. The first imposes a transparency requirement on both sets of providers requiring them to "publicly disclose accurate information regarding the network management practices, performance, and commercial terms of [their] broadband Internet access services." *Id.* at 17937.

The second rule imposes anti-blocking requirements on both types of broadband providers prohibiting the blocking of access to lawful content and applications. The third rule

> imposes an anti-discrimination requirement only on fixed broadband providers. The FCC rules require such providers to "not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband Internet access service."

> The Majority Opinion, written by Judge Tatel, used a classic APA/ *Chevron* analysis to find that the FCC had reasonably interpreted §706 to give it authority to adopt regulations for Internet service providers. That was the good news for the FCC.

The bad news for the FCC was the court's conclusion that the anti-blocking and anti-discrimination provisions were invalid. The Court vacated them but preserved the disclosure rules.

The anti-discrimination and anti-blocking rules were struck down because they imposed common carrier obligations from the "basic" services bucket on broadband providers that are in the "enhanced" service provider bucket. 47 USC §153(51) precludes this because "a telecommunications carrier shall be treated as a common carrier under this [act] only to the extent that it is engaged in providing telecommunications services." Furthermore, 47

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USC §332(c) (2) provides mobile broadband providers with statutory immunity from treatment as a common carrier.

The anti-discrimination rule prohibited broadband providers from granting preferred status or services to edge providers who might pay for such benefits, or for their own services. The anti-discrimination rule language mirrors the language in 47 USC §202 which establishes the basic common carrier obligation not to "make any unjust or unreasonable discrimination." The Court reasoned that the new rule imposed a common carrier obligation and found that the anti-blocking rules that preclude broadband providers from blocking access to edge providers did so as well.

The bottom line is that the DC Circuit said you cannot classify broadband service providers for regulation one way and then impose rules that are inapplicable to that classification.

FCC's Chairman, Thomas Wheeler, has said that he was pleased that the DC Circuit held that \$706 give the Commission with affirmative authority to enact measures to encourage the deployment of broadband infrastructure. He did not rule out further appeal of the Decision, but indicated that the FCC did not intend to abandon its network neutrality efforts.

Judith Endejan is a partner with Garvey Schubert Barer in Seattle, WA. Helgi C. Walker, Gibson, Dunn & Crutcher LLP, argued the case for Verizon. Sean A. Lev, FCC General Counsel, argued the case for the Commission. Pantelis Michalopoulos argued the case for the intervenors, Independent Telephone & Telecommunications Alliance, et al. A full counsel list is available in the hyperlinked opinion.

Recent MLRC Publications

Non-Competes in the Broadcast Industry

Eight states and the District of Columbia have laws that target the broadcast industry and limit broadcast employers' ability to enforce non-compete agreements with their on and off screen talent. This paper describes the elements of those laws and their impact. It also addresses several alternative approaches for broadcast employers' efforts to retain employees and the impact of the broadcast non-compete ban laws on those alternatives.

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Sex, Lies and Section 230 • Literary License(s)? Why the First Amendment Protects Fiction, and What This Means For Video Games • Making Fair Use More Client-Friendly: The Set Of Principles In Fair Use For Journalism • Fair Use Is Foul and Foul Use Is Fair: Legal Certainty Or Witches' Cauldron? • New Developments 2013

Access to Public Employee Pension Records

In 2012 and 2013, the MLRC Newsgathering Committee examined the issue of access to public employees' pension records and researched the various statutes and case law that allow for or prohibit public disclosure. This paper summarizes some of the committee's findings and offers suggestions to counsel dealing with the issue both in the courts and in the state legislatures.

Can I Use This Clip? A Guide to Audio/Video Use

A presentation from the Pre-Publication/Pre-Broadcast Committee on the legal issues arising from the use of audio or video clips. The presentation consists of a powerpoint to be used for training purposes. The powerpoint can be customized to suit the needs of a particular client. Slides that are not relevant to the organization's needs/issues can be deleted, and other information could be added, if desired.

Florida Appeals Court Lifts Prior Restraint In Hulk Hogan Sex Tape Case

By Paul J. Safier

On January 17, 2014, Florida's Second District Court of Appeals reversed an order directing Gawker Media, LLC ("Gawker"), the owner and operator of the website Gawker.com, to remove a post about a sex tape featuring Hulk Hogan, a post that included both commentary about, and brief excerpts from, the sex tape. *See Gawker Media*, *LLC v. Bollea*, 2014 WL 185217 (Fla. 2d DCA Jan. 17, 2014) ("*Bollea III*").

In its ruling, the DCA held that the commentary and video excerpts Gawker had published "address[ed] matters of public concern" (primarily, a preexisting controversy about

the sex tape), and that the injunction issued below constituted "an unconstitutional prior restraint under the First Amendment." *Id.* at *1, 3.

The Gawker Story

On October 4, 2012, Gawker posted a story, written by its then-editor, A.J. Daulerio, entitled, "Even for a Minute, Watching Hulk Hogan Have Sex in a Canopy Bed is Not Safe For Work but Watch it Anyway." As explained in the article, Mr. Daulerio had recently received from an anonymous source a copy of a "sex tape" that featured the celebrity wrestler, Hulk Hogan. At the time Mr. Daulerio

received the tape, there had already been numerous published reports, dating back to March 2012, about the possible existence of a Hulk Hogan sex tape, including the publication of still photographs from one such purported tape.

Among other things, those reports generated speculation about whether the woman in the tape was Heather Clem (as many suspected, based on the published photographs), the wife of Hogan's then-best friend, the popular radio personality Bubba "the Love Sponge" Clem.

Gawker's article was principally taken up with providing a tongue-and-cheek description of the sex and conversation depicted on the tape. In addition, it addressed the prior media reports about the tape and the speculation about the identity of Mr. Hogan's romantic partner, noting that the tape appears not only to show Mr. Hogan having an affair with his best-friend's wife, but to show him doing so with his best friend's blessing. Finally, the Gawker Story discussed the Hulk Hogan sex tape in the context of its general commentary about the public's fascination with celebrities' sex lives, describing the sense of both disappointment and satisfaction that comes from learning that "celebrity sex" is often as ordinary and unglamorous as non-celebrity sex.

The text of the Gawker story was accompanied by heavily edited video excerpts from the sex tape. In keeping with the

> themes of the underlying story, the excerpts focused on the least sexy aspects of the tryst depicted on the tape, e.g., Mr. Hogan receiving a call on his cell phone, and deciding not to take it, but only after first checking to see who it was; Mr. Hogan telling Ms. Clem, after the sex had concluded, that he just ate and felt "like a pig"; and Mr. Hogan asking Ms. Clem, as he was leaving, whether he should leave the door open or closed. In addition, the excerpts provided video confirmation of one of the Gawker Story's chief contentions, i.e., that the tryst occurred with the blessing of Ms. Clem's husband, as the excerpts began with a man, later confirmed to be Mr. Clem, encouraging Mr. Hogan and Ms. Clem to

have sex and telling them, "I'll be in my office if you need me."

The excerpts included less than 10 seconds of footage of actual sexual activity, and, taken together, totaled one minute and 41 seconds, out of a tape that, in the form originally submitted to Gawker, ran about 30 minutes.

The Federal Court Action

On October 15, 2012, Mr. Hogan (whose real name is Terry Gene Bollea) filed two separate lawsuits related to the (Continued on page 10)

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Gawker Story, one in Florida state court against the Clems (who had divorced since the encounter was recorded) and another in the United States District Court for the Middle District of Florida against Gawker and eight related parties (including Gawker's parent corporation and its president). In both lawsuits, Mr. Hogan alleged that the sexual encounter was recorded, and the recording later disseminated, without either his knowledge or permission. (In the period between the publication of Gawker's story about the sex tape and the filing of the lawsuits, Mr. Hogan had publicly confirmed that the woman in the tape is, in fact, Ms. Clem, and that the encounter took place with Mr. Clem's blessing.) In addition, in his complaints, Mr. Hogan dated the tryst depicted in the tape to 2006, when he was still married to his long-time wife and reality-television co-star, Linda Bollea.

In his action against Gawker, Hogan sought \$100 million in damages, asserting claims for: (1) intrusion upon seclusion,

(2) publication of private facts, (3) violation of the right of publicity, (4) intentional infliction of emotional distress, and (5) negligent infliction of emotional distress. The day after he filed that lawsuit, he moved for a temporary restraining order and a preliminary injunction, seeking an order requiring the Gawker, *inter alia*, to cease publication of the sex tape excerpts. The district court (Whittemore, J.) denied the request for a temporary restraining order on

October 22, 2012, and then, on November 14, 2012, denied the preliminary injunction motion. *See Bollea v. Gawker Media, LLC*, 2012 WL 5509624 (M.D. Fla. Nov. 14, 2012) ("*Bollea I*").

In his ruling, Judge Whittemore held that the wrestler "ha [d] failed to satisfy his heavy burden to overcome the presumption that the requested preliminary injunction would be an unconstitutional prior restraint," and that Mr. Hogan's "public persona, including the publicity he and his family derived from a television reality show detailing their personal life, his own book describing an affair he had during his marriage, prior reports by other parties of the existence and content of the Video, and Plaintiff's own discussion of issues relating to his marriage, sex life, and the Video all demonstrate that the Video is a subject of general interest and concern to the community." *Id.* at *3.

On November 30, 2012, Mr. Hogan filed a second motion for a preliminary injunction, this time contending that

Gawker's posting of the video excerpts violated the copyright in the sex tape that he claimed to have subsequently acquired from Mr. Clem.

(Prior to filing his second motion for a preliminary injunction, Mr. Hogan appealed the denial of his first preliminary injunction motion to the United States Court of Appeal for the Eleventh Circuit, ultimately moving before both the district court and the Eleventh Circuit for an injunction pending appeal. The district court denied the motion, while the motion before the Eleventh Circuit was never adjudicated because Mr. Hogan dismissed his federal lawsuit before that court could rule. Thus, all told, Hogan filed five separate motions in federal court seeking some form of preliminary injunctive relief.)

On December 21, 2012, Judge Whittemore denied that motion, holding that Mr. Hogan had failed to establish either that he was likely to prevail of his copyright claim or that he would suffer irreparable harm in the interim if the status quo

were maintained. See Bollea v. Gawker Media, LLC, 913 F. Supp. 2d 1325 (M.D. Fla. 2012) ("Bollea II").

In addressing whether Mr. Hogan would be likely, in a subsequent trial on the merits on his copyright claim, to overcome Gawker's "fair use" defense, Judge Whittemore reiterated his prior assessment regarding the newsworthiness of the Gawker publication, explaining: "Gawker . . . posted an edited excerpt of the Video together with

nearly three pages of commentary and editorial describing and discussing the Video in a manner designed to comment on the public's fascination with celebrity sex in general, and more specifically Plaintiff's status as a 'Real American Hero to many,' as well as the controversy surrounding the allegedly surreptitious taping of sexual relations between Plaintiff and the then wife of his best friend – a fact that was previously reported by other sources and was already the subject of substantial discussion by numerous media outlets." *Id.* at 1328.

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Hogan sex tape in the
context of its general
commentary about the
public's fascination with

celebrities' sex lives.

The Gawker Story

The State Court Action

On December 28, 2012, Mr. Hogan voluntarily dismissed his federal lawsuit and filed an amended complaint in Florida state court. In the amended complaint, Mr. Hogan dropped

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(Continued from page 10)

Mr. Clem, with whom he had previously settled, as a defendant, and added as defendants each of the Gawker parties whom he had previously sued in federal court. Shortly thereafter, Gawker attempted unsuccessfully to remove the case to federal court. On April 19, 2013, with the case having been remanded back to state court, Mr. Hogan again moved to enjoin Gawker's publication. On April 25, 2013, the trial court (Campbell, J.) granted the injunction, directing that Gawker remove from its website both the video excerpts and the underlying commentary.

Gawker promptly removed the video excerpts from its website, but, as explained here, declined to remove the accompanying commentary, describing the "portion of the order compelling us to remove the entirety of [Mr.]

Daulerio's post—his words, his *speech*—[a] s grossly unconstitutional." Gawker then appealed to Florida's Second District Court of Appeal (the "DCA"), which granted an emergency stay of the injunction four days later, pending its review of the merits. On January 17, 2014, the DCA ruled on the merits of the appeal and reversed the injunction in its entirety.

The DCA Ruling

In its ruling, the DCA rejected two grounds for enjoining the Gawker publication: (a) that Mr. Hogan's asserted privacy interests in the removal of the publication were sufficient to overcome Gawker's First Amendment rights, and (b)

that the allegedly unlawful circumstances under which the sex tape was recorded prohibited Gawker from publishing commentary about, or excerpts from, the copy of the tape it had received.

In addition to addressing these two substantive points, the appellate court also expressed its concern that the trial court had not made "any findings at the hearing or in its written order to support its decision" and that court had also required Mr. Bollea to post a bond, a very basic and ministerial act," a requirement that the court is "without discretion" to waive. Bollea III, 2014 WL 185217, at *1, 1 n.2; *see also id.* at *2 ("It is not clear from the hearing transcript, and certainly not

from the order, why the circuit court granted the motion for temporary injunction.").

