

  
**MEDIA LAW LETTER**

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Reporting Developments Through July 25, 2015

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## *From the Executive Director's Desk*

# **Ken Stabler: R.I.P. - and the Story of a Libel Case**

Kenny Stabler died last month at 69.

The obituaries duly noted his being named the NFL's most valuable player in 1974, his leading the Oakland Raiders to a Super Bowl championship in 1977, and his status as one of football's greatest quarterbacks not to be elected into the Hall of Fame. The obits also highlighted some of his great plays: that as a late game substitute in 1972 he led the Raiders to an apparent last minute playoff game touchdown before Franco Harris caught the Immaculate Reception allowing the Pittsburgh Steelers to snatch a miraculous victory (voted the NFL's greatest play ever); his "Sea of Hands" play, where his accurate pass in the midst of several Miami Dolphin defenders to his teammate in the end zone led the Raiders to a 1974 playoff victory; and, perhaps most typically, his "Holy Roller" play where, about to be tackled in the game's final minute, he intentionally fumbled the ball forward to his tight end, who recovered it in the end zone for a game winning touchdown – leading the NFL to change its rules to prohibit such a maneuver.



**George Freeman**

On the other hand, the obits didn't mention the allegations and investigations of the Snake's (his appropriate nickname) planting cocaine in the car of a sportswriter he didn't like, and the police being tipped off and arresting the poor journalist. (He was quickly released when the plant became apparent.) Nor did the obits mention his long-time association with a gambler linked to organized crime, and the libel case he brought against The New York Times for reporting it – my first big public figure libel case during my 31 year career there.

The first page article, published on August 30, 1981, was entitled "Pro Football's Ken Stabler Is Linked to a Gambler" and was written by two star national correspondents, both Pulitzer Prize winners. It reported on the many investigations of Stabler because of his continuing association with the gambler, making clear that such association was not illegal, but that it did run afoul of NFL rules.

A year later Stabler sued The Times in federal court in Houston (after the Raiders, he played for the Houston Oilers). He alleged that the article falsely suggested a "wrong and malevolent

**Bluntly, the allegation Stabler made was libel by implication – that The Times implied that he had fixed the game.**

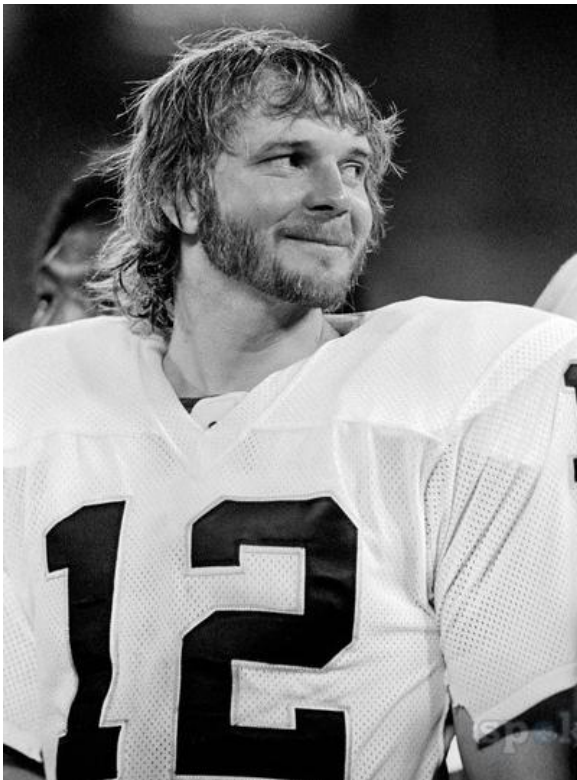
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connection with a known gambler.” But when later flushed out, the case hinged on a paragraph deep in the lengthy piece which said that the gambler was seen in the team’s hotel in New York the night before they were to play the Jets, suggesting that he may have seen Stabler then. The next sentences stated, “ The Oilers, who were favored, lost 31-28, in overtime. Four Stabler passes were intercepted.” Bluntly, the allegation Stabler made was libel by implication – that The Times implied that he had fixed the game.

I felt this juxtaposition was worrisome. My boss at the time – who didn’t know the first thing about football – pointedly asked why we had detailed the game result after this meeting, rather than after some other meeting where Stabler’s team triumphed. And if a judge or jury was to find that the defamatory implication did exist, it was unclear whether the implication had to be made with actual malice – many later cases say it does (see *Wayne Newton v. NBC*), but that wasn’t at all clear in the early 80’s.

The litigation became all the more troublesome after we lost a motion to dismiss. It was based on the unremarkable theory back then, well before the Internet age, that there was no jurisdiction in Texas because we didn’t have sufficient links with that state. But the judge found that enough issues of the paper did find their way into Texas – so discovery ensued.



**I said his withdrawal confirmed that our story was accurate – and then added, “I think Stabler was thrown for a loss on this one.”**

The critical moment came when Stabler was deposed. I remember going to Houston for the dep where our Debevoise & Plimpton team of John Koeltl, now a highly respected federal judge in the Southern District of New York, assisted by then-associate John Kiernan, now the head of Debevoise’s Litigation Department (and, as important, my weekend tennis partner for the past 25 years), skewered the unwilling witness.

Did he ever gamble, on horses or baseball games, he was asked. “My mammy and pappy told me never to gamble” was his non-answer. I also remember that about every 10 minutes Stabler’s lawyer would object to something, shouting in an aggressive drawl, “That might be

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the way you do it in New Yawk, but that's not the way we do it in Texas", as if a local jury was in the deposition room.

But I remember most vividly what happened after the end of the first day of deposition, when we informed Stabler that we intended to continue and that he would have to sit for a second day. He immediately called for a meeting with his lawyers – the upshot of which was that he agreed to drop the case with neither a money payment nor a correction.

Apparently he so much hated spending another day with lawyers – even his own – that continuing was unpalatable. Also I later learned that Stabler was at that time seeking a job in broadcasting (he was by then retired), and that his agent advised him that suing The Times (and NBC, which was the subject of similar claims) was probably not the best route to get a job in the media.

Enthused by this victory, I went down to my friends/clients in the Sports Department to suggest that a news item announcing this fine result was appropriate. They immediately cited me the Times rule that an article about the conclusion of a Times litigation can't run unless there had been an story about the case's filing. I replied that we had run a short item when Stabler filed suit against us.

So they then asked if I had a comment for the piece. As depicted in a short July 1985 sports article "Stabler Drops Times from a Libel Action", I said his withdrawal confirmed that our story was accurate – and then added, "I think Stabler was thrown for a loss on this one."

The next day, after the article had run, I was walking in the newsroom, and bumped into our esteemed Metropolitan Editor, a veteran of numerous Times political wars. "My, we're getting humorous in the Legal Department these days," he offered in a tone of disapproval (which I hoped might be mock-disapproval). Being a relative newbie, I probably betrayed a visage of fear. "Do you think I'm in trouble?," I asked. "No," he answered, pointing first to the desk of Executive Editor Abe Rosenthal and then to the top floor, where publisher Punch Sulzberger resided, "our bosses don't read the sports pages."

*We welcome responses to this column at [gfreeman@medialaw.org](mailto:gfreeman@medialaw.org); they may be printed in next month's MediaLawLetter.*



# Unsealing the Cosby Documents

## *Comedian Voluntarily Narrowed His Zone of Privacy*

By Gayle C. Sproul

An iconic comedian “voluntarily narrowed his zone of privacy” by donning the role of “public moralist,” according to the court in [\*Constand v. Cosby\*](#), 2015 WL 4071586 (E.D. Pa. July 6, 2015). By doing so, Bill Cosby substantially diminished his claim that “good cause” existed to keep under wraps discovery-related documents, including excerpts of his deposition, sealed ten years earlier at his request.

Andrea Constand, then the Director of Operations for the women’s basketball program at Temple University, claimed in 2005 that Cosby had sexually assaulted her at his home outside Philadelphia. When local prosecutors refused to charge Cosby with rape, Constand sued him for assault, battery and related torts. At the outset of the case, Cosby sought a broad sealing order, asking the court to rule that everything produced in discovery should be deemed

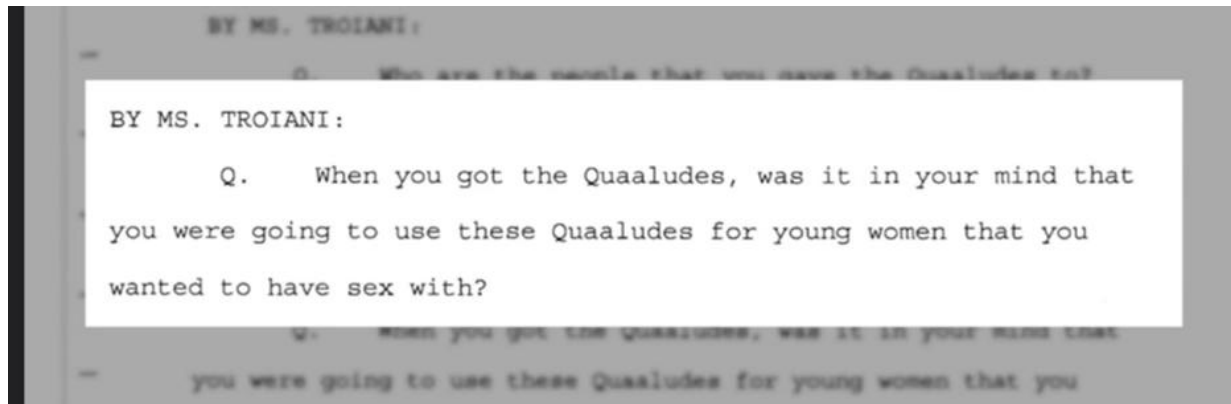


**An iconic comedian “voluntarily narrowed his zone of privacy” by donning the role of “public moralist,” according to the court in *Constand v. Cosby*.**

confidential. The Associated Press intervened, and the court declined to grant the protective order. Then, as discovery began, the parties became embroiled in disputes that resulted in the filing of discovery motions. Cosby asked that these motions and all related documents be filed under seal, and, over the objection of the AP, the court granted that request “without prejudice.” It ruled that the filed documents would be kept under seal temporarily until the conclusion of discovery, when a “full hearing” would be held to review the sealed materials on a document-by-document basis. Before discovery concluded, however, the case settled and the sealing of the documents was not revisited as the judge had expected.

Ten years later, new allegations of sexual abuse were asserted against Cosby as many more accusers came forward and at least one new lawsuit was filed. The AP, remembering the sealed documents in the *Constand* case, asked the court to implement its procedure under a local court rule which requires that documents under seal two years after the closing of a case be reviewed for unsealing. Why this was not done in the *Constand* case is unknown to the AP. Cosby objected to the unsealing and the court scheduled briefing and a hearing, asking the parties to pay particular attention to the analysis set forth in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994). In its submissions and at the hearing, the AP contended that good cause did not exist to maintain the seal on the documents

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under Rule 26(c) because Cosby had failed to demonstrate that he would incur “specific, cognizable injury from the dissemination” of the documents under seal.

Cosby relied upon his counsel to demonstrate his injury, who simply stated that the release of the material would be “terribly embarrassing” for him. Cosby also claimed that the non-exclusive *Pansy* factors – which include whether the material is sought for “a legitimate purpose,” whether the parties are public officials, whether the case involves matters of public importance and the extent to which the disclosure would violate the privacy of any person – all favored continued sealing. Cosby claimed he was a simple entertainer and impugned the AP’s motives in seeking the documents. The AP argued that Cosby was in fact much more than a comedian, and, much like the archetypal limited purpose public figure described in *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974), had thrust himself in to the vortex of the discussion of public morality. The AP argued that the court should take this into consideration in its analysis of the breadth of Cosby’s privacy interests and the public interest in and importance of the case.

In its 25-page opinion, the court concluded that no good cause remained for sealing the documents and ordered that each of the sixteen documents under seal be publicly filed, including motions for sanctions and to compel, and excerpts of his deposition testimony. The opinion contains several noteworthy and helpful passages:

- “Defendant has donned the mantle of public moralist and mounted the proverbial electronic or print soap box to volunteer his views on, among other things, childrearing, family life, education, and crime. To the extent that Defendant has freely entered the public square and ‘thrust himself into the vortex of th[ese] public issue[s],’ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974), he has voluntarily narrowed the zone of privacy that he is entitled to claim.”
- “The allegations (which are of course just that, and have not been proven) are already in the public domain. The Complaint is explicit in detail. A number of other persons have publicly alleged similar conduct on the part of Defendant in the media and in at least two

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pending civil actions. In turn, Defendant has responded publicly with denials as to the veracity of the claims and questioned the possible motives of his accusers. By joining the debate about the merits of the allegations against him, he has further diminished his entitlement to a claim of privacy.”

- “[T]he AP’s interest in obtaining Defendant’s depositions is legitimate. The purpose for which the deposition is sought (and surely will be distributed to the world) is not merely commercial gain or prurient interest in exposing the details of Defendant’s personal life. Nor is it simply a matter collateral to the issues in the lawsuit. Rather, the stark contrast between Bill Cosby, the public moralist and Bill Cosby, the subject of serious allegations concerning improper (and perhaps criminal) conduct, is a matter as to which the AP—and by extension the public—has a significant interest.”
- “Although of course intense media scrutiny into one’s private matters would almost always cause embarrassment, this is the type of general allegation that does not satisfy *Pansy*. Defendant has not specifically shown why his embarrassment would be ‘particularly serious’ at this time and in the context of this case. In short, Defendant has failed to show what specific and severe injuries he would suffer upon release of the deposition testimony at this time which he has not already experienced.”
- “Defendant contends that releasing the deposition testimony now would undermine the parties’ reliance on their private settlement agreement, in which, according to Defendant’s representation (as it has not been filed of record in this action), the parties agreed to keep all discovery material confidential. . . . Because Defendant did not seek the Court’s imprimatur on his intent to keep the Documents from ever seeing the light of day, his reliance that the discovery materials would remain out of the public eye was misplaced.”
- “Defendant argues specifically that releasing his deposition testimony now ‘would impact jury selection in [a] case currently proceeding against him in the District of Massachusetts.’ . . . But the specificity of the discovery material and the pretrial publicity does not explain what about Defendant’s deposition testimony will interfere with the selection of an impartial jury in the Massachusetts case. In other words, Defendant does not show why or how the Court’s release of additional documents here will overcome the district court’s ability to choose a fair jury.”

