



MEDIA LAW LETTER

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MLRC Media Law Conference September 21-23, 2016 | Reston, Va.

***Registration for the MLRC
Media Law Conference is now open.***

In addition to the usual timely and topical breakouts and boutiques, this year's conference will feature plenaries commemorating the 25th anniversary of the Rodney King case – looking at both the copyright/fair use/First Amendment and police/press aspects; a Fred Friendly hypothetical case program starring Washington insiders on the eve of the election; a panel of once active MLRC members who are now federal judges; Floyd Abrams talking about his new book, "Why the First Amendment Matters"; as well as a rousing game of Family Feud: Journalism Edition; and a twist on the Next Big Thing, looking at the hits and misses of NBT sessions of the last ten years.

The full [Program](#) is also now available. We hope you will [register soon](#).

*From the Executive Director's Desk***MLRC in Paris, Gawker Lawyers Speak, and Trump Takes on Libel Law**

Our second annual Paris Conference – despite having to survive a transit strike (impacting planes and trains), floods (the Louvre was closed so that thousands of pieces of artwork could be moved to higher floors), terrorist threats, and too much foie gras – was a success. Its goals are quite different from our biennial London Conference which counts 50% Americans as its attendees; the Paris Conference is really meant for EU media lawyers (or need I now say EU and UK attorneys) with only a very slight dollop of a United States presence.

**George Freeman**

Its goals are fourfold: first, to expose the European media bar to our First Amendment principles and largely more protective free speech laws; second, to form a more cohesive European media bar so as to make more possible stronger free expression laws in the various EU countries; third, to put on informative and engaging programs; and fourth, as we have accomplished in the UK, to give the MLRC a greater foothold on the Continent, and maybe even some more members.

With these rather lofty goals as our standard, the Conference was fairly successful. It probably succeeded most in terms of goal #3: the one-day Conference, (held somewhat aptly on June 6) held by the Place de la Concorde in Jones Day's historic office which once was the residence of Tallyrand and where the Marshall Plan was signed, had numerous very informative and entertaining panels.

The day began with a session on invasion of privacy, the area we found last year to be one of the greatest disconnects between American and European lawyers. Thus, the Europeans seemed quite content to believe that a couple photographed kissing in the middle of a town square surrounded by scores of other pedestrians should have a valid claim. When asked how they could claim a privacy invasion where they were visible to scads of the public, their answer was that the photographed embrace ought to be actionable since the couple had a private attitude (ditto for the mistress of the French President, photographed in her car leaving a tryst) – neither example even a close call on our shores.

But a very delightful talk by ECHR Judge Ganna

**ECHR Judge Ganna Yudkivska discussing the balance of privacy and free expression under the European Convention.**

Yudkivska of the Ukraine seemed to show that recent ECHR decisions moved the privacy needle at least a wee bit in our direction. Not only was she very informative, for a sitting judge she was refreshingly open as to the work of her colleagues on the Strasbourg Court. Following the talk, we had an open forum discussion about the clash between individual privacy rights and free expression, which hopefully contributed to greater understanding of all sides of the issue.

Another highlight was a “debate” on Hate Speech regulations. Robert Corn-Revere gave a very erudite and eloquent defense of the American position with no allowable regulation save

where the speech could lead to imminent unlawful action. The European speaker, Guy Berger from UNESCO in Paris, leaned more in favor of regulations protecting individuals, particularly those in vulnerable groups, but it was a very civil and high-minded exchange.

Two panels consisted of a survey of comparative law in the various EU countries and the US. Randy Shapiro led such a discussion with respect to the reporters’ privilege and protection of sources. The takeaway was that this is one area where European law tends to be more protective of journalists than in the US. And Peter Canfield made good use of slides to get the views of a diverse group of lawyers on copyright and fair use questions. And we had a very intriguing and lively, not to say timely, program on *National Security v. Civil Liberties*, starring a DOJ Prosecutor

stationed in Brussels, a German defense policy expert, the legal head of Reporters Without Borders in Paris, and Steve Crown of Microsoft — all expertly questioned by Rob Balin.

One challenge of putting on such a program in Europe is that their view of what should go on at a panel is far removed from mine. As many of you who have seen MLRC or ABA Boca programs know, my view of a successful panel includes no speeches but rather discussion among panelists with many questions and quick exchanges. The European tradition, however, is for each speaker to essentially read a paper, a rather sleep inducing concept leaving no time for discussion. In general, we did a fairly good job of avoiding the latter, but not with a 100% success rate.



Guy Berger, UNESCO, and Robert Corn-Revere, Davis Wright Tremaine, discussing comparative approaches to hate speech.



Left to right: Marco Bellezza, Jean-Yves Dupeux, Anna Otkina, Dr. Roger Mann and Randy Shapiro discussing protection of sources in Europe.



Left to right: Jean-Frederic Gaultier, Jens van den Brink, Pia Sarma, Felix Stang on Fair Use, Fair Dealing & Copyright Reform panel.

How successful we were in our other goals is hard to say at this point. Last year, we did enroll some new foreign members after the conference, and we hope for the same result soon. More important, we have learned that our soft attempt at proselytization and perhaps even movement and reform of European media laws will not yield immediate success, but will be incremental, maybe even glacial, in time and scope. But that said, the exchanges of ideas between our colleagues across the pond is very worthwhile, truly interesting, and, in the long run, might lead to some change.

* * *

Another notable confab put on in June was a presentation by the PrePublication / PreBroadcast Committee on the Hulk Hogan v. Gawker sex tape privacy case. It was put on before a live audience at the offices of Davis Wright Tremaine, but distributed by webinar to about 100 eager listeners around the country.

At the outset, kudos to Heather Dietrick, President and GC of Gawker, and Michael Berry, one of the trial lawyers on the Levine Sullivan team representing Gawker, for their willingness to speak so openly about the trial and the case. Especially given the result of the trial as well as

the bankruptcy and possible sale of the company, both of which had just been announced, it would have been very easy for Gawker to take the lawyers' way out and not speak since the case is still pending and the appeal forthcoming. But consistent with the transparent approach Heather and Gawker have displayed throughout the litigation, they spoke quite frankly about the trial and some of the strategic decisions they made during the lawsuit.

Congratulations and thanks also to Lisa Zyberman and Dana Rosen, co-chairs of the Committee, who put the presentation together. As they told me, they wanted to do something out of the box and different from the usual telephonic committee meetings, and in coming up with such a timely and controversial program, they certainly hit one out of the park – or, perhaps more aptly, delivered a lightening quick pin for their efforts. Perhaps some of our other committees can take note and follow suit.

* * *

Finally, how could a column written just a few weeks before the Republican National Convention not include some lines about Donald Trump. First, we are strongly considering that our Forum – the late afternoon session held just before our Annual Dinner – will focus on the journalistic and legal issues raised in covering his campaign. Since the Forum will be the day after the election, this seems totally apt. Given the way his campaign is going – and the almost daily contretemps he is having with the press – there will be no shortage of issues; indeed, it's hard to list what issues we might cover, since new controversies seem to arise weekly.

But among the topics which Michael Norwick, our Forum guru, has proposed are: Did the media give Trump too much free coverage? Was he considered an entertaining sideshow for too long, thus not subjecting him to serious scrutiny? Did Trump succeed with his strategy of denying credentials to reporters and news organizations he considered hostile – not to mention his demagoguery in calling out specific reporters and the press generally at his rallies? Did the media let him get away with constant untruthfulness, flip-flopping and taking positions with no factual support? Did Trump change the dynamic of press coverage by his use of social media? And so on.

Since Trump is the master of the “I told you so” – going so far as to congratulate himself for having called out radical Islam after the Orlando murders – I would be remiss in not playing the same game with respect to his pledge to “open up our libel laws” if he became president. In this column in March, I said “I would think Trump ought to think twice before campaigning to make the libel laws more favorable for a plaintiff” because it seems much more likely he would be a libel defendant needing the protections of *Times v. Sullivan* than a plaintiff. I wrote,

I would think Trump ought to think twice before campaigning to make the libel laws more favorable for a plaintiff” because it seems much more likely he would be a libel defendant needing the protections of *Times v. Sullivan* than a plaintiff.

“Trump seems to cast aspersions with reckless disregard and abandon, and very much would seem to need the protections he is wailing against.”

Just recently our Daily Report brings news about a libel case in which a cable news commentator and political operator Cheri Jacobus sued Trump for his tweeting (after she said negative things about him on CNN) that she is “a real dummy,” and that she had “begged us for a job. We said no and she went hostile.” “Major loser, zero credibility.” Putting aside the fact that the claim would seem easily disposable on opinion grounds, Trump just recently filed a motion to dismiss on the very grounds he had argued were too press-protective. His brief contended that “plaintiff also cannot meet the added pleading requirement of ‘actual malice’ required for ‘public figures’ in defamation claims.” A footnote added that plaintiff clearly was a public figure, “or, at the very least, a ‘limited public figure,’ as she has clearly thrust [herself] to the forefront of [a] particular public controversy...”

Thus, as Eric Wemple of the Washington Post concluded, “What’s certain is that Trump continues to benefit from a legal system that he says he wants to dismantle.”

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



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What Happens When You Condense a Month (or Two) of Stories into a Single Article?

The Monthly Daily

An Experiment in Drinking from the Firehose

By Jeff Hermes

So, I go on vacation for a few weeks after our *Legal Frontiers in Digital Media* conference, and what do I find? [Donald Trump](#) notching up media outlet after media outlet on his personal blacklist, and [Peter Thiel](#) outed as masterminding the [litigation campaign](#) against Gawker. Thiel's statement that "It's precisely because I respect journalists that I do not believe they are endangered by fighting back against Gawker" is familiar as the line that plaintiffs' lawyers always seem to trot out when reassuring a jury that their blunderbuss claims against the press won't damage the First Amendment, and [it's no more persuasive here](#).

And we've got the FCC ruling on net neutrality. And two big copyright jury trials. And drone use by journalists is legal. And recent attacks on 230 seem to be working. And, and, and...

Time to buckle up for some warp-speed commentary on developments in media law. Forgive me if I drop some items out in this issue, but we've got a lot to cover. If I miss something about which you care deeply, let me know at jhermes [at] medialaw.org, or, I don't know, [leave the European Union or something](#).

Supreme Court

We now have the final decisions from October Term 2015, including several with implications for media, tech, and the First Amendment:

- [Spokeo v. Robins](#): No, Congress cannot create Article III standing through the enactment of a statutory cause of action; but, Congress is well positioned to identify intangible harms and in certain cases these harms will meet the injury-in-fact requirement for standing. Why do we care? The case arose out of allegedly false information in a "people search engine" database, and has implications for privacy class actions.
- [Halo Electronics v. Pulse Electronics](#): The Federal Circuit's test for determining willful patent infringement and the plaintiff's entitlement to treble damages is too rigid.
- [Cuozzo Speed Technologies v. Lee](#): The Court affirmed the USPTO's "inter partes review" procedures and standards for challenging patent validity, which sounds dry but creates a powerful tool to fight patent trolls.

- [*Kirtsaeng v. John Wiley & Sons, Inc.* \(Kirtsaeng II\)](#): The objective reasonableness of a copyright plaintiff's position does not create a presumption against an award of defense attorneys' fees, but reasonableness is entitled to substantial weight.
- [*McDonnell v. United States*](#): The Court held that "official acts" subject to federal corruption laws are limited in scope, and thus remanded because the jury instructions in former Va. Gov. Robert McDonnell's corruption trial were too broad; by not reaching McDonnell's First Amendment arguments, the Court left [earlier precedent protecting "ingratiation and access"](#) intact.

Meanwhile, the Court is still down a justice, but that hasn't stopped folks from trying for cert. [Sheriff Thomas Dart](#) is asking the Court to reverse the 7th Circuit's smackdown of his attempt to bully payment processors into cutting ties with Backpage.com. The NCAA has asked the Court to review the 9th Circuit's decision in the [O'Bannon antitrust case](#) involving the use of student-athlete likenesses in video games, and raised an underlying right of publicity question as well (but if the Court didn't take that issue directly in *EA v. Davis*, I'm not sure why they'd take it here). [Freelancer Wayne Anderson](#) had his press credentials revoked by the U.S. Army without a hearing, and wants the Court to rule on his due process claim. The [parent of two minor Facebook users](#) has asked the Court to review a \$20 million settlement in a case about the use of user likenesses in sponsored posts, while a Phoenix family has asked the Court to draw a line at [Fox's live broadcast of a police chase](#) that ended with a suicide.

Oh, and Simon Tam jumped in and asked the Supreme Court to review the Federal Circuit's decision in his favor in the "Slants" case, figuring that going to the Court is [better than waiting around in limbo](#); the [DOJ filed a brief](#) as well, arguing that the Washington Redskins shouldn't be able to jump over the 4th Circuit to join *Tam v. Lee* at the Supreme Court.

No relevant grants to report, but we did get a couple of notable denials: the Court [will not hear *Scholz v. Delp*](#), involving a failed defamation claim against the *Boston Herald* over a report on the suicide of *Boston* singer Brad Delp; and has denied rehearing on its 4-4 decision in [Friedrichs v. California Teachers Association](#), a First Amendment case about compelled funding of union speech.

Reporters' Privilege

The New York Shield Law showed its teeth again in May, with a trial court [quashing subpoenas to the *Daily News* and the *Post*](#) from a defendant who sought to prove that the police were telling inconsistent stories about his arrest. There was a similar result in Georgia, where a [subpoena for raw footage of interviews with police](#) during the production of "The First 48" was quashed after the cops said they'd agree to be interviewed by defense counsel.

Reporters in Vermont and Pennsylvania were not so lucky, with journos in the former required to testify at a [state senator's trial](#), and in the latter required to [produce notes to a judge](#) who is a plaintiff in a libel claim against them.

And in S.D.N.Y. we saw what can happen when the [journalist-source relationship goes sour](#), where a confidential source claimed the Center for Investigative Reporting burned her and forged her name on a release. Turns out it was the source trying to pull a fast one: the judge found that she'd submitted falsified handwriting evidence to the court, dooming her case.

Defamation

The [federal anti-SLAPP bill](#) continues to make progress in D.C., with a hearing before the House Subcommittee on the Constitution and Civil Justice this month. While the looming specter of a Trump presidency might be driving it forward, also remember that [Trump isn't too proud](#) to use to his own advantage the legal protections he would deny to others.

Turning to new complaints, in entertainment-related cases we saw the following: A&E allegedly [mixed up law firms](#) in an expose on insurance fraud and was sued in S.D. Fla.; 80's/90's fixture Arsenio Hall sued 80's/90's fixture Sinéad O'Connor in California over claims that [Hall supplied pills to 80's/90's fixture Prince](#); a reality star sued the Discovery Channel in D. Ariz. claiming that Discovery [whiffed on the "reality" part](#); an N.Y. attorney sued a different reality star in Cali claiming that he was falsely [branded as a "con artist"](#) on social media; in Colorado, DISH Network sued a Denver talk show host who accused the network of ["pirating" his show](#); an Emmy-award winning writer sued the producers of "Learning to Drive" for [portraying him as an adulterer](#); Amber Heard sued comedian Doug Stanhope in Arizona, claiming his statements about her [treatment of estranged husband Johnny Depp](#) were no joke; and Ellen DeGeneres found herself sued in M.D. Ga. after her [intentional mispronunciation of a woman's name](#) got a few laughs.



Alan Light CC BY 2.0

Okay, fine, Prince is a music icon who transcends the decades. Tell that to the eleven-year-old me who lived through the [repercussions of Purple Rain](#) in 1984. (Wow, I've literally dated myself.)

In lawsuits against the press: The *Wall Street Journal* drew a complaint in S.D.N.Y. from a [Venezuelan pol](#) allegedly libeled in a drug investigation article; a [suspected Peter Thiel sock puppet](#) who [claims to have invented e-mail](#) sued Gawker for \$35M in D. Mass.; a Greek Orthodox priest/hedge fund manager (hey, one of my best friends is an [acupuncturist/capoeira expert with an MBA](#), so why not?) sued Bloomberg in Mass. state court over [stock manipulation allegations](#); a county politician in Virginia sued Style Weekly for allegedly [labeling him a book banner](#); a sailor sued WAVY-TV in Virginia over a [false report of his arrest](#) (and not, it appears, for a punny call sign upsetting to a man of the sea); a Utah man sued a local paper for reporting his alleged involvement in an [FTC fraud investigation](#); CBS was

sued for supposedly identifying a North Carolina doctor as [a drug pusher](#); “[Dr. H](#)” filed a complaint against the *New York Post* for calling the [weight loss methods](#) he encouraged on “The Biggest Loser” unsafe and illegal; and, in a case that brings libel inside the newsroom, a [fired news director](#) sued WKRN in Tennessee over statements related to his termination.

And out in the wilds of digital space, where the targets are plentiful but the vindication is rarely worth the effort: A Texas petsitter is doubling down on her claim against a couple over a [negative Yelp review about an overfed fish](#), upping her claims to \$1 million; an [ousted Delaware politician](#) is pursuing claims against anonymous YouTube and Facebook posters; and a California law firm is trying to figure out who the “incompetent young adults” [complaining about them on Glassdoor](#) might be, in order to “bring them to justice.” Doesn’t that make you want to work there?



