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MEDIALAWLETTER

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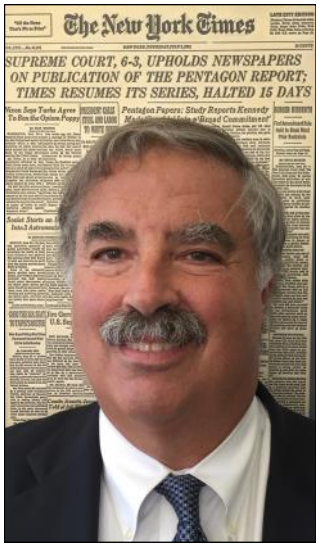
MLRC

LIBEL & PRIVACY

From the Executive Director's Desk

First Amendment Issues May Be Thornier Than They Seem

There are many reasons why we are fortunate to be media lawyers. We are on the "right" side of most issues, protecting civil rights and the ability of our fellow citizens to be informed; we have interesting and smart journalists as clients; we work on highly visible cases which, among other things, make for great cocktail party conversation; I'm sure you can add more. One other important asset is that we get to grapple and use some intellectual rigor in thinking through what the law, good public policy and our clients' practical responses should be to really tough and significant issues – a thought process which ought to keep us engaged and stimulated more often than most.



George Freeman

I was lucky enough to have two such moments during three days in mid-January. First, I was asked to speak to some administrators at a public university about their speech and disciplinary codes – raising complex questions of bullying, Internet practices, the reach and jurisdiction of the school, and, of course, the applicability of First Amendment principles and law.

Two days later I was in Los Angeles moderating a program at our Entertainment Law Conference on the law and journalistic ethics of the media's publishing many of the materials hacked from Sony by the North Koreans a year ago. The more I got into these issues, the more I realized that neither was as simple as it might have seemed at first blush.

Questions about student speech are extremely challenging. We know that *Brandenburg v. Ohio* holds that the First Amendment protects speech unless it is likely to incite imminent lawless action. But *Tinker v. Des Moines* says that in the public school context (K-12) speech can be restricted or punished if it causes substantial disruption to the educational process. Interestingly, there have been few cases in the college or university context: we know, of course, that private colleges can implement pretty much any restriction they want since they are not subject to the First Amendment, but what of a public university? Dealing with young adults rather than middle or high school children, but still in the school context, is the test closer to *Brandenburg* or *Tinker?*

Then there are the questions arising from the Internet age. Much of the speech at issue in school disciplinary contexts is speech in social media. Can/should a university enforce rules on speech which is communicated off-campus, from a private iphone or computer, where

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traditionally deans were not wont to tread. Does the effect of such speech on students on the campus give the school a right or duty to patrol that off-campus speech?

The Student Code of Conduct at this school had some provisions which clearly fell afoul of First Amendment standards: harassment, verbal abuse and bullying were, without more, subject to discipline. But other provisions seemed to have been written by lawyers looking at Tinker – intimidation or bullying motivated by characteristics about a protected class which was insulting or demeaning to any student "in such a way as to cause disruption in or interference with the orderly operation of the University" was also cause for discipline.

But in the end, this combination of vague and inconsistent law and troublesome facts only produced hard questions: in a traditional vein, can the university discipline a student who shouts the "n" word at a student, adding "get out of here; you don't belong here", causing her to miss weeks of classes? What if someone pastes swastikas to a little-used public bulletin board? Or should/can the school discipline a student who posts on social media (from her home) that Suzy Student is a slut, reasonably causing Suzy to fall into a deep depression? In all these situations, advocates of student speech might well be persuasive that legal theory and the cases are on their side. Indeed, most of these examples will only hurt one student or a small group of students, which seems to be short of a substantial disruption. But, yet, what is the social value of that speech? What is the relative value weighed against the harm? And what, as a practical matter, is a university administration supposed to do?

***Mary Beth Tinker v. Des Moines*, the grandmommy of all free speech cases.**

This school was in the Third Circuit, so like any diligent lawyer I thought I'd look up some 3rd Circuit cases. It turns out that Circuit, for whatever reason, is more protective of student speech than just about any other. But most interestingly, and somewhat to my chagrin, I found that one of the strongest First Amendment opinions was written by then-Judge, now-Justice Alito, whom I had implied in my column last month was the worst First Amendment justice on the Supreme Court.

In *Saxe v. State College Area School District*, a claim challenging a school district's anti-harassment policy, he wrote for a unanimous panel, striking down the school policy, that "there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs." (I can't help but note: query his lone dissent in the *Westboro Baptist Church* case.) He noted that "where pure expression is involved, anti-discrimination laws steer into the territory of the First Amendment," and concluded that "The

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Supreme Court has held time and again, both within and outside the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it."

One might think that that those rousing words would carry the day. But after I cited this and a few other pro-speech cases, back came the question: "But if we hear you correctly, and can't ban or punish bullying speech, what are we supposed to tell the grieving mother who calls us after her student daughter has killed or hurt herself because of the continual taunting on social media of which the school became aware, and asks: why didn't you do anything about it? A lawyer might suggest the administrator could say the law didn't allow me to do anything about it or, I suppose, a lawyer could advise to draw up rules which we know are unconstitutional and punish such speech and hope that lawsuits don't ensue, or one can say, "yup, looks like you're caught between a rock and a hard place," but none of those answers seems very satisfactory.

* *

Two days later, I found myself at the MLRC's Entertainment and Media Law Conference at the Los Angeles Times building, a Conference this year entitled "One Year after the Sony Hacks." I was moderating a panel "From Your Hard Drive to the Front Page - Leaked Information, Journalism and the First Amendment," which delved into the legality, ethics and propriety of publishing most of the Sony materials – from private emails and personal information to proposed movie scripts – hacked by the North Koreans as part of their strategy of threats and disruption if Sony released the film *The Interview*. The movie was a political satire about the planned assassination of North Korean leader Kim Jong-un.

Dealing with the legal issue first, Sorkin argued intelligently, eloquently and passionately that none – or, upon some pressing, almost none – of the Sony materials were newsworthy.

At the time most of us thought that the media were well within their rights in republishing the Sony materials and poked fun at a David Boies letter, on behalf of Sony, urging media companies not to publish the materials and vaguely threatening legal action if they did. Likewise, because the media routinely, and often for good purpose, publish documents they know they should not have, not many of us thought there was much of an ethical problem either. The panel made many of us reconsider these instinctive beliefs.

The main proponent against such publication was Aaron Sorkin, just off winning a Golden Globe for his screenwriting of "Steven Jobs." Dealing with the legal issue first, he argued intelligently, eloquently and passionately that none – or, upon some pressing, almost none - of the Sony materials were newsworthy. As Eugene Volokh related, *Bartnicki*, while a press victory, had made the *Cox Broadcasting v. Cohen* test tougher. It used to be that publishing

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proscribed materials was not punishable if the materials were truthful, not illegally obtained by you, and newsworthy, i.e., of legitimate public interest. After Justice Breyer's concurrence in *Bartnicki* the materials should be of real public significance – and Sorkin contended with much brio that Sony emails gossiping about the frailties of divas and criticizing proposed scripts fell far short of that mark.

But, he was asked, everyone is so interested in the movies, how they are made and selected, and certainly movie stars; after all, the Hollywood industry and players have gotten rich from the discretionary spending of the public; doesn't that give the public some right of entry to their lives and industry? When Sorkin, as he had in his op-ed article in The New York Times criticizing the media who ran the Sony materials, steadfastly argued that this was Sony's private business, I asked whether Sony materials weren't, at the least, of greater public interest than the documents of, say, General Tire Co. To the contrary, he cleverly responded, those materials would give information about safety issues, critical to the well-being of all Americans; these just deal with the movies and celebrities.

Photo © Tom Burke

The author, left, with Aaron Sorkin in L.A.

On the panel was Sidley Austin partner Mark Haddad, who had clerked for Justice William J. Brennan. I asked Mark not what he thought about this kerfuffle, but how he believed Justice Brennan would have responded. He gave a very interesting and nuanced answer. He said that Justice Brennan was almost always resistant to the concept of anyone restricting the press' right to publish what it wanted, but, he added, he would have been concerned about the chill on individuals' speech if they reasonably feared that their seemingly private emails were possibly going to be made public.

Sorkin was chomping at the bit to get into the ethical discussion: his main point was that the media were doing the Koreans bidding by harming Sony and creating massive disruptions – why would our media aid and abet this dictatorial and corrupt regime? Former U.S. Ambassador to Malta and constitutional law professor Douglas Kmiec, himself a victim of the Wikileaks disclosures, added that this problem was even greater in the national security context: why, he asked, would the media republish sensitive diplomatic cables which could only harm our nation's foreign relations?

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Prof. Volokh gave the standard First Amendment answers: it was paramount for the public to be informed about these issues. What the U.S. Government and a major movie studio did, and why, were newsworthy, and should be subject to public scrutiny. After all, the media have published materials they were not really supposed to have for centuries, largely with good results. And the Government and big companies ought not be able to censor or pressure the press into not publishing, because often they would do so to cover up their own corruption, mistakes and embarrassments.

We don't help ourselves or our cause by simply waving the First Amendment flag and pronouncing our purity.

Time ran out as Sorkin contended that the media wouldn't have published such hacked material if ISIS were the hacker; why did they act differently because it was equally evil North Korea? He mused on why there wasn't a greater public outcry at the media's actions in publishing this private Sony information, suggesting that maybe it was because the public is totally unsympathetic to Hollywood, its entitlements, its self-promotion and its wealth.

* * *

Whatever the answers to these not so simple problems, my take-away is that they are far more complex and nuanced then we sometimes admit. We don't help ourselves or our cause by simply waving the First Amendment flag and pronouncing our purity. It's fun and rewarding to really puzzle through these issues. Doing so is what makes our jobs so interesting, and what allows us to do our jobs better.

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

Texas Court of Appeal Reinstates Libel by Implication Suit vs. Dallas Morning News

Column Could Imply Plaintiffs Were Deceitful in Writing Son's Obituary

By Jim Hemphill

"It's not a lie if you believe it." - George Costanza[*]

"Libel by implication" and "good faith belief" play significant roles in a recent Texas intermediate appellate court decision that reversed a trial court's grant of summary judgment against *The Dallas Morning News*.

The case, *Tatum v. Dallas Morning News*, 2015 WL 9582903 (Tex. App. – Dallas, Dec. 30, 2015, no pet. h.), involves a suicide, an obituary omitting the suicide, and a column advocating "honesty" in discussing suicide.

The Obituary and Column

Seventeen-year-old Paul Tatum shot himself. His parents took out a paid obituary in *The Dallas Morning News* stating that Paul died "as a result of injuries sustained in an automobile accident." *Tatum* at *1. The parents wrote the obituary, which was not edited by the *Morning News*.


Steve Blow

Shrouding suicide in secrecy leaves its danger unaddressed

Facebook Twitter Email Comments Print

Steve Blow

Published: 12 July 2010 05:15 AM
Updated: 26 November 2010 02:39 PM

So I guess we're down to just one form of death still considered worthy of deception.

I'm told there was a time when the word "cancer" was never mentioned. Oddly, it was considered an embarrassing way to die.

The column, a commentary on societal attitudes about suicide and suicide prevention, addressed two incidents in which suicide was not mentioned as a cause of death. Click to read.

One month later, on Father's Day, the *Morning News* published a column by longtime columnist Steve Blow headlined "Shrouding suicide leaves its danger unaddressed." The column, which was a commentary on societal attitudes about suicide and suicide prevention, addressed two incidents in which suicide was not mentioned as a cause of death: a local art expert whose name was used in the column, and Paul Tatum, who was not mentioned by name. The Tatum obituary, however, was quoted and discussed in the column.

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* Uttered in the Seinfeld episode "The Beard," Season 6, Episode 16, first aired Feb. 9, 1995.

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The column noted the obituary's assertion of the cause of Paul's death, then stated (*Tatum* at *2-3):

> When one of my colleagues began to inquire, thinking the death deserved news coverage, it turned out to have been a suicide.
>
> There was a car crash, all right, but death came from a self-inflicted gunshot wound in a time of remorse afterward. ….
>
> I'm troubled that we, as a society, allow suicide to remain cloaked in such secrecy, if not outright deception. ….
>
> Awareness, frank discussion, timely intervention, treatment – those are the things that save lives.
>
> Honesty is the first step.

