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

MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through January 25, 2015

MLRC

LIBEL & PRIVACY

From the Executive Director's Desk

By George Freeman

Last month I had planned a rather cheerful Christmas column, but events took hold: my column focused, instead, on the Sony hacking incident and its attempts to keep publishers from writing about the company's hacked emails. This month I thought I would pen an optimistic New Year's column, but again events trumped that idea: how could I not write about the heinous slaying of the Charlie Hebdo journalists, and the consequences of those murders on free expression?

George Freeman

At the outset, I should point out that last month's column was implicitly critical of Sony, and in particular, its lawyer David Boies' letter to a slew of media entities, threatening them if they published the hacked emails. The column argued that the media's republication of the emails, albeit hacked illegitimately, probably was protected as reporting matters of public concern under the *Bartnicki* doctrine, and likely could be defended from a copyright infringement claim as fair use. In contrast, if you read on, you will see that this column is supportive of Sony in its distribution of the movie which led to the brouhaha. More to the point, the Sony case, although seemingly different, presents almost the same paradigm as the Charlie Hebdo tragedy.

The Charlie Hebdo cartoonists and editors were killed because they had published an insulting and perhaps over-the-top crude and rude cartoon of Muhammad that had so offended these terrorists that they, with intent, lethally attacked the magazine. Similarly, Sony produced an insulting and perhaps over-the-top crude and rude movie showing an assassination plot against North Korea's leader Kim Jong Un that so offended him and his administration that they, at least according to the American government, criminally hacked into and unlawfully distributed thousands of sensitive and often confidential Sony emails.

There are two fundamental questions which these scenarios raise. First, what speech ought to be protected by governments as legitimate, even if tasteless, insulting and provocative? And second, what behaviors are appropriate and

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legitimate to respond to such attacks and provocations? Since the second is far easier, let's start with that.

* * *

Pretty clearly murder and assault, email or vmail hacking, burglary or even defamation are all unjustified and unlawful responses to abhorrent speech. That should be true here, where we have a First Amendment, as well as in the rest of the world, which doesn't. True, Justice Holmes pointed to the First Amendment in his epic line in *U.S. v. Schwimmer* (dissenting) when he wrote, "If there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate." But that value hardly needs the support of the First Amendment; it is a value to which all even somewhat free people should subscribe.

The Sony case, although seemingly different, presents almost the same paradigm as the Charlie Hebdo tragedy.

But even if there might be any debate about that issue, it has to be true to a moral certainty that murder or other overtly criminal acts cannot be an allowable response to any expression, no matter how disgusting or heinous it may be. In this country, perhaps in typical American fashion, we often resort to litigation to hash out these disputes. Thus, when Mayor Rudolph Guiliani cut funding to the Brooklyn Museum because it had displayed a painting of the Virgin Mary smeared with elephant dung, the museum went to court – and won: no matter how offensive to Catholics, no matter how obnoxious to those with religious values, government could not punish free expression. And in *Snyder v. Phelps*, where a military funeral was used to further the expression of the Westboro Baptist Church's belief that American deaths in the Middle East were caused by our nation's tolerance for homosexuality, the grieving father's claim for emotional distress damages was thrown out by the Supreme Court since the offensive and certainly inappropriate speech was deemed protected.

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More recently, the Metropolitan Opera performed an opera "Klinghoffer" which portrayed, with what some saw as moral equivalence, the dumping overboard and killing of an old Jewish man in a wheelchair by Palestinians. But the Jewish groups who vehemently protested did not hack the Opera's books and records, nor assault Peter Gelb, the General Manager of the Met (and son of former NY Times Managing Editor Arthur Gelb); they wrote and argued in protest, they demonstrated and perhaps even boycotted the Met – but barely more. (The opening performance's curtain was met by boos and catcalls and there were two brief interruptions caused by protestors.)

A boycott seems like a perfectly reasonable way to express one's response to speech. Indeed, let's not forget that in access cases we often herald the audience's First Amendment right to receive information; concomitant to that would be their right to respond to that information. Yet I recall a few decades ago when liberal groups were outraged that a boycott of goods of advertisers of the TV sitcom Murphy Brown was planned to protest the show's alleged betrayal of family values when its heroine had a child out of wedlock. Just like not buying Charlie Hebdo on the newsstand, that seems like a perfectly legitimate way of showing disapproval of the speaker's content.

What speech ought to be protected by governments as legitimate, even if tasteless, insulting and provocative?

Similar issues get raised, often on college campuses, with invitations to controversial and extreme speakers. I remember about 10 years ago when students and faculty at my alma mater tried to coerce the administration to disinvite Justice Scalia (whose views on diversity they felt morally intolerable). Wisely, the administration did not give in; students debated what sort of protest was appropriate; in the end, some stayed away, some demonstrated; some educated others as to Scalia's positions; and others threatened to attend the speech with backs turned (maybe that's where the NYPD got the idea of protesting Mayor DiBlasio's recent speeches) – all justified and permissible ways (though the latter pretty rude) of weighing in.

* * *

Second, as to what speech should always be protected and what may be criminalized or made the subject of civil suits, that is a tougher question,

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particularly in regimes which have no First Amendment (and may still be trying to correct the unique depravities of WWII). But, as a starter, it would seem that without some objective form of incitement to violent or criminal behavior, truthful speech should not be punished. (I put aside for now obscenity, privacy and the rest of that bucket list.) Perhaps the standard need not be as tough as ours, demanding that for speech to be unprotected it needs to incite imminent lawless action, but something more than mere advocacy should be required. (This test, set forth in the 1969 *Brandenburg v. Ohio* decision of the Supreme Court is an outgrowth of the famous "clear and present danger" dissents of Justices Holmes and Brandeis.)

Just as over a million people and many world leaders (though famously not Pres. Obama) marched through Paris extolling free speech and expression, the French authorities were jailing and charging scores of people for speech condoning terrorism

What's novel about the current scenarios is that the violence and criminal activities of the terrorists were not aimed at governments to coerce leaders into changing policy; rather, they were the vehicle used to extort studios and editors to alter the content of their expression. It is an extreme version of the heckler's veto, where the rabble-rousers hope that to appease them, speakers will essentially censor themselves. That's why it was important for both Sony and Charlie Hebdo to continue distribution – not surprisingly, to sales much more robust than the movie or cartoons really warranted – after the attacks on them.

It is unclear to me why blasphemous speech about religion should hold a special place as being subject to punishment. While I don't believe speech about race or ethnicity should be given less protection that insulting personal attacks or outrageous and nasty political speech, at least you are stuck with your race; your religion, at least from a Western perspective, is a matter of personal choice and seems far more appropriate to be the subject of caustic debate.

But what happened in France last month turns all this on its head. Thus, just as over a million people and many world leaders (though famously not Pres. Obama) marched through Paris extolling free speech and expression, the French authorities were jailing and charging scores of people for speech

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condoning terrorism – consistent with French and other European laws banning anti-Semitic speech and Holocaust denial.

To say that appears contradictory is an understatement. I have always felt that flag burning statutes offer the true test of whether one really understands and believes in the First Amendment (the first Pres. Bush failed this test miserably). Under such a test for really believing in free expression, the French fail miserably as well. The arrest of a French comedian, known for anti-Semitic humor, for condoning terrorism, seems particularly reprehensible since his statements hardly were intended to incite anything and were in the political realm, where, in any free society, the allowances for speech should be the broadest. Embracing free speech – but only as long it's speech with which we agree – is no answer.

These are hard questions, and while we seem to deal with them differently than our friends overseas, we are far from perfect. Most unjustified to me are campus speech codes – allowable only in private schools since a state school across the street must abide by the constitutional Brandenburg incitement test. They are really an outgrowth of the nation's mood of political correctness – since it's Super Bowl time, don't get me started on the Washington Redskins – but it seems bizarre that in the academy, of all places, speech is not subject to its reception in the marketplace of ideas, but is legislated by administrators on high.

Embracing free speech – but only as long it's speech with which we agree – is no answer.

The Interview, the Sony movie about the North Korean assassination, and the Charlie Hebdo cartoons were hardly intend to incite criminal behavior. They might have been puerile, caustic, deeply insulting and outrageously indecent. But while their work might be juvenile and shocking, the last thing Seth Rogen and the Paris cartoonists meant to do was incite anyone to do anything, other than perhaps purchase movie tickets and sell magazines. And, broadly speaking, their speech was on matters that ought to be the subject of debate, as religion and politics are both areas of reflective decisions and personal choices. Putting it all together, I would slightly amend the current free speech mantra: *Je suis Sony et Charlie Hebdo.*

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

Jury Awards $4.5 Million to Vietnamese Newspaper Accused of Having "Communist" Ties

In a rare media vs. media case, an Orange County, California jury awarded $3 million in compensatory damages, and $1.5 million in punitive damages, to a Vietnamese-language newspaper, the *Nguoi Viet Daily News*, which had sued a competitor, *Saigon Nho*, for libel for publishing an article implying that plaintiff and a member of its staff had communist sympathies. *Vihn Hoang v. Saigon Nho Newspapers*, No. 30-2012-00595526 (Cal. Super. Dec. 29, 2014) (Hon. Frederick P. Horn).

Both papers are distributed to Vietnamese communities in the United States and Canada.

Background

The July 28, 2012 column was titled: "Secrets of Nguoi Viet Daily News: Who is Really the Owner of NV Daily News?" and made several personal attacks against the staff of the newspaper, calling one woman, Vinh Hoang, "mentally defective," with "no journalistic abilities," and "known for many scandalous affairs." Furthermore, the article speculated that the *Nguoi Viet Daily News* was owned by a Vietnamese communist, and that another employee, Phan Huy Dat, a member of the California Bar, assumed ownership in "name only," i.e., as a front for the alleged communist owners.

In December 2012, Vinh Hoang, Phan Huy Dat, and the publisher of the newspaper, Nguoi Viet News, Inc., filed suit for libel against *Saigon Nho*, and the author of the article, Hoang Duoc Thao, who is also the owner and founder of *Saigon Nho*. In their complaint, plaintiffs alleged that the article intended to communicate that Phan Huy Dat "conducted himself unethically as an attorney and as a communist agent operating Nguoi Viet Daily News on behalf of the communist government of Viet Nam."

They further alleged that the article communicated that Vinh Hoang was "unqualified for her profession and an unchaste woman." The complaint asserted that these

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allegations, including those asserting that plaintiffs "associated with the communist government of Viet Nam," are known to evoke feelings of hatred, contempt and ridicule within Vietnamese communities in the United States.

A jury trial in this matter commenced in the Superior Court of California, for the County of Orange, on November 24, 2014 and concluded December 30, 2014.

During her testimony, Ms. Thao, the author of the *Saigon Nho* column, admitted that her allegations were largely based upon rumors. With respect to the allegations about Ms. Hoang's love life, the defendant testified:

". . . Rumors are things that I have heard, that I don't have to personally witness, see. However, I heard about it from the community leaders. I heard it from the radio. I read it on the internet. I received letters from readers. So for all of those things show me that she is the person who has no good reputation about her private life."

