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# MEDIALAWLETTER

Reporting Developments Through July 25, 2017

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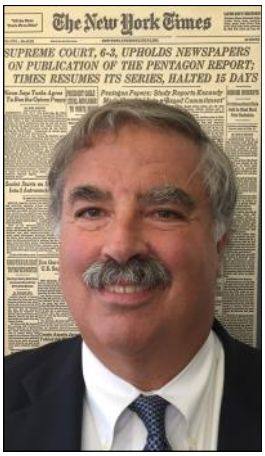
*From the Executive Director's Desk*

# How Trump Shapes Public Opinion of the Media (and How We Can Fight Back)

Last week marked the halfway point in Donald Trump's first year as President. The bad news is obvious. Even putting totally aside the substantive issues such as the Wall, immigration, health care, the budget, etc., it has been a terrible Administration: scores of statements a day which are, at best, inaccurate and, at worst, lies; personal and obnoxious ranting tweets; a total lack of respect for the rule of law and ethical standards; and a sharp decline in the view of America by people around the world. All this was underscored by his recent statement that he could be the second most "presidential" president in history (behind Lincoln), whereas almost every statement he makes and action he takes ensures, without doubt, that he is the 45th.




**George Freeman**

The good news, such as it is, is that on the media front, substantively, at least, not much has happened. There has been no attempt to "open up the libel laws". Save for the Sean Spicer gaggle incident, there has been no concerted effort to punish "unfavorable" reporters. As best as we can tell FOIA requests have been treated in the same lousy way as in past administrations. For all of Trump's blustering about leaks, there has been but once leak prosecution commenced, and none against a journalist, a record about equal to Obama's. And while there has been a dearth of presidential press conferences, and a pointless cut in video transmissions of press briefings by his press secretaries, he has sat for many interviews with the press, including ones from his foils The New York Times and Washington Post. Finally, though there was fear that his use of social media would result in his circumventing the Fourth Estate, to some degree the opposite has occurred: his tweets have given us entree into the Presidential mind and have begun a back-and-forth on the many issues he has raised in those tweets. (Incidentally, our Annual Dinner on Nov. 8 will feature some Clinton and Bush press secretaries, including Ari Fleischer and Dana Perino, discussing Trump's relationship with the press.)

On the other hand, the bad news is that, despite no real changes on the substantive front, Trump has railed against the press on a daily basis, and his constant criticism and negative blustering have had a deleterious effect. Given that, at bottom, Trump loves the press, there is a certain irony in all this. But the press rants exist despite the fact that Trump loves press attention, watches news shows on TV incessantly, has an office splashed with magazine covers he is on (and some he artificially constructed), seeks approval of the mainstream media, and generally seems to like journalists and his give-and -take with them.

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**Trump lashes out at the media at a press conference**

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So why the constant battering of the press? First, it works. Trump came to this line of attack when he found at campaign rallies that his bashing of the press got him his biggest and most enthusiastic responses. The more vile and violent his jabs (pointing to reporters who were penned up at his rallies and calling them "scum", "slime", "disgusting" and "dishonest"), the greater a reaction he got. So if it worked for him politically, and delighted his base, quel surpris that he would continue these rants, no matter how destructive to our democracy. Second, fighting, criticizing, litigating is his style. From the 3,500 lawsuits he has been a part of (according to USA Today) to his bizarre criticisms of his primary opponents' looks, size, energy levels and the like, the President's main approach has been through combat and criticism, not through a positive narrative. So, again, no great surprise that he constantly denigrates a group that has the temerity of doing its constitutional duty in criticizing him. Finally, and perhaps most important, the president's main frustration is that, unlike in his business life, things don't happen just because he wants it so. Amazingly, our system was built with checks and balances – just to guard against someone like Trump. And since the Congress has been so docile, the two institutions which can most significantly block his agenda are the courts and the press. Hence, it should come as no surprise that these are the two groups he has raved against the strongest – to minimize and delegitimize them so they have less credibility and resonance in future battles.

And all this has taken a toll. Polls show that however low the esteem of the media has been, the public's trust in the media is even lower now. Thus, a Gallup poll this Spring showed that only 32% of the public has a "great deal" or "fair amount" of trust in the media, the lowest number ever, and a "deep dive" from preceding polls. More troubling, a number of polls report that the public's trust in the media is lower than its trust in the Trump Administration. Although obviously these results vary among partisan lines, it is shocking that, given the demonstrable and palpable untruths by this Administration, these are the depths to which the media have fallen. Moreover, according to a Harvard-Harris poll, 65% of the people believe there is a lot of "fake news" in the mainstream media.

Especially worrisome to us media lawyers, all this may have an effect on our daily jobs. Thus, though I have no inside information whatsoever, it certainly seems plausible that a case

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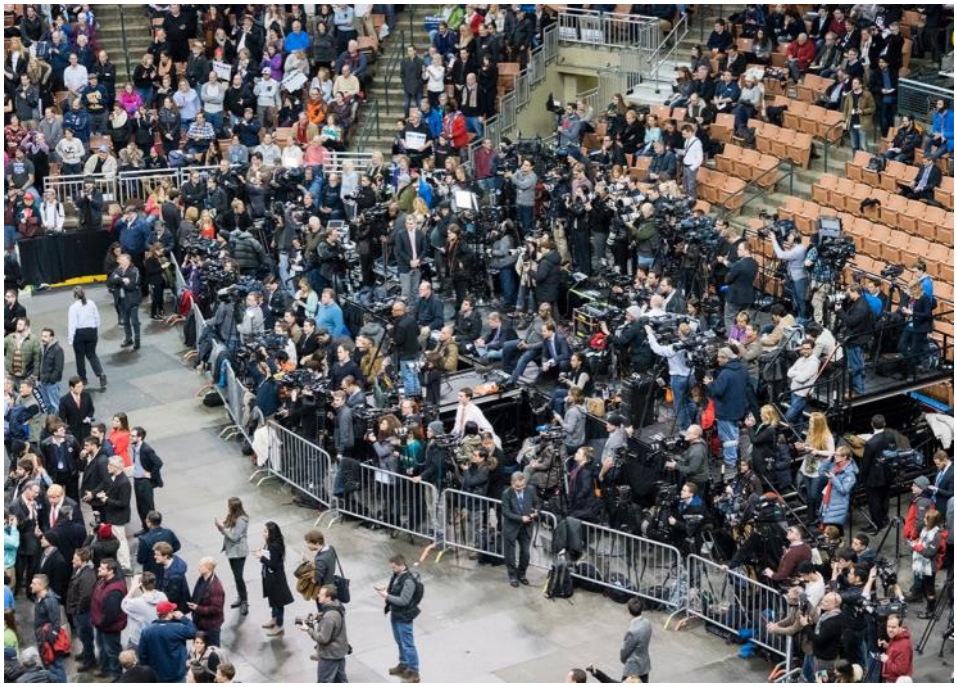
such as the Pink Slime litigation in North Dakota was settled because of the fear of adverse feelings about the media by the jury in the case – feelings that might well have derived from Trump's diatribes. And there is anecdotal evidence that the last six months have seen an increase in the number of defamation cases brought, though I believe the evidence is still too sparse to call it a trend.



**The "disgusting media" covering a Trump rally in 2016**

So the question is what are we going to do about all this. In brief, the discussion below leads inexorably to the conclusion that the problem is not legal, but one of public opinion. And so the response need not be legal, but, rather, more in the public relations realm. To the extent some repercussions are legal, they exist because of the adverse views of the media by the public – after all, we all know that judges, just as jurors, are guided by societal viewpoints and mores. So to the extent we can shift the public opinion needle more favorably to the press, it will have a concomitant result in the legal arena. But we at the MLRC – and, I suppose most of our members – are not public relations gurus. And, making it even more difficult, I believe any public relations initiative will have to feature social media, since that is where many of the heartland folks are getting their information from. The old fashioned p.r. campaign on tv or in full page newspaper ads wouldn't seem targeted at the audience we have to reach.

One step the MLRC is talking, on this and other fronts, is to try to develop a press freedom coalition, including other groups such as the Reporters Committee for Freedom of the Press, the Committee to Protect Journalists, PEN America and Free Press. Such a combination would give us more authority, visibility and resources than each of us working alone. While we still are having discussions as to how this might work, the group would likely focus on threats on journalists, deterrence on their newsgathering efforts and restrictions on access to government, a concerted litigation strategy and the denigration of the role and credibility of the media in public discourse. On this latter point, it would seem critical for this group to work with our digital members and others in the digital community to come up with a social media strategy and

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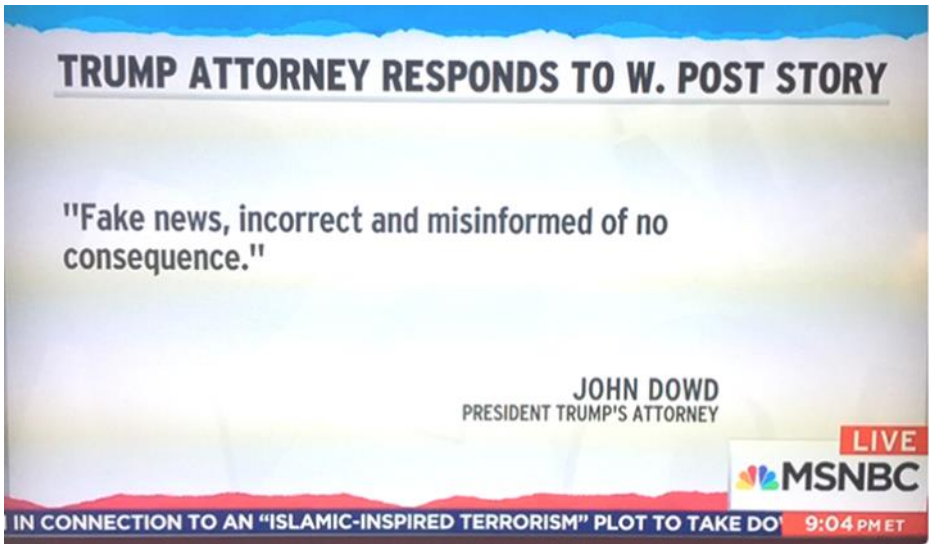
campaign. This is all somewhat ambitious, but I believe crucial if we are going to be able to repulse the Trump anti-media agenda and get the public to understand what a vacant, destructive and selfish effort it is.




**Trump attorney John Dowd evokes "fake news" in response to an accurate Washington Post report on the President dictating his son Don Jr.'s first and ultimately misleading statement about a secretive meeting with a Kremlin-linked lawyer at Trump Tower.**

At this point, it is very hard for me not to include a few lines om what total b.s. the Trump "fake news" rhetoric is. It means nothing except to say someone has published information I don't like. The epithet never is accompanied by an explanation of why the information so labeled is false, inaccurate or unreliable. It reminds me of the idiotic response of 10-year old kids in my neighborhood when someone called them a nasty name or criticized them: First kid: "You're a jerk." 2nd boy: "I know you are, but what am I." Meaningless, vapid, without any substance whatsoever. Yet – amazingly – it's taken. And the more Administration officials use it, the more it resonates, somewhat like the Big Lie. The ultimate problem is that Trump and his people have undermined the very nature of truth and fact to the degree that truth doesn't anymore matter. And that has broad cultural ramifications - but also undercuts the very purpose of the press. Any p.r. campaign will have to confront this craziness, but how to do it successfully is not all that easy.