Privacy

The DCA's ruling that Mr. Hogan's asserted privacy interests did not trump Gawker's free speech rights was grounded in its conclusion that "the report and the related video excerpts address[ed] a matter of public concern," and, therefore, are entitled to the highest degree of First Amendment protection. *Bollea III*, 2014 WL 185217, at *3. In its analysis, the court made a point of noting that it was not holding that, on account of Mr. Hogan's celebrity, "every aspect of his private life is [automatically] a subject of public concern." *Id.*

Rather, the court's holding was that, on the particular

facts of this case, Gawker's reporting about the sex tape - reporting supported by the video excerpts it published - addressed a matter of public concern primarily because of a preexisting controversy about the tape and the underlying extramarital affair, a controversy to which Hogan himself contributed. Id. at *3-4. Indeed, based on Mr. Hogan's repeated discussions of his sex life in connection with the sex tape controversy, both before and after Gawker published its story, the court concluded, "We are hard-pressed to believe that Mr. [Hogan] truly desired the affair and Sex Tape to remain private or to otherwise be 'swept under the rug." Id. at *3 n.5.

In addition, the court noted that, in the past, Mr. Hogan had freely and openly

"discussed his family, marriage, and sex life through various media outlets," including discussing in his autobiography the details of an affair he had with a different woman, which likewise occurred during his marriage to Linda Bollea. *Id.* at *3.

In holding that Mr. Hogan's privacy interests were not adequate to justify the injunction, the DCA rejected his attempt to analogize the case to *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998) ("*Michaels I*"), where the court enjoined the commercial distribution of entire celebrity sex tape on copyright grounds. The DCA held that *Michaels I* was

(Continued on page 12)

The DCA's ruling that Mr. Hogan's asserted privacy interests did not trump Gawker's free speech rights was grounded in its conclusion that "the report and the related video excerpts address [ed] a matter of public concern," and, therefore, are entitled to the highest degree of First Amendment protection.

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distinguishable because, among other reasons, "Gawker . . . has not attempted to sell the Sex Tape or any material creating the instant controversy, for that matter. Rather, Gawker . . . reported on Mr. [Hogan's] extramarital affair and complementary thereto posted excerpts from the video." *Bollea III*, 2014 WL 185217, at *4.

Accordingly, the court found more analogous a subsequent decision in the same case, *Michaels v. Internet Entertainment Group, Inc.*, 1998 WL 882848 (C.D. Cal. Sept. 11, 1998) ("*Michaels II*"), in which the court held that a news report about the sex tape accompanied by brief excerpts from it was not an invasion of privacy. *Bollea III*, 2014 WL 185217, at *4 (citing *Michaels II*, 1998 WL 882848, at *7, 10).

Ultimately, the DCA concluded that Gawker's "written report and video excerpts are linked to a matter of public concern – Mr. [Hogan's] extramarital affair and the video existence of such – as there was public discussion about the affair and the Sex Tape, including by Mr. [Hogan] himself." *Id.* at *4.

On that basis, the court held that Mr. Hogan "failed to meet the meet the heavy burden to overcome the presumption that the temporary injunction is invalid as an unconstitutional prior restraint under the First Amendment," and that it "was within Gawker's editorial discretion to publish the written report and the video excerpts." *Id.*

Illegal Recording

The DCA also rejected the contention that it was proper to enjoin Gawker's reporting about, and publication of excerpts from, the sex tape it received because the original recording was allegedly made in violation of the law (specifically, Florida's Video Voyeurism Act, Fla. Stat. § 810.145, and Florida's wiretap act, Fla. Stat. § 943.10).

In reaching this conclusion, the court relied primarily on *Bartnicki v. Vopper*, 532 U.S. 514 (2001), which it summarized as standing for the proposition that, "if a

publisher lawfully obtains the information in question, the speech is protected by the First Amendment provided it is a matter of public concern, even if the source recorded it unlawfully." *Bollea III*, 2014 WL 185217, at *4 (citing *Bartnicki*, 532 U.S. at 535).

The DCA held that Gawker was fully entitled to the protection provided by *Bartnicki*, because "the speech in question . . . is indeed a matter of legitimate public concern," and "there is no dispute that Gawker . . . was not responsible for the creation of the Sex Tape," nor any suggestion "that Gawker . . . otherwise obtained it unlawfully." *Id*.

(In its opinion, the DCA also rejected Gawker's argument that the injunction issued below was barred under principles of collateral estoppel by the prior rulings of the federal district court. While the DCA described Gawker's arguments on this point as "persuasive," it ultimately concluded "we are not convinced that a ruling at such a provisional stage in the proceedings should have preclusive effect." *Id.* at *5. This did not affect the disposition of the appeal, as the court determined that the injunction, even if technically not barred by the prior decisions in federal court, was nonetheless improper on the merits.)

Conclusion

The DCA ultimately ruled that the injunction barring Gawker from publishing its commentary about, and excerpts from, the Hulk Hogan sex tape was an unconstitutional prior restraint and reversed the injunction in its entirety.

Heather L. Dietrick, General Counsel of Gawker Media, Seth D. Berlin, Cameron Stracher, and Paul J. Safier of Levine Sullivan Koch & Schulz, LLP, and Gregg D. Thomas and Rachel E. Fugate of Thomas & LoCicero PL represented defendant/appellant Gawker Media, LLC. Charles Harder of Harder Mirell & Abrams LLP, David Houston of the Law Office of David Houston, and Kenneth G. Turkel and Christina K. Ramirez of Bajo Cuva Cohen & Turkel, P.A. represented plaintiff/appellee Terry Gene Bollea.

New from the MLRC Employment Law Committee: Non-Competes in the Broadcast Industry

Eight states and the District of Columbia have laws that target the broadcast industry and limit broadcast employers' ability to enforce non-compete agreements with their on and off screen talent. This paper describes the elements of those laws and their impact. It also addresses several alternative approaches for broadcast employers' efforts to retain employees and the impact of the broadcast non-compete ban laws on those alternatives. Click to read or visit medialaw.org.

Ninth Circuit Holds Blogger Entitled to Protection Under Gertz

Reverses \$2.5 Million Verdict and Remands for New Trial

The jury awarded

compensatory damages

in the amounts of \$1.5

million for Padrick and \$1

million for Obsidian.

By Michael K. Cantwell

In a case involving critical comments on a blog that had previously attracted widespread attention for having been adjudicated on a strict liability basis, the Ninth Circuit has explicitly held that the constitutional limitations on defamation claims applicable under *Gertz v. Robert Welch*, *Inc.*, 418 U.S. 323 (1974), are not limited to cases involving institutional media defendants. *Obsidian Finance Group*, *LLC v. Cox*, No. 12-35238 (9th Cir., Jan.17, 2014) (Alarcón, Smith, Hurwitz, JJ.).

Reversing the district court's refusal to apply *Gertz* to the defendant blogger, as well as its holding that her postings (including allegations of criminal activity) had not involved matters of public concern, the appellate court remanded the case for a new trial.

The court did not reach the most farreaching of defendant's contentions, namely, that *Gertz* applies even to speech that is purely a matter of private concern. That latter issue was explored in a MLRC Bulletin article. *See* Michael K. Cantwell, "Exploring the Issue of 'Strict Liability' for Defamation," MLRC Bulletin, 2012:3

(December 2012), hereafter "Exploring 'Strict Liability' for Defamation."

Finally, the Ninth Circuit affirmed the lower court's rulings that (1) plaintiffs are not public officials required to prove constitutional malice as a prerequisite to recovery and (2) other of the defendant's allegedly defamatory statements are nonactionable expressions of opinion.

Background

Plaintiff Kevin Padrick is a senior principal with plaintiff Obsidian Finance Group, LLC ("Obsidian"), an advisory and investment firm that was hired by Summit Accommodators, Inc. ("Summit"), in connection with a contemplated bankruptcy. After Summit filed for bankruptcy, Padrick was appointed Chapter 11 trustee. Because Summit had misappropriated funds from clients, Padrick's principal task

was to marshal Summit's assets for the benefit of those clients. Slip op. at 3-4.

Defendant Cox published numerous posts on several web sites she'd created, accusing Padrick and Obsidian of engaging in a variety of illegal activities in connection with the Summit bankruptcy. Pointing to their hyperbolic language and inability to be proven true or false, the trial court held all but one of the posts to be non-actionable expressions of opinion. However, the court found several "fairly specific allegations" in a lengthy posting published by Cox on December 25, 2010 (the "December 25 blog post") that could be understood "to imply a provable fact assertion" and allowed that claim to proceed to trial. *Id.* at 4.

In a pre-trial memorandum, Cox (at that point proceeding

pro se) argued that, because the blog postings involved matters of public concern, the plaintiffs were required to prove negligence in order to recover for defamation and actual malice in order to recover presumed damages. Alternatively she argued that plaintiffs were public figures required to prove actual malice as a prerequisite to any recovery. *Id.* at 5.

The district court rejected both arguments and directed the jury that "[d]efendant's knowledge of whether the statements at issue were true or false, and defendant's intent or purpose in publishing those statements, are not elements of the claim and are not relevant to a determination of liability." *Id.* at 5-6. Cox neither proposed jury instructions of her own nor objected to the court's instructions.

The jury awarded compensatory damages in the amounts of \$1.5 million for Padrick and \$1 million for Obsidian. Following the verdict, and now represented by noted constitutional scholar Eugene Volokh, Cox moved for a new trial. Once again, the district court rejected her arguments that the plaintiffs were public figures and that the December 25 blog post involved matters of public concern. *Id.* at 6. The district court also rejected a newly raised argument that

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the plaintiffs were public officials. *Obsidian Finance Group, LLC v. Cox*, 2012 WL 1065484, Slip at *3.

Both parties appealed, Cox from the denial of her motion for a new trial and the plaintiffs from the district court's refusal to submit Cox's other blog posts to the jury.

Cox argued that the district court had erred in allowing liability to be imposed without a showing of fault or actual damages and in ruling that the plaintiffs were not public officials. She did not contest the district court's ruling that the December 25 blog post contained an assertion of fact or the jury's verdict that the post was false and defamatory. She also did not contest the district court's holding that the plaintiffs were not public figures.

Ninth Circuit Decision

The court began by rejecting plaintiffs' argument that Cox had waived her First Amendment objections to the jury instructions by refusing to object to them prior to their submission to the jury. Because the district court had been fully informed of (and had explicitly rejected) Cox's First Amendment arguments at the time, further objection was unnecessary to preserve them. *Id.* at 7-8.

The court then rejected plaintiffs' claim that *Gertz* is limited to suits against the institutional media. Not only was there was no such explicit requirement in *Gertz*, but the Supreme Court has repeatedly refused to

afford greater protection to the institutional media than other defendants in non-defamation contexts. *Id.* at 9-10 (*citing Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Henry v. Collins*, 380 U.S. 356 (1965); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). And in *Citizens United v. Federal Election Commission*, the Court specifically noted: "We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." 558 U.S. 310, 352 (2010).

Although the appellate court concluded by joining its sister circuits in holding that *Gertz* is not limited to

institutional speakers, this was only the first step in deciding the appeal. Plaintiffs argued – and the court below had held – that the *Gertz* negligence standard was inapplicable because the December 25 blog post was not on a matter of public concern. The trial verdict and damage award would stand unless the Ninth Circuit either held that the speech involved a matter of public concern or that *Gertz* applies even to speech on matters of private concern.

The Supreme Court had yet to address the applicability of the *Gertz* negligence standard in the private-private context, having considered only on the prong of *Gertz* that requires proof of actual malice as a prerequisite to recovery of presumed or punitive damages (and holding such a requirement inapplicable in the private-private context). *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749

(1985).

However, in a decision cited by Cox in her brief, the Ninth Circuit had previously stated that negligence is a prerequisite to recovery even to speech that is not on a matter of public concern. See Newcombe v. Adolf Coors Co., a 157 F.3d 686, 694 n.4 (9th Cir. 1998). ("A private person who is allegedly defamed concerning a matter that is not of public concern need only prove, in addition to the requirements set out by the local jurisdiction, that the defamation was due to the negligence of the defendant.") The statement was dictum because the panel had already ruled that the challenged language was not libelous on its face and plaintiff had failed to prove special damages,

as required under the California defamation statute. 157 F.3d at 695.

Rather than revisit this issue, the Ninth Circuit took what would seem the less controversial route of ruling that the December 25 blog post qualified as a statement on a matter of public concern. In support, the court cited various of its prior holdings as well as decisions from its sister circuits that "[p] ublic allegations that someone is involved in crime generally are speech on a matter of public concern." *Id.* at 13.

The court went on to explain that Cox's allegations were similarly a matter of public concern, noting that plaintiffs had been hired to advise "a company that had defrauded its investors through a Ponzi scheme" prior to Padrick's

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Because the speech involved a matter of public concern, the district court had erred by failing to instruct the jury that it could not find Cox liable for defamation unless it found she was negligent and that it could not award presumed damages without finding that she acted with actual malice.

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appointment as a Chapter 11 in connection with the company's bankruptcy, and that Cox's posts questioned whether plaintiffs "were failing to protect the defrauded investors because they were in league with their original clients." *Id.* at 13-14.

Finally, and in contrast to the speech held to be on a matter of private concern in *Dun & Bradstreet*, the December 25 blog post was not "solely in the interest of the speaker and its specific business audience" but rather was published to the public at large. Because the speech involved a matter of public concern, the district court had erred by failing to instruct the jury that it could not find Cox liable for defamation unless it found she was negligent and that it could not award presumed damages without finding that she acted with actual malice. *Id.* at 14.

However, the court rejected Cox's claim that plaintiffs were "tantamount to public officials" because of Padrick's status as a court-appointed bankruptcy trustee, holding that he "was neither elected nor appointed to a government position, and he did not exercise 'substantial . . . control over the conduct of governmental affairs." *Id.* at 15 (*citing Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966)).

Finally, the court rejected the plaintiffs' cross-appeal that Cox's other blog posts – including, *inter alia*, allegations that plaintiffs had engaged in "illegal activity," "corruption," "fraud," "tax crimes," and "fraud against the government" and may have "hired a hit man to kill her" – were non-actionable statements of opinion.