Over defense objections based upon Shield Law grounds, Ms. Thao named her most knowledgeable source for the rumors as Bui Bich Ha, a former columnist for *Nguoi Viet Daily News*. However, called as a rebuttal witness, Ms. Ha testified she never had any conversation with Ms. Thao about Vinh Hoang.

The author of the Saigon Nho column, admitted that her allegations were largely based upon rumors.

Thao claimed she had public documents to support her allegation that the *Nguoi Viet Daily News* was owned by the Vietnam government, and that plaintiff Phan Huy Dat was standing in as "owner." But her trial testimony demonstrated that the statements in the article were speculative in nature.

Causing further damage to the defendants' case, plaintiffs presented a videotape of a press conference Ms.Thao gave (months after the lawsuit was filed) taking credit for several affiliates of the *Nguoi Viet Daily News* canceling publication of the paper in various cities throughout the country – and apparently leading a boycott of her competitor.

The defendants maintained that the the *Nguoi Viet Daily News* had published pro-communist messages in the past, which had generated a great deal of controversy in Vietnamese-American communities. In particular, on July 8, 2012, a few weeks prior to the publication of the *Saigon Nho* article at issue, the *Nguoi Viet Daily News* published a pro-communist letter to the editor which generated a firestorm of controversy in the community. Plaintiffs fired the editor responsible for publishing the letter, and publicly apologized for what they deemed to be a mistake. According to the defendants, their column was merely an attempt at humor playing off the pre-existing debate within the community.

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On December 29, 2014, the jury found in favor of the three plaintiffs. The Nguoi Viet News was required to prove actual malice while the individual plaintiffs Vinh Hoang and Phan Huy Dat were private figures required to prove negligence. The jury however was asked to decide if each of the plaintiffs proved their cases by "clear and convincing evidence that Defendants acted with malice, oppression, or fraud" for the purposes of deciding whether punitive damages were appropriate; and the jury answered in the affirmative as to each of the plaintiffs.

According to the defendants, the sued upon column was merely an attempt at humor playing off the pre-existing debate within the community.

Nguoi Viet News, Inc. was awarded $1,000,000 in actual damages for harm to reputation, $500,000 for assumed harm to reputation, and $1,000,000 in punitive damages: a total of $2.5 million. Mr. Phan Huy Dat was awarded actual damages of $300,000 for harm to reputation, $100,000 for shame, mortification or hurt feelings, $100,000 for assumed harm, and $200,000 in punitive damages: a total of $700,000. Ms. Vinh Hoang was awarded actual damages of $400,000 for harm to reputation, $400,000 for shame, mortification or hurt feelings, $200,000 for assumed harm and $300,000 in punitive damages: a total of $1.3 million. Accordingly, the court entered a judgment against the defendants totaling $4.5 million.

The plaintiffs were represented by Hoyt E. Hart II, Rancho Santa Fe, CA. The defendants were represented by Aaron Morris, Morris & Stone, Tustin, CA.

Lawyer Acquitted of Sexual Assault Sues Above the Law and Gawker Over Trial Coverage

Case Against Gawker and Most Claims Against Above The Law Dismissed

By Steven P. Mandell and Catherine L. Gibbons

Meanith Huon, an Illinois attorney, found himself on the other side of the defense table in 2008, when he was charged with criminal sexual assault, criminal sexual abuse, and unlawful restraint. The charges were based on the allegations of "Jane Doe," who reported to police that Huon lured her over the Internet into meeting with him by posing as a marketing promoter and dangling the possibility of a job but when they met he sexually assaulted her.

A year after those charges were filed, police arrested Huon again and charged him with using the Internet to harass and cyberstalk "Jane." Though these latter two charges were ultimately dismissed, Huon was tried for the sexual assault charges in 2010 and the jury acquitted him. The stories about the charges, Huon's trial, and his subsequent suits against the media garnered a lot of media coverage.

Both the title and the article clearly indicated that Huon had been acquitted of the charges against him and the article further clarified that those charges were for sexual assault, not rape.

Media Coverage of Huon's Trouble with the Law

The day after the prosecutors filed the sexual assault charges against Huon, AboveTheLaw.com ("ATL") published a post that included the statement "Lawyer of the Day: Meanith Huon" along with a link to another story that summarized the charges. ATL updated its coverage of the case after his trial started, publishing a post about the first day of his trial titled "Rape Potpurri" (the post also included a report about rape allegations made against former NFL player, Lawrence Taylor).

The portion of the ATL post about Huon quoted from and linked to stories about Huon's case published in other websites and papers but included commentary from the ATL author as well. This particular ATL post generated over 100 comments from its users.

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Huon sued ATL for defamation, claiming compensatory and punitive damages in excess of $100,000,000. *Huon v. Breaking Media, LLC*, No. 1:11-cv-3054 (N.D. Ill. May 6, 2011) (*Complaint*). The allegedly defamatory portions of the ATL post that Huon challenged consisted of (1) blocks of text summarizing Jane Doe's testimony and defense counsel's opening statement at trial, (2) commentary related to those summarizes, (3) a humorous section that suggested people should start using sexual consent forms, and (4) a section referring to other coverage of Huon's charges and suggesting that if only Jane Doe had Googled Huon *before* their meeting, she would have found stories about what ATL indicated were other women who had separately lodged similar claims against Huon.

Gawker Gets Roped Into the Legal Fray

Similar to the media and public interest in his trial, Huon's suit against ATL garnered much attention in the press. Gawker.com ("Gawker"), which also owns and operates the website Jezebel.com ("Jezebel"), published an article on Jezebel titled "Acquitted Rapist Sues Blogger for Calling Him Serial Rapist." The Gawker article discussed Huon's trial, his suits against local law enforcement for prosecutorial misconduct, and the suit against ATL. The article included an image of Huon's arrest photo superimposed over a screenshot of the ATL piece. Gawker's article also generated many comments from its users.

Huon then brought Gawker into his suit against ATL, claiming, among other things, that the Gawker article defamed him by falsely accusing him of rape. According to Huon, because his arrest photo was placed near the words "rape" and "rapist" appearing in the Gawker headline and the screenshot of the ATL post, Gawker's article implied that Huon had committed rape.

In the latest iteration of his omnibus complaint, Huon alleged claims against both ATL and Gawker for defamation *per se*, defamation *per quod*, false light, intrusion upon seclusion, intentional infliction of emotional distress, conspiracy to defame, conspiracy to invade privacy, tortious interference, and cyberstalking and cyberbullying. *Huon v. Breaking Media, LLC*, 1:11-cv-3054 (N.D. Ill. Nov. 15, 2012) (*Fourth Amended Complaint*).

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Court Dismisses Claims Against Gawker;
Above The Law Not Totally Above the Law

The district court first addressed Huon's claims that both ATL and Gawker should be held liable for any "offensive" statements posted by their users in response to the Defendant's various online publications. The court found that the Communications Decency Act, 47 U.S.C. § 230(c)(1), barred these claims, pointing out that the Act protected websites from liability as the publisher of information provided by its users. *Huon v. Breaking Media, LLC*, 1:11-cv-3054 (N.D. Ill. Dec. 4, 2014) (*Memorandum Opinion and Order*).

The court rejected Huon's unsupported contentions that the Defendants should still be liable because their websites were designed to encourage defamatory comments and Huon believed some of the comments were written by Gawker employees under aliases. Even if the Defendants' sites edited third-party content or strategically chose to put certain posts and comments in a more prominent position on the site, they were still covered by the CDA.

The court then turned to Huon's defamation claims, ultimately dismissing all claims against Gawker and most of the claims against ATL. Regarding the Gawker article, the court held that just because the word "rapist" appeared in the headline and close to his photograph, the term could not be isolated from the context of the rest of the article. As the court explained, both the title and the article clearly indicated that Huon had been acquitted of the charges against him and the article further clarified that those charges were for sexual assault, not rape.

As for Huon's defamation claims against ATL, the court determined that the fair report privilege barred his claims based on the portions of the post summarizing the trial proceedings. Huon complained that because the post only described the first day of his trial it was not a fair and accurate summary. But the court disagreed, noting that there was not support for Huon's novel contention that the privilege only applies when a publication summarizes an *entire* judicial proceeding. The court, however, did not dispose of Huon's defamation claims based on ATL's statements suggesting that if Jane Doe had only Googled Huon before agreeing to meet, she would have realized he had previously been charged with sexual assault and cyberstalking and had posed before as a promotions supervisor looking to hire.

The problem, the court explained, was that, at least on the pleadings, there was no evidence that Huon had ever before been charged with such crimes or ever posed as a marketing promoter in order to meet women. By suggesting that he had, the court found, the ATL article falsely implied that Huon was a repeat offender. The court

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concluded that these statements were defamatory *per se*, not just because they falsely accused Huon of prior criminal activity but also because they impugned his professional integrity. Because Huon is an attorney, the court noted, his profession is one that "requires a high degree of integrity" and these defamatory statements are even more likely to negatively impact his professional reputation. For these reasons, the court allowed Huon's defamation and other related tort claims based on the reference to Huon's prior criminal conduct to survive.

Interestingly, since the district court issued its opinion, the Seventh Circuit Court of Appeals ruled on another case involving Huon: *Huon v. Mudge*, No. 13-2966, slip op. (7th Cir. Jan. 5, 2015), which is Huon's civil rights lawsuit against the law-enforcement officers and prosecutors who were involved in the prosecution of Doe's sexual assault claims. Notably, the Seventh Circuit found that Huon "had made unsolicited recruiting calls" to four other women "using the same 'marketing promoter' pitch" he gave to "Jane Doe." It is unclear if or how this may impact the viability of Huon's defamation claims against ATL, at least those based on ATL's statements suggesting that Huon had previously posed as a marketing promoter to lure women into meeting with him.

Both the ATL and Gawker publications involved an issue about legal terminology that has been coming up more often in defamation cases—whether plaintiffs can exploit a perceived distinction between the terms "rape" and "sexual assault" as a basis for their claims. The Illinois state courts addressed this issue most recently in *Ludlow v. Sun-Times Media, LLC*, No. 2014-L-1529 (Cir. Ct. Cook Cty. July, 16, 2014) (*Memorandum Opinion and Order*). In *Ludlow*, a Northwestern University student had accused one of her professors of sexual assault and the media defendants published articles about the suits the student later filed against the school and the professor.

All three media defendants used the same headline, which described the allegations as "rape" instead of "sexual assault," and the professor sued for defamation claiming that he had been falsely accused of a crime he did not commit. Both here and in *Ludlow*, the courts held that the terms could be used interchangeably and that publications need not employ the exact same legal verbiage as was used in the proceeding to constitute a fair report. Both courts also pointed out that in Illinois, as in many other states, the offense of "rape" has been subsumed by the more recently created offenses of criminal and aggravated sexual assault, underscoring that, legally, the terms are synonymous.

Steven P. Mandell, Steven L. Baron, and Catherine L. Gibbons are representing Above The Law; David Feige is representing Gawker; and Meanith Huon is representing himself pro se.

Libel Suit Against Talk Show Host Glenn Beck Survives Motion to Dismiss

Man Questioned About Boston Bombing Not a Public Figure

A Saudi Arabian student accused of being complicit in the Boston Marathon bombing is a private figure plaintiff who stated a claim against radio and television talk show host Glenn Beck and his shows' distributors for accusing him of being complicit in the attack. *Alharbi v. Beck, et al.*, No. 14-11550 (D. Mass. Dec. 2, 2014) (Saris, J.)