**The AP argued that Cosby was in fact much more than a comedian, and, much like the archetypal limited purpose public figure described in Gertz, had thrust himself in to the vortex of the discussion of public morality.**

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- “At bottom, it is not unfair to Defendant for the Court to unseal the Documents, including those portions of the deposition testimony that were filed in this case. Defendant is highly educated (he earned a doctoral degree from the University of Massachusetts). He is a successful professional, accustomed to performing in the public eye. He appeared at his deposition in a federal court case with able legal counsel who actively interposed objections and directed Defendant not to answer when he thought the questions were improper. At the end of this exercise, punctuated by vigorous verbal combat between counsel, what emerged from those portions of the deposition testimony that were filed with the Court is Defendant’s version of certain of the events surrounding this lawsuit--in his own words.’

Cosby had not sought a stay in the event that the motion was granted, and he did not get one. When the court released its opinion, it simultaneously unsealed the documents. Less than forty minutes after the opinion was issued, Cosby’s counsel wrote to the court, asking it to stay its order unsealing the documents so he could move for reconsideration. By the time that letter was emailed to the court, however, the documents had already been downloaded into the files of the AP and had become the basis for a breaking news story about Cosby’s testimony.

Cosby filed a notice of appeal on July 27th.

*Gayle Sproul is a partner in the Philadelphia office of Levine Sullivan Koch & Schulz, LLP, and she represented the AP in this matter, working with Brian Barrett, Assistant General Counsel at the AP, and Mara Gassman, an associate in the Washington, D.C. office of Levine Sullivan. Cosby was represented by Patrick J. O’Connor and George M. Gowen, III, of Cozen O’Connor in Philadelphia. Plaintiff Andrea Constand, who was represented by Delores M. Troiani of Troiani & Gibney, LLP, of Berwyn, PA, and Bebe H. Kivitz of Jacobs Kivitz & Drake, LLC, Philadelphia, did not appear in connection with this motion.*

## **MEDIA PRIVACY & RELATED LAW 2015-16**

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# Ex-Firefighter's Defamation Claim Extinguished

## "Kelly's Court" Segment on Disability Recipient Protected Opinion

By Steven Mandell and Natalie Harris

Former Milwaukee firefighter Aaron Marjala swam, biked, and ran himself into the center of a controversy about the Wisconsin state duty disability system. That system provides publicly funded lifetime benefits to firefighters who suffer permanent work-related injuries and can no longer perform their duties. At the age of 28, Marjala began collecting duty disability benefits for a permanent—but minor—elbow injury he suffered on the job. While the injury left him unable to lift ladders or tie rope knots, he continued to participate in vigorous physical activities including marathons, waterskiing, snow skiing and an Ironman triathlon.

Fox News picked-up Marjala's story from a piece broadcast on the local Milwaukee news and put it "on the docket" of *Kelly's Court* during the *America Live* program. The *Kelly's Court* segment is [available here](#).

*Kelly's Court* is a segment that features a mock-courtroom format with host and "judge" Megyn Kelly presiding over guest panelists who debate opposing sides of hot issues ripped from the headlines. This *Kelly's Court* segment focused on who should be held accountable when able-bodied individuals collect disability payments on the taxpayers' dime. On one side of the debate, New York attorney Lee Armstrong argued that healthy individuals—like Marjala—who choose to collect benefits when they are able to work bear some culpability for exploiting the system. In response, Fox News legal analyst Lis Wiehl defended Marjala, urging viewers not to blame him, but rather the broken system and the state of Wisconsin.

At the opening of the segment, Megyn Kelly declared *Kelly's Court* "in session" describing Aaron Marjala as the "Ironman too injured to fight fires" after he "banged his funny bone on a countertop in a kitchen at a Milwaukee firehouse." Kelly reported that Marjala sought a light duty job with the fire department, but with no positions available, the department gave him a choice—apply for duty disability or find another job. She explained that Marjala opted to apply for disability and doctors certified him permanently disabled, "opening the door to \$50,000 in disability payments, tax free." Kelly remarked that despite collecting benefits, "Marjala was able-bodied enough to run seven marathons and an Ironman triathlon," and introduced footage

**The court stressed that "the statements must be considered in light of the overall context in which they were made," and noted that the segment topic—Wisconsin's duty disability system—is an issue of public importance.**

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of Marjala being interviewed at a race finish line, acknowledging that he was only 15% paralyzed in his elbow area and suffered only “minor limitations.”

As the debate ensued, Armstrong remarked that there were other firefighters who were “genuinely injured, really hurt” but that Marjala appeared “sheepish” when describing his injuries during his television interview. Armstrong asserted that Marjala had “exploited his supposed injury” and suggested that there should “be an investigation” because “this guy should no longer get this money.” In response, Lis Wiehl reminded viewers that Marjala did request a desk job with the department and argued that “you really can’t say that he scammed the system.” Wiehl emphasized that independent doctors—not Marjala himself—declared him permanently disabled, likely because disability law requires doctors to consider activities a person cannot do, rather than what they can do. She cast the scenario as a classic failure of government bureaucracy.



Throughout the segment, Armstrong, Kelly and Wiehl smirked, snickered, lobbed sarcastic zings and shouted over each other to make their points. “Judge” Kelly ultimately sided with Armstrong, wondering aloud why Marjala should “be excused from the fraud.” Flanked by a gavel and the scales of justice, Kelly issued her opinion, concluding that “people [are] taking advantage of the system and it’s wrong.”

Marjala filed a defamation lawsuit in the circuit court of Milwaukee County against Fox News, Lee Armstrong and Megyn Kelly alleging that statements in the *Kelly’s Court* segment “falsely communicated to viewers that Marjala was not really injured at all, that Marjala deserved scorn and ridicule for even applying for disability status, that Marjala collected disability instead of working, even though he is physically able, and that Marjala had committed a crime.” (Marjala also named fire chief Robert Whitaker as a defendant based on statements Whitaker made in the separate story aired by the local Fox affiliate.)

Marjala specifically objected to several statements, including Megyn Kelly’s characterization of his ulnar nerve injury as “hitting his funny bone” and her assertion that he was “going to get this money for life, tax free” without mentioning that future earnings would

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be set off from his benefits. He also alleged that Megyn Kelly's rhetorical question accused him of committing fraud.

The Fox News defendants moved to dismiss Marjala's complaint arguing that the subject statements were either true or non-actionable opinion. The Honorable Judge Jeffrey Conen heard arguments and [issued an oral ruling from the bench on June 29, 2015](#). The court stressed that "the statements must be considered in light of the overall context in which they were made," and noted that the segment topic—Wisconsin's duty disability system—is an issue of public importance. Based on the "passionate, flippant nature" of *Kelly's Court*, Judge Conen concluded that "a viewer would not understand the segment to be hard news," and could independently judge for themselves "whether the defendants' opinions and comments were reasonable and make up their own mind about the duty disability system and Mr. Marjala's receipt of the benefits."

Finally, while the court acknowledged that the facts did not flatter Marjala, the segment did disclose "the full factual background about his injury and about the receipt of duty disability" upon which Armstrong and Kelly based their opinions. The court ultimately dismissed Marjala's complaint with prejudice, finding that "the statements do not imply that Mr. Marjala lied about his injury or that he has committed a crime, rather the defendants' comments called into question Mr. Marjala's moral decision to accept benefits which he's legally entitled [to] even though he's capable of performing count[less] other jobs."

*Steven P. Mandell and Natalie A. Harris of Mandell Menkes LLC, Chicago, IL represented Fox News Network LLC, Lee Armstrong and Megyn Kelly. Aaron Marjala was represented by Michael Hart and Craig Powell of Kohler & Hart, S.C., Milwaukee, WI. Fire Chief Robert Whitaker was represented by Bradley Matthiesen and Timothy Pagel of Matthiesen, Wickert & Lehrer, S.C., Hartford, WI and Peter Farb of Law Offices of Thomas P. Stilp, Milwaukee, WI.*

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# Single Publication Rule Bars Former American Idol Contestants' Libel Suit

## *Online Articles Are Not Perpetually Actionable Under Tennessee Defamation Law*

By Brittany Berckes

The Sixth Circuit affirmed dismissal of libel and related claims brought by two former *American Idol* contestants, holding their claims were barred by the single publication rule or otherwise improperly pled. [\*Clark v. Viacom\*](#), No.14-5709 (6<sup>th</sup> Cir. July 8, 2015) (applying Tennessee law) (unpublished).

### Background

Plaintiffs Corey Clark and Jaered Andrews were both contestants on the second season of *American Idol* in 2002. Both were dismissed as contestants in the late rounds of the show – Clark for allegedly failing to disclose a prior arrest; Andrews for allegedly being at the scene of an assault for which he was later charged and acquitted. Numerous media outlets reported on their departure from the show. As recently as 2011 and 2012 MTV News discussed their departure stating that Clark “was disqualified for lying about a hairy domestic dispute” and Andrews “was sent home over undisclosed assault charges.”

Clark and Andrews sued Viacom, owner of MTV, for defamation, false light, and negligent hiring and retention, disputing MTV’s accounts of their departures. The Tennessee district court dismissed, finding the complaint was untimely and failed to state a claim.

### Single Publication Rule

On appeal, plaintiffs argued that the MTV articles caused a continuing wrong to them, e.g., that statements published on the internet are “immortal” and may continue to be viewed by third parties possibly in “perpetuity.” Second, plaintiffs argued alternatively that the MTV articles were “republished” to restart the limitations period.

The Sixth Circuit readily dispatched the first argument because Tennessee courts have never recognized continuing defamation. The limitations principles may bar a libeled plaintiff from recourse, even where the libel continues to cause reputational harm. Additionally, the continuing tort doctrine generally applies where a plaintiff’s injury is caused by cumulative exposure over time to instances of conduct that do not individually cause a detriment. In the case of reputational injury, the damage may generally be traced to a discrete cause occurring at

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an identifiable moment in time: the publication to a third party of a harmful statement. Thus, the Court concluded that under Tennessee law defamation claims turn upon individual instances of publication rather than upon a generalized or cumulative effect, therefore the continuing tort doctrine does not apply to defamation claims.

In addition, online statements are not perpetually actionable under Tennessee defamation law solely because they continue to be available online. In 1973, Tennessee joined the majority of states in adopting the “single publication rule.” Under the single publication rule, any mass communication that is made at approximately one time is construed as a single publication of the statement it contains, thereby giving rise to only one cause of action as of the moment of initial publication, no matter how many copies are distributed. The Court held that the single publication rule extends to online publications, rejecting plaintiffs’ contention that it only applies in the print domain. Citing the policy considerations behind the single publication rule, the court found that “it would be highly unusual” if the rule did not apply to the online context. Indeed, “the possibility of defamation liability would hover over any publicly available online statement regardless of its age as long as a plaintiff could find a third party who had not previously seen it. That, as a functional matter, would make the statute of limitations irrelevant in the online defamation context.”

As for republishing the statements in question and restarting the limitations period, the Court acknowledged that the republication doctrine can be complicated in the online context. For example, “Difficult questions arise with respect to online statements that were initially published only to limited audiences – perhaps behind a paywall, or available only to social media users privileged to access the posting, or available only through a fee or privilege based application or other content delivery system – and then later disseminated to a wider group of third parties or the general public.”

But statements posted to a generally accessible website are not republished by 1) a third party’s posting the statement elsewhere on the internet; 2) passively maintaining the website to which the defamatory statement is posted; 3) failing to remove a statement after receiving notice of its falsity; 4) adding an unrelated story to the web page that hosts the statement; 5) creating hyperlinks to previously published statements; 6) revising other information at the URL at which the allegedly defamatory statement is found, but leaving the statement itself intact; 7) updating a website’s user interface to give visitors additional avenues to access the allegedly defamatory statements; and 8) changing the URL at which the allegedly defamatory statement was posted.

**Online statements are not perpetually actionable under Tennessee defamation law solely because they continue to be available online.**

*(Continued on page 15)*

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This is consistent with the “traditional touchstone of the republication doctrine: that the test of whether a statement has been republished is if the speaker has affirmatively reiterated it in an attempt to reach a new audience that the statement’s prior dissemination did not encompass.”

Here there was no republication because there were no substantive alterations to the news articles.

### **Failure to Allege Falsity**

The Sixth Circuit also affirmed dismissal of defamation claims which fell within the statute of limitations for failure to plausibly allege falsity. Plaintiffs objected to statements saying they were “disqualified,” “booted,” and “sent home” by *American Idol*. They did not allege that these statements were false, but disputed the rationale given by *American Idol* for doing so. “The complaint, in other words, has alleged that FOX did exactly what Viacom said that it did. Properly construed, plaintiffs’ complaint does not fail a test of truth; instead, it fails the law of non-contradiction.”

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# New York Court Reduces Damage Award for Libelous Online Review

## *\$125,000 Award Cut to \$100*

A \$125,000 damage award for a defamatory review posted to the online complaint website ripoffreport.com was reduced on appeal to a mere \$100. [\*Lynn & Cahill v. Witkin\*](#), 2015 NY Slip Op 06020 (N.Y. App. July 9, 2015).

In a typically short and terse New York appellate court decision, the panel wrote “The evidence does not support an award of more than nominal compensatory damages or any punitive damages.”