Applying the Ninth Circuit's three-part test for determining "whether a statement contains an assertion of objective fact," *see Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990), the court found that the general tenor of the other blog posts as well as her use of extreme and hyperbolic

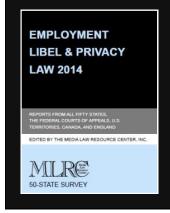
language negated the impression she was asserting objective facts, and that, "in the context of a non-professional website containing consistently hyperbolic language," the other blog posts were "not sufficiently factual to be proven true of false." *Id.* at 16-17.

Discussion

Although the court declined to express a view on the cutting edge issue of whether *Gertz* applies in the private-private context, a holding that *Gertz* is not limited to the institutional media and that blog posts accusing a court-appointed trustee of criminality are speech on a matter of public concern is far less likely to be questioned than a holding announcing that *Gertz* applies even to speech on matters of private concern.

Nonetheless, there are still aspects of this case that would present less than an ideal context for any further appeal. Indeed, the Ninth Circuit itself raised questions about Cox and her posts, noting that "Cox apparently has a history of making ... allegations [of "fraud, corruption, moneylaundering, and other illegal activities"] and seeking payoffs in exchange for retraction." *Id.* at 4. Moreover, this unattractive set of facts might also not be the ideal context in connection with the Ninth Circuit's somewhat cursory disposition of the plaintiffs' claim that Cox's other posts involved statements of fact and should have been submitted to the jury.

Michael K. Cantwell practices media, publishing and IP law with Henry R. Kaufman, P.C. in New York City. Plaintiffs in the case were represented by Robyn Ridler Aoyagi, Steven M. Wilker, and David S. Aman, of Tonkon Torp LLP, Portland, Oregon. Defendant was represented by Eugene Volokh, of Mayer Brown LLP, Los Angeles, California.



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Employment Libel and Privacy Law 2014 examines defamation and privacy claims in an employment context, an increasing concern to labor and employment practitioners.

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The Michigan Court of Appeals Inches Closer To Dendrite

They Like It, But Won't Quite Adopt It

By James E. Stewart and J. Michael Huget

Following the April 2013 decision of the Michigan Court of Appeals in *Thomas M. Cooley Law School v John Doe I*, No. 307426 (Mich. Ct. App. 2013), the bar had been awaiting the Court's next anonymous speech decision in *Ghanam v John Does*, 204 Mich. App. LEXIS 26, which had been argued shortly after the Cooley case.

In Cooley, the court had declined to apply the so called *Dendrite* standard to the unique facts of that case in part because those facts did not present what the panel described as the "extreme case" of an anonymous speaker who did not know he was being sued and in which the plaintiff was seeking his identity for any number of reasons including extra judicial harassment.

Ghanam presented that "extreme case." In its January 2, 2014 decision, the majority opined that Michigan should apply Dendrite but they felt constrained to do so by the panel's decision in *Cooley*. Nevertheless, in what can only be described as a very pro First Amendment opinion, the court inched closer to *Dendrite*, protected the anonymity of the speakers whose identities were being sought and joined the jurisdictions that have found internet speech to be generally nonfactual.

Cooley v. Doe 1

Cooley is a private law school headquartered in Michigan with several campuses in Michigan and one campus in Tampa, Florida. Plaintiff John Doe wrote a blog—under the name Rockstar 05—that was hosted by California ISP Weebly. In his blog, which was unapologetically and confrontationally named "THOMAS M. COOLEY LAW SCHOOL SCAM," Doe claimed to be a past Cooley student and had very harsh things to say about the school.

Cooley filed a defamation action in Michigan state court against Doe and sought to obtain Doe's identity by subpoena to the ISP. Having learned that he was being sued when Cooley held a press conference announcing the filing of the suit, Doe retained counsel and opposed the subpoena.

However the ISP inadvertently disclosed Doe's identity to Cooley and Cooley amended its complaint naming Doe with his real name. Doe moved the trial court to strike the identifying information then in the amended complaint on the basis that Cooley had violated the Michigan Court Rules by disclosing information that they knew Doe considered to be protected. The trial court denied Doe's motion to quash and his motion for protective order but stayed its ruling pending Doe's efforts to obtain appellate review.

Doe's Application for Leave to Appeal was granted by the

Michigan Court of Appeals. The Court issued its decision in the case on April 4, 2013. Despite a detailed analysis of *Dendrite Int'l Inc. v. Doe No 3*, 342 NJ Super 134 (2001), *Doe No 1 v Cahill*, 884 A2d 451 (Del, 2005), and *In re Anonymous Online Speakers*, 661 F3d 1168 (CA 9, 2011), and recognition that a number of jurisdictions have adopted some version of the *Dendrite* analysis, the court elected not to incorporate *Dendrite* into Michigan law.

In short, the Court of Appeals concluded that "Michigan procedures for a protective order, when combined with Michigan procedures for summary disposition adequately protect a defendant's First Amendment interests in anonymity."

The court recognized the problematic aspects of what it described as "the extreme case": an anonymous speaker who does not know that he has been sued and a case in which the plaintiff may be seeking his identity for any number of reasons, including extra-judicial harassment and efforts to chill his speech. But, because Doe had knowledge of Cooley's law suit, had appeared through counsel, and was no longer truly anonymous, the court held that such an extreme case was not presented to them.

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Accordingly, "under the well-recognized concept of judicial restraint," the majority elected to confine its ruling to the facts of the case before it. The majority accordingly reversed and remanded the case to the trial court for consideration of whether it had power to quash a California subpoena and, if not, whether Doe was entitled to a protective order.

Judge Beckering agreed with the conclusion that the only remedy for Doe was a protective order because his identity had been disclosed. However she urged through a dissent that it would not require establishing new law to have a trial court presented with such a request for pre-service discovery apply a modified *Dendrite* analysis as part of its decision as to whether "good cause" had been demonstrated.

The Underlying Lawsuit: Ghanam v. John Does

Plaintiff Gus Ghanam is the Deputy Director of Public Services for the City of Warren, Michigan. The political pot is always on high simmer in Warren where politics are part of the fabric of the city and are played as a full contact sport with no quarter is given or requested. The goings on in Warren are frequent topics for coverage by the Detroit Media who in early 2012 reported on an FBI subpoena to the city for extensive records, including Ghanam's emails, in connection with an investigation of city contracts with a trash hauling contractor.

This was followed by a report that a City audit had disclosed that over 3,000 tons of road salt was missing from the city storage dome and a report that the city had purchased new garbage trucks despite heated opposition to the purchase.

Enter warrenforum.net, a site proclaiming that "Politicians in this City live in Fear of this Web Site". In response to the topic, "Where did our road salt go?", several posters took aim at Ghanam. Poster "northend" posted that "IMO the salt is somewhere around the Sports Complex on Van Dyke just south of 14 mile, where Gus hangs out and drinks most days..." And poster "yogi" added that "The pizza maker sold it! Him and Gus probably split the money."

The posts regarding the garbage truck purchase were equally critical of Ghanam. "hateresrlosers' posted that the only reason that the city was getting more trucks was because "Gus needs to get more tires to sell and to get more money for his pocket". "pstigerfan" added that "Dick and Gus run the department and, and in turn make money off of it (selling

tires, selling road salt etc.)", and that if the city did not have a sanitation department with new trucks, "then Gus would have to take the tires off of other vehicles in other departments to make his money."

This really wasn't all that unusual for political dialog in Warren, but it was too much for Ghanam who filed a defamation action against these anonymous speakers. He obtained an exparte order to take the deposition of one Joseph Munem based on the representation that Munem was a long time Warren political figure who would know their identity and the ownership of warrenforum.

Munem was indeed enough of a veteran of the Warren political wars that he had the good sense to lawyer up and seek a protective order against the deposition. He urged that the First Amendment protected anonymous criticism of government officials and argued that Ghanam should have to meet a Dendrite like standard before he could seek the names of these anonymous speakers.

Things did not go well for the First Amendment with the trial judge who felt that the trend of the cases in this area "is toward transparency, not hiding things in this country." Concluding somewhat incongruously that Ghanam was entitled to learn the identities of the anonymous posters in order to decide if there had been any defamation, he ordered Munen to be deposed. The Michigan Court of Appeals granted Munen's application for leave to appeal and the case was argued a month after the Cooley argument. The decision in Ghanam came down on January 2, 2014.

The Majority Opinion

The majority opinion was written by Judge Kurtis Wilder and joined by Judge Michael Talbot-both well respected appellate judges. The opinion is very pro First Amendment. It endorses the need for great leeway in political speech and the First Amendment protection for anonymous speech in this area, "We agree with Munem that discovery attempts by public officials seeking the identity of anonymous Internet critics raise First Amendment about the use of defamation actions to identify current critics and discourage others from exercising their rights to free speech."

Following a detailed and thoughtful analysis of the *Dendrite* standard urged by Munem, they concluded that "we agree with the dissent in Cooley that it would have been preferable to also adopt the *Dendrite/Cahill* standard."

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However, they felt that they were bound to follow the *Cooley* decision that a protective order under the Michigan Court Rules and the ability to file a motion to dismiss the complaint on its face was sufficient protection for an anonymous speaker whose identity is sought.

The majority however, recognized that their case was indeed the "extreme case" contemplated by but not decided by *Cooley*. Thus the majority placed two additional requirements on a Plaintiff seeking the identity of an anonymous speaker who is not aware of the action. The plaintiff must demonstrate reasonable efforts to notify the anonymous speakers, for example through the blog where the posts appeared and the trial court must consider whether the suit can survive a motion to dismiss even if one has not been filed.

Having set the new standard, the majority applied it by analyzing the complaint and concluded that the statements complained of were not factual but were nonactionable rhetorical hyperbole or opinion and remanded the case to the trial court to dismiss. In doing so the Majority reaffirmed the value of free speech especially in the context of this "core political speech" and a court's duty "to examine the statements' and the context in which they are made to determine whether the statements are subject to First Amendment protection."

Combining this approach with the *Milkovich* requirement that the complained of statements be provable as false, the Majority concluded that "the comments were made facetiously and with the intent to ridicule, criticize and denigrate plaintiff rather than to assert knowledge of actual facts." In her concurring opinion, Judge Cynthia Stephens agreed with the result but believed that Michigan should adopt the Cahill/Doe standard.

Some Thoughts on the Ghanam Opinion

So where does Michigan stand on the Dendrite standard? Six appellate judges have considered it. One (Judge Beckering dissenting in *Cooley*) has urged the adoption of *Dendrite*, one (Judge Stephens concurring in Ghanam) has urged the adoption of Cahill, and two (Judges Wilder and Talbot) have indicated they wish Michigan would adopt it. But ironically it is not yet adopted in Michigan — at least formally.

One interesting aspect of the Ghanam opinion is Judge Wilder and Talbot's coming to the result they felt was proper – protection of anonymous political critics – without ruffling the feathers of their fellow judges on the *Cooley* panel.

The decision reflects yet another state appellate court struggling with the anonymous speech issue and its historic First Amendment protection and reaching a fair and balanced result.

The tone of the decision, its reaffirmance of core First Amendment protections and its result will give plenty of ammunition to any Michigan lawyer confronted with the next anonymous speech case.

In arriving at the conclusion that the comments were not actionable under a *Milkovich* analysis, the court of course relied on the *Greenbelt* line of cases and on the overall context of this political debate and the warrenforum itself. This was good but not particularly notable or unexpected. Perhaps of more value to media lawyers including those not in Michigan was the majority embrace of the line of cases finding that much internet speech to be singularly nonfactual.

It did so without reservations stating that "Courts that have considered the matter have concluded that Internet message boards and similar communications are generally regarded as containing statements of pure opinion rather than statements or implications of actual provable facts." The decision then went on to a somewhat detailed analysis of the actual posts and the internet use of "acronyms and symbols to represent longer words or express emotion."

For example, it noted that "hatersrlosers" use of ":P" to close his post was an "emoticon" to express that he was making his comment tongue in cheek, that "yogi's use of an exclamation mark meant in the internet context connotes a "humorous intent" and that "northend's 'use of IMO meant only that the missing salt being near the sports complex where Gus hangs around and drinks every day was "in my opinion".

Perhaps the statements in the warrenforum would have been found nonactionable under a *Milkovich* analysis if they had been in a campaign flyer or had appeared in a Letter to the Editor. But the fact that they were on a blog was of significance to the panel. So, while Michigan has not quite joined the jurisdictions applying the Dendrite standard to requests for the identity of anonymous bloggers, in Ghanam, it joined the jurisdictions finding much Internet speech found on blogs, message boards and chat rooms to be non-actionable.

James E. Stewart and J. Michael Huget are partners in the Ann Arbor office of Honigman Miller Schwartz and Cohn LLP.

Don't Like That Bad Yelp! Review? Virginia Court Provides Some Solace

By Judith Endejan

A common modern headache many businesses face is a negative, vitriolic (and perhaps untruthful) review that torpedoes the room, the food, or the room service etc. written by an anonymous poster on Yelp! Unmasking that poster is the first, and can be, the toughest, hurdle for a business to overcome to rectify the review.

Recently a Virginia court eased that burden – somewhat. The Court of Appeals of Virginia in <u>Yelp!, Inc. v.</u> <u>Hadeed Carpet Cleaning, Inc.</u>, No. 0116-13-4 (Jan. 7, 2014) ruled against Yelp! regarding disclosure of an anonymous poster. There, the Court applied a special Virginia procedural statute targeted at unmasking anonymous



online speakers and upheld a contempt order against Yelp! Issued after Yelp! refused to reveal the identifies of seven users who posted specific critical reviews of the carpet cleaning company.