The court rejected defendants' argument that plaintiff was a voluntary or involuntary public figure and found that plaintiff pled more than enough facts to show negligence.

Background

The plaintiff Abdulrahman Alharbi was a spectator at the Boston Marathon on April 15, 2013. He was injured in the bombings and afterwards, according to the complaint, was questioned and cleared by Boston and federal law enforcement. Many news outlets reported that a man of Middle Eastern descent was questioned and searched in connection with the bombings. And plaintiff gave some interviews to the press.

For weeks after the bombings, Beck allegedly accused Alharbi of being the "money man" behind the attacks and Beck questioned the motives of the FBI for not pursuing him. Alharbi sued Beck and his distributors for one count of defamation.

Motion to Dismiss

Defendants moved to dismiss under FRCP 12(b)(6) arguing that plaintiff was either a limited purpose public figure or an involuntary public figure who failed to allege any facts to support the element of actual malice.

Denying the motion, the court first held that plaintiff was not a limited purpose public figure. Although there was no question that a controversy existed over the bombings, plaintiff, according to the court, played no role in the controversy other than attending the event, being injured and being searched and questioned by authorities.

Plaintiff acknowledged that his questioning was covered in the media, but said he did not voluntarily seek out any press attention. And the court refused to take judicial notice of several interviews the plaintiff gave to the press after the search of his home. The court distinguished the cases of *Hatfill v. New York Times Co.*, 532 F.3d 312 (4th

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Cir. 2008) and *Atlanta-Journal Constitution v. Jewell*, 555 S.E.2d 175 (Ga. Ct. App. 2001), finding that the plaintiffs in those cases had through their extensive press interviews voluntarily thrust themselves into the controversies over the anthrax terror attacks and Atlanta Olympic Park bombing, respectively.

Plaintiff was also not an "exceedingly rare" involuntary public figure. For this category to apply the court held that "an individual must have assumed the risk of publicity to be assigned that status, meaning that he has taken some action, or failed to act when action was required, in circumstances in which a reasonable person would understand that publicity would likely inhere." Mere bad luck of being at the site of a public tragedy is insufficient to create an involuntary public figure.

Plaintiff's attendance at the Boston Marathon along with thousands of other spectators "is not the kind of conduct that a reasonable person would expect to result in publicity. Quite to the contrary, a spectator at an event like the Boston Marathon would reasonably expect to disappear into the throngs of others, never attracting notice by the press." Moreover, even if plaintiff was an involuntary public figure at the time of the bombings that status would have lapsed once he was cleared by authorities.

Since plaintiff was not required to plead actual malice, the facts in his complaint were sufficient to permit an inference that the defendants were negligent.

Plaintiff is represented by Peter J. Haley, Nelson Mullins Riley & Scarborough LLP, Boston, MA. Defendants are represented by Michael Grygiel, Mark A. Berthiaume, and Zachary C. Kleinsasser of Greenberg Traurig LLP.

Pennsylvania Court Dismisses Former Housing Authority Executive Director's Appeal in Originally 246-Article Case

By Amy Ginensky, Eli Segal, and Kaitlin Gurney

On January 12, 2015, the Pennsylvania Superior Court dismissed former Philadelphia Housing Authority ("PHA") Executive Director Carl Greene's appeal from the trial court's grant of summary judgment in his lawsuit based on nearly a year of coverage by *The Philadelphia Inquirer* and *Philadelphia Daily News*. The trial court had granted summary judgment because of Greene's failure to provide clear and convincing evidence of falsity or actual malice. The Superior Court, in contrast, dismissed his appeal—before any briefing—for an entirely non-substantive reason: Greene failed to order and pay for the transcript from a *Frye* hearing in the case.

Trial Court Excludes Linguistics Expert and Grants Summary Judgment

In September 2011, Greene sued the owners of *The Philadelphia Inquirer* and the *Philadelphia Daily News* for defamation, false light invasion of privacy, and commercial disparagement based on 246 articles and editorials published between August 2010 and September 2011. The essence of his claims was that the newspapers' year-long coverage of him—in the midst and aftermath of his suspension and termination by the PHA Board—was a contrived effort to increase readership and revenue based on the predetermined themes of corruption, misspending, sex, and deceit. Through pre-discovery motion practice, the number of publications at issue was cut to seventeen articles and editorials, published between November 1, 2010 and August 9, 2011.

The essence of his claims was that the newspapers' year-long coverage of him was a contrived effort to increase readership and revenue based on the predetermined themes of corruption, misspending, sex, and deceit.

In December 2013, after extensive discovery on a host of factual issues, the Defendants moved for summary judgment, arguing that Greene had failed to meet his falsity or actual malice burden as to any of the seventeen articles and editorials. Greene rooted his summary judgment response in large part on a linguistics expert report, pointing to the report repeatedly as evidence that Greene's reading of the publications was reasonable and that the defendants acted with actual malice. On July 28, the Court

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held a full-day *Frye* hearing (Pennsylvania follows *Frye*, not *Daubert*) on the admissibility of the expert's testimony.

On August 1, just four days after the *Frye* hearing, Philadelphia Court of Common Pleas Judge Lisa M. Rau found the expert's report and testimony inadmissible and struck them from the record. Judge Rau issued an 18-page supporting opinion that explained that the expert was not qualified; his methodology was not reliable, scientific, or generally accepted; his testimony would not help a jury decide relevant issues; and his testimony would be unfairly prejudicial, confusing, and misleading. *Greene v. Phila. Media Network, Inc.*, 2014 Phila. Ct. Com. Pl. LEXIS 236 (Pa. Com. Pl. Aug. 1, 2014).

That same day, after having excluded the expert's report and testimony, Judge Rau granted the defendants' summary judgment motion and dismissed Greene's claims as to all seventeen articles and editorials. In a footnote to her one-page summary judgment order—no opinion is required absent an appeal—she explained that Greene had "failed to provide the clear and convincing evidence of falsity or actual malice required to sustain his claims."

Judge Rau's opinion excluding Greene's linguistics expert remains on the books and should be a valuable tool for any media defendants.

Greene's Short-Lived Appeal

Greene appealed to the Pennsylvania Superior Court on September 3. The trial court, on September 9, 2014, directed him to comply with Pennsylvania Rule of Appellate Procedure 1911's mandate that the appellant request and pay for any transcripts required for the appeal—here, the *Frye* hearing transcript.

On November 19, 2014, the Superior Court ordered Greene to submit a statement within seven days as to whether he had complied with Rule 1911 and, if the answer was "yes," to also submit copies of the transcript request and proof of payment. The Court made clear that failure to comply "will result in the dismissal of this appeal without further notice."

Almost two months later, on January 12, 2015, the Superior Court followed through on its threat. The Court explained: "Appellant has not responded to this Court's Order of November 19, 2014, which directed Appellant to indicate whether he has complied with Pa.R.A.P. 1911(a), and to submit proof of compliance by November 26, 2014, or else risk dismissal of the appeal." Thus, Greene's appeal was dismissed—before a briefing schedule was issued and before Judge Rau completed an opinion in support of her grant of summary judgment.

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* * *

And so, a hard-fought, three-plus-year lawsuit over a year's worth of newspaper coverage came to an anticlimactic end. While the case did not yield any new appellate authority, Judge Rau's opinion excluding Greene's linguistics expert remains on the books and should be a valuable tool for any media defendants—in Philadelphia or elsewhere—seeking to exclude similar experts in the future. In addition, in her opinion on the linguistics expert, Judge Rau provided a powerful explanation—sure to show up in media defendants' briefs for years to come—of just how important it is to our society for the press to be free to report on and criticize public officials:

> The press must be permitted to write about public officials like Plaintiff Greene in order to keep the citizenry informed about the conduct of those serving in their government. Public officials in a democracy must be open to being evaluated by the press and the public they serve. Muzzling the press from criticizing public officials would threaten good government and ultimately threaten democracy's survival.

Greene, 2014 Phila. Ct. Com. Pl. LEXIS 236, at *12-13.

Amy Ginensky, Michael Baughman, Kristin Jones, Raphael Cunniff, Eli Segal, and Kaitlin Gurney of Pepper Hamilton LLP represented defendants. Plaintiff was represented by Clifford E. Haines and Lauren Warner of Haines & Associates.

UPCOMING MLRC EVENTS

Legal Issues Concerning Hispanic and Latin America Media
March 9, 2014 | Miami, FL

Legal Frontiers in Digital Media
May 14-15, 2015 | Mountain View, CA

MLRC London Conference
September 28-29, 2015 | London, England

Who Is That Masked Plaintiff? Lessons Learned From Defending a Claim Brought By an Internet Troll

By James E. Stewart and Leonard M. Niehoff

Assume the following. A denizen of the Internet netherworld fancies himself a virtual Lone Ranger. He dons a mask for purposes of his YouTube and blog posts, takes malicious swipes at various individuals and businesses, and harasses everyone with seeming impunity.

Your client's consumer-interest reporter outs him by revealing his less-than-completely-secret identity in a report about his online antics. This prompts the Internet troll to turn his attention toward your reporter and to find a lawyer who will file a defamation action against him and his station – your clients.

This plaintiff devotes a substantial part of his life to making other people miserable. He has time and bile to spare and does not play by the same rules as the rest of us. And now he's focused on your clients. What do you do?

This plaintiff devotes a substantial part of his life to making other people miserable. And now he's focused on your clients. What do you do?

We faced this situation in *Fitch v. Fox* and in December a Michigan trial court granted our motion to dismiss and for summary judgment. *Fitch v. Fox,* (Mich. Cir. Dec. 17, 2014). While a Michigan trial court opinion is not of major precedental significance, in the course of getting rid of this case we learned some lessons that may be of use to practitioners across the country who are encountering plaintiffs of a similar ilk. If you have not run into such a plaintiff yet, it is just a matter of time. He or she is coming soon to a website near you.

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The reader may wish to view both broadcasts by clicking on the screen grabs. This will give you some sense of the curious world in which we found ourselves.

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Background

Plaintiff Robert Fitch, who lives in the metropolitan Detroit area, had been a prolific eBay seller under various monikers until the site barred him. This drove him to take up a personal campaign against eBay and PayPal. He adopted the moniker "eBayis a joke," wore a creepy Guy Fawkes mask like the hackers in the "Anonymous" organization, posted online diatribes about eBay and PayPal on Youtube and elsewhere, and engaged in a variety of stunts that disrupted the activities of eBay users, including a successful one who goes by the name "Hubcap Joe."

This Internet troll came to the attention of Fox 2's consumer-interest reporter Rob Wolchek, who does a regular "Hall of Shame" feature that combines solid reporting with some humor and dramatic flair. Following his investigation, Wolchek's first broadcast—"Wolchek pulls the mask off internet bully"—aired in August of 2013. Consistent with his pattern of puzzling behavior, Fitch then moved for a personal protection order against "Hubcap Joe," a favorite Fitch target that Wolchek discussed in the broadcast. Wolchek reported on this bizarre development in a second broadcast in September of 2013—"Internet bully claims he's scared."