The [New York Law Journal](#) reported the interesting backstory to the case. Plaintiff is a New York lawyer. The defendant is a television news producer and a disgruntled former client. Defendant posted an anonymous and lengthy diatribe on ripoffreport.com. Under the heading “John R. Cahill Should Be Disbarred For His Grossly Unethical Conduct,” the defendant said, among other things, that plaintiff was “a confidence man, a bully, unethical, sleazy, dangerous, a rotten egg, irrational, and a greedy, crazed and irrational nutjob.” Defendant also wrote that plaintiff is “a gambler operating on the edge of the law, crossing the line when he feels necessary, and preying upon victims like myself and other consumers who do not have the resources to expose his misconduct and shut him down.”

At the time the review was written, defendant was being sued by plaintiff for unpaid legal bills connected to trusts and estate litigation. After the review appeared plaintiff added a claim for defamation.

Defendant defaulted on the defamation claim, but appeared at an inquest on damages after which the trial court awarded plaintiff \$75,000 in compensatory damages and \$50,000 in punitive damages, finding the review was libelous per se and made with an “intentional deliberate malevolence.” See [\*Lynn & Cahill v. Witkin\*](#), (N.Y. Sup. 2014).

The appellate court affirmed liability, fining that plaintiff had no excuse for failing to timely answer the complaint but that only nominal damages of \$100 were warranted.

In an interview with the New York Law Journal, plaintiff appeared to acknowledge that he had no proof that he lost any business because of the posting. Defendant’s pro bono lawyer opined that “The ruling stands for the proposition that you can’t presume actual damages on a defamation claim, even when there is a finding of per se defamation, or a default by the defendant.”

*Plaintiff was represented by Cahill Partners LLP, New York. Defendant was represented by Karen Chesley, Boies, Schiller & Flexner LLP, New York.*

# Oregon Court of Appeals Strikes SLAPP Suit Against TV Station

## *No Likelihood of Success on Negligence and Emotional Distress Claims*

Negligence and emotional distress claims brought by a prison guard and his wife over a news report that showed the guard outside his home were dismissed on appeal under the Oregon anti-SLAPP statute. [\*Mullen v. Meredith Corp.\*](#), dba KPTV, 271 Or App 698 (2015). The court held the claims fit squarely within the scope of the Oregon anti-SLAPP law, since the news report involved a matter of public concern, and plaintiffs failed to demonstrate a probability of success on their negligence and emotional distress claims where no special relationship existed between the parties and no physical injury occurred.

### Background

At issue was a news report about gunfire in plaintiffs' neighborhood in Salem, Oregon. The guard alleged that he allowed a KPTV reporter to cover the story and film from his property on condition that his image not be used in the news broadcast because he had received death threats from current and former inmates and needed to keep his home address private.

The initial evening news broadcasts did not include the guard's image, but a subsequent morning news report was recut for a different reporter and that version showed plaintiff outside his home for several seconds. The guard alleged that colleagues and multiple inmates saw him on television and one inmate told plaintiff he now knew where he lived. Plaintiffs immediately moved out and put their home up for sale.

Plaintiffs sued defendants for: (1) breach of contract, based on the promise not to show plaintiff in the news report; (2) negligence, based on the broadcast of plaintiff's image; and (3) negligent and intentional infliction of emotional distress.

Defendants moved to strike the negligence and emotional distress claims under the state's ant-SLAPP law, [ORS 31.150](#). The trial court denied the motion reasoning that while a report on gunfire was a matter of public interest, using the guard's image in the news report was not. The trial court wrote that defendants "could have easily reported the news of the shooting without filming" plaintiff.

### Appellate Court Decision

In an issue of first impression, the appeals court held that the trial court erred in so narrowly interpreting the scope of the anti-SLAPP statute. The statute applies to "any claim in a civil

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action that arises out of ... [a]ny other conduct in furtherance of the exercise of ... the constitutional right of free speech in connection with a public issue or an issue of public interest.” The trial court, however, erroneously focused on whether plaintiff was a public figure whose identity could be a matter of public interest. This “inquiry into whether the specific speech at issue was somehow necessary to the public’s understanding of the story being broadcast exceeds the scope of the statutory inquiry.” The court further explained that “Narrowing the reach of the anti-SLAPP statute to claims that arise only out of conduct that is necessary to free speech rights would narrow its reach beyond what the legislature intended.”

### **Negligence and Emotional Distress Claims**

Turning to the merits of the tort claims, the appellate court held that plaintiffs failed to show a probability of success where they suffered no physical injury and had no special relationship with the defendants outside of the alleged contract. The claim for negligent publication was an interest that could be recoverable in contract.

Similarly, absent physical injury, the claim for negligent infliction of emotional distress failed because there was no special relationship between the parties other than the alleged contract. As the court explained:

Here, defendant Hanharan and plaintiff were strangers to each other before the agreement, which was limited to the term that defendants could come onto plaintiffs’ property if they agreed not to air plaintiff’s likeness. That agreement did not form a special relationship; defendants were not acting as plaintiffs’ agents, and plaintiffs did not relinquish control of matters to defendants that required them to exercise independent judgment on plaintiffs’ behalf. That is so because plaintiffs could not relinquish control of an activity—filming, editing, or broadcasting a news report—that they never had in the first place. Thus, defendants did not owe a heightened duty to plaintiffs that would support a claim for noneconomic damages absent a personal injury.

Likewise, the claim for intentional infliction of emotional distress failed where there was no evidence defendants intended to harm plaintiffs. “At most, defendants unreasonably failed to make all of their employees aware of the promise made to plaintiff and to prevent the harm that could follow from breaking that promise.”

*Duane A. Bosworth and Derek D. Green of Davis Wright Tremaine LLP, Portland, OR, represented the media defendants. Plaintiffs were represented by Rick J. Glantz, Vick & Glantz, LLP.*

# Appeals Court Reverses Denial of Publisher's Anti-SLAPP Motion in "Shoot on Sight" Libel Lawsuit

By Paul C. Watler and James McFall

A libel suit by an unsuccessful candidate for the U.S. Senate who told the *Dallas Morning News* ("The News") that immigrants should be "legal, lethal targets" for south Texas ranchers must be dismissed, according to a recent opinion by the Fifth District Court of Appeals of Texas. [\*Dallas Morning News, Inc. v. Mapp\*](#), 05-14-00848-CV, 2015 WL 3932868 (Tex. App. —Dallas June 26, 2015, no. pet. h.)

The candidate, Christopher Mapp, sued the newspaper over an editorial endorsing U.S. Senator John Cornyn in the 2014 Republican primary. The appellate court held that reporting that Mapp told the newspaper that immigrants should be "shot on sight" was a reasonable interpretation of his remarks and that Mapp failed to show a false statement was published about him with actual malice.

## Background

*The News'* editorial board interviewed Mapp and another candidate seeking the 2014 Republican nomination for the seat of Senator Cornyn. The incumbent was interviewed on another occasion. During the interview, Mapp identified immigration as one of his "top three platforms," described his stance on immigration as "very hard," and advocated a "seal, defend, and protect" policy for our Southern borders. Among other things, Mapp stated:

As far as our borders go, we can give immigrants a choice.

*We can either ask them to respect our borders by choice or they can respect them by force. It's obvious that choice has not been working out so well.*

The other part of this is since 9–11, it's really important we know who you are, why you're here, and how long you're staying and what your intentions are. So we already have border crossings. *You will only use those border crossings. If you do not use those border crossings, you are a legal, lethal target. If a*

**The court held that reporting that Mapp told the newspaper that immigrants should be "shot on sight" was a reasonable interpretation of his remarks and that Mapp failed to show a false statement was published about him with actual malice.**

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*rancher in South Texas is afraid for immigrants who come—illegal immigrants who come across his property, in fear of his life, he has the right to defend his property just like anybody else that has trespassers on their property. And the problem with the porous border is we’re not getting just illegal immigrants from South America all the way down, but we’re also getting the drug cartel coming through there.*

Mapp went on to refer to illegal immigrants as “wetbacks” and President Obama as a “socialist son of a bitch.”

Days after the interview, *The News* published an editorial endorsing Senator Cornyn in the 2014 Senate Republican primary. The editorial contained a single comment referring to Mapp:

South Texas businessman Chris Mapp, 53, told this editorial board that ranchers should be allowed to shoot on sight anyone illegally crossing the border on their land, referred to such people as “wetbacks,” and called the president a “socialist son of a bitch.”

Two weeks later, Mapp sued *The News*, contending that the editorial defamed him. In response to Mapp’s lawsuit, *The News* filed a motion to dismiss under the State’s anti-SLAPP statute, Chapter 27 of the Texas Civil Practice and Remedies Code, alleging that Mapp’s lawsuit was based on, related to, or in response to *The News*’ exercise of its right of free speech and that Mapp could not meet his burden of establishing by “clear and specific” evidence a *prima facie* case for each element of his claim.

A hearing was held on May 23, 2014, and a ruling was required by statute within 30 days. *The News* twice wrote letters to the trial judge to remind her of the 30-day statutory deadline. When the trial court did not rule by the deadline, *The News*’ motion was denied by operation of law and *The News* perfected an appeal. Ten days later, outside the statutory time period, the trial judge signed a written judgment granting *The News*’ motion, dismissing the case with prejudice, and awarding *The News*’ attorneys’ fees.

### Analysis

The court addressed whether the “shoot on sight” statement attributed to Mapp was defamatory or published with actual malice. Mapp admitted that he told the editorial board that immigrants illegally crossing the border should be considered a “legal, lethal target.” However,

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Mapp asserted that *The News* materially changed the meaning of his statements by ignoring “significant qualifiers” regarding the use of force by ranchers when they are “afraid” or in “fear for their life.” *The News* argued that the editorial is substantially true as a matter of law because “there is no ‘material distinction’ between saying a person should be ‘shot-on-sight’ and that a person is a ‘legal, lethal target.’” *The News* also contended that Mapp failed to establish that the shoot-on-sight statement was published with actual malice.

The Fifth Court of Appeals agreed with *The News*, holding that Mapp failed to present *prima facie* evidence that *The News* acted with actual malice in attributing the shoot-on-sight statement to him. Relying heavily on the Texas Supreme Court’s *Freedom Newspapers of Texas v. Cantu* decision (168 S.W.3d 847, 853 (Tex. 2005)), the court found that, considering all of the evidence presented, and in particular, Mapp’s remarks as whole and in the context in which they were made, *The News* did not publish the shoot-on-sight statement with actual malice because the editorial was a rational interpretation of what Mapp actually said.

In contrast to Mapp’s comments referring to illegal immigrants as “wetbacks” and President Obama as a “socialist son of a bitch,” the shoot on sight statement was not placed in quotation marks. The court found “[b]y not placing the particular offending phrase in quotation marks, the editorial signaled to its readers that he or she was reading a paraphrase and not the verbatim words of the speaker.” (slip op. at 12 citing *Cantu*, 168 S.W.3d at 854).

Moreover, uncontroverted affidavit testimony from *The News’* editorial writer who interviewed Mapp and wrote the editorial established that he believed the shoot on sight statement was a “fair, accurate and truthful paraphrase” of Mapp’s comments in the interview based on his immediate mental impression of the statement.

The Fifth Court Appeals also determined whether the trial court erred in allowing the motion to be denied by operation of law. The Court held that the trial court erred by denying *The News’* motion by operation of law. Accordingly, the court reversed the trial court’s denial of *The News’* Chapter 27 motion to dismiss, rendered judgment dismissing Mapp’s claims, and remanded the case to the trial court for a determination of costs, attorneys’ fees, and other expenses as authorized by statute.

*Paul C. Watler, a partner at Jackson Walker L.L.P. in Dallas, and James C. McFall, an associate, were counsel for the Dallas Morning News.*

**“By not placing the particular offending phrase in quotation marks, the editorial signaled to its readers that he or she was reading a paraphrase and not the verbatim words of the speaker.”**

# Texas Court of Appeals Reverses Wiretap Conviction

## *Coach Had No Privacy Interest in Locker Room Talks*

In an interesting non-media case, a Texas appellate court ruled that secret recording of a high school coach's locker room talks to his team was not a violation of the state's criminal wiretap statute because the coach had no reasonable expectation of privacy under the circumstances.

[\*Long v. Texas\*](#), No. 08-13-00334-CR (Tex. App. June 30, 2015)

The victim of the taping, Lelon "Skip" Townsend, is a self-described "intense" girl's high school basketball coach. The defendant, Wendee Long, is the mother of a former team member. Townsend allegedly berated and belittled his players. Presumably to expose him, Long had her daughter hide an iPhone in a gym locker to record his half-time and end of game speeches. Long later sent copies of the tape to school board members.

Long was charged with violating Texas' wiretap statute which prohibits recording electronic or oral communications made with a reasonable expectation of privacy under the circumstances. She was convicted following a jury trial and sentenced to five years' confinement, probated for three years, and fined \$1,000.

**"A public high school coach—like a public high school teacher—is an educator, in the broadest sense of the word."**

### **No Reasonable Expectation of Privacy**

Reversing the conviction, the Court of Appeal held the coach had no reasonable expectation of privacy under the circumstances. The court relied on case law from around the country holding that public school teachers have no expectation of privacy in the classroom. The court explained that "a public high school coach—like a public high school teacher—is an educator, in the broadest sense of the word.... [S]ociety is not willing to recognize that a public school educator—whether a teacher or a coach—has a reasonable expectation of privacy in his or her instructional communications and activities, regardless of where they occur, because they are always subject to public dissemination and generally exposed to the public view."

# Developments in the Emerging Law of Butt Dialing

By Lynda Hils Mathews and John C. Greiner

We've all either placed one or received one – the inadvertent cell phone call, often referred to as the “butt dial.” Perhaps it's not surprising that the federal courts have been called upon to weigh in on this phenomenon. The most recent decision comes via the United States Court of Appeals for the Sixth Circuit. And it does not clarify the law quite yet. See [\*Huff et al v. Spaw\*](#), No. 14-5123 (July 21, 2015).