The Story Behind the Suicide

The opinion describes Paul Tatum as "an excellent and popular student" and "an outstanding athlete" with "no history of mental illness." *Tatum* at *1. One night when his parents were out of town, he was in a vehicle accident. The opinion calls the accident "one-car"; police reports indicate that Paul ran a stop sign, crashed through a chain-link fence at an auto body shop, and collided with several vehicles parked there. Appellees' Brief at 3.

According to the opinion, immediately after the accident, Paul "began sending incoherent text messages to friends." He also called one of these friends, and the content of the phone conversation (not described in the opinion) prompted the friend and her mother to drive to Paul's house in the early morning hours. *Tatum* at *1.

The friend found Paul "dazed, confused, irrational, incoherent, and apparently in physical anguish and holding one of the family's firearms." The friend went back to the car to tell her mother; while she was gone, Paul fatally shot himself. *Id.*

Paul's parents asserted that, "after investigation," they believed "that the best explanation of the underlying cause of Paul's suicide was a brain injury sustained in the auto accident." *Tatum* at *10. They claimed that they did not mention suicide in the obituary because such a mention "would give a false impression that Paul committed suicide as a result of depression or other mental illness," and because "they did not feel it would honor Paul's memory to include morbid details about his death or to include overly scientific information." *Id.*

The opinion does not mention several arguably salient facts:

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- The medical examiner ruled the death a suicide, despite the parents' objections; they undertook extensive but ultimately unsuccessful efforts to convince the medical examiner to attribute Paul's death to a head injury sustained the accident rather than, or in addition to, the suicide. Appellees' Brief at 3, 5-6.
- Paul was intoxicated at the time of his death, with a blood alcohol content nearly twice the legal limit for driving. *Id.* at 2.
- Paul's friend was with him for 45 minutes before he shot himself, during which time he was holding a shotgun to his head. *Id.*
- A Dallas police detective noted that the motive was "remorse" over the car crash. *Id.* at 3.

The Parents' Libel Claim

Paul Tatum's parents sued the *Morning News* and columnist Steve Blow for libel. They did not assert that the column libeled their deceased son; instead, they contended that the column accused them "of acting with deception in writing their son's obituary in order to mislead others as a means to cover up a suicide, mental illness, and their own potential responsibility for their son's death." Appellants' Reply Brief at 2.

Tatum's parents contended that the column accused them "of acting with deception in writing their son's obituary in order to mislead others as a means to cover up a suicide, mental illness, and their own potential responsibility for their son's death."

The Tatums particularly focused on the column's use of terms such as "deception" and "honesty," contending that the column implied that they lied when they attributed, in the obituary, their son's death to an automobile accident; and on the column's call for "timely intervention," which they contended was an implication that they ignored signs of mental illness in their son and failed to intervene, thus making them at least partially responsible for his death.

(The Tatums also asserted a claim under Texas' Deceptive Trade Practices Act, contending that the *Morning News* failed to inform them, when they purchased the obituary, that the paper's writers sometimes commented on obituaries. This claim was dismissed by the trial court and the dismissal was affirmed on appeal. *Tatum* at *20-21.)

The *Morning News* asserted numerous defenses, including that the column wasn't of and concerning the Tatums; that the column was not defamatory as to them; that the column was true; that it was non-actionable opinion; that it was privileged; and that the Defendants were not negligent and did not act with actual malice.

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The trial court granted summary judgment in favor of the *Morning News* defendants. The Court of Appeals, however, unanimously reversed, rejecting virtually all of the newspaper's legal theories in defense of the libel claim.

The Court's Opinion

Of and concerning. The record contained evidence that several persons who knew the Tatum family, and who also read the column, understood the column to refer to Paul's suicide. The *Morning News* argued that this was insufficient to show that any reader understood the column to contain defamatory material referring to Paul's parents. The appellate court held that the of-and-concerning requirement was met because some readers realized the column discussed Paul Tatum; the court did not address whether any of those readers read the column as defamatory as to the parents. *Tatum* at *6-7.

Defamatory meaning. The court ruled that an objective reasonable reader could interpret the column as asserting that the Tatums intentionally submitted a false obituary that lied about the cause of their son's death, and that such an implication was defamatory. In the court's words, "a person of ordinary intelligence could read the column to accused the Tatums of deception about the cause of Paul's death and a statement is defamatory if it impeaches a person's honesty or integrity." *Tatum* at *8.

In the court's words, "a person of ordinary intelligence could read the column to accused the Tatums of deception about the cause of Paul's death.

The Tatums argued that the column's defamatory gist "is that [they] dishonestly characterized their son's death in the Obituary as a means to 'shroud' his suicide in secrecy." *Tatum* at *10. The court held that this gist could reasonably be read as defamatory. The court also held that "a person of ordinary intelligence could construe the column to suggest that Paul suffered from mental illness and his parents failed to confront it honestly and timely, perhaps missing a chance to save his life," and that this implication or impression also could be found defamatory. *Id.* at 9. The opinion did not note that the column's discussion of "honesty" focused on an event *after* the suicide – specifically the deceptive obituary – not on any alleged pre-suicide failures.

Falsity. The court addressed the column's alleged "false gist – that the Tatums wrote Paul's obituary with the intent to deceive" – and analyzed whether "a hypothetically true column would have been less damaging to the Tatums' reputation." *Tatum* at *12. The court concluded that a "true" column "would have mentioned that the Tatums claimed to have written the obituary in a good faith belief in its truth and without an intent to deceive." *Id.*

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In other words: the column allegedly implied that the Tatums were lying when they said Paul's death was the result of an auto accident, but *it wasn't a lie if the Tatums believed it* – even though all official proceedings, such as the medical examiner's investigation, concluded that the single cause of death was suicide.

This is reinforced by a passage in the opinion dealing with the assertion that Paul's brain injury caused the suicide. In response to the newspaper's argument "that there is no evidence to support the Tatums' theory that a brain injury made Paul suicidal," the court said: "This argument misses the point. The truth of the column's gist hinges on whether the Tatums intended to deceive when they wrote the obituary, not necessarily on the strength of the scientific evidence supporting their belief about the cause of Paul's suicide." *Tatum* at *12. In any event, the court said, the Tatums submitted affidavits from a doctor and a bioengineer who opined that Paul had a traumatic brain injury and would not have committed suicide but for that injury. *Id.*

Opinion. Relying heavily on the U.S. Supreme Court's opinion in *Milkovich v. Lorain Journal* – which held that an accusation of perjury was "sufficiently factual to be susceptible of being proved true or false" – the court held that "the column's gist that the Tatums were deceptive when they wrote Paul's obituary is sufficiently verifiable to be actionable in defamation." *Tatum* at *15. Presumably the appellate court envisions a jury being asked if the Tatums truly believed that the auto accident was a but-for cause of their son's suicide, and if the jury answers "yes," imposition of liability on the newspaper and the columnist would be appropriate.

Under *Tatum*, then, apparently any politician (or anyone else) whose inconsistency of statements is noted by the media has a viable cause of action against the media for implying dishonesty.

A potential danger of *Tatum*'s holding can be found in the court's discussion of *West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994). As described by the *Tatum* court, *West* involved newspaper columns pointing out that West, a mayoral candidate, voiced one position on an issue before an election, then articulated a contrary opinion after he was elected. West sued, claiming the columns falsely implied that he had lied about his position in order to get elected. The Utah Supreme Court held that the implication was not subject to verification and thus could not be the basis of a libel suit. The *Tatum* court stated that it disagreed with *West*, and that accusations of lying or misrepresentation – even if made only by implication through the statement of indisputably true facts – can be objectively verified. *Tatum* at *16. Under *Tatum*, then, apparently any politician (or anyone else) whose inconsistency of statements is noted by the media has a viable cause of action against the media for implying dishonesty.

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Privilege. The *Morning News* argued that the column was privileged as a fair report of official proceedings and as fair comment – for example, the column's use of the word "remorse" to describe Paul's state of mind at the time of his death was taken directly from the Dallas police investigation.

The court rejected both privilege arguments. It noted that the fair report privilege was not available because the column did not specifically cite to the proceedings (such as the police investigation), "nor does it report any statements or findings made in the course of those proceedings." *Tatum* at *14. The court then held that the fair comment privilege does not apply because the column was not "based on substantially true facts" – rather, it was based on the (allegedly) false premise that the Tatums knowingly lied about the cause of their son's death. *Id.*

Negligence and actual malice. The *Morning News* argued that the Tatums were limited-purpose public figures because they were involved in a public controversy over the cause of Paul's death. The court rejected this argument, finding that any controversy was not "public" because "there is no evidence that the outcome of this alleged controversy affected anyone except the Tatums," *Tatum* at *18 – despite the fact that there apparently were contentious proceedings initiated by the Tatums regarding the medical examiner's determination of cause of death.

The fair report privilege was not available because the column did not specifically cite to the proceedings (such as the police investigation).

Because the court found that the Tatums were not public figures, the culpability required for liability and actual damages is negligence. The court held that the Tatums had presented evidence sufficient to raise a fact issue on negligence by submitting an affidavit from an expert witness that the failure to contact the Tatums for comment before the column was published "fell short of journalistic standards promulgated by DMN and by the Society of Professional Journalism [*sic*]." *Tatum* at *19. (The opinion does not name any journalism expert. The Tatums' brief identifies one expert as Dr. David Rudd, "an internationally recognized expert in the field of suicide prevention," who apparently "also testified that the Column fell outside of prescribed media guidelines." Appellants' Brief at 15 n.3. The Tatums' reply brief asserts that "journalism expert Fred Brown … and DMN editor Bob Mong … agree" that the columnist's failure to contact the Tatums "violates basic journalism standards." Appellants' Reply Brief at 24.)

The court then turned to actual malice, which is necessary to recover punitive damages. The court purported to acknowledge that "evidence of a negligent investigation, standing alone, does not raise a fact issue on actual malice," *id.* But the court found that two additional items would allow a jury to find actual malice.

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First, the court found some evidence that columnist Blow "misrepresented his investigation and sources of information." *Id.* Blow testified that he learned about the Tatum matter from two newspaper colleagues, but according to the opinion, those two colleagues were deposed, "and they both testified that they did not remember having a conversation with Blow about Paul's death." *Id.* at 20. The court held that this is some evidence of actual malice, without explaining how this could possibly show that Blow was actually aware that the Tatums had a "good faith" belief that the accident "caused" the suicide – the primary allegation of falsity.

Second, the court found evidence that "Blow had a motive not to learn if there was any explanation for the way the Tatums chose to write the obituary other than the supposed desire to deceive the obituary's readers": that Blow wished to write a column about lack of "honesty" in dealing with suicide, and that this desire would be "undercut" if he learned that the Tatums did not intend to deceive. *Id.* This, the court held, could be seen as "a desire to avoid the truth," which "may demonstrate the reckless disregard required for actual malice." *Tatum* at *19-20 (quoting *Bentley v. Bunton*, 94 S.W.3d 561, 591 (Tex. 2002)).

The court found evidence that "Blow had a motive not to learn if there was any explanation for the way the Tatums chose to write the obituary other than the supposed desire to deceive the obituary's readers."

Next Steps?

The *Tatum* decision was an appeal from a grant of summary judgment. In the absence of further appeals, the case would be remanded for trial. The opinion was issued on December 30, 2015. The Defendants/Appellees may seek a rehearing in the Court of Appeals and/or petition the Texas Supreme Court for review. As of the time of this writing, neither a motion for rehearing nor a petition for review has been filed. The technical deadline to seek rehearing is within 15 days of the court's opinion, but a motion to extend time may be filed anytime within 30 days of the opinion, and such motions are typically granted. The technical deadline to file a petition for review is 45 days after the court of appeals renders judgment or after all rehearing motions are ruled upon; motions to extend this time are usually granted.