Only the first broadcast was the subject of Fitch's eventual defamation action but the reader may wish to view both broadcasts by clicking on the screen grabs. This will give

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you some sense of the curious world in which we found ourselves. Plus, the broadcasts are just plain fun to watch.

Following the two broadcasts, Fitch decided to engage in a little self-help by launching an online campaign of harassment of Wolchek. For months Wolchek endured abusive emails, Internet postings of photographs from hardcore pornography with Wolchek's face superimposed, and online rants encouraging others to harass Wolchek. Finally, Wolchek sought and obtained a Personal Protection Order. When Fitch appealed, the Oakland County Circuit Court held a hearing, took testimony, and upheld the order, describing Fitch and his conduct in these terms:

> "[Fitch's] repeated emails, internet postings, and invitation to vandalize [reporter Wolchek's] residence all constitute the type of harassing and stalking behavior prohibited by Michigan law. While it is true that [Wolchek] is unable to prove with absolute certainty that [Fitch] poisoned [his] dogs, such evidence is nevertheless disconcerting and troubling given the underlying circumstances surrounding [Fitch's] overall behavior. The court additionally finds that it is reasonable that [Wolchek] feels discomforted by [Fitch's] ownership of at least one firearm."

A week after this ruling, and just before the statute of limitations expired, Fitch resorted to a more traditional method of harassment—he filed a complaint for defamation, false light invasion of privacy, and intentional infliction of emotional distress. The complaint alleged that the first broadcast included a number of false statements of fact and specifically identified them. Some of those allegations were easily disposed of: a few of the identified statements could not be the subject of a defamation claim at all because they were subjective expressions of subjective opinion or colorful uses of rhetorical hyperbole.

Other allegations were trickier because they appeared—at least on their face—to present questions of fact about whether Fitch had engaged in all the conduct described in the broadcast.

Of course, all of us always strive to get ride of cases as expeditiously as possible. But you can imagine why in this instance a quick resolution was paramount. Litigation with this plaintiff would be a messy, disruptive, unpredictable, and expensive detour into the Twilight Zone. We needed an aggressive strategy and a quick exit. We decided to file a motion for summary judgment.

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You can imagine why this strategy posed some challenges. Filing a motion so early in the case would inevitably prompt cries from the plaintiff that he had not had any opportunity to conduct discovery. This was true—no discovery had been taken. Supporting the motion through affidavits by our reporter or others at the station would only feed the plaintiff's argument that he needed to take depositions. In addition, it appeared that before he commenced the litigation Fitch had deleted from YouTube a number of videos that might have been useful to us.

You can see the problem: how do you get summary judgment when the complaint raises questions about whether a broadcast is true, no one has taken any discovery, and the plaintiff's self-inculpatory public statements have conveniently (or, from our perspective, inconveniently) disappeared?

It turned out that Fitch had inadvertently helped us in this enterprise by making lots and lots of enemies. Various websites documented and preserved his statements, stunts, and deceptions. Indeed, as noted in the broadcast, at least one site (ChuchFitchScammer.com) was wholly devoted to exposing his tricks. Wandering through sites like these is time consuming—and can put a serious dent in your view of human nature—but there was a trail to follow and the pursuit paid off. We were able to assemble a pattern of online mischief that pointed indisputably to Mr. Charles Fitch.

In his complaint, Fitch claimed that our clients had erred in reporting that he had been barred from eBay for violating its rules. But we located online material where he admitted that eBay had banned him not only from its site but also from its frequent seller conferences. He claimed we had falsely reported that he had deliberately tried to hurt the business of others. But we were able to track down YouTube videos where he offered a one-hundred-dollar bounty to anyone who could get Hubcap Joe's YouTube channel deleted.

He complained that the report had falsely accused him of using eBay "stealth" accounts (accounts not associated with an actual good will purchaser) to harm others selling on eBay. But we located a singularly scatological posting of his that encouraged the use of stealth accounts and showed an image of a toilet with an eBay executive's grafted into it. And we discovered some unexpected goodies along the way—for example, a lengthy recorded telephone conversation in which Fitch impersonated an FBI agent in a call to PayPal to try to get information about an eBay seller he had in his sights.

In short, we discovered that Fitch had left fingerprints in lots of online spaces (Professor Moriarity he is not) that confirmed the substantial truth of the broadcast in question.

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We loaded this information onto disks that we attached to a motion for summary judgment; we had our firm's resident technology guru sign an affidavit authenticating the online sourcing of the material on the disks; and we submitted an intriguing, if also unsettling, package to the court. Fitch helped us again by filing a remarkably weak affidavit in opposition—a sworn statement that quibbled with some details, but did not raise an issue of material falsity.

The judge reviewed the complaint and the materials and agreed with us, concluding that the statements in the broadcast were substantially true and therefore non-actionable.

So if you find yourself on the receiving end of a lawsuit filed by an Internet troll, do not despair. Sure, you may end up wandering through some creepy online forests. But trolls do not clean up after themselves and leave a trail. And some of the kindlier forest denizens may be more than happy to help you follow it.

James E. Stewart and Leonard M. Niehoff of Honigman Miller Schwartz and Cohn LLP in Ann Arbor, MI, represented Fox together with Fox in-house counsel Susan Seager and Cynthia Amer.

No Personal Jurisdiction in Wisconsin Over Sydney Morning Herald

By Dustin B. Brown

A Milwaukee trial judge dismissed a defamation action against a group of Australian media companies for lack of personal jurisdiction, concluding that the newspaper's website created insufficient contacts with Wisconsin to satisfy the due process clause. *Salfinger v. Fairfax Media Limited*, No. 13cv010081 (Milwaukee County Circuit Court, Dec. 3, 2014).

The advertisements that "greet Wisconsin residents who themselves take the initiative to visit the defendants' websites" were not enough to justify haling the Australian defendants into Wisconsin court, Judge Richard J. Sankovitz held.

Background

The article at issue appeared in the print and online editions of the *Sydney Morning Herald* under the headline "Lawyers, guns, money: the sting in Yellow Tail." The story, a look into the colorful business dealings of the family behind the Yellow Tail wine label, also touched on their association with entrepreneur Roderick Salfinger—who, the article said, "faces prosecution in the US after allegedly producing a revolver at his daughter's wedding."

Salfinger denied ever owning a gun or facing a firearms-related charge and sued the Australian publisher and related media companies for libel in Wisconsin, where he had an address and allegedly lived part-time (and which also, not incidentally, has an unusually long statute of limitations). The defendants objected to the exercise of personal jurisdiction and moved to dismiss the action.

Since the newspaper's only contact with Wisconsin was through its website, which did not target the state in any way, the Australian defendants argued that haling them to

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court in Wisconsin would violate their due process rights. Salfinger claimed that the newspaper did target Wisconsin through its advertising, which he argued justified the exercise of personal jurisdiction because it was customized to each viewer's interests and location.

Decision

The court concluded that exercising personal jurisdiction over the defendants would offend due process. Applying the familiar "minimum contacts" requirement from *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), the court focused on whether the defendants had purposefully availed themselves "of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

Demonstrating familiarity with the workings of internet advertising, Judge Sankovitz recognized that websites often display ads that are "individualized in some way to the viewer." Salfinger tried to rely on this targeted advertising to create a foothold for personal jurisdiction, an argument that the court rejected.

The court identified two features of the minimum contacts analysis that are critical in this context. First, the defendants must themselves create the contacts with the state, and second, what matters are "the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Walden v. Fiore*, 134 S. Ct. 1115, 1122, 1123. (2014).

The Australian defendants do "'reach out' to some Wisconsinites" through their targeted advertising, but only if "Wisconsinites first 'reach out'" to the website—which is the key difference, Judge Sankovitz ruled. He distinguished publishing a website that is accessible in Wisconsin from circulating newspapers or magazines there, which can give rise to personal jurisdiction. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984).

Ultimately, the defendants' contacts with Wisconsin residents through their website were simply too attenuated to comport with due process, the court held. Given that the alleged contacts between the defendants "and the forum state are not made until initiated by extra-territorial contacts of Wisconsin residents," they "would not lead a reasonable merchant to 'reasonably anticipate being haled into court'" in the state.

Robert J. Dreps and Dustin B. Brown of Godfrey & Kahn, S.C. represented the defendants. The plaintiffs were represented by Charles J. Crueger, Jessica C. Mederson and Brendan M. Bush of Hansen Reynolds Dickinson Crueger LLC.

Court Dismisses Libel Action Against Radio Station

Limited Purpose Public Figure Failed To Allege Sufficient Facts of Actual Malice

The Circuit Court for Montgomery County, Maryland held that a Baltimore woman who had suffered personal injuries in a scuffle with a former Washington Redskins football player could not state a claim for defamation or false light invasion of privacy against radio station WTEM-AM ("ESPN 980") and its talk show host who called her a "madam" and a "pimpette" during a radio broadcast discussing the incident. *Chaka v. Red Zebra Broadcasting*, LLC et al., Case No. 388380V (Md. Cir. Ct. Oct. 9, 2014).

Background

On January 6, 2011, then-Washington Redskins tight end Fred Davis and the plaintiff, Makini Chaka, attended an event at a Washington, D.C. nightclub. Surveillance video captured Chaka throwing a drink in Davis's face and Davis retaliating by first emptying a carafe of juice on Chaka's head and then throwing the empty carafe at Chaka's face. A few days later, Chaka filed a civil lawsuit against Davis for harassment and personal injury in the Superior Court for the District of Columbia. The case received widespread media attention, with both Davis and Chaka representing themselves pro se until the eve of trial. Chaka took the stand at the March 11, 2013 trial and testified that not only did Davis physically injure her at the nightclub, but after she filed her lawsuit, he falsely accused her of other conduct, including that she secured "dates" for professional athletes and acted as a pimp, a "pimpette," and a madam. The Superior Court returned a verdict in favor of Chaka and awarded her a judgment of $19,761 against Davis.

Chaka claimed that she lost business opportunities and suffered emotional distress allegedly due to Loverro's commentary referring to her as "madam slash pimpette" and "madam pimpette."

The Chaka-Davis Trial Is Discussed on "The Sports Fix"

The day after the trial, talk show host Thom Loverro discussed the case for approximately five minutes on his daily, two-hour radio show, "The Sports Fix" on

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ESPN 980. Loverro began by stating: "The Fred Davis trial. We talked about this when court papers had been filed about a year ago. Fred Davis is being sued by madam slash pimpette Makini Chaka, durin- as a result of an incident that happened during a 2011 birthday party." Loverro commented that the trial "should be on TV. This actually - this is definitely a 'People's Court' kinda situation." He also provided other details about the case and cited to a news report on the trial posted on Washingtonian Magazine's website. "There is a lot of stuff in here, in this report in Washingtonian, about, you know, the incident, and the back and forth between the madam pimpette and Fred Davis." These were the only references to Chaka as "madam" and "pimpette" during the five minute discussion.

Plaintiff Sues ESPN 980 AM and Loverro in Maryland Circuit Court

On March 12, 2014, a year to the day that the broadcast aired, Chaka filed suit in the Circuit Court in Maryland against Loverro and ESPN 980's owner, Red Zebra Broadcasting. Chaka claimed that she lost business opportunities and suffered emotional distress allegedly due to Loverro's commentary referring to her as "madam slash pimpette" and "madam pimpette."