## Background

James Huff was Chairman of the Kenton County, Kentucky, Airport Board (Airport Board), which oversees the Cincinnati/Northern Kentucky International Airport (CVG). In October 2013, he traveled to Bologna, Italy with his wife, Bertha Huff, and with Airport Board Vice Chairman Larry Savage to attend a business conference. Carol Spaw worked at CVG as Senior Executive Assistant to the airport's CEO, Candace McGraw, and as liaison to the Airport Board. Her work responsibilities included making travel arrangements for board members.

After a conference meeting on October 24, James Huff and Savage went on an outdoor balcony in their hotel to speak about CVG personnel matters, including the possibility of replacing Candace McGraw as CEO. While on the balcony, James Huff tried to call Spaw's personal cellphone using his iPhone to ask her to make dinner reservations for him and Savage. The call did not connect because James misdialed Spaw's number. After this unsuccessful attempt, James placed the iPhone in his suit's breast pocket. Savage then successfully called Spaw's office phone using his personal cellphone and had her make reservations. After this phone call, Savage and Spaw hung up their respective phones.

Soon thereafter, while James Huff spoke with Savage about CVG personnel matters, the iPhone in James's suit pocket placed a pocket-dial call to Spaw's office phone. Spaw answered and could hear James Huff and Savage talking, but she could not understand what they were saying. She said “hello” several times but got no response. Spaw then put the phone on speaker mode to enhance the volume and said “hello” several more times. Within ninety seconds, Spaw determined that Huff and Savage were discussing McGraw's employment situation and that the call was not intended for them.

**We've all either placed one or received one – the inadvertent cell phone call, often referred to as the “butt dial.”**

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Spaw began to take handwritten notes of the conversation. Spaw claims that she believed that she heard James Huff and Savage engaged in a discussion to discriminate unlawfully against McGraw and felt that it was her responsibility to record the conversation and report it through appropriate channels. The pocket-dial call lasted approximately 91 minutes, during which Spaw listened continuously.

James Huff and Savage spoke on the hotel balcony about CVG personnel matters for approximately the first 40 minutes of the pocket-dial call. The two board members then left the balcony to attend a meeting in a conference room. Spaw stayed on the line and asked a co-worker to obtain an iPhone from the CVG IT Department with which she could record the call. The meeting in the conference room ended approximately 70 minutes into the call. James Huff and Savage left the meeting room and walked back to their respective hotel rooms. Along the way, Spaw heard them talking about innocuous subjects such as their children's activities, taking a nap, and evening plans. Approximately 75 minutes into the call, James Huff returned to his hotel room where his wife, Bertha Huff, awaited him. In addition to speaking about personal family matters, James and Bertha Huff discussed the contents of James's earlier conversation with Savage. Spaw used an iPhone obtained from the CVG IT Department to record the final four minutes and 21 seconds of the conversation between the Huffs.

After the call ended, Spaw converted handwritten notes that she made into a typewritten summary. She also transferred the iPhone recording to a thumb drive, which she gave to a third-party company to enhance the audio quality. She eventually shared the typewritten summary and the enhanced audio recording with other members of the Airport Board.

On December 3, 2013, Bertha and James Huff filed a Verified Complaint alleging that Spaw violated Title III by intentionally intercepting their oral communications, in violation of 18 U.S.C. § 2511(1)(a); disclosing the contents of intercepted oral communications, in violation of 18 U.S.C. § 2511(1)(c); and using the contents of intercepted oral communications, in violation of 18 U.S.C. § 2511(1)(d). The district court granted summary judgment to Spaw on January 24, 2014, holding that Title III does not protect the Huffs' conversations because any expectation that their conversations would not be intercepted was not reasonable under the circumstances.

**Speaking to a person who may carry a device capable of intercepting one's statements does not constitute a waiver of the expectation of privacy in those statements.**

### **Sixth Circuit Opinion**

The Sixth Circuit affirmed the trial court's ruling as to James Huff, but reversed as to Bertha Huff. In the appellate court's view, the threshold issue was whether the Huffs had a reasonable

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expectation of privacy in their conversations. That necessitated a two part inquiry: (1) whether the Huffs exhibited an expectation of privacy and (2) whether that expectation was reasonable.

The first part of the test requires more than an internal belief in privacy. Rather, one must exhibit an intention to keep statements private. A person fails to exhibit an expectation of privacy if he exposes those statements to the “plain view” of outsiders, or if he fails to take steps to prevent exposure to third parties. James Huff failed this test. In the appellate court’s view, “[b]ecause James Huff placed the pocket-dial call to Spaw, he exposed his statements to her and therefore failed to exhibit an expectation of privacy with respect to those statements. ... Exposure need not be deliberate and instead can be the inadvertent product of neglect. Under the plain-view doctrine, if a homeowner neglects to cover a window with drapes, he would lose his reasonable expectation of privacy with respect to a viewer looking into the window from outside of his property.”

James Huff admitted in his deposition that he was aware of the risk of making inadvertent pocket-dial calls and had previously made such calls on his cellphone, but he employed no measures to prevent such calls from happening (such as locking his phone with a password). In the court’s view, this made James Huff “no different from the person who exposes in-home activities by leaving drapes open or a webcam on ....” He thus exhibited no expectation of privacy.

The trial court had extended this logic to Bertha Huff. In its view, because Bertha Huff knew that her husband owned a cellphone and that cellphones were capable of inadvertently transmitting conversations to third-party listeners via pocket-dial calls, she lacked a reasonable expectation of privacy in her face-to-face conversation with her husband in their hotel room on the basis of this awareness.

The Sixth Circuit was unwilling to go that far. It found that speaking to a person who may carry a device capable of intercepting one’s statements does not constitute a waiver of the expectation of privacy in those statements. In its view, “[t]he district court’s holding would logically result in the loss of a reasonable expectation of privacy in face-to-face conversations where one party is aware that a participant in the conversation may have a modern cellphone. As nearly every participant in a conversation is a potential cellphone carrier, such a conclusion would dramatically undermine the protection that Title III grants to oral communication.”

The case will now return to the trial court for a determination whether the recipient of an inadvertent call “intentionally intercepts” the call by continuing to listen and or record it. And so the law of butt dialing will continue to evolve.

*Lynda Hils Mathews and John C. Greiner are lawyers with Graydon Head & Ritchey LLP, Cincinnati, OH.*

*From the MLRC Next Gen Committee*

# **Is the Right to Be Forgotten Among Our Unalienable Rights?**

**By Erin E. Rhinehart**

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

- Declaration of Independence, July 4, 1776

It is doubtful that our founding fathers ever considered whether one's "pursuit of happiness" includes the right to be forgotten. Yet, American jurists now find themselves in the midst of a moral and legal quandary – should people have the right to be forgotten? Last year our friends across the pond answered in the affirmative. In May 2014, the European Court of Justice (ECJ) held that Europeans' fundamental right to privacy encompasses the "right to be forgotten." *Google Spain SL et al. v. AEPD et al.*, No. C-131/12 (May 13, 2014). The repercussions of the decision have been, and continue to be, phenomenal. Europeans are overwhelming Google with takedown requests; First Amendment scholars debate fiercely whether the United States should recognize a similar right; and media lawyers grapple with how best to advise their domestic clients when someone seeks to have outdated or embarrassing content removed from the Internet. Indeed, in early July, a non-profit consumer rights group, Consumer Watchdog, petitioned the Federal Trade Commission (FTC) to enact a domestic version of Europe's right to be forgotten, arguing that it is necessary for Google to protect the privacy of consumers.

While the U.S. struggles with the right to be forgotten, Europe seems to have embraced it. In June, France's Commission Nationale de l'Informatique et des Libertés (CNIL) ordered Google to apply the "right to be forgotten" takedown requests to all of Google's domain names, including Google.com. As the volume of personal information online abounds, and the ease with which we can access information from a variety of sources intensifies, the issue of whether the U.S. should recognize a right to be forgotten will persist. But, where should the U.S. land on the issue?

The United States Supreme Court has the opportunity to consider the right to be forgotten in *Martin v. Hearst Corp.*, 777 F.3d 546 (2d Cir. 2015), *petition for cert. filed*, No.14-1301 (April 28, 2015). In *Martin*, the petitioner, seeks to clarify whether traditional First Amendment law

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should be altered when it comes to digital defamation claims. While it is unlikely that the Supreme Court will accept certiorari, the issue of whether a publisher is required to takedown an article referring to a criminal act that was accurate when published, but has since been expunged, sealed, or “erased” under applicable state statutes, is one of importance to online media.

### ***Martin v. Hearst Corporation* Makes Its Way Through the Second Circuit**

In 2010, petitioner Lorraine Martin, a resident of Greenwich, Connecticut, was arrested on various drug charges. Hearst Corporation, and its local news outlets, published reports of Martin’s arrest. There is no dispute that the original publications were accurate at the time they were published. In 2012, pursuant to Connecticut’s “Erasure Statute” (General Statute §54-142a), the charges against Martin were dismissed. Under the Erasure Statute, all records of the arrest are “erased,” Martin is deemed to “have never been arrested,” and Martin may swear under oath that she was never arrested.

Following the state court’s dismissal of her charges, Martin (like many others in her situation) requested that the media remove all references to her arrest from their website. The media refused to take down the content. Martin filed a lawsuit alleging libel, false light, negligent infliction of emotional distress, and invasion of privacy. The case was removed to federal court, and the United States District Court for the District of Connecticut found that the state’s Erasure Statute did not render the prior publications false. *Martin v. Hearst Corp.*, 3:12CV1023 MPS (D. Conn. Aug. 5, 2013).

Martin appealed to the Second Circuit, which affirmed. The appellate court found that the publications were true regardless of when published because the Erasure Statute did not render them false as a matter of historical fact. *Martin v. Hearst Corp.*, 777 F.3d 546, 551 (2nd Cir. 2015) (“The [Erasure] statute creates legal fictions, but it does not and cannot undo historical facts or convert once true facts into falsehoods.”). The Second Circuit also found that the media’s reporting of the plaintiff’s arrest without an update “implies nothing false about [Martin].” *Id.* at 553. In April, Martin filed a petition for certiorari with the Supreme Court.

**Toggling between the future of First Amendment law and over fifty years of precedent, Martin struggles to find her stride in her petition to the Court.**

### **Martin’s SCOTUS Petition Struggles to Find Its Stride**

Toggling between the future of First Amendment law and over fifty years of precedent, Martin struggles to find her stride in her petition to the Court. Her argument, ironically, rests on

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a false premise – the “falsity” of the 2010 arrest. Petition, pp. 25, 28. Martin concedes – as she must – that “the truth or falsity of a statement for purposes of libel cases is judged as of the date of publication.” *Id.* at p. 21 n.7 (citations omitted). Connecticut, like most states, requires a statement to be false to be actionable as defamation. *Id.* at p. 9 (citations omitted). “Truth provides an absolute defense to defamation.” *Id.* Notwithstanding this well-established principle of defamation law, Martin argues that what is “true” can be redefined under the law, including defamation law.

No opposition or waiver was filed on behalf of Hearst Corp., and the case has been set for conference this September. While it would be helpful to hear from the Justices on these issues, the Court is unlikely to grant certiorari. All courts appear to be in agreement that the First Amendment protects the media defendants’ publication of Martin’s 2010 arrest. Recognizing this potentially fatal flaw, Martin argues that “[a]t least one court has answered ‘yes’ when faced with a similar set of facts.” Petition, p. 12 (citing *Lamon v. Butler*, 44 Wn. App. 654 (Wash. 1986), *aff’d*, 110 Wash. 2d 216 (Wash. 1988)). The court in *Lamon*, however, was not presented with a similar set of facts, and no other case is cited by Martin as analogous, or creating a Circuit split. In *Lamon*, the allegedly defamatory article was published *after* a court dismissed the plaintiff’s assault conviction, and the article failed to mention the dismissal because, while the reporter knew of the dismissal, she testified that she failed to understand the effect of the dismissal. 44 Wash. App. at 657-659. In other words, the article was not accurate when it was published – a key distinction from the article at issue in *Martin*.

**All courts appear to be in agreement that the First Amendment protects the media defendants’ publication of Martin’s 2010 arrest.**

In addition, most states currently have some form of “correction” legislation that protects individuals from false publications. In Ohio, for example, section 2739.13 of the Ohio Revised Code requires newspapers to, “upon demand of any persons affected,” “print, publish, and circulate any statement or article setting forth . . . the truth . . . which such persons or their representatives, shall offer to such company for publication.” R.C. §2739.13. Of course, correction statutes, like the one in Ohio, are inapplicable if the original publication was accurate when published. Therefore, these types of statutes provide no comfort to those seeking to wipe the Internet clean of their past mistakes.

Martin’s last argument to the Justices addresses the “practical consequences” of maintaining the status quo. Yet, the practical consequences of requiring media companies with an online presence to remove all stale content is anything but practical. It is not feasible (economically, technologically, or otherwise) for media companies to monitor the lifespan of every arrest reported on; make the legal determination whether an event that was factually true is now a legal falsity requiring removal; and ensure that all links to the online content are wiped clean.

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Requiring any of the foregoing runs afoul of the First Amendment's protections of freedom of speech and freedom of the press.

### **Should Martin Have Focused on Her Privacy Rights?**

Notwithstanding the flaws in Martin's First Amendment arguments, an article published in the American Bar Association's Winter 2015 edition of *Litigation* posed an interesting thought – perhaps the U.S. already recognizes a right to be forgotten. Ashish S. Joshi, the author of “Leave Me Alone! Europe's ‘Right to be Forgotten,’” reminds readers of a 1931 California appellate court decision that found that people have a “right to be let alone” – a right that is rooted in our “inalienable right . . . to pursue and obtain happiness.” *Melvin v. Reid*, 112 Cal. App. 285, 289-292, 297 P. 91 (Cal. Dist. Ct. App. 1931). *Melvin* has since been superseded by the California Constitution, Article I, Section 1, which codified Californians' right to privacy. CA Const., Art. I, Sec. 1 (“All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and *pursuing and obtaining* safety, happiness, and *privacy*.”) (emphasis added).