Jim Hemphill is a shareholder at MLRC member firm Graves Dougherty Hearon & Moody, PC in Austin, Texas, and is co-chair of the MLRC DCS Litigation Committee. Neither he nor Graves Dougherty was involved in the Tatum *case. Plaintiffs are represented by Joe Sibley, Camara Sibley LLP, Houston. Defendants are represented by Paul Watler and Shannon Zmud Teicher, Jackson Walker LLP, Dallas.*

Expert Testimony on Journalism Standards Allowed in Actual Malice Case

By Wallace Lightsey

The South Carolina Court of Appeals recently affirmed a $650,000 libel verdict for the plaintiff against Sun Publishing Co., publisher of the Myrtle Beach-based *The Sun News*, and its reporter David Wren. Kelley v. Wren (Jan. 13, 2016).

In doing so, the appellate court casually, almost dismissively, affirmed the trial court's admission of expert testimony on standards of journalism and what the newspaper reporter "should have known," even though the plaintiff was a public figure and his claim was governed by the actual malice standard of liability. This decision puts South Carolina law at odds with court rulings across the country, and seems hard to square with the fundamental meaning of actual malice.

Background

The case concerned a series of articles written by Wren concerning various aspects of campaign contributions in the Myrtle Beach area that he believed appeared unethical. In one of them, Wren described a meeting of the president of the Myrtle Beach Chamber of Commerce with then gubernatorial candidate Gresham Barrett and the plaintiff, who is a registered lobbyist and former state legislator. The article stated that the Chamber president, "along with chamber lobbyist Mark Kelley [the plaintiff], delivered about $84,000 [in] contributions to Barrett" at the meeting. The plaintiff contended that the phrase, "along with," insinuated and was in fact construed by readers to mean that the plaintiff participated in delivering campaign contributions to the candidate, which is illegal under state law for lobbyists to do. The reporter contended that the phrase meant only that the plaintiff was with the chamber president at the meeting. It was undisputed that the plaintiff did not participate in or facilitate the delivery of contributions.

The appellate court casually, almost dismissively, affirmed the trial court's admission of expert testimony on standards of journalism and what the newspaper reporter "should have known."

In a pretrial ruling, the trial judge determined as a matter of law that the plaintiff was a public figure. During the trial, over the defendants' objection, the judge allowed the plaintiff to present testimony from a college journalism professor. Opining as an expert on standards of journalism and the application of the law of defamation to the facts of the case, the professor was allowed to testify that the newspaper did not act "in accordance with standards that would be followed by a responsible publisher" and that "the reporter knew or should have known that

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the reporting was false." The jury rendered a verdict for the plaintiff for $400,000 in actual damages and $250,000 in punitive damages.

The Court of Appeals affirmed. It found that there was sufficient evidence of falsity and malice for those issues to go to the jury. As to the admissibility of the professor's testimony, the appellate court held that the professor was qualified to give expert testimony, that his testimony assisted the trier of fact, and that his testimony was sufficiently reliable. This part of the Court of Appeals' opinion was pure *ipse dixit*, as the court did not provide any explanation of its reasoning at all. In addressing the argument that the professor's testimony was not relevant because it was based on a negligence standard, the court stated: "Although some of Dr. Lee's testimony concerned professional standards and whether Wren and Sun Publishing conformed to those standards, he focused primarily on whether the evidence indicated Wren had substantial doubt as to the truth of the statements he published or had a reckless disregard for their truth or falsity. Thus, the crux of Dr. Lee's testimony was that Wren knowingly published a false statement with actual malice … not that he should be held liable for deviating from professional standards."

The problem with the Court of Appeals' cursory analysis is that the journalism professor's opinion was predicated on a legally flawed understanding of what "reckless disregard" means, and consequently of what type of conduct can meet the standard of actual malice. In cross-examination on voir dire, the professor responded as follows:

The problem with the Court of Appeals' cursory analysis is that the journalism professor's opinion was predicated on a legally flawed understanding of what "reckless disregard" means.

> Q: Now, as I understood what you said you would testify to is whether The Sun News acted in accordance with standards a responsible news organization would follow; did I get that down correctly?
>
> A: Yes.
>
> Q: And you were asked if you would testify as to whether or not The Sun News knew or should have known its reporting was false?
>
> A: Yes.
>
> …
>
> Q: And knew or should've known, now that's not the actual malice standard, is it?
>
> A: You're incorrect. Should've known is an important part of reckless disregard of the truth.

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(Continued from page 16)

(emphasis added)

The underscored statement is blatantly wrong as a matter of law, and yet it formed the foundation of the professor's opinion that the defendants acted with reckless disregard of the truth. Based on his legally erroneous view of the actual malice standard, the professor testified to the jury as follows:

> Q: Have you reached an opinion in this case?
>
> A: Yes.
>
> Q: And would you state that opinion?
>
> A: In my opinion, there were indications to Mr. Wren that should have been paid attention to, which he did not. … I believe also that there is a problem in the way the information was processed at The Sun News. All of this leads me to conclude that The Sun News did not act the way professional news organizations act in these circumstances.
>
> (emphasis added)
>
> A: … Mr Wren and his editor should have paid the greatest attention to the sourcing of the story and the way it was written.
>
> (emphasis added)
>
> Q: Does the reporter – is the reporter supposed to look at the source and determine whether the source is biased and take that into consideration in writing an article?
>
> A: Clearly ...
>
> (emphasis added)
>
> Q: Was he careful?
>
> A: I don't believe so.
>
> (emphasis added)

This testimony espouses a standard of simple negligence. It was completely irrelevant to the issue of whether the defendants acted with actual malice, and could not have had any effect other than to confuse or prejudice the jury. Because the professor fundamentally misunderstood what "reckless disregard" means under the actual malice standard, the Court of

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Appeals was clearly wrong in holding that the testimony was relevant to whether the defendants acted in reckless disregard of the truth.

Courts from across the country have rejected expert testimony on standards of journalism and whether or not the defendant "should have known" that a falsehood was being reported as irrelevant and inadmissible where the plaintiff is a public figure or public official and must show that the defendant acted with actual malice. The definition of actual malice, as a matter of First Amendment jurisprudence, is that the defendant either knew the statement at issue was false or in fact harbored serious doubts about its truth. Thus, actual malice is determined exclusively by reference to the defendant's subjective beliefs about the truthfulness of the statement at the time of publication, not by comparing the defendant's conduct to some objective standard of due care. For this reason, courts from numerous other jurisdictions have rejected expert testimony of this nature in actual malice cases, finding that it is irrelevant to the issue of the defendant's state of mind, not helpful to the jury, and outweighed by the potential confusion as to the appropriate legal standard.

Moreover, the decision to allow such testimony creates a real and serious threat to the protection of freedom of speech and of the press provided by the actual malice standard. In effect, the admission of such "expert" testimony allows public figure plaintiffs to circumvent the intentionally demanding burden of proof inherent in the actual malice standard. It enables the plaintiff to confuse the jury as to whether actual malice may be based on the testimony of a journalism professor that a defendant deviated from "standards that would be followed by a responsible publisher" and that the defendant "should have known" that a false statement was being published.

The defendants intend to take the case to the South Carolina Supreme Court. Hopefully it will reverse the Court of Appeals and trial court and bring some clarity and cohesion to this area of the law in South Carolina.

As the Court of Appeals noted – with approval no less – the professor also went on to opine about what was in David Wren's mind – an area in which he clearly had no expertise or specialized knowledge that would be helpful to the jury:

> Q: Does it show that he was conscious of the fact that he didn't have the evidence?
>
> A: He would have to be.
>
> …
>
> Q: So, if he knew that he didn't have evidence and he printed it, that would be intentional on his part?
>
> A: Yes.

(Continued on page 19)

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The professor did not purport to be a psychic mind reader, or even a psychologist. There is nothing in his background or experience that gave him any special skill in psychoanalyzing the mind of David Wren, or that would make his speculation about what the reporter knew or believed helpful to the jury. Such expert testimony should not have been allowed, as the subject matter of the proffered testimony is within the ordinary understanding of the jury.

The defendants intend to take the case to the South Carolina Supreme Court. Hopefully it will reverse the Court of Appeals and trial court and bring some clarity and cohesion to this area of the law in South Carolina.

Wallace Lightsey is a partner at Wyche P.A. in Greenville, SC. He filed an amicus brief in this case on the expert witness issue. Plaintiff was represented by James P. Stevens, Jr. and Natalie Shawn Stevens-Graziani, Stevens Law Firm, PC, of Loris, SC. Defendants were represented by Jay Bender, Baker Ravenel & Bender, LLP, of Columbia, SC.

Recently Published

MLRC Bulletin: Report on Significant Developments

Including

TO GIVE FEES OR NOT TO GIVE FEES, THAT IS THE QUESTION (WITH A DIFFERENT ANSWER IN EVERY CIRCUIT)

The Circuit Split Over Attorneys' Fees Awards Under the Copyright Act

By Lincoln Bandlow and Rom Bar-Nissim

On January 15, the Supreme Court granted cert. in *Kirtsaeng v. John Wiley & Sons* to resolve a circuit split on interpreting the attorneys' fees provision of the Copyright Act.

11th Circuit Affirms Dismissal of Rosa Parks Institute Right of Publicity Claim

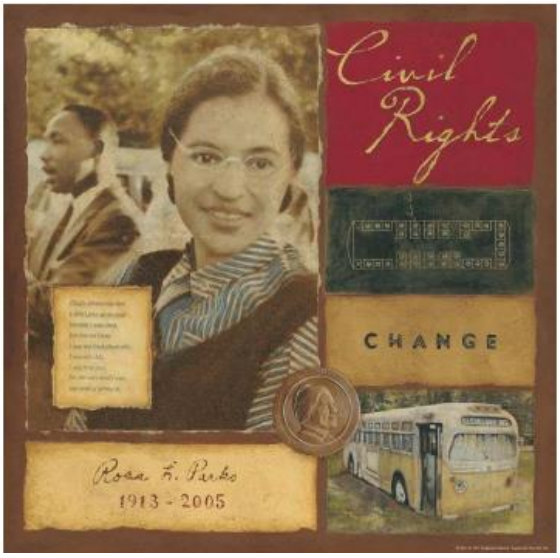
Books, Movie and Plaque Were Privileged

By Peter M. Routhier

The U.S. Court of Appeals for the 11th Circuit recently affirmed the dismissal of a right of publicity claim brought against Target Corporation by the Rosa and Raymond Parks Institute for Self Development. *Rosa and Raymond Parks Institute for Self Development v. Target Corporation*, No. 15-10880, 2016 U.S. App. LEXIS 7 (11th Cir. Jan. 4, 2016). The ruling is notable for its detailed explanation of a qualified privilege for communications on matters of public interest.

District Court Litigation

The Parks Institute is a 501(c)(3) non-profit based in Detroit, Michigan. It was co-founded by Rosa Parks in 1987 and claims that Ms. Parks's subsequently transferred her right of publicity to it. It has been involved in a bit of litigation in recent years, including with Rosa Parks's own heirs. *See, e.g., In re Rosa Louise Parks Trust*, Case No. 310948, 2014 WL 902359 (Mich. App. Feb. 20, 2014).



In late 2013 the Parks Institute sued Target in the U.S. District Court for the Middle District of Alabama, alleging violations of Ms. Parks's right of publicity. The complaint did not identify any particular allegedly infringing advertisement or product, and although Target consequently moved for a more definite statement, that motion was denied. In discovery, the Institute identified nine allegedly infringing items: seven books about Rosa Parks, a movie about Rosa Parks, and the *Civil Rights* plaque (pictured).

Target ultimately moved for summary judgment on all nine works, arguing that the case should be dismissed in its entirety because the works were privileged under Michigan law as concerning matters of public interest. In the alternative, Target sought to dismiss almost all of the claims on statute of limitations grounds as an application of the single publication rule. Target also sought, again in the alternative, to dismiss the Institute's claims for damages as impermissibly speculative.

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On February 9, 2015, the district court granted Target's motion for summary judgment, dismissing all claims on the basis of Michigan's public-interest exception to the right of publicity. *Rosa and Raymond Parks Institute for Self Development v. Target* Corporation, 90 F. Supp. 3d 1256 (M.D. Ala. 2015). In dismissing the claims against the books and the movie, the court cited previous Michigan cases rejecting life-story claims, holding that "[t]he depiction of Rosa Parks's life story without the Parks Institute's consent does not violate the Parks Institute's ownership rights."