The Virginia statute, Code § 8.01-407.1, has a lower standard for protecting anonymous speech than those adopted in other leading cases regarding unmasking internet bloggers. The Virginia Court did not follow these leading cases, Dendrite International, Inc. v. Doe #3, 775 A 2d 756 (N.J. Super Court App. Div. 2001) or Doe v. Cahill, 884 A. 2d 451 (Del. 2005), which impose a fairly strict standard for a defamation plaintiff to pass. Under Dendrite and Doe, the plaintiff has to provide evidence that substantiates that the speech was tortious (i.e., defamatory) or otherwise illegal to overcome First Amendment protection of anonymous speech, which requires a compelling state interest.

The Virginia Court applied the Virginia statute,

which has a lower burden, requiring only that you prove, among other things, that the review is or "may be" defamatory, or that you have a legitimate, good faith basis for "believing" that the review is defamatory. In the Virginia case, the plaintiffs presented evidence that could prove the seven reviewers were not actual customers of the carpet cleaner. The court reasoned that if the reviewers weren't customers, then whatever they said must have been false, hence defamatory.

While the Virginia case may indicate some easing of the burden for getting redress for a negative Yelp! review, the decision is based on a specific state statute and should not be viewed as having universal application in other parts of the country.

Judith Endejan is a partner at Garvey Schubert Barer in Seattle, WA. Plaintiff was represented by Raighne C. Delaney, James Bruce Davis and Rachelle E. Hill, Bean, Kinney & Korman, P.C., Arlington, VA. Yelp! was by Paul Alan Levy, Public Citizen Litigation Group; and Raymond D. Battocchi, P.C., McLean, VA.

Reality TV Show Was Not Campaign Donation in Brooklyn D.A. Race

Court Dismisses Novel Claim to Stop Broadcast

A CBS reality show about Brooklyn prosecutors was not an unlawful campaign donation to the then incumbent District Attorney and the challenger was not entitled to a preliminary injunction stopping the broadcast of the show. *George v. Hynes*, No. 100730/13 (N.Y. Sup. Dec. 19, 2013). In May, the court denied plaintiff's motions for a TRO and preliminary injunction. The court issued a written opinion in December and dismissed the case.

Background

In 2013, CBS put together a six-week reality television show about the Brooklyn District Attorney's Office, headed then by Charles "Joe" J. Hynes. Abe George, a former prosecutor, challenged the six term incumbent for reelection.

The show was scheduled to air on May 28, 2013. On May 14, George sought a temporary restraining order to stop the broadcast on May 28th or any other time before the general election on November 5, 2013. George argued the show was an illegal campaign contribution to

Hynes, specifically that it was an in-kind services and campaign contribution that was greater in value than the \$5,000 ceiling on campaign contributions under New York's campaign finance law.

George also sought injunctive relief on the grounds that Hynes was unlawfully seeking to further his personal political career by providing "public monies and resources of his public office to the CBS defendants, a private corporation" in violation of the state constitution. George also sought injunctive relief to prevent Hynes from using public funds to further his reelection campaign.



Trial Court Hearing

During a hearing, Judge Paul Wooten rejected George's request for a temporary restraining order because the judge found that the plaintiff did not show the danger of irreparable harm from the alleged campaign contribution. Judge Wooten also rejected the TRO because George failed to show that the balance of equities weighed in his favor, "particularly in light of the timeliness of the injunction application and the First Amendment Constitutional issues involved."

George, a former Manhattan assistant district attorney,

dropped out of the race in July. During the general election, Hynes lost to another opponent, Ken Thompson.

Limited Discovery Allowed

After the TRO was denied, the court allowed limited and expedited discovery on the hearing for preliminary injunction. Plaintiff sought to establish that Hynes was heavily involved in the show and that his involvement meant he violated New York's Constitution and campaign finance laws. George was able to depose two CBS

producers "excluding any communication subject to privilege, as well as the alleged First Amendment news reporter privilege asserted by CBS."

On May 24, the court affirmed once again that George had not shown irreparable injury, a likelihood of success, or that the balance of equities weighed in his favor. In the written opinion issued in December, Judge Wooten rejected the motion for a preliminary injunction and dismissed the case in its entirety.

CBS was represented by Levine Sullivan Koch & Schulz. Abe George was represented by Aaron M. Rubin.

Media Defendants Not Liable for Filming Police Raid

Appeals Court Affirms Summary Judgment in Ride-Along Lawsuit

By Patrick Kabat

Rejecting a state-law variation on conventional "ride-along" claims, a New York appellate court put an end to a personal injury plaintiff's long-running campaign to hold a documentary production company and its development partner responsible for gunshot injuries she sustained during the execution of a search warrant by the New York Police Department. *Rodriguez v. City of New York et al.*, 112 A.D.3d 905 (2d Dep't 2013).

Plaintiff Vivian Rodriguez alleged a "tacit agreement" between the media defendants and the police to enhance the film's entertainment value by staging an unnecessarily violent raid, but her concerted action claim against the media defendants was rebuffed for want of evidence at summary judgment.

On appeal, the Second Department affirmed, clarifying that neither attending preparation meetings, filming and miking police officers during the execution of a search warrant (without accompanying them into the apartment), nor drafting pitch and development documents that colorfully describe a tactical unit's dangerous role are evidence of the "common plan" necessary, under a theory of concerted action, to render media defendants liable for the tortious acts of their subjects.

HBO "did not participate, either directly or indirectly, in a common plan or design to commit the allegedly tortious act that caused the plaintiff's injuries."

Background

In early 2001, filmmaker Eames Yates pitched a documentary about the Emergency Services Unit ("ESU") of the NYPD to HBO, which entered into a development agreement with Yates' production company. To assist with assembling preliminary footage, the production company contracted with a different production company to supply Stephen McCarthy as a second cameraman on the project. Yates and McCarthy embedded themselves with the ESU and

recorded hours of interviews and routine footage of squad members.

On August 4, 2003, the ESU executed a search warrant on a basement-level apartment in Brooklyn where designer clothing and other items of questionable provenance were sold at remarkably low prices. McCarthy filmed the pre-execution planning meeting and miked the ESU officer responsible for breaching the building's external door. As a passenger in a patrol car, he followed the ESU's tactical truck to the scene of the raid. Though McCarthy remained outside the building at all times, filming the building's breach from the street and, briefly, from an external stairwell, the microphone he placed on the breaching officer (who also remained outside the apartment) captured audio, including a

gunshot moments after the search began. One of the ESU officers who went into the apartment had encountered the plaintiff in a dark bathroom and, mistaking her purse for a weapon, shot her.

Rodriguez filed a personal injury lawsuit against the city of New York, the NYPD, New York's public hospital system, Yates's production company, HBO, and its parent, Time Warner Inc. The trial court initially granted the media defendants' motion to dismiss the four counts of the complaint in which they were named. In 2006, however, on

the case's first trip to the Appellate Division, the Second Department reinstated two claims to the extent that they, together, stated a cause of action for concerted action liability. Emphasizing that "the mere act of filming the NYPD's use of excessive force" does not create media liability, the panel issued a limited remand permitting Rodriguez to seek evidence that the media defendants formed and participated in a common plan with the NYPD to use excessive force. *Rodriguez v. City of New York*, 35 A.D. 3d 702 (2d Dep't 2006).

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Following extensive discovery, including the depositions of several NYPD officers, McCarthy, Yates, and the HBO executive who authorized the development deal, the media defendants moved for summary judgment on the ground that there was no evidence of any common plan with the NYPD to use excessive force, proffering affidavits and deposition testimony showing that neither HBO nor Yates directed McCarthy's actions on the night of the raid, much less the actions of the ESU.

Moreover, they argued, regardless of McCarthy's alleged role in the events of the raid, his actions could not create liability for the named media defendants because he, through his own production company, was an independent contractor of Yates's production company, and was doubly removed from any agency relationship with HBO.

The plaintiff, in turn, insisted that the development deal, the treatment, and a progress update (which described the dangerous duties and lively personalities of the ESU) were evidence that the media defendants roused the ESU to unnecessary violence for the sake of a sensationalized "reality show," that the videographer's "participation" as an observer reached a level of culpable action with the squad members, and that questions of fact remained as to the nature of the purported implied agreement to gin up dangerous scenarios for the amusement of viewers.

Nonetheless, after oral argument, the Supreme Court granted summary judgment by terse Order, dismissing not only the concerted action tort claim, but a more conventional Fourth Amendment ride-along claim that crept belatedly into the plaintiff's briefing.

Claims against Time Warner Inc. and the hospital system were dismissed by stipulation before summary judgment. The City and the NYPD settled the plaintiff's claims on a confidential basis on the eye of trial.

Appellate Court Ruling

In her ensuing appeal from the Order granting summary judgment to the media defendants, the plaintiff expanded the field of issues, further developing her conventional ride-along arguments and packing a new claim for tortious interference with law enforcement into the reinstated counts. The Second Department, however, issued a clean opinion resolving the plaintiff's appeal on the "common plan" element of her concerted action claim. Having reviewed the relevant footage, the Second Department was not misled by the plaintiff's recitation of supposedly "participatory" acts, and affirmed that McCarthy's role throughout his time with the ESU was limited to observation.

The panel rejected the plaintiff's other arguments as "without merit." These included the contention that concerted action is necessarily a question for the factfinder, that a statute intended to protect law enforcement officers against interference with performance of their duties imposes on members of the public a duty to each other not to interfere, and that the court should draw a distinction between so-called "reality" programming and sober "documentary" productions.

Rather than resolving McCarthy's agency status, the Second Department affirmed solely on the basis of the plaintiff's evidentiary burden, at summary judgment, on an essential element of her concerted action claim. The panel ruled that Rodriguez failed to show a triable issue of fact in light of overwhelming evidence that Yates's production company and HBO "did not participate, either directly or indirectly, in a common plan or design to commit the allegedly tortious act that caused the plaintiff's injuries."

HBO and Eames Yates Productions were represented at summary judgment and on the second appeal by Stephanie Abrutyn of HBO and Jay Ward Brown of Levine Sullivan Koch & Schulz, L.L.P.'s Washington, D.C. and New York offices, with Patrick Kabat of the firm's New York office.

MLRC Bulletin: Articles and Reports on Significant Developments

Sex, Lies and Section 230 • Literary License(s)? Why the First Amendment Protects Fiction, and What This Means For Video Games • Making Fair Use More Client-Friendly: The Set Of Principles In Fair Use For Journalism • Fair Use Is Foul and Foul Use Is Fair: Legal Certainty Or Witches' Cauldron? • New Developments 2013

Former Drug Dealer Loses Right of Publicity Suit Against Same Name Rapper

The California Court of Appeal has rejected an ex-cocaine trafficker's right of publicity claim against a rapper who uses the same name and whose lyrics portray a drug-dealing lifestyle. The intermediate appellate court concluded that the First Amendment is a complete defense to all of the plaintiff's claims. *Ross v. Roberts*, B242531 (Cal. App. Dec. 23, 2013).

Background

Plaintiff Ricky D. Ross has served time in state prison for his large-scale cocaine-dealing operations. He sold as much as \$3 million worth of cocaine a day during the height of his drug-dealing in the 1980s. He amassed a fortune of hundreds of millions. While in prison, he helped to uncover a ring of dirty cops, leading to the release of 120 wrongly convicted men and his early release from prison.

He went back to prison for a new conviction on charges of conspiracy to traffic cocaine. During his second stint of incarceration, Ross got significant exposure for having a peripheral role in the Iran-Contra scandal after revealing his former drug supplier had close ties to the Nicaraguan Contras.

Ross sued William Leonard Roberts II, who raps under the stage name "Rick Ross," and other defendants for an alleged violation of California's statutory right of publicity,

false advertising, unjust enrichment, unfair business practices, common law claims of misappropriation of name and identity and misappropriation of rights of publicity.

Roberts, who released his first single in 2005 and has been successful commercially, often raps about running a fictional large-scale cocaine trafficking operation. Roberts has said that his stage name is related to Ross' life story, but he also has said his name is play on his high school football nickname, "big boss."

The trial court granted summary judgment on two grounds. First, Ross' claims accrued in 2005, which was when Roberts made the first commercial use of his stage

name. Moreover, the single publication rule prevented plaintiff from seeking damages for the later uses of his name by Roberts. Second, plaintiffs' claims were barred by laches.

Appellate Court Decision

Even though the defendants did not raise a First Amendment defense at the summary judgment stage in the trial court, the Court of Appeal, Second Appellate District, said it would consider the argument. Among other reasons, the court said that speedy resolution is important in a case involving free-speech rights, and the plaintiff was granted leave to brief the issue and had adequate opportunity to litigate the issue.

The appellate court applied the transformation balancing test *from Comedy III Productions v. Saderup*, 25 Cal. 4th 387

(Cal. 2001), on whether "the new work merely 'supersede[s] the objects' of the original creation ... or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message."

While Roberts' celebrity identity relies to some extent on plaintiff's name and persona, his raps are transformative because he added new expression and created original artistic works, the court reasoned. "He was not simply an imposter seeking to profit solely off the name and reputation of Rick Ross," the

court opined. "Rather, he made music out of fictional tales of dealing drugs and other exploits—some of which related to the plaintiff."

The subsidiary inquiry from *Comedy III* in close cases is whether the "marketability and economic value of the challenged work derive primarily from the fame of the celebrity." The value of Roberts' music does not primarily derive from Ross' fame, even if it did lead him to initially get some exposure, the panel said. "It can safely be assumed that when individuals purchases music, they generally do so in order to listen to music that they enjoy," the court said.

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The California Court of Appeal has rejected an ex-cocaine trafficker's right of publicity claim against a rapper who uses the same name and whose lyrics portray a drug-dealing lifestyle.