Indeed, effective January 1, 2015, California became the first state to enact online “eraser” legislation. California S.B. 568 (“Privacy Rights for California Minors in the Digital World”). The statute permits web users under the age of 18 to delete or remove content he or she posted online. Of course, this state law will raise several interesting legal questions. What if your son, who lives in Ohio, tweets an embarrassing photograph of himself while on vacation in Los Angeles – is Twitter required to erase the tweet? Is Twitter required to erase re-tweets of the original post? Is the law discriminatory because it only protects minors? Although California is the only state thus far to enact legislation specific to the right to be forgotten, the more general right to be let alone is not new.

The idea that our right to privacy includes a right to be forgotten may not be as provocative as we once thought. Three years before *Melvin*, Justice Brandeis observed that the right to privacy is “the most comprehensive of rights and the right most valued by civilized men.” *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564 (1928) (Brandeis, J., dissenting). Most (if not all) states recognize a right to privacy in some form or another – a right bred from our unalienable right to pursue happiness. For nearly sixty years, Ohio has recognized the common law right to be left alone. *Housh v. Peth*, 165 Ohio St. 35 (1956) (“Personal security includes the right to exist and the right to the enjoyment of life while existing, and is invaded not only by a deprivation of life, but also by a deprivation of those things which are necessary to the enjoyment of life according to the nature, temperament, and lawful desires of the individual.”). When the Supreme Court of Ohio decided *Peth* it followed sixteen other states

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that had already recognized a right to privacy. So, why is the right to be forgotten – an apparent extension of our right to privacy – so controversial?

### Conclusion

Perhaps the advent of the Internet has roused our inner voyeur. Perhaps we see the right to be forgotten as a step backward in a world where technology is hurdling us forward at unprecedented rates. Perhaps upholding the right to be forgotten is technologically impractical. Perhaps, whether fair or not, we are fearful of allowing others to re-write their own history. Or, most importantly, perhaps the First Amendment trumps this attack on Americans' right to free speech. Punishing the press for reporting accurately is the very injustice the First Amendment seeks to prevent. Whatever the reason, those of us on the left side of the Atlantic view the right to be forgotten with much trepidation. For better or worse, though, *Google Spain* altered the global landscape of privacy and media law, and regardless whether the Supreme Court grants certiorari in *Martin*, our judicial system will continue struggle with the issue of whether our right to be left alone includes the right to be forgotten.

*Erin E. Rhinehart is a Partner with the commercial litigation firm Faruki Ireland & Cox P.L.L., which has offices in Dayton and Cincinnati, Ohio.*

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# Backpage.com Obtains TRO to Stop Interference with Payment Processing for Adult Ads

## *Pressure on Credit Card Companies Threatened Irreparable First Amendment Injury*

By Jeff Hermes

On July 24, 2015, Judge John J. Tharp, Jr., of the U.S. District Court for the Northern District of Illinois issued a temporary restraining order against Sheriff Thomas J. Dart of Cook County, Illinois, prohibiting him, his office, and his agents from interfering with the relationship between online classified ad website Backpage.com and its payment processors and financial institutions. Backpage.com's complaint in the case, *Backpage.com v. Dart*, Docket No. 15-cv-06340 (N.D. Ill. Jul. 21, 2015), was filed after Dart successfully pressured major credit card companies (including Visa and MasterCard) into cutting off the use of their cards for purchases on the site.

### Earlier Efforts Blocked by Section 230

This was not Sheriff Dart's first attempt to take action against what he saw as the proliferation of advertisements for illegal sexual services in online classified ads, nor was he alone in these efforts. However, prior attempts, undertaken in the exercise of state-granted authority, foundered against the rocks of Section 230.

Dart's crusade had originally targeted Backpage.com's primary competitor Craigslist, based on that site's adult personals section. As a general classified advertising service, Craigslist had hosted a section of "erotic services" content on its service. This section attracted the attention of state and local law enforcement in the United States, after it was perceived that some were using the section to advertise services that were illegal under state law.

For example, in March 2008, the attorney general of Connecticut, Richard Blumenthal, sent a letter to Craigslist on behalf of the attorneys general of 40 states, demanding that Craigslist purge the site of ads for prostitution and illegal sex-oriented businesses and more effectively enforce its own terms of service, which prohibit illegal activity. Jim Buckmaster, chief executive of Craigslist, stated that the attorneys general had "identified ads that were crossing the line," and that the company "saw their point, and . . . resolved to see what [it] could do to get that stuff off the site." Brad Stone, [Craigslist Agrees to Curb Sex Ads](#), NEW YORK TIMES,

**This was not Sheriff Dart's first attempt to take action against advertisements for illegal sexual services in online classified ads, but prior attempts foundered against the rocks of Section 230.**

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Nov. 6, 2008. Craigslist subsequently reported a 90% drop in erotic services listings. Jacqui Cheng, [Craigslist trumpets 90% drop in erotic services listings](#), ARS TECHNICA, Mar. 10, 2009.

Sheriff Dart took independent action in 2009, suing Craigslist in federal court and claiming that the site created a “public nuisance” under Illinois law, because its “conduct in creating erotic services, developing twenty-one categories, and providing a word search function causes a significant interference with the public’s health, safety, peace, and welfare.” *Dart v. Craigslist, Inc.*, Docket No. 09-cv-01385 (N.D. Ill. Mar. 5, 2009). Craigslist moved for judgment on the pleadings in the case on the basis of Section 230, asserting that Dart was attempting to hold Craigslist liable as the “publisher or speaker” of content created by third party users; Craigslist ultimately won that case on that basis in October 2009. *Id.*, 665 F. Supp.2d 961 (N.D. Ill. 2009). Dart did not appeal the decision.

Nevertheless, state authorities kept up their pressure on Craigslist. In May 2009, the attorney general of South Carolina, Henry McMaster, sent Craigslist a letter threatening the company’s management with criminal investigation and prosecution, stating that “[i]t appears that the management of craigslist has knowingly allowed the site to be used for illegal and unlawful activity after warnings from law enforcement officials and after an agreement with forty state attorneys general.” [Letter from Henry McMaster to Jim Buckmaster](#), May 5, 2009. Craigslist filed a declaratory judgment action against McMaster in federal district court in South Carolina, asserting that McMaster’s threats violated the First Amendment by chilling Craigslist’s speech and that the threatened prosecution would be blocked by the First Amendment and Section 230. [Complaint](#), *craigslist, Inc. v. McMaster*, Docket No. 09-cv- 01308 (D.S.C. May 20, 2009). McMaster consented to a preliminary injunction against prosecution of Craigslist, [Consent Order](#), *craigslist, Inc. v. McMaster*, Docket No. 09-cv- 01308 (D.S.C. May 22, 2009). The court ultimately dismissed Craigslist’s complaint without reaching the Section 230 issue, holding that there was no actual case or controversy ripe for adjudication because no prosecution had been initiated. [Order](#), *craigslist, Inc. v. McMaster*, Docket No. 09-cv- 01308 (D.S.C. Aug. 5, 2010).

### **Informal Pressure Works on Craigslist, but not Backpage.com**

Craigslist did, however, eventually succumb to public and government pressure, and shuttered its “erotic services” section (and its successor, the “adult services” section). As of September 4, 2010, the link to the section on Craigslist was replaced with a black label reading “censored.” Claire Cain Miller, [Craigslist Blocks Access to ‘Adult Services’ Pages](#), NEW YORK TIMES, Sept. 4, 2010. This label (and the dead link to the defunct section) was removed a few days later. Chris Matyszczyk, [Craigslist removes ‘censored’ bar from site](#), CNET, Sept. 8, 2010.

Later that month, Craigslist representatives appeared at a hearing of the House Judiciary Committee and testified that it was unrealistic to believe that blocking adult advertisements

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would end sex crimes. By pressuring Craigslist to close the section, they claimed, state governments had ended their ability to contain the illegal activity in one location and to work with Craigslist to pursue offenders; now, this traffic would simply migrate to other sites. Craigslist's representatives specifically pointed to a spike in traffic to Backpage.com following the shutdown of Craigslist's section. Claire Cain Miller, [\*Craigslist Says It Has Shut Its Section for Sex Ads\*](#), NEW YORK TIMES, Sept. 15, 2010.

State and federal government agencies then turned their sights on Backpage.com. Six days after Craigslist testified, twenty-one state Attorneys General sent a public letter to Backpage.com demanding that it close its "adult entertainment services" section, stating that the "volume of these ads will grow in light of Craigslist's recent decision to eliminate the adult services section of its site." Eric Torbenson, [\*Attorneys general ask Backpage.com to drop adult ads\*](#), DALLAS MORNING NEWS, Sept. 22, 2010. Backpage.com publicly rejected the states' demand that same day, writing:

Backpage.com respectfully declines the recent demand by a group of 21 state attorneys general that it close its adult classifieds website . . . Backpage.com is a legal business and operates its website in accordance with all applicable laws . . . Censorship will not create public safety nor will it rid the world of exploitation.

**After Craigslist shut down its adult services in response to public pressure, state and federal government agencies turned their sites on Backpage.com**

[\*Backpage.com Rejects Calls for Censorship\*](#), ASSOCIATION OF ALTERNATIVE NEWSMEDIA, Sept. 21, 2010. Nevertheless, on October 18, 2010, Backpage.com announced that it would temporarily suspend certain aspects of its adult sections while implementing improved screening procedures for advertisements for illegal services. [\*Backpage.com to Suspend Certain Areas of Personals and Adult Sections While It Implements Solid Defenses against Misuse\*](#), BUSINESS WIRE, Oct. 18, 2010, .

Beginning in July 2011, there were renewed demands from both local officials and private actors for Backpage.com to reform or remove its adult services section. See, e.g., Cienna Madrid, [\*Clergy Takes Out NY Times Ad; Pressures Village Voice to End Sex Trafficking in Its Publications\*](#), The Stranger, Oct. 25, 2011. That summer, forty-six state attorneys general sent a public letter to Backpage.com calling for information about how the site attempted to remove advertising for sex trafficking, especially ads that could involve minors. The letter pointed to more than fifty cases involving the trafficking or attempted trafficking of minors through Backpage.com. Washington State Office of the Attorney General, [\*Attorneys General to Backpage.com: prove you're fighting human trafficking\*](#), Aug. 31, 2011. A petition signed by

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80,000 people and spearheaded by John Buffalo Mailer, the son of Village Voice co-founder Norman Mailer, later demanded that the Village Voice shut down the adult services section. [\*Village Voice Founder's Son Criticizes Company for Advertisements That Others Can Use for Sex Trafficking of Minors, Joins Groundswell Campaign\*](#), PR NEWswire, Jan. 12, 2012. The Village Voice would subsequently divest itself of Backpage.com – but Backpage.com continued to operate independently and to carry adult advertisements. [\*Village Voice cuts ties from sex ad-linked Backpage\*](#), CHRISTIAN SCIENCE MONITOR, Sept. 24, 2012.

### **State Officials Escalate Their Efforts against Backpage.com**

At the Spring 2012 meeting of the National Association of Attorneys General (NAAG), Washington State Attorney General Rob McKenna gave a speech to attendees in which he made clear that the fundamental problem in dealing with Backpage.com was Section 230. [\*National Association of Attorneys General \(NAAG\) Speech on Backpage.com\*](#), Mar. 7, 2012. Thereafter, Washington state, as well as the states of Tennessee and New Jersey, passed statutes were expressly targeted at Backpage.com's advertising, notwithstanding the fact that Section 230 barred the imposition of such liability under state law. Backpage.com filed three separate lawsuits in federal court to prevent the enforcement of these laws, arguing that they were preempted by Section 230 and violated the First Amendment, and quickly succeeded in all three cases. *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013); *Backpage.com, LLC v. Hoffman*, 2013 WL 4502097 (D.N.J. Aug. 23, 2013).

It is unlikely that these state laws were ever intended to survive; to the contrary, one might easily believe they were designed to fail, in order to fuel a federal legislative effort to gut Section 230. On July 23, 2013, forty-nine state and territory attorneys general sent an open letter to four members of Congress citing the activities of Backpage.com and calling upon Congress to amend Section 230. The letter cited to the Washington and Tennessee cases, among others, as evidence that Section 230 was frustrating attempts by state law enforcement to suppress sex trafficking, and accordingly asked that Congress amend Section 230 to include an exception for state criminal law as well as federal law. Specifically, the proposed legislative amendment would have added the words "or State" to 47 U.S.C. § 230(e)(1), so it would read "[n]othing in this section shall be construed to impair the enforcement of . . . any . . . Federal or State criminal statute." [\*Letter from Chris Koster, et al., to Sen. John Rockefeller IV, et al.\*](#), Jul. 23, 2013.

This power grab by state law enforcement did not succeed. Instead, the U.S. Congress passed the "Stop Advertising Victims of Exploitation Act of 2015," Sec. 118 of the [\*Justice for Victims of Trafficking Act of 2015\*](#), which created new federal criminal penalties for

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advertising sex trafficking. Pub. L. No. 114-22, 129 Stat. 227 (May 29, 2015). But while the law did effectively create an exception to Section 230 for such advertisements, it imposed liability only upon knowledge of the content of an illegal advertisement, did not impose any obligation to monitor advertisements, and granted no additional authority to state officials.

### Sheriff Dart Goes for the Money

Frustrated by his legal inability to pursue Backpage.com and the company's resistance to public pressure, Sheriff Dart took a page from the federal government's playbook against Wikipedia and proposed copyright legislation such as SOPA/PIPA.

In 2010, Amazon.com cut off web hosting services for Wikileaks after Joe Lieberman, then chairman of the Senate's committee on homeland security, contacted Amazon. While the exact content of the communication to Amazon is unknown, Lieberman subsequently said that the company's "decision to cut off WikiLeaks now is the right decision and should set the standard for other companies WikiLeaks is using to distribute its illegally seized material. I call on any other company or organization that is hosting WikiLeaks to immediately terminate its relationship with them." Ewen MacAskill, [WikiLeaks website pulled by Amazon after US political pressure](#), GUARDIAN, Dec. 1, 2010.