A second initiative the MLRC is working on, in conjunction with Gannett and the Columbia Journalism Review, is to have local newspapers and tv stations in the red states, which remain popular in their local communities, host town meetings where the value and importance of good and independent journalism is discussed. Gannett is willing to host such meetings at some of its papers, and we have enlisted CJR to draw up an agenda. But just as President Trump has found the Presidency tougher than he thought it would be, I have found this project more difficult that I thought at first blush. Thus, we would have to create a discussion outline which does not get into national politics or even the President's denunciation of the media, for that would likely polarize and alienate the audience. Rather, we probably would have to come to the issue through the back door, perhaps starting with the value of the local newspaper in the local community, moving from there to the tenets of good journalism and somehow using that as a

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premise to indirectly move people from their views about fake news and the disloyalty of the media.

All these are not easy tasks. The public, to a remarkable degree, has bought in to the bombastic blustering buffoonery of the White House. Despite the last few months being one of the high points in the history of American investigative journalism – where the Times and the Post seems to be well ahead of the Congressional committees and Special Counsel – too many American appear to nonsensically agree that the press "is the enemy of the American people." As JFK said, "All this will not be finished in the first 100 days… But let us begin."

*The opinions expressed in this column are those of the author and not the MLRC. We welcome responses at gfreeman@medialaw.org; they may be printed in next month's MediaLawLetter.*

* * *

In response to George Freeman's column in the June 2017 MediaLawLetter "The Espionage Act Turns 100: Will Trump Use It Against Journalists?", Jon Bekken wrote in, referring to the statement that the act "has never been used to prosecute a journalist – let alone successfully":

> "It was used, albeit ultimately unsuccessfully (his conviction was overturned on appeal), to prosecute the editor of the Milwaukee Leader, Victor Berger. http://todayinclh.com/?event=victor-berger-on-trial-for-violating-espionage-act"
>
> Jon Bekken
> Associate Professor of Communication, Albright College

Upon further research, we confirmed that five prominent socialists, including three journalists, were charged and sentenced to twenty years in federal prison in 1918 for conspiracy to "violate the espionage act by speeches and articles printed in certain publications." The journalists, congressman Victor Berger, J. Louis Engdahl, and William F. Kruse, all served as editors for socialist publications. The charges stemmed from espousing socialist anti-war views, not for leaking or reporting on government documents or specific leaked or sensitive information. The sentences were overturned by the Supreme Court in Berger v. United States, 255 U.S. 22 (1921), because of the trial judge's anti-German bias.

# New York's Appellate Court Reaffirms Broad Scope of Shield Law

## *Protects Niche Publication From Forced Disclosure of Confidential Sources*

**By Joanna Summerscales, Laura Handman and Jim Rosenfeld**

In a victory for newsgathering, a New York appellate court struck down an order compelling Reorg Research, Inc., a niche publication covering the distressed debt and leveraged finance markets, to disclose the names of confidential sources who had allegedly acted in violation of their non-disclosure obligations to the petitioner. In re Murray Energy Corporation v. Reorg Research, Inc., Index No. 157797/16, 2017 WL 2977781, 2017 N.Y. Slip Op. 05688(N.Y. App. Ct. 1st Dep't, July 13, 2017).

The case reaffirms New York's "long tradition, with roots dating back to the colonial era, of providing the utmost protection of freedom of the press" – protection that has been recognized as "the strongest in the nation." *Matter of Holmes v. Winter*, 22 N.Y.3d 300, 307, 310 (2013), *cert. denied*, 134 S.Ct. 2664. One manifestation of this strong public policy is New York's Shield Law, N.Y. Civ. Rights Law § 79-h(b), which protects "professional journalists," whom the statute defines as:

> one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public….

N.Y. Civ. Rights Law § 79-h(a)(6). Provided that the individual is a "professional journalist," the statute further provides an "[a]bsolute protection" for confidential sources.

### Background

Appellant Reorg Research is a news organization that provides its subscribers with access to breaking news, market-moving intelligence, and independent in-depth analysis on the distressed debt and leveraged finance markets involving such far-reaching subjects as Puerto Rico's debt. Petitioner-Appellee Murray Energy Corporation is one of the largest players in the troubled U.S. coal market employing over 6,000 people in six states (and a serial litigant against the media who cover it, most recently suing the *New York Times* over an editorial and HBO over *Last*

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*Week Tonight* with John Oliver.) Although a privately-held company, Murray Energy has issued approximately three billion dollars in debt bonds that are publicly traded. On a quarterly basis, Murray Energy holds calls to present its quarterly results, projections, and any other developments that may impact its financial health to investors, potential investors, and others.

This proceeding concerns two articles published by Reorg Research, which reported on Murray Energy's efforts to reduce its debt burden, stave off bankruptcy and avoid hundreds of lay-offs. Both articles, prompted by press releases announcing a favorable renegotiation of a collective bargaining agreement with the United Mine Workers, relied in part on information from sources cited in the story who agreed to speak with the Reorg Research reporter (Max Frumes) on the condition that he promise not to disclose his or her identity.

For both articles, Frumes sought comment from Murray Energy and, in connection with the second article, Murray Energy provided a written statement that expressly confirmed the information in the article and expressed Murray Energy's satisfaction with the new agreement.

On September 16, 2016, Murray Energy filed a petition for pre-action disclosure pursuant to Rule 3102(c) of the New York Civil Practice Law and Rules (the "Petition"), seeking to compel Reorg to disclose to Murray Energy the identities of its reporter's confidential sources in alleged furtherance of a breach of contract action. In the Petition, Murray Energy alleged that Reorg Research's sources could not have gained access to the information they provided unless they had signed a non-confidentiality agreement.

**Murray Energy took the position that the Shield Law was limited to publications that are made available to the "general public."**

Reorg Research raised New York's Shield Law, N.Y. Civ. Rights Law § 79-h(b), Article I § 8 of the New York State Constitution and the First Amendment, among other grounds, as defenses to the Petition, and submitted factual affirmations and expert declaration from Paul Steiger, former Managing Editor of the *Wall Street Journal* and founding Editor-n-Chief, CEO and President of *ProPublica*, describing and analyzing its business model.

Murray Energy took the position that the Shield Law was limited to publications that are made available to the "general public" and that Reorg Research could not meet this "requirement." Murray Energy thus argued that Reorg Research could not assert the privilege, pointing to (1) the size and composition of Reorg's subscriber base, which comprises 375 unique institutional subscribers with over 9,000 active individual users; (2) the cost of subscriptions, which can exceed $100,000, depending on the size of the organization; (3) the highly-specialized subject matter; and (4) the fact that Reorg Research posts much of its content behind a paywall and places certain restrictions on the dissemination of its content to non-subscribers—although limited personal distribution and excerpting of "brief quotations" are

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expressly permitted. The Manhattan Supreme Court (Edmead, J.) sided with Murray Energy, ordering Reorg to produce the names of its sources and any newsgathering materials.

Reorg Research appealed. A number of prominent news organizations– including Bloomberg L.P., Dow Jones & Company, Inc., The Economist Newspaper Limited, Euromoney Institutional Investor PLC, The Financial Times LTD, Intelligence Press, Inc., Politico LLC, Providence Publications, LLC, Reuters America LLC, and Sporting Goods Intelligence Inc., filed an amici curiae brief in support of Reorg's position.

These news organizations "either originally entered the media landscape focused on a particular subset of readers and/or publish at least one subscription only publication or premium -content service on a specialized topic."

**Appellate Court Ruling**

On July 13, 2017, the New York Supreme Court, Appellate Division, First Department, unanimously reversed on the facts and the law and dismissed the Petition. Of particular importance, the First Department recognized that the features upon with Murray Energy relied are "not uncommon among, and in fact are essential to the economic viability of, specialty or niche publications that target relatively narrow audiences by focusing on a topic not ordinarily covered by the general news media—such as the debt-distressed market"—a position advanced by Reorg Research's expert and corroborated by numerous prominent news organizations who served as amici curiae before the appellate court.

Moreover, the court recognized that highly-specialized publications offer an important public benefit. Reorg's clients include institutions and financial advisors that control trillions of dollars of pension funds and endowments, law firms, investment banks, and many others who are in the best position to digest and use this information, stating that

> [R]espondent and amici argue persuasively that the public benefits secondarily from the information that respondent provides to its limited audience, because that audience is comprised of the people who are most interested in this information and most able to use and benefit from it. More importantly, given the substantial investment required to unearth this information and the limited number of interested readers, the alternative is not broader coverage but no coverage at all.

The court also emphasized the fact that Reorg Research's editorial staff is solely responsible for deciding what stories to cover. Numerous other cases applying both the Shield Law and federal reporter's privilege have focused on a publication's exercise of independence and

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editorial control, including whether the publication accepts compensation for, or allows subscribers to dictate, reporting on specific topics—an approach that the appellate court adopted here.

Perhaps most importantly, this case represents an important affirmance of New York's commitment to the freedom of the press. The court expressly acknowledged that the Shield Law is intended to encourage newsgathering by ensuring that confidential sources can rely on a promise that their identities will not become public. The court thus rejected the trial court's approach, which attempted to condition protection on a highly subjective analysis of the publication's reach and business model. As the appellate court explained:

> To condition coverage on a fact-intensive inquiry analyzing a publication's number of subscribers, subscription fees, and the extent to which it allows further dissemination of information is unworkable and would create substantial prospective uncertainty, leading to a potential "chilling" effect.

**This case represents an important affirmance of New York's commitment to the freedom of the press.**

*Davis Wright Tremaine LLP attorneys Laura R. Handman, James Rosenfeld, Joanna Summerscales and Jeremy Chase represent Reorg Research in connection with the appeal. Reorg Research was represented in the lower court by Matthew M. Oliver and Jamie Gottlieb Furia of Lowenstein Sandler LLP. Michael Berry of Levine Sullivan Koch and Schulz represented amici curiae. Jeffrey J. Chapman of McGuire Woods was of counsel for respondent Murray Energy.*

# Second Circuit Affirms Dismissal of "Bomb" Defamation Claim, Deciding Substantial Truth on Motion to Dismiss

**By Andrew Jacobs**

On July 25, the U.S. Court of Appeals for the Second Circuit affirmed a district court's dismissal of a defamation claim brought against NBC News by Tannerite, a manufacturer of exploding binary rifle targets (EBRTs). *Tannerite Sports, LLC v. NBCUniversal News Group*, 2017 WL 3137462 (2d Cir. July 25, 2017). The Second Circuit found that NBC News's report, which compared EBRTs to 'bombs,' was substantially true. The court also affirmed the district court's denial of Tannerite's request for leave to replead.