In dismissing the claim against the plaque, the court cited Michigan state law for the proposition that right of publicity liability will not lie where a work has "a redeeming public interest, news, or historical value." *Id.* at 1264 (*citing Battaglieri v. Mackinac Ctr. for Pub. Policy,* 680 N.W.2d 915, 918 (Mich App. 2004)). Under this line of cases, because the Plaque indisputably concerned matters that are "historically significant to the fight for equality in the South," the plaque was deemed privileged as a matter of law.

The Appeal

The Parks Institute appealed, arguing that fact questions precluded the grant of summary judgment. In this vein, it is worth recalling the outcome of the last case addressing Rosa Parks's right of publicity—*Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003). In that case the defendants, who were involved with the production of the OutKast song "Rosa Parks," obtained summary judgment in the district court, but lost on appeal. The U.S. Court of Appeals for the Sixth Circuit held that there was a question of fact whether the title of the song was used in a protected manner or "solely to attract attention" to the work. Unlike in this *Target* case, the *LaFace Records* case was concerned not with a state law privilege, but instead focused on the direct application of the First Amendment under the *Rogers v. Grimaldi* test.

This case may well provide additional authority for litigants facing vexing questions at the boundaries of the right of publicity and the First Amendment.

Fortunately for Target, the Court of Appeals did not identify any fact questions necessary for resolving this newer Rosa Parks case. As the Eleventh Circuit held, Michigan law provides a "qualified privilege to report on matters in the public interest," and the question whether the privilege applies "presents a question of law" so long as the facts are undisputed.

In this case, "it is beyond dispute that Rosa Parks is a figure of great historical significance," and moreover, "all of the works in question 'communicate[] information, express[] opinion[s], recite[] grievances, [and] protest[] claimed abuses, . . . on behalf of a movement whose existence and objectives' continue to be 'of the highest public interest and concern'." *Rosa and Raymond Parks Institute for Self Development v. Target Corporation*, No. 15-10880, 2016 U.S.

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App. LEXIS 7 (11th Cir. Jan. 4, 2016) (*quoting New York Times Co. v. Sullivan,* 376 U.S. 254, 266, (1964)).

As a result, their use of Rosa Parks's name and image was "necessary to chronicling and discussing the history of the Civil Rights Movement—matters quintessentially embraced and protected by Michigan's qualified privilege." *Id.* The order of the district court was therefore affirmed.

In the course of rendering its opinion, the Eleventh Circuit provided an interesting discussion of the scope of Michigan's public interest privilege. For instance, it held that the privilege "is not a constant but varies with the situation and the importance of the social issues at stake." Moreover, while the court was careful to state that it was applying Michigan law, not federal constitutional law, it did also note that "[t]he rights to free speech under the Michigan and federal constitutions are coterminous." As a result**,** this case may well provide additional authority for litigants facing vexing questions at the boundaries of the right of publicity and the First Amendment.

Peter M. Routhier, an associate at Faegre Baker Daniels LLP in Minneapolis, MN, represented Target in this case. Plaintiffs were represented by Gwendolyn Thomas Kennedy, Montgomery, AL.

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Speech-Based Claims Against Australian Media Defendants Dismissed

New York Court Finds Lack of Personal Jurisdiction

By Katherine M. Bolger & Matthew L. Schafer

In January, Justice Jennifer Schecter of New York Supreme Court dismissed for a lack of personal jurisdiction a myriad of speech-based claims brought against two Australian-based reporters and their employers. *Den Hollander v. Shepherd*. The case reaffirmed that "there is no authority for subjecting [media] defendants to jurisdiction in New York based on articles published outside New York for a non-New York audience."

Background

The New York plaintiff, self-avowed anti-feminist Roy Den Hollander, brought a lawsuit for injurious falsehood, tortious interference, and *prima facie* tort, in addition to a single defamation count against one reporter, arising out of several articles regarding his attempts to teach a "Men's Studies" course at the University of South Australia. The plaintiff alleged that it was only after the challenged reports critiquing his views of women were published that the University canceled his course. The defendants moved to dismiss the case on multiple grounds, including for a lack of personal jurisdiction over the reporters and corporate defendants.

While they published the challenged reports to their websites, they affirmed that their websites were targeted to Australians—not New Yorkers.

On the jurisdiction grounds, the defendants argued that they lacked sufficient contacts with New York principally because none of the research for the articles was conducted in New York and no defendant ever intended to target New York with the articles. One reporter, for example, had only telephoned the plaintiff from Australia and exchanged emails with the plaintiff and another professor who also lived in New York. The other had not had any contacts with the United States at all in reporting her article.

Both Australian news organizations, *The Sydney Morning Herald* and *The Advertiser*, also lacked any meaningful contacts. While they published the challenged reports to their websites, they affirmed that their websites were targeted to Australians—not New Yorkers. Moreover, neither sold any physical product directly to New Yorkers. And, although one contracted with a third party to print copies of the paper in the United States, it had no control over where those copies were sold once they were printed.

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In response, the plaintiff argued that the newspapers had "global ties and ha[d] written articles about New York" in the past. He also asserted that the "allegedly defamatory articles were available on the newspapers' interactive websites . . . [that gave] the newspaper defendants a 'virtual office in the State.'" Finally, he moved for discovery to determine whether "defendants expected publication of the article to have consequences in New York," had any meaningful relationships with advertising representatives in New York, or paid taxes in New York.

Court Ruling

The court found that there was no jurisdiction over any defendant pursuant to the long-arm statute. First, the court explained that long-arm jurisdiction in defamation cases is limited to CPLR 302(a)(1), "which provides that a court may exercise personal jurisdiction over a non-domiciliary that 'transacts any business within the state' so long as the cause of action arises from the in-State activity." This grant of jurisdiction, the court cautioned, is "narrow" in defamation actions and should be construed so as to avoid "chill[ing] free speech."

"Placement of defamatory content on the internet and making it generally accessible to members of the public does not constitute transaction of business in New York even when it is likely the material will be read by New Yorkers."

Distinguishing several cases finding long-arm jurisdiction appropriate where nearly all the research was conducted in New York, the court found "in stark contrast, [that] defendants have very minimal attenuated New York contacts." Of the reporters, only one had any contacts at all which were limited to a phone call and emails. Such limited out-of-state contacts could not support jurisdiction under existing case law, which required—at the very least—that "the content in question was based on research *physically conducted* in New York."

The news organizations also lacked sufficient contacts. As to their websites, the court made clear that "placement of defamatory content on the internet and making it generally accessible to members of the public does not constitute transaction of business in New York even when it is likely the material will be read by New Yorkers." And even assuming that the news organizations' had advertising or distribution agreements with third parties, such contacts too were insufficient as they were not "substantially related to the defamation." For largely the same reason, the court then denied the plaintiff's motion for discovery.

The Defendants, Tory Shepherd, Amy McNeilage, Advertiser Newspapers, and Fairfax Media, were represented in this matter by Katherine M. Bolger, with the assistance of Matthew L. Schafer, of Levine Sullivan Koch & Schulz, LLP. The plaintiff, a lawyer, represented himself.

Defamation Suit Against Israeli Investigative Journalist Dismissed

Court Finds Lack of Personal Jurisdiction

A defamation lawsuit by New York plaintiffs against an Israeli investigative journalist and news magazine program was recently dismissed for lack of personal jurisdiction. *Mosdot Shuva Israel v. Dayan-Orbach*, No. 156173/2014 (N.Y. Sup. Dec. 31, 2015).

A New York property developer and affiliated religious charity sued Ilana Dayan, a well-known reporter for Uvda ("fact" in English), a 60 Minutes-style news program in Israel, over a news report questioning the operation of the charity. The news report was available online for a few days and viewed by a few hundred New Yorkers.

Among other things, the plaintiffs alleged that the report implied the charity was "a front for money and profit." As for suing in New York, plaintiffs alleged that Dayan and the news magazine traveled to New York for the report, made money from it, and thus were doing business in New York.

The court dismissed for lack of personal jurisdiction, holding that the program was not targeted to New York, and limited phone calls to New York and use of a videographer to provide shots of New York did not constitute transacting business in New York. Moreover, the complaint was also dismissible on grounds of forum non conveniens since Israel was a more suitable forum for a complaint over a Hebrew language broadcast by Israeli defendants and sources.

Defendants were represented by Charles Sims and John Browning, Proskauer, NY.

Judge: Defamation Claim Requires Mulling Islamic Law, Must be Dismissed

By Sarah Fehm Stewart

A state trial court judge dismissed an action by a Saudi Arabian resident against her half-sister in New Jersey that alleged a pattern of social media defamation because defendant's allegation that plaintiff engaged in sexual relations with many men would require the court and a jury to engage in interpretation of Islamic law. *Raghd Alashaal Faisal Alhusaini v. Malak Alshaal Faisal Alhusaini*, No. BER-L-5514-15. Plaintiff's complaint alleged that she was damaged in Saudi Arabia, which operates under Shari'a law.

Background

Plaintiff Raghd Alashaal Faisal Alhusaini, who at the time of the motion to dismiss had more than 300,000 Twitter followers as a self-proclaimed spokeswoman for women's rights in Saudi Arabia, sued her half-sister Malak Alshaal Faisal Alhusaini, herself with more than 2 million Instagram followers concerning her life in the United States, for conducting a defamatory "campaign" against Plaintiff on social media, including allegations that Plaintiff engaged in "*Misyar* marriages" which are, according to Plaintiff, "an untraditional type of 'marriage' practiced in countries like Saudi Arabia" and which are "frowned upon" and considered "fornication/unlawful sexual relations."

Judge Bachmann dismissed the action, partially on the grounds of unconstitutional religious entanglement.

Superior Court Decision

On January 6, 2016, Bergen County Superior Court **Judge** Keith A. Bachmann dismissed the action, partially on the grounds of unconstitutional religious entanglement, explaining: "In order for a jury to decide whether the defendant is liable to the plaintiff, a jury would have to understand what a *Misyar* is; and then decide whether the allegation would cause injury to the plaintiff's reputation; and then decide if the defendant can prove that the plaintiff committed *Misyar*. Whether or not it is defamatory to claim someone has engaged or is engaging in *Misyar* is a completely non-secular question and therefore this court cannot entertain a claim for defamation…"

Judge Bachman dismissed the remainder of Plaintiff's defamation claim with respect to allegations that she "should be thrown in the street by her husband for her immoral behavior", is of an "inferior social class" and had been "disowned" by her father. Judge Bachman found

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that these statements are all nonactionable opinion. He also dismissed counts for invasion of privacy, intentional infliction of emotional distress and prima facie tort as failing to state a claim, and domestic violence and extortion counts as not cognizable in his court.

The initial judge in the matter had signed an Order to Show Cause with Restraints against Defendant's speech and behavior that were challenged in the motion papers. Plaintiff's attorney, Abed Awad, Esq., of Awad & Khoury, LLP in Hasbrouck Heights, N.J., told the Court in a letter he intends to appeal and told one media report that he was not purely discussing *Misyar* marriage but an attack on his client's chastity .

Defendant was represented by Bruce S. Rosen and Sarah Fehm Stewart of McCusker, Anselmi, Rosen & Carvelli, P.C. in Florham Park, N.J.

Libel Suit Over Republication of Tweet Survives Motion to Dismiss

Court Declines to Apply "Own Words" Defense

Fans of hip hop music may know the back story to this defamation case, a 2012 nightclub brawl between singers Chris Brown and Drake and their camps allegedly over their romantic rivalry for pop star Rihanna. Media law practitioners got a fast education on the incident, courtesy of a recent New York appellate court decision dealing with a news report of the fracas that also contains a reminder that context matters when interpreting online speech.

The court held that the accurate quotation of part of a tweet could form the basis of a defamation claim by falsely implying that plaintiff, an aspiring DJ, was present during the fight and contemplated using his gun. The court also granted plaintiff leave to plead special damages to support his claim that his career was hurt by implying he would speak to the press about the goings on at trendy clubs. *Franklin v. Daily Holdings, Inc.,* 2015 NY Slip Op 08139 (1st Dept. Nov. 12, 2015).