The Stop Online Piracy Act of 2011, better known as "SOPA" or (in conjunction with the Senate version of the bill, the "Protect IP Act") "SOPA/PIPA," also looked to the third-party relationships of alleged wrongdoers with a particular focus on financial arrangements. As originally proposed, the bill created procedures for the U.S.

Department of Justice and private copyright holders to proceed against online ad networks or payment services doing business with websites alleged to be in violation of federal copyright laws. H.R. 3261, 112th Cong. §§ 102, 103 (2011).

Borrowing a little from each approach, on June 29, 2015, Sheriff Dart sent letters to Visa and MasterCard demanding that they "defund" sex trafficking and "compelling" them to sever ties with Backpage.com; both companies cut off ties with Backpage.com by the morning of July 1. Cook County Sheriff's Office, [Sheriff Dart's Demand to Defund Sex Trafficking Compels Visa and MasterCard to Sever Ties with Backpage.com](#), July 1, 2015. The letters ordered that the companies "immediately cease and desist from allowing [their] credit cards to be used to place ads on ... Backpage.com," and, according to Backpage.com, Dart "made sure his threat was plain by citing statutes imposing criminal penalties for money laundering, allowing termination of a financial institution's status as an insured depository institution, and permitting

**Backpage.com filed three separate lawsuits in federal court to prevent the enforcement of state laws targeting its classified ads, and quickly succeeded in all three cases.**

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investigations and enforcement actions.” Complaint, *Backpage.com v. Dart*, Docket No. 15-cv-06340 (N.D. Ill. Jul. 21, 2015), ¶ 39 & Exs. B, C.

This left Backpage.com with a very restricted range of payment options for its users, not only for its adult advertisements but for all of its services. *Id.*, ¶ 45. In response, Backpage.com began offering free advertisements on its site, *Id.*, ¶ 46 and filed the instant lawsuit and sought a temporary restraining order.

### “An Informal Extralegal Prior Restraint of Speech”

Backpage.com’s complaint was filed on July 21, 2015, and alleged that Dart’s targeting of threatening letters against Visa and MasterCard constituted “an informal extralegal prior restraint of speech without due process in violation of the First and Fourteenth Amendments and the Communications Decency Act (‘CDA’), 47 U.S.C. § 230.” Complaint, ¶ 1. Backpage.com claimed that Dart’s actions infringed not only the site’s own rights but those of all of its users.

The complaint compared Dart’s tactics to those of the “Rhode Island Commission to Encourage Morality in Youth” in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), which without any enforcement authority had threatened prosecution of magazine wholesale distributors who carried materials that, in the eyes of the Commission, were obscene. The result of the communications in *Bantam* was that wholesalers dropped the allegedly illegal publications without any prior adjudication of their illegality, which the U.S. Supreme Court found to violate the First Amendment:

**Frustrated by his legal inability to pursue Backpage.com, Sheriff Dart took a page from SOPA/PIPA and the federal government’s playbook against Wikipedia.**

[I]t is contended, these salutary principles [against prior restraints on speech] have no application to the activities of the Rhode Island Commission because it does not regulate or suppress obscenity but simply exhorts booksellers and advises them of their legal rights. This contention, premised on the Commission's want of power to apply formal legal sanctions, is untenable. It is true that appellants' books have not been seized or banned by the State, and that no one has been prosecuted for their possession or sale. But though the Commission is limited to informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation—the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed "objectionable" and succeeded in its aim. We are not the first court to look through forms to the substance and recognize

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that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief.

*Bantam Books* at 66-67.

Dart moved to dismiss the complaint and opposed Backpage.com's request for a temporary restraining order, arguing that Backpage.com lacked standing to assert the First Amendment rights of its users and that Visa and MasterCard's actions were wholly voluntary.

Judge Tharp rejected Dart's arguments on both counts, *see Order, Backpage.com v. Dart*, Docket No. 15-cv-06340 (N.D. Ill. Jul. 24, 2015), and issued a temporary restraining order against Dart, his office, and "all employees, agents, or others who are acting or have acted on [his] behalf ... from taking any actions, including but not limited to sending letters, to formally or informally request, direct, persuade, coerce, or threaten credit card companies, processors, financial institutions or any other third parties to discontinue, terminate, disallow or interfere with payment or services to Backpage.com," *see Temporary Restraining Order, Backpage.com v. Dart*, Docket No. 15-cv-06340 (N.D. Ill. Jul. 24, 2015).

The court found that there was "no 'standing' impediment to Backpage's First Amendment claim," with third party standing standards relaxed in First Amendment cases. *Order*, slip op. at 3. The court also found that the timing of the credit card companies' withdrawal from a relationship with Backpage.com indicated that Dart's actions were a motivating factor:

**"Informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief."**

[B]y writing in his official capacity on Sheriff's Department letterhead, requesting a "cease and desist," invoking the legal obligations of "financial institutions" to cooperate with law enforcement, and requiring ongoing contact with the companies, among other things, it could reasonably be inferred that Dart brought the weight of his office to bear on his "request" that the companies stop their association with Backpage altogether. ... These companies had worked with Backpage for more than a decade, and they terminated their relationships because of Dart's letters. The Court cannot state as a matter of law that the letters were not a threat. ... Whether Dart coerced the companies or simply educated them has not yet been definitively established, but given the timing of the withdrawals and the companies' public statements, at the very least it is clear on this record that the companies did not act spontaneously. Accordingly, Backpage has established a more-than-negligible likelihood of success on the merits of its claim that Dart's informal lobbying of the credit card

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companies violated the First Amendment by imposing an informal prior restraint on the advertisements hosted by Backpage.com.

*Id.*, slip op. at 5.

The court had no problem finding irreparable harm, with Backpage.com's existence threatened and First Amendment injury that was "irreparable almost by definition." *Id.* Finally, the court did not find a significant public interest in allowing Dart's activities to continue: "Sheriff Dart has made no argument, and has provided no evidence, that prostitution, trafficking, and sexual exploitation of minors will be reduced significantly reduced by Backpage's demise; indeed, it appears that an oft-used tool for identifying lawbreakers (by Dart and other law enforcement agencies) will be lost if Backpage were to fold." *Id.*, slip op. at 6. Judge Tharp also rejected Dart's allegation that the current offer of free access to Backpage.com benefited the public, finding it disingenuous that Dart was arguing that more access to Backpage.com was a public benefit while disregarding the fact that forcing Backpage.com into that situation threatened the site's existence as a whole. *Id.*

### Conclusion

This case has the potential to be very important for the future of Internet censorship. As noted above, this is not the first time that government officials have attempted to impose extralegal pressure to shut down speech they do not like, but it is one of the first in the online context where the legality of those tactics has been challenged in court.

Informal, "soft" pressure is particularly insidious when brought to bear against a third party with limited interest in the main target's First Amendment rights. Contrast this case and the case of Wikipedia discussed above, where the pressure on third parties was effective, with the ineffective attempts to pressure Google to remove the *Innocence of Muslims* video, *see* Josh Feldman, [Google Keeping Innocence of Muslims On YouTube, Despite White House Pressure](#), MEDIAITE, Sept. 14, 2012, or Apple not to provide strong encryption to its users, *see* Matthew Panzarino, [Apple's Tim Cook Delivers Blistering Speech On Encryption, Privacy](#), TECHCRUNCH, Jun. 2, 2015. To protect First Amendment activity on the Internet, it is critical that we curb attempts to leverage the dependence of online forums on third parties for hosting, payment processing, and other functions.

In this case, the court's ruling (as with the *Bantam Books* ruling) treated the question of whether there was a First Amendment violation as turning on whether Dart's statements could

**"These companies had worked with Backpage for more than a decade, and they terminated their relationships because of Dart's letters."**

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be interpreted as a threat (either to bring his own authority to bear or to trigger enforcement of the law by another government agency). But given the limited interests which third parties have at stake in cases like these, virtually any expression of government displeasure can be enough to shut down speech. Even without a threat of imminent legal action, the mere fear of future friction with state or federal authorities can be enough to convince a vendor or payment processor that providing services is not worth the trouble. Hopefully as *Backpage.com*'s case moves forward, the court will recognize that fact and apply the principles of *Bantam Books* accordingly.

*Jeff Hermes is a deputy director at MLRC.*



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# Washington Court Provides Standard for Unmasking Anonymous Posters (Sort Of)

## *Standard May Vary Based on Nature of Speech*

By Judy Endejan

On July 6, 2015, the Washington Court of Appeals handed down a decision that purports to establish the standard that a defamation plaintiff must meet to obtain the identity of anonymous posters. While it did so in the specific case presented – [\*Thomson v. Doe\*](#) (Case No. 72321-9-1) – this standard is far from clear for future cases that raise the same issue.

In [\*Thomson v. Doe\*](#), the Court of Appeals affirmed the trial court’s denial of a motion to compel disclosure because the plaintiff presented no factual evidence with her motion and therefore could not establish a *prima facie* case.

### Background

Thomson, a Florida attorney, sued Doe for a negative posting about her services on the Avvo.com site. Thomson claimed that the poster was never a client and that the posting contained false statements of fact. Thomson obtained a subpoena from the King County Superior Court to obtain the anonymous poster’s identity from Avvo. When Avvo refused to disclose the identity, Thomson filed a motion to compel in King County Superior Court. This was denied because she failed to make a *prima facie* showing on her underlying defamation claim. She appealed this denial to the Court of Appeals, which granted a discretionary review on the basis that the case involved a matter of significant public interest.

The Court of Appeals determined that it would review the trial court’s decision under a *de novo* standard rather than an abuse of discretion standard, which is usually applied to trial court discovery decisions, because of the First Amendment implications raised by anonymous speech. Under this *de novo* review, the Court of Appeals determined that the trial court applied the correct standard in requiring a defamation plaintiff to establish a *prima facie* case in order to obtain the disclosure of an anonymous poster’s identity.

**If the anonymous speech is commercial in nature then a lesser evidentiary showing would be required, whereas if the anonymous speech is political then the highest evidentiary standard would have to be satisfied.**

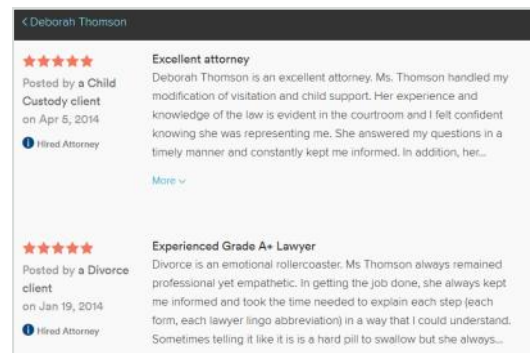
### Protection for Anonymous Speech

The Court recognized the two leading cases regarding motions to reveal an anonymous speaker’s identity. The first, *Dendrite Int’l Inc. v. Doe No. 3*, 342 N.J. Super. 134, 140, 77 A2d

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756 (2001), set out a four-step process for determining whether to compel disclosure of the speaker's identity. The second, *Doe No. 1 v. Cahil*, 884 A2d 451, 456 (Delaware 2005), adopted a modified *Dendrite* standard with only two components from *Dendrite* that require a plaintiff to make reasonable efforts to notify the defendant and to satisfy a summary judgment standard.

The Washington Court of Appeals adopted neither test in whole but agreed with both cases that “notice is a crucial element of the standard.” [Notice was not an issue in *Thomson v. Doe* because Avvo had notified Doe of Thomson's request.] The Court of Appeals then ruled that the standard to apply *depends upon the nature of the speech at issue*. If the anonymous speech is commercial in nature then a lesser evidentiary showing would be required, whereas if the anonymous speech is political then the highest evidentiary standard would have to be satisfied. The court did not state what standard should apply to commercial speech, because it concluded that the speech at issue was not commercial in nature and it warranted an intermediate level of protection, which means a *prima facie* standard. The Court noted that in Washington a *prima facie* standard is lower than a summary judgment standard, requiring only “evidence of sufficient circumstances which would support a logical and reasonable inference of the facts sought to be proved.” Under the facts of the present case, the Court found that the *prima facie* standard was appropriate. Because the trial court applied that standard, its decision was affirmed.



In reaching this decision, the Court rejected an argument that it should also use a balancing test which would weigh an individual's right to speak freely with an injured plaintiff's right to redress. The Court said, “While *Dendrite* balancing might be appropriate in some cases, it is not justified on the record before us.”

The decision inexplicably said that Avvo, having obtained information from the anonymous poster, should have afforded the trial court the opportunity for *in camera* review of the identity.

*Thomson v. Doe* does not resolve with certainty the standard a court should apply in ruling on a motion to unmask the identity of an anonymous poster. The standard to be applied is dependent upon the nature of the speech (commercial, intermediate, or political). The case suggests that where the speech at issue is political in nature, a summary judgment standard would apply, but it does not define the standard to be used for commercial speech. Nor does it suggest when *Dendrite* balancing might be appropriate. The case further suggests that a trial court should undertake *in camera* review where the identity of the anonymous poster is known. In sum, this case provides some guidance, but sets no definite standard of general applicability for future anonymous speech cases.