## The NBC News Report

On March 23, 2015, NBC News aired an investigative report on the *Today* show about the potential dangers and minimal regulation of EBRTs, which are sold as kits with separately packaged chemicals that detonate when mixed and shot with a bullet.

In his live lead-in to the report, NBC News correspondent Jeff Rossen held two containers of unlabeled EBRT and stated, "Right now, I am basically holding a bomb in my hand. And you'll never believe where I got this. A sporting goods store, no questions asked." He continued: "[T]he key ingredient here that causes the explosion has been used by terrorists to kill Americans. . . . This morning, you`re about to see what can happen when this gets in the wrong hands."

**Because "the primary purpose of a Tannerite exploding rifle target is to explode," NBC's description "was, at the least, substantially true."**

A recorded segment followed, beginning with video clips of explosions caused by EBRTs. Rossen identified Tannerite as the leading manufacturer of the product and stated that EBRTs' key ingredient, ammonium nitrate, was used in the Oklahoma City bombing and in attacks on U.S. troops in Afghanistan. The report demonstrated EBRTs' wide retail availability through a sequence in which Rossen and his producers acquired Tannerite in bulk at a sporting goods store and online. It also showed portions of an interview between Rossen and firearms expert Travis Bond, who stated, "I'm a huge supporter of the Second Amendment, but it's extremely dangerous. It's equivalent of buying explosives off the shelf."

In his live concluding remarks, Rossen, still holding the EBRT containers, stated that "after buying all these products, we are handing it over to experts," noting that they were "not dangerous being in the studio right now." He concluded, "But it is incredibly dangerous when you think about it, and how this is used overseas by terrorists."

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After it aired, the *Today* segment was published on the internet, alongside a written NBC News article covering the same set of subjects and interviews as the report (together with the video segment, the "NBC Reports"). The internet article was entitled "Bombs for sale: Targets containing dangerous explosive being sold legally."

**The Lawsuit**

Tannerite brought a defamation claim against NBC News in the U.S. District Court for the Southern District of New York on March 27, 2015, and amended its complaint shortly thereafter. In its amended complaint, Tannerite identified two allegedly defamatory statements by NBC News: the phrase "Bombs for sale" in the title of the internet article, and Rossen's assertion, "Right now I am basically holding a bomb in my hand." The complaint also asserted a series of allegedly defamatory implications in the reports, including that Tannerite targets are "dangerous bombs" before they are mixed and that "gun-rights enthusiasts" oppose their sale.

NBC News moved to dismiss the action for failure to state a claim. On October 1, 2015, the district court granted NBC News's motion, holding that the NBC Reports were substantially true and that the reports did not make any of the allegedly defamatory implications asserted in the complaint. The court also denied as futile Tannerite's request for leave to amend the complaint.

**The Second Circuit's Decision**

In affirming the district court, the Second Circuit first rejected Tannerite's argument that substantial truth is an affirmative defense that must await summary judgment. The court noted that "substantial truth" is "the standard by which New York law . . . determines an allegedly defamatory statement to be true or false." It then recognized that because "falsity is an element of a New York defamation claim, . . . a plaintiff in New York courts generally must identify how the defendant's statement was false to survive a motion to dismiss." Combining these propositions, the court concluded that substantial truth is an appropriate inquiry on a motion to dismiss: "Because falsity is an element of New York's defamation tort, and 'falsity' refers to material not substantially true, the complaint . . . must plead facts that, if proven, would establish that the defendant's statements were not substantially true."

Applying this standard, the Second Circuit held that Tannerite had failed to plead any way in which the NBC Reports were false. As to NBC's comparison of Tanneritie's EBRTs to "bombs," the court held that because "the primary purpose of a Tannerite exploding rifle target is to explode," NBC's description "was, at the least, substantially true." The court further rejected any claim based specifically on the phrase "bomb on a shelf," emphasizing that

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defamatory meaning must be analyzed in context of "the entire publication" and finding that the NBC Reports "made clear that the target's ingredients must be removed from the packaging, mixed, and shot before they explode." As to the alleged defamatory implication that "gun-rights enthusiasts" oppose the sale of Tannerite targets, the court determined that neither NBC's interview with Travis Bond nor the balance of the NBC reports made any such suggestion.

The Second Circuit also rejected Tannerite's argument that the district court had ignored a stated basis for Tannerite's claim, namely the supposed implication that that terrorists were associated with the company or had used its products. To support this argument, Tannerite had cited a single sentence in its brief opposing dismissal and a paragraph in its complaint that incorporated a third-party internet article critical of the NBC Reports. The court held that these "scattered, cryptic references" to an alleged implication did not constitute proper pleading, as they "[did] not substitute for making a specific allegation that NBC falsely associated Tannerite with terrorists."

Finally, the Second Circuit affirmed the district court's denial of leave to amend the complaint, holding that Tannerite's single-sentence request in its opposition to dismissal was properly denied as futile. The court also rejected Tannerite's newly proposed amendments as untimely, "particularly given that the news arguments rely only on facts that Tannerite knew when the operative complaint was filed."

*NBC News was represented by NBCUniversal in-house counsel Daniel M. Kummer, Chelley E. Talbert, and Andrew D. Jacobs. Tannerite was represented by David L. Cargille of Baer Crossey McDemus LLC and Robert Jackel.*

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# Tenth Circuit Affirms Dismissal of Defamation Claim After Reviewing Undercover Video

## *Broadcast About Questionable Annuity Sales Tactics Was Substantially True*

**By Matthew E. Kelley**

Hidden-camera footage of a sales seminar for insurance agents showed that an NBC News report about the seminar was not materially false and therefore not defamatory, the Tenth Circuit Court of Appeals held. *Broker's Choice of America, Inc. v. NBC NEWS Universal, Inc.*, 2017 WL 2785352 (10th Cir. June 28, 2017) ("Broker's Choice II").

The Tenth Circuit affirmed a trial court's dismissal of the defamation claim, ruling that the undercover video showed that NBC News accurately reflected the contents of the plaintiffs' two -day seminar, which taught questionable sales tactics for selling annuities to senior citizens.

This was the second time the Tenth Circuit considered the case. An earlier panel had remanded the case after a previous dismissal, holding that the trial judge had incorrectly ruled that NBC's undercover recordings were privileged.

**Hidden-camera footage of a sales seminar for insurance agents showed that an NBC News report about the seminar was not materially false and therefore not defamatory.**

On remand, the trial court considered the full recordings and transcripts of them and again dismissed the action with prejudice, holding that the NBC News report was substantially true.

The plaintiffs appealed again, and the Tenth Circuit affirmed.

The case began in 2007, when journalists for *Dateline NBC* began investigating sales of annuities to senior citizens. Some state regulators had cracked down on the practice and a number of lawsuits had been filed by seniors who felt they had been misled by the insurance companies that issued the annuities and the agents who sold them.

*Dateline* producers interviewed critics of the industry practices, including some state insurance commissioners and attorneys general, who argued that some insurance agents were using questionable sales tactics. Critics argued that annuities are a poor investment choice for the elderly because they lock up the person's savings for years while requiring hefty surrender penalties if the money is needed for emergencies such as hospitalization or nursing home care.

Alabama's insurance commissioner agreed to issue licenses to two *Dateline* producers so they could attend "Annuity University," an agents-only sales seminar operated in Colorado by Broker's Choice of America, Inc., and its founder, Tyrone Clark, the eventual plaintiffs. The

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NBC News journalists used a number of hidden cameras to record the seminar, most of which was presented by Clark himself.

The *Dateline* segment that aired in April 2008, entitled "Tricks of the Trade," reported that Annuity University was "a school where, authorities say, insurance salesmen are being taught questionable tools of the trade." Using short clips from the undercover video, the *Dateline* report said Clark advocated using "scare tactics" such as preying on seniors "natural fear of nursing homes," and claimed annuities had "no risk" and were more liquid than any other financial instrument. That, Minnesota Attorney General Lori Swanson told *Dateline*, was "simply not true."

Nearly a year later, Clark and Broker's Choice sued NBC, the *Dateline* journalists and NBC's then-parent, General Electric, in federal court alleging defamation, civil rights violations pursuant to 42 U.S.C. § 1983, and tag-along claims for trespass, invasion of privacy and fraud. After the trial court dismissed the original complaint in an order from the bench, the plaintiffs filed an amended complaint limiting their claims to defamation and § 1983 violations. According to the plaintiffs, the *Dateline* segment was defamatory because Clark did not teach scare tactics but rather told his students to provide clients with a balanced picture of annuities and determine on a case-by-case basis whether an annuity was the right fight for each client. The plaintiffs based their civil rights claim on the fact that Alabama authorities had granted the NBC News producers insurance sales licenses, which the plaintiffs argued provided the requisite state action that rendered the undercover recordings an unconstitutional search.

**The case began in 2007, when journalists for Dateline NBC began investigating sales of annuities to senior citizens.**

In 2011, the district court dismissed the case again, holding in a written opinion that the broadcast was substantially true, based on Clark's recorded statements used in the report. The court dismissed the civil rights claim because the NBC News journalists were not state actors and in any event were protected by the invited informant doctrine. Earlier, the court had stayed discovery in the case and held that the "outtakes" – the hidden-camera recordings of the seminar – were protected from discovery by Colorado's shield law.

On appeal for the first time, the Tenth Circuit affirmed the dismissal of the § 1983 claim. But the appeals panel reversed the reporter's privilege ruling and the dismissal of the defamation claim, holding that the trial court improperly evaluated the challenged characterizations of the seminar and excerpts from it in isolation, rather than in the full context of the full two-day seminar.

The appeals Court determined the gist of the broadcast to be that "Clark teaches insurance agents to scare and mislead seniors into buying unsuitable insurance products." Broker's Choice of America, Inc. v. NBC Universal, Inc., 757 F. 3d 1125, 1138 (10th Cir 2014) ("Broker's

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Choice I"). BCA had specifically alleged that NBC News had selected a few short clips from the undercover videos and presented them out of context in a defamatory manner, and the panel agreed that Broker's Choice had adequately pleaded the element of material falsity with allegations that the full recordings "would show Clark teaching the downside of annuities, urging his students to probe into the customer's personal situation to determine the most suitable product, repeatedly telling students annuities are not for everyone, stressing BCA's code of ethics which require full disclosure of various advantages and disadvantages of annuity products, and promoting personal involvement in the community to gain credibility." *Broker's Choice I* at 1139. The Court held that the full recordings, which involved no issues of confidentiality, should be produced to test that contention. Once NBC News produced the outtakes, the Tenth Circuit said, the court or a properly instructed jury could compare the content of Annuity University to the *Dateline* report to determine if the latter was substantially true or false and defamatory.

On remand, NBC News produced the outtakes as directed, and the parties provided the court with transcripts of the entire Annuity University presentation. The network again moved to dismiss the remaining defamation claim, arguing that the outtakes conclusively showed that the *Dateline* report was substantially true and therefore not actionable. Broker's Choice attacked NBC News's position on several fronts, arguing that NBC News violated the prohibition on successive motions to dismiss; that the Tenth Circuit's ruling meant the case had to go to a jury; and that the outtakes showed the broadcast was defamatorily false.