At issue was an article published in the Daily, an iPad subscription newspaper created by a News Corporation subsidiary that lasted from 2010 through 2012. The article, entitled "Ri-Ri's Rumble," used allegedly fabricated quotes to portray plaintiff as giving an eyewitness account of the event, including the statement from his public Twitter account: "I was gonna start shooting in the air but I decided against it." The full tweet, however, read "I was gonna start shooting in the air but I decided against it. Too much violence in the hip hop community."

As to the alleged fabricated quotes, the court held that being placed at the scene of the fight was not defamatory on its face, but the court granted plaintiff leave to plead special damages to show that his career was hurt by the article. The accurately quoted tweet, however, stated a claim for defamation because "a reader could read the alleged defamatory statement in the context of the rest of the article and think that plaintiff was actually present in the club, prepared to shoot a firearm; whereas, a reader of plaintiff's isolated statement on Twitter may not have the same impression. In this unique case, the context of the two versions of the same statement is crucial."

Defendants argued the claim should be dismissed under the "own words" defense. *See, e.g., Thomas v Pearl*, 998 F2d 447, 452 (7th Cir 1993) ("party's accurate quoting of another's statement cannot defame the speaker's reputation since the speaker is himself responsible for whatever harm the words might cause"). The court noted that the "own words" defense has not been directly considered by courts in New York and concluded that "Even if we were to adopt the 'own words' defense, we find that it would not apply here where a comparison of the two statements reveals the potential for them to have different effects on the mind of the reader."

Plaintiff is represented by Neil B. Solomon, McLaughlin & Stern LLP, New York. Defendants are represented by Laura R. Handman and Deborah Adler, Davis Wright Tremaine LLP.

Reporter's Privilege Protects Newsgathering Information in Promotional Segment from Discovery

By Adrianna C. Rodriguez

A Magistrate Judge for the U.S. District Court for the Middle District of Florida-Jacksonville Division quashed subpoenas *duces tecum* to the News Director and Programming Coordinator of Gray Television Group, Inc., station WCTV-TV in Tallahassee, Florida, that sought production of a promotional segment and testimony about where and how many times the segment was broadcast under the First Amendment reporter's privilege. *James Michael Cohen v. Jeffrey McGuire, et al.*, Case No. 3:15-cv-00133-MMH-JRK (M.D. Fla.).

Background

Plaintiff James Michael Cohen was a police captain with the City of Jasper in Florida. He resigned his position in November 2013, and was arrested and charged with three felony counts of official misconduct, grand theft, and cheating. The charges were later *nolle prossed* by the State Attorney's Office. Cohen then sued the city, the chief of police and the city manager on various state and federal causes of action for false arrest and malicious prosecution. He alleged that the defendants damaged his reputation by "creat[ing] and disseminat[ing] a false and defamatory impression" about him and making reports about the criminal charges against him that "were false and stigmatizing."

On June 5, 2015, Plaintiff served subpoenas *duces tecum* for depositions directed to WCTV's News Director and Programming Coordinator seeking the production of "any and all materials" related to a segment referred to as "WCTV #1 Everywhere." In subsequent filings, he clarified that he sought a copy of the "WCTV #1 Everywhere" segment and information concerning how many times the segment aired and over what period of time.

The "WCTV #1 Everywhere" segment Plaintiff subpoenaed has nothing to do with him, or the news coverage related to his arrest—the incident that gave rise to his lawsuit. Instead, the "WCTV #1 Everywhere" segment informs viewers about electronic access to WCTV's news content and includes graphics depicting the news content available on the station's website and smart phone App. The graphic from WCTV's website used in the segment happens to be a screenshot taken on a day that a story about Plaintiff's case was featured on the station's homepage along with his mug shot. The screenshot is small, and the only legible content is the station's logo—WCTV.tv. Nevertheless, Plaintiff alleged that each time the segment aired he suffered pain, humiliation and damage to his reputation because people in the community "may have" seen it.

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Magistrate Judge's Order

On January 15, 2016, U.S. Magistrate Judge James R. Klindt granted WCTV's Motion to Quash Plaintiff's Subpoenas *Duces Tecum* for Depositions and for Protective Order in full. In the 7-page ruling, the Magistrate Judge rejected Plaintiff's attempt to limit the applicability of the reporter's privilege by characterizing WCTV's segment as not "genuine newsgathering information." He held that the qualified reporter's privilege applied to all newsgathering materials regardless of the medium in which they were disseminated. "Indeed, if the Court were to find that the journalist's privilege does not apply based solely on the method of dissemination of the information, journalists would be hard pressed to determine when they are able to rely upon the privilege and when they are not," wrote Magistrate Judge Klindt.

The "WCTV #1 Everywhere" segment containing screenshots of WCTV's homepage featuring a story about Plaintiff's and his mug shot.

In this case, the information in the screenshot of WCTV's homepage featured in the segment was the product of newsgathering, and the fact that it was presented in the segment did not take it outside of the protections of the privilege. The Magistrate Judge further held that the information about how many times the segment aired and over what period of time also fell within the reach of the reporter's privilege.

After finding that Plaintiff had failed to meet his burden to overcome the privilege, the Magistrate Judge quashed the subpoenas to WCTV's News Director and Programming Coordinator holding that "members of WCTV need not respond to the subpoenas or appear for the depositions."

On January 20, 2016, Plaintiff filed an Objection with the District Court seeking the reversal of the Magistrate Judge's Order. The Objection is pending.

Timothy J. Conner, Holland & Knight LLP, Jacksonville, FL, and Charles D. Tobin and Adrianna C. Rodriguez, Holland & Knight LLP, Washington D.C., represented Gray Television Group, Inc., WCTV-TV, its News Director and Programming Coordinator. David W. Collins, The Collins Law Firm, Monticello, FL, and David J. Finger, Miami, FL, represented plaintiff James Michael Cohen. Meagan L. Logan, Marks Gray, P.A., Jacksonville, FL, represented defendants Jeffrey McGuire, Charles Williams, and City of Jasper, Florida.

From the Next Gen Committee:

Wait, the FCC Regulates Political Speech?

By Joshua N. Pila

Unless you have consumed no media over the past few months (which would be odd considering the readers of this newsletter are "media" lawyers), you are well aware that the political advertising season has begun. What may come as a surprise (or a surprising reminder), however, is the level of control from statute that the Federal Communications Commission has over the content of political advertising. That's right, the "Communications", and not "Elections" Commission.

While FCC rules about "equal opportunities" (*e.g.*, Donald Trump on Saturday Night Live) or "lowest unit charge" steal the headlines, it's the FCC's political advertising sponsorship identification rules at 47 C.F.R. § 73.1212 that have a direct effect on government-enforced speech. This rule, which emanates from statutory authority granted by the Communications Act (as amended) at 47 U.S.C. § 317 requires: (a) a "paid for by" or "sponsored by" statement in each political advertisement, (b) a minimum size and timing of such disclosure, and (c) the exercise of "reasonable diligence" by a broadcaster to determine what or who must be listed as the sponsor in the advertising copy.

Like the Federal Trade Commission's rules and policies on sponsorship identification, the FCC's sponsorship identification rules are meant to alleviate potential consumer harm from not knowing the true sponsor of a message. One could argue for hours on whether a country with a proud history of the anonymous pamphleteer (*See, e.g.*, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995)) should have such a requirement at all.

Presuming for this article that a political advertising sponsorship identification requirement is justified under public policy and constitutional law, why is that requirement imposed upon broadcasters by the FCC?

Presuming for this article that a political advertising sponsorship identification requirement is justified under public policy and constitutional law, why is that requirement imposed upon broadcasters by the FCC? Indeed, the Bipartisan Campaign Reform Act ("BCRA") imposes distinct sponsorship identification requirements on federal candidates themselves - the actual speakers.

While broadcasters certainly are highly-regulated speakers under *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (however tenuous that may be in the present day), one would think that with entire government enforcement agencies dedicated to the political process (*i.e.*, Federal Elections Commission and similar state and local agencies) there would be no need for the government to require broadcasters to serve as its enforcers of speech in this area. Oddly,

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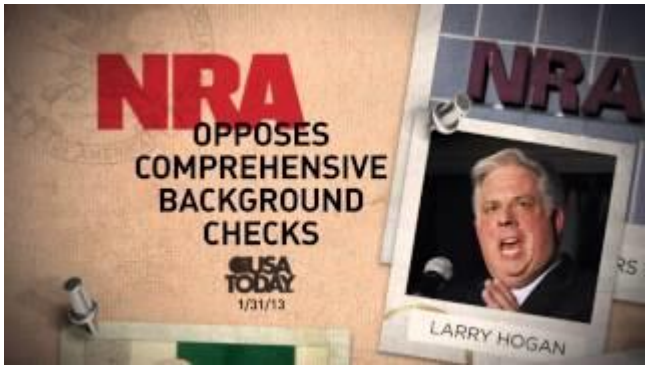

The Sunlight Foundation, Common Cause, and the Campaign Legal Center have jointly filed complaints against television stations and sent "warning" letters to others claiming they must ensure that advertisements for the Independence USA PAC list Michael Bloomberg, and not just the PAC, in sponsorship identification.

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however, some groups are asking the FCC to actually become more involved in the speech of broadcasters using this provision.

The Sunlight Foundation, Common Cause, and the Campaign Legal Center have jointly filed eighteen complaints against television stations and sent "warning" letters to at least 100 other TV stations claiming that television stations must ensure that advertisements for the Independence USA PAC list Michael Bloomberg, and not just the PAC, in sponsorship identification. You can read it about it in their own words at http://sunlightfoundation.com/blog/2015/12/10/sunlight-and-allies-file-another-round-of-complaints-against-tv-stations/. Full Disclosure: Two Meredith Corporation television stations received complaints and I will be defending the stations against those complaints.

The stations will surely provide a variety of legal and factual arguments in response to the complaints. The bigger picture argument for media lawyers is should the FCC even be a forum for such complaints? I leave you to ponder that.

Joshua Pila is the General Counsel of Meredith Corporation's Local Media Group. The opinions expressed herein are solely those of Mr. Pila and are not necessarily indicative of those of Meredith Corporation.

Middle District of Florida Unseals Competency Evaluation Report of Man Accused of Terrorism

By Timothy J. Conner

On January 25 the United States Court for the Middle District of Florida unsealed roughly 90 percent of a competency evaluation report of a man accused of a terror plot. Federal authorities have accused 20 year old Joshua Ryne Goldberg of Orange Park, Florida, of conspiring to have a pressure cooker bomb detonated at a 9/11 memorial event in Kansas City, Mo, in September 2015. *United States v. Goldberg,* No. 3:15-MJ-1170. He is charged under a criminal complaint with distributing information related to explosives, destructive devices and weapons of mass destruction.

Following his arrest, defense attorneys argued he was not competent to stand trial, and he was ordered to undergo an evaluation by a court appointed psychologist. The standard for determining whether a defendant is mentally competent to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and [if] he has a rational as well as factual understanding of the proceedings against him." *Johnston v. Singletary*, 162 F. 3d 630, 634 n.4 (11th Cir. 1988). Goldberg underwent an evaluation by Lisa B. Feldman, Psy.D., between September 2015 and November 2015. She issued a competency report and provided it to the Court and to counsel.

The media argued that the common law and First Amendment rights of access outweighed any alleged privacy interests asserted by Goldberg.

On December 14, 2015, the court held a hearing to determine competency, which was open to the public. Dr. Feldman testified regarding her findings, and her conclusion that Goldberg was not currently competent to stand trial. The court also received into evidence the competency evaluation report as Government's Exhibit No. 2. In its written Order the Court ruled "[a]fter hearing testimony from Dr. Feldman and reviewing the Government's exhibits, the court finds that Defendant is mentally incompetent to stand trial at the present time because he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."

At the competency hearing the defense requested that the Court place Dr. Feldman's report under seal. The court indicate it would temporarily place the report under seal, but directed the defense to file a motion to seal explaining the basis for sealing, for the United States to state its position on sealing the report, and invited other "interested parties" to submit any motion by

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December 29, 2015. The defense promptly filed an "unopposed" motion to seal, arguing that the entire report should be sealed as it revealed personal and private information about Goldberg that was protected by a right to privacy. The United States agreed, and filed no opposition.