In plaintiff’s victories: The defamation case filed by Jerry Heller, the former manager of N.W.A, over [biopic *Straight Outta Compton*](#) narrowly avoided dismissal in C.D. Cal. based on the film’s alleged suggestion that Heller was trying to “take advantage of an unsophisticated artist.” [Girls Gone Wild founder Joe Francis](#) was held in contempt in D.N.J. and slapped with more than \$3 million in fines and fees on a default judgment. Lee Daniels apologized to Sean Penn for [calling him a wife beater](#), and the two settled their lawsuit in New York. And down in Florida, [billionaire Jeff Green](#) settled his lingering suit against the *Tampa Bay Times* – but didn’t like how the [Times reported the settlement](#). You know, there’s this club for thin-skinned billionaires you can join...

As usual, there are more defense side victories to report – nicely done, all y’all. In the trial courts: The Southern District of New York dismissed the lawsuit filed by Phi Kappa Psi frat brothers [against Rolling Stone over the “A Rape on Campus” story](#), finding the story didn’t identify them as the supposed attackers. S.D.N.Y. also held that even if the National Music Publishers Association had engaged in a bit of [puffing in a press release](#) about a lawsuit, such minor exaggerations did not amount to defamation. The District of Maine flipped a [\\$14.5 million verdict for the founder of a Haiti orphanage](#), finding that as a U.S. citizen living abroad the plaintiff could not bring a federal case under diversity jurisdiction.



Let’s see, what else... It seems the plaintiff in Bill Cosby’s defamation case in D. Mass. [voluntarily dismissed her claims](#). Former MLB pitcher Mitch Williams lost his N.J. libel claim against Deadspin over claims that he [swore at an umpire](#) while coaching a youth baseball team; tough to show substantial falsity when you’ve publicly apologized for your behavior. A fired Kansas City, Mo., journalist sued his paper over an article explaining his dismissal; [his claims were likewise](#) dismissed. A couple of lawsuits against [bloggers in Mass.](#) and [Minn.](#) over critical

(Continued on page 49)

A Textbook Claim of Libel by Implication Fails in Texas

A Divided Texas Supreme Court Rejects Pediatrician's Lawsuit Against Broadcaster

By Jim Hemphill

Consider the following undisputed facts:

- Dr. Minda Lao Toledo is a medical doctor practicing in the Port Arthur, Texas area.
- Dr. Toledo was disciplined by the Texas Medical Board because she “engaged in sexual contact with a patient.”
- Dr. Toledo is a pediatrician.

Is it logical to conclude from these facts that Dr. Toledo had sexual contact with a child?

Dr. Toledo, a Texas trial court, and three judges on an intermediate Texas Court of Appeals – along with three Justices on Texas’ nine-justice Supreme Court – said “yes.”

But the other six Texas Supreme Court Justices said “no,” holding that Dr. Toledo’s libel claim against Beaumont television station KBMT and others should be dismissed under Texas’ anti-SLAPP statute. [*KBMT Operating Co. v. Toledo*](#), No. 14-0456, 2016 WL 3413477 (Tex. June 17, 2016).

The majority’s decision may represent a significant narrowing of Texas’ “libel by implication” doctrine, in which a plaintiff alleges that although the facts in a report are literally true, the report creates a false impression through omission of other material facts, or by “juxtaposition” of true facts.

The majority’s decision may represent a significant narrowing of Texas’ “libel by implication” doctrine.

The Doctor and the Broadcast

The Texas Medical Board issued a two-sentence press release stating that it had disciplined Dr. Toledo for “unprofessional conduct.” The press release said that the doctor “behaved unprofessionally when she engaged in sexual contact with a patient and became financially or personally involved with a patient in an inappropriate manner.” The press release also stated that the Board and Dr. Toledo entered into an agreed order requiring her to complete ethics training, pass a professionalism course, and pay \$3,000 as an administrative penalty. *KBMT* at *1.

KBMT, the Beaumont/Port Arthur-area ABC affiliate, learned of the press release and found it on the Board's website. Also available on the site were the agreed order and Dr. Toledo's profile. *Id.* at *2.

The press release did not identify Dr. Toledo as a pediatrician, but the agreed order did, as did Dr. Toledo's profile. None of the documents stated the age of the patient with whom Dr. Toledo had sexual contact. *Id.*
KBMT's report, repeated on three newscasts, stated:

A Port Arthur pediatrician has been punished by the Texas Medical Board after the Board found she engaged in sexual contact with a patient and became financially involved with a patient in an inappropriate manner. Dr. Minda Lao Toledo will have to complete sixteen hours of continuing medical education, including eight hours of ethics and eight hours of risk management, and pay an administrative penalty of three thousand dollars. Toledo is a native of the Philippines and has been practicing medicine in Texas for five years.

The same report was repeated a fourth time, but that time the news anchor reported that the patient at issue was "an adult." *Id.*

In fact, the patient was a 60-year-old male with whom Dr. Toledo had been in "a long-term dating relationship." *Id.* The record revealed that the doctor was "administering medications that other doctors had prescribed" to her boyfriend. *Id.* at *12 (Boyd, J., dissenting).

According to Dr. Toledo, when their relationship soured, the boyfriend reported her to the Texas Medical Board, which eventually imposed sanctions. *KBMT Operating Co. v. Toldeo*, 434 S.W.3d 276, 280 (Tex. App. – Beaumont 2014), *rev'd*, 2016 WL 3413477 (Tex. June 17, 2016).

The patient was a 60-year-old male with whom Dr. Toledo had been in "a long-term dating relationship."

The Lawsuit, Motion to Dismiss, Appellate Opinion

Dr. Toledo sued for libel, alleging that the broadcast implied that she had sexual contact with a child. She claimed that this impression or implication was conveyed by the omission of the age of the patient at issue, and/or by the juxtaposition of the fact that she is a pediatrician with the fact that she was disciplined for having "sexual contact with a patient." Thus, she contended, the broadcast was defamatory *per se* because it "attributed a criminal activity and moral turpitude to her, tended to injure her business, and suggested professional incompetence." *KBMT*, 434 S.W.3d at 281.

KBMT moved to dismiss under the Texas Citizens Participation Act, Texas' anti-SLAPP statute (found at Chapter 27 of the Texas Civil Practice & Remedies Code). The TCPA places the initial burden on the defendant/movant to prove, by a preponderance, that the plaintiff's claim falls within the scope of the statute. Claims based on the defendant's exercise of its free

speech rights are squarely within the statute's scope, and the courts agreed that KBMT met this initial burden.

The TCPA also provides that a movant can prevail if it proves all essential elements of an affirmative defense by a preponderance of the evidence.

The statute then shifts the burden to the non-movant, who must come forward with "clear and specific evidence" of a prima facie case on each essential element of her claim. At issue was whether Dr. Toledo carried her burden to show the requisite element of falsity.

The trial court denied the dismissal motion, from which KBMT took an interlocutory appeal as allowed by statute. The Beaumont Court of Appeals affirmed the denial, holding that "the average viewer could, and in most cases would, reasonably conclude that the 'patient' of a 'pediatrician' is a child." *KBMT*, 434 S.W.3d at 285. The court elaborated:

[T]he media defendants' decision to place these two facts together in the same sentence, particularly with the word "pediatrician" being used, in essence, as the subject of the phrase "engaged in sexual contact with a patient," resulted in a statement that was reasonably capable of being interpreted by the average listener as stating that Dr. Toledo was punished for having improper sexual contact with a child.

Id. The Court of Appeals further held that the remainder of the broadcast "does not effectively negate the impression." Although the story stated that Dr. Toledo had been "financially involved with a patient in an inappropriate manner," the court noted that this could refer to "the simple act of gift-giving, which is equally likely to involve an adult or a child." *Id.*

"The ordinary listener could not reasonably have understood the report to have been about criminal sexual abuse of a child."

The Court of Appeals relied in large part on the Texas Supreme Court's opinion in *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000), the Court's first explicit recognition of the viability of a "libel by implication" claim even when all the stated facts were true. The *Turner* court held that "a publication can convey a false and defamatory meaning by omitting or juxtaposing facts, even though all the story's individual statements considered in isolation were literally true or non-defamatory." *Id.* at 114.

Supreme Court Splits, KBMT Gets a Majority

The Texas Supreme Court granted KBMT's petition for discretionary review. Oral argument was held on November 13, 2015, and the 6-3 decision in favor of the broadcaster was issued on June 17, 2016 near the end of the Court's term (as is common for divided opinions).

Chief Justice Nathan Hecht authored the majority opinion. The two key holdings were (1) that "the ordinary listener could not reasonably have understood the report to have been about criminal sexual abuse of a child," 2016 WL 3413477 at *4, and (2) "if there could have been

any confusion over the broadcast, the same possibility of confusion existed in the Board's report of its proceedings," *id.* at *5.

In support of the first holding, the majority noted that the ordinary listener would know that sexual contact with a child is a serious crime and would not believe that it would simply be "punished with a slap on the wrist" by the Medical Board. "Any ordinary listener would have known that a network television broadcast about a physician's criminal sexual abuse of a child would have said so in no uncertain terms and not left the listener to wonder." *Id.* at *4.

In the trial court, Dr. Toledo had submitted her affidavit, which stated (without drawing an objection) that after the broadcast her office started getting phone calls; Dr. Toledo alleged that "[i]t was apparent from the content of the inquiries that my patients were concerned that I had been engaged in sexual contact with pediatric patients." *Id.* at *4 n.28. But the majority dismissed the affidavit as "self-serving" and "conclusory," and noted that Dr. Toledo "stopped short of identifying any ordinary listener who understood from the broadcast that she had engaged in a sexual relationship with a pediatric patient." *Id.* at *4.

The majority also noted that in evaluating whether the report was true, the report "must be compared to the Board proceedings," not the actual facts. *Id.* at *5. The opinion discussed how, taken together, the publicly available Texas Medical Board documents set forth the grounds for Dr. Toledo's discipline and identified her as a pediatrician, but that they did not state the age of the patient at issue.

Justice Jeff Boyd, joined by two other Justices, penned a lengthy dissent. Justice Boyd would have held that whether the broadcast conveyed a false and defamatory implication should be determined by a jury. He credited Dr. Toledo's affidavit, stating that it "provided evidence that *some* viewers who watched the broadcasts in fact did understand that the Board punished her for engaging in sexual contact with a minor." *Id.* at *6. Accordingly, he disagreed with the majority, which he characterized as holding "as a matter of law that every ordinary viewer who watched the broadcasts necessarily must have understood the broadcasts the way the Court now construes them." *Id.* at *7.

One major disagreement between the majority and dissent involves the standard to be applied in making the initial legal determination as to whether a statement is reasonably capable of conveying a false and defamatory meaning. In a lengthy footnote, Justice Hecht for the majority disagrees with the dissent's position "that a broadcast of official proceedings of public interest cannot as a matter of law be substantially true if there is any possibility that an ordinary listener *could* (the dissent uses the word over 30 times) have misunderstood it to convey a falsehood." *Id.* at *5 n.29 (emphasis in original). Rather, the majority stated, the question is the meaning "an ordinary listener" *would* have taken from the broadcast. And in making that determination, a court "must be guided" by constitutional principles that give breathing space for speech concerning public affairs. *Id.*

One major disagreement between the majority and dissent involves the standard to be applied in making the initial legal determination as to whether a statement is reasonably capable of conveying a false and defamatory meaning.

How Much of “Libel by Implication” Remains?

The Texas Supreme Court’s 2000 decision in *Turner v. KTRK Television* was widely interpreted at the time as a potential floodgate-opening opinion for “libel by implication” cases in Texas. The dissent in *KBMT* argued that the majority’s opinion is inconsistent with *Turner*. As Justice Boyd noted, the *Turner* opinion was not unanimous; in fact, Chief Justice Hecht (who wrote the *KBMT* majority) dissented in part in *Turner* (before he was named Chief Justice; he is the only Justice who was on the Court for both cases).

Justice Boyd, in his *KBMT* dissent, argued that the majority’s opinion “is more like the approach the Chief Justice urged in his dissent in *Turner* than the one the *Turner* majority adopted and applied.” *KBMT* at *11 n.4. In Justice Boyd’s view, the standard to be used by a court is highly important: whether an ordinary viewer *could* have understood the broadcast to be false and defamatory, versus whether a reasonable person *would* have so understood the broadcast. Justice Boyd argued that particularly at the motion to dismiss stage, a showing that an ordinary viewer *could* have interpreted the broadcast as false and defamatory should be sufficient. *Id.*

Reasonable, Ordinary, Objective, Subjective

An interesting aspect of the case is the various formulations used by the majority and dissent in describing the standard by which a statement’s alleged implication should be judged. The majority variously states that a court should view the statement as “an ordinary listener,” “the ordinary listener,” “a person of ordinary intelligence,” “the average listener,” “any ordinary listener,” and whether “no ordinary listener” could, or would, take the impression urged by the plaintiff. For its part, the dissent appeared to adopt the standard that a jury question is presented if “any ordinary listener” actually interpreted the broadcast as stating false, defamatory facts about the plaintiff – even if “most did not.” *Id.* at *6. The dissent argued that under the majority’s holding, “the trial judge, the appellate justices, and at least some who actually watched the broadcasts are either not ordinary or were just plain wrong.” *Id.* at *7.

Several years ago, the Texas Supreme Court addressed a similar issue in the context of a libel claim based on a satirical newspaper article. There, the plaintiffs – a judge and a district attorney who were the subject of the satire – argued that *some* ordinary, reasonable readers interpreted the article as stating actual facts, instead of being a fictional satire. They offered evidence that some actual readers believed (at least initially) that the article was straight news. *New Times, Inc. v. Isaacks*, 146 S.W.3d 144 (Tex. 2004).

In rejecting the plaintiffs’ claims, the unanimous *New Times* Court held that the “appropriate inquiry is objective, not subjective. Thus, the question is not whether some actual readers were misled, as they inevitably will be, but whether the hypothetical reasonable reader

Several years ago, the Texas Supreme Court addressed a similar issue in the context of a libel claim based on a satirical newspaper article.

Jim Hemphill is a shareholder at MLRC member firm Graves Dougherty Hearon & Moody, PC in Austin, Texas, and is co-chair of the MLRC DCS Litigation Committee. Neither he nor Graves Dougherty was involved in the KBMT case. KBMT was represented by Michael A. McCabe and Olga A. Bograd of Munck Wilson Mandala LLP Dallas; and William Little, Mehaffey Weber, Beaumont, TX. Plaintiff was represented by Joe House, House & Perron, Houston; Mark Wham, The Woodlands, TX; and Brian Mazzola, Beaumont, TX.



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Defamation Claim Against “American Hustle” Producers Dismissed on Appeal

*Movie Scene Not False and Defamatory;
Film a Matter of Public Interest*

By Lou Petrich

On June 6, 2016, the California Court of Appeal reversed an Order by the Los Angeles Superior Court denying defendants’ California anti-SLAPP Act motion to strike a four count complaint for defamation. The Court of Appeal instructed the trial court to enter a new order granting the motion and to award defendants their attorneys’ fees and costs. [*Brodeur v. Atlas Entertainment Inc.*](#), 2016 WL 3244871, 44 Media L. Rep. 1843 (2016). Defendant’s request that the opinion be certified for publication was granted.

Background

Plaintiff’s complaint described plaintiff as a “well-known author in the environmental field, pointing out the health dangers of the use of various electrical devises and other household items.” In addition, defendants presented evidence that plaintiff also wrote in the 1970s, opined about health dangers from the use of microwaves, including in microwave ovens.

Defendants Annapurna Productions LLC, Atlas Entertainment, Inc. and Columbia Pictures Industries, Inc. financed, produced and distributed the feature length motion picture “American Hustle” (the “Film”), a docudrama about the 1970s and 1980s “Abscam” sting of public officials convicted of bribery. To illustrate the culture of the times, the relationship between a con man (played by Christian Bale) and a corrupt mayor, and the ongoing domestic battle between the con man, Irving, and his wife, the Film contains [a farcical scene](#) in which the con man’s wife, Rosalyn (played by Jennifer Lawrence) – in order to deflect blame for destroying a microwave oven her husband had been gifted by the Mayor – states that she had read an article supposedly written by Plaintiff in which it was stated that the then relatively new microwave ovens could deplete food of all nutritional value (the “Challenged Statement”).

Rosalyn is portrayed throughout the Film as an emotionally unstable character prone to outrageous behavior.

Rosalyn is portrayed throughout the Film as an emotionally unstable character prone to outrageous behavior. Rosalyn was described by [New York Times](#) and [Los Angeles Times](#) reviewers as “hilarious,” “slightly unhinged,” “out of control” and a “loose cannon.”

When Rosalyn makes her first appearance in the Film, Irving is criticizing her for starting a home fire with a new tanning lamp. Sporting a sunburn, she dismisses him, “Just stop with the

whole fire thing. ... I'm sure a million people do that. All the time. Those sunlamps are dangerous. Shouldn't even have them in the house really."