**The trial court held, and the Tenth Circuit agreed, that the outtakes showed it was the plaintiffs who mischaracterized the content of the seminar, not NBC News.**

The trial court held, and the Tenth Circuit agreed, that the outtakes showed it was the plaintiffs who mischaracterized the content of the seminar, not NBC News. Those recordings, the Tenth Circuit said, showed Clark acknowledging that "one of the seminar's main purposes" was "to teach agents how to sell annuities and get rich." Moreover, the videos showed that Clark "instructed seminar attendees to exploit seniors' emotions and to use 'fear' to make sales," the Tenth Circuit said. And rather than teaching agents how to determine whether an annuity was the right product for a specific client, as the plaintiffs claimed, the appellate panel found that videos showed that "the seminar's limited discussion of suitability [and] lack of meaningful instruction on how to determine suitability," combined with the scare tactics, the misleading pitches, and "equating suitability with customer desire," showed the contrary.

The Tenth Circuit also affirmed the trial court's rejection of all of the plaintiffs' procedural arguments. First, BCA argued that the law of the case doctrine precluded another motion to dismiss on remand because the first appellate panel had found the complaint sufficient to

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withstand a Rule 12(b)(6) motion. The Tenth Circuit agreed with the trial court that the law of the case rule didn't apply because the addition of the undercover videos – for which BCA had reserved an exhibit to the original complaint – operated as an amendment to the complaint that allowed the court to entertain a new motion to dismiss.

Second, the plaintiffs asserted that the trial court violated Rule 12(g)(2)'s prohibition on successive motions to dismiss based on arguments available to the movant on earlier motions. That rule did not apply to this case, the Tenth Circuit said, because NBC News's good-faith assertion of the reporter's privilege meant the videos were not available as an earlier basis for dismissal. Further, even if it were a successive motion, the district court could have considered NBC's latest motion to dismiss as a Rule 12(c) motion for judgment on the pleadings, which is functionally indistinguishable from a motion to dismiss, the Tenth Circuit held.

Finally, BCA claimed the trial court improperly ruled on the motion to dismiss using "analytical tools" that were reserved for motions for summary judgment: weighing evidence, resolving disputed issues of material fact, and failing to view factual issues in the light most favorable to the plaintiffs. The Tenth Circuit affirmed the district court on this point as well, noting that the court merely analyzed the new materials incorporated into the complaint – the videos – and ruled as a matter of law that the broadcast was substantially true.

Broker's Choice has filed a motion for rehearing *en banc*.

*Levine Sullivan Koch & Schulz attorneys Thomas B. Kelley, Gayle Sproul and Matthew E. Kelley represented defendants. John J. Walsh and Joshua E. Abraham of Carter Ledyard & Milburn in New York and G. Stephen Long, Lidiana Rios and Nicole A. Westbrook of Jones & Keller in Denver represented plaintiffs.*

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MediaLawLetter June 2017
The Espionage Act Turns 100: Will Trump Use It Against Journalists?; SCOTUS: Trademark Disparagement Clause Violates First Amendment; Supreme Court Upholds First Amendment Right to Use Social Media; Court Finds Gun Documentary Was Neither False Nor Defamatory; Court Delivers Defamation Victory to D Magazine in "Party Crasher" Case; MLRC Pre-Pub Committee on The Rolling Stone/UVA Case; Pulse Nightclub: Litigation Over 911 Calls Finally Comes to a Close; and more.

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# Speech to Closed Group of Subscribers About Website Content a Matter of Public Concern Under Cal. Anti-SLAPP Law

## *FilmOn v. DoubleVerify*

**By Lincoln D. Bandlow and Rom Bar-Nissim**

### Background

FilmOn.com is a website that provides the public access to hundreds of television, premium movie and pay-per-view channels, including 45,000 video-on-demand titles. DoubleVerify is an online service that provides advertisers individualized and confidential reports that provide data on the advertisers' digital ad placement. Part of these reports include "tags" classifying a website's content with a legend explaining the tags. In DoubleVerify's confidential reports to its clients, it classified FilmOn.com as containing "Adult Content" and "Copyright Infringement – Streaming or File Sharing."

**FilmOn.com sued DoubleVerify for a host of business related torts, but the gravamen of its claims was that DoubleVerify's tagging FilmOn.com as having adult content and being associated with copyright infringement constituted trade libel.**

### The Lawsuit

FilmOn.com sued DoubleVerify for a host of business related torts, but the gravamen of its claims was that DoubleVerify's tagging FilmOn.com as having adult content and being associated with copyright infringement constituted trade libel. DoubleVerify responded by filing an anti-SLAPP motion under California's Code of Civil Procedure Section 425.16. Under the statute, a lawsuit will be dismissed when: (a) The defendant demonstrates that "the challenged cause of action is one arising from protected activity made in furtherance of a person's right to petition or free speech under the United States Constitution or the California Constitution in connection with a public issue"; and (b) The plaintiff fails to establish "a probability the plaintiff will prevail on the claim."

The trial court granted DoubleVerify's anti-SLAPP motion. As for the first prong of the anti-SLAPP statute, the trial court found that DoubleVerify's use of tags to classify content arose from protected activity because "the public had a demonstrable interest in knowing what content is available on the Internet, especially with respect to adult content and the illegal distribution of

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copyrighted material." Slip Op. 6-7. This shifted the burden to FilmOn.com to establish a probability that it would prevail on its claims. FilmOn.com could not meet that burden because DoubleVerify's statements were "essentially true" (FilmOn.com conceded that it had "R" rated programing and various "bikini babes" channels and that FilmOn.com was the subject of litigation around the country in which it was accused of copyright infringement). *Id.* at 7.

**The Appeal**

FilmOn.com appealed the trial court's order, but challenged only the trial court's findings as to the first prong of the anti-SLAPP analysis (*i.e.*, whether DoubleVerify's conduct arose from speed made in connection with an issue of public interest). FilmOn.com advanced two arguments on appeal: (1) "the reports contained only basic classifications and certifications decisions with little to no analysis or opinion"; and (2) "the reports were made entirely in private, to individual companies that subscribe to DoubleVerify's services." Slip. Op. 7 (internal quotes and brackets omitted).

**DoubleVerify's Tags a Matter of Public Interest**

**The Court of Appeals found that DoubleVerify's tags involved "conduct in furtherance of its right of free speech in connection with a public issue."**

The Court of Appeals found that DoubleVerify's tags involved "conduct in furtherance of its right of free speech in connection with a public issue." Slip Op. at 16. FilmOn.com sought to refute this point by analogizing DoubleVerify's tags to the certifications at issue in *All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc.* (2010) 183 Cal. App. 4th 1186 ("*OASIS*"), in which the court had held that the first prong of the anti-SLAPP analysis had not been met. In *OASIS,* the Court of Appeals held that a trade association's certification of commercial products with the label "organic" was not conduct in furtherance of its right to free speech on a matter of public interest. *Id.* at 1203. While the trade association sought to argue that the certification constituted its articulation and dissemination of its organic standard and, therefore, satisfied the first prong of the anti-SLAPP analysis, the court disagreed – finding that the articulation of the standard occurred ***before*** the act of certification.

In *DoubleVerify*, the court found this analogy unpersuasive. As the court explained:

> In *OASIS,* the association's act of placing its seal on a member product communicated nothing about what standards should be used to judge whether a personal care product is organic. [Citation]. In this case, FilmOn's business tort

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> and trade libel claims are based ***entirely*** upon the message communicated by DoubleVerify's tags.

Slip Op. at 15 (emphasis in the original).

The court went on to explain that:

> [I]t is only because advertisers understand that the public is interested in whether adult content or copyright infringing material appears on a website that these companies would modify their advertising strategies based on DoubleVerify's tags. Unlike the unfair business practice claims in *OASIS,* FilmOn's allegations are directly based on the content of DoubleVerify's communications.

*Id.*

(At first blush, the Court of Appeals distinction may appear a bit unpersuasive because the "organic" certification could be perceived as communicating a message. It may be helpful to characterize the court's analysis in *OASIS* as focusing on the ***conduct*** giving rise to the cause of action and whether that conduct contained expression relating to a matter of public interest. In *OASIS,* the challenged conduct involved the trade association only authorizing its members to place the "organic" certification on their products and whether it constituted unfair competition. *OASIS,* 183 Cal. App. 4th at 1202. Non-members were not authorized to use the "organic" certification even if they met the trade association's standards and, therefore the consuming public might be misled. *Id.* Therefore, the conduct at issue was less about whether a product was "organic" or not, but rather the trade association only authorizing its members to use the certification and not non-members. In contrast, DoubleVerify's clients were specifically asking for DoubleVerify's individualized opinion on the content of the websites they advertised on and, therefore, the challenged conduct arose from DoubleVerify providing that opinion, which contained speech relating to a matter of public interest.)

**The question of "whether a statement concerns an issue of public interest depends on the content of the statement, not the statement's speaker or audience."**

To determine whether the issues of adult content or copyright infringement on the Internet were matters of public interest, the court focused on the following facts:

***Press Reports*:** The Court of Appeals set forth a bright line rule that "[m]atters receiving extensive media coverage through widely distributed news or entertainment outlets are, by definition, matters of which the public has an interest." Slip Op. at 15-16 (citing *Annette F. v.*

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*Sharon S.* (2004) 119 Cal. App. 4th 1146, 1162; *Church of Scientology v. Wollersheim* (1996) 42 Cal. App. 4th 628, 651 & 651 fn. 3.

***Regulatory Actions***: While the court did not cite specific examples, FilmOn.com had unsuccessfully lobbied the United States Copyright Office in an attempt to obtain a compulsory licenses to retransmit broadcast television under 17 U.S.C. § 111. *See e.g.,* U.S. Copyright Office, Satellite Home Viewer Extension and Reauthorization Act § 109 Report 43 & 70 (2008).

***Lawsuits***: Like the regulatory actions, the court did not cite specific examples, however, numerous cases of copyright infringement against FilmOn.com – and other similar services – have been heavily litigated, including in the Supreme Court of the United States. *See e.g., American Broad. Cos. v. Aereo, Inc.* (2014) 134 S. Ct. 2498; *Fox Television Stations, Inc. v. Aereokiller, LLC* (2017) 851 F.3d 1002; *WPIX, Inc. v. ivi, Inc.* (2d Cir. 2012) 691 F.3d 275; *Fox Television Stations, Inc. v. FilmOn X LLC* (D.D.C. 2015) 150 F. Supp. 3d 1; *Filmon X, LLC v. Window to the World Commc'ns, Inc.* (N.D. Ill. Mar. 23, 2016) No. 13 C 8451, 2016 WL 1161276; *CBS Broad. Inc. v. FilmOn.com, Inc.* (S.D.N.Y. July 24, 2014) No. 10 CIV. 7532 NRB, 2014 WL 3702568.

## DoubleVerify's Speech Was Protected Despite Occurring In Private And In A Commercial Context

The Court of Appeals rejected FilmOn.com's argument that DoubleVerify could not satisfy the first prong of the anti-SLAPP analysis because its reports were "private statements made in a commercial context." Slip Op. at 17. This argument had two components (1) the communication was private; and (2) it did not contribute to a public debate.