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The court also rejected Ross' argument that the First Amendment only applies in right of publicity cases when the alleged misappropriation is of a likeness, not a name. Ross cited *Estate of Fuller v. Maxfield & Oberton Holdings*, 906 F.Supp.2d 997 (N.D. Cal. 2012). The appellate court distinguished this case reasoning that the simple use of a name is not expressive in the way that the creation of imagery is: "We believe that *Fuller*'s emphasis on the 'visual nature' of the First Amendment defense in right of publicity cases can be misleading, since it has been held previously" that

First Amendment protection extends to all forms of expression.

In conclusion, the court said "the resemblance [between the plaintiff and defendant] is not 'raw material' upon which the story is based, but it is merely a minor detail when viewed in the context of the larger story—Robert's music and persona are much more than literal depictions of the real Rick Ross."

Plaintiff was represented by John D. Younesi and Jan A. Yoss. Defendants were represented by Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor, and Caldwell Leslie & Proctor.

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March 10, 2014 University of Miami



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Texas Cases Test Constitutional Limits on Post-Trial Defamation Injunctions

By Amaris Elliott-Engel

One of the traditional rules of First Amendment law is that equity will not enjoin a libel. Two cases pending before the Texas Supreme Court highlight challenges to the traditional rules governing injunctions in defamation cases. Are post-trial injunctions against false and defamatory statements illegal prior restraints? Can injunctions ever be sufficiently tailored to ensure they don't reach too broadly and curb free-speech rights? And how do these Texas cases compare to case law elsewhere in the country?

Injunctive Relief in the Lone Star State

In the first case, plaintiff Robert Kinney says he was defamed by his former employer Andrew Barnes and legal recruiting firm BCG Attorney Search in website postings

stating that Kinney was fired for engaging in a kickback scheme with a job candidate. Kinney is not seeking damages, only a permanent injunction to take the statements off-line and an order directing defendants to request the removal of those statements from other websites. The trial court granted summary judgment to defendants and the Texas Court of Appeals affirmed, holding that the requested relief would be a prior restraint on speech. *Kinney v. Barnes*, No. 03-10-00657-CV (Tex. App. Nov. 12, 2012).

The second case involves the constitutionally of a post-trial injunction and a \$9.8 million judgment. Allen Chadwick Burbage was found to have defamed his brother, W. Kirk Burbage, as part of a long-lasting family dispute over the ownership of a funeral home and a private family cemetery. Among other actions, defendant created a website and sent emails to the plaintiff's competitors stating that plaintiff abused their grandmother and mother. The Court of Appeals reduced the damage award to \$3.8 million and vacated the permanent injunction as a prior restraint. *Burbage v. Burbage*, No. 03-09-00704-CV (Tex. App. Dec. 21, 2011).

Are post-trial injunctions against false and defamatory statements illegal prior restraints? Can injunctions ever be sufficiently tailored to ensure they don't reach too broadly and curb free-speech rights?

Both plaintiffs urge the Texas Supreme Court to follow what they called the "modern rule" and allow the injunction of statements found to be false and defamatory.

Plaintiff Kinney further argued that it would constitutionally permissible for the statements to be ordered to be taken off-line after they have been found to be false and defamatory. Such injunctive relief would not be a prior restraint on free speech in his case because it would only remove three sentences, not a "judicial order that generically instructs a speaker to stop engaging in, say, 'scandalous or defamatory' speech, leaving him to guess if his future utterances qualify." Finally, Kinney argued that taking off-line statements that have been adjudicated to be defamatory would not violate the Texas Constitution's guarantee that "every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of

that privilege."

Defendant Barnes countered in his court papers that a permanent injunction requiring the removal of defamatory statements from websites would be a prior restraint of constitutionally protected speech under the Texas Constitution.

Texas Supreme Court Argument

The Texas Supreme Court heard oral arguments in both cases January 9.

Defendants drew a parallel with leaving books that contain defamatory statements in library collections. Such books are not pulled off the shelves of libraries. Justice Jeffrey S. Boyd appeared to agree and commented that requiring removal of online statements was "more like taking the book out of the library than publishing a new article."

During the *Burbage* argument, Chief Justice Nathan L. Hecht inquired, if a libel defendant's behavior can't be changed no matter the damage award, is there nothing that can be done. Defendant's attorney, Peter D. Kennedy, said that the problem is not new to the Internet. If a book with

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libelous statements has been written and it's in the library, it'll be there whether you like it or not, Kennedy argued.

Justice Paul W. Green also asked what the law could do about a "prolific defamer" who repeats the libel multiple times and borders on harassment.

Plaintiff's attorney Martin J. Siegel later countered that even if post-judgment injunctions are characterized as prior restraints they are "tolerable" under U.S. Supreme Court case law if there are appropriate procedural safeguards.

Anthony Ricciardelli, the attorney for the Barnes defendants, told the justices that free speech would be endangered if post-trial injunctions on defamatory statements are allowed in any circumstances. Justice Debra Lehrmann asked how that was so if the speech has been adjudicated to be defamatory. Ricciardelli responded that, if the speech was only substantially the same as the defamatory statements,

there would be a question on how close in proximity the speech has to be in order to be barred by the injunction. That could lead to vague and ambiguous injunctions, he said._ "If we get rid of the bright line we currently have" Texas will set "in motion a gradual erosion of our right of free speech."

After Peter Kennedy argued that the Texas Supreme Court has frowned on postjudgment injunctions for a century, Justice Lehrmann retorted the world is different

today because, in an instant, one Internet posting can completely ruin someone's reputation.

Justice Eva Guzman asked what the point of postjudgment injunctions would be if they are limited to a ban on the specific defamatory statements. Then the equitable relief does nothing about defamatory paraphrases. "Certainly an injunction would not be effective," Guzman said.

Around the Country

The U.S. Supreme Court has never addressed whether post-trial injunctions in defamation cases violate the First Amendment.

The Court came close to deciding the question in <u>Tory v.</u> <u>Cochran</u>, 544 U.S. 734 (2005). Famed trial lawyer Johnnie Cochran obtained an injunction preventing a disgruntled former client from continuing to picket at Cochran's office and otherwise speaking about Cochran and his law firm in

any public forum. The California Court of Appeal upheld the injunction.

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The defendant acted pro se at trial, but later obtained the assistance of noted First Amendment scholar Professor Erwin Chemerinsky who filed a petition for cert., together with media lawyers Gary Bostwick and Jean-Paul Jassy. They argued that injunctions should not be allowed in defamation cases because: money damages are inherently adequate, injunctions in libel cases have been historically condemned and it is inevitably futile to craft an injunction that is both effective and narrowly tailored. Public figures and public officials, they said, certainly should not be able to obtain injunctions because they have access to the media to respond to attacks on their reputation.

The Supreme Court granted review on "whether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure,

violates the First Amendment." Cochran, however, died after the case was argued to the Court and before a decision was rendered.

In a 7-2 decision written by Justice Stephen Breyer, the Court took note of Cochran's death and held that under the circumstances and as written, the injunction was an overly broad prior restraint upon speech. But Cochran's death made it unnecessary to explore whether the First

Amendment bans permanent injunctions in defamation cases, particularly for public-figure plaintiffs. In dissent, Justices Thomas and Scalia argued that the petition should have been dismissed as improvidently granted.

State Case Law

In the last 40 years, six state supreme courts have approved post-trial injunctions in libel cases. One has disapproved them. All of these cases involved non-media defendants.

In May 1975, the Ohio Supreme Court held that a landlord could be entitled to an injunction against future repetitions of statements – if the statements were shown at trial to be false and defamatory. *O'Brien v. University Community Tenants Union, Inc.*, 42 Ohio St. 2d 242, 245 (Ohio 1975). The court emphasized that, before injunctions in

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defamation cases could issue, "judicial determination that specific speech is defamatory must be made prior to any restraint." *Id.*

In July 1975, the Georgia Supreme Court held that a credit-report company could be enjoined after it was determined at trial that the company libeled the plaintiff by reporting he was fired from a job. *Retail Credit Company v. Russell*, 234 Ga. 765, 765 (Ga. 1975). The doctrine of prior restraint is concerned with inhibiting protected speech "before an adequate determination that it is unprotected by the First Amendment." *Id.* (citing *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 390 (1973)).

In 1984, the Minnesota Supreme Court held that a manufacturer of firearms training equipment could enjoin a competitor from repeating statements found to defame plaintiff and its products. <u>Advanced Training Systems, Inc v.</u>

Caswell Equipment Company, Inc., 352 N.W. 2d 1, 3 (Minn. 1984). The court also agreed that constitutional rights were not violated in a case in which a "judicial tribunal has, after full adversarial proceedings, found that defendant's criticism ... constituted 'false or misleading' product disparagement." *Id.* at 11.

In 1997, the Nebraska Supreme Court held that, "absent a prior adversarial determination that the complained of publication is false or a misleading

representation of fact," that pre-trial injunctions of libel can't be allowed. <u>Sid-Dillon Chevrolet-Oldsmobile-Pontiac</u>, <u>Inc. v. Sullivan</u>, 251 Neb. 722, 732 (Neb. 1997). However, the court held that post-trial injunctions are allowed in defamation cases if the libel is in violation of a trust or contract, if the libel is in aid of another tort or unlawful act, or if injunctive relief is essential to preserve a property right.

In 2007, the California Supreme Court held that "following a trial at which it is determined that the plaintiff defamed the defendant, the court may issue an injunction prohibiting the defendant from repeating the statements determined to be defamatory." *Balboa Island Village Inn, Inc. v. Lemen*, 40 Cal. 4Th 1141, 1144 (Cal. 2007). A jury found that defendant defamed the Village Inn bar-restaurant by repeatedly claiming that it engaged in child pornography, prostitution, sold drugs and alcohol to minors, and was

involved with the Mafia. The trial court issued a broad injunction and no money damages were sought. Although the California Supreme Court found that post-trial injunctions may be constitutional, here the injunction issued to restrain the defendant was overbroad because, among other things, it prevented her from petitioning governmental officials about her complaints against plaintiff. *Id.* at 1160-61.

In 2010, the Kentucky Supreme Court rejected injunctions against expression prior to a final adjudication that the expression is unprotected by the Federal Constitution or the State Constitution. *H.C. "Blue" Hill v. Petrotech Resources Corp.*, 325 S.W. 3d 302, 303(Ky. 2010). The case involved an oil-and-gas driller who refused to refund an investor's funds. *Id.* at 304. The collection agency, which was retained by the investor, posted on several websites that the driller engaged in illegal conduct, had violated criminal and securities law, and that "MOST OF WHAT THEY DO IS CROOKED." The collection agency also contacted the driller's customers,

clients and investors, claiming that it was engaged in illegal activity.

The Kentucky Supreme Court vacated the temporary injunction as a prior restraint. But it also rejected First Amendment scholar Erwin Chemerinsky's stance, cited by defendant, that even a post-trial injunction is a prior restraint because the person who is bound by an injunction must go to court and get permission to get the injunction dissolved. *Id.* at 306-07. The Kentucky justices said defamatory speech may be enjoined after the

speech has been shown by a preponderance of the evidence to be false. The court also construed the Kentucky Constitution as not protecting defamatory speech. The state's constitution guarantees that "every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty." *Id.* at 312-13. The justices concluded that responsibility applies to paying monetary damages as well as obeying a "narrowly tailored injunction against repetition of that false speech." *Id.*

Lower appellate courts also have upheld post-judgment injunctions in libel cases. The New Jersey Superior Court, in an unpublished decision, upheld a post-judgment injunction against a defendant who alleged that a more successful businessman had converted his father's businesses into his own through the improper administration of his father's

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Chief Justice Nathan L.
Hecht inquired, if a libel
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Media lawyers and First

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estate. Chambers v. Scutieri, 2013 N.J. Super. Unpub. LEXIS 760, at *1, *7 (N.J. Sup. Ct. April 4, 2013). The defendant picketed with at least a dozen paid picketers in several prominent locations in Morristown, N.J., sent pamphlets to over 4,500 recipients with the allegations, and created a website containing the same accusations. Id. at 10-11, 13-14. The New Jersey court held that, once it has been proven at a trial that statements are defamatory, a permanent injunction barring the repetition of such statements is appropriate. Id. at 37.

A federal district court in New Mexico also predicted that New Mexico would adopt the modern rule that defamatory speech may be enjoined after statements have been determined to be false. Wagner Equipment Co. v. Wood, 893 F. Supp. 2d 1157, 1163 (D. N.M. 2012).

The Pennsylvania Supreme Court. however, held that injunctions against defamatory speech violate the free speech provisions of the state's constitution. Willing v. Mazzocone, 482 Pa. 377, 382 (Pa. 1978).

At issue were similar facts to the Tory v. Cochran case. A disgruntled client protested outside the offices of her former lawyers and accused them of stealing her money. The lower courts had entered and affirmed an injunction, in part, on the ground that a suit for money damages would have been Vacating the injunction, the Pennsylvania ineffective. Supreme Court recalled the historic prohibitions on prior restraints. The court also noted that "in Pennsylvania the insolvency of a defendant does not create a situation where there is no adequate remedy at law."

More recently, a Pennsylvania federal court predicted that Pennsylvania would continue to adhere to the rule that equity will not enjoin libel. Graboff v. American Association of Orthopaedic Surgeons, 2013 U.S. Dist. LEXIS 63282, at *1 (D. E.D. Pa. May 2, 2013). The court rejected a plaintiff's request for an order that defendant's website be taken down because it contained statements that a jury found placed the

> plaintiff in a false light. The district court predicted that the "Pennsylvania Supreme Court will adhere to the traditional, common law principle that equity will not enjoin a defamation, especially when a party has an adequate remedy at law in the form of money

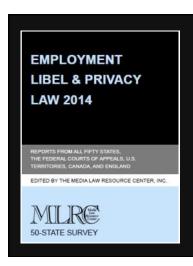
damages." Id. at *14-15.