Her dialogue is replete with bizarre theories ("Historically, the best perfumes in the world, they're all laced with something nasty ... It is true!") and garbled pop psychology ("I've been reading this book, Irving. It's by Wayne Dyer, about the Power of Intention. And my intention in sending [the Mafia] over to you was so that you could come up with this plan. So you're welcome.").

Rosalyn almost gets Irving killed by telling her new mobster boyfriend, Pete, that Irving is working with an "IRS" agent. After Irving confronts her, she bursts into tears and says she only wanted to get back at Irving because he didn't love her, and that she's leaving him for Pete: "Why can't you just be happy for me? ... Why are you taking your heart pills?" Irving describes her as "the Picasso of passive-aggressive karate. She was better than any con artist I ever met, including myself."

In her last appearance in the Film, she is wearing a neck brace of unexplained origin: "The car is a little dinged up, I'm a little stiff, but whatever, I don't want to talk about it."

The Film contains several humorous references to the late 1970s culture. In one scene, Camden Mayor Carmine Polito shows his new "friend" Irving that he has a gift for him, a new microwave oven: However, he warns Irving: "Don't put metal in it."

Immediately afterward, in the farcical scene complained of by plaintiff, Rosalyn (Jennifer Lawrence) attempts to use the new microwave oven and ignores her husband's warning not to put metal in "the science oven." She heats a foil pan in the oven and the oven explodes. (Her young son yells, "Another fire!" and she tells him to grab a fire extinguisher: "That one's empty. We gotta use the big one!") When Irving sees the destruction, Rosalyn uses a series of red herrings to distract her husband from criticizing her. First she tells him to "just get another one," and when that doesn't work, she tells him that she read that microwave ovens harm the nutritional value of food. When Irving evinces skepticism, she appeals to "authority," tossing out the name of a contemporary (1970s) writer on the dangers of microwaves, plaintiff Paul Brodeur. Her husband is not convinced; he is nonplussed. (As an added comedic touch, she just happens to have at hand an article she claims was written by Paul Brodeur.). The humor arises from the couple's tortured relationship and their own foibles, not the least of which is that Rosalyn and Irving are so clueless about the nature of microwave ovens that they refer to it as a "science oven."

The complete dialogue of the scene is as follows:

Irving Rosenfeld: I told you not to put metal in the science oven, what did you do that for?

Rosalyn Rosenfeld: Don't make such a big deal! Just get another one.

Irving Rosenfeld: I don't want another one, I want the one that Carmine gave me.



Rosalyn Rosenfeld: [mocking her husband] “Oh, Carmine! I want the one that Carmine gave me! Carmine! Carmine!” Why don’t you just marry Carmine? Get a little gold microwave and put it on a chain around your neck! You wanna be more like Carmine? Why don’t you build something, like he does? Instead of all your empty deals; they’re just like your fuckin’ science oven. You know, I read that it takes all of the nutrition out of our food! It’s empty, just like your deals. Empty! Empty!

Irving Rosenfeld: Listen to this bullshit.

Rosalyn Rosenfeld: It’s not bullshit! I read it in an article, look: By Paul Brodeur.
[hands Irving a magazine]

Rosalyn Rosenfeld: Bring something into this house that’s gonna take all the nutrition out of our food and then light our house on fire? Thank God for me.

The scene lasts less than a minute. The trial judge commented that although he saw and enjoyed the Film, he did not notice the reference to Plaintiff.

Plaintiff filed a four-count Complaint against defendants for libel, defamation slander and false light invasion of privacy, all based on Rosalyn’s single line of dialogue. Defendants filed an anti-SLAPP motion under Cal. Civ. Code Proc. § 425.16(b)(1). It provides four bases to seek summary resolution if defendants can show under the first prong of the statute that defendants’ speech or conduct was taken “in furtherance of the [defendants’] right of petition or free speech under the United States or California Constitution in connection with a public issue.” If a movant satisfies this first prong, the burden of presenting evidence sufficient to support a verdict of liability shifts to plaintiff. The trial judge may not resolve issues of fact.

The statute provides that the scope of the term ‘public interest’ is to be construed broadly. Case law has established that a matter of public interest is virtually any issue in which the public is interested. The challenge posed by this set of facts was to convince a court that the Challenged Statement simultaneously addressed a matter of public interest and was not understood as a statement of fact. Defendants argued that several matters in the Film were matters of public interest” the film itself, the culture of the 1970s, the Abscam sting, health concerns about microwaves and plaintiff’s opinions about microwaves

Plaintiff argued that the Challenged Statement was not sufficiently connected to any public issue and presented evidence that plaintiff in a 1970s interview had stated there was no known evidence that microwave ovens were injurious to health. .

The trial court, relying on the decision in *Dyer v. Childress*, 147 Cal. App.4th 1273 (2007), denied the motion on the ground that defendants had not satisfied the first prong. Defendants took advantage of the statutory provision allowing a direct appeal from the denial.

Court of Appeal Decision

The Opinion by a three-judge Court of Appeal analyzes the first prong of the anti-SLAPP statute in a significantly different manner than the published opinion in *Dyer v. Childress*, 147 Cal. App.4th 1273 (2007) which found no public interest in a fictional motion picture about the issues regarding Generation X at the beginning of the 1990s because the Court required proof that there was a public interest in a private person who claimed to be depicted in the motion picture. Defendants argued in this case that *Dyer* should not be followed because *Dyer* implicitly (and incorrectly) conflated the first and second prongs by framing the issue under the first prong as whether there was any “discernable public interest” in defaming Mr. Dyer because he was not a public figure. (The California Supreme Court in *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal.4th 728, 740 (2003) had explained that a court does not evaluate under the first prong of the anti-SLAPP Act whether defendants’ conduct was lawful or unlawful; those issues are to be decided under the second prong analysis.)

However, the issue whether the movie in that case defamed Dyer should have been determined under the second prong, and involved the question whether an audience would reasonably believe that the character played by Ethan Hawke, because he shared the same name as plaintiff, was intended to portray the plaintiff. As defendants argued at the hearing in this case, if the first and second prongs are so conflated, no defendant accused of defamation would ever satisfy the first prong because a defendant could never prove there is a public interest in defaming someone.

Dyer has caused confusion in the trial courts by conflating the issue regarding the merits of the case into the first prong analysis. The *Dyer* decision has been cited in at least 57 decisions,

The challenge posed by this set of facts was to convince a court that the Challenged Statement simultaneously addressed a matter of public interest and was not understood as a statement of fact.

mostly unpublished. The Ninth Circuit in *Doe v. Gangland Productions, Inc.*, 730 F.3d 946, 954 (9th Cir. 2013) criticized the district court’s analysis in *Doe* because it “conflated the two distinct prongs of the anti-SLAPP statute”). *Doe* explained that contrary to *Dyer*, (“[Defendants] were not required to show a specific public interest in Plaintiff...Plaintiff’s reliance on *Dyer* is misplaced. Unlike *Dyer*, Plaintiff is directly connected to the issues of public interest, gang violence and Miller’s murder.”). *Id.*, at 956-57.

Even though the *Brodeur* Court’s Opinion does not explicitly criticize *Dyer*’s conflation, it explains the logic of *Dyer*, in order to distinguish it. The Opinion at 11 states:

In *Dyer*, the court found “the specific dispute” concerned the alleged misuse of Mr. Dyer’s persona, in which there was “no discernable public interest.”

While the Court’s Opinion found *Dyer* easily distinguishable because *Brodeur* was admittedly a public figure, the Opinion went on to explain that

the microwave oven scene plainly drew on an issue of public interest in the 1970’s and plaintiff was an integral part of that issue at the time. Whether we consider the public interest in the movie as a whole – which is conceded and undeniable – or the public interest in the particular topic being discussed in the scene at issue – which likewise existed during the era being depicted – our conclusion remains the same. Defendants’ conduct in writing and broadcasting the microwave oven scene was protected activity within the meaning of the anti-SLAPP statute.

Thus, the Opinion holds that Defendants’ conduct is connected to a public issue because it helps illustrate a theme or subject matter of a fictionalized work, namely, the culture of the 1970s, which is a matter of public interest.

Regarding the second prong of the anti-SLAPP statute, the Opinion found on alternative grounds that plaintiff failed to present a *prima facie* case that the Challenged Statement was false and defamatory. First, it noted that plaintiff filed no declaration categorically denying that he ever wrote or stated that microwave ovens deplete food of nutrition. His published 1970s interview denying physical harm did not suffice. A 2015 FDA statement that microwave “cooking does not reduce the nutritional value of foods any more than conventional cooking” did not speak to the state of scientific knowledge in the 1970s.

Alternatively, the Court of Appeal agreed with defendants “that Rosalyn’s comment ... is not reasonably susceptible of a defamatory meaning.” The Court noted that the movie “is, after all, a farce,” the disclaimer at the front of the film (“Some of this actually happened”) set the tone, and as for whether the statement was “factual” adopted plaintiff’s label mocking defendants’ “ditzy” defense, finding that because of the “ditzy nature of the character” an audience would not expect “anything Rosalyn says to reflect objective fact.”

Lou Petrich, Elizabeth L. Schilken and Eva S. Neuberg of Leopold, Petrich & Smith, Los Angeles, represented defendants. Kelli L. Sager, Jonathan L. Segal and Thomas R. Burke filed an Amici Curiae brief on the first prong issue for CBS Broadcasting Inc., The Motion Picture Association of America, The New York Times Company, Getty Images (US), Inc., Hearst Corporation, First Look Media Works, Inc., Center for Investigative Reporting, Inc., the California Newspaper Publishers Association, First Amendment Coalition, Californians Aware, and the Reporters Committee for Freedom of the Press. Plaintiff was represented by Leon Friedman and by David McClain and Ian A Rivamonte of Kazan, McClain, Satterley &



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Eighth Circuit Reverses American Sniper Verdict

Unjust Enrichment Award Thrown Out; Defamation Claim Remanded

By Leita Walker

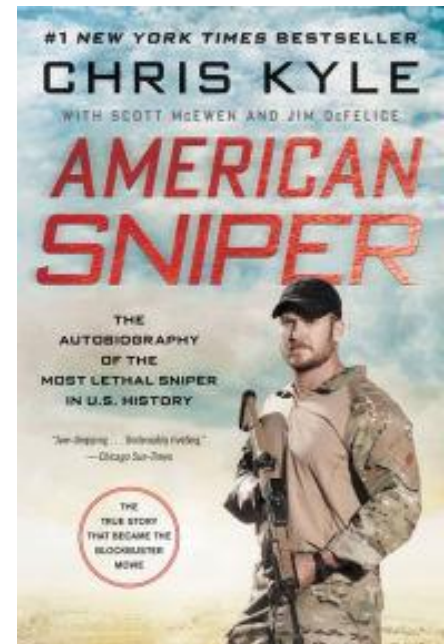
On June 13, the Eighth Circuit reversed a \$1.8 million jury verdict in Jesse Ventura's libel case against the Estate of Chris Kyle, a Navy Seal and author of *American Sniper*, who was killed in an unrelated incident in February 2013. [*Ventura v. Kyle*](#).

The Eighth Circuit rejected the \$1.3 million award for unjust enrichment outright, stating that this claim "enjoys no legal support under Minnesota law." It also reversed the \$500,000 award for defamation due to admission of evidence regarding insurance coverage, but remanded the defamation claim for a new trial.

Background

The case arose after Chris Kyle described in *American Sniper* an incident in a California bar in 2006 when he punched a "celebrity" referred to as "Scruff Face" who was making offensive remarks about SEALs. According to Kyle's account, the punch occurred at a gathering following the funeral a SEAL killed in combat and was preceded by Kyle asking Scruff Face to "cool it," to which Scruff Face replied, "You deserve to lose a few." Kyle did not identify Scruff Face in the book, but during a radio interview the day after the book was released Kyle confirmed, in response to a caller's question, that Scruff Face was Ventura. Ventura filed suit shortly thereafter, alleging that Kyle fabricated the entire account and claiming defamation, misappropriation of name and likeness, and unjust enrichment.

Following two unsuccessful motions for summary judgment, the case was tried in the summer of 2014 before District of Minnesota Judge Richard Kyle (no relation to Chris Kyle). According to the Eighth Circuit's opinion, "Ventura testified he had a normal evening without any verbal or physical altercation. Three people who were with him that evening also testified they witnessed no alteration. However, these people were not in Ventura's immediate vicinity for the entire evening, and one testified he was hard of hearing." Ventura also introduced photos of himself at the graduation the next day that he argued showed he had no obvious injuries.



Meanwhile, wrote the Eighth Circuit, the Estate--represented by Kyle's widow, Taya Kyle—"presented several witnesses who were at the bar that evening, who testified they either heard Ventura make the alleged comments, witnessed some type of physical altercation or both." Specifically, "[a]t least seven witnesses testified that they overheard some of Ventura's remarks and offered generally similar accounts of what Ventura said. At least seven witnesses testified they saw Kyle (or an unidentified man, for those who did not know Kyle) punch Ventura; saw Ventura on the ground or getting up off the ground; or heard a 'commotion' or 'yelling.'" The Eighth Circuit noted that "estimates of the timing and location of the incident were not consistent."

Witnesses from publisher Harper Collins testified that the book was a runaway success but that the mention of Jesse Ventura had only a "negligible" effect on the success of the book. Ventura's counsel sought to impeach these witnesses by questioning them about Kyle's and HarperCollins's insurance coverage (over the Estate's objection). Ventura's counsel then stated during his closing argument that the book's publicist

testified that she did not know her company's insurer is on the hook if you find that Jesse Ventura was defamed. Both her and [the book's editor] also testified that they do not know that their company's insurer was paying for the defense of this lawsuit. But they are not the disinterested, unbiased witnesses they were put in front of you for you to believe. It's hard to believe that they didn't know about the insurance policy because it's right in Kyle's publishing contract. ... Chris Kyle is an additional insured for defamation under the publisher's insurance policy.

The Eighth Circuit rejected the \$1.3 million award for unjust enrichment outright, stating that this claim "enjoys no legal support under Minnesota law."

The court noted that although the Estate did not object in front of the jury, it moved for a mistrial.

The jury struggled to reach a verdict and the parties ultimately agreed to an 8-2 verdict on the fifth full day of deliberations. The split jury found for Ventura on the defamation claim, awarding \$500,000, rejected the misappropriation claim, and entered an advisory verdict of \$1.3 million on the unjust enrichment claim, which the district court adopted.

Eighth Circuit Ruling

On appeal, the Estate raised primarily three arguments: (1) that the court erred in instructing the jury on certain elements of Ventura's libel claim, (2) that the unjust enrichment judgment violated the law, and (3) that the verdict was tainted by the admission of prejudicial evidence about insurance.

The Eighth Circuit agreed with the Estate on its second and third points and thus found it unnecessary to address the first.

With regard to the unjust enrichment claim, the court held that the Estate was not unjustly enriched as a matter of Minnesota law for two reasons. First, under Minnesota law, to prevail on a claim of unjust enrichment, a claimant must establish an implied-in-law or quasi-contract under which the defendant received some benefit, and Ventura could not show such a contract.

Second, even if Ventura had been able to show the existence of an implied-in-law or quasi-contract, an unjust enrichment award was not available to him because he had an adequate remedy at law—money damages for defamation. The court noted that “[n]either the district court nor Ventura cited any case awarding profits in a defamation case under an unjust-enrichment theory, or even suggesting money damages are an inadequate remedy in a public-figure defamation case.”

With regard to the references to insurance, the Eight Circuit rejected Ventura’s argument that such references were permissible to show the bias of the HarperCollins witnesses. It stated, “Here there is no evidence [that they] had any economic tie or ‘substantial connection’ to HarperCollins’s insurance carrier. They were not currently or formerly employed by the insurance company, seeking employment with the insurance company, paid for their testimony by the insurance company, or holders of stock in the insurance company.”

In fact, the court held, “Ventura never established by direct evidence or reasonable inference that [the witnesses] even knew about any insurance coverage or possible insurance payment.” The court went on to hold that such questioning of the HarperCollins witnesses, coupled with Ventura’s counsel’s “strategic and calculated” decision to mention insurance during his closing argument, prevented Kyle from receiving a fair trial. Among other reasons, it stated that it is “utterly repugnant to a fair trial or ... a just verdict for the jury to hear that the damages sued for ... will be taken care of by an insurance company” (ellipses in original; citation omitted).

Judge Smith of the Eighth Circuit concurred in part and dissented in part. He concurred in reversal of the unjust enrichment verdict but would not have granted a new trial on the defamation claim. Although he agreed that the district court erred in permitting Ventura’s counsel to question the Harper Collins witnesses regarding insurance, he believed that the Estate’s motion for a mistrial was untimely and that the error was harmless and non-prejudicial.

Leita Walker and John Borger of Faegre Baker Daniels, Minneapolis, MN, represented the defendants at trial. Lee Levine, Levine, Sullivan, Koch & Schulz argued the case for defendants on appeal. Former Gov. Ventura was represented by David Bradley, Olson, Henson & Efron, Minneapolis, MN. A media amicus coalition was represented by Susan Buckley, Floyd Abrams, and Merriam Mikhail, Cahill Gordon & Reindel, NY.