As to the argument that DoubleVerify's reports were private in nature, the Court of Appeals explicitly stated that "the identity of the speaker" and "the identity of the audience" are "irrelevant" to the inquiry. Slip Op. at 20. Rather, the question of "[w]hether a statement concerns an issue of public interest depends on the ***content of the statement***, not the statement's speaker or audience." *Id.*

As to the argument DoubleVerify's reports did not contribute to a public debate, the Court of Appeals rejected this rule, stating "where a statement concerns an issue of widespread public interest, it need ***not*** also contribute in some manner to a public debate." Slip Op. at 19 (emphasis added). Relying on *Cross v. Cooper* (2011) 197 Cal. App. 4th 381 fn. 15, the court rejected the requirement set forth in *Wilbanks v. Wolk* (2004) 121 Cal. App. 4th 883, 898 that the conduct must contribute to a debate on a matter of public interest. Slip Op. at 19. The Court of Appeals agreed with the *Cross* court that this was a "narrow interpretation" of the anti-

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SLAPP statute and was contrary to the California Legislature's intent that the statute be "broadly construed." *Id.*

**Requests For Publication from the Motion Picture Association of America ("MPAA") and Trustworthy Accountability Group ("TAG")**

The original opinion was not certified for publication. The MPAA and TAG filed letters with the Court of Appeals requesting it to publish the decision. The MPAA sought publication because the opinion contained language stating that the MPAA's rating system concerned matters of public interest, namely adult content in motion pictures.

> As the [trial] court pointed out, the Motion Picture Association of America (MPAA) engages in conduct quite similar to DoubleVerify's activities by rating movies concerning their level of adult content; and the MPAA does so, because the public cares about the issue.

Slip Op. at 16.

TAG sought publication because it works with websites similar to DoubleVerify. TAG is a cross-industry accountability program to create transparency in the digital advertising industry. One of TAG's programs is the "Certified Against Piracy" program, which certifies Digital Advertising Assurance Providers that provide advertisers information about the content of the websites containing their ads to help them make informed decisions about ad placement. As such, the conduct at issue in *DoubleVerify* directly concerned TAG's "Certified Against Piracy" program.

On July 25, 2017, the Court of Appeals certified the opinion for publication. That is an important development because the decision sets forth some very important principles for future anti-SLAPP jurisprudence, not the least of which is the concept that it is the content of the speech, and not the size and make-up of the audience, that determines the issue of whether speech relates to a matter of public concern.

*Lincoln Bandlow is a partner and Rom Bar-Nissim is an associate at Fox Rothschild LLP in Los Angeles where they practice media and entertainment litigation. Mr. Bandlow represented DoubleVerify in this matter. Plaintiff was represented by Baker Marquart LLP, Los Angeles.*

# No Qualified Immunity for Louisiana Sheriff Over Search and Seizure of Blogger

## *First and Fourth Amendment Claims Survive Motion to Dismiss*

**By Mary Ellen Roy and Dan Zimmerman**

"Some qualified immunity cases are hard. This case is not one of them." So begins the federal district court's ruling in Anderson v. Larpenter, No. 16-13733 (E.D. La. July 18, 2017), making it pretty clear that things are not going to go well for the Sheriff of Terrebonne Parish.

### Background

Fifty-three years ago, in 1964, the United States Supreme Court in *Garrison v. Louisiana*, 379 U.S. 64 (1964), unanimously held that the "actual malice" standard of *New York Times Co. v. Sullivan* applied to render Louisiana's criminal defamation statute unconstitutional "in the context of criticism of the official conduct of public officials." A few years later, in 1973, the Louisiana Supreme Court went further, holding the statute unconstitutional as applied "to public expression and publication concerning public officials, public figures and private individuals engaged in public affairs." *State v. Snyder*, 277 So.2d 660, 668 (La. 1973).

**The Sheriff of Terrebonne Parish convinced a Judge to issue a search warrant of a woman suspected of being the source of an anonymous blog that criticized the use of public funds and alleged nepotism by the Sheriff.**

Nonetheless, the Sheriff of Terrebonne Parish convinced a Judge to issue a search warrant and, executing that warrant, seized the computers, cellular phones and other electronic devices of a woman suspected of being the source of an anonymous blog that criticized the use of public funds and alleged nepotism by the Sheriff and the head of the local Levee and Conservation District, who also was an insurance broker. The Plaintiff's "Exposedat" blog criticized the Sheriff's dealings with the Levee District head's insurance agency, where the Sheriff's wife worked. When the Levee District head complained about the blog to the Sheriff, he ordered one of his deputies to investigate. The Deputy determined that Plaintiff was behind the blog, and at the Sheriff's insistence, the Deputy applied for and got a search warrant. The Sheriff's Office executed the warrant and seized the electronic devices.

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Plaintiff challenged the warrant – the Judge who had issued it upheld it. The Court of Appeal quickly reversed, based on *Garrison* and *Snyder* and the fact that the head of the Levee District was a public official.

Plaintiff then filed suit in federal court. The Sheriff filed a motion to dismiss, which the District Court resoundingly rejected. Both the First and Fourth Amendment claims survived the Sheriff's claim of qualified immunity.

**Fourth Amendment Analysis**

On the Fourth Amendment claim, the Court concluded that "no prudent person would believe that [Plaintiff's] statements . . . could constitutionally form the basis of a crime." There was "not . . . a scintilla of evidence" of actual malice – even the Deputy's application for the search warrant noted that Plaintiff's blog featured publicly-available documents to support her claims. Furthermore, based on *Snyder*, even if the Sheriff had shown that Plaintiff's "statements were both false and made with actual malice, the facts and circumstance known to Sheriff Larpenter would still not have led a prudent person to conclude that the search warrant sought evidence of a crime."

**"No prudent person would believe that [Plaintiff's] statements . . . could constitutionally form the basis of a crime."**

And the Court was not done – because Plaintiff's speech was "a paradigmatic example" of speech about public affairs, "even accepting Sheriff Larpenter's unpersuasive argument that" the Levee District head's public role was distinct from his private role as an insurance broker, still no prudent person would have concluded that the search warrant sought evidence of a crime. Thus, Plaintiff stated a claim under the Fourth Amendment.

Turning to the Sheriff's qualified immunity argument, the Court considered whether the Sheriff's actions were "objectively reasonable in light of clearly established law." Pointing out that *Garrison* was decided "over fifty years ago" and that *Snyder* was decided "over four decades ago," the Court easily concluded that "any reasonable law enforcement official" would or should have known that Plaintiff's statements "could not constitute a crime." Thus, the Sheriff was not entitled to qualified immunity on Plaintiff's Fourth Amendment claim.

**First Amendment Retaliation**

The Court then turned to Plaintiff's First Amendment retaliation claim. The Court quickly concluded that Plaintiff's speech was protected by the First Amendment. The Sheriff next argued that, because Plaintiff's electronic devices were never searched by law enforcement and

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were returned to her, she did not suffer a "an injury sufficient to chill a person of ordinary firmness" from continuing to engage in the conduct that had led to the search and seizure.

The Court gave this argument short shrift, stating that the search and seizure imposed a "considerable chill – perhaps even to the point of a freeze." It probably did not help the Sheriff that he appeared on a local television news program and said: "If you're gonna lie about me and make it under a fictitious name, I'm gonna come after you." Pulling no punches, the Court stated: "To the Court, *that* message – if you speak ill of the sheriff of your parish, then the sheriff will direct his law enforcement resources toward forcibly entering your home and taking your belongings under the guise of a criminal investigation – . . . would certainly chill anyone of ordinary firmness from engaging in similar constitutionally protected speech in the future." Thus, there was no doubt that the Sheriff's actions were motivated against Plaintiff's exercise of her First Amendment rights, and Plaintiff therefore stated a cause of action for First Amendment retaliation.

The Sheriff's qualified immunity argument on Plaintiff's First Amendment claim fared no better than his Fourth Amendment qualified immunity argument. Because "no reasonable police officer could have believed that probable cause existed" to obtain the search warrant, the Sheriff's actions "violated clearly established law" and he was not entitled to qualified immunity.

As to both the First and Fourth Amendment claims, the Court also rejected the Sheriff's argument that his actions were protected by the fact that a Court had issued the search warrant, because the Sheriff had an independent duty to comply with established law.

Finally, Plaintiff asserted a *Monnell* claim that the Sheriff had a policy of violating First and Fourth Amendment rights. Sheriffs in Louisiana are extraordinarily powerful and "virtually autonomous." The Court held: "This case illustrates the appropriate circumstances where *Monnell* liability may be imposed in response to a single unilateral action taken by a single policymaker."

The only win for the Sheriff was on Plaintiff's malicious prosecution claim. But since Plaintiff had not been prosecuted for anything this is cold comfort.

All in all, a resounding victory for the First Amendment right to criticize local officials even with anonymous speech.

*Mary Ellen Roy is a partner and Dan Zimmerman a staff attorney at Phelps Dunbar LLP in New Orleans, where they specialize in First Amendment, media, and intellectual property law.*

# Federal Court Strikes Down Utah's Ag-Gag Statute as Unconstitutional

## *Abridgement of the First Amendment*

**By Jeffrey J. Hunt and Bryan S. Johansen**

On July 7, 2017 the United States District Court for the District of Utah struck down Utah's "ag-gag" statute as an unconstitutional abridgement of the First Amendment. Animal League Defense Fund v. Herbert.

### The Statute

While ag-gag statutes come in a variety of forms, they typically criminalize the undisclosed recording of livestock operations, obtaining access or employment with a livestock or poultry operation under false pretenses, or otherwise illegally obtaining access to the livestock or poultry operation to record its operations.

Enacted in 2012, Utah's law is similar to those enacted by over a dozen states over the past two decades. The statute criminalizes (1) "obtain[ing] access to an agricultural operation under false pretenses," (2) "bugging an agricultural operation," (3) "filming an agricultural operation after applying for a position with the intent to film," and (4) "filming an agricultural operation while trespassing." Utah Code Annotated § 76-6-112, *et. seq*.

**While "Utah undoubtedly has an interest in addressing perceived threats to the state agricultural industry…,suppressing broad swaths of protected speech without justification… is not one of them."**

### The Challenge

In 2013, an animal rights activist, Amy Meyer, was charged with violating Utah's ag-gag statute when she recorded workers using heavy machinery to move a sick cow at a slaughterhouse in Draper, Utah, a suburb of Salt Lake City. It was later determined that Ms. Meyer was on public property at the time of the recording and the charges against her were dropped.

In response to the arrest of Ms. Meyer, the Animal Legal Defense Fund (ALDF), People for the Ethical Treatment of Animals (PETA), and Ms. Meyer, filed a lawsuit against the State of Utah styled, *ALDF, et al. v. Gov. Gary Herbert, et al*., Civ. No. 2:13-cv-679, in the United States District Court for the District of Utah, seeking to have the law declared unconstitutional as an abridgement of protected First Amendment speech.