*Judy Endejan is a partner at Garvey Schubert Barer in Seattle, WA.*

## 2d Circuit: Director Does Not Have a Separate Copyright in Contributions Integrated in a Motion Picture

### *Director Cannot Interfere with Producer's Exploitation of the Film*

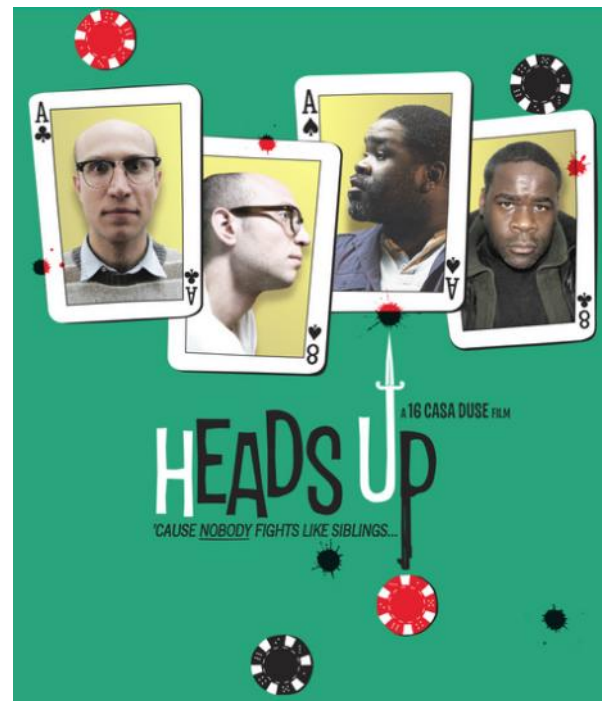
By Eleanor Lackman

On June 29, 2015, the Second Circuit answered a question of first impression in the Circuit: “May a contributor to a creative work whose contributions are inseparable from, and integrated into, the work maintain a copyright interest in his or her contributions alone?” Under the facts presented to it, the Court concluded that he or she may not. [\*16 Casa Duse v. Merkin\*](#), No. 13-3865 (Sack, Katzmman, Lynch, JJ.).

#### Background

The dispute at issue involved a film entitled *Heads Up*, which 16 Casa Duse developed, financed and produced based on a screenplay of the same name. 16 Casa Duse set out to hire the cast and crew, including Alex Merkin, who 16 Casa Duse asked to serve as the film’s director. All other cast and crew members entered into “work for hire” agreements with 16 Casa Duse, but Merkin – despite receiving a copy of a similar agreement and promising to have his lawyer review it, and notwithstanding 16 Casa Duse’s attempts to follow up – never did.

After principal photography ended, 16 Casa Duse sent Merkin a copy of the raw footage for purposes of Merkin making an initial edit. In doing so, 16 Casa Duse stated that it was not giving up ownership rights. Merkin responded that he was not relinquishing any of his rights, and that his work was still his own work and not the property of 16 Casa Duse. 16 Casa Duse responded to clarify that the film was intended to be the producer’s, and not a joint venture with Merkin.



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Despite engaging legal counsel to assist with the negotiations, the parties were never able to come to terms on an agreement, and Merkin began to warn 16 Casa Duse's principal that he could not exploit the film without Merkin's permission. In the interim, without 16 Casa Duse's knowledge, Merkin transferred the raw footage to four DVDs and registered them with the U.S. Copyright Office.

In April 2012, 16 Casa Duse hosted an invitation-only screening at the New York Film Academy (NYFA). Just as the screening was about to start, Merkin and his attorney, Maurice Reichman, informed NYFA's director that 16 Casa Duse had no rights to show the film. NYFA cancelled the screening in response. This incident precipitated a request for a temporary restraining order and preliminary injunction restraining Merkin from interfering with the use of the film. Judge Sullivan of the Southern District of New York granted both. A few months thereafter, 16 Casa Duse moved for summary judgment on its claims, and for fees and sanctions against Merkin and Reichman. In late 2013, the court granted the request in full.

### Second Circuit Ruling

On appeal, the court, in a unanimous opinion written by Judge Sack, squarely addressed Merkin's position that his directorial contributions were subject to separate copyright protection that Merkin could assert against others. To contextualize the ruling, the court made two initial observations. First, both parties agreed that Merkin was not a joint author or co-author of the film under the 1976 Copyright Act. Had Merkin been a joint or co-author, that would have prevented him from interfering with 16 Casa Duse's use and display of the film given that one joint owner cannot be liable for copyright infringement to another. Second, the parties agreed that Merkin's efforts (assuming that they were a "work" in the first place) could not be deemed a "work made for hire" under the Copyright Act.

With that background, the court addressed a new question: whether an individual's non-*de minimis* creative contributions to a work in which copyright protection subsists, such as a film, fall within the subject matter of copyright, when the contributions are inseparable from the work and the individual is neither the sole nor a joint author of the work and is not a party to a work-for-hire agreement. However, the court found that the Copyright Act's terms, structure and history supported the conclusion that whereas the film is a "work of authorship" amenable to copyright protection, Merkin's contributions to that integrated work could not be a "work of authorship" subject to their own copyright protection.

**Giving a nod to the Ninth Circuit's recent en banc decision in *Garcia v. Google*, the Second Circuit expressed concern about making "Swiss cheese of copyrights."**

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The court also made some practical observations to support its conclusion. Giving a nod to the Ninth Circuit's recent *en banc* decision in *Garcia v. Google*, the Second Circuit expressed concern about making "Swiss cheese of copyrights," wherein the copyright to a collaborative work such as a film could be undermined by any number of individual claims. The court also opined that a conclusion other than the one it adopted would grant contributors like Merkin greater rights than joint authors, who have no right to interfere with a co-author's use of the copyrighted work. In the court's words, "[w]e doubt that Congress intended for contributors who are not joint authors to have greater rights enabling them to hamstring authors' use of copyrighted works, as apparently occurred in the case at bar."

The court then moved to the question of how to resolve a situation where a multiple-author situation arises, but the Copyright Act provides no indication as to the parties' copyright ownership in the work. In such a situation, the court opined, the question is resolved by looking at a multi-factor test to determine which of the putative authors is the "dominant author." Those factors were held to include decisionmaking authority over what changes are made and what is included in a work; the way in which the parties bill or credit themselves; and the parties' agreements with outsiders such as other cast and crew and the owners of any underlying rights. On those facts, the court agreed that 16 Casa Duse was the dominant author of the film, including the underlying raw footage that Merkin had registered with the Copyright Office.

Last month's ruling has important implications for media companies. In particular, it confirms that in both the Second and Ninth Circuits, a non-joint author contributor to an integrated work ordinarily cannot assert copyright claims against producers, co-contributors or third parties. *16 Casa Duse v. Merkin* provides assurances to a media or entertainment company that even in a case where a work-for-hire agreement may not have been procured, the contributor cannot hamstring (or threaten to hamstring) the rights that a producer or distributor may have received from the "dominant author" to exploit the work – be it a film, television show or other collaborative integrated work.

*Eleanor Lackman of Cowan, DeBaets, Abrahams & Sheppard LLP, New York, NY, represented 16 Casa Duse. Maurice Reichman, New York, NY, represented Alex Merkin.*

**Last month's ruling confirms that in both the Second and Ninth Circuits, a non-joint author contributor to an integrated work ordinarily cannot assert copyright claims against producers, co-contributors or third parties.**

# Streaming Service FilmOn Found to be Eligible for Statutory Broadcast Retransmission License

*Alki David Gets First Win, But FCC or Congress Could Have Last Word*

By Jeff Hermes

In *Fox Television Stations, Inc. v. FilmOn X, LLC*, Docket No. 12-cv-6921 (C.D. Cal. Jul. 16, 2015) (*FilmOn IV*), the U.S. District Court for the Central District of California held that online streaming service FilmOn could qualify for a mandatory statutory license for broadcast content under § 111 of the Copyright Act. The court's tentative ruling on cross-motions for summary judgment spends considerable time untangling the procedural and analytical threads of the dispute and the different authorities that have addressed the underlying question of who is eligible for a § 111 license, before resolving the issue as a relatively straightforward matter of statutory interpretation.

## Procedural Background – Litigating in the Wake of *ivi* and Aereo

This case involves a dispute between the major television networks and FilmOn X, its founder Alkiviades David, and related entities (collectively, “FilmOn”), over the defendants’ online streaming of the plaintiffs’ broadcast content. The case has been heavily influenced by a complex history of similar lawsuits involving the defendants and their competitors *ivi*, Inc., and Aereo, Inc.

The district court characterized the intertwining litigation as follows. In 2010, a group of network plaintiffs (overlapping with the current plaintiffs) sued FilmOn in the Southern District of New York, alleging that FilmOn’s unlicensed Internet streaming of the networks’ broadcast content violated their copyrights. After the Southern District held in a companion case that streaming company *ivi*, Inc., was not entitled to a § 111 license (*ivi I*), FilmOn stipulated to a consent judgment and permanent injunction (*FilmOn I*). The Second Circuit later affirmed the ruling against *ivi* in *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2nd Cir. 2012) (*ivi II*), the only Court of Appeals ruling to date on § 111 and Internet retransmission.

But in 2012, it looked like online streaming services’ entitlement to a § 111 license might become moot after the Southern District of New York held that Aereo’s antenna array system

**The case was heavily influenced by a complex history of similar lawsuits involving the defendants and their competitors *ivi* and Aereo.**

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and streaming service did not infringe the networks' public performance rights (*Aereo I*). FilmOn quickly launched a new online streaming service in response.

The networks, presumably concerned about this turn of events, sought a different result in California by filing the present infringement suit against FilmOn, in addition to pursuing sanctions for violation of the New York injunction in *FilmOn I*. They succeeded in both courts. The Central District of California disagreed with *Aereo I* about the scope of the networks' public performance rights and the meaning of the "Transmit Clause" of the Copyright Act, and issued a preliminary injunction in 2012 (*FilmOn II*).

In 2013, the Second Circuit (in *Aereo II*) affirmed the Southern District's decision in *Aereo I*. Then, in 2014, the U.S. Supreme Court decided *ABC v. Aereo, Inc.*, 134 S.Ct. 2498 (2014) (*Aereo III*), reversing *Aereo I & II*, finding that Aereo's system infringed the networks' public performance rights, and stating that notwithstanding the design of Aereo's service it was "for all practical purposes a traditional cable system."

At this point, FilmOn switched tactics. Given the Supreme Court's description of Aereo as "a traditional cable system," it argued in both New York (on another contempt motion filed by the networks) and in California (on cross-motions for partial summary judgment) that they were entitled to a compulsory license for cable systems under § 111 of the Copyright Act.

The Southern District of New York rejected that argument in 2014 (*FilmOn III*), finding that *Aereo III* had not addressed the compulsory license question and holding that *ivi II* was still controlling authority on § 111 in the Second Circuit. The Central District of California reached a different result in this new ruling (*FilmOn IV*).

**The court focused on (1) whether FilmOn operated a "facility, located in any State"; and (2) whether online streaming of the networks' broadcast content constituted "secondary transmissions of such signals or programs by ... communications channels."**

### **Broadcast Streaming Decisions**

*ivi I* (S.D.N.Y. 2010) – § 111, denied license

*FilmOn I* (S.D.N.Y. 2012) – § 111, consent judgment/injunction

*ivi II* (2nd Cir. 2012) – § 111, denied license

*Aereo I* (S.D.N.Y. 2012) – Transmit Clause, no infringement

*FilmOn II* (C.D. Cal. 2012) – Transmit Clause, streaming infringes

*Aereo II* (2nd Cir. 2013) – Transmit Clause, no infringement

*Aereo III* (S.Ct. 2014) – Transmit Clause, streaming infringes

*FilmOn III* (S.D.N.Y. 2014) – § 111, denied license

***FilmOn IV* (C.D. Cal. 2015) – § 111, eligible for license**

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### **Prior Interpretations of the Section 111 License**

As discussed above, the core issue in *FilmOn IV* is whether FilmOn qualifies as a “cable system” entitled to a mandatory license for secondary transmission of broadcast content under § 111. Section 111(c)(1) provides that:

[S]econdary transmissions to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico shall be subject to statutory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

17 U.S.C. § 111(c). A “cable system” is in turn defined as

a facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(1), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

17 U.S.C. § 111(f)(3).

The Central District of California focused its analysis on (1) whether FilmOn operated a “facility, located in any State”; and (2) whether online streaming of the networks’ broadcast content constituted “secondary transmissions of such signals or programs by ... communications channels.”

The district court noted that with the advent of satellite broadcasting, a similar dispute had arisen as to whether the language of § 111(f)(3) required a “facility located in any state” to exist entirely within a *single* state. Broadcast networks had urged that narrow interpretation, concerned about the fact that satellite retransmissions might extend beyond the local broadcast

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area. But the Eleventh Circuit rejected that interpretation as too narrow, stating that broadcast networks' concern over the reach of satellite retransmissions "is not a concern of § 111." *NBC v. Satellite Broad. Networks, Inc.*, 940 F.2d 1467, 1470 & n.7 (11th Cir. 1991).

The U.S. Copyright Office took a different view, promulgating regulations while the above case was pending that denied satellite broadcasters a § 111 license. The agency took the position that § 111 was intended for localized retransmission services and that satellite systems did not receive and transmit signals from within a single state. (The Eleventh Circuit noted these regulations but held that they were entitled only to prospective deference.) In 1992, the Copyright Office also took the position that "communications channels" under § 111(f)(3) should not include "future unknown services" whose impact Congress had not evaluated. The legality of satellite retransmission was not settled until Congress enacted a separate statute, 17 U.S.C. § 122, in 1999.

The Copyright Office voiced a similar position with the advent of the Internet. In Congressional testimony in 2000, the Register of Copyrights stated both a general policy objection to § 111 licenses as a derogation of copyright interests and a specific objection to extending those licenses to Internet retransmissions. In the Office's view, Internet retransmission was substantially different from cable and satellite because broadcasters could elect to engage in Internet retransmission themselves but generally lacked the resources to set up a cable or satellite system, and because of the difficulty of controlling the geographic reach of online transmissions.

This set the backdrop for the ruling in *ivi II*. In that case, the Second Circuit held that *ivi*'s Internet retransmission services were not entitled to the § 111 license, holding that (1) it was unclear whether the Internet was a "facility" under the statute, as a "global network of millions of interconnected computers," and (2) Congress had not explicitly included the Internet as a "communications channel" in § 111(f)(3).

The Second Circuit also held that Copyright Office's statements on Internet retransmission were entitled to *Chevron* deference. Among other things, both the Second Circuit and the Copyright Office gave weight to the second sentence of § 111(f)(3), which states: "For purposes of determining the royalty fee under subsection (d)(1), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system." In the Second Circuit's view, this sentence was meaningless as applied to retransmission via the Internet, just as the Copyright Office had found that it was meaningless as applied to satellite carriers.