Conclusion

Media lawyers and First Amendment scholars will be looking forward to the Texas Supreme Court's decisions in the *Kinney* and Burbage cases for further jurisprudence on

post-trial injunctions in defamation cases. As the oral argument in those cases showed, the traditional bright-line rule against injunctions is being tested by concerns over the "prolific" defamer – particularly those who go online. While the decisions may be limited to their unique facts, they will add to the case law on the issue and perhaps detail the fundamental free speech issues at stake.

Amaris Elliott-Engel is the 2013-2014 Media Law Resource Center Legal Fellow.



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Employment Libel and Privacy Law 2014 examines defamation and privacy claims in an employment context, an increasing concern to labor and employment practitioners.

Topics covered in this publication include: Publication, Compelled Self-Publication, Fault Standards, Damages, Recurring Fact Patterns, Privileges and Defenses, Procedural Issues, Employer Testing of Employees, Searches, Monitoring of Employees, Activities Outside the Workplace, Records, Negligent Hiring, Intentional Infliction of Emotional Distress, Interference with Economic Advantage, and Prima Facie Tort.

Anti-SLAPP Law Applied to Weatherman's Employment Discrimination Claim

Statute Applies to All Acts in Furtherance of First Amendment Right

By Thomas R. Burke

On December 11, 2013, the California Court of Appeal ordered published its Opinion in <u>Hunter v. CBS</u> <u>Broadcasting, Inc.</u>, finding that California's anti-SLAPP statute applied to employment discrimination claims brought by a candidate for an on-air position against a television station.

Background

Plaintiff Kyle Hunter filed a complaint against CBS Broadcasting Inc. ("CBS") alleging that he was discriminated against on the basis of his age and gender when he was not hired by CBS to fill an open position as an on-air weather anchor at its Los Angeles local television stations. Plaintiff argued that even though he was the most qualified candidate for the position, he was not hired because CBS instead chose to hire an attractive, younger woman.

In response to the Complaint, CBS filed a motion to strike pursuant to California Code of Civil Procedure 425.16 (the "anti-SLAPP Statute"). In its motion to strike, CBS argued that the gravamen of plaintiff's claims was CBS's selection of on-air talent for its news broadcast. The act of selecting on-air talent is an act in furtherance of CBS' First Amendment rights because the selection of whom a broadcaster chooses to speak for it and represent it to the public is a fundamental exercise of its First Amendment rights. In addition, CBS argued that television news and weather broadcasts, and the on-air talent who do the reporting, are matters that are in connection with an issue of public interest.

The trial court denied CBS' motion to strike, agreeing with Plaintiff that the anti-SLAPP statute did not apply to discrimination claims.

Appellate Court Decision

CBS appealed and the Court of Appeal unanimously reversed the trial court, rejecting plaintiff's argument that discrimination claims were immune from the application of the anti-SLAPP statute. The Court of Appeal reiterated that the anti-SLAPP statute could be applied to any claim and that the proper analysis under the anti-SLAPP statute requires a court to disregard the defendant's alleged motivations or intent and to make a factual determination as to whether the defendant's conduct at issue was an act in furtherance of a First Amendment right.

This is an important decision for media defendants, as it is only one of two published decisions in which the anti-SLAPP statute has been applied to discrimination claims. Accordingly, it provides media defendants with a potential method for seeking early dismissal of certain employment discrimination claims. In addition, this decision reaffirms that the anti-SLAPP statute is intended to apply to all acts that are in furtherance of First Amendment rights, regardless of the nature of the claim or a plaintiff's allegations of wrongdoing.

Thomas R. Burke is a partner with Davis Wright Tremaine LLP in San Francisco, CA. CBS was represented in this case by Keri Borders and Sarah Cronin of Kelly Drye, Los Angeles. Plaintiff was represented by Gloria Allred, Allred, Maroko & Goldberg, Los Angeles.

Wall Street Journal Wins UK Access Motion

Phone-hacking Prosecutors Must Supply Exhibits, No Strings Attached

By Jason P. Conti and Jacob P. Goldstein

In October 2013, as the criminal phone-hacking trial commenced in London, the Crown Prosecution Service refused to provide "overseas media outlets" with copies of trial exhibits and other materials unless they signed an agreement that the materials are "only to be used in accordance with the reporting restrictions as they apply to UK based media outlets."

The Wall Street Journal, which publishes online and in separate US, European, and Asian print editions, objected to this effort to impose English legal restrictions on content published outside the Court's jurisdiction.

The Honorable Mr. Justice Saunders ultimately granted the *Journal*'s motion. Noting that the purpose of providing access to trial documents is "to promote open justice and to assist the press to report the proceedings both accurately and fairly," Justice Saunders found "no good reason why they should not have the documents in the same way as the national press does."

This seemingly straightforward and successful motion nevertheless sparked multiple hearings and much debate about how to balance freedom of the press and the integrity of the judicial process when international media interest in a case extends far beyond the Old Bailey.

The *Journal* had initially tried to negotiate with the Crown Prosecution Service and the Attorney General, offering to agree to adhere to court-imposed reporting restrictions with respect to material it publishes in the UK, including material it publishes on the internet.

After this offer was refused, the *Journal* applied to the Court, arguing that the prosecutors' insistence on imposing English law on anything the *Journal* published anywhere in the world was an improper and discriminatory effort to apply their laws outside their jurisdiction. Under English law, the Contempt of Court Act 1981 makes punishable by fine or

imprisonment any publication "which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced." The law also authorizes judges to impose reporting restrictions to postpone or prohibit news coverage of court proceedings, even fair and accurate reports, in order to ensure a fair trial.

While the *Journal* agreed to abide by the Court's reporting restrictions for content it made available in England, it objected to the prosecutors' demands in order to preserve its right to publish freely in other parts of the world. The *Journal* also objected to the discriminatory aspect of the prosecutors' preconditions for access to trial materials, as

there was no similar insistence that UK media outlets agree not to publish reports outside the UK that did not comply with the Court's restrictions.

At a hearing in early December, Justice Saunders encouraged the parties to negotiate a pragmatic solution, while advising them to return if necessary. The *Journal* tried to address prosecutors' concerns by promising to inform them if it subsequently decided to put geo-filters on its websites and publish online and outside the UK information that would be restricted in the UK. This was unacceptable to the prosecutors, who feared that online material the *Journal* might seek to

keep out of the UK would nonetheless be "proliferated by others beyond [the *Journal*'s] control" who might copy or comment on the online content on other websites; such third parties might themselves be beyond the Court's control and not deterred by the Contempt of Court Act.

The negotiations failed, and the *Journal* returned to Court. In January, Justice Saunders then issued his ruling. He fully appreciated the prosecutors' concerns:

Such is the power of the internet that anything, wherever it is published, can find its way onto the

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The Journal applied to the Court, arguing that the prosecutors' insistence on imposing English law on anything the Journal published anywhere in the world was an improper and discriminatory effort to apply their laws outside their jurisdiction.

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internet and be available world wide and more importantly in this country. The inability of domestic courts to control the flow of information on the internet has been apparent in this trial. While the Wall Street Journal have said that they will take steps to ensure that the information is excluded from any of their publications appearing on the internet, they will not be in a position to prevent a third party who acquires this information abroad, posting it on the internet.

Nevertheless, Justice Saunders granted the *Journal*'s motion in full:

There is a strong public interest in enabling the press to report as fully and as accurately as possible the proceedings in this trial. That applies as much to the foreign press as it does to the national media. The proceedings are of interest not only in this country but also abroad. The supply of documents with such redactions as may be necessary will assist the foreign press to report the matter accurately and, at the moment, I can see no good reason why they should not have the documents in the same way as the national press does. I do not consider that the signing of the agreement should be a pre-condition of that supply.

At a hearing, two UK reporters objected to the Court's ruling, arguing that granting the *Journal*'s motion would provide it with an unfair advantage because it would somehow not need to comply with UK law. The Court nevertheless issued its ruling, which declined to make the *Journal* agree to confirm its compliance with reporting restrictions when reporting within the jurisdiction, as that goes without saying and "is not properly a matter for agreement." At a subsequent hearing, Justice Saunders also denied the prosecutors' request for a formal undertaking from the *Journal* promising not to publish on the internet anything covered by reporting restrictions, as he was satisfied with the *Journal*'s assurances to this effect.

However, in his ruling, Justice Saunders noted that even material published only in the US or Asian print editions could still pose a risk of contempt of court: "The issue may arise as to where exactly publication takes place. The information is no doubt sent in a report from the court to the local office and from there to America for inclusion in the American or Asian editions. In those circumstances it may well be that a publication of the information takes place in this country." Resolution of that issue will have to await another day.

Jason P. Conti and Jacob P. Goldstein are counsel for Dow Jones. Dow Jones & Company, Inc. was represented by Adam Wolanski, 5RB, and Caroline Kean, Wiggin LLP. Andrew Edis represented the CPS. Angus McCullough represented the Attorney General.

MEDIA LIBEL LAW 2013-14

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Researcher-Participant Privilege Is Established in Canada

Court Recognizes Need to Protect Promises of Confidentiality in Academic Research

By Peter Jacobsen and Tae Mee Park

A recent landmark decision from a Canadian court has, for the first time, recognized a confidentiality privilege between researchers and participants. Parent c. R., 2014 QCCS 132 (CanLII).

The decision, from the Quebec Superior Court, is seen as a reassurance to those who participate in academic studies where confidentiality is justifiably promised. The court followed the principles set out by the Supreme Court of

Canada in two seminal decisions from 2010 where the Supreme Court discussed the confidentiality privilege between journalists and their confidential sources through the application of the Wigmore test. See R v National Post, 2010 SCC 16 (CanLII); Globe and Mail v Canada (Attorney General) 2010 SCC 41 (CanLII).

Background

The case related to Luka Rocco Magnotta who is currently awaiting trial for several alleged crimes which in May 2012 including first degree murder, interfering with a dead body and the ghoulish act of sending body parts to various public

nature of the alleged crimes including the fact that Magnotta apparently recorded the murder and uploaded it onto the internet has attracted massive international attention.

The underlying facts of the case rendered the decision of particular interest to the public and posed a difficult balancing exercise for the court. At the heart of the case was an audio recording and paper transcript of that audio recording which were seized by the Montreal police pursuant to a search warrant.

Their Clients." The study was conducted by two prominent University of Ottawa professors over a four year period. Magnotta was interviewed by a student who was hired and supervised by one of the professors to assist in gathering data for the Research Project. After seeing the media coverage on Magnotta, the student contacted the Montreal police and tipped them off to the existence of the

The seized items recorded a confidential interview from

March 2007 with Magnotta which was part of a large-scale

academic study titled "Sex Work and Intimacy: Escorts and

interview. This resulted in the seizure of the audio recording and transcript of the interview from the office of the professors' lawyers. The professors claimed researcherparticipant privilege and the seized material was put in a sealed packet pending review by the court. The professors then brought an application for certiorari to quash the search warrant on the basis that the seized items were protected by researcher participant confidentiality privilege.

officials including the Prime Minister. The

The court recognized that research involving human subjects in the health and social sciences will often delve into sensitive areas and few, if any, would agree to participate in a study soliciting such personal and possibly damning information without a promise of confidentiality.

Wigmore Test Applied

The judge applied the Wigmore case-bycase test for common law confidentiality privilege, the same test as is as applied in the

journalist-source confidentiality privilege decisions. The test requires the person asserting the privilege to satisfy the four prongs of the Wigmore test: (1) the communications must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the

(Continued on page 33)

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communications must be greater than the benefit gained for the correct disposal of litigation.

The judge was convinced on the evidence that Magnotta along with all the other participants in the Research Project, was promised and expected confidentiality as a condition of participating in what she found to be an important study which involved disclosing very personal, sensitive issues and vulnerable participants. The judge held that the participants could face multiple risks of harm ranging from criminal prosecution to social ostracism if the promise of confidentiality was not upheld.

On the third prong, the judge accepted the value of the relationship between researchers and participants who are promised confidentiality. Like journalists who require the ability to offer anonymity in situations where sources would otherwise dry-up in order to facilitate freedom of expression, the court recognized that research involving human subjects in the health and social sciences will often delve

into sensitive areas and few, if any, would agree to participate in a study soliciting such personal and possibly damning information without a promise of confidentiality. This finding was based on significant evidence filed by a renowned social scientist as well as the applicants themselves. The academic community was particularly gratified to read that the court recognized the high social value of this kind of research.

Finally, on the fourth prong, which requires the court to balance the interests at stake, the court held that the public interest in protecting such important research and academic freedom outweighed the probative benefit of this evidence to the trial of Magnotta. The applicants argued, and the Crown did not dispute, that the 2007 interview would not shed any light on whether the crime itself was committed. Thus the court found that there was little probative value in the seized items to the investigation and prosecution of the alleged crime.

To cover off the possibility that he Crown might assert that the contents of the recording might assist in a psychiatric evaluation of Magnotta and a possible defence of not

criminally responsible (NCR) on account of mental disorder the applicants submitted and the court accepted, the expert evidence of a renowned forensic psychiatrist who opined that the information contained in a 2007 confidential interview would likely be of "minimal assistance" to a psychiatric assessment of the individual in 2012 or 2013 as it would relate to any NCR defence.

The court also recognized the value in preventing unnecessary intrusion into

academic freedom and the reasonable expectation of privacy of the research participants and balanced the likely minimal probative value of the recording against the convincing evidence that the relationship between a researcher and her confidential research participant, in the circumstances of this case, should be protected.