After three years of litigation, the parties filed cross-motions for summary judgment seeking to have their respective positions declared correct, one upholding the law and the other striking

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it down. A number of *amici*, including agricultural industry groups and local and national news media and journalism groups, filed friend-of-the-court briefs.

**The Decision**

United States District Court Judge Robert Shelby, in a thoughtful and thorough analysis, held that while "Utah undoubtedly has an interest in addressing perceived threats to the state agricultural industry…,[s]uppressing broad swaths of protected speech without justification… is not one of them."

At the outset, the Court noted that while the law would appear to "pit the First Amendment broadly against the privacy and property interests of landowners… because of both the breadth of the Act and the narrow grounds on which the state defended it, these complex policy questions never really materialize in this case."

The Court first rejected the challenge made by the State that the right to free speech is not guaranteed once one enters private property: "[t]he fact that speech occurs on a private agricultural facility does not render it outside First Amendment protection." While "owners of an agricultural facility can immediately remove from the property any person speaking in ways the owners find objectionable[,]" the Court ruled, "if the State wants to criminalize the same speech, it must justify the law under the First Amendment."

The Court also concluded, contrary to the State's argument, that the act of recording itself is protected First Amendment speech:

> Because recordings themselves are protected by the First Amendment, so too must the making of those recordings be protected. This is not to say the State cannot regulate the act of recording; it is merely to say that if it wishes to do so, the State must justify and narrowly tailor the restriction, as with any other constraint on protected speech.

After establishing that the statute pertained to speech protected by the First Amendment, the Court then concluded that the law was subject to strict scrutiny because it was a content-based restriction. The Court concluded that it was so because "the only way to know whether [a person] is criminally liable under the Act is to view the recording."

To survive strict scrutiny, a law must be "actually necessary" to achieve "a compelling interest" of the State, "narrowly tailored" to address the compelling interest, and may not be over- or under-inclusive.

According to the State, "people who lie about their background to gain access to a facility, and who record while inside, risk spreading diseases to and injuring animals and workers, and that the Act is appropriately targeted at mitigating that risk." The Court noted, however, that "it

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is not clear that these were the actual reasons motivating the Act." In fact, the Court pointed out, "the legislative history surrounding the Act appears entirely devoid of any reference to an intention by the State to protect the safety of animals or the workers." Rather, the legislative history is "rife with discussion of the need to address harm caused by 'national propaganda groups,' and by 'the vegetarian people' who are trying to 'kill the animal industry,' 'a group of people that want to put [agricultural facilities] out of business."

Further, the Court stated, even if "animal and employee safety were the state's actual reasons for enacting the Act, there is no indication that those interests are actually threatened by people who lie to get in the door or record once inside." In fact, as the Court pointed out, "the state conceded that the record does not show that Plaintiffs' undercover operatives have created any of the diseases [employers] risk, or that Plaintiffs' undercover operatives have caused an injury to another worker." As a result, "the harm targeted by the Act is entirely speculative. And harm that is 'mere[ly] speculat[ive]…does not constitute a compelling state interest."

Finally, in refuting the State's claim that the statute was narrowly tailored, the Judge called the law "seemingly not necessary" to remedy the State's alleged harms and an "entirely over-inclusive" means to address them. For example, the Court explained, "[i]t targets, for example, the employee who lies on her job application but otherwise performs her job admirably, and it criminalizes the most diligent well-trained undercover employees."

**Conclusion**

Judge Shelby concluded that "[t]here can be no doubt that today, over 200 years after Washington implored Congress to safeguard the agricultural industry, the industry remains crucially important to the continued viability of the nation[.]" "Similarly important to the nation's continued viability, however, is the safeguarding of the fundamental rights Washington helped enshrine into the Constitution." As a result, the Court held that Utah's ag-gag law was an unlawful restriction of protected First Amendment speech.

Similar challenges have been and will continue to be made against ag-gag statutes across the nation. So far, the courts have been vigilant in upholding free speech rights in response to challenges of over-reaching ag-gag laws. For example, the United States District Court for the District of Idaho likewise ruled that the Idaho ag-gag statute violated the First Amendment. That decision is currently on appeal to the Ninth Circuit Court of Appeals.

The State of Utah has not yet announced whether it will appeal Judge Shelby's decision to the Tenth Circuit Court of Appeals.

*Jeffrey J. Hunt and Bryan S. Johansen at Parr Brown Gee & Loveless in Salt Lake City, Utah, together with Gregg Leslie and Bruce Brown at the Reporters Committee for Freedom of the Press, filed an amicus brief in the case on behalf of the RCFP and a coalition of national and Utah media and journalism organizations.*

# New Jersey Supreme Court Issues Landmark Police Records Decision

## *Use of Force Reports and Names of Officers Who Shoot Suspects Subject to Open Public Records Act*

**By CJ Griffin**

The New Jersey Supreme Court recently ruled that police use of force reports ("UFRs") and the names of officers who shoot suspects are subject to the state's Open Public Records Act ("OPRA"). The Court also ruled that dash cam videos of such shootings should generally be accessible under the common law right of access. North Jersey Media Group Inc. vs. Township of Lyndhurst, (July 11, 2017).

### Background

The case, began when reporters of NJMG's flagship paper, *The Record,* sought to obtain UFRs and other records relating to a police chase and fatal shooting of Kashad Ashford in 2014. The OPRA request was denied by each of the police agencies involved in the police chase. After NJMG filed suit, the New Jersey Attorney General ("AG") stepped in to defend the denials.

The AG argued that the records were subject to OPRA's "criminal investigatory records" exemption, which exempts records which "are not required to be made, maintained, or kept on file" and which "pertain to any criminal investigation." The AG took this position, despite the fact that the Appellate Division had previously ruled in *O'Shea v. Twp. of W. Milford*, 982 A.2d 459 (App. Div. 2009), that UFRs were not criminal investigatory records because the AG's own Use of Force Policy was a "law" that required them to be made.

**The Court made it clear that the public's interest in disclosure will usually outweigh any interest in non-disclosure, especially where records pertain to deadly force.**

In accordance with *O'Shea*, the trial court ruled that UFRs and other records must be disclosed. The Appellate Division, however, unexpectedly reversed course and disagreed with its prior ruling in *O'Shea*. Instead, it held that only statutes, regulations, and executive orders satisfy the "required by law" standard, not the AG's policies.

The Appellate Division's ruling was so broad that it shut down access to nearly all police records. Indeed, bolstered by the ruling, the Attorney General's Office and local police agencies across the state began denying access to UFRs and the names of officers who were involved in even very minor uses of force.

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**NJ Supreme Court Decision**

The Supreme Court's decision will reverse this trend, as it agreed with *O'Shea* that the AG's policies are "laws" and thus UFRs are not criminal investigatory records. While OPRA's ongoing investigation exemption could still shield records from access where release would be "inimical to the public interest," the Court made it clear that the public's interest in disclosure will usually outweigh any interest in non-disclosure, especially where records pertain to deadly force.

The Supreme Court also ruled that dash cam footage should almost always be accessible pursuant to the common law right of access, as non-disclosure "can undermine confidence in law enforcement" and "fuel the perception that information is being concealed." While the Court granted access to the videos under the common law, it held that they were not subject to OPRA since no party pointed to an AG policy or local police directive that required them to be made, maintained or kept on file. The Court left open the question, however, of whether a local directive by the chief of police satisfies the "required by law" standard and defeats the criminal investigatory records exemption. That question will be resolved by the Court later this year when it hears the appeal in *Paff v. Ocean County Prosecutor's Office*, 141 A.3d 300 (App. Div.), *certif. granted*, 157 A.3d 831 (2016).

*NJMG was represented by Samuel J. Samaro and CJ Griffin of Pashman Stein Walder Hayden and Jennifer A. Borg, who was NJMG's Vice President and General Counsel at the time. Assistant Attorney General Raymond R. Chance, III, represented the Defendants. The ACLU of New Jersey, Association of Criminal Defense Lawyers of New Jersey, New Jersey Foundation for Open Government, Reporters Committee for the Freedom of the Press, New Jersey Press Association, and sixteen other media organizations filed amici curiae briefs supporting NJMG. The State Troopers Fraternal Association and Bergen County Policemen's Benevolent Association Conference filed an amici curiae brief supporting the State.*

# When Is Speaking to the Media About a Pending Lawsuit 'Frivolous Conduct' Under Ohio Law?

**By Erin E. Rhinehart**

In an emotionally charged case involving child sexual abuse allegations and claims of wrongful termination, an unlikely decision emerged with the potential to curtail lawyers' First Amendment rights in Ohio. The Cleveland-based trial court found that the plaintiffs' lawyer, Peter Pattakos, violated Ohio's frivolous conduct statute – R.C. §2323.51 – by communicating publicly available information about the case to the media prior to trial.

Recognizing the likely implications of the trial court's decision on free speech rights, and lack of supporting law, the appellate court reversed the trial court's decision and confirmed that an award of sanctions is not appropriate where a lawyer communicates with the media about a pending case. Cruz, et al. v. English Nanny & Governess Sch., Inc., et al., 8th Dist. Cuyahoga No. 103714, 2017-Ohio-4176 (June 8, 2017).

## Trial Court Sanctions Lawyer for Speaking to the Media

The case centers on allegations of child abuse lodged by two employees of a prominent child-care placement agency. The employees were discharged and sued the agency. Prior to the first jury trial, their lawyer Peter Pattakos reached out to a local magazine and provided publically available information, including scheduling information, regarding the upcoming trial.

**An award of sanctions is not appropriate where a lawyer communicates with the media about a pending case.**

The magazine published an article, which was available online and via free copies circulating at the courthouse where the trial was held. Following voir dire, defense counsel argued that the jury pool was tainted by the magazine article. The trial court questioned the parties and the jury about the article. While it found that Pattakos' conduct was "problematic," the trial court did not find that the jury was tainted to warrant a mistrial. *Id*. at ¶11. Notwithstanding, the trial court ordered a mistrial on unrelated grounds a few days later.

Subsequently, a second jury was empaneled and a multi-week jury trial ensued. Significant post-trial motion practice by the parties commenced, including a motion for sanctions filed by defense counsel against Pattakos for his involvement in the magazine article published during the first jury trial.

The trial court found that the information provided by Pattakos to the media "may very well have been protected by [Ohio Rule of Professional Conduct] 3.6(b)," and ordered a hearing on

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the motion for sanctions. *Id*. at ¶118. Following the hearing, the trial court found that Pattakos engaged in frivolous conduct under R.C. §2323.51. *Id*. at ¶109. Pattakos appealed.

**Appellate Court Reverses Finding of Frivolous Conduct**

Ohio's Eighth District Court of Appeals reversed the trial court's finding of frivolous conduct and found that, "[w]e can find no law supporting the award of sanctions under R.C. 2323.51 for . . . communicating with the media about a pending case." *Id*. at ¶113.

First, the appellate court considered the trial court's findings relating to Ohio's Rules of Professional Conduct. *Id*. Prof. Cond. R. 3.6 provides, in relevant part, that:

> "(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
>
> (b) Notwithstanding division (a) of this rule and if permitted by Rule 1.6, a lawyer may state any of the following:
>
> (1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;
> (2) information contained in a public record;
> (3) that an investigation of a matter is in progress;
> (4) the scheduling or result of any step in litigation."