Chaka "voluntarily assumed a role of special prominence in the public controversy.

On August 7, 2014, the defendants moved to dismiss or in the alternative for summary judgment, on a number of grounds, including (1) that Loverro's commentary did not constitute provably false statements of fact, or if it did, (2) it was protected as a fair report of a judicial proceeding; (3) that Chaka, a limited purpose public figure, could not state a viable claim for defamation or false light invasion of privacy; and (4) that her previous lawsuit against John Doe defendants barred her claim as res judicata or collateral estoppel. After a hearing on September 9, 2014, Circuit Court Judge Joseph M. Quirk dismissed the case on October 9, 2014.

Plaintiff's Involvement in Controversy with Famous Athlete Confers Public Figure Status

Judge Quirk addressed two considerations in determining whether the plaintiff is a limited purpose public figure. First, he looked to whether there was a particular public controversy that gave rise to the alleged defamation and second, he determined whether

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the nature and extent of the plaintiff's participation in the particular controversy was sufficient to justify public figure status. He concluded that the controversy between Chaka and Davis "was a public controversy because it impacted others, including scores of fans who care deeply about their favorite professional football team and feared the altercation might affect Davis' status with the team." The controversy also "implicated a larger issue concerning behavior of professional athletes and the inappropriate course of action for a team and league faced with players engaged in improper behavior."

Next the Court examined the nature and extent of Chaka's participation in the public controversy. The Court reviewed the totality of the circumstances – including that Chaka represented famous professional athletes as a promoter, that she threw a drink in the face of one such athlete in a public setting, and that her attorney in her personal injury lawsuit posted the surveillance video of the altercation with Davis on social media. The Court concluded that Chaka "voluntarily assumed a role of special prominence in the public controversy and sought to influence the outcome," and thereby satisfied the limited purpose public figure test. Recognizing that Chaka failed to plead any "specific" facts that would establish actual malice, as opposed to conclusory allegations, the Court held that the complaint failed to state a claim for which relief can be granted.

As a final ground for dismissal, the Court held that the defamation and false light claims were barred under the doctrine of res judicata.

Loverro's Commentary On Sports Radio Show Cannot Be Interpreted as Stating Actual Facts

Following the reasoning in *Farah v. Esquire Magazine*, 736 F.3d 528, 535 (D.C. Cir. 2013), the Court found that "Loverro's use of the words 'madam' and 'pimpette,' given the context, could not reasonably be interpreted as a statement of actual facts about Chaka." The Court reviewed the broad context of where and how the statements were made, noting that the sports radio show does not "furnish listeners with hard news, but rather opinions and commentary about sports and professional athletes." It also examined the immediate context, which was "a discussion of the reporting and allegations in the controversy between Chaka and Davis." In that discussion, the Court noted, "Loverro did not make any statements that Chaka was securing prostitutes or otherwise engaged in illegal conduct." On the contrary, "Loverro referred to the case as

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a 'People's Court kinda situation' and mocked Davis' defense of 'drop[ping] the bottle' like he 'dropped a pass.'" It was "simply impossible to believe that a reasonable listener who heard the broadcast would have understood Loverro to be making a factual assertion about the line of work Chaka was engaged in."

Plaintiff's Prior Lawsuit Against "John Does" Created Res Judicata Effect

As a final ground for dismissal, the court held that the defamation and false light claims were barred under the doctrine of res judicata. Nearly a year before filing her lawsuit against ESPN 980 and Loverro in Maryland, Chaka sued Fred Davis (for a second time) and certain "John Doe" defendants in federal court for allegedly falsely accusing her of engaging in the business of procuring prostitutes for professional athletes and labeling her as a pimp, "pimpette," or madam. *Remy Enterprise Group, LLC & Makini R. Chaka v. Frederick Davis & One or More John Does*, 1:13-cv-00-461 (D.D.C. April 9, 2013). ESPN 980, along with several other media outlets, were identified in this federal complaint as having "republished the rumors about Chaka."

"Loverro's use of the words 'madam' and 'pimpette,' given the context, could not reasonably be interpreted as a statement of actual facts about Chaka."

On March 13, 2014, the federal court dismissed the case against Davis, finding that "all the claims in the instant matter arise from the same transaction that gave rise to" the earlier matter that Chaka brought against Davis and could have been litigated in that case. Because Chaka did not attempt to complete service of process on any of the John Doe defendants, the case against them was also dismissed with prejudice. Finding that a "person joined as a defendant but identified by a fictitious name acquires the status of a party at the time the action is filed," the Court concluded that ESPN 980 attained the status of a party in the earlier federal court action and the dismissal in that matter constituted an "adverse final decision on the merits" that triggers res judicata effect for the Maryland case. Chaka did not appeal the dismissal.

Plaintiff Makini Chaka was represented by Patrice A. Sultan of the Sultan Law Offices PLLC, Washington, D.C. and Justin Okezie,P.C. Washington, D.C. Defendants Red Zebra Broadcasting LLC and Thom Loverro were represented by Mark I. Bailen and Paul M. Levine of Baker Hostetler, Washington, D.C.

Court Compells Production of Photos Posted on "Private" Facebook Page

"Minimal" Privacy Interest Regardless of Settings

By Robert L. Rogers, III

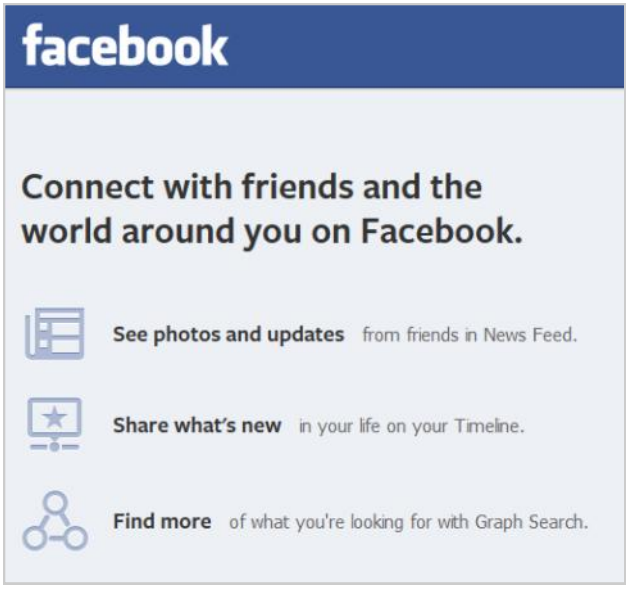
A Florida appellate court has ordered a plaintiff to produce photographs from her "private" Facebook page in an important decision holding that Facebook users' privacy interests in the content they post—regardless of the account settings they choose—are "minimal, if any." *Nucci v. Target Corp.*, 40 Fla. L. Weekly D166a (Fla. 4th DCA Jan. 7, 2015).

Nucci v. Target Corp. involves a personal injury action asserted against Target Corporation by Maria Nucci, a customer who claims she slipped and fell at a Target store. After viewing surveillance video that called into question Ms. Nucci's claims of permanent injury, Target asked Nucci to produce more than 1,200 photographs listed on her Facebook profile. After Nucci refused, Target moved to compel their production, and eventually narrowed its request to only photos of Nucci (as opposed to photos of other persons posted on Nucci's Facebook page). The trial court granted Target's motion and ordered Nucci to produce all photos of herself that she posted on her Facebook page dating from two years before the accident at issue to the present.

Both at trial and on appeal, Nucci pointed out that she had maintained her Facebook page "on a privacy setting that prevented the general public from having access to her account," and she therefore argued that Target's request invaded her "reasonable expectation of privacy" in the photos at issue.

The appeals court, however, disagreed and affirmed the order compelling production of Nucci's Facebook photos in part because "Nucci has but a limited privacy interest, if any, in pictures posted on her social networking sites."

"[G]enerally, the photographs posted on a social networking site are neither privileged nor protected by any right of privacy, regardless of any privacy settings that the user may have established" for several reasons. For one,



Nucci v. Target Corp. **provides key support for a litigant's right to discover personal content posted by litigants on their social media pages.**

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Facebook's own terms and conditions explain that Facebook does not guarantee privacy. "By creating a Facebook account, a user acknowledges that her personal information would be shared with others. 'Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist.'"

Furthermore, even if Facebook users use privacy settings that allow only "friends" to see the photos they post, they know their friends can independently copy and disseminate those photos. "In fact, the wider her circle of friends, the more likely her posts would be viewed by someone she never expected to see them."

"Because information that an individual shares through social networking websites like Facebook may be copied and disseminated by another, the expectation that such information is private, in the traditional sense of the word, is not a reasonable one."

The appeals court also affirmed the trial court's rejection of Nucci's argument that discovery of the photographs would violate the Federal Stored Communications Act codified at 18 U.S.C. §§ 2701-2712, which prevents providers of communications services, *e.g.*, Facebook, from divulging private communications to certain entities and persons. Because the FSCA does not apply to persons who use communications services like Facebook, it does not prohibit discovery of a Facebook user's electronically stored communications directly from the users.

Nucci v. Target Corp. therefore provides key support for a litigant's right to discover personal content posted by litigants on their social media pages, even when those litigants maintain their pages under privacy settings that limit access to the general public. In fact, the appeals court went beyond merely rejecting Nucci's privacy argument and also described the unique value of social media posts by explaining "there is no better portrayal of what an individual's life was like than the photographs the individual has chosen to share through social media before the occurrence of an accident causing injury. Such photographs are the equivalent of a 'day in the life' slide show..."

Nucci is also a valuable case for media defendants charged with invading a Facebook user's privacy by publishing content posted on "private" pages, since the decision explains why Facebook users do not have a reasonable legal expectation of privacy over content posted on "private" pages.

Robert L. Rogers, III is a media and business litigation attorney with Holland & Knight LLP and works in the firm's Orlando office. The Plaintiffs/Petitioners were represented by John H. Pelzer and Victor Kline of Greenspoon Marder, P.A. The Defendant/Respondent was represented by Nicolette N. John and Thomas W. Paradise of Vernis & Bowling of Broward, P.A.

Virginia Court Upholds Newspapers' Editorial Discretion

Dismisses Claims for Not Reporting Plaintiff's Lawsuits

By Damon E. Dunn and Cecilia M. Suh

A federal district court in Virginia dismissed claims against eleven newspapers across the country over their failure to report plaintiff's administrative proceedings and civil actions against the federal government. *Melvin v. U.S.A. Today, et al.*, No. 3:14-cv-00439-JRS (E.D.Va. Jan. 20, 2015) (Spencer, J.).

The court held that the plaintiff, Pamela Melvin, could not compel newspapers to publish her preferred content because "the conduct alleged by Melvin lies at the heart of editorial discretion protected by the First Amendment, which leaves to private citizens, not the government or litigants, the power to decide whether to speak on any particular subject." The court also noted that the plaintiff failed to allege that the newspapers engaged in purposeful discrimination or deprived plaintiff of any contractual rights by not reporting on her lawsuits as required to prevail on race discrimination claims under 42 U.S.C. § 1981.