Media Interests Intervene and Move to Unseal

A coalition of media interests filed a Motion to Intervene and Opposition to the Motion to Seal on December 29, 2015. The media argued that the common law and First Amendment rights of access outweighed any alleged privacy interests asserted by Goldberg. Although there is a little federal law directly on point, there are several important state court decisions which have addressed competency hearings and reports and the need for public access.

In one key case, *Poole v. South Dade Nursing & Rehabilitation Center*, 139 So. 3d 436 (Fla. 3d DCA 2014), the Court offered the following analysis:

> In forensic examinations, the person being examined is not seeking care and treatment. … In the instant case, the physicians were consulted for purposes of examinations only, not for treatment. The purpose behind the examinations was to assist the court in determining whether the defendant was capable of participating in the criminal process. Any reports resulting from such an examination are intended to be communicated outside the patient-physician relationship. Thus, they are not the type of patient's medical record generally entitled to confidentiality protection.

139 So. 2d at 441-442.

Other state courts have also found both competency proceedings and reports to be open. *See, e.g., State v. Chew*, 309 P.3d 410 (Wash. 2013) (*en banc*)("competency evaluations are presumptively open once they become court records"); *State v. Koch*, 169 Vt. 109, 730 A.2d 577 (Vermont 1999)(non-hospitalization order); *In re Times-World Corp.,* 488 S.E.2d 677 (Vir. App. 1997) (holding that documents which were admitted into evidence during a competency proceeding should have been open to the public); *Soc. of Prof. Journalists, Utah Chapter v. Bullock*, 743 P.2d 1166 (Utah 1997) (holding that pretrial competency proceedings in criminal cases may be closed only upon a showing that access raises a realistic likelihood of prejudice to the defendant's right to a fair trial); *Express-News Corp. v. MacRae*, 787 S.W.2d 451 (Tx. App.

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1990) (holding the examination and report were "criminal law matters" and thus it was error for trial court to deny media's motion for access to competency report).

In federal court, mental competency hearings have historically been open to the public in the absence of specific facts supporting closure. *United States v. Guerrero,* 693 F.3d 990, 1000-02 (9th Cir. 2012); *United States v. Curran,* 2006 WL 1159855 (D. Ariz. 2006)(unpublished); *United States v. Moussaoui*, 2002 WL 1311734 (E.D. Va. 2002)(unpublished). In *United States v. Guerrero*, 693 F.3d 990, 1000-02 (9th Cir. 2012), the Court ruled that the district court did not commit clear error by denying a criminal defendant's motion to close a competency hearing. The Court held that there is a clear qualified First Amendment right of access to mental competency hearings and "related filings."

The Court Unseals the Competency Report

On January 25, 2016, the Court held a hearing on the media's opposition to the sealing of the competency report. After hearing argument, the Court indicated that it planned to unseal a significant amount of the competency evaluation report immediately, and took a brief recess. Following the recess, the Court unsealed 90 percent of the report, and redacted the remainder. The redacted portions consisted mainly of portions that provide personal background information. The Judge indicated he wanted to consider the redacted material more carefully, and would issue a future ruling on whether it should be unsealed as well. The Judge stated, however, that he did not want to hold up release of the vast majority of the report while he considered the remaining portions, and that is why he went ahead and unsealed most of the report on the spot. The Judge actually hand redacted the information, made copies for counsel, and handed those copies out in open court, honoring the principle of "news delayed is news denied."

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Timothy J. Conner, and Jennifer A. Mansfield, Holland & Knight LLP, Jacksonville, FL, represented Morris Publishing Group LLC, d/b/a The Florida Times-Union, The Associated Press, Multimedia Holdings Corporation d/b/a WTLV/WJXX First Coast News, Graham Media Group, Florida, Inc., d/b/a WJXT News4Jax, and Cox Television Jacksonville, LLC, WJAX/ WFOX, and Edward L. Birk, Marks Gray, P.A., Jacksonville, FL, represented Graham Media Group, Florida, Inc., d/b/a WJXT News4Jax..

The Monthly Daily: A Roundup of Media Law Developments

By Jeff Hermes

As those of you who receive the MediaLawDaily might have noticed, we've been trying out some new ideas with respect to our daily newsletter. Knowing that not all of our very busy members have time to review all of the articles we hunt down every day, we've launched a new Saturday roundup edition with some of the key stories you might have missed.

Another thing we've discovered is that preparing the Daily is not only a great way to know what's going on day to day — it also places the MLRC in a unique position to think about changes and trends in the practice of media law. This article is the first in a new series that will step back from the torrent of stories that we cover to get a broader perspective, summarizing activity over the past month and starting to note some month-to-month observations that we hope will be of interest to our members.

Some caveats: This isn't a scientific report by any means — we're as subject to selection bias as anyone, if not more so because you're getting our sources' editorial choices filtered through our own judgment. Also, not all of the cases we'll mention below were actually decided in January; sometimes it takes a little while for matters to come to light. We're not dealing with general news about the business of media, labor issues, or international news, which are all big enough topics for their own articles. (The short-form update on International: Europe says it's concerned about privacy; China also says it's concerned about privacy while meaning the exact opposite thing; Facebook is still having problems convincing India it comes in peace; proceed at your own risk elsewhere.)

This article is the first in a new series that will step back from the torrent of stories that we cover to get a broader perspective, summarizing activity over the past month and starting to note some month-to-month observations that we hope will be of interest.

Still, we hope you'll find this interesting. And if you have any feedback, ideas for different ways we can slice this information, or other approaches that might be of use, please contact me at jhermes@medialaw.org.

Supreme Court

Intellectual property was the favorite topic of the petitions for cert we covered in January, with copyright battles over the Batmobile and Google Books knocking for admission, the Samsung/Apple design patent fight making its way up the steps, and rights of publicity at the line in *Electronic Arts v. Davis*. (I know, we here at the MLRC categorize rights of publicity as

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being privacy rights, but the modern doctrine has come a long way from the privacy-grounded right, and that's the real problem, isn't it?) The only traditional First Amendment petition we spotted was *Hodge v. Talkin*, dealing with federal laws prohibiting parades, processions, and assemblages in the Supreme Court building or on its grounds.

d copyright was the subject of the most notable grant of cert this month, with the Court welcoming Supap Kirtsaeng back for round two as he battles for his attorneys fees after winning a first sale doctrine case on his prior visit. The only other even vaguely media-related grant we flagged was the decision to take *Microsoft v. Baker*, in which an alleged problem with Xbox 360 discs spinning out of control has boiled down to the question of whether the Ninth Circuit had jurisdiction over the appeal of the case after the name plaintiffs dismissed their claims with prejudice. I know, exciting, right?

Meanwhile, the Supreme Court denied cert in a case that I was personally following, *Sam Francis Foundation v. Christies*. I know you were all chomping at the bit on this one, in which the Ninth Circuit knocked back California's attempt to regulate out-of-state art sales on a dormant commerce clause argument. But seriously, if you're at all interested in digital media, you'll want to watch what happens with the commerce clause in sunny Cali, where we've seen a seemingly endless stream of attempts to regulate the Internet with potentially national repercussions. Just me? Fine, be that way.

The court heard two First Amendment cases at the periphery of our usual concern, but did anyone expect *Reed v. Town of Gilbert* to turn out to be that important? (Certainly not me—I thought that the whole "content-based" thing was pretty clear way back in Police Dept. of Chicago v. Mosley—but there you go.) So, we had *Friedrichs v. California Teachers Association*, asking whether employees can be required to opt out of subsidizing union messages with which they disagree, and *Heffernan v. City of Patterson*, asking whether a public employee can be fired for a reason that is blatantly viewpoint-discriminatory when the employee doesn't actually hold the viewpoint ascribed (whoops).

Seriously, though, keep an eye on *Heffernan* because it's actually an interesting question: does the First Amendment protect only the affirmative exercise of rights, or does it restrain pernicious government motives in the abstract? It's almost as fundamental a question as that considered in my all-time favorite Supreme Court case, *U.S. v. Alvarez* (which saw a follow up case in the Ninth Circuit this month). If you want to get me talking, ask me about that one sometime, but be sure to bring a whiteboard.

We only flagged one actual opinion this month, *Campbell-Ewald v. Gomez*, in which the Court narrowly ruled that unaccepted settlement offer or offer of judgment to an individual plaintiff before class certification does not moot a potential class action. It's arguably media-related because the underlying claim involved alleged violations of the Telephone Consumer

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Protection Act, but more because the case dealt with a potential end-run around the privacy class actions that can plague digital media platforms.

Reporters' Privilege

It was a slow month for reporters' privilege issues. Subpoenas were quashed in Tennessee state and Florida federal court. There was a bit of a sticky issue for Bloomberg News in bankruptcy court in Delaware, involving an order that more than 100 people disclose information that they might have provided to Bloomberg about a bankrupt mining company. But the judge has realized the order was too broad, and hopefully this issue will resolve itself.

So, bullets (mostly) dodged. Onward.

Defamation

We've reported six new (well, new-ish, at least) defamation complaints this month. Four of the suits were against media defendants, with Al Jazeera America facing suit in D.D.C., Gawker and BuzzFeed in S.D.N.Y., and WBRZ-TV of Baton Rouge in the state courts of Louisiana. Maxim magazine raised some eyebrows by jumping to the other side of the v. and suing a couple of its own former employees in New York state court, claiming that they defamed the magazine in comments made to the New York Post. We're also counting a bar grievance filed by an irritated doctor against a Michigan attorney over a blog post, which seems to be an attempted end run around the relevant statute of limitations for libel claims and the opinion doctrine. (A bar complaint as an end-run around defamation law... wonder if my media policy covers that as a claim.)

Luckily, we're moving them out at the trial level just about as quickly as they're coming in, with six defamation suits (and one defamation-like claim) dismissed. Two New York state cases were kicked, with an Israeli journalist and an Australian newspaper slipping out the door on jurisdictional grounds. Three social media spats (in E.D.N.Y., W.D.N.C., and New Jersey state court) went nowhere, two for the usual reasons that social media spats don't belong in court, and one – the Jersey case – because it depended on interpretation of religious issues. E.D. Mo. dismissed an internet troll's lawsuit against Gawker for lack of personal jurisdiction, although a duplicate suit lives on in California. And a judge in W.D. Pa. gave Bill Cosby the first good news he's heard in a long time by dismissing a defamation claim by one of his accusers on the basis of opinion.

Although the dismissal happened earlier, this month also saw a Texas district court judge whack a defamation plaintiff with a $1 million sanction, plus $300K in legal fees, under the state's anti-SLAPP law. My enthusiasm is only tempered by the judge's willingness to blow

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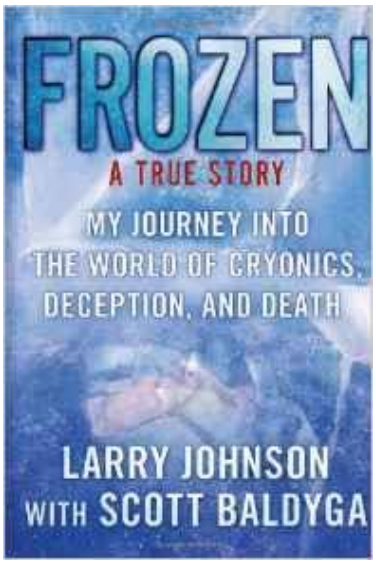
past the First Amendment in the other direction, with an order compelling the *plaintiff* to post admissions of fault and apologies with respect to statements made about *defendant*. And they were doing so well...



Alas, The Morning Sun didn't succeed in its motion to dismiss a libel claim by a Michigan attorney, which sued the paper over its coverage of another libel suit the attorney filed over a parody Twitter account. It's turtles all the way down, folks. The paper is taking the case up to the Michigan Court of Appeals. Other new appeals include a defendant's appeal to the First Circuit of a $14.5 million verdict over accusations of serial pedophilia, and an appeal in New York's state courts by a cryogenics facility over statements in a 2009 tell-all book (yes, the Ted Williams case).

And as far as appellate rulings go, January was, much like the weather, a bit bleak. The state appellate courts of South Carolina, Florida, and California all upheld plaintiff's verdicts, while a Texas appellate court reinstated a case that had been dismissed. We spotted only one appellate decision in favor of the defendant – a Wisconsin opinion affirming that the trial court lacked jurisdiction over an Australian newspaper...hmm.