**The court acknowledged the "numerous unintended consequences" upholding the trial court's decision could have on protected speech.**

The appellate court warned that violations of Ohio's Rules of Professional Conduct are within the "exclusive jurisdiction" of the Ohio Supreme Court. Therefore, [w]hether attorney Pattakos violated Prof.Cond.R. 3.6 is not for this court to decide." *Id*. at ¶123.

Second, the appellate court turned to Ohio's frivolous conduct statute. "Frivolous conduct" is defined as conduct that "obviously serves merely to harass or maliciously injure another party to the civil action . . . or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation." R.C. §2323.51. Recognizing that sanctions are typically imposed under Ohio's frivolous conduct statute for pleading and discovery-related issues, the court stated that "we can find no law supporting the award of sanctions under R.C. 2323.51 for the type of conduct here — communicating with the media about a pending case." *Id*. at ¶113.

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Further, the court acknowledged the "numerous unintended consequences" upholding the trial court's decision could have on protected speech.

> "[F]or example, defendants in criminal cases potentially could ask for sanctions against prosecutors who provide information to the media about criminal cases. On any given day, newspapers show headlines of ongoing trials, recapping the evidence that was presented that day at trial." *Id*. at ¶122.

Therefore, the appellate court found that lawyers' "media communications remained within the confines of protected speech," and "[i]t should not be held that merely urging a media outlet to cover a trial constitutes frivolous conduct." *Id*. at ¶¶117, 123.

**Conclusion**

The integrity of the American judicial system is dependent upon transparency and public access to the courts; and, lawyers occupy a unique role as intermediaries between the public and the court system. As the American Civil Liberties Union of Ohio explained in its amicus brief, "[a]ttorneys' extrajudicial speech [] plays key role in the proper functioning of the legal system. . . . It is critical for the public to be able to receive information about trials and other legal proceedings, because their attention to them and understanding of them has been said to enhance the integrity and quality of what takes place." (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578 (1980)). Therefore, the appellate court's decision is significant because it supports an informed public, as well as preserves protected speech.

*Erin E. Rhinehart is a partner at Faruki Ireland Cox Rhinehart & Dusing P.L.L. in Dayton, Ohio.*

# Ninth Circuit Rejects Facial Challenge to NSL Gag Orders

## *Implications for Recent Twitter Win on Transparency Reporting Unclear*

**By Jeff Hermes**

On July 17, 2017, the U.S. Court of Appeals for the Ninth Circuit issued its opinion in In re National Security Letter (Under Seal v. Sessions), Nos. 16-16067, 16-16081 and 16-16082, a facial First Amendment challenge to the provisions of 18 U.S.C. § 2709 allowing the Federal Bureau of Investigation to issue National Security Letters ("NSL") to wire or electronic communication service providers accompanied by a requirement that the recipient not disclose the receipt of an NSL. The Ninth Circuit rejected the challenge, holding that the statutory scheme as amended by the USA FREEDOM Act of 2015 survives strict scrutiny.

### Background

The plaintiffs, whose names were originally sealed in the record to preserve the secrecy of the NSLs that they had received, were later revealed to be mobile virtual network operator CREDO Mobile and Internet content delivery network Cloudflare. The case initially involved five NSLs, three to CREDO and two to Cloudflare; by the time the case reached the Ninth Circuit, only two NSL gag orders were still in effect, one to each plaintiff.

The gag order on the NSL to CREDO had also been modified so that the only information that the company could not reveal involved information regarding the specific accounts at issue in the NSL or that could be used to identify the accounts or associated subscribers.

As described by the Ninth Circuit, the procedure for issuing NSLs with gag orders has several key aspects, as set forth in 18 U.S.C. §§ 2709 and 3511:

NSLs are effectively a form on administrative subpoena that can only be enforced by the FBI going to court and requesting an order to that effect.

An NSL may only be issued where the FBI Director or another high-ranking designee determines that the NSL is seeking records "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities" that "is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States."

A gag order may accompany an NSL only if the FBI Director/designee issues a certification that without such an order one of the following harms may result: "(i) a danger to the national

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security of the United States; (ii) interference with a criminal, counterterrorism, or counterintelligence investigation; (iii) interference with diplomatic relations; or (iv) danger to the life or physical safety of any person."

Notwithstanding the gag order, the NSL may be revealed to (1) anyone necessary in order to comply with the request and (2) an attorney in connection with legal help regarding the request. The FBI Director/designee may, at their discretion, permit the recipient to disclose the order to additional parties. The recipient must inform anyone with whom the NSL is shared that they are subject to the gag order.

The recipient of an NSL gag order has the option to file a petition for judicial review, or to notify the government that judicial review is desired. In the latter case, the government must apply to the court within 30 days for issuance of a judicial gag order, and must submit a certification from the FBI Director/designee stating specific facts indicating that absent a gag order one of the four harms listed above might result.

**The Ninth Circuit easily determined that NSL gag orders are facially content-based restrictions on speech, because they are phrased in terms of the content of the prohibited communications.**

Regardless of the path by which the issue reaches the court, the original NSL gag order remains in effect pending the court's decision, though the court "should rule expeditiously." The court is required to review submissions from the government ex parte and in camera if the government so requests, and is required to issue a judicial gag order upon a determination that there is "good reason" that disclosure may result in one of the four harms. However, the court may impose "conditions appropriate to the circumstances" on any order that it issues.

NSL gag orders terminate at the conclusion of the underlying investigation or on the three-year anniversary of the launch of the investigation, unless the FBI determines at each occasion that one of the statutory reasons for nondisclosure still applies. If a gag order terminates, the FBI must notify the recipient; if the FBI continues the gag order, the recipient retains the right to challenge the order in court.

Notwithstanding a gag order, the recipient of an NSL may, under a separate statute (50 U.S.C. § 1874), report aggregated data regarding the number of NSLs received, but only by reporting how many have been received in specific "bands": 0 to 99, 0 to 249, 0 to 499, and 0 to 999. Reports utilizing the 0-99 band may be made annually; the remainder may be reported semi-annually. The statute does not provide an option to exclude "zero" from the reporting range (though companies have found ways to indicate that they have received at least one NSL through so-called "warrant canaries" and other indirect signaling).

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**Ninth Circuit Decision**

Reviewing this statutory scheme, the Ninth Circuit easily determined that NSL gag orders are facially content-based restrictions on speech, because they are phrased in terms of the content of the prohibited communications – namely, that the FBI "has sought or obtained access to information or records" by means of an NSL." Thus, held the court, strict scrutiny was appropriate.

With respect to the existence of a compelling government interest, the court rather facilely deferred to the government's invocation of national security concerns with a nod toward *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). Moreover, the plaintiffs did not challenge whether NSL gag orders serve that interest, or whether any of the four of enumerated harms set forth in the statute might not relate to national security. (This, at least, seems to have been a tactical error by the plaintiffs; for example, an NSL gag order may be issued in order to avoid "danger to the life or physical safety of any person," but a risk of danger to an individual does not necessarily equate to a threat to national security.)

**The court rather facilely deferred to the government's invocation of national security concerns with a nod toward *Holder v. Humanitarian Law Project*.**

As a result, the plaintiffs' challenge was limited to the question of whether the gag order scheme was narrowly tailored. In rejecting that challenge, the Ninth Circuit cited multiple times to the Supreme Court's admonition in *Williams-Yulee v. Florida Bar*, 521 U.S. 844 (2015), that "narrowly tailored" does not mean "perfectly tailored."

On that basis, the court brushed off the argument that reporting the mere fact of receipt of an NSL by a service provider with millions of customers (as opposed to information regarding its target) is unlikely to pose any threat to national security; likewise, it rejected the argument that if the FBI has discretion to identify additional persons who can safely know about an NSL, it should be required to determine whether such persons exist in each case. The court found that these challenges to the statute's tailoring were too granular, and that the statute must instead be evaluated as a whole. The concerns raised by the plaintiffs, held the court, were addressed by (1) the requirement that the FBI certify that there is "some reasonable likelihood" that harm would result from the disclosure and (2) the availability of mandatory judicial review upon request.

For similar reasons, the Ninth Circuit rejected arguments that the NSL gag order scheme lacked sufficient temporal constraints. The court acknowledged that the mandatory review of the necessity of a gag order at the conclusion of an investigation and/or its three-year anniversary left open the possibility of extended periods not covered by mandatory review.

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Nevertheless, it held that the availability of judicial review at any time and the capacity of a court to order the government to undertake periodic reviews beyond those compelled by statute would address this concern.

Finally, the Ninth Circuit rejected the argument that the NSL gag order scheme does not comport with the procedural requirements for a system of prior restraints under *Freedman v. Maryland*, 380 U.S. 51 (1965), namely that: "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court." *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 321 (2002), citing *Freedman* at 58-60.

The court questioned whether NSL gag orders were prior restraints subject to *Freedman* at all, finding them more akin to restraining issues on participants in a judicial proceeding with respect to information acquired in the course of the proceeding.

It did not ultimately resolve that question, however, finding that the NSL gag order scheme satisfies *Freedman*. It rejected claims regarding the speed of NSL review, finding the government's obligation to go to court within 30 days of notice both specific and brief, and the court's general obligation to avoid undue delay in First Amendment cases sufficient without need for a specific deadline for a judicial ruling. It also held that placing the burden on the recipient to choose between going to court itself or giving notice to the government of the desire for judicial review did not violate *Freedman*, because the government still could be required to bear the burden of filing with the court and proving the need for a gag order. Accordingly, the Ninth Circuit upheld the constitutionality of the NSL gag order scheme.

**The court questioned whether NSL gag orders were prior restraints, finding them more akin to restraining issues on participants on a judicial proceeding.**

On what amounted to little more than a side note, the Ninth Circuit found the limitations of the reporting "bands" specified in 50 U.S.C. § 1874 (i.e., 0 to 99 NSLs received, 0 to 249, etc.) to be irrelevant to its determination of this case. The plaintiffs had argued that § 1874 did not cure tailoring deficiencies in the NSL gag order scheme, because it left recipients in the position of either saying nothing to their customers, and thus failing to be transparent, or reporting within the "bands" under 50 U.S.C. § 1874, which were alleged to be inherently deceptive because they required the company to include "zero" within the reported range. Given the court's conclusion that the scheme was narrowly tailored irrespective of § 1874, it found that the "bands" had no effect on the court's analysis. Nevertheless, the panel expressed a view that § 1874 expands rather than limits recipients' speech by allowing them to make additional

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disclosures without seeking authorization, and expressly declined to "quibble" with the manner in which the bands were defined.