Fired Columnist's Suit Against Kansas City Star Dismissed

*Article About His Firing Was True;
Made Without Actual Malice*

By Eric Weslander

A news publication's article about its own termination of a public-figure columnist, for violating the organization's plagiarism policy, was protected under the First Amendment from claims for defamation, prima facie tort, and negligent infliction of emotional distress, a Missouri state court concluded in a recent pair of decisions in *Steve Penn v. Cypress Media, LLC et al.*, No. 1416-CV-26391 ([Mo. Cir. June 13, 2016](#)) and ([Mo. Cir. June 15, 2016](#)).

Background

The action stemmed from *The Kansas City Star's* publication on July 13, 2011, of an article about longtime reporter and columnist Steve Penn's termination for what the Star's management concluded to be clear violations of their ethics policy: Penn admitted that on numerous occasions, he copied entire portions of other people's writing, verbatim and without attribution, into his "Commentary" column for the *Star*.

The statements in the article that Penn alleged to be defamatory were as follows:

- That editors discovered, during the normal editing process, that Penn had "lifted" material from press releases verbatim.
- That Penn was dismissed "for using material that wasn't his and representing it as his own work."
- That Penn was "in some cases presenting others' conclusions and opinions as his own and without attribution;" and
- That according to a quote in the article from Mike Fannin, Editor and Vice President of *The Star*: "Steve made some serious errors of judgment that we concluded were clear violations of our ethics policy."

Penn did not dispute in his lawsuit that he had engaged in the wholesale copying of others' writing. Rather, he claimed that despite the *Star's* express policy prohibiting wholesale

The action stemmed from The Kansas City Star's publication on July 13, 2011, of an article about longtime reporter and columnist Steve Penn's termination.

copying of other people’s work without attribution, there was an unwritten exception for press releases. Penn asserted that because press-release authors “release” them to the public and desire to see their words used, copying them verbatim into a “Commentary” column without attribution could not be plagiarism—and that the article was therefore necessarily false.

Penn filed his original petition in Jackson County Circuit Court on June 29, 2012, consisting of two counts against the *Star’s* operator, Cypress Media, LLC: “defamation a/k/a libel” (Count I) and prima facie tort (Count II). Following a full discovery period, the *Star* moved for summary judgment as to both counts, on grounds that the statements in the article were all substantially true or statements of opinion; (b) Penn was a public figure with no evidence of actual malice; and (c) the prima facie tort doctrine only applies to conduct that does not fall under a traditional tort theory, and therefore could not be used to backstop an invalid defamation claim.

On Nov. 4, 2013, two weeks prior to the start of trial, the Hon. Edith Messina denied the *Star’s* summary-judgment motion without explanation. On Nov. 17, 2013, a day before trial was scheduled to begin, Penn dismissed the action with prejudice, beginning a one-year savings period. He re-filed his action on Nov. 7, 2014, adding claims for negligent infliction of emotional distress against both the *Star* and Editor Mike Fannin. The re-filed matter was assigned to the Hon. W. Brent Powell.

The *Star* then removed the case to the U.S. District Court for the Western District of Missouri on diversity-jurisdiction grounds, where it filed a Motion to Dismiss the alternative counts for prima facie tort and negligent infliction of emotional distress, followed immediately by a Motion for Summary Judgment as to the defamation count. After Penn stipulated that his damages did not exceed \$75,000, the Hon. Fernando J. Gaitan, Jr. remanded the action back to the Circuit Court of Jackson County.

The *Star* then filed its third Motion for Summary Judgment, as well as a Motion to Dismiss the alternative counts, under the applicable state-law standards.

In a decision issued June 13, 2016, Judge Powell granted the *Star’s* Motion for Summary Judgment as to the defamation claim, first rejecting Penn’s argument that the prior 2013 order by Judge Messina denying the Motion for Summary Judgment was the “law of the case” which prohibited Judge Powell from considering the motion. Judge Powell concluded that the law of the case doctrine does not limit a trial court’s discretion to reconsider and change its interlocutory orders prior to entry of final judgment.

Noting that it was not in serious dispute that Penn was a public figure, Judge Powell held that pursuant to the actual-malice standard as articulated by the U.S. Supreme Court and interpreted by Missouri state courts, Penn was required to “submit evidence ‘with convincing

No reasonable jury could find that the *Star* acted with actual malice when it published the statement.

clarity” (emphasis in Court’s ruling) showing a genuine issue of material fact from which a reasonable jury could find that the *Star* acted with actual malice.

Judge Powell classified the statements at issue as falling into two categories: (a) statements about alleged conduct, and (b) statements regarding violation of the *Star*’s ethics policy.

As to the first category, Judge Powell concluded, “Penn does not dispute that he used press releases without attribution. To that extent, there is no genuine dispute of material fact about whether or not the portions of the statement regarding Penn’s conduct are true.”

As to the second category, Judge Powell concluded that Pen’s allegations that some reporters believed his actions were not a violation of the ethics policy was insufficient to create a “genuine conflict of material fact” as to whether the *Star* made the statement with actual malice. Judge Powell quoted the *Star*’s ethics policy at length and concluded that, just as in a factually similar prior decision by the *Warner v. Kansas City Star*, 726 S.W.2d 384, 391 (Mo. App. 1987), Penn’s actions “arguably violate[d]” the ethics policy. The Court held that the disputed statement was therefore “arguably true,” and that “Penn is not entitled to bring a defamation claim if he believes that the policy was unfairly applied to him,” concluding that no reasonable jury could find that the *Star* acted with actual malice when it published the statement.

On June 15, 2016, Judge Powell granted the *Star*’s Motion to Dismiss the alternate counts for Prima Facie Tort and Negligent Infliction of Emotional Distress, confirming that these theories may not be used as surrogates for a defamation claim that cannot survive the actual-malice standard. As to prima facie tort, the Court relied on the holding in *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 315 (Mo. 1993) that prima facie tort is “not a duplicative cause of action established either by the failure to prove a recognized tort claim, or by *the failure of such a claim on account of a particular defense*.” (Emphasis in Court’s ruling). The Court concluded that “Recovery for damaging or injurious statements should be in defamation or other recognizable torts; and Penn cannot justify bringing an action for prima facie tort just because Defendants have a valid defense to such torts.”

Similarly, as to Penn’s two negligent infliction of emotional distress counts, the Court confirmed that because the “harmful conduct alleged by Penn against the Defendants consists solely of speech—namely the publication of the article,” First Amendment standards applied whether the claim was styled as one for defamation or for infliction of emotional distress. The Court concluded: “To recover for emotional distress caused to a public figure by speech, the First Amendment requires a showing of a false statement of fact and actual malice. Because Penn has failed to plead a false statement of fact in Counts III and IV, they must be dismissed.”

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Kirtsaeng Episode II: The Revenge of the Factors

*(a.k.a. Did the Supreme Court Create More
Confusion About the Proper Standard for
Granting Attorneys' Fees in Copyright Cases?)*

By Lincoln D. Bandlow & Rom Bar-Nissim

On June 16, 2016, the U. S. Supreme Court issued its much anticipated decision in *Kirtsaeng, dba BlueChristine99 v. John Wiley & Sons, Inc* (“*Kirtsaeng II*”), addressing the Circuit split regarding the standard for awarding attorneys’ fees under 17 U.S.C. § 505. It was hoped that the decision would bring some much needed clarity as to how district courts should exercise their discretion when granting or denying an award of attorneys’ fees in copyright cases. Previously, in *Fogerty v. Fantasy, Inc.* 510 U.S. 517, 534 n.19 (1994), the Court set forth the following non-exclusive factors that courts should apply when determining whether to grant attorneys’ fees to the prevailing party:

- Frivolousness;
- Motivation;
- Objective Unreasonableness (both in the factual and legal components of the case); and
- The need in particular circumstances to advance considerations of compensation and deterrence

Kirtsaeng had purchased textbooks in Thailand and sold them in the United States. John Wiley sued for copyright infringement based on violation of its distribution rights.

After the Court’s decision in *Fogerty*, the Courts of Appeal throughout the United States became hopelessly fractured regarding how to apply these factors. Some seemed to even abandon the *Fogerty* framework altogether by applying presumptions based on the prevailing party or the objective unreasonableness of the non-prevailing party’s arguments.

Kirtsaeng II sought to resolve the confusion. The Court was asked to determine whether Supap Kirtsaeng was entitled to recover his attorneys’ fees from John Wiley & Sons after he successfully litigated his first-sale doctrine defense all the way up to the Supreme Court in *Kirtsaeng v. John Wiley & Sons, Inc.* (“*Kirtsaeng I*”), 133 S.Ct 1351 (2013).

(*Kirtsaeng I* involved defining the contours of the first sale doctrine, as codified in 17 U.S.C. § 109(a). Kirtsaeng had purchased textbooks in Thailand and sold them in the United States. *Kirtsaeng I*, 133 S.Ct. at 1356. John Wiley sued for copyright infringement based on violation of its distribution rights. *Id.* at 1357. Kirtsaeng’s defense was the first sale doctrine. Previously, courts were split on whether the first sale doctrine applied to the sale of lawful

copies that had been manufactured and acquired abroad. In the decision below, the Second Circuit held that the first sale doctrine did not apply to lawful copies manufactured abroad. *Id.*

In the Ninth Circuit, copies manufactured abroad could be entitled to first sale protection, if the first copy sold was in the United States. *Id.* (citing *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982, 986 (9th Cir. 2008)). The Third Circuit expressed trepidation to any geographic limitation on the first sale doctrine. *Kirtsaeng I*, 133 S.Ct. at 1357 (citing *Sebastian Int'l, Inc. v. Consumer Contacts (PTY) Ltd.*, 847 F.2d 1093, 1098 n.1 (3rd Cir. 1988)). The Supreme Court held that the text of Section 109 contained no geographic limitation, rather, the first sale doctrine applies, irrespective of where the lawful copy is manufactured. *Kirtsaeng I*, 133 S.Ct. at 1358.)

The district court decided to deny Kirtsaeng's request for attorneys' fees because John Wiley & Son's claims and its arguments in support thereof were not objectively unreasonable. *John Wiley & Sons, Inc. v. Kirtsaeng*, No. 08-CV-07834 DCP, 2013 WL 6722887, at *6 (S.D.N.Y. Dec. 20, 2013). The Second Circuit affirmed. *John Wiley & Sons, Inc. v. Kirtsaeng*, 605 F.App'x 48, 50 (2nd Cir. 2015). On September 28, 2015, Kirtsaeng petitioned the Supreme Court for a writ certiorari. On January 15, 2016, the Court granted Kirtsaeng's petition.

The Court's Opinion

In a unanimous decision authored by Justice Elena Kagan, the Court stated:

The question presented here is whether a court, in exercising [its] authority [to grant attorneys' fees], should give substantial weight to the objective reasonableness of the losing party's position. The answer, as both decisions below held, is yes-the court should. But the court must also give due consideration to all other circumstances relevant to granting fees' and it retains discretion, in light of those factors to make an award even when the losing party advance a reasonable claim or defense.

Slip Op. at 1.

The Court began its analysis by reinforcing the following principles from *Fogerty*:

- The language of Section 505 “clearly connotes discretion and eschews any precise rule or formula for awarding fees.” Slip Op. at 4.
- Attorneys' fees may not be granted as a “matter of course” and, instead, require a “particularized, case-by-case assessment.” *Id.*

- The *Fogerty* factors are a non-exhaustive list of considerations a court may use to exercise its discretion in granting or denying attorneys' fees. *Id.*

Although district courts have broad discretion, guidance on the exercise of that discretion was necessary because “in a system of laws discretion is rarely without limits.” Slip Op. at 5. Without guidelines, Courts would exercise their discretion upon a “whim or predilection.” *Id.* Furthermore, boundless discretion would prevent individuals from “predicting how fee decisions will turn out, and thus [prevent parties] from making properly informed judgments about whether to litigate.” *Id.* at 6.

John Wiley & Sons had argued that the Copyright Act is best served by placing substantial weight to the objective reasonableness of the non-prevailing party's position. Slip Op. at 5. Kirtsaeng, in response, had argued that the Copyright Act is best served by “giving special consideration to whether a lawsuit resolved an important and close legal issue and thus meaningfully clarified copyright law.” *Id.*

The Supreme Court assessed the parties' arguments in light of the objectives of the Copyright Act. Slip Op. at 6. Quoting *Fogerty*, the Court stated that the Copyright Acts' purpose has always been to “enrich[] the general public through access to creative works.” *Id.* To achieve that end, the Copyrights Act strikes “a balance between two subsidiary aims: encouraging and rewarding authors' creation while also enabling others to build on that work.” *Id.*

In the Court's opinion, the objective reasonableness approach serves the Copyright Act best, since “it both encourages parties with strong legal positions to stand on their rights and deters those with weak ones from proceeding with litigation.” Slip Op. at 6-7. Under this standard, both plaintiffs and defendants with strong legal positions would be “incentivize[d] to litigate the case all the way to the end.” Slip Op. at 7. Additionally, potential plaintiffs with weak claims would be deterred from filing a lawsuit, while defendants with weak defenses would be incentivized to settle the lawsuit quickly. *Id.* In contrast, Kirtsaeng's approach “would not be sure to produce such benefits,” therefore, “the value of his approach was entirely speculative.” Slip Op. at 7-8.

The Court also found the objective reasonableness approach to be more administrable. Slip Op. at 8-9. It explained why:

A district court that has ruled on the merits of a copyright case can easily assess whether the losing party advanced an unreasonable claim or defense.

...

In deciding any case, a judge cannot help but consider the strength and weakness of each side's arguments. By contrast, a judge may not know at the conclusion of

The Supreme Court held that the text of Section 109 contained no geographic limitation, rather, the first sale doctrine applies, irrespective of where the lawful copy is manufactured.

a suit whether a newly decided issue will have, as Kirtsaeng thinks critical, broad legal significance.

Slip Op. at 9.

Furthermore, the Court found that the objective reasonableness approach treated plaintiffs and defendants equally, as required by *Fogerty*. Slip Op. at 9. The Court did emphasize, however, that a finding of liability should not be confused with objective reasonableness. Slip Op. at 10. If a court were to do so, it would be a reversible abuse of discretion. *Id.*

It is at this point that the Court's opinion becomes very muddled. The Court starts to hedge its emphasis on objective reasonableness and deemphasize its overall weight in the analysis. Thus, "objective reasonableness can only be an important factor in assessing fee applications—not a controlling one." Slip Op. at 10. Rather, the analysis "must take into account a range of considerations beyond the reasonableness of litigating positions." *Id.*

That means in any given case a court may award fees even though the losing party offered reasonable arguments (or, conversely, deny fees even though the losing party made unreasonable ones).

...

Although objective reasonableness carries significant weight, courts must view all the circumstances of a case on their own terms, in light of the Copyright Act's essential goals.

Slip Op. at 10-11. The Court cited examples where objective reasonableness was overcome by the non-prevailing party's litigation misconduct, repeated instances of infringement, or overaggressive assertion of copyright claims. Slip Op. at 11 (citing *Bridgeport Music, Inc. v. WB Music, Cop.*, 520 F.3d 588, 593-95 (6th Cir. 2008); *Viva Video, Inc. v. Cabrera*, 9 Fed.App'x 77, 80 (2nd Cir. 2001))

The Court went on to critique the Second Circuit and its district courts for their over reliance on objective reasonableness. Slip Op. at 11. In the Court's view, the Second Circuit's language suggested that:

[A] finding of reasonableness raises a presumption against granting fees [citation] and that goes too far in cabining how a district court must structure its analysis and what it may conclude from its review of relevant factors.

Id. The Court critiqued district courts within the Second Circuit as treating objective unreasonableness as a "dispositive" factor, instead of just a "substantial" one. *Id.*

Consequently, the Court vacated the district court's opinion and remanded for further proceedings. Slip Op. at 11-12. The Court made it clear, however, that it was "not at

all intimat[ing] that the District Court should have reached a different conclusion.”
Slip Op. at 12.

To summarize, *Kirtsaeng II* provided guidance on the following points:

- With respect to attorneys’ fees, the Copyright Act’s objective is to promote both plaintiffs and defendants with strong legal positions to pursue their claims or defenses to the end of litigation. Additionally, the attorneys’ fees provision of the Act should be utilized by courts to deter potential plaintiffs with weak claims from filing suit and to pressure defendants with weak defenses to settle quickly.
- Objective reasonableness is assessed by the strength of the non-prevailing party’s claims or defenses.
- The objective reasonableness inquiry best promotes the objectives of the Copyright Act and, therefore, should be given substantial weight.
- Objective reasonableness should not be confused with liability and a district court doing so would be a reversible abuse of discretion.
- All other relevant factors must be considered in addition to objective reasonableness.
- Objective reasonableness is not a dispositive factor, nor does objective reasonableness create a presumption in favor of denying attorneys’ fees.
- Attorneys’ fees may be granted even when the non-prevailing party’s litigation position is objectively reasonable.

In the Court’s opinion, the objective reasonableness approach serves the Copyright Act best, since “it both encourages parties with strong legal positions to stand on their rights and deters those with weak ones from proceeding with litigation.”