Peter Jacobsen and Tae Mee Park are partners at Bersenas Jacobsen Chouest Thomson Blackburn LLP in Toronto, CA. They represented the petitioners in this case.

The court recognized the value in preventing unnecessary intrusion into academic freedom and the reasonable expectation of privacy of the research participants.

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Non-Competes in the Broadcast Industry

Eight states and the District of Columbia have laws that target the broadcast industry and limit broadcast employers' ability to enforce non-compete agreements with their on and off screen talent. This paper describes the elements of those laws and their impact. It also addresses several alternative approaches for broadcast employers' efforts to retain employees and the impact of the broadcast non-compete ban laws on those alternatives.

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MLRC Joins Coalition Seeking Grand Chamber Review in *Delfi v. Estonia*

ECHR Held News Portal Could Be Liable for User Comments

This month, 69 media organizations, internet companies, human rights groups and academic institutions asked the President of the European Court of Human Rights to support Grand Chamber review of the judgment in <u>Delfi v.</u> <u>Estonia</u> (Application No. 64569/09), holding that an Estonian news portal could be liable for defamatory comments made by a user.

As reported in October, courts in Estonia held the news portal liable for defamatory user generated comments, even though the comments were removed upon notification. The case was taken to European Court and in October, the First Section ruled that Estonia was within the margin of appreciation to hold the website liable and there was no Article 10 violation. For more background see "ECHR Rules That News Portal Can Be Held Responsible for User Comments," MediaLawLetter (Oct. 2013).

In seeking Grand Chamber review, the coalition argues that if the First Section judgment is allowed to stand it will have serious adverse repercussions for freedom of expression and democratic openness in the digital era, citing four areas of concern.

First, the chamber judgment failed to clarify and address the nature of the duty imposed on websites carrying user-generated content: what are they to do to avoid civil and potentially criminal liability in such cases? The inevitable implication of the chamber ruling is that it is consistent with Article 10 to impose some form of strict liability on online publications for all third-party content they may carry. This would translate, in effect, into a duty to *prevent* the posting, for any period of time, of any user-generated content that may be defamatory.

Second, the chamber ruling is inconsistent with Council of Europe standards as well as the letter and spirit of European Union law. For example, under the EU's

Electronic Commerce Directive of 2000, member states cannot impose on intermediaries a general duty to monitor the legality of third-party communications; they can only be held liable if they fail to act "expeditiously" upon obtaining "actual knowledge" of any illegality.

Third, the *Delfi* chamber panel did not thoroughly assess whether the decisions of the Estonian authorities were "prescribed by law" within the meaning of Article 10 § 2. Under the E-Commerce Directive and relevant judgments of the Court of Justice of the European Union (CJEU), it was not unreasonable for Delfi to believe that it would be protected by the "safe harbour" provisions of EU law in circumstances such as those of the current case.

The CJEU has ruled, with reference inter alia to Article 10 ECHR, that an Internet service provider cannot be required to install a system filtering (scanning) all electronic communication passing through its services as this would amount to a preventive measure and a disproportionate interference with its users' freedom of expression and information. See *Scarlet v. Sabam*, Case C-70/10, Judgment of 24 November 2011; and *Netlog v. Sabam*, Case C-360/10, Judgment of 16 February 2012.

The chamber ruling sets the Court on a potential course of collision with the case law of the CJEU and may also give rise to a conflict under Article 53 of the Convention.

Fourth, and finally, the chamber ruling conflicts with emerging practices in the member states, such as the new notice and takedown regime in the new Defamation Act in the UK.

Singapore Court of Appeal Rejects Request For Pre-Action Disclosure of Journalist's Sources

Court Took Note of Public Interest in Exposing Corruption

By George Hwang and Intan Krishanty Wirayadi

The Singapore Court of Appeal in <u>James Dorsey v World Sports Group</u> [2014] SGCA 4, has on 14 January 2014 handed down a decision on pre-action 3rd party interrogatories which has wide implications on the disclosure of journalists sources. This is the first time the Court of Appeal has heard such a case.

Background

The appellant, James Dorsey, blogs about football (soccer) in the Middle East. The article in question covered the corruption scandal which rocked the sport in 2011. In a blog posted on 28 August 2012, he cited an audit report by Price Waterhouse Cooper, a Master Rights Agreement between the World Sports Group ("WSG") and the Asian Football Confederation ("AFC"), and "sources close to AFC" to paint a picture of an undervalued deal which does not seem to serve AFC's interest. WSG would like Dorsey to reveal his sources, claiming that they are contemplating actions for breach of confidence and defamation against his sources. This took the form of a pre-action 3rd party discovery and interrogatory application against Dorsey.

Singapore's rules on civil procedure have codified what in common law jurisdiction is called a Norwich Pharmacal Order. Discovery was refused by the Registrar who heard the matter. However, all the interrogatories were allowed. On appeal, the High Court judge allowed some of the interrogatories. They relate to the identity of the "sources close to AFC" and the Master Rights Agreement. The Court of Appeal reversed the High Court's decision. No information now needs to be disclosed.

Court of Appeal Decision

Given the dearth of precedents on such cases, the Court of Appeal took the opportunity to clarify the principles applicable. It states that a multi-factorial approach should be taken. The court needs to balance the interest of the Plaintiff with that of the Defendant. Also, whether there is a real grievance which the Plaintiff should be allowed to pursue against the public interest of preserving the identity of the source. The court cautions that the highly intrusive nature of such an order needs to be taken into account.

The factors to be considered include:

- the public interest in allowing the Plaintiff to vindicate its legal rights;
- the strength of the possible cause of action contemplated by the Plaintiff;
- whether it is a necessary and proportionate response in all the circumstances;
- whether the information could be obtained from another source;
- the degree of confidentiality of the information sought:
- whether it will deter similar future wrongdoing.

The Court of Appeal decided that WSG has not adequately proven that it will be left without a remedy if the sources are not disclosed. It could sue Dorsey for both defamation and breach of confidence. This is the essence of the Norwich Pharmacal order, i.e., the lack of a party who the Plaintiff can proceed against when its rights are obviously infringed.

The court is not satisfied that WSG has a real interest in obtaining the sources identity since there is no evidence that they are in Singapore or linked to Singapore. As the order is draconian, the court needs to be satisfied that the source's act of defamation and breach of confidence were committed within Singapore's jurisdiction or that action can be taken within Singapore against the source. Also, the information that WSG alleged was leaked to Dorsey was already in the public domain by the time Dorsey published his blog post.

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The decision has wide

implications on the

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The court drew the analogy between an injunction in the Spycatcher case and such an interrogatory. Once the information comes into the public domain, the damage is done. Therefore, it is futile to order the disclosure of source's identity if other remedies can be pursued. Further, if the Plaintiff has been genuinely interested in protecting its reputation, it should have commenced action against Dorsey, immediately.

The ramification is that someone in the Plaintiff's shoes should commence an action against the journalist before applying to the court for discovery or interrogatory to get the source's identity. How the court will decide is unclear, especially, if parallel proceedings are taken overseas. We can

only take heart in the court's 4 page dicta on exposing corruption. The Plaintiff did not contest on this point.

> "Significantly, the wider interest in disclosure of journalists exposing corruption was not a point sources. This is the first that WSG contested.... it may be time the Court of Appeal difficult for WSG (Plaintiff) to has heard such a case. insist that its interests confidentiality would override the wider interest in exposing corruption... There is compelling public interest consideration every present in Singapore to encourage whistle blowing against corruption Sunlight is the best disinfectant for corruption"

The Court was strongly persuaded by the public interest towards protecting Dorsey's source when the article in question exposes corruption in a body as big as the AFC. Singapore's interest in encouraging whistle blowing and discouraging corruption can be distilled from statutes such as the Prevention of Corruption Act (Cap 241, 1993 Rev Ed), as well as being a member state of the United Nations Convention Against Corruption.

The court referred to the iniquity rule developed under common law and states that it might apply. This is a public policy defense when sued for breach of confidence. Corruption is not protectable as confidential information. The first ingredient to be proven if one is to succeed in a breach of confidential information case is that the information is protectable as one.

Whilst the court did not discuss some public interest points, such as:

- the applicability of the newspaper rule in Singapore;
 - whether Dorsey, a consummate and renown journalist specializing in Middle Eastern affairs, who at the material time has a job as an academic, should be considered as one; or
 - the argument that it is in the interest of democracy that the balance of factors be tilted in favor of keeping a journalist's source confidential,

The Court's comments on corruption and whistle blowing can be developed. The basis for confidentiality of journalists' sources is to encourage the free flow of information. This supports the freedom of expression as it allows information which is in the public interest to be brought to light and debated. Protection of whistle blowers where there is corruption relies on the same logic.

We will have to wait for another courageous soul before knowing if this can be developed.

George Hwang is a Director, and Intan Krishanty Wirayadi a law intern, at George Hwang LLC in Singapore.

New from the MLRC Employment Law Committee: Non-Competes in the Broadcast Industry

Eight states and the District of Columbia have laws that target the broadcast industry and limit broadcast employers' ability to enforce non-compete agreements with their on and off screen talent. This paper describes the elements of those laws and their impact. It also addresses several alternative approaches for broadcast employers' efforts to retain employees and the impact of the broadcast non-compete ban laws on those alternatives. Click to read or visit medialaw.org.

Supreme Court Hears Argument Over Laches Defense to Copyright Claim

MGM Tries to Keep Raging Bull Copyright Plaintiff from Being a Contender

"Raging Bull" is the story of middleweight boxing champion Jake LaMotta who was known for taking the fight to his opponents and stalking them in the ring. The plaintiff in this copyright action, in contrast, used a "rope-a-dope" tactic and waited nearly 20 years to bring suit.

At issue in *Petrella v. Metro-Goldwyn-Mayer*, now pending in the U.S. Supreme Court, is whether the equitable

defense of laches can bar plaintiff's copyright claim. See <u>Petrella v. Metro-Goldwyn-Mayer</u>, 695 F.3d 946 (9th Cir. 2012), cert. granted, (Oct. 1, 2013). The Copyright Act has a three-year statute of limitations, but a separate claim accrues each and every time the copyright is infringed. The Supreme Court heard the case on January 21.

Background

The backstory of the making of *Raging Bull* starts with a boxer and his friend. Boxer Jake LaMotta collaborated with his friend, Frank Peter Petrella, in the production of a biography and two screenplays about his life. Petrella and LaMotta assigned to Chartoff-Winkler Productions their copyrights in the book and in the screenplays written in 1963 and 1973. In turn, Chartoff-

Winkler assigned its motion picture rights to a wholly owned subsidiary of MGM. The movie came out in 1980 and is now considered the best film of the 1980s by many critics.

When Petrella died in 1981 his renewal rights passed to his heirs. In 1991, Petrella's daughter, Paula, had an attorney file an application to renew the copyrights in the 1963 screenplay. She had been alerted to consult counsel after learning of the U.S. Supreme Court's decision in <u>Stewart v. Abend.</u> 495 U.S. 207 (1990) (in which the court held that, if an author died before a copyright renewal period begins, his/her statutory successors are entitled to renewal rights, even if those rights have been assigned to another party). During a series of correspondence in 1998 to 2000, Petrella's counsel

claimed that the defendants were infringing her copyright.

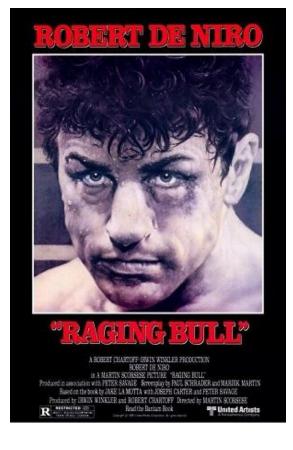
Finally in 2009, Petrella filed a lawsuit for copyright infringement, unjust enrichment and accounting. The district court granted summary judgment to defendants, holding the suit was barred by laches.

One of the reasons Petrella gave for not filing suit in the 1990s was that the film was "deeply in the red and would probably never recoup." She didn't sue from 2000 to 2009 because, among other reasons, the defendants told her the film's financial position was hopeless, that her mother was fearful of retaliation from the defendants, and because she was preoccupied with her mother's illness and her brother's disability.

When the case got to the Ninth Circuit, the appellate court found Petrella's reasons for delay to be dilatory and unpersuasive. "The

evidence suggests the true cause of Petrella's delay was, as she admits that 'the film hadn't made money' during the time period. A delay to 'determine whether the scope of proposed infringement will justify the cost of litigation' may be reasonable; but delay for the purpose of capitalizing 'on the

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At issue in Petrella v.

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value of the alleged infringer's labor, by determining whether the infringing conduct will be profitable' is not," wrote Judge Raymond C. Fischer, citing *Danjaq LLC v. Sony Corp.*, 263 F.3d 942 (9th Cir. 2001).

Under Ninth Circuit precedent laches is available if 1) the plaintiff has delayed in initiating the lawsuit, 2) the delay was unreasonable, and 3) the delay resulted in prejudice. The panel found that the defendants had experienced "expectations-based prejudice" because the studio had invested significant sums in promoting "Raging Bull" in the years after Petrella's correspondence stopped in 2000.

For example, the defendants spent approximately \$3 million in 2004 and 2005 to promote a 25th-anniversary edition of the film. The defendants spent \$100,000 to convert the film to the Blu-Ray format. The defendants also licensed the film to be broadcast on TV through 2015. If the defendants turned out to be wrong in their assumption that

they were the rightful owners of Raging Bull, "the anticipated profits from these investments and licensing agreements – the expectation of which underlay their business decision making – would wind up in Petrella's pocket," the Court said.