**Twitter v. Sessions**

The Ninth Circuit will likely have the opportunity to consider the reporting bands of § 1874 again soon, on appeal from another decision issued in July 2017. In *Twitter, Inc. v. Sessions*, No. 14-cv-04480 (N.D. Cal. July 6, 2017), the U.S. District Court for the Northern District of California denied summary judgment to the U.S. government on Twitter's claim that the government's classification of the mere fact of receipt of NSL letters and FISA orders amounts to an unconstitutional prior restraint on Twitter's transparency reporting of aggregated data. The government argued that it could properly classify any information about receipt of such demands beyond the reporting bands § 1874 specifically permits, but the district court, applying strict scrutiny, found that the government had failed to show how the reporting bands were narrowly tailored to protect a national security interest as applied to Twitter's intended transparency report.

Exactly how the Ninth Circuit's decision will apply to Twitter's case is unclear. Twitter's challenge is an as-applied challenge to a government classification decision that lacks any end date, as opposed to a facial challenge to a statutory scheme with presumptive termination dates and an automatic right to judicial review. Nevertheless, Twitter is presumably also subject to non-disclosure orders with respect to both NSL letters and FISA orders, and so those schemes lurk in the background of its case.

Moreover, in contrast to the Ninth Circuit's decision with respect to CREDO and Cloudflare, the district court found that it was relevant that the FISA non-disclosure scheme did not require the government to separately consider whether Twitter's release of aggregated data would threaten national security; to the Ninth Circuit, presumably, that would be too "granular" an analysis. And while the Ninth Circuit considered whether an NSL gag order was more akin to a judicial gag order on participants to a court proceeding than a classic prior restraint, the district court reached the opposite conclusion with respect to classification decisions.

*Jeff Hermes is a Deputy Director of MLRC.*

*The Games Remain Afoot*

# Court Finds Restrictions on Location-Based Augmented Reality Games to Likely be Unconstitutional

**By Brian D. Wassom**

A July 20, 2017 ruling from the U.S. District Court for the Eastern District of Wisconsin has added augmented reality to the list of expressive media deserving of full First Amendment protection. The court granted a preliminary injunction against the enforcement of an Ordinance the County adopted in February 2017 requiring any "company" planning to "introduce" a "virtual or location-based augmented reality game" playable in Milwaukee parks to first obtain a permit. *Candy Lab, Inc. v. Milwaukee County*, No. 17-CV-569-JPS (first described in the April 2017 MediaLawLetter). The County adopted the Ordinance in reaction to complaints about damage to local parks by players during the height of the Summer 2016 *Pokémon Go* fad.

**A ruling from the U.S. District Court for the Eastern District of Wisconsin has added augmented reality to the list of expressive media deserving of full First Amendment protection.**

To put the First Amendment significance of the Ordinance into context, suppose a famous author wrote a spellbinding mystery novel about events in a particular city's public park. For all the serendipitous reasons that drive public tastes, the book becomes an overnight sensation.

Hordes of avid readers descend upon the park to experience for themselves the locations the author so vividly brought to life, and even to re-enact key scenes from the book—all for the sheer enjoyment of doing so. Indeed, the book even encourages this.

For a time, the crowds are unprecedented, and occasionally unruly. Neighbors complain. The fad evaporates after a few months, although there will always be a small percentage of future park visitors who are motivated by their discovery or memories of that novel. (Indeed, such phenomena are not uncommon.

Consider what *Midnight in the Garden of Good and Evil* did for Savannah, Georgia; the upsurge in tourism to New Zealand after the *Lord of the Rings* films; and the demand to visit a remote Irish island after it was featured in the closing scene of *Star Wars: The Force Awakens*.)

Would these events give the city the right to pre-screen novels about its parks, and to require writers and publishing houses to obtain a costly permit, insurance coverage, and provide for bathrooms, trash pickup, and security services in the park (as Milwaukee's permitting scheme does)—just in case another writer turns out a similar page-turner?

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Welcome to Texas Rope 'Em!

Of course not. The very thought is absurd, and anathema to everything the First Amendment stands for. Substitute "virtual and location-based augmented reality games" for "book" in that hypothetical, however, and you have Milwaukee County's Ordinance.

The County pursued two primary arguments and one tactical maneuver in response to Candy Lab AR's injunction motion. The first argument—which it made in both its response and a separate motion to dismiss—was that no First Amendment rights were at issue. Specifically, that the mobile application Candy Lab AR offered up as a test case—the poker-themed *Texas Rope 'Em*—did not contain enough plot, character development, dialogue, or other elements that the Supreme Court cited when affording First Amendment rights to video games in *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011), and even that it was a form of illegal gambling under Wisconsin law. The County further expressed skepticism over how much expressive content could be found in the genre of AR in general, and suggested that this Court should not be the first to protect it.

The Court made short work of each contention. It echoed Brown's instruction that "whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Id*. at 789. It was "satisfied that Texas Rope 'Em has sufficient expressive content," both in its "Western-themed" content and "by employing "features distinctive to the medium (such as the player's interaction with the virtual world)" (quoting *Brown* at 790.) And it found the argument that the poker-themed mobile app constituted unlawful gambling "also specious."

The County's second argument was that the Ordinance is a valid time, place, and manner restriction justified by its legitimate purpose of protecting the physical integrity of County parks. This, however, would require the Ordinance to be narrowly tailored to serve this interest. "An acceptable regulation," the Court noted, "must 'contain adequate standards to guide the

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official's decision and render it subject to effective judicial review'" (quoting *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002)). Yet "[u]nder any reading of the Ordinance, no such standards exist ... as [the Permit Application] expressly warns that 'Milwaukee County Parks in its sole discretion may grant, deny, revoke, or suspend any permit, at any time and for any reason.'" Even the limited criteria the Ordinance lists as relevant to the permitting decision—such as "site selection," "protection of rare flora and fauna" and "the intensity of game activities on park lands"—"are themselves too vague to afford adequate protection to free speech interests." As the Court rhetorically asked, "how is a developer to know how much flower-trampling is too much?"

Although these findings were "enough to invalidate the Ordinance," the Court went on to "observe[] that the Ordinance suffers from other serious infirmities." For example, it puzzled over the Ordinance's "strangeness and lack of sophistication[, because it] treats game developers like

Candy Lab as though they are trying hold an 'event' in a Milwaukee County park," which does not correctly apprehend the ac of publishing a mobile application. This ham-fisted attempt to "[f]orc[e] a square peg in a round hole demonstrates a true lack of tailoring, much less 'narrow' tailoring designed to address the County's interests[.]"

**The County has not yet made its next move in the litigation, but press reports quote the Ordinance's architect as vowing to defend his handiwork "all the way to the Supreme Court."**

Finally, as a last-ditch tactical maneuver, the County moved to stay the case while its Board "contemplate[d]" amending the Ordinance in some unspecified fashion. The Court was unpersuaded, in light of "the potential harm Candy Lab and others may suffer in the interim." The County has not yet made its next move in the litigation, but press reports quote the Ordinance's architect, Supervisor Sheldon Wasserman, as vowing to defend his handiwork "all the way to the Supreme Court" if necessary. Whether his constituents reward him for spending County dollars on this quixotic quest remains to be seen.

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*Ten Questions to a Media Lawyer*

# Lynn Oberlander

**Lynn Oberlander, General Counsel for the Gizmodo Media Group**

**How'd you get into media law? What was your first job?**

I can trace my career in media law directly to a Media Law seminar led by John Zucker during my senior year of college. I was already a journalist at the finest college newspaper in the country – The Yale Daily News – but still unconvinced that I would become a stellar reporter in the world at large. When I first read New York Times v. Sullivan and the other great First Amendment cases in Zucker's seminar, I was hooked – and realized that I could remain in journalism by fighting for issues I truly believed in, while still making my parents happy by going to law school.

After a year working on the business side of the New York Daily New, law school at Columbia, a federal clerkship in DC, and four years as a litigator and antitrust associate at Paul Weiss, Susan Weiner hired me at NBC. I spent one year as a litigator there, and then joined NBC's media group, where I worked with the O&Os, CNBC, and the network's news division. In all I spent 5 years at NBC, before moving to Forbes for 5 years, The New Yorker for 7 years, First Look Media/The Intercept for 3 years, and, since March, the Gizmodo Media Group.

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NEWS DESK

# THE LAW BEHIND THE A.P. PHONE-RECORD SCANDAL

By Lynn Oberlander May 14, 2013

The cowardly move by the Justice Department to subpoena two months of the A.P.'s phone records, both of its office lines and of the home phones of individual reporters, is potentially a breach of the Justice Department's own guidelines. Even more important, it prevented the A.P. from seeking a judicial review of the action. Some months ago, apparently, the government

**In addition to serving as general counsel for the New Yorker, Oberlander would pen the occasional article. Click to read.**

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**What do you like most about your job? What do you like least?**

The best part of being an in-house media lawyer is working with the journalists every day to help them produce the strongest reporting we can, with a minimal amount of legal risk — or, at least, identifying the legal risk so that the editors can decide whether to proceed. My least favorite part of all of my jobs – actually, I pretty much like all of it.

**What's the biggest blunder you've committed on the job?**

Early in my career, I didn't fully understand how important both collaboration and communication are in media organizations. I thought that I could "handle" some issues without informing my superiors that the issues even existed. (There was an investigative report at an airport that went in an unexpected direction.) I learned pretty quickly that that was not an acceptable way to practice, and now I really make an effort to let everyone potentially involved know about issues early. I try to tell our journalists the same thing – as in, if the subject of your reporting writes directly to you to complain about the reporting, please do not "handle" it yourself without letting your editor and me know about it.

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**Highest court you've argued in or most high profile case?**

I've been extremely fortunate to have worked on a number of high profile matters, from Boris Berezovsky's libel case against Forbes in the UK to the New Yorker's reporting on the Church of Scientology, to reporting at The Intercept based on the NSA documents taken by Edward Snowden, including a lawsuit against the British home office for detaining Glenn Greenwald's partner at Heathrow under the UK's Terrorism Act.

**What's a surprising object in your office?**

Office? Here in the digital media world, we don't have private offices.

**What's the first website you check in the morning?**

The Gizmodo sites. But after that, the New York Times.

**It's almost a cliché for lawyers to tell those contemplating law school: "Don't go." What do you think?**

I have been a very happy lawyer, and so I don't tell people not to go. Law school and legal practice has provided me extremely satisfying and meaningful work while creating sufficient financial security that I could buy an apartment in Manhattan, and send my kids to summer camp. But I do think it is difficult, though not impossible, to get a job in media law if you haven't gone to a top law school or if you don't have a real passion for the work, and to those people I might suggest some other approach.

**One piece of advice for someone looking to get into media law?**

Make your own future. Write on the topic, join media law bar committees, and become a corporate lawyer rather than a litigator. It is much harder to get an in-house job as a

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**In response to the New Yorker's expose on Scientology, the church published a 51-page magazine to try to discredit the magazine's journalists, sources and lawyer.**

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litigator; it's easier to be a corporate lawyer and then learn the media side once at a company.

**What would you have done if you hadn't been a lawyer?**

I would have been a journalist. Or maybe a neuroscientist.

**What issue keeps you up at night?**

That we will have a continued roll-back of public information; that the "right to be forgotten" will come to these shores; and that the secret and sealed court proceedings hiding all sorts of malfeasance will continue. But not really – when I'm up at night it is usually because I'm concerned that I've screwed up somehow or missed a key issue.