The gravamen of her case was that the newspapers had ignored Melvin's administrative and civil actions against the government because she was African-American

Background

Melvin alleged that she had been mistreated by the U.S. Department of Veterans' Affairs ("VA") and various government officials. She claimed that she was "in dire need of medical treatment" and that her life was "in grave danger" due to purportedly criminal and racially discriminatory conduct on the part of the VA and the failure of any U.S. court or official to protect her.

Plaintiff Sues Newspapers Across the Country

On June 19, 2014, Melvin filed a 173-page, 600-paragraph complaint against eleven newspapers across the country: *Atlanta Journal Constitution*, *Boston Globe*, *Chicago Sun-Times*, *Dallas Morning News*, *Detroit Free Press*, *Los Angeles Times*, *Philadelphia Inquirer*, *Tampa Bay Times*, *U.S.A. Today*, *Washington Post*, and *Star-Ledger*. Melvin's complaint alleged violations of her constitutional and civil rights under § 1981

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and the First Amendment as well as violations of the Universal Declaration of Human Rights.

The gravamen of her case was that the newspapers had reported high-profile civil cases filed by white citizens, including Paula Jones and Valerie Plame, against the federal government but ignored Melvin's administrative and civil actions against the government because she was African-American. According to Melvin, the newspapers had intentionally discriminated against her because of her race and she sought damages and a mandatory injunction compelling the eleven newspapers to report the court cases that she had filed against the federal government.

Several newspaper defendants filed motions to dismiss Melvin's complaint, generally arguing that Melvin had no enforceable right of access to their pages and that the First Amendment protected their exercise of editorial judgment. The newspapers also asserted that Melvin failed to plead facts showing that the newspaper defendants had engaged in intentional, purposeful discrimination against Melvin due to her race or that their conduct interfered with any contract rights, as required by § 1981.

Pleading defects aside, the court agreed with the newspapers that the First Amendment contemplates the press will exercise editorial discretion rather than act as a "passive receptacle."

In response, Melvin filed a motion to amend her complaint, seeking to replace her references to 42 U.S.C. § 1981 with the Civil Rights Act of 1964. The court, however, denied the motion to amend, finding that it was untimely and filed without leave or defendants' consent to the amendment.

Complaint Dismissed with Prejudice

Instead, the court granted defendants' motions to dismiss Melvin's case with prejudice. It observed that, in order to succeed on a claim under § 1981, Melvin had to establish that the newspapers intended to unlawfully discriminate against her and that the discrimination interfered with a contractual interest or property right. The court ruled that Melvin failed to allege any facts indicating that the newspapers' editorial decisions—publishing articles about cases filed by white citizens but not cases filed by Melvin—were motivated by "purposeful discrimination." The court further found that Melvin did not state a claim under § 1981 because she failed to allege facts showing that the newspapers deprived her of any legitimate contract or property right by not reporting on her cases.

Pleading defects aside, the court agreed with the newspapers that the First Amendment contemplates the press will exercise editorial discretion rather than act as a "passive receptacle." Although this rule was not "not directly articulated by the Fourth

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Circuit," the court noted that other jurisdictions had "declined to compel privately owned newspapers to publish certain information or cover certain events at the request of a private individual." Thus, even after accepting her allegations as true, the court concluded that Melvin could not compel the newspapers to provide "equal access" to their pages without running afoul of the constitutional guarantee of the freedom of the press.

The court declined to address Melvin's allegations regarding violations of the Universal Declaration of Human Rights because they were based on nonbinding law.

Sun-Times Media, LLC was represented by Damon E. Dunn and Cecilia M. Suh of Funkhouser Vegosen Liebman & Dunn Ltd. and Bradfute W. Davenport, Jr. and Stanley W. Hammer of Troutman Sanders LLP. USA Today, Washington Post, Detroit Free Press, Star-Ledger, Philadelphia Inquirer, and Dallas Morning News were represented by Stephen M. Faraci and Laurin H. Mills of LeClairRyan. The Boston Globe was represented by Ky E. Booth-Kirby of Bingham McCutchen LLP. Pamela Melvin represented herself.

Definitions of the Media: Three Recent Data Points

By Jeff Hermes

The debate continues as to the scope of media that should be protected by legislative or regulatory measures intended to protect newsgathering and reporting. A pair of brief court rulings from the last quarter of 2014 applied statutory press protections to social media platforms and their users. Meanwhile, the Department of Justice has declined to grapple with this question in the latest iteration of its media policy.

Oregon's Shield Law

Lincoln City Lodging Ltd. P'ship I v. Doe involved a defamation claim based upon a TripAdvisor user's review of an Oregon hotel. The suit was brought to a halt when TripAdvisor refused under Oregon's state shield law, O.R.S. §§ 44.510 et seq., to comply with a subpoena for the identity of the user. The Multnomah County Circuit Court upheld that ruling in a one-paragraph order, stating:

The state court judge in Lincoln City Lodging appears to have accepted that the "ordinary meaning" of a "medium of communication" could evolve over time to include services like TripAdvisor.

> [T]he website TripAdvisor.com is a medium of communication within the meaning of ORS 44.510(2) because it broadly disseminates information to the public; Oregon's shield law, ORS 44.510 to ORS 44.540 applies to TripAdvisor.com; and the information sought by the subpoena is both the source of the published information, ORS 44.520(1)(a), and unpublished information obtained in the course of receiving information for a medium of public communication to the public, ORS 44.520(1)(b).

Case No. 14CV04902, slip op. at 1 (Or. Cir. Ct. Oct. 1, 2014).

O.R.S. § 44.510(2) defines a "medium of communication" for the purposes of the shield law as follows: "Medium of communication has its ordinary meaning and includes, but is not limited to, any newspaper, magazine or other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system."

The decision is notable both for its brevity and because it reaches a different result from the last court to consider the applicability of Oregon's shield law to digital media.

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In 2011, Obsidian Finance Group sued blogger Crystal Cox for defamation in the U.S. District Court for the District of Oregon. Cox refused to reveal the source of certain of her allegations, invoking Oregon's shield law. The district court judge rejected her argument:

> [A]lthough defendant is a self-proclaimed "investigative blogger" and defines herself as "media," the record fails to show that she is affiliated with any newspaper, magazine, periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system. Thus, she is not entitled to the protections of the law in the first instance.

Obsidian Finance Group, LLC v. Cox, No. CV-11-57-HZ, slip op. at 3 (D. Or. Nov. 30, 2011). In a subsequent order, the judge acknowledged that the language of the statute was not limited to the specifically enumerated media; nevertheless he found that, even if the Oregon Legislature intended the statute to have a wider reach, it did not mean that the Legislature intended it to cover new media that did not exist when the law was passed: "[I]t is inappropriate … to expand the Oregon Legislature's admittedly broad definition of '[m]edium of communication' to cover all communications made on the Internet." *Obsidian Finance Group, LLC v. Cox*, No. CV-11-57-HZ, slip op. at 26 (D. Or. Mar. 27, 2012).

By the logic of the district court's ruling, TripAdvisor's entitlement to the protection of the shield law would be questionable, as an online service with clear distinctions from the enumerated examples of traditional media. Nevertheless, the state court judge in *Lincoln City Lodging* appears to have accepted that the "ordinary meaning" of a "medium of communication" could evolve over time to include services like TripAdvisor.

This is not to suggest that TripAdvisor's service and Cox's blog are equivalent or that recognizing one as a "medium of communication" requires the same result for the other; it is a common fallacy to lump Internet-based media together. The federal court in *Cox* was unwilling to extend shield law protection to an independent website controlled by a single individual, while *Lincoln City Lodging* dealt with a well-established platform backed by a corporate reputation. Interestingly, however, a consequence of finding that TripAdvisor is a "medium of communication" under Oregon's shield law is that, in proper circumstances, TripAdvisor's users might themselves be able to invoke the law to protect their own sources. O.R.S. § 44.520(1) extends the protection of the statute to anyone "connected with, employed by *or engaged in* any medium of communication to the public."

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California's Privilege for Reports of Public Proceedings

Another brief opinion from the end of 2014 extended – if only by implication – California's statutory protection for reports of public proceedings to a reporter who published a statement on Twitter.

Enjaian v. ALM Media Properties, LLC involved a defamation claim based upon an article posted by ALM and a tweet by the author of the article. The basis of the suit was the plaintiff's claim that he was wrongfully described in both contexts as having been "accused" of stalking because he had never been criminally charged for such an offense. The U.S. District Court for the Northern District of California granted the defendants' anti-SLAPP motion, finding that the plaintiff had not demonstrated a probability that he could prove the statements at issue were false. *Enjaian v. ALM Media Properties, LLC*, No. C 14-3872 PJH, slip op. at 3-4 (N.D. Cal. Dec. 23, 2014).

Of more interest is the court's application of California's statute protecting reports of public proceedings:

> A privileged publication or broadcast is one made . . . [b]y a fair and true report in, or a communication to, a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof, or (E) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued.

Cal. Civ. Code § 47(d). Without explicitly discussing whether a tweet constitutes a "publication or broadcast … made … in, or a communication to, a public journal," the court held as an alternative basis for its ruling that both the article and the reporter's tweet were "sufficiently 'fair and true' to qualify as privileged." *Enjaian*, slip op. at 4.

This result might have been driven less by a detailed consideration of whether Twitter constitutes a "public journal" than by the professional status of the reporter defendant. Moreover, while the tweet itself contained the entirety of the allegedly defamatory statement, it also linked to and was intended to promote an article in the National Law Journal. It remains to be seen whether the same result would be reached in a case involving Twitter alone.

Department of Justice Media Policy

In January 2015, the Justice Department released an updated version of its "Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media," 28

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C.F.R. § 50.10 (the "Policy"). The revised Policy, while making important changes to some problematic language, remains unclear as to whom it actually protects. Like prior iterations, the updated Policy indicates that the Department is supposed to avoid interference with the activity of "members of the news media," but contains no affirmative definition of that term.

Instead, the only way in which "members of the news media" are defined in the Policy is through exclusions. Some of these exclusions predictably relate to persons acting as agents of a foreign power, plotting terrorist activity, et cetera. More challenging are the implications of the following provision, carried over with only slight changes from the prior version of the Policy released in February 2014:

> A Deputy Assistant Attorney General for the Criminal Division may authorize, under an applicable [Privacy Protection Act] exception, an application for a warrant to search the premises, property, communications records, or business records of an individual *other than a member of the news media*, but who is reasonably believed to have "a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication."

Enjaian v. ALM Media Properties, LLC involved a defamation claim based upon an article posted by ALM and a tweet by the author of the article.

28 C.F.R. § 50.10(d)(6) (emphasis added). The phrase "person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication" is drawn from the Policy's statutory counterpart, the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa, and defines the scope of that statute's protection. We still do not know what "members of the news media" means in the DOJ Policy, but, by the way the above provision is phrased, it is apparently more restrictive than the functional definition in the Privacy Protection Act.

At most, well-established news outlets might expect the Department to adhere to the Policy, but edge cases (particularly those beginning with "Wiki" and ending with "leaks") cannot make such assumptions. The Policy also explicitly states that it is not "intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person." 28 C.F.R. § 50.10(i). As a result, clarity on this issue is unlikely to come through judicial interpretation.