**In *ivi II*, the Second Circuit held that *ivi*'s Internet retransmission services were not entitled to the § 111 license, holding that it was unclear whether the Internet was a "facility" under the statute and Congress had not explicitly identified the Internet as a valid "communications channel."**

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### **Disagreement with the Second Circuit and the Copyright Office**

In *FilmOn IV*, the Central District of California found that the Supreme Court’s statement in *Aereo III* that Aereo was “for all practical purposes a traditional cable system,” while not binding, was persuasive:

Because the Supreme Court was not answering the question at issue in this case, *Aereo III* does not control the result here. ... It is, however, about as close a statement directly in Defendants’ favor as could be made, and the decision’s reasoning continues the trajectory started [in prior cases]: courts consistently reject the argument that technological changes affect the balance of rights as between broadcasters and retransmitters in the wake of technological innovation. Instead, courts have lest such rebalancing to Congress.

*FilmOn IV*, slip op. at 10.

The district court also rejected the idea of granting deference to the Copyright Office. The court noted that the agency had long voiced its opposition to entire concept of § 111 licenses, setting it at odds with explicit Congressional intent and rendering its judgment about the proper scope of such licenses suspect: “[I]f in the Copyright Office’s view § 111 is ‘bad,’ and ‘really bad’ as applied to internet transmission, we must ask what the Office’s view of internet transmission would be if it considered § 111 to be ‘good,’ as Congress deemed it. That question is impossible to answer precisely.” *Id.*, slip op. at 11.

Moreover, the court found that *Chevron* deference was inappropriate where the Copyright Office had never conducted a formal rulemaking regarding Internet transmission, Congress’ statutory language was (in the court’s view) unambiguous, and there was no gap in policy surrounding § 111 that Congress had delegated to the Copyright Office to fill. *Id.* To the contrary, the district court found that the Office’s position depended on “a very strange reading of the words ‘facility’ and ‘communications channels’ in § 111,” making it “questionable whether, even if *Chevron* applied, it would be appropriate to defer to the Office’s interpretation.” *Id.*, slip op. at 12.

Turning to *ivi II*, the district court found that the Second Circuit had confused the “facility” operated by FilmOn (i.e., its physical array of antennas and associated equipment) with the “communications channel” (the Internet):

[I]t is difficult to recognize the ambiguity the Second Circuit saw in the statute, at least as applied to the facts of this case. ... The “internet” is not the “facility”

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urged by Defendants here. And it can't be a "facility" for the purposes of the § 111 analysis because without the Defendants' facilities, the internet does not receive Plaintiffs' public broadcast signal. ... [T]he signals are not received by "the internet." They are received by antennas, located in particular buildings wholly within particular states. They are then retransmitted out of those facilities on "wires, cables, microwave, or other communications channels." We know that they are so communicated because Defendants' users received them. ... Thus, the nebulous nature of the Internet does not seem to bear on whether *Defendants operate equipment* that "receives signals transmitted or programs broadcast by one or more television broadcast stations," reformats those signals, and then sends them out to the viewing public.

*Id.*, slip op. at 13 (emphasis in original).

The district court also found unpersuasive the argument that the Internet would need to be specifically enumerated in § 111(f)(3) to be considered a valid channel of communication, finding that such a restrictive view "would make a nullity of the phrase 'or other communications channels.'" *Id.*, slip op. at 13 n.17. In doing so, the court implicitly rejected the Copyright Office's position that "other communication channels" should include only channels in existence at the time of § 111's enactment in 1976.

Finally, the district court rejected the Second Circuit's reliance on the second sentence of § 111(f)(3), holding that the clause affected the calculation of statutory royalties for a certain category of cable system but did not limit the definition of a "cable system" to that category. *Id.* at 14.

Because it found that FilmOn operated a "facility" and that its streaming of broadcast content on the Internet utilized a "communications channel," the court held that FilmOn was potentially eligible for a § 111 license.

### FilmOn's Non-Compliance with Statutory Requirements

The network plaintiffs also argued that FilmOn should be disqualified from a § 111 license for failing to comply with other statutory conditions:

**"Because the Supreme Court was not answering the question at issue in this case, *Aereo III* does not control the result here. ... It is, however, about as close a statement directly in Defendants' favor as could be made."**

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- FilmOn provided a “trial period” of its service for free, which the plaintiffs claimed was inconsistent with the definition of a cable system as a “facility ... that in whole or in part ... makes secondary transmissions of such signals or programs ... to subscribing members of the public *who pay for such service*.” 17 U.S.C. § 111(f)(3) (emphasis added).
- FilmOn edited the content of the broadcasts to add advertising content at the beginning of a rebroadcast, which plaintiffs argued constituted infringement through modification of commercial advertising under § 111(c)(3), which states that “the secondary transmission ... is actionable as an act of infringement ... if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered.”
- FilmOn had belatedly submitted account statements and royalty fees for certain network stations, potentially rendering them liable for infringement for the relevant retransmissions: “[T]he willful or repeated secondary transmission to the public by a cable system of a primary transmission ... is actionable as an act of infringement ... where the cable system has not deposited the statement of account and royalty fee required by subsection (d).” 17 U.S.C. § 111(c)(2)(B).

The district court held that these departures from the statutory requirements might constitute specific instances of infringement subject to an award of damages, but would not categorically disqualify FilmOn from a § 111 license if it managed to comply with these requirements in the future. *FilmOn IV*, slip op. at 3 n.4, 13-14.

**"[I]t is difficult to recognize the ambiguity the Second Circuit saw in the statute, at least as applied to the facts of this case. ... The 'internet' is not the 'facility' urged by Defendants here."**

### **In the Shadow of the FCC**

The court found no current FCC regulations that addressed FilmOn’s transmissions, and thus no basis to find that its service was not “permissible under the rules, regulations, or authorizations of the Federal Communications Commission,” 17 U.S.C. § 111(c)(1). *FilmOn IV*, slip op. at 14. But the court also recognized that the FCC is currently considering whether Internet services may qualify as “multichannel video programming distributors” (MVPDs). *Id.*

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It is not clear what affect the potential FCC rulemaking would have on § 111 licenses, and the district court did not reach any conclusions other than that the “proposed rules appear to provide a parallel path to program access for internet retransmitters.” *Id.* It is worth noting, however, that the FCC might impose requirements on Internet MVPDs that § 111 does not. In particular, network affiliates have argued that the FCC should impose local market exclusivity on Internet systems and require technical measures to guard against out-of-market reception, in the same way that the FCC does for cable and satellite operators. Harry A. Jessell, *FilmOn Ruling Not the End of the World*, TV NEWSCHECK, Jul. 17, 2015, <http://www.tvnewscheck.com/article/86986/filmon-ruling-not-the-end-of-the-world/>.

This could pose difficulties for FilmOn, which the district court found to be struggling with this very issue: “[W]hile Defendants have attempted to develop a more robust geolocation and content protection system, that system: (1) has not been fully developed, (2) makes approximations and compromises that result in access being granted outside of the designated market area, (3) is not immune to manipulation, and (4) has not always been accurately described by Defendants to the Court.” *FilmOn IV*, slip op. at 4. While the district court did “not find the detail to be material for the present discussion [of § 111] ... the precise system performance may be an appropriate subject for regulation by, e.g., the FCC, should it choose to affirmatively authorize systems like Defendants’.” *Id.*, slip op. at 4 n.4.

### Conclusion

The district court closed by noting that judicial rulings were unlikely to be the last word on this issue, given Congress’ history of adapting the Copyright Act to changing technology. The court authorized an immediate appeal of its order to the Ninth Circuit in light of the importance of the issues and because of its disagreement with the Second Circuit. It left the existing injunction in place due to FilmOn’s difficulty complying with the statutory requirements of a § 111 license, and stayed further proceedings at the pending the result of any appeal.

*Jeff Hermes is a deputy director at MLRC.*

# The Second Circuit's New Primary Beneficiary Test

## *When Are Interns Entitled to Wages and Overtime?*

By Thomas H. Wilson

The Second Circuit Court of Appeals recently adopted a seven-factor “primary beneficiary” test to determine when interns are employees entitled to minimum wage and overtime protections under the Fair Labor Standards Act (“FLSA”). [\*Glatt v. Fox Searchlight Pictures, Inc.\*](#), Nos. 13-4478-cv, 13-4481-cv, 2015 WL 4033018 (2d Cir. 2015) (Walker, Jacobs, Wesley, JJ.).

Although the new test provides employers some flexibility to classify employees as unpaid interns rather than employees, it also requires a fact-intensive, individualized inquiry to determine whether the intern or the employer is the primary beneficiary of the working relationship.

### ***Black Swan* Unpaid Interns File Lawsuit Demanding Wages**

In 2009-2010, the plaintiffs were college students and recent graduates working as unpaid accounting, production, and publicity interns for Fox Searchlight and Fox Entertainment Group (together, “Fox”) during the production of the movie *Black Swan*. Their duties varied, but mostly consisted of administrative tasks such as copying, scanning, filing, running errands, answering calls, mailing invitations, making travel arrangements, ordering lunch, and setting up rooms for events. The plaintiffs did not receive academic credit for their work, and they worked full days, 3-5 days per week.

Following their internships, the plaintiffs sued Fox in federal district court in New York, alleging that Fox had violated the FLSA and the New York Labor Law (“NYLL”) by failing to pay them as employees under those laws’ minimum wage and overtime provisions. Fox countered by arguing that the interns were not employees, and therefore the minimum wage and overtime laws did not apply.



### **The Legal Issue: When Are Unpaid Interns “Employees”?**

With certain exceptions, both the FLSA and NYLL require employers to pay all “employees” a specified minimum wage, and overtime for hours worked in excess of forty per

week. Unfortunately, neither law clearly defines “employee,” or explains whether and when interns should be considered employees entitled to minimum wage and overtime.

To decide whether the plaintiffs were employees, the district court applied a six-factor test proposed in guidance issued by the Department of Labor (“DOL”). The DOL test recommends that interns by default be considered employees subject to the FLSA, *unless* certain factors apply, and therefore tends to favor a finding that interns are employees. Applying DOL’s test, the court granted two plaintiffs partial summary judgment, holding that they were employees entitled to minimum wage and overtime. In addition, the court granted the third plaintiff’s motion to certify a state-wide class of unpaid interns under the NYLL and to conditionally certify a nationwide collective under the FLSA.

Faced with this initial defeat and the prospect of class and collective actions, Fox appealed to the Second Circuit Court of Appeals. First, Fox argued that the appropriate standard for whether an intern is an employee should be whether the employer or the plaintiff is the primary beneficiary of the working relationship. Second, Fox argued that class and collective action certifications were inappropriate in this case because whether a worker is an employee is a fact-specific determination requiring individualized analysis, and there was not sufficient commonality among the potential plaintiffs.

### **The Second Circuit’s New “Primary Beneficiary” Test**

The Second Circuit agreed with Fox. It held that the DOL test was overly rigid and did not adequately reflect the realities of modern internships. Instead, the court held that the proper question when determining whether an intern is an employee is whether the intern or the employer is the primary beneficiary of the working relationship. If the employer primarily benefits from the arrangement, the intern is an employee. If, on the other hand, the intern primarily benefits, he is *not* an employee. This approach, the court reasoned, adequately protects interns by focusing on what the intern receives in exchange for his work, while providing courts flexibility to examine the economic reality as it actually exists between the intern and employer.

To help determine which party is the primary beneficiary, the court provided a non-exhaustive list of seven factors to consider. All factors must be evaluated, but no one factor is determinative and not every factor need point in the same direction. However, positive answers to the following factors would support a finding that the intern is not an employee:

1. Does the intern clearly understand that there is no expectation of compensation?
2. Does the internship provide training that would be similar to that which would be given in an educational environment, including the clinical and hands-on training provided by educational institutions?

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3. Is the internship tied to the intern's formal education program by integrated coursework or the receipt of academic credit?
4. Does the internship accommodate the intern's academic commitments by corresponding to the academic calendar?
5. Is the internship's duration limited to the period in which the internship provides the intern with beneficial learning?
6. Does the intern's work complement, rather than displace, the work of paid employees while providing significant educational benefits to the intern?
7. Does the intern understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship?

The Second Circuit also agreed with Fox that class and collective actions were inappropriate in this case, because the "primary beneficiary" test requires an individualized, fact-intensive analysis of the specific circumstances surrounding each intern's working arrangement. Finally, the Second Circuit remanded the case back to the district court to re-evaluate the interns' claims under the new test.

### Key Takeaways for Employers

Employers in the Second Circuit should generally be pleased with this decision. There is now an established test for determining when an intern is not an employee, and that test provides employers more flexibility to create an unpaid internship than the alternative DOL test. In addition, the court's emphasis on an individualized, fact-intensive analysis means that potential plaintiffs will likely face an uphill battle when arguing that class or collective certification is appropriate in these types of cases.

However, this decision does not grant employers *cart blanche* to deny interns wages. To structure a valid unpaid internship, employers should develop a written plan for their internship program reflecting the seven factors in the primary beneficiary test. In addition, employers should consider providing written guidelines for interns to sign prior to beginning work, including clear notification that they will not be entitled to pay or a guaranteed job.

*Thomas H. Wilson is a partner at Vinson & Elkins and co-chair of the MLRC Employment Committee. Defendants were represented by Neal Katyal, Mary Wimberly, Frederick Liu, Hogan Lovells US LLP, Washington, DC; and Elise M. Bloom, Mark D. Harris, Chantel L. Febus, Amy F. Melican, Joshua S. Fox, Proskauer Rose LLP, New York. Plaintiffs were represented by Rachel Bien, Outten & Golden LLP, New York, NY.*

**The new test provides employers some flexibility to classify employees as unpaid interns rather than employees, it also requires a fact-intensive, individualized inquiry.**