Kirtsaeng II provided guidance but it is also likely to create some confusion regarding how much weight in the analysis should be given to objective reasonableness. The Court provided a very strong rationale for why objective reasonableness should be given substantial weight, but it seemed to hedge strongly regarding what “substantial” actually means. There does appear to be a ceiling: objective reasonableness cannot be treated as a dispositive factor nor lead to a presumption in favor of denying attorneys’ fees. But there does not seem to be a floor. If other factors may overcome objective reasonableness, it is unclear whether those factors must dominate or merely be present to overcome the substantial weight given to objective reasonableness.

The examples cited by the Court make it seem that the other factors must be more substantial than objective reasonableness, but the Court failed to clarify if that was the case.

Furthermore, the Court never stated that the factor *Kirtsaeng* advanced should not be considered at all. To the contrary, by stating that district courts should consider all other relevant factors, the Court appears to hold that it should be a relevant factor and that this factor could (particularly when combined with other factors) potentially overcome any objective unreasonableness.

Impact On The Various Circuits

Kirtsaeng II will likely have the greatest impact on the First, Second, Fifth and Seventh Circuits. The remaining Circuits will likely feel very little or no impact from the decision, except that they will be required to determine when and how a showing of objective reasonableness may be overcome.

A. The First and Second Circuits:

Objective Unreasonableness Can No Longer Be The Sole Criteria

The impact on the Second Circuit comes directly from the opinion. The Second Circuit's approach was to award attorneys' fees if the non-prevailing party's claim or defense was "objectively unreasonable." See *Matthew Bender & Co., Inc. v. West Pub. Co.*, 240 F.3d 115, 121-122 (2nd Cir. 2001). The Court criticized the Second Circuit for creating a presumption based on objective reasonableness and the district courts for treating objective unreasonableness as a dispositive factor. While the Court did cite the Second Circuit's decision *Viva Video* with approval, it seems a new body of case law pertaining to other relevant factors will have to emerge to supplement the Second Circuit's objective unreasonableness approach.

Kirtsaeng II makes it apparent that the First Circuit's current approach is also no longer good law. The First Circuit's approach was that "the prevailing party need only show that its opponent's copyright claims or defenses were 'objectively weak'" for granting attorneys' fees. See *Latin American Music Co. ASCAP*, 629 F.3d 262, 263 (1st Cir. 2010); see also *Garcia-Goyco v. Law Environmental Consultants, Inc.*, 428 F.3d 14, 20 (1st Cir. 2005) ("Thus, the award of fees has been approved where the claim is 'objectively weak.'"). This approach seems to violate *Kirtsaeng II* in two ways. First, it treats objective reasonableness as a dispositive factor. Second, it limits the factors that may be considered.

Most likely, the First Circuit will return to its approach in *Lotus Development Corp. v. Borland International Corp.*, 14 F.3d 70 (1st Cir. 1998). That decision tracks closer with *Kirtsaeng II*. In *Lotus*, the First Circuit affirmed the district court's decision to deny a defendant's motion for attorneys' fees. The First Circuit adopted the district court's rationale, which was:

[W]hen a plaintiff prosecutes an action in good faith, in an unsettled area of law, and with a reasonable likelihood of success, against a party with similar financial

resources, the prevailing party's case for attorney's fees is weaker, whether it be a plaintiff or a defendant.

Id. at 74.

Lotus may even provide guidance on how to treat *Kirtsaeng*'s argued factor looking at whether a party advanced a litigation position that ends up clarifying copyright law.

[A] copyright defendant's success on the merits in a case of first impression may militate in favor of a fee award, but we are unwilling to hold that a successful defense in an important case necessarily mandates an award of attorney's fees. When close infringement cases are litigated, copyright law benefits from the resulting clarification of the doctrine's boundaries. But because novel cases require a plaintiff to sue in the first place, the need to encourage meritorious defenses is a factor that a district court may balance against the potentially chilling effect of imposing a large fee award on a plaintiff, who, in a particular case, may have advanced a reasonable, albeit unsuccessful, claim.

B. The Fifth and Seventh Circuits:

Impermissible Presumptions In Favor Of The Prevailing Party

Both the Fifth and Seventh Circuits create a presumption in favor of granting attorneys' fees to the prevailing party. *Assessment Technologies of Wisconsin, LLC v. WIREdata, Inc.*, 361 F.3d 434, 436-37 (7th Cir. 2004); *Hogan Systems, Inc. v. Cybresource International, Inc.*, 158 F.3d 319, 325 (5th Cir. 1998). *Kirtsaeng II* seems to indicate that this approach is wrong for two reasons. First, the presumption aspect is impermissible because not even objective reasonableness is allowed to serve as a presumption in favor of attorneys' fees. Second, the prevailing party aspect seems impermissible, since confusing objective reasonableness with prevailing party is reversible abuse of discretion. It seems the Fifth and Seventh Circuits must go back to the drawing board.

The Court also found the objective reasonableness approach to be more administrable.

C. The Remaining Circuits: Unscathed?

It appears that *Kirtsaeng II* will have far less impact on the Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits. The decisions from the Courts of Appeal in those Circuits are, for the most part, in-line with *Kirtsaeng II*. Some might require minor adjustments to their approaches, but most are in accord.

There is one issue that every single Circuit will eventually face: what does “substantial weight” actually mean and how is it overcome?

Conclusion

Kirtsaeng II brought some much needed clarity to how district courts should exercise their discretion to award attorneys’ fees. Objective reasonableness should be given significant weight, but it is not dispositive nor does it create a presumption in favor of denying attorneys’ fees. Rather, all relevant factors must be considered and objective reasonableness may be overcome by other compelling factors. It remains to be seen what it takes to overcome the substantial weight given to a showing of objective reasonableness, but litigation misconduct, repeated instances of infringement and overaggressive assertion of copyright claims may be sufficient. The Second Circuit will have to develop a body of law addressing the other factors beyond objective reasonableness. The First Circuit may start over or it may start building off of its decision in *Lotus*. Both the Fifth and Seventh Circuits are back to square one. It remains to be seen if *Kirtsaeng II* will have any impact on the remaining Circuits. However, every Circuit will eventually have to address what does “substantial weight” actually mean and how can it be overcome by the presence of other factors.

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Using Trademarks in Expressive Works

An in-depth discussion of the main legal defenses that may enable content creators to avoid the time and expense of establishing that consumer confusion is unlikely under the applicable multi-factor test.

North Carolina Supreme Court Invalidates State Cyber-Bullying Statute

Compelling State Interest, But Statute Not Narrowly Tailored to Problem

By Kirsten Jackson

Earlier this month, the North Carolina Supreme Court unanimously held that a state cyber-bullying statute violated the First Amendment and therefore was invalid. [*State v. Bishop*](#), (N.C. App. June 10, 2016).

Background

The case involved a high school student who was convicted of cyber-bullying under a North Carolina [statute](#) that made it unlawful “for any person to use a computer or computer network to... post or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor,” “with the intent to intimidate or torment a minor.”

The Supreme Court’s ruling reversed a Court of Appeals decision holding that the law was valid because it regulated conduct, not speech. While the Supreme Court acknowledged the state’s “compelling interest in protecting children,” it held the law was unconstitutional due to its overly extensive reach.

The Supreme Court’s ruling reversed a Court of Appeals decision holding that the law was valid because it regulated conduct, not speech.

Supreme Court Opinion

In concluding the statute implicated the First Amendment, the court engaged in a two-part inquiry. First, the court analyzed whether the law regulated speech or conduct. The court likened posting online to “stapling flyers to bulletin boards or distributing pamphlets to passersby—activities long protected by the First Amendment.” Accordingly, the court concluded that “such communication does not lose protection merely because it involves the ‘act’ of posting online, for much speech requires an ‘act’ of some variety—whether putting ink to paper, or paint to canvas, or hoisting a picket sign...” The First Amendment does not stop shy at new technology, the court held. To the contrary, the “United States Supreme Court has made clear, the protections of the First Amendment extend in full not just to the Internet.”

Having concluded that the cyber-bullying statute regulated speech, the court next examined whether the restriction on speech was content based or content neutral. Under the U.S.

Supreme Court's recent decision in [Reed v. Town of Gilbert](#), 135 S. Ct. 2218 (2015), the North Carolina Supreme Court noted that content based restrictions can be evidenced by "the plain text of a statute, or the animating impulse behind it, or the lack of any plausible explanation besides distaste for the subject matter or message."

Here the court found that "the statute criminalizes some messages but not others, and makes it impossible to determine whether the accused has committed a crime without examining the content of his communications."

The court concluded its threshold analysis and held that "it is clear that the cyberbullying statute is content based, on its face and by its plain text, because the statute 'defines regulated speech by its particular subject matter.'" Because the statute placed a content-based restriction on speech, it was subject to the most demanding level of review, strict scrutiny, and "few content based restrictions have survived this inquiry."

In its analysis, the court reaffirmed "that the State has a compelling interest in protecting the physical and psychological well-being of minors." But, "the State must show not only that a challenged content based measure addresses the identified harm, but that the enactment provides 'the least restrictive means' of doing so." The court held that the cyber-bullying statute failed on this count because it was not narrowly tailored to advance the state's interest, and instead "create[s] a criminal prohibition of alarming breadth."

The statute's Achilles Heel was readily apparent, but several drafting issues were identified by the court. First, the court noted that there was no requirement for actual injury. Second, the law did not provide a definition of "intimidate" or "torment." During trial, the state had asserted that "torment" should reference "conduct intended to annoy, pester or harass." The court criticized the breadth of the proposed definition: "it is hardly clear that teenagers require protection via the criminal law from online annoyance."

The breadth of the statute was further illustrated by the subject matter it intended to restrict, "private, personal or sexual information pertaining to a minor." Again, the state provided no definitions for these terms. The court concluded that "such an interpretation would essentially criminalize posting any information about any specific minor if done with the requisite intent." The statute could essentially criminalize venting about a break-up online, as a [friend-of-the-court brief](#) filed on behalf of the Electronic Frontier Foundation by UCLA Professor Eugene Volokh explained.

The North Carolina Supreme Court's ruling leaves it to the state legislature to consider rewriting the cyber-bullying law to bring it into compliance with the First Amendment.

Kirsten Jackson is a summer associate at Brooks Pierce LLP in Raleigh, North Carolina.

3d Circuit Holds Porn Industry Record Keeping Laws Require Strict Scrutiny

Under Reed v. Town of Gilbert Statute is Content Based

In another case demonstrating the impact of *Reed v. Town of Gilbert* on First Amendment jurisprudence, the Third Circuit this month held that a federal record keeping law for pornography producers, 18 U.S.C. §§ 2257 and 2257A, is a content based restrictions on speech that requires strict scrutiny review to pass constitutional muster. [*Free Speech Coalition v. Attorney General*](#), (3d Cir. June 8, 2016) (Rendell, Smith, Sirica, JJ.).

At issue are portions of the Child Protection and Obscenity Enforcement Act of 1988. Among other things, the Act requires producers of sexually explicit material to collect information about performers and models to demonstrate that they are not minors. The Free Speech Coalition and other supporters challenged the constitutionality of the law. Last year, the Third Circuit held the statute was content neutral and subject to intermediate scrutiny. In so ruling, the court focused on the purpose of the law – protecting children – and concluded this purpose was unrelated to the content of the targeted expression, even if the law had an incidental effect on some speakers or messages, but not on others.

In light of *Reed*, the Third Circuit was compelled to reverse. At issue in *Reed* was the constitutionality of a town code regulating outdoor signs. The Supreme Court instructed that a “law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.”

In addition, the court declined to apply the secondary effects test to save this section of the law. “We deem it significant that the Supreme Court has never actually applied the secondary effects doctrine outside the realm of brick-and-mortar purveyors of adult sexually explicit content. We decline to do so now, because any application of the secondary effects doctrine beyond what the Supreme Court has explicitly endorsed would bring this case into direct conflict with *Reed*’s pronouncement that we cannot look behind a facially content-based law to a benign motive in order to shield the law from the rigors of strict scrutiny.”

The court remanded for application of the strict scrutiny standard, but noted that “Nothing in our analysis dictates a conclusion that the Statutes will not (or will) pass strict scrutiny.” (Portions of the statute governing record inspections were struck down on other grounds.)

FAA Releases Final Rule, Opens Skies for Drone Journalism

New Rule Eliminates Requirement for Pilot's License

By Charles D. Tobin, Christine N. Walz, and Mickey H. Osterreicher

On June 21, 2016, the Federal Aviation Administration (FAA) announced its long-awaited final rule on commercial use of small unmanned aircraft systems (UAS, or drones) weighing less than 55 lbs. The rule, which will be effective in late August, will loosen many current restrictions and open up significant opportunities for newsgathering.

Currently, commercial drone use, which the FAA has said encompasses newsroom use, is banned in the United States absent a special exemption from the FAA. The exemptions have come with tight restrictions that have hampered development of drone journalism. The most difficult restriction for newsrooms has been the requirement that drone operators hold a license to pilot manned aircraft.



The new rule – released after more than a year of FAA review of comments to a notice of proposed rulemaking, reports from industry stakeholder committees, and testing programs conducted by news media companies – eliminates the pilot's license requirement and takes other positive steps for journalists. Under the new [rule](#):

- Anyone who wants to operate a drone commercially will need an FAA "remote pilot airman certificate." To get one, journalists will need to go to a center near them that the FAA will set up and take an aeronautical knowledge test. The FAA has set up a page of ["Activities, Courses, Seminars and Webinars"](#) to help operators prepare for the test.
- Operators will also have to be at least 16 years old; be able to read, speak, write, and understand English (with a few exceptions) and be in a physical and mental condition to safely operate a small UAS.
- Operators will need to be vetted by the Transportation Safety Administration.
- No visual observer is required in addition to the drone operator, although operators are permitted to work with a visual observer.
- Use of tethered drones affixed to grounded objects or buildings is permitted.

- Drones must be operated within the visual line of sight. At all times, either the "pilot in command" operating the drone, or the visual observer must observe the drone with unaided sight.
- Drone operations generally must be limited to flights under 400 feet. However, drone operations are permitted higher than the 400-foot ceiling for flights that remain within a 400-foot radius of a tall structure.
- Drones may be flown during daylight, or in twilight (30 minutes before official sunrise to 30 minutes after official sunset, local time) with appropriate anti-collision lighting. There also must be at least three miles of weather visibility from the control station.
- Flights are not permitted over people who are not directly participating in the operation, unless the people are located under a covered structure or stationary vehicle that would protect them from a falling drone. A separate rule allowing some operations over people is expected later this year.
- Drones may not be operated from a moving vehicle unless the operation is over a "sparsely populated area."

Most of the operational restrictions can be waived by the FAA, upon a showing that a proposed operation can be conducted safely under a waiver.

The final rule and waiver process will largely supplant the current exemption process under Section 333 of the FAA Modernization and Reform Act of 2012, the Obama Administration initiative that required the FAA to prepare regulations to integrate UAS into the National Airspace (NAS). However, operators currently holding Section 333 exemptions may continue to operate under them until the final rule goes into effect. At that point, operators can decide whether to operate under the final rule requirements or under the conditions set forth in their Section 333 exemption.

The final UAS rule reflects many of the comments submitted by a News Media Coalition of 24 news organizations following the FAA's notice of proposed rulemaking last year. A subgroup of News Media Coalition organizations also conducted testing on news drones last year in conjunction with an FAA-approved test site at Virginia Tech. CNN also has been conducting experimental operations in cooperation with the FAA under a program at Georgia Tech.

Notably, the new FAA rule does not address privacy issues. The FAA continues to stay away from that issue citing its lack of expertise on the subject and limited statutory authority. In its discussion, the FAA defers to the National Telecommunications and Information Administration (NTIA) process and current state law on privacy.

The NTIA recently concluded its series of multi-stakeholder meetings with representatives of manufacturing, data privacy and other stakeholder groups. Following often contentious exchanges with privacy groups seeking severe restrictions on drone photography in public places, the News Media Coalition secured a carve-out for newsgathering in the NTIA voluntary ["best practices" released](#) in May 2016. That carve-out preserves newsroom autonomy and provides clear language allowing journalists and news organizations to establish their own drone practices:

***BEST PRACTICES FOR NEWSGATHERERS
AND NEWS REPORTING ORGANIZATIONS***

Newsgathering and news reporting are strongly protected by United States law, including the First Amendment to the Constitution. The public relies on an independent press to gather and report the news and ensure an informed public.

For this reason, these Best Practices do not apply to newsgatherers and news reporting organizations. Newsgatherers and news reporting organizations may use UAS in the same manner as any other comparable technology to capture, store, retain and use data or images in public spaces. Newsgatherers and news reporting organizations should operate under the ethics rules and standards of their organization, and according to existing federal and state laws.

In the explanation accompanying the final rule, the FAA devoted eight pages to whether the First Amendment limits its authority to restrict the use of drones for newsgathering. It responds to the some of the concerns expressed by the News Media Coalition in its public comments on the proposed rule.