Jeff Hermes is a Deputy Director at the Media Law Resource Center.

DOJ Releases New Guidelines on Subpoenas to News Media

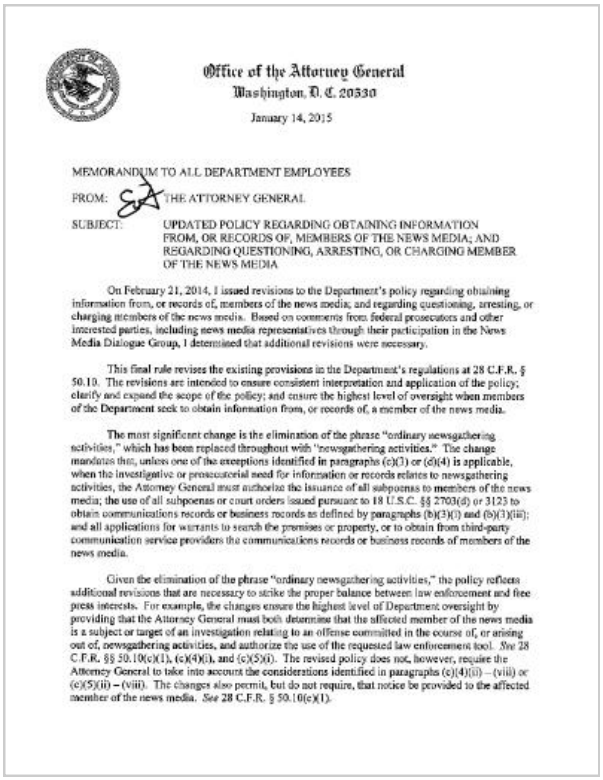
Summary of Changes

By Gregg Leslie

The Department of Justice released modified guidelines regarding subpoenas to members of the news media in February 2014. There were several aspects of those guidelines that media organizations felt were unclear, incomplete, or even harmful to the interests they were meant to protect. The News Media Dialog Group, proposed by the Attorney General in his July 2013 report to the president, met and conferred with department officials several times in 2014, and the department then released modified guidelines in January 2015.

The key changes to those guidelines concern:

"Ordinary" newsgathering activities. The use of the phrase "ordinary newsgathering activities" appeared nine times in the 2014 regulations, even though that phrase was not in the original regulations and had never come up during the discussion process. Media organizations felt that the addition of the word "ordinary" created a large exception where prosecutors and future attorneys general could decide that a wide range of activities that they would find unacceptable – such as talking to sources about national security information – would be deemed "extra-ordinary" and thus not subject to the protections of the guidelines. Department officials said they only meant it to exclude situations where journalists were clearly breaking the law.



Office of the Attorney General
Washington, D. C. 20530

January 14, 2015

MEMORANDUM TO ALL DEPARTMENT EMPLOYEES

FROM: THE ATTORNEY GENERAL

SUBJECT: UPDATED POLICY REGARDING OBTAINING INFORMATION FROM, OR RECORDS OF, MEMBERS OF THE NEWS MEDIA; AND REGARDING QUESTIONING, ARRESTING, OR CHARGING MEMBER OF THE NEWS MEDIA

On February 21, 2014, I issued revisions to the Department's policy regarding obtaining information from, or records of, members of the news media; and regarding questioning, arresting, or charging members of the news media. Based on comments from federal prosecutors and other interested parties, including news media representatives through their participation in the News Media Dialogue Group, I determined that additional revisions were necessary.

This final rule revises the existing provisions in the Department's regulations at 28 C.F.R. § 50.10. The revisions are intended to ensure consistent interpretation and application of the policy; clarify and expand the scope of the policy; and ensure the highest level of oversight when members of the Department seek to obtain information from, or records of, a member of the news media.

The most significant change is the elimination of the phrase "ordinary newsgathering activities," which has been replaced throughout with "newsgathering activities." The change mandates that, unless one of the exceptions identified in paragraphs (c)(3) or (d)(4) is applicable, when the investigative or prosecutorial need for information or records relates to newsgathering activities, the Attorney General must authorize the issuance of all subpoenas to members of the news media; the use of all subpoenas or court orders issued pursuant to 18 U.S.C. §§ 2703(d) or 3123 to obtain communications records or business records as defined by paragraphs (b)(3)(i) and (b)(3)(iii); and all applications for warrants to search the premises or property, or to obtain from third-party communication service providers the communications records or business records of members of the news media.

Given the elimination of the phrase "ordinary newsgathering activities," the policy reflects additional revisions that are necessary to strike the proper balance between law enforcement and free press interests. For example, the changes ensure the highest level of Department oversight by providing that the Attorney General must both determine that the affected member of the news media is a subject or target of an investigation relating to an offense committed in the course of, or arising out of, newsgathering activities, and authorize the use of the requested law enforcement tool. *See* 28 C.F.R. §§ 50.10(c)(1), (c)(4)(i), and (c)(5)(i). The revised policy does not, however, require the Attorney General to take into account the considerations identified in paragraphs (c)(4)(ii) – (viii) or (c)(5)(ii) – (viii). The changes also permit, but do not require, that notice be provided to the affected member of the news media. *See* 28 C.F.R. § 50.10(e)(1).

Attorney General Holder's memo outlining guideline revisions. Click to read.

In the new 2015 regulations, the word "ordinary" was removed in each instance. Removal of this term should eliminate some ambiguity and provide clearer direction to prosecutors in how the guidelines are interpreted.

Similarly, in section (f), concerning the questioning, arrest, and charging of journalists, three uses of the language "the coverage or investigation of news, or while

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engaged in the performance of duties undertaken as a member of the news media" were replaced with the phrase "newsgathering activity" for internal consistency.

Business records. Most references to records held by third parties that were protected under the 2014 guidelines referred to communications records and business records, both of which are defined in the regulations. But a few references, particularly with regard to records held by "communications service providers" (section (b)(2)(ii)) and those subject to search warrants (section (d), including subparts (1), (2), (3) and (6)) referred only to "communications records." Those sections were amended in the new 2015 regulations to include "business records." In addition, the definition of "business records" (section (b)(3)(iii)(A)) was changed to specifically include "work product and other documentary materials." This is consistent with the intent of the 2014 changes, and the 2015 edits make it more explicit.

"Focus" of investigations. The 2014 regulations (*Statement of Principles*, section (a)(1)) stated that they did not cover journalists "who are the focus of criminal investigations for conduct not based on, or within the scope of" their newsgathering activities. The media coalition felt that "focus" was ambiguous, and was inconsistent with the terms of art used elsewhere in DOJ rules and regulations if it was meant to apply only to those actually under investigation. The 2015 regulations replaced "focus" with "subjects or targets."

Similarly, section (d)(4), regarding when the Privacy Protection Act "suspect exception" (meaning the PPA's protection for journalists against search warrants can only be overcome if they are suspected of a crime) is invoked, was changed from when the journalist is "a focus" of a criminal investigation to "a subject or target" of the investigation.

The 2015 guidelines also added new sections — (c)(4)(i) on direct subpoenas, and (c)(5)(i) on third-party subpoenas — addressing when the journalist is a subject or target of an investigation related to newsgathering activities. The new language says that when requesting a subpoena in such situations, the prosecutor must present facts supporting why the member is a subject or target to the Attorney General, and in reviewing the subpoena, the Attorney General "should" consider the *principles* of the policy (section (a)), but "need not" consider the *specific restrictions* created by the policy (sections (c)(4) and (c)(5)).

National defense information. The 2014 guidelines added sections stating that the Attorney General "may" authorize subpoenas when the Director of National Intelligence certifies the investigation concerns the unauthorized disclosure of properly classified information. But this language was ambiguous as to whether, when such a certification is made, the rest of this policy would be ignored by the Attorney General.

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The 2015 guidelines now make clear that this is an additional step in leaks investigations and prosecutions. Sections (c)(4)(vi) (regarding direct subpoenas) and (c)(5)(v) (regarding third-party subpoenas) make clear that in approving a subpoena in a leaks investigation, the Attorney General "should take into account" both the DNI certification and the specific restrictions in the guidelines (sections (c)(4) and (c)(5)).

Harassment. A new section (c)(5)(vi) was added regarding third-party subpoenas to mirror language regarding direct subpoenas ((c)(4)(vii)). "Requests should be treated with care to avoid interference with newsgathering activities and to avoid claims of harassment."

Extra step before compelled disclosure. A new section (c)(6) was added to clarify that even after any subpoena or other instrument is issued and negotiations with the media entity fail, prosecutors must consult with the Criminal Division before asking a judge to compel compliance with any direct or third-party subpoena or court order. The initiative for this new section came from DOJ and the media coalition endorsed it.

Safeguarding seized materials. The Attorney General's July 2013 report to the president included promises that information obtained through a subpoena or other instrument would be safeguarded to protect against additional or unnecessary disclosure, but that language was not included in the 2014 guidelines. The department indicated that it had intended to create such a requirement in the U.S. Attorneys' Manual instead. A new section (h) was added to the 2015 guidelines saying such information must be "closely held so as to prevent disclosure of the information to unauthorized persons or for improper purposes," and also refers prosecutors to the Attorneys' Manual for further guidance.

Notice to the news media. The 2014 regulations required that the news media be given notice of subpoenas to third parties before they were served, thus giving the media the opportunity to move to quash them.

In the 2015 regulations, similar language was added to section (a)(3) of the "Statement of Principles." In addition, an exception to the notice requirement was added for instances where the member of the news media is a "subject or target" of the investigation. This section, (e)(1), gives the Attorney General discretion to nonetheless direct that notice be provided, and requires prosecutors to update the Attorney General every 90 days about the status of the investigation and the continuing need for withholding notice.

Detaining journalists. In section (f), regarding requests for approval to question, arrest, or seek indictment of members of the news media, a new section (f)(5) was added stating that the Attorney General must follow the Statement of Principles of this policy.

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Cumulative information. Section (c)(5)(ii)(A) was amended to state: "The subpoena or court order should not be used to obtain peripheral, nonessential, ***cumulative***, or speculative information."

"Filter teams." On search protocols for executing warrants, the 2015 guidelines removed a parenthetical in section (d)(7) that defined the department "filter teams" that would review searches of records as "reviewing teams separate from the prosecution and investigative teams." However, that phrase remains in section (c)(5)(viii), regarding third-party subpoenas. Presumably this means that when reviewing the material obtained through search warrants, the "filter teams" can come from the ranks of officials already involved in the case.

Foreign agents. Section (b)(1)(ii) changed person "who is or is reasonably likely to be" a foreign agent or terrorist to "where there are reasonable grounds to believe that the individual or entity is" such.

Gregg Leslie is Legal Director of the Reporters Committee for Freedom of the Press. RCFP Executive Director Bruce Brown, AP General Counsel Karen Kaiser, and Kurt Wimmer, Covington & Burling, helped negotiate the new guidelines with the Department of Justice.

Reporter's Source can Remain Anonymous in Double Murder Trial

By Kristen C. Rodriguez

The Third District Appellate Court of Illinois recently reversed a trial court decision requiring Patch.com reporter Joseph Hosey to reveal the identity of his confidential sources. *People of the State of Illinois v. McKee*, 2014 IL App (3d) 130696.

