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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through March 25, 2014

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MLRC Miami Conference Explores Challenges and Opportunities in Cross-Border Publishing

Legal Issues Concerning Hispanic and Latin American Media

On March 10, approximately 70 lawyers convened at the University of Miami School of Communication for MLRC's second annual conference on Legal Issues of Concern for Hispanic and Latin American Media.

The Conference was a unique opportunity for lawyers from North and South America to meet and educate one another on the wide-range of issues that arise in cross-border content creation, newsgathering, and distribution. The conference included two dynamic news executives as speakers. And interactive conference sessions examined libel, privacy, and newsgathering laws; licensing and distribution under Latin American intellectual property and related laws; and advertising issues for the Spanish language market -- all through the lens of cross-border publication and deal-making.

Myriam Marquez, el Nuevo Herald

Isaac Lee, Univision and Fusion

The opening speaker was **Myriam Marquez**, Executive Editor of el Nuevo Herald. Myriam discussed the evolution of el Nuevo Herald which started by translating articles from the Miami Herald into Spanish and has grown to be a market leader in Spanish language coverage of Hispanic and Latin American news. She described Spanish language media as a throwback to the old days of competitive newspaper markets. This is evidenced not only by el Nuevo Herald's large hard copy circulation, but by a large online readership in Spain and Latin America. She also offered a reminder of troubling regional press freedom issues, noting the difficulties her paper's reporters face to get into Cuba – and the recent detention of a reporter in Venezuela.

Lunch speaker **Isaac Lee**, the President of News for Univision, and CEO of Fusion, a Disney–Univision partnership, began with a sobering reminder of the press freedom challenges in Latin America – most pressing the problem of "immunity" – the unsolved killing of journalists. Over the past 20 years, 144 journalists have been killed in Latin America and 100 cases remain unsolved. Moreover, coverage of certain people and topics in Latin America is a danger zone for journalists. Isaac cited Univision's coverage of the arrest in Mexico of fugitive drug

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lord el Chapo as an example of a story his network can tell, while colleagues in Latin America would be at risk for reporting. He also spoke eloquently of his own background as an investigative reporter in Colombia – where engaging in journalism can get you killed.

On the media business side, he spoke of Fusion's efforts to reach English and Spanish speaking millennials by being "nimble, fast, and flexible" in reporting the news in a timely way. Millennials, he said, "are interested in the non-boring" and he will use his entrepreneurial journalistic style to reach them.

Libel, Privacy & Newsgathering

Gary Bostwick (Bostwick Law, Los Angeles) and **Ashley Messenger** (NPR, DC) led the morning discussion session on Cross-border Libel, Privacy and Newsgathering issues. They began by describing the breakout-style interactive format which they deployed with great skill to achieve debate and discussion among the delegates. To launch discussion, they played a video clip of a PBS News Hour report about a women in El Salvador who was charged and convicted of having an abortion and jailed for ten years under the country's stringent anti-abortion laws. Among other things, the report stated that the women denied having an abortion and her father blamed her abusive boyfriend for causing the death of the child.

The clip raised numerous libel and privacy law issues for discussion. To what extent would this broadcast be protected in Latin American jurisdictions as a fair report of trial proceedings? Would accusations against the unnamed boyfriend be actionable? Would it be legal to disclose that a women had an abortion? Would there be a public interest to report such information? What about the use and legality of hidden recordings?

Lawyers from Argentina, Brazil, Chile, Colombia, Mexico, and Venezuela participated in the discussion, debating and sparring over the hypothetical and related media law issues in their jurisdictions.

Cross Border Licensing and Distribution

Beatriz Roth (Vice President, Chief Counsel, Reuters Agency and Consumer Digital, New York) and **Jose Sariego** (Senior Vice President, Business & Legal Affairs, Telemundo Media, Miami) led an interactive discussion on practical issues for cross border content deals. They began with a hypothetical situation of a U.S. producer trying to do a co-production in Brazil. The hypothetical raised multiple issues – agency and compensation claims by distributors; whether online distribution via Netflix constitutes a change to content; and laws on country quotas on foreign content. In addition, the session touched on copyright complexities caused by the recognition of moral rights in works. The moderators noted the way in which copyright, privacy law and antitrust law have been used in tandem to assert protection for content, in Mexico for example.

Hispanic and Spanish-Language Advertising Platforms

Lynn Carrillo (Vice President Media Law, NBCUniversal, Miami) led a panel and group discussion session on custom content deals, integrations, cross-platform material and executing contests and sweepstakes. The panel included in-house lawyer **Ana Salas Siegel**, SVP & Deputy General Counsel Fox International Channels, and two advertising executives – **Isabella Sanchez**, Zubi Advertising, and **Caroline Turner**, MediaVest.