Specifically, the FAA argues that:

- The rule is narrowly tailored to serve the significant governmental interest of aviation safety as well as "the safety of people on the ground."
- The rule's restrictions on speech are incidental, viewpoint neutral and non-content-based and therefore, they "need not be the least restrictive or least intrusive means of furthering that government interest."
- The NAS is a non-public forum, requiring a lower level of scrutiny.
- The rule does not burden First Amendment-protected activity because "attaching a camera to a small unmanned aircraft does not transform flying that aircraft into expressive conduct any more than attaching a camera to a car would transform driving that car into expressive conduct."

- The rule leaves open alternative avenues of communication because "anyone seeking to use a small UAS for photography or videography in a manner not permitted under this rule is free to utilize another method of photography or videography by, for example, using a manned aircraft, filming from a tall structure or landmark, filming from the ground, or using specialized equipment."

The FAA's inclusion of these arguments in its explanatory language appears aimed at forestalling a First Amendment challenge to the rule, rather than practically impacting how newsgathering drones may be operated. And they overstate the FAA's authority to restrict the use of drones for newsgathering, where there is no appreciable enhanced benefit to public safety.

Additionally, some of these arguments are inconsistent with other parts of the rule. For example, the government's justification that it is leaving open alternative avenues of communication by asserting that "anyone seeking to use a small UAS for photography or videography in a manner not permitted under this rule is free to utilize another method of photography or videography by, for example, using a manned aircraft, filming from a tall structure or landmark, filming from the ground, or using specialized equipment," flies in the face of the FAA's own language that "in addition to enabling this industry to develop, the FAA anticipates that this final rule will provide an opportunity to substitute small UAS operations for some risky manned flights, such as inspection of houses, towers, bridges, or parks, thereby averting potential fatalities and injuries."

Up next is the FAA's anticipated release of a proposed rule that will govern flights over people, and will open up even greater opportunity for breaking news use. That proposed rule is expected to come out at the end of this year.

Charles D. Tobin and Christine N. Walz are with Holland & Knight, LLP, in Washington, D.C. Mickey H. Osterreicher is General Counsel of the National Press Photographers Association in Buffalo, N.Y.

Holland & Knight represented the News Media Coalition, consisting of the following news organizations, in submitting comments to the FAA on the proposed small UAS rule: Advance Publications, Inc.; A.H. Belo Corp.; American Society of Media Photographers; The Associated Press; Cable News Network, Inc.; Capitol Broadcasting Co.; Cox Media Group, LLC; Fusion Media Network, LLC; Gannett Co., Inc.; Getty Images (US), Inc.; Gray Television Group, Inc.; Media Law Resource Center; MPA – the Association of Magazine Media; National Press Club; National Press Photographers Association; NBCUniversal Media, LLC; The New York Times Company; Reporters Committee for Freedom of the Press; The E.W. Scripps Company; Sinclair Broadcast Group, Inc.; Society of Professional Journalists; Reuters; TEGNA; and WP Company LLC.

Court Finds Raw, Unpublished Footage Not Necessary in Capital Murder Case

By Amy Gross

Reasoning that police detectives were available and willing to speak with defense counsel directly, a Superior Court judge in Atlanta applied the Georgia reporter's shield law and ruled that raw, unpublished footage of interviews of those individuals filmed during the production of an episode of *The First 48* was not necessary to the defense in the capital murder case of Aeman Presley.

The First 48 and the Presley Investigation

Presley is charged with four murders, including the shooting of two homeless men in Atlanta. In November 2014, field producers for *The First 48*, a documentary television program produced by Kirkstall Road Enterprises, LLC, a subsidiary of New York-based ITV Studios, Inc., shadowed Atlanta Police Department detectives as they investigated the murders. During this time, Presley was arrested and questioned by the Atlanta Homicide department. During questioning, Presley confessed at length to the two murders being investigated, as well as two others.



In November 2015, an episode of *The First 48* about Presley aired, including footage from the investigation, some footage of Presley's custodial interview, and interviews with detectives who worked on the Presley investigation. In January 2016, more than a year after Presley's arrest and confession, *The First 48* field producers conducted follow-up interviews with four of the detectives who had been involved with the Presley investigation, in which the interviewees provided retrospective reminiscences about the investigation.

Presley Subpoenas Kirkstall

The following month, Presley's defense counsel sought to subpoena from Kirkstall "any and all footage, including raw footage and any and all backups both audio and video," relating to the Presley investigation. Because Kirkstall is located in New York, Presley's counsel had to seek the materials through the Uniform Act to Secure the attendance of Witnesses from

Without the State (the “Uniform Act”), codified in Georgia at O.C.G.A. §§ 24-13-90 *et seq.* To do this, Presley’s counsel had to obtain a certification from the Georgia court where the action is pending that the information sought is “material” to the case. *See* O.C.G.A. § 24-13-94(a). Presley’s counsel then had to apply to the local court in New York to issue the subpoena, which was to determine, after a hearing, whether the witness or evidence is “material and necessary” to the case and whether or not complying with the subpoena would subject the witness to undue hardship. N.Y. Crim. Proc. L. § 640.10(2).

By Petition dated February 24, 2016, Presley’s counsel sought and obtained from the Georgia court a Certification of Materiality of Out-of-State Witness for Kirkstall, claiming that Kirkstall’s footage was material and necessary to Presley’s defense. Presley’s attorneys then had the Certification presented to the New York State court and, apparently on the same day it was presented and without a hearing, the New York court issued the subpoena.

Kirkstall Resists the Subpoena

Kirkstall moved in the Georgia court for reconsideration of Presley’s Petition for the Certification and for revocation of the Certification. Kirkstall meanwhile obtained a stay of enforcement of the subpoena in New York.

Kirkstall argued that the Certification was defective because Presley had not made a sufficient showing of materiality. Kirkstall also argued that under both the New York and the Georgia reporter’s shield laws, the material should not be produced, as it was not material, critical, or necessary, and the evidence therein was obtainable from other sources.

The Georgia court ruled on April 21, 2016 that Presley had established that the footage he sought was, at a minimum, material and relevant to his counsel’s investigation of the case. It also stated that the footage might be necessary for a proper preparation and presentation of Presley’s defense if the officers interviewed in the footage refused to be interviewed prior to trial. The court pointed in particular to the fact that Presley is charged with capital murder and found that heightened standards apply to capital cases (though there is no other Georgia authority indicating a different reporter’s shield standard in a capital murder case).

Noting the “marked tension” between Presley’s right to compulsory process and the newsgathering privilege, the Court sought ordered a full evidentiary hearing on May 10, 2016 on whether the reporter’s shield protected Kirkstall from having to disclose its unpublished footage and ordered Kirkstall to bring the footage to the hearing and have it available for *in camera* review. In so doing, the Georgia Court relied on *Matter of Faber*, 394 A.2d 330, 337-38 (1978), a New Jersey case describing *in camera* review as a “preliminary step” to determine whether the newsgathering privilege must yield to a defendant’s constitutional rights.

The four detectives whose interviews were the subject of the raw Kirkstall footage testified that they were willing to be interviewed by Presley’s counsel.

Kirkstall Moves for Clarification

Kirkstall, on May 5, 2016, moved for clarification or reconsideration of the Court's April 21, 2016 Order, arguing, among other things, that *Faber* was decided under a much weaker shield law than those of New York and Georgia, and that requiring *in camera* review of Kirkstall's footage as an intermediate step before determining applicability of the reporter's shield laws would eviscerate those laws' purpose of protecting the media against compelled disclosure of its newsgathering materials absent a showing of the elements necessary to pierce the shield at an evidentiary hearing. Kirkstall also asked the Georgia Court, in the event it ultimately did order *in camera* review, to give Kirkstall adequate time to either produce the footage or appeal the decision.

The next day, the Georgia Court confirmed that the evidentiary hearing would go forward as scheduled on May 10 and gave Kirkstall 72 hours to produce the materials or appeal if the hearing resulted in the Court instructing Kirkstall to turn the material over for *in camera* review.

Footage Not Necessary to Defense

At the hearing, the four detectives whose interviews were the subject of the raw Kirkstall footage testified that they were willing to be interviewed by Presley's counsel. Therefore, the Court found, it did not appear that the footage was necessary because that evidence was "reasonably available from an alternative source, *i.e.*, the detectives and officers themselves." The Georgia court ordered Kirkstall to preserve the remaining raw footage, however, in case it was discovered that there was "information necessary to the proper preparation and presentation of Defendant's case that is not available through these officers."

All's well that ends well, then, though the multiple motions and full hearing required before the Court would apply the reporter's shield laws in what should have been a fairly open-and-shut case (the footage was, after all, solely recent, retrospective interviews of four individuals still available as trial witnesses) highlight the need for vigilance and persistence in the face of attempts to pierce the newsgathering privilege. This is particularly so where, as in the Presley case, a court does not at first see the damage of *in camera* production as a means of getting a quick answer as to what is in newsgathering material before ruling on the applicability of the reporter's shield.

Amy C. Gross is an associate at Duane Morris LLP in New York. Cynthia Counts, Duane Morris Atlanta, represented Kirkstall in the Georgia proceeding. Jerilyn Bell, Crystal Bice, and Lisa M. Wolf, Georgia Capital Defender, represented Defendant. Shiela Gallow, Lance Cross, and Kevin Armstrong acted for the Office of the Fulton County District Attorney.

Missouri Passes Bodycam Bill

Post-Ferguson Bill on Gov's Desk

By Jean Maneke

Missouri's legislature passed two bills this session containing identical language regarding how bodycam video would be handled by law enforcement in the state. [Senate Bill 732 \(2016\)](#) is the primary of the bills, and the language relating to such video can be found on page 53 of that bill.

Basically, Missouri will be considering such a video (as well as dash camera video) as an "investigative report," generally to be handled in the same way all investigative reports are presently handled by law enforcement. Those records in Missouri are "closed" records until the matter becomes "inactive," another defined term meaning that no further action is going to be taken by law enforcement due to the running of the statute of limitations, finality of convictions, or a decision not to pursue a case.

The law does provide that if a video is recorded in a "nonpublic" location (another defined term designating a place not open to the public), then it will be a closed record, except the family may obtain a copy on written request. It does provide a means for a third party to bring an action asking the court to determine whether disclosure of the closed video offers a public benefit that outweighs the harm to the public, law enforcement or a third party in the video. If the court decides that the public benefit is more important, the court may order release of the video under whatever terms the court chooses to implement. If such a nonpublic video is released by the court and the recipient intends to display it (for example, posting to a website), notice must be provided to the third party in the video and a ten-day period is provided for them to seek to enjoin the display.

Laws passed by the legislature become public automatically on August 28 of each year, unless vetoed by the Governor, in which case they become subject to a possible overriding vote by the legislature in the veto session in the fall. As of mid-June, the bill is still on the Governor's desk awaiting further action.

Jean Maneke, The Maneke Law Group, Kansas City, MO.

MLRC Model Policy on Police Body-Worn Camera Footage

The Model Policy provides that police bodycam recordings ought to be presumptively available for public access, subject to the exemptions in existing public records laws. The Model Policy sets forth more nuanced guidelines with respect to bodycam recordings made inside private homes. MLRC encourages you to use the Model Policy before the many legislative bodies that are considering rules addressing public access and retention to such policy bodycam tapes.

(Continued from page 11)

comments were bounced. A [weird case brought by University of Louisville students](#) against the author of a tell-all book about on-campus sex parties met an abrupt end; the students claimed that the book damaged the value of their education, and are now facing a [countersuit for extortion](#). And an even weirder case that we reported last month involving an [allegedly forged cake from Whole Foods](#) did indeed crumble, as predicted.

On the appellate side: The 8th Circuit overturned Jesse Ventura's defamation win in the [American Sniper case](#) on an evidentiary issue and remanded for retrial (though a [bid for rehearing](#) is expected). The 9th Circuit held that the [grant of an anti-SLAPP motion](#) is not immediately appealable. The 11th Circuit affirmed summary judgment against Larry Klayman in his claim over [sex abuse allegations](#), finding a lack of evidence of actual malice, as did the D.C. Circuit with respect to a [Serbian oligarch's claim](#).

The Texas Supreme Court affirmed a [local TV station's anti-SLAPP win](#) against a doctor alleged to have had sexual contact with a patient. The California Court of Appeals held that no one would believe that statements by Jennifer Lawrence's character in [American Hustle](#) were intended to be factual. The Michigan Court of Appeals agreed that a [Twitter parody of an attorney](#) was not actionable. An appellate panel of the Pennsylvania Supreme Court held that a [former county commissioner](#) failed to prove that Ogden Newspapers published a story about him with actual malice. The New York Appellate Division reversed a decision granting more time to serve a [libel claim on the Village Voice](#), finding no excuse for delay and no merit in the case. Finally, the South Carolina Appeals Court affirmed dismissal of a claim by a [Slovenian businessman against a Slovenian newspaper](#), holding that the availability of statements online did not satisfy minimum contacts.



Wait, someone was trying to forum shop a defamation claim [into the United States](#)?

Anyway, we have a few pending appeals to watch. NBCUniversal argued that the Second Circuit should affirm a ruling that [calling exploding rifle targets "bombs"](#) was not actionable. The Third Circuit is considering whether the [juxtaposition of a firefighter's photo](#) with a story on a sex scandal suffices to meet the "of and concerning" requirement. Before the Seventh Circuit, Gawker is attempting to fend off a retrial of a defamation claim [by a lawyer acquitted of rape](#). The Texas Supreme Court will hear [a Dallas magazine's appeal](#) of an order denying its motion to dismiss a defamation suit. And in Nebraska's top court, the City of Lincoln is trying to flip a defamation judgment for \$259K based on [police calling a woman a "crook"](#) online.

Privacy

Right of Publicity

Provocateur filmmaker Vincent Gallo's been [having a rough time lately](#). He was one of two victims of a catfishing scam based on a false "Vincent Gallo" profile on Facebook; the other

(more direct) victim was Gallo's ex-girlfriend, who was tricked by the anonymous creator of the profile into sending nude photos. Gallo sued the John Doe in C.D. Cal. for right of publicity and identity theft violations, and roped in Facebook for alleged Lanham Act violations after the site decided it couldn't verify the real Gallo's identity and refused to remove the bogus page.

In other right-of-publicity news, back in February, I mentioned [Johannes Martin's quixotic effort](#) to defend the honor of his Hacky Sack world record against the makers of 5-Hour Energy. Turns out he also filed a suit against [Wendy's and Guinness World Records](#) over the former's promotional giveaway of world-record themed toys. Martin's beef? The instruction card for the bag used his name. Not a problem, per N.D. Ill.: the mere mention of his name didn't constitute endorsement.



No sooner was a potential class action over the use of college athletes' names and likenesses in fantasy sports contests [voluntarily dismissed in Illinois federal court](#), than a virtually identical lawsuit showed up in the [Southern District of Indiana](#).

The Julia Child Foundation sued Airbnb in California over its promotion of the opportunity to stay at the [culinary icon's former vacation cottage](#) in Provence. Also in California, Electronic Arts settled a right of publicity claim with [NFL'er Jim Brown over Madden NFL](#); one down, only about 6,000 claims to go...

And in Minnesota, decade-transcendent music icon Prince was [nearly honored](#) with a statute granting a post-mortem right of publicity, but the bill met [stiff opposition](#) and has been relegated to committee limbo.



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Disclosure of Private Information/Intrusion

Minnesota might not have expanded publicity rights, but it has a [new revenge porn statute](#) signed by the Governor in May. The new law is a reaction to a failed attempt to use [Minnesota criminal defamation law](#) (maybe not the best legal theory?) to prosecute revenge porn. Rhode Island's legislature passed a similar bill, but it was [vetoed by the governor](#) due to First Amendment concerns.

Hearst failed to escape from a case over [selling of customer data](#) without consent, with a judge in S.D.N.Y. rejecting a constitutional challenge to the Michigan law at issue. Time Warner Cable fared better in a putative class action claim over [retaining its customers' data](#) after they drop their service, with a judge in E.D. Wis. finding that the lead plaintiff lacked standing under the Supreme Court's new decision in *Spokeo*.

Hulk Hogan's \$140 million verdict versus Gawker remains in place after the Florida trial judge [declined to flip the jury's decision](#); the judge also issued a [permanent injunction](#) against the publication of the sex tape. Meanwhile, Hogan filed [another lawsuit](#) in the same court against Gawker, claiming that the company leaked surreptitiously recorded bedroom conversations to the media. All of this has been thrown into confusion, however, by [Gawker's filing for Section 11 bankruptcy](#) and auction for its assets after the trial court refused to stay the

judgment. Now, Hogan's attorneys are wrestling in a new ring: New York bankruptcy court, where they're going to the mat over who can pursue [claims that Gawker might have against third parties](#). Hogan is also pushing for discovery as to whether [Nick Denton is so necessary to the bankruptcy process](#) that enforcement of the judgment against him personally cannot proceed.

Finally, the Connecticut Supreme Court affirmed a woman's conviction for harassment and breach of the peace for [stealing pages from her boyfriend's daughter's diary](#) and posting them to Facebook. The defendant proffered an odd First Amendment defense for her conduct based on her work as a journalist, which the court rejected as inadequately briefed.