Good month to be from Australia, I guess.

Privacy

Besides the looming cert petition of *EA v. Davis* discussed above, our old friend right of publicity was back in January with a bunch of new cases and rulings. We flagged five new complaints: one from N.D. Cal. where Darlene Love sued over the use of her voice in a Google smartphone ad; one from N.D. Ill., where a former college football player has sued fantasy gaming sites FanDuel and DraftKings; one from New York state court where a Queens woman sued the Associated Press over its sale of a photo of her in a hijab to the Washington Post; a class action from Cook County, Illinois (which might already have been dismissed) asserting that the mugshot racket is still alive and kicking; and a lawsuit in California state court by a former "Bachelor" against a dating site for using his image without permission.

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As far as ROP rulings go, we noticed an odd coincidence as two different federal courts down south were both called upon to apply Michigan state law. The Southern District of Florida allowed an appropriation claim to proceed against Shaquille O'Neal over a Twitter/Instagram post, finding that Michigan required little in the way of commercial value of the plaintiff's likeness or commercial purpose on the part of Shaq. Meanwhile, the 11th Circuit held – without considering the First Amendment – that Michigan's free speech guarantee overrode ROP claims regarding the use of Rosa Parks' name and likeness by Target in commemorative plaques and other media.

There were a smattering of other privacy-related cases worthy of note. A Texas appellate court carved down the damages in a revenge porn case from $500K to $345K, finding that the jury was wrongly allowed to award defamation-related damages when there was nothing "false" about the online posts at issue. The top court in Massachusetts held that cops with a warrant aren't limited as to where they can search on a smartphone.

Finally, Planned Parenthood filed an intrusion lawsuit against The Center for Medical Progress over its sting operation regarding the sale of fetal tissue donations. And another shoe was soon to drop for the would-be gotcha journalists, with the undercover videographers indicted for tampering with government records and trafficking in human organs in the course of their efforts.

Access/FOIA

There was quite a bit of activity around access to public records and proceedings this month. I'm going to stick to judicial and legislative developments, rather than talking about all of the delayed or incomplete responses to FOIA requests that we've reported. We're painfully aware that even a court win doesn't mean you'll actually get records in anything like a timely fashion, but other than noting that state and federal agencies are still playing fast and loose with their responsibilities, there's not much more to say on that point.

We reported nine new access lawsuits (including media interventions in existing suits) filed around the country. In New York, we had a New Yorker reporter suing over a 40-second delay and edits in the audio that the media were permitted to hear at Guantánamo Bay military tribunals, and news network NY1 fighting over a $36,000 charge from the NYPD to produce body cam footage. In Washington DC, Vice News reporter Jason Leopold filed two lawsuits, one over e-mails between the Solicitor General and Supreme Court justices and one about e-mails related to a controversial memo on drone strikes; a third D.C. case was filed by Citizens United over correspondence between Chelsea Clinton and the State Department. Meanwhile, media outlets sought access to a hearing in North Carolina, names of unindicted co-conspirators in New Jersey, an arrest affidavit in the case of a Planned Parenthood shooting suspect in

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Colorado (last-minute update: the Colorado Supreme Court ordered the trial court judge to justify his sealing of records in the case), and court records in the Orange Park terror plot case in the Middle District of Florida. One additional lawsuit worth mentioning: a putative class action lawsuit was filed in the Western District of Washington alleging that PACER systematically overcharges its users.

We saw nearly as many wins as we saw lawsuits. In the federal courts, the Orange Park case resulted in the release of most of a psychologist's report on the defendant; the Eastern District of New York granted access to a DEA surveillance tape; the District Court for the District of Columbia held that the FBI improperly withheld records regarding how it responds to FOIA requests; the Ninth Circuit held that Chrysler had to show a compelling interest (and not just good cause) to seal corporate records attached to filings in a products liability case; and the D.C. Circuit held that a one-man nonprofit run by an attorney could recover fees for winning access to CIA records. State courts ordered the release of stingray records in Illinois, mugshot photos in Montana, and teacher sick leave records in Colorado. The Attorney General of New Mexico opined that the state could not withhold the names of medical marijuana producers, and the Wisconsin Public Records Board revoked an earlier decision expanding the definition of "transitory" records that did not need to be preserved by officials.

It wasn't all positive. The Second Circuit held that the National Security Council is not an agency subject to FOIA. Lawyers for a death-row inmate sought last-minute en banc review of an Eleventh Circuit ruling denying access to information about Georgia's lethal drug protocols. The outgoing Attorney General of Kentucky issued a determination that private cell phones can be used by public officials for their official communications. A South Carolina judge ruled that a city solicitor's disciplinary records would remain public.

And it was much more of a mixed bag when it came to legislative developments in January.

The big story on the legislative side was the House's approval by voice vote of a federal bill to improve public access under the 50-year-old Freedom of Information Act. The bill would require agencies to make information available online, and to adopt presumptions in favor of openness over secrecy. The Electronic Frontier Foundation is also pushing Congress to insert what it believes to be a missing comma into FOIA exemption 7(E), which would have a dramatic effect on law enforcement records. Meanwhile, Massachusetts is struggling with public records issues, as transparency advocates in my home state try to keep reform measures from being eroded in the legislative process. Over the objection of local and national press, a Florida bill was unanimously passed that trades mandatory awards of attorneys' fees to successful plaintiffs for discretionary awards. But a spot of hope in Colorado, where an upcoming bill looks like it would expand access to judicial records.

When it comes to topical amendments to public records laws, law enforcement is the big issue, and body cams in particular. Indiana is advancing a measure to make campus police

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records public, while a bill relating to body cams is a step backwards for access. Illinois, on the other hand, is trying to speed up access to body cam footage, and Iowa's state public records board has appointed an outside prosecutor to handle a body cam case against state law enforcement. Elsewhere, bills in New Jersey and Hawaii are favoring secrecy over transparency with respect to body cams and, in Jersey, 911 calls.

Other topics of legislative activity included a measure to remove public employee names from a salary database in Virginia after someone tried to file bogus tax returns for about 1,500 state employees, another bill in Virginia to block access to information about fracking chemicals, a bill in Michigan to create an exemption for records dealing with energy infrastructure, and an effort in Florida to carve hunting and fishing license information out of the public record. Because you don't want the fish to know where you live.

Finally, journalists in Missouri and Virginia are decrying restrictions on access to the floor of their state senates — because it's always better for politicians that journalists report what they hear second-hand, right?

Newsgathering

Drones, drones, what to do about the drones? The FAA's registration program racked up 300K drone owners in its first month, and California in particular is looking at other measures, including requiring drone owners to have insurance. Meanwhile, the tech sector is sharing its own views on how to manage the skies as the lobbying process ramps up. On top of that, we reported not one but two lawsuits filed by drone hobbyists -- one in the D.C. Circuit challenging the FAA registration requirement, and one in W.D. Ky. arguing that drones can't trespass on private property if they're in airspace regulated by the federal government. Apples, meet oranges.

Border crossings were a bit tricky this month, with questions raised about a BBC journalist prevented from flying into the U.S. based on her dual UK-Iranian nationality, Sean Penn's jaunt to Mexico to interview El Chapo, and high stakes diplomacy resulting -- at long last -- in the return of Washington Post reporter Jason Rezaian and others held in Iran. Welcome home.

In other newsgathering news (this job is so meta sometimes), we spotted two new federal lawsuits over ag-gag laws. This time, Wyoming and North Carolina are in the spotlight. We also reported two situations where sources are under fire for speaking to the press, one an Air Force officer currently in the brig who might face discipline for speaking to the Air Force Times via telephone about his case, and the other a former DOJ lawyer facing ethics charges for leaking information about G.W. Bush-era domestic surveillance.

Arizona was the latest state to flirt with restrictions on recording the police; the proposed bill was quickly withdrawn. Meanwhile, in a District of Massachusetts case, a man charged with

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wiretapping for using his iPhone to film a police officer settled his civil rights lawsuit for $72,500.

I should read *Glik* again. Great decision.

Prior Restraint

Yes, they keep trying to issue them.

The Florida courts of appeal knocked down two: a gag order against Alki David arising out of some nasty texts and social media posts about business rival John Textor, and an order prohibiting the Palm Beach Post from publishing transcripts of recorded jailhouse phone calls. Meanwhile, a judge in E.D.N.Y. threatened the Brooklyn office of the U.S. Attorney with "severe remedies" if it continues to add language to its subpoenas purportedly prohibiting recipients from disclosing the existence of the subpoena.

We're still waiting to find out what's going to happen with a Louisiana state judge's plan to hold the press in contempt if they publish photos of an accused child killer in prison regalia, but we're fairly optimistic that the issue will resolve itself.

And we saw some quick backtracking in state legislatures. A Kentucky measure to ban social media posts after injury-causing events was introduced and then pulled three days later, with the state senator who proposed the measure seeking some cover with a claim that he just "wanted to start a conversation." A South Carolina bill to license journalists was also introduced and withdrawn in short order, with that bill's proponent claiming it was just a stunt to illustrate how differently First and Second Amendment rights are treated in our society. Oranges, meet apples.

Broadcast/Cable/Satellite

A busy start to the year at the FCC. We've got:

- the Charter-TWC merger triggering concerns from various parties;
- the upcoming spectrum auction in which small TV broadcasters (and Michael Dell) seem poised to make a killing while low-power TV stations lost an interim court battle to be allowed to participate;
- a $540K settlement with the former owner of a New Hampshire radio station for failing to identify the sponsor of 178 commercial announcements;
- a planned FCC vote on ad disclosure rules before the Iowa caucuses;

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- a metaphorical brawl between broadcast and pay TV lobbyists over retransmission consent rules;
- and Tom Wheeler's declaration that it's time to open up the market for set-top boxes.

Oh, and there's that whole net neutrality thing. But that's an issue we'll save for...

Internet/New Media

Throttling, data caps, and zero-rating were the net neutrality buzzwords this month, with T-Mobile particularly in the spotlight for its "Binge On" plan combining all of these issues (and what can only be described as an unwise decision to throw down with EFF over the service). The FCC had a "productive" chat with T-Mobile and Comcast about what has been going on. New bills introduced in the House would strip the FCC of authority to inquire into these issues; meanwhile, Senate republicans criticized the FCC's redefinition of broadband download speed to 25 Mbps as a power grab, and Republican FCC Commissioner Ajit Pai urged Silicon Valley to rethink support for net neutrality. In less controversial news, the FCC gave small ISPs another extension until December to comply with the transparency requirements of its Open Internet Order.

Hate, threats, and terrorism-related content online remains an urgent topic, with the challenges of dealing with terrorist recruitment revealing some deep fractures in how to approach these issues. Silicon Valley and the White House met for a high-level discussion of tactics, while tech companies also worked on their individual approaches. Complicating matters, Twitter was hit with a lawsuit by the widow of a man killed in Jordan, alleging that the site knowingly aided ISIS to spread its message.

Not much this month from some of our classic Internet issues, Section 230 and anonymity. We had a Section 230 loss in Connecticut Superior Court in a case involving forwarding screenshots of tweets by e-mail. Facebook is fighting a subpoena from the Republic of Kazakhstan in a CFAA case filed in the Eastern District of California, which threatens to expose the operators of a newspaper banned in the country. There was also an attempt in California state court to unmask a YouTube user who republished a critical TV news story about a dentist. Speaking of negative consumer attention, the federal Consumer Review Freedom Act, a bill to protect contributors on Yelp, TripAdvisor, and the like, received some positive press.

The controversy over the legality of fantasy sports sites continued to make headlines, with pending litigation in New York, regulations in Massachusetts, and legislation to regulate fantasy sports in California and to legalize some form of the game in Washington.

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Finally, there were a handful of social-media related cases of interest. A California appeals court struggled with the definition of a "social media site" in interpreting the conditions of a prisoner's parole. Another California appeals court affirmed the dismissal of contract claims against YouTube over the removal of content that the service determined to violate its anti-spam rules. A woman under a New York restraining order was found to have violated the order by tagging her sister-in-law on Facebook. And attorneys who obtained a non-monetary settlement with Facebook over purchases by minors on the site are seeking $1.25 million in fees. Well, I suppose they've got a better shot than I did with those PowerBall tickets.