In addition to highlighting the growth of Spanish language media and advertising, the panel discussed a real integrated advertising campaign by Proctor & Gamble to sponsor a sweepstakes for Telemundo's show "La Voz Kids," a Spanish language version of the popular reality talent show "The Voice." The complicated campaign involved integration with entrants' Facebook accounts and concerns over right of publicity claims.

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CONFERENCE CO-CHAIRS

The Conference was programmed and led by Conference co-chairs:

- Gary Bostwick, Bostwick Law, Los Angeles
- Lynn Carrillo, NBCUniversal, Miami
- Maria Diaz, Thomson Reuters, New York
- Adolfo Jimenez, Holland & Knight LLP, Miami

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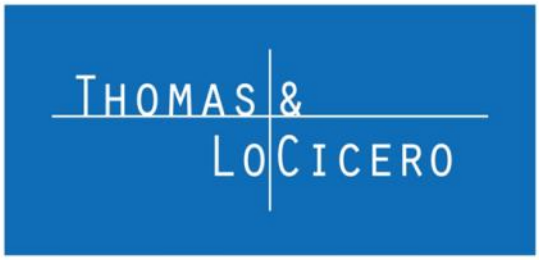

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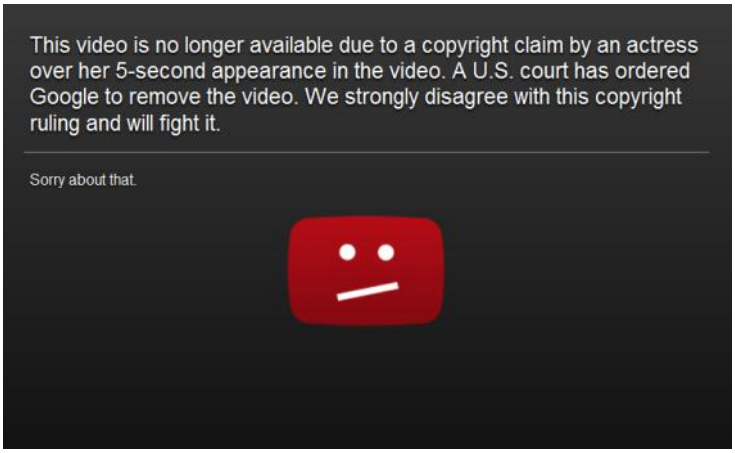
Ninth Circuit Orders Take-Down of "Innocence of Muslims" Video in Novel and Controversial Application of Copyright Law

By Thomas J. Williams and Vincent P. Circelli

Reminding one of the expression that bad facts can make, at least in the eyes of many, bad law, the Ninth Circuit Court of Appeals ordered Google to remove from YouTube all or part of a film entitled "Innocence of Muslims" based on an actress' claim that she retained a copyright interest in her independently copyrightable contribution to a joint work. *Garcia v. Google, Inc.*, No. 12-57302, slip op. at 4, 14 (9th Cir. Feb. 26, 2014).

Many commentators have expressed alarm over the ruling, but the Ninth Circuit has declined to rehear *en banc* its panel's denial of a stay of its order directing Google to remove all or part of the film from its platforms worldwide.



The Dispute and the Lawsuit

Cindy Garcia was paid $500 for three and a half days of filming for a minor role in what she was told would be "an adventure film set in ancient Arabia" with the working title "Desert Warrior." Instead of "Desert Warrior," however, Garcia's scene was used in a film entitled "Innocence of Muslims," which, unbeknownst to Garcia, contained Arabic dubbing and subtitles which made it appear that Garcia was speaking words offensive to many Muslims.

The dubbed version, which Garcia first saw after it was uploaded to YouTube.com, sparked protests in Egypt and elsewhere, and an "Egyptian cleric issued a fatwa, calling for the killing of everyone involved in the film." *Id.* at 4. Garcia received death threats and immediately began efforts to have the film removed from YouTube.

Garcia initially filed takedown notices with Google under the Digital Millennium Copyright Act. *See* 17 U.S.C. § 512. Google refused, so Garcia sued and applied for a temporary restraining order (which the district court treated as a motion for preliminary injunction), seeking removal of the film from YouTube.

The district court denied Garcia's request, concluding that Garcia (1) delayed in bringing the action; (2) failed to demonstrate "that the requested preliminary relief would prevent any alleged harm;" and (3) was "unlikely to succeed on the merits" of her copyright claim.

Ninth Circuit Majority

On appeal to the Ninth Circuit, a 2-1 majority reversed and ordered Google to remove immediately all copies of "Innocence of Muslims" from YouTube.com and any other platforms under Google's control. The panel later modified its order to allow posting of other versions of the film if they did not include Garcia's performance.