Judge William A. Fletcher concurred, stating he was bound to follow the Ninth Circuit's decision in *Danjaq*. But he noted "a severe circuit split on the availability of a laches defense in copyright cases."

In the Fourth Circuit, there is no laches at all. If a copyright suit is brought within the statute of limitations, it may go forward. In the Eleventh Circuit, "there is a strong presumption that a plaintiff's suit is timely if it is filed before the statute of limitations has run. Only in the most extraordinary circumstances will laches be recognized as a defense." Even if laches is found, "laches serves as a bar only to the recovery of retrospective damages, not to prospective relief." In the Second Circuit, laches is available as a bar to injunctive relief but not to money damages. In the Sixth Circuit, laches is available in only "the most compelling of cases."

At the U.S. Supreme Court

The Supreme Court granted certiorari on "whether the nonstatutory defense of laches is available without restriction to bar all remedies for civil copyright claims filed within the three-year statute of limitations prescribed by Congress, 17 U.S.C. § 507(b)."

During oral argument in January, the issue of Petrella's alleged delay in suing in order to take advantage of "Raging Bull" finally making money came up more than once.

Justice Elena Kagan said copyright law cuts against Petrella's argument that laches shouldn't apply because "of this separate accrual rule and the feature of these roll-in statues of limitations combined with very, very lengthy copyright terms, that essentially a plaintiff cannot bring a suit for years, decades, and time the suit in order to maximize her own gain."

But Stephanos Bibas, counsel for petitioner, argued that

"whether our client brings suit now or 20 years from now, she gets three and only three years' damages. The evidence in this case is that creative works are worth the most right after they're released." Bibas also mentioned that before his client would "get a dime" the defendants are entitled to deduct all their expenses from earning their profits attributable to the alleged copyright infringement.

Justice Ruth Bader Ginsberg asked why it was unreasonable for the plaintiff to wait until the work in which she holds copyright is profitable. "If no profits had been made in that early period and it would cost the plaintiff more to mount a lawsuit then the plaintiff could possibly receive in damages, why should the plaintiff who has a copyright that's going to run a long, long time sue?" Ginsburg asked. Mark A. Perry, attorney for MGM and the other defendants, replied that there are statutory damages and attorneys' fees available in cases in which there are no profits to incentivize "the rights asserter to come forward to court and clarify those rights." He added that the earlier resolution of rights is something that film studios support. "We are on both sides of the 'v." with respect to ownership issues.

Both Bibas and Nicole A. Saharsky, arguing as an amicus for the U.S. government in support of Petrella, were peppered with skeptical questions from every justice but

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Chief Justice John G. Roberts Jr. and Justice Clarence Thomas (who famously never asks questions) on whether laches could ever apply to curtail copyright claims. The copyright law "says you can't do it unless it's within three years. But it doesn't say that if it's within three years, you're home-free." Alito remarked.

The government's argument was that laches should not have been applied here, but that laches should be available in "extraordinary cases" because copyright law allows plaintiffs to sue many years after infringement started.

However, the defendants' lawyer faced his own share of skeptical questions. Justice Sonia Sotomayor commented that in any Supreme Court case in which there has been an underlying statute of limitations the court has not allowed a laches defense.

Both sides said public policy favors their positions. The petitioner said recognizing laches in an area of law involving a statute of limitations would open a "whole new field of litigation over laches." Respondent said rejecting laches would give "studios and other potential defendants ... the economic incentive to bring declaratory actions or contract actions or other preemptive suits to clarify rights, increasing litigation, increasing complexity."

By the time the bell rung on the oral arguments, it appeared neither side had had a knock-out round before the Supreme Court.

Stephanos Bibas of the University of Pennsylvania Law School argued on behalf of plaintiff-petitioner Paula Petrella. Mark A. Perry, Gibson Dunn & Crutcher, Washington, D.C., argued on behalf of the defendant-respondents. Briefs and a transcript of the oral argument are available on Scotusblog.



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The NFL Ravens Score Touchdown for Fair Use

By Cory Struble and Robert Raskopf

The United States Court of Appeals for the Fourth Circuit last month issued the latest decision in a nearly two-decade long copyright dispute between the NFL Ravens and Frederick Bouchat, holding that the NFL's "fleeting and infrequent" use in videos and displays at the Ravens stadium of the "Flying B Logo" - the Ravens' inaugural season logo that was later found to infringe Bouchat's copyright - was protected as fair use. Bouchat v. Baltimore Ravens Ltd. P'Ship, 737 F.3d 932, 936, 949 (4th Cir. 2013) ("Bouchat V").

The decision was a victory arguably not just for the Ravens but for the fair use doctrine writ large, as the Court strongly affirmed the principle that filmmakers and documentarians need not "receive permission from copyright holders for fleeting factual uses of their works." Id. at 944.

Background

Litigation began in 1997 Bouchat when alleged that the Ravens team logo infringed his copyright in three drawings. The jury found the defendants liable for infringement to one of drawings, but awarded

no monetary damages to Bouchat. See Bouchat v. Baltimore Ravens, Inc., 241 F.3d 350 (4th Cir. 2000) ("Bouchat I"); Bouchat v. Baltimore Ravens Football Club, Inc., 346 F.3d 514 (4th Cir. 2003) ("Bouchat II"). The Fourth Circuit affirmed these and other decisions, including judgments which precluded Bouchat from obtaining actual damages against NFL licensees that had used the logo. See Bouchat v. Bon-Ton Dep't Stores, Inc., 506 F.3d 315 (4th Cir. 2007) ("Bouchat III").

In 2010, Bouchat sued again, and the Fourth Circuit held that while the use of the logo in the Ravens' corporate lobby was transformative and thus fair use because the lobby was a

"museum-like setting" that was "dedicated to the history of the team," footage of the logo in highlight films was not fair use because "the logo was shown again and again, always as a brand identifier" - i.e., its original use. Bouchat v. Baltimore Ravens Ltd. P'ship, 619 F.3d 301, 313-14 (4th Cir. 2010) ("Bouchat IV"); Bouchat V, 737 F.3d at 941.

Instant Suit

At issue in the instant suit were three videos broadcast online and on the NFL television network as well as highlight reels and historical displays at the Ravens stadium. The three videos featured footage of the Ravens that included incidental uses of the logo; the logo appeared, for example, on the side of helmets or on banners in the stadium. Bouchat V, 737 F.3d at 938. In two videos, the logo was visible for "less than one

> second;" in the third, it was visible for "less than ten seconds." Id. at 938, 940.

> Likewise, the stadium displays used the logo fleetingly. For example, a timeline display of Ravens history beginning with the year 1881 featured the logo in a "segment for a single

year - 1996." Id. at 945. The logo also "appears incidentally" in a highlight reel, which featured "illustrations of significant moments in Ravens' history," including, for example, a "picture of a former Ravens player," wherein the logo "is partially visible on the side of" his helmet. Id. at 946.



Left: Baltimore Raven's original logo; right: plaintiff's original sketch.

Fourth Circuit's Fair Use Analysis

The NFL and the Ravens, long represented in the litigation by Quinn Emanuel, argued that these uses were fair use, and the Fourth Circuit agreed. Reasoning that the videos

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"present a narrative about some aspect of Ravens or NFL history," the appellate court found that the use of the logo, insofar as it was included in the videos "as part of the historical record," was transformative because it differed from the logo's original purpose "as the brand symbol for the team, its on-field identifier, and the principal thrust of its promotional efforts." *Id.* at 939-40.

The logo thus served "no expressive function at all, but instead act[ed] simply as a historical guidepost." *Id.* at 940. In light of the "fleeting and transformative use" of the logo, the remaining fair use factors "d[id] nothing to undermine" the fair use finding. *Id.* at 942. Similarly, the uses in the Ravens stadium utilized the logo merely "as a historical artifact." *Id.* at 947. The Court reasoned that "some incidental reproduction of the logo would seem almost unavoidable" if "Baltimore's football history is to be accurately depicted." *Id.* at 948.

Of chief concern to the Court was the prospect that Bouchat's fair use position "would chill the very artistic creation that copyright law attempts to nurture" by "forc[ing] those wishing to produce films and documentaries to receive permission from copyright holders for fleeting factual uses of their works," who "could 'simply choose to prohibit unflattering or disfavored depictions." *Id.* at 944-45. The Court acknowledged that copyright law can be used to "constrict speech," and that "fair use serves as a necessary 'First Amendment safeguard[]' against this danger." *Id.* at 944.

A copyright regime which required the copyright owner's permission for the use of the work in social commentary or historical narrative would thus "align incentives in exactly the wrong manner, diminishing accuracy and increasing transaction costs, all the while discouraging the creation of new expressive works." *Id*.

The Court's decision makes clear that the incidental and insubstantial use of a copyrighted work as part of a factual narrative – be it commercial or not – will be deemed transformative and thus fair use.

Cory Stuble and Robert Raskopf are attorneys with Quinn Emmanuel Urquhart & Sullivan, LLP. The NFL was represented by Quinn Emmanuel attorneys Todd Anten, Rachel E. Epstein, Robert L. Raskopf, and Sanford Ian Weisburst.



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Maryland Media Coalition Wins Access to Officials' Email Address Lists

By Charles D. Tobin

A coalition of media companies -- the Carroll County Times, Washington Post, Baltimore Sun and Scripps Media's WMAR-TV -- won a novel victory this month under the Maryland Public Information Act (MPIA) that will help prevent officials from using email to conduct government business outside of the sunshine.

A judge on January 16 ordered Carroll County's commissioners to produce to the newspapers and TV station all email distribution lists that they use to send messages to select groups of supporters. J. Douglas Howard, et al. v. Christian Alexandersen, et al., Case Nos. C-13-063914 & C-13-063484, Carroll County Circuit Court --

Order and Memorandum, January 16, 2014.

Background

The lawsuit began after Carroll County Times reporter Christian Alexandersen in February 2013 requested all of the commissioners' email distribution lists. For example, Commissioner Richard Rothschild maintains a distribution list under an email "Conservative Counties," and Commissioner Robin Bartlett Frazier maintains a list called "Republic Women's Club of Taneytown." Alexandersen asked to see the email addresses on these and all other lists each commissioner has compiled.

Rather than comply, four of the commissioners filed a petition against Alexandersen in Carroll County Circuit Court. They asserted that the release of the email addresses on the list would expose people to identity theft and computer malware, and would discourage people from communicating with government by email. A fifth commissioner disagreed with the board's decision, said that the MPIA required the release, and turned his lists over to the newspaper.

The county and the four commissioners brought the petition under §10-619 of the MPIA, which permits municipalities to temporarily deny records requests if they go to court within 10 days and can prove the release would cause "substantial injury to the public interest." The provision is very rarely invoked. Following that start to the litigation, the Washington Post, Baltimore Sun and WMAR-TV sent the county identical requests, and the county filed petitions against them as well.

The media coalition countersued under the conventional provisions of MPIA. They asked the judge to order release of the lists in all computer formats after the county took the position that the media's requests only included lists maintained in Outlook, and not in Word or Excel. The group also asked for an award of their legal fees, which is a

> discretionary call by the judge in MPIA litigation. In an October 2013 ruling, the court denied the county's motion to dismiss the counterclaim but held for summary judgment the overall issue of whether a government's petition cuts off the public's right to bring a MPIA suit.

> In his 20-page ruling, retired Howard County Circuit Judge Dennis M. Sweeney, who was specially assigned after all local organizations

judges recused themselves, rejected the county's arguments and awarded summary judgment on the media coalition's counterclaims. As to potentially malicious use of the email addresses, he noted the requests came from "four respected media engaged in traditional journalistic activities regarding Maryland government," making it "highly unlikely" they would help

others "engage in the potentially deleterious activities" that worried the commissioners. He further noted that anyone concerned about the exposure of their email addresses could always use telephone calls, personal visits and regular mail to communicate with the government. And while he found that "the overall public interest concerns raised commissioners were "not trivial," he firmly ruled that the county had not met its burden to show any of them rose to the level of a "substantial injury to the public interest."

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Judge Sweeney noted that the General Assembly has considered, and failed to enact, three bills in the past couple of years that would have restricted or completely exempted email addresses from MPIA. To the court, this showed the issue neither "novel nor unusual," and that the legislature has not overlooked it.

Finally, he held that the public need not await the outcome of a government's petition before availing itself of the right to bring lawsuits for the release of records, and for attorney's fees.

The court gave the commissioners 20 days to release the email address lists in all formats, and it asked the parties to coordinate on a briefing schedule on the media coalition's request for legal fees.

This decision will help open-government proponents in several ways: (1) It serves as helpful precedent for access to email address lists in Maryland governments' hands; (2) It strongly reaffirms the long-standing principle that, absent a specific exemption in MPIA, all government records are presumptively open; and (3) By permitting the media coalition to maintain a countersuit, and awarding the coalition a judgment, the decision helps prevent local governments from racing to the courthouse first in an effort to cut off the public's right to seek legal fees in MPIA litigation.

Charles D. Tobin, Drew E. Shenkman, and Cheryl A. Feeley, of Holland & Knight LLP in Washington, D.C., represented the media coalition. Timothy C. Burke and Gail D. Kessler, with the Carroll County Attorney's Office, represented Carroll County and the four commissioners.

MLRC 2014: UPCOMING EVENTS

Legal Issues Concerning
Hispanic and Latin American Media
March 10, 2014 | Miami, FL

Legal Frontiers in Digital Media May 15-16, 2014 | Mountain View, CA

MLRC/NAA/NAB
Media Law Conference
September 17-19, 2014 | Reston, VA

MLRC Annual Dinner
November 12, 2014 | New York, NY

DCS Annual Lunch & Meeting November 13, 2014 | New York, NY

More information at medialaw.org or medialaw@medialaw.org