Access/FOIA

New claims

In Florida, more than twenty media outlets are fighting for access to 911 calls, radio transmissions, and other materials related to the [Pulse nightclub shooting](#); the DOJ has released the [unredacted transcript](#) of the shooter's own 911 call, but the [FBI has told state agencies](#) to deny public records requests on the incident. In the District of Nevada, the Las Vegas Review-Journal and Battle Born Media have intervened to challenge a protective order in the trial of 19 people charged in connection with the 2014 [armed standoff at the Cliven Bundy ranch](#). In Kansas, the Associated Press sued a county government for blocking access to [records related to alleged fiscal shenanigans](#) by the county's former elections chief. In Tennessee, a Memphis newspaper is suing for [access to job applications](#) for the position as Memphis' chief of police. In W.D. Wash., Rebecca Tushnet is going another round in her [battle against meaningless redaction](#) in the *FTC v. Amazon* case. And in D.D.C., a watchdog group is suing the White House for allegedly [systematically interfering with FOIA](#) requests since 2009.

Access granted

In FOIA cases, we've got wins involving: a former mayor's [Facebook page](#) (N.M. Dist. Ct.); [police accident reports](#) (Wis. App.); files on investigation of [prosecutorial misconduct](#) (Wis.); [ethnicity records](#) on city workers (Mass. Super.); a mayor's electronic communications on [privately owned devices](#) (Ill. Cir.); video of [Oklahoma running back Joe Mixon](#) slugging another student (Okla.); and [FOIA fee waivers for students](#) (D.C. Cir.). That last one's a great win for journalism grad students who use FOIA for their coursework.

In courtroom access, we have wins involving: records on [Jerry Sandusky abuse claims](#) from the 70's and 80's (Pa. Cmmw.); records in a defamation lawsuit arising out of the [Freddie Gray case](#) (D. Md.); access to a [heat-of-passion murder trial](#) (Fla. Dist.); records in a fraud case against the manufacturer of [OxyContin](#) (Ky. Cir.); and access to [internal Trump University documents](#) in the pending fraud case (S.D. Cal.). [Efforts to obtain video](#) of Trump's deposition

testimony continue, though Trump has [agreed to lift](#) at least some of the confidentiality designations with respect to the transcripts.



Access denied

Those seeking access to information on the Hillary Clinton e-mail scandal weren't quite so lucky. Video of the [depositions of Clinton's aides](#) will be sealed (a fact [not lost on Donald Trump](#) in the case mentioned above), a tech aide is seeking to keep his deal for immunity secret, the State Department has said that it won't release more information about [Clinton's email security procedures](#) until December, and the judge has [put the entire case on hold](#). But in another case involving Clinton-era State Department records of a [deal with defense contractor BAE Systems](#), a judge has ordered that the release of documents be expedited.

Other FOIA/access denials included the NYPD successfully defeating efforts to access its records on [surveillance of two Muslim men](#), and [losing records](#) that it had been ordered to maintain on its history of domestic surveillance. The Alabama Supreme Court held that Alabama State University is allowed to withhold financial records on [football players who lost their scholarships](#). A media bid to intervene in decade-transcendent music icon [Prince's probate case](#) in Minnesota was denied. And the ACLU's long-running quest to obtain a copy of the full ["Torture Report"](#) from the Obama Administration hit a wall in the D.C. Circuit, with the court holding that the report was a Congressional document not subject to FOIA.

Pending appeals

The media won access the [list of unindicted co-conspirators](#) in the D.N.J. case over the George Washington Bridge closure scandal, but the release of the list was stayed after one of the names on the list appealed the decision. The Third Circuit [heard argument](#), and its decision is pending.

Legislation

[President Obama signed the pending FOIA reform bill](#) at the end of June, establishing a presumption that government records are public unless proven otherwise. We'll have to see whether that has any practical effect, but it's certainly a start.

It was a long haul, but [Massachusetts](#) has finally caught up with state-of-the-art public records laws. State-of-the-art in the 20th Century, but still. Now Mass. citizens can enjoy such benefits such as discretionary attorney fee shifting, appointed records officers, records in electronic form "unless the record is not available in electronic form" (there had to be a better way to phrase that), and a 10-day response time for the inevitable denial/demand for outrageous fees. Hey, it's better than what we had before.



And it could be much worse: South Carolina's effort to pass public records reform was [blocked in the state senate](#), and [New Hampshire, Minnesota, and Louisiana](#) all passed laws exempting at least some police body cam videos from disclosure. Meanwhile, Kansas has passed a law stating that [public officials can't hide public business in private emails](#), so that's a win.

Newsgathering

Credentialing

Raise your hand if you're still eligible to cover a Donald Trump rally. [Feeling a bit lonely?](#) But if Trump is elected, not to worry; he promises he won't ban reporters from the [White House briefing room](#). I feel so much better, don't you?

And to be fair, Donald's not alone in shutting out the press. The [Mayor of Harrisburg, Pa.](#), recently banned PennLive reporters from weekly briefings, saying the site needed to clean up its public comment sections. And [Woody Allen](#) recently chased the *Hollywood Reporter* out of an event at Cannes in retribution for its coverage. The company you keep...

As I've discussed before, the right to a press pass is a precious and fragile thing. [A judge in S.D.N.Y.](#) has recently reiterated that all it takes is a "compelling reason—or perhaps simply a rational basis" for police to yank your credentials. Maybe that will change in the unlikely event that the Supreme Court takes up that embedded reporter's case, but don't bet on it.

Lawsuits & Prosecutions

Let's start with the positive. Idaho is on the hook for \$250K in legal fees to the non-profit coalition that [successfully challenged the state's ag-gag law](#) in federal court. Meanwhile, four journalists who sued St. Louis County police over [abuse during the Ferguson protests](#) reached a confidential (and hopefully hefty) settlement. [Ferguson-related charges](#) were also dropped against two other reporters.

Not such good news for the citizen reporters, though. The Fifth Circuit held that a grand jury's finding of probable cause on an interference charge [insulated police from First Amendment claims](#) by a man they arrested for filming their activity. The Sixth Circuit held that a man who wanted to [record activities in in a county court building](#) lacked standing to challenge a ban on electronic devices. [A month after recording a traffic stop](#), a Pennsylvania man was arrested in his home by the officer involved; the county dropped the charges, and the ACLU has filed suit in federal court. [YouTube talk-show host Pete Santilli](#) is still in prison, after the Chief Judge of the District of Nevada rejected his claim that he was present at the Bundy family's armed standoff as a journalist.

And finally and ridiculously, [city officials in Wetumpka, Alabama](#) (if that were a [town in Massachusetts](#), it would be pronounced "Woompah," or quite possibly "Gloucester") aren't backing down on the arrest of a cop-recorder for interference with police business. They're

blaming him for police phone lines being overwhelmed by calls prompted by one of his online videos.

Miscellaneous

Good news on drones, folks! In about two months, [news organizations](#) will be able to fire up their quad copters and get the most out of their GoPros. But [read the regulations first](#)—the FAA has put a licensing scheme into place, and there are plenty of other limitations. There’s still a [case pending in D. Conn.](#) about whether small drones are “aircraft” subject to FAA jurisdiction at all, but at least we’re finding a way around that “no commercial use” issue.



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And if you know anyone who wants to play reporter, now they can. The most significant document leaks in recent history – the [Snowden docs](#) and the [Panama Papers](#) – are being released to the public so that interested folks can wade through them to find their own revelations.

Prior Restraint

Netflix is facing a prior restraint from an unexpected source – a U.S. Bankruptcy Court, which barred the streaming giant from [showing two Relativity Media films](#) mixed up in the studio’s financial meltdown. Netflix is taking the order up the chain to a district court judge in S.D.N.Y.

Several prior restraints have been quashed recently, including: a “stop talking about the plaintiff” [cyberharassment order](#) (Fla. App.); demands by prosecutors that Facebook keep quiet about [15 subpoenas for company data](#) (E.D.N.Y.); an order enjoining the media from publishing the content of a [search warrant and affidavit](#) lawfully obtained from a court clerk (Mich. Dist.); and an order banning FOIA service MuckRock from publishing [documents received pursuant to a public records request](#) (Wash. Super.).

MUCKROCK

A judge in E.D. Cal. also enjoined enforcement of [California Penal Code § 9026.5](#), which would have made it illegal to rebroadcast televised California Assembly proceedings for any political or commercial purpose.

Unfortunately, Twitter’s First Amendment fight to disclose information about its receipt of [National Security Letters and FISA requests](#) ran aground in the Northern District of California. The court held that there is no constitutional right to publish information properly classified as

confidential, and that Twitter had failed to challenge the underlying classification of the receipt of NSLs/FISA requests.

Broadcast/Cable/Satellite

ESPN and Verizon settled that [“skinny bundle” lawsuit](#) from a few months ago, allowing some variation in how pay-TV providers offer channels. I’ve just signed up with Verizon myself (hello, Hoboken!), and as a guy who generally prefers scripted television I have to say it’s nice to have options.

Now, about the FCC. The [set-top box proposal](#) is running into problems, there’s [disquiet](#) about the [competition-boosting provisions](#) that the agency required for the Charter/TWC deal, the Third Circuit vacated an attempt to make [joint sales agreements](#) attributable as ownership interests, the [FCC’s spectrum auction](#) kicked off but [not without some issues](#), and...
...you don’t really care about any of that, do you? Let’s get to the big story.

Internet/New Media

Net Neutrality/FCC

Yes, [the D.C. Circuit issued its opinion in the net neutrality case](#), and the 2-1 ruling was a complete win for Tom Wheeler’s vision of the future. Especially fascinating is the Court’s analysis at the end of the opinion about ISPs’ First Amendment interests as carriers of third-party content. Check out this paragraph:

If a broadband provider nonetheless were to choose to exercise editorial discretion—for instance, by picking a limited set of websites to carry and offering that service as a curated internet experience—it might then qualify as a First Amendment speaker. But the Order itself excludes such providers from the rules. The Order defines broadband internet access service as a “mass-market retail service”... that “provides the capability to transmit data to and receive data from all or substantially all Internet endpoints.” ... Providers that may opt to exercise editorial discretion—for instance, by offering access only to a limited segment of websites specifically catered to certain content—would not offer a standardized service that can reach “substantially all” endpoints.



Noodle on that one, if you will, and just imagine what would happen if Comcast decided to reinvent itself as [Prodigy circa 1990](#). I’m telling you, [the future is the past](#), man. (Seriously, just click the links.)

Of course, with a lengthy dissenting opinion, there's a chance ([if perhaps a small one](#)) we'll at least get *en banc* review, so save some of your popcorn for the final act.

Section 230

Bad times for the CDA in California, I'm afraid. The Superior Court held that [state right of publicity claims](#) are not covered by Section 230 in a case against Facebook (a result familiar from other courts but inconsistent with Ninth Circuit precedent). The Appeals Court issued an abomination of an opinion holding that [Section 230 does not prevent ordering Yelp to remove defamatory user reviews](#) or insulate it from penalties for contempt of such an order, while along the way finding that Yelp has no First Amendment interests in the user content that it curates and publishes. Another Cal. App. case bends Section 230 to the breaking point to squeeze [a revenge porn site operator within the *Roommates.com* rubric](#). And the Ninth Circuit held that Section 230 doesn't affect a claim that a social media platform [failed to warn users](#) about misuse of the service, but didn't recognize that the only relationship that could give rise to a duty to warn is the site's role in publishing user content.



Add to these a case from D. Or. in which a [review website's Section 230 defense fell flat](#) due to alleged tinkering with the reviews, and a case from M.D. Fla. in which a judge held that Google could be sued for [allegedly de-indexing of the plaintiff's sites in bad faith](#), and one can see why Eric Goldman is asking "[WTF Is Going On With Section 230?](#)" These days we're lucky that a bog-standard claim of liability based on UCG can still get [dismissed in New York](#). We'll see how this plays out in a [new case filed by Airbnb](#) in California, which is suing to block a San Francisco ordinance that would fine the service for every user who posts an ad without registering first—an apparent violation of Section 230.

And now that we've got a brand-new form of federal intellectual property law, we've got another way for plaintiffs to attempt evade Section 230. Keep an eye out for Defend Trade Secrets Act claims cropping up in cases where they have no business being, and bogus trade secret clauses showing up in contracts where you might have seen non-disparagement or compulsory copyright transfer provisions. More on the DTSA below under "Intellectual Property."

Hate, Threats & Terror

That [class action against Twitter for supporting terrorism](#) was dismissed with leave to amend in N.D. Cal., with the judge finding that the plaintiff had not adequately pleaded a connection between Twitter and the plaintiffs' injury. [Another suit is already in the works](#), blaming Twitter, Facebook and Google for supporting the criminals in the Paris terrorist attacks. Lawsuits aside, some platforms are taking steps to implement [automated removal of extremist material](#); expect some bumpiness as the kinks are worked out in the AI.

The good folks at [Twitch](#) and [Facebook](#) are also coping with some of the more unfortunate consequences of live streaming – such as what happens when an apparent crime occurs in the course of a user’s stream. And where there is online crime you can get [online vigilantes](#), such as a Michigan man who undertook to deal with sexual predators on digital platforms by posing as a teenage girl and luring would-be pedophiles into videotaped confrontations; now he’s being sued for libel by one of his targets.

That bad N.C. App. cyberbullying ruling that I mentioned a while back has been [overturned by the North Carolina Supreme Court](#), which held that the statute violated the First Amendment. New Jersey restaurateur “NJ Weedman” was arrested and charged with cyberharassment under a N.J. law for [calling a cop a pedophile](#) in an online video (oddly, not the only New Jersey restaurant-related case we have this month). Meanwhile, the Third Circuit is once more trying to figure out [what to do with Anthony Elonis](#); the Court of Appeals is looking at his case anew after Elonis’ win last year at the Supreme Court, which left open an underlying First Amendment question about the state of mind necessary for a “true threat.”



Anonymity

A subpoena for the disclosure of user identities was quashed in N.D. Fla. in a case involving [commenters on a news site](#). In D.D.C., a federal judge held that Comcast didn’t need to provide subscriber records for use in a [UK defamation case](#).

Still pending: An Alabama judge will decide whether to force AL.com to disclose the identities of two users in [House Speaker Mike Hubbard’s ethics case](#); a federal district court judge in the same state will decide whether a woman is entitled to know who [posted her name and picture to ShesAHomewrecker.com](#); and the California Court of Appeals will consider the intersection of anonymity and commercial speech in a convoluted defamation case involving [whistle-blowing about Hollywood SFX wizards](#).

Miscellaneous

- The Middle District of Louisiana struck down the state’s [attempt to make the Internet child-safe](#), echoing the nearly 20-year-old Supreme Court decision in [Reno v. ACLU](#). A similar [Minnesota state law](#) met a similar fate.
- The Eastern District of Virginia held that a county attorney might have violated the First Amendment by [kicking a citizen off of a county-operated Facebook page](#).
- The ACLU has filed an interesting case in D.D.C. challenging the [constitutionality of the Computer Fraud & Abuse Act](#), arguing that bans testing online services for unlawful discrimination by the usual technique of spoofing membership in a protected class.

- Twitch has filed suit in the Northern District of California against the [makers of bots used to inflate the popularity](#) of some users.
- [Snapchat's speed filter](#) allegedly caused a severe accident in Georgia, where a teen driver was claimed to have been trying to capture her car's 107 mph speed with the app. Lawsuits ensued.
- DraftKings and FanDuel ended games in [Alabama and Idaho](#) and were the subject of a [House subcommittee hearing](#), but fantasy sports were legalized in [Missouri](#) and [Colorado](#) (as well as [New York](#), if Governor Cuomo gets around to signing the bill that just passed).



Internet Privacy

The First Circuit has declined rehearing on its surprising [Video Privacy Protection Act opinion](#) from April, which tagged Gannett for tracking what users of its USA Today app were watching. Meanwhile, the Third Circuit [reversed a ruling in favor of Viacom](#) on a claim alleging that it violated a promise not to collect personal information on kids' website Nick.com.

From the federal courts of California, we have the following developments:

- Facebook was sued for allegedly [collecting messages](#) that were promised to be private into a searchable database, but [escaped class certification](#) in another suit over user data.
- A [mobile advertising firm](#) has agreed to pay \$950K to settle FTC charges that it was tracking hundreds of millions of people without consent.
- A man who [spammed about half a million Facebook accounts](#) with more than 27 million junk messages was sentenced to 2.5 years in prison.
- Illinois' biometric privacy law is at the heart of two cases to watch, with [Facebook](#) unable to escape a case in the Northern District and [Snapchat](#) facing a new complaint in the Central District.

The FBI is also under fire for biometric scanning, with a GAO report finding that the agency [secretly assembled a massive facial recognition database](#) without authorization in violation of federal law. Meanwhile, a widely reviled [anti-cryptography bill](#) inspired by the FBI/Apple mess stalled in the Senate, along with another bill that would have allowed the FBI to [access metadata with National Security Letters](#). There's also an effort afoot in the Senate to block new [Fed. R. Crim. P. 41](#), which would expand the geographic reach of the FBI's hacking powers.