The majority opinion by Chief Judge Alex Kozinski first examined the district court's finding that Garcia was unlikely to succeed on the merits of her copyright claim. The majority found that "just because Garcia isn't a joint author of 'Innocence of Muslims' doesn't mean she doesn't have a copyright interest in her own performance within the film." *Id.* at 6-7. The majority disregarded Google's argument that Garcia made no protectable contribution to the film because she did not write the dialogue or manage the production, and her few speaking roles were dubbed over. *Id.* 7-8. Citing a 1930s acting handbook, the majority noted that "an actor does far more than speak words on a page; he must 'live his part

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inwardly, and then ... give to his experience an external embodiment.'" The majority found that Garcia's performance thus met the "minimal degree of creativity" to constitute a copyrightable performance. *Id.*

The majority then concluded in, an odd and contradictory statement, that "while the matter is fairly debatable, Garcia is likely to prevail." *Id.* at 10.

The majority next examined whether Garcia had shown sufficient likelihood of irreparable harm. Noting that "[i] rreparable harm isn't presumed in copyright cases," the majority found the death threats Garcia received were "real and immediate," and concluded that "to the extent the irreparable harm inquiry is at all a close question, we think it best to err on the side of life." *Id.* at 15-17.

Finally, the majority examined the balance of equities, noting that "the First Amendment doesn't protect copyright infringement," and that because "Garcia has demonstrated a likelihood of success on her claim that 'Innocence of Muslims' infringes her copyright" the balance of equities "clearly favors Garcia." *Id.* at 18. The majority concluded that to the "extent the public interest is implicated at all, it, too, tips in Garcia's direction." *Id.*

Dissent

In a strongly worded dissent, Judge N.R. Smith charged that "the majority makes new law in this circuit in order to reach the result it seeks." *Id.* at 21. The dissent argued that mandatory injunctions are "particularly disfavored," *id.* at 19, and vehemently disagreed that Garcia was likely to succeed on the merits, given a long list of Ninth Circuit cases finding that acting and singing performances do not constitute copyrightable works. *Id.* at 26-27. The dissent argued the majority's ruling created "an impenetrable thicket of copyright" in every created work that would be untenable and unpredictable. *Id.* at 27.

Subsequent Activity and Reactions

Numerous commentators have questioned the majority opinion's logic and potential impact on the field of copyright, entertainment, and First Amendment law, s*ee, e.g.*, Donahue, *9th Circ.'s Google Ruling Leaves Copyright Attys Speechless*; Boston Herald, *YouTube ordered to take down anti-Muslim film*. Google promptly filed an emergency motion to stay the order requiring removal of the film. The panel which decided the case denied the motion, but one Ninth Circuit judge *sua sponte* requested a vote on whether to rehear *en banc* the panel's order denying the stay.

However, a majority of the Court's non-recused active judges did not vote in favor of rehearing the denial of the stay *en banc*, leaving intact, at least for now, the order that the film be removed. *Garcia v. Google, Inc.*, No. 12-57302, Order (9th Cir. March 14, 2014).

Meanwhile, Google also filed a petition for rehearing *en banc*, and the Court ordered Garcia to respond by April 3, 2014. The Court also announced it would entertain *amicus* briefs if filed within ten days after Garcia's response, and numerous *amici* have already weighed in and more are likely to follow. On March 13, 2014, a group of media *amici* urged the Court to stay the injunction pending disposition of Google's petition for *en banc* review of the panel opinion, and on March 20, 2014, Public Citizen submitted an *amicus* letter brief suggesting that because Garcia "seeks to suppress publication of the film because of its content," the doctrine of copyright misuse, which the panel opinion did not address, should be considered in evaluating Google's petition for rehearing.

Not all observers are critical of the panel's opinion: on March 13, 2014, Los Angeles entertainment lawyer Charles J. Harder, writing "individually" and not "on behalf of any ... clients," submitted an *amicus* letter brief arguing that the panel "correctly decided" the case and that "*en banc* review of that decision is unnecessary."

On March 25, plaintiff filed an emergency motion to hold Google and YouTube in contempt for disobeying the Ninth Circuit's order.

In a strongly worded brief in response, defendants call this allegation "false" and argue they have complied with the injunction, but note that the injunction is not sufficiently specific to even be enforced by contempt.

Thomas J. Williams is a partner and Vincent P. Circelli is an associate in the Fort Worth office of Haynes and Boone, LLP. Google and YouTube are represented by Timothy L. Alger and Sunita Bali, Perkins Coie LLP, Palo Alto, CA; and Neal Katyal, Dominic F. Perella, and Sean Marotta, Hogan Lovells US LLP, Washington D.C. Plaintiff is represented by M. Cris Armenta, The Armenta Law Firm APC, Los Angeles, CA; and Credence Sol, Chauvigng, France.