The appellate decision arose from a series of articles Hosey authored concerning a grisly double murder in Joliet, Illinois, a southwest suburb of Chicago. Hosey's reports were based on confidential reports about the murders received from an unnamed source. In over 500 affidavits submitted to the court, the parties, attorneys, and police department personnel involved all denied responsibility for leaking the documents to Hosey.

One of the four defendants, Bethany McKee, claimed her rights to a fair trial had been violated because Hosey's reporting potentially tainted the jury pool, and exacerbated pre-trial publicity. She moved to divest Hosey of his statutory reporter's privilege.

The trial court sided with the defendant. Finding that all other means of identifying the source had been exhausted and that disclosure of the source was essential to determining whether the secrecy of the grand jury proceedings or discovery rules had been violated, the trial judge ordered Hosey to provide copies of documents from his source, and to submit an affidavit disclosing the source if the documents did not reveal the source's identity.

The Appellate Court's decision should prove helpful to reporters battling against parties who seek source information for purely collateral matters.

When Hosey refused, the trial court found him in contempt and ordered a $1,000 contempt fine, plus a $300 per day fine for every day of noncompliance, up to 180 days, at which point Hosey would be subject to incarceration until he complied with the court's order.

Hosey then appealed to the Third District Appellate Court of Illinois. He argued that the source of the leak was not relevant to the underlying proceedings, which is a threshold requirement of divestiture under the Illinois Reporter's Privilege Act, 735 ILCS 5/8-901 *et seq*. Nearly 40 media organizations banded together and filed an amicus brief in support of Hosey.

While the appeal was pending, McKee and another defendant were convicted for murder. Hosey moved to vacate the contempt order, but the Appellate Court denied the motion.

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On December 15, 2014, the Appellate Court reversed the trial court's contempt order, finding that "the identity of Hosey's source cannot be said to be relevant to a fact of consequence to the first degree murder allegations." Emphasizing that the purpose of the privilege "is to assure reporters access to information, thereby encouraging a free press and a well-informed citizenry," the Appellate Court's decision should prove helpful to reporters battling against parties who seek source information for purely collateral matters.

Joseph Hosey was represented by Kenneth Schmetterer and Joseph Roselius of DLA Piper, Chicago. The Amici in support of Hosey were represented by Bruce D. Brown of the Reporters Committee for Freedom of the Press, and Natalie Spears and Kristen Rodriguez of Dentons US LLP, Chicago.

11th Circuit Affirms Dismissal of "Million Dollar Challenge" Lawsuit

Lawyer's Statement in News Interview Did Not Create Unilateral Contract

Big talkers can rest easy. Last December, the Eleventh Circuit ruled that hyperbolic speech in a news interview did not create a unilateral contract. *Kolodziej v. Mason*, No. 14-10644, 2014 WL 7180962 (11th Cir. Dec. 18, 2014). Defendant's "million dollar challenge" could not reasonably be understood as a real invitation to contract.

Background

Plaintiff Dustin Kolodziej claimed that a unilateral contract had been formed when he successfully completed a "million-dollar challenge" made by defendant on national television. The defendant, James Mason, is a criminal defense lawyer. At the time the "challenge" was made, Mason was representing a client on trial for multiple murders. Mason was interviewed about the case on NBC's Dateline where he argued that the prosecution's theory of the case was impossible.

Big talkers can rest easy. Last December, the Eleventh Circuit ruled that hyperbolic speech in a news interview did not create a unilateral contract.

According to Mason, the prosecution's theory defied the conventions of time and travel. His client appeared in an Atlanta hotel's security tapes in the morning and evening, hundreds of miles from the scene of the crime in Florida. The prosecution, however, argued that his client, Nelson Serrano, "slipped out of the hotel and, traveling under several aliases, flew from Atlanta to Orlando, where he rented a car, drove to Bartow, Florida, and committed the murders. From there, Serrano allegedly drove to the Tampa International Airport, flew back to Atlanta, and drove from the Atlanta International Airport to the La Quinta, to make an appearance on the hotel's security footage once again that evening."

Mason argued his client could not have committed the murders within this timeline, stating "I challenge anybody to show me, and guess what? Did they bring in any evidence to say that somebody made that route, did so? State's burden of proof. If they can do it, I'll challenge 'em. I'll pay them a million dollars if they can do it."

The interview aired after a jury convicted his client of the murders. Dateline edited the interview and removed the references to the state's burden of proof. As aired,

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defendant questioned the timeline, stating "I challenge anybody to show me—I'll pay them a million dollars if they can do it.'"

Plaintiff, at the time of broadcast, was a law student at South Texas College of Law. After the Dateline broadcast he recorded himself traveling the alleged route all within the prosecution's timeframe, including deplaning in Atlanta and making it back to the hotel within 28 minutes. Plaintiff sent Mason a copy of the recording and demanded payment for completing the challenge. After Mason refused to pay, plaintiff sued Mason and his law firm for breach of contract.

The district court granted Mason's motion for summary judgment on two grounds. First, plaintiff had not seen and was unaware of the unedited interview at the time he attempted to perform the challenge, and thus he could not accept an offer he did not know existed; second, the challenge in the unedited interview was unambiguously directed to the prosecution only, and thus plaintiff could not accept an offer that was not open to him.

11th Circuit Opinion

The Eleventh Circuit reiterated the essential elements for contract formation: (1) offer; (2) acceptance; (3) consideration; and (4) sufficient specification of the essential terms of the contract. The Court noted that although mutual assent is not "necessarily an independent element," the existence of assent could be evaluated by "analyzing the parties' agreement process in terms of offer and acceptance." An "objective test" is used to determine the enforceability of a contract. The determination of whether a party made an offer to enter into a contract requires the court to determine how a reasonable, objective person would have understood the potential offeror's communication.

Here defendant's statements could not be thought of as an invitation to contract by a reasonable, objective person.

Here defendant's statements could not be thought of as an invitation to contract by a reasonable, objective person based on the nature of the statements and the circumstances in which they were made.

In this case, the amount of one million dollars was akin to the exaggerated comments of movie villains and schoolyard wagerers. Those words would have given any reasonable person pause, considering all of the attendant circumstances in this case, e.g., a television interview of a defense lawyer speaking about what he thought were serious holes in the prosecution's case.

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Moreover there were no prior communications between the parties, and defendant "did not have the payment set aside in escrow; nor had he ever declared that he had money set aside in case someone proved him wrong....Simply put, Mason's conduct lacks any indicia of assent to contract."

As the Court explained, "Mason merely used a rhetorical expression to raise questions as to the prosecution's case. We could just as easily substitute a comparable idiom such as 'I'll eat my hat' or 'I'll be a monkey's uncle' into Mason's interview in the place of 'I'll pay them a million dollars,' and the outcome would be the same. We would not be inclined to make him either consume his headwear or assume a simian relationship were he to be proven wrong; nor will we make him pay one million dollars here." *Kolodziej*, at *5.

Plaintiff was represented by William David George of Connelly Baker Wotring, LLP, Houston, TX. Defendants were represented by Lisabeth Fryer, Winter Park, FL; Law Office of Osha Liang, LLP, Austin, TX; and Equels Law Firm, Orlando, FL.

* * *

Lest you think only ambitious law students bring suits to enforce hyperbolic challenges issued on TV, the Court in a footnote noted a recent effort by Donald Trump to do similar.

In 2013, Trump sued Bill Maher for breach of contract after Maher stated on national TV that he would pay to a charity of Trump's choice $5 million if Trump could prove he was not an orangutan's son.

As the Court explained "Trump claimed to accept this offer by providing a copy of his birth certificate as proof of his non-orangutan origin, filing suit when Maher did not respond to his demand for payment."

After the initial saber rattling, and prior to any discovery into the truth, the suit was voluntarily dismissed.

What's Next(Gen)? MLRC Introduces New Committee

By Drew Shenkman, Rachel Strom, and Christine Walz

Over the summer, the MLRC formed the Next Generation Committee (a/k/a the "Next Gen" committee), a new committee targeted to those within the first ten years of practice in media law. The Next Gen Committee's primary goal is to extend MLRC's reach to the younger generation of media lawyers by providing new opportunities for professional growth and development, speaking, writing, and leadership. The committee is co-chaired by Drew Shenkman of CNN, Rachel Strom of Levine Sullivan Koch & Schulz, and Christine Walz of Holland & Knight.

The committee has gotten off to a great and active start. We already have over 100 members across numerous law firms and in-house legal departments, and we are growing every day!

We officially kicked things off in September at MLRC's Virginia conference, where we hosted a drinks reception attended by more than 60 Next Gen members. The drinks were so successful that MLRC has already decided to keep the Next Gen drinks on the agenda for future Virginia conferences. And in November, the Next Gen'ers continued the fun and met for drinks and networking in New York in conjunction with the MLRC's annual dinner.

But the Next Gen isn't just the MLRC's latest "fun" committee. In October, we got down to business and hosted our first webinar on Digital Security, Eavesdropping and Journalistic-Source Confidentiality. The webinar was attended by nearly 50 people from across MLRC membership, with others tuning in to watch the recording later.

We had a diverse panel of experts, including Nahbiya Syed, associate with Levine Sullivan Koch & Schulz (and Next Gen member), Trevor Timm, Executive Director of the Freedom of the Press Foundation, and Pamela Brown, CNN's Justice Correspondent. The panel discussed the ins and outs of email encryption, cloud storage, and how lawyers and journalists are working to protect sources and client information from subpoenas, hackers, and the government.

The presentation is archived on our committee's website and we encourage you to check it out: http://www.medialaw.org/committees/next-generation-media-lawyers

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The panel discussed the ins and outs of email encryption, cloud storage, and how lawyers and journalists are working to protect sources and client information from subpoenas, hackers, and the government.

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For 2015, we plan to keep the activities coming – with more social events and topic-related calls/webinars, including an upcoming webinar on native advertising. We will also work on identifying speaking and writing opportunities for our members – hoping to give our members a greater audience.

For starters, the MLRC has agreed to give Next Gen committee members this very space on a monthly basis for an article from committee members generally focused on topics of "What's Next?" in media law. We welcome volunteers to write in this space, as well as your input on making the Next Gen Committee even better, so please contact us below!

MLRC Next Generation Committee is co-chaired by Drew Shenkman of CNN (drew.shenkman@turner.com), Rachel Strom of Levine Sullivan Koch & Schulz (rstrom@lskslaw.com), and Christine Walz of Holland & Knight (christine.walz@hklaw.com).

MLRC Practically Pocket-Sized Guide to Internet Law

Contains 25 concise articles on a wide-range of Internet law questions that come up in day-to-day media law practice. Topics covered included: Section 230; Online Retractions and Corrections, Single Publication Rule; Enforceability of Electronic Contracts; Behavioral Advertising; Mobile Data Collection; The Computer Fraud and Abuse Act; Text Messages and The Fourth Amendment; E-Discovery; Digital Millennium Copyright Act; Deep Linking Around the World;News Aggregation Websites; Evolution of "DMTA" Law; AdWords Litigation; Music Webcasting and more.