Internet Privacy

Terrorism and law enforcement concerns continue to drive the encryption debate. We learned that ISIS has its own encrypted chat app, before learning that no, it really doesn't. Politicians have circled the issue without saying very much and still seem to expect magic from Silicon Valley, and both New York and California both saw bills designed to prevent strong encryption on smartphones. (See, this is why I keep an eye on the dormant commerce clause; by banning strong encryption on cell phones in New York, you automatically weaken the security of calls to or from other states. Does a single state have that power?) AT&T has washed its hands of the whole affair, letting Apple carry the standard.

Since we're talking about making communications available to the government, it's worth noting that we've passed the Jan. 31 deadline for a new US-EU safe harbor agreement. But it looks like the negotiators have at least pulled together a framework that will stave off immediate action in Europe.

Meanwhile, we're still sorting out the meaning of the Cybersecurity Act of 2015, slipped through Congress at the end of the year; there's already a push to repeal the law.

At the state level, we saw a late-January legislative campaign by the ACLU in 16 states and the District of Columbia to rein in government surveillance promises increases in employee and e-mail privacy, and curbs on the use of stingray equipment. More on that as it develops.

Court battles over control of personal information on social media and other online services rattled on. The Ninth Circuit upheld a class action settlement with Facebook of the use of user photos in ads, while in the Northern District of California, Yahoo settled a class action over targeting advertisements based on e-mail and Twitter escaped claims that it eavesdropped on direct messages. Two lawsuits in the Northern District of Illinois alleging violations of Illinois' biometric privacy law through use of facial recognition software reached different results on motions to dismiss; Shutterfly failed to escape a suit on substantive grounds, while Facebook escaped claims on jurisdictional grounds (although still facing a similar suit back home in California). Finally, the Third Circuit allowed a narrow invasion of privacy claim to continue

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against Google and others under California law, based on the companies' alleged circumvention of browser cookie-blocking settings.

Intellectual Property

Copyright

Good news for copyright lawyers in New York and California! We tracked six new complaints in each of the Southern District of New York and the Central District of California, and one each in D.D.C. and the Eastern District of Pennsylvania. The media involved run the gamut, including television (twice), feature films, digital video, news, music (twice), magazines, books, photographs, HD technology, and social media. Notably, there's a new suit against appropriation artist Richard Prince, who is at it again, and a celebration of 50 years of *Star Trek* intellectual property rights with a claim against a professional-quality fan film production. Alas, we might never know exactly what happened at the Battle of Axanar.

Courts were definitely favoring the alleged infringers this month. The Southern District of Florida allowed PissedConsumer to pursue a separate Section 512(f) action against Roca Labs for bogus DMCA takedown notices. The Southern District of New York put an end to an artist's claim against Starbucks, while the Second Circuit affirmed the dismissal of a claim against 50 Cent because the plaintiff filed suit too late. (This isn't the only limitations period case the 2nd Circuit considered in January — the appellate court also heard argument that a suit against Jay Z over "Big Pimpin" and other songs had missed the deadline.) The Southern District of California dismissed a lawsuit over 24 Village People songs. The Central District of California kicked out a lawsuit over Fox's "New Girl," and saw accused filesharing pirates win a class-action settlement from Warner Bros. and Rightscorp. And in the Northern District of California, Google and Waze fought off a claim over traffic hazard and speed trap data, while Judge William Orrick held that a crested macaque of some notoriety lacked standing to sue over his selfie picture. Too bad, Naruto.

Plaintiffs managed to eke out interlocutory victories in C.D. Cal. and D. Utah, with lawsuits being allowed to proceed over Katy Perry's dress in the former and customized hot rods in the latter. The Utah case was interesting for the district court's rejection of the *Zippo* test for jurisdiction based on the interactivity of a website, finding that the online world has become much more complicated since 1997 but that the classic jurisdictional tests still made sense. And in a case being watched closely by attorneys in Rivendell, the Ninth Circuit declined to rehear a decision from last October allowing Warner Bros. to assert contractual counterclaims in a long-running copyright battle over *The Hobbit* and *Lord of the Rings* with the Tolkien estate.

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There are also a couple of new copyright appeals to watch. Streaming service FilmOn X's multi-state battle against the networks is headed to the D.C. Circuit, after a district court judge allowed an immediate appeal of her ruling that FilmOn X is not eligible for a compulsory license. The appeal will give the D.C. Circuit an opportunity to weigh in on the issue, on which federal courts in California and New York are currently split. On the other side of the country, a screenwriter's copyright case against Elizabeth Banks over the movie "Walk of Shame" is headed to the Ninth Circuit after he walked out of the district court with his head hanging low.

In other copyright news:

The International Trade Commission is seeking en banc review of a Federal Circuit ruling that barred it from blocking the import of intangible data — an issue with major implications for enforcement of copyright by the agency.

Fox News was headed to trial this month in S.D.N.Y. over its use of an iconic 9/11 photo, after a fair use ruling that left a lot of us puzzled. (Where does it say that a fair use needs to be an original use? And can the district court's reliance on commercial use survive after Judge Leval's recent Google Books decision?) Late update: We've heard that the trial has now been continued to February 16, so we'll revisit this next month.

The U.S. Commerce Department has urged Congress to reform the Copyright Act to make damages awards more proportionate to the nature of the alleged infringement.

Legal scholars and others are weighing in on a case in D.D.C. over the copyrightability of proprietary building and safety codes incorporated by reference into binding laws and regulations.

Five years after the fact, U.S. Immigrations & Customs Enforcement quietly returned control of a hip-hop website to its owners after determining that ICE had no basis to believe there was infringement occurring.

Concerned about copyright trolling, an Oregon federal judge has drafted a standing order to help infringement defendants to find counsel.

With election campaigns in full swing, IP silly season is upon us. Mike Huckabee has argued that his rally with Kim Davis was a religious gathering, insulating him against infringement claims over his unauthorized use of *Eye of the Tiger*. Reminds me of the "In-A-Gadda-Da-Vida" gag from *The Simpsons*.

Patent

Turning to the other half of Article I, section 8, clause 8, patent plaintiffs didn't do all that well with media tech lawsuits this month. After a claim over comparison systems used in online search stumbled, the Federal Circuit upheld an award of attorneys' fees to the plaintiff in the first case to apply the Supreme Court's 2014 Octane Fitness ruling. The Federal Circuit also

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handed Google, Facebook, and AOL a win by affirming the invalidation of a patent for the gamification of online discount programs. And a patent troll who sued well-known troll slayer Newegg and then immediately dropped its case found that it couldn't escape so easily — Newegg hauled the troll back into court in the Central District of California in a declaratory judgment action.

Apple in particular is fighting patent battles on both sides of the v., with mixed results. In the Northern District of California, Apple won dismissal of an infringement lawsuit over video streaming. Meanwhile, in its role as plaintiff in its long-running fight with Samsung, Apple obtained a largely symbolic injunction prohibiting Samsung from selling certain cell phones that are no longer on the market. Lastly, patent troll VirnetX is taking a shot at Apple in a trial that just started in the Eastern District of Texas, alleging Apple's use of virtual private network and video-messaging tech is infringing.

Trade Secrets

Just a quick note that the Senate Judiciary Committee has passed an amended version of the federal Defend Trade Secrets Act.

This section is long enough, so I'll deal with trademark issues in…

Commercial Speech

A few trademark decisions of note this month. The repercussions of December's ruling in *In re Tam* continue to be seen, with the USPTO acknowledging before the Federal Circuit that its opinion on "disparaging" marks would apply to "scandalous and immoral" marks too. The 6th Circuit upheld a permanent injunction granted to Larry Flynt, ordering his brother Jimmy not to use the "Flynt" name for his adult retail store in Ohio without including his first name. The 9th Circuit affirmed dismissal of a claim by Adobe against an unauthorized software reseller, finding that the defendant's use of Adobe trademarks was nominative and that the software giant couldn't use trademark claims to assert bait-and-switch false advertising.

In the district courts, experienced trademark plaintiff Louis Vuitton was stymied by parodic use of its designs in a case in the Southern District of New York, with the judge finding humor in the shoulder-carried version of the old "My other car is a…" joke; LV now faces a motion for attorneys' fees. A religious dispute in the Chabad Lubavitch community transformed into a trademark fight in the Eastern District of New York, when two sects' disagreement over the identity of the Messiah was reflected in distinct but similar marks used in various publications; the court kicked out the case finding that confusion was unlikely, and that a delay of seventeen years before raising trademark claims was more than enough time for a laches defense to apply.

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A trademark plaintiff did have some luck in the Western District of Wisconsin, which allowed a trademark claim to proceed against General Electric after finding that GE's use of the Internet Archive's Wayback Machine to establish prior online use did not suffice at the motion to dismiss stage.

Recent false advertising cases were more successful. The FTC obtained a $2 million settlement from Lumos Labs, in an N.D. Cal. case over Lumos' promise that playing its video games could stave off cognitive decline. In a suit brought by holders of taxicab permits, the Southern District of Texas held that while many of Uber's statements about safety were puffery, some of them contained specific measurable assertions that could be falsified and that these statements constituted commercial speech targeting consumers. A New York judge held that the state had jurisdiction over a seller of magazine subscriptions that allegedly deceived consumers with offers that looked like renewal notices. The Southern District of California did dismiss a claim against Sea World alleging that its statements regarding its care for orcas were deceptive, because the complaint lacked any allegation that such statements were considered by visitors when buying tickets — but leave to amend was granted.

Three interesting rulings in professional speech issues, relating to attorneys and judges. The New York City Bar issued an opinion resolving a long-standing question regarding lawyers' LinkedIn profiles, finding that most do not count as attorney advertising. In Indiana, however, a bankruptcy lawyer was suspended for thirty days for claiming that he had been "screwing banks since 1992," which was found to be misleading. Finally, the 9th Circuit has upheld Arizona's limits on judges' soliciting donations and campaigning for colleagues. (That last one isn't really a commercial speech issue, I know, but it fits better here than anywhere else.)

Compelled speech was the subject of an order from the Northern District of California in a dispute over cell phone radiation warnings. The court has allowed the City of Berkeley to require retailers to display the warnings, subject to the deletion of one sentence regarding harm to children.

We'll close out this section with a judge trial in the Central District of Illinois against Dish Network over illegal robocalling. Four states and the U.S. Department of Justice are seeking more than $24 billion in penalties; the judge already determined that Dish made more than 55 million illegal calls.

Miscellaneous

Just about anything can show up in the MediaLawDaily's Miscellaneous section, but there are two topics we see fairly regularly.

Government licensing and funding of speech generated a number of recent court matters. The Second Circuit heard argument regarding the running of an anti-Hamas ad on New York

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City buses, with questions as to why the issue was not moot after the city withdrew its objection. The Fifth Circuit held that the Texas Film Commission did not violate the First Amendment in denying an incentive grant to the producers of the film *Machete Kills* based on its controversial content. The Eleventh Circuit overturned a ruling preventing the opening of a tattoo shop in Key West. Finally, the State of Idaho found itself in federal court after it tried to revoke Meridian Cinemas' liquor license for the chain's showing of Fifty Shades of Grey.

In the world of academia, University of Missouri professor Melissa Click, who called for "muscle" to help her drive a journalist away from a protest on the Mizzou campus, has been suspended and charged with third-degree assault. A state bill filed in reaction to the Mizzou protests would require free speech classes at Missouri colleges. In the latest of a long series of educational and judicial resources wasted by schools getting upset over student T-shirts, the Middle District of Tennessee held that the First Amendment protected a high schooler's right to inform others that "Some People Are Gay, Get Over It." But if you're a professional student, the Ninth Circuit has held that in some cases you can be kicked out of your program for expressing views that do not square with standards set by government authorities — a bad case perhaps making bad law, given that the issue involved a student in a secondary school teacher certification program arguing that online child predation should be legalized.

* * *

So, that's it for January. If you didn't see mention of a case you thought was important, or want to call our attention to trends that you're seeing, let us know and we'll keep an eye out next month!

Jeff Hermes is a Deputy Director of MLRC.