Speaking of NSLs, Yahoo [recently published three](#) of them – a release made possible by changes to the USA Freedom Act that compelled the FBI to reconsider nondisclosure demands. Meanwhile, [Twitter has shut down U.S. government access](#) to the firehose, cutting off intelligence agencies from using a tool that allowed them to search every tweet that crossed the service. Other companies, including Facebook and Yahoo, are [also starting to push back on FBI requests](#) for information.

In other news, a Ukrainian hacker pleaded guilty in D.N.J. for hacking the networks of three newswires and [stealing more than 150,000 press releases](#) still under embargo, containing financial information about hundreds of companies. Well, at least it's less likely to destroy the fabric of the universe than the old [time machine/stock market scam](#).

Finally, the [U.S. government has sought to intervene](#) in the Irish High Court privacy case between Facebook and Max Schrems – an interesting move given that the revised EU-U.S. Privacy Shield deal is [expected very soon](#).

Intellectual Property

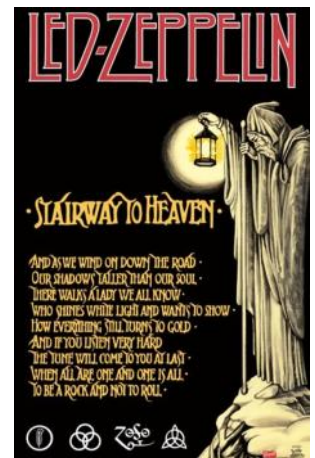
Copyright

Going to California (C.D. Cal.), we saw the end of the battle of evermore between rock and roll groups Spirit and Led Zeppelin over “Stairway to Heaven,” where the former had sued the latter for a pile of cash and their little black dog, too. But it turns out that when the levee breaks, the jury doesn’t give four sticks about whether Page and Plant had heard Spirit’s “Taurus” while on their misty mountain hop through the late 60’s. Instead, they showed a whole lotta love for Zeppelin with a [unanimous verdict on lack of similarity](#).

Wait a sec...something doesn’t fit in that last paragraph. Anyone who can identify what’s out of place and why gets a shout-out next month.

Oh, there was another big copyright trial, wasn’t there? Something about APIs? Right, after all of the wrangling over jury instructions and trial procedure, [Google defeated Oracle America](#) in N.D. Cal. with a jury finding that Google’s use of the Java APIs was fair. The judge [upheld the decision](#) on post-trial motions, setting up a return to the Ninth Circuit and a debate about whether [the sky is falling](#).

Not that the Ninth Circuit’s otherwise been kind to copyright plaintiffs recently, granting Madonna a win in a case over the [use of sampling](#) in “Vogue,” holding that a [replica Spanish galleon at Burning Man](#) wasn’t visual art protected under VARA, and smacking the team at Prenda Law (remember [Prenda?](#)) with a ruling upholding [\\$230K in sanctions](#). The Eleventh Circuit has also given owners of pre-1972 sound recordings a scare, [certifying a question to the Florida Supreme Court](#) as to whether public performance can release works that are the subject of common law property rights into the public domain.



But it was the Second Circuit that perhaps dealt copyright plaintiffs the hardest blow, coming down solidly in favor of streaming video website Vimeo on Capitol Records' infringement lawsuit over instances of pre-1972 music recordings on the site. The Court of Appeals [rejected Capitol's argument that the DMCA does not apply to pre-'72 sound recordings](#), and held that the fact that Vimeo employees might periodically have encountered the music on the site was not by itself evidence of "red flag knowledge" of infringement.

Speaking of pre-1972 music, CBS pulled off a [surprise win in C.D. Cal.](#) in a case alleging that it infringed pre-'72 copyrights by playing remastered versions of the originals. CBS responded with the gutsy (and successful) argument that remastered versions of the old songs were covered by their own federal copyright, not state law, and that the owners of the originals couldn't prevent their performance. [An appeal](#) has been filed.

And since we're talking about CBS, let's talk about Axanar. After the court [denied a motion to dismiss](#), no less an insider than [J.J. Abrams himself](#) announced that the Paramount/CBS suit over the Star Trek fan film would be "going away" in response to protests by Justin Lin, director of this summer's *Star Trek Beyond*. But it turns out that J.J. might have been speaking off the cuff, or perhaps thinking of that other "Star" saga with which he's now involved (I can't wait for *The Force Hits the Snooze Button*, and *The Force Sleeps In*). The studios really aren't cool, as it happens, with a semi-professional *Trek* production where the filmmakers are paying themselves for their time and effort out of the funds they've raised from fans. They have now released a set of ["Star Trek Fan Film Rules"](#) that function as a sort of revocable suggestion that they won't sue over fan flicks that abide by certain fairly significant restrictions, almost all of which the [planned version of Axanar](#) and [many other notable fan productions](#) would violate. Now, the studios didn't have to do *anything*, but to be frank this comes across more like a warning to the fans than an olive branch.



Other developments of note: Google/Oracle Judge William Alsup gave copyright trolls pause by signaling that they [couldn't easily bail out of meritless claims](#) in his courtroom; Whitney Houston's estate was [enjoined from selling the singer's Emmy](#) on copyright grounds; federal judges in both D.N.J. and D. Or. held that [an IP address doesn't identify an individual defendant](#) in a file-sharing claim; [Mike Huckabee forked over \\$25K](#) to settle a claim over his use of "Eye of the Tiger" at a Kim Davis rally; the *New York Times* settled with the book publisher who used reduced-size images of [Times front pages for a book's endpapers](#); CBS settled with the manufacturer of a ["farting hippo" toy](#) over its use on procedural series "NCIS"; and Dish Network won a \$5M judgment against a [foreign language TV distributor](#). Separately, Dish settled the [last of the Hopper DVR cases](#) with NBC, agreeing that Dish won't allow ad-skipping in the first seven days following a show's broadcast.

In new copyright cases, C.D. Cal. brings us: [Gene Kelly's widow](#) asserting copyright in interviews to stop publication of a book about her husband (um, no); a Dutch photographer suing Spotify over a [photograph of Biggie](#); a screenwriter suing over faith-based film [God's](#)

[Not Dead](#); a composer suing over the [use of his song in the videogame “NBA 2K16”](#); Richard Prince being sued [yet again](#), this time for using someone else’s photo of Sid Vicious; Ed Sheeran being sued over his hit [“Photograph”](#) by the same attorney who represented the Gaye family in the “Blurred Lines” case; and a group of Hollywood studios suing a company allegedly operating an [unauthorized movie rental service](#).

On the other side of the country in S.D.N.Y., new cases include: a [YouTube personality](#) suing two critics to stop the criticism (um, again, no); another attempt by the “Happy Birthday” crew to release a classic song into the public domain, this time [“This Land is Your Land”](#); Beyonce targeted with an infringement claim over her [trailer for “Lemonade”](#); and Gannett being sued by a jewelry company over its use of a [video of a dog catching a lobster](#). (No, really – I swear, I haven’t been playing copyright Mad Libs.) Oh, and [that Bieber kid](#) and electronica icon Skrillex were sued in M.D. Tenn. for allegedly ripping off White Hinterland’s “Ring the Bell.”



And in pending appeals, we’ve got: the 2nd Circuit considering whether a sock puppet (a real one, not operated by Peter Thiel) performance of [“Who’s on First?” during a Broadway play](#) was infringing; the 6th Circuit thinking about whether [termination rights can be extinguished or waived](#); and the 9th Circuit hearing argument on whether a [fancifully designed USB drive](#) enjoys copyright protection.

A final note: The Copyright Office is contemplating requiring those who have registered DMCA agents [to re-register periodically](#), and it’s not clear existing registrations will be grandfathered in. If your company has a DMCA agent, or you represent an organization that does, you need to [keep an eye on what happens](#) with this.

Patents

Another month (or two), another set of Federal Circuit decisions about software. In a case against Microsoft, the Court of Appeals held that the plaintiff’s concept for [self-referential database software](#) is not inherently abstract. (Yeah, I don’t understand it either.) Yahoo, Google, ESPN and others saw the Court vacate a stipulation that they did not infringe a [targeted ad delivery patent](#). But Twitter and Snapchat escaped a claim over a [photo-sharing patent](#), with the Federal Circuit upholding a finding of invalidity. Meanwhile, the Court affirmed findings that Apple did not induce ESPN to infringe a [live-streaming patent](#) and that Facebook did not infringe a [data acquisition and search patent](#).

Trade Secrets & Misappropriation

As mentioned up above, the [Defend Trade Secrets Act](#) is here, and [not everyone is sanguine](#) about it. Eric Goldman’s commentary about how a [recent California trade secrets case](#) would have played out under the DTSA is worth a read. A [defense win for a news website](#) in S.D.

Ohio should provide some comfort, however, with the court stressing that the First Amendment has a role to play when analyzing trade secret cases against the media.

We've also been noticing more cases lately involving breach of confidence claims and theft of ideas for TV shows and movies. Whether they actually have trade secrets claims baked in or not, they seem to belong in the same place, so I'm going to slot them into this section going forward. This time, we have the screenwriter of *X-Men* alleging in California state court that the producers of [Will Ferrell vehicle *Get Hard*](#) stole his concept, and a personal trainer claiming the same of Sylvester Stallone and NBC in N.Y. state court with respect to [reality competition series "Strong."](#)



Commercial Speech

Trademark

Did you know the Garden State has more diners per capita than anywhere else in the U.S.? *Walking Dead* creator Robert Kirkman apparently thinks that's one too many, seeing as he's suing some folks planning a [theme restaurant](#) in the District of New Jersey. And if like me you've spent too much time in diners, you might take an interest in [NBC's "The Biggest Loser,"](#) which recently drew its own trademark suit in C.D. Cal. from an ex-NFL player who claims that the show treads on a TM for his football academy.

In other new cases, [theater chain Cinemark](#) is pursuing trademark infringers into virtual worlds, suing in N.D. Tex. over users' recreation of its theaters in "[sandbox](#)" game Roblox. In S.D.N.Y., Citigroup has sued AT&T for thanking customers, alleging [infringement of its "THANKYOU" trademark](#). See, this is why we can't have nice things.

The 2nd Circuit has held that [nominative fair use](#) is not an independent affirmative defense against trademark claims, but instead must be considered in connection with the likelihood of confusion analysis alongside the full laundry list of factors. Bad news for those of us who think that there needs to be a [safety outlet for the First Amendment in TM cases](#), so that the media don't get dragged through the multifarious, inapt, and expensive-to-litigate *Polaroid* factors. On the other hand, the 5th Circuit has held that following the Supreme Court's ruling in *Octane Fitness* there is [no need to show bad faith](#) for a defendant to recover attorneys' fees. And Judge Neil Gorsuch in the 10th Circuit took some time to make some [chile pepper puns](#) while authoring an opinion on discovery procedure before the TTAB.



Meanwhile in Florida, the 11th Circuit is contemplating whether [Amazon's "Fire TV" mark](#) infringes that of a pornography streaming service, and the internecine dispute over use of the ["Commodores" name](#) will proceed to trial in M.D. Fla. after cross-

summary judgment motions were denied. (Thomas McClary should just go the [Dweezil Zappa route](#) here.)

Oh, and if you're serving a bogus trademark takedown notice over a parody website, for goodness' sake at least serve it on the direct host of the content rather than an upstream cloud provider so that you don't [knock out 38,000 other innocent websites](#). And CafePress, if someone wants to call Donald Trump a "[Cheeto-Faced Shitgibbon](#)" on a T-shirt, you might want to check with Frito-Lay *before* blocking the product on company's behalf.

Restricted Subject Matter

The FDA has finally spoken on e-cigarette advertising, and while [the ads will not face bans](#) akin to tobacco advertising, talking about the benefits of e-cigarettes over the alternatives could trigger [other FDA regulations](#) on sale of the devices.

In New York, Airbnb is pulling for a [veto of a bill](#) passed by the state legislature that would restrict advertising for available rentals.

And if you've recently tried Flying Dog Brewery's Belgian-style IPA "Raging Bitch," it's because the company won a First Amendment claim last year before the Sixth Circuit. Now, the brewery is [giving back to the First Amendment community](#), donating its winnings in the case to a new non-profit.



Professional Speech

Can Florida doctors [talk to their patients about guns](#)? The 11th Circuit is pondering. Can would-be Indiana lawyers [call for the violent overthrow of the government](#)? The 7th Circuit says you at least have to apply to the bar and see what Indiana says before you sue. Can secondary school teachers be disciplined for [mentioning racial epithets](#) in the course of a well-intentioned educational exercise? The 7th Circuit says yes, but thinks it's stupid to do so. Can [judges be active on social media](#)? The New Mexico Supreme Court calls for extreme caution.

False Advertising & Deceptive Practices

It's satellite vs. broadcast and cable vs. cable, as [Dish sues Tribune Broadcasting](#) in N.D. Ill. over an alleged violation of a non-disparagement agreement for calling Dish "disgusting" to its viewers, and [Frontier sues Charter](#) in D. Conn. for using inflammatory ads to drive off its customers in Texas and California.

In pending cases, the First Circuit upheld a claim against [people-rating service Jerk.com](#) (haven't we already decided that these services—*cough* [Peeple](#) *cough*—are a bad idea?), finding that its practice of harvesting Facebook profiles to populate its website and then claiming that those profiles had been created by Jerk.com users was deceptive. The Eastern District of Virginia, however, held that a tax settlement business had no Lanham Act claim against [regional Better Business Bureaus](#) over their poor rating of the plaintiff: the ratings

themselves were non-actionable opinion, and the BBBs' statement that the ratings were derived by a neutral process was insufficiently tied to the alleged harm.

In another E.D. Va. case, the court went deep on the definition of "commercial advertising or promotion" to find that a [certification non-profit's comments](#) on an uncertified business were commercial in nature. Meanwhile, a judge in C.D. Cal. deferred Dr. Oz's anti-SLAPP motion in a case involving claims of [fraudulent promotion of weight loss products](#), finding the defendant was entitled to discovery on whether his statements were commercial.

Finally, the District of Massachusetts issued a curious ruling dismissing a false advertising/trademark case between [manufacturers of "fire cider,"](#) which must be tasted to be believed. What's curious about it? The court dismissed the federal Lanham Act claims under Massachusetts' (notoriously limited) anti-SLAPP law, without the usual sleight-of-hand of treating the anti-SLAPP motion as a 12(b)(6)/Rule 56 motion with respect to the federal claims.



Miscellaneous

Quick hits from the Federal Circuits, because this edition is really pressed for space:

- 2nd Cir.: A [blogger in federal prison](#) writing for HuffPo didn't have a clearly established First Amendment right to criticize the prison's conditions that would insulate him from retaliatory discipline.
- 3rd Cir.: Citing *Reed v. Town of Gilbert*, the court holds that [federal record-keeping requirements imposed on porn companies](#) are content-based laws requiring strict scrutiny.
- 5th Cir.: An author arrested for [selling JFK conspiracy books](#) from his spot on the grassy knoll sufficiently pleaded a retaliation claim against the city of Dallas.
- 6th Cir.: The city of Allergan, Michigan was not on the hook for its [police chief shutting down an anti-Muslim event](#) in response to a threat, because it didn't have a municipal policy allowing that action.
- 7th Cir.: A man ticketed for [selling a baseball-related magazine](#) outside of Wrigley Field before Cubs home games might have a claim for discriminatory enforcement; a licensing scheme for those peddling magazines raises tough but premature First Amendment issues.
- 7th Cir.: A public bus company allowed [advertising on the sides of its buses](#), and having done could not arbitrarily discriminate against particular ads. Judge Posner took a well-aimed shot at the ridiculousness of traditional public forum analysis.

- 8th Cir.: A [Ferguson grand juror](#) might have a claim that enforcement of her oath of secrecy in a case publicized by the prosecution violates the First Amendment, but more development of the facts is necessary.
- 9th Cir.: The court reversed the dismissal of a student group's First Amendment claim against the [Arizona Board of Regents](#); allegations that the Board withheld services in retaliation for the group's political views were sufficient for the case to go forward.
- D.C. Cir.: [Crowdfunded movies are safe](#), as the court upholds changes to SEC rules allowing non-sophisticated investors to get involved.

Conclusion

Enough for now. To borrow a phrase from Zeppelin: There's a feeling I get when I look to the west, and my spirit is crying for leaving. But unlike Tolkien's elves, in my case that just means going home to Hoboken.

You did know that Led Zeppelin is the [primordial nerd rock band](#), didn't you? The Ringwraiths ride in black, folks.



Registration for the MLRC Media Law Conference is now open.

In addition to the usual timely and topical breakouts and boutiques, this year's conference will feature plenaries commemorating the 25th anniversary of the Rodney King case – looking at both the copyright/fair use/First Amendment and police/press aspects; a Fred Friendly hypothetical case program starring Washington insiders on the eve of the election; a panel of once active MLRC members who are now federal judges; Floyd Abrams talking about his new book, "Why the First Amendment Matters"; as well as a rousing game of Family Feud: Journalism Edition; and a twist on the Next Big Thing, looking at the hits and misses of NBT sessions of the last ten years.

The full [Program](#) is also now available. We hope you will [register soon](#).

Sponsorship opportunities are still available. If you have any questions, please feel free to contact George Freeman gfreeman@medialaw.org or Dave Heller (dheller@medialaw.org).