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Second Circuit Protects News Organizations That Report on Copyrightable Material

Publication of Analyst Call a Fair Use

By William M. Ried and Thomas H. Golden

In its recent decision upholding Bloomberg News's right to publish the contents of an analyst call held by a publicly-traded company, the Second Circuit made clear that newsmakers will have a hard time precluding the media from reporting on newsworthy disclosures by claiming ownership of copyrights in them. *The Swatch Group Management Services Ltd. v. Bloomberg L.P,* Nos. 12-2412-cv and 12-2645-cv (Jan. 27, 2014 (Katzman, Kearse, Wesley, JJ.), affirming 861 F. Supp.2d 336 (SDNY 2012) (Hellerstein, J).

On January 27, 2014, the court issued its opinion in *Swatch v. Bloomberg* affirming the district court's grant of summary judgment that Bloomberg's publication of a transcript and recording of an analyst call held by the Swiss watch maker Swatch, which Swatch claimed was protected by copyright, was a permissible "fair use."

In doing so, the court recognized both that Bloomberg's "overriding purpose here was not to 'scoop[]' Swatch or 'supplant the copyright holder's commercially valuable right of first publication'… but rather simply to deliver newsworthy financial information to American investors and analysts." *Citing Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 562 (1985).

Swatch argued that Bloomberg was entitled to lesser protection because, in the context of the analyst call, Bloomberg delivered "data" rather than "news."

It also recognized that such reporting, "whose protection lies at the core of the First Amendment, would be crippled if the news media and similar organizations were limited to authorized sources of information." (pp. 22-23) *citing New York Times Co. v. United States*, 403 U.S. 713 (1971). The court's decision builds on its 2011 ruling in the *Flyonthewall.com* case that a company's ability to make news by issuing information likely to affect the market price of a security "does not give rise to a right for it to control who breaks that news and how." (p.42) *quoting Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 907 (2d Cir. 2011).

Background

The *Swatch* case concerned a February 2011 conference call that Swatch held to discuss its recent financial results with over one hundred invited analysts. Swatch's vendor recorded the call, and an operator warned the analysts that the call "must not be recorded for publication or broadcast." Neither Bloomberg nor any other press organization was invited to the call but, after it was concluded, Bloomberg distributed a recording and transcript of the call, without commentary, to subscribers of its BLOOMBERG PROFESSIONAL® service. Swatch quickly demanded that Bloomberg take down the transcript and recording, Bloomberg refused, and Swatch sued, claiming that Bloomberg had infringed its exclusive rights to reproduce and distribute its recording. (In its Second Amended Complaint, Swatch did not challenge Bloomberg's preparation and distribution of the written transcript of the call.)

In May 2012, after listening to the audiotape, U.S. District Judge Alvin Hellerstein granted Bloomberg's motion for summary judgment on the basis of the affirmative defense of "fair use," finding that Bloomberg's "work as a prominent gatherer and publisher of business and financial information serves an important public interest, for the public is served by the full, timely and accurate dissemination of business and financial news."

Second Circuit Analysis

Reviewing that decision *de novo*, and "resolving all ambiguities and drawing all reasonable inferences against" Bloomberg, the Second Circuit affirmed. In doing so, the court noted that the four statutory factors for assessing fair use, though mandatory, are non-exclusive elements of the ultimate test of "whether the copyright law's goal of

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promoting the Progress of Science and useful Arts would be better served by allowing the use than by preventing it." *Quoting Bill Graham Archives v. Dorling Kindersley Ltd*., 448 F.3d 605, 608 (2d Cir. 2006) (additional citations omitted).

Applying those four factors, the court concluded that Bloomberg's reporting on the entirety to the call served a significant editorial purpose and did not meaningfully interfere with any of Swatch's interests.

With respect to the first fair use factor, the purpose and character of the defendant's use, Swatch argued that Bloomberg was entitled to lesser protection because, in the context of the analyst call, Bloomberg delivered "data" rather than "news." The court concluded that this was a semantic rather than a factual dispute, and noted that, regardless of how Bloomberg's use was characterized, "there can be no doubt that Bloomberg's purpose in obtaining and disseminating the recording at issue was to make important financial information about Swatch Group available to American investors and analysts."

The court's decision is notable for finding fair use in a commercial, non-transformative use of an entire, unpublished copyrighted work.

In reaching this conclusion, the court noted that, through Reg FD (17 C.F.R. § 243.000), the "SEC has mandated that when American companies disclose this kind of material nonpublic information, they must make it available to the public immediately." While Swatch, a Swiss Company, may not be subject to Reg FD from an SEC enforcement perspective, the court found that the rule's underlying policy "provides additional support for a proposition that would be clear in any event: American investors and analysts have an interest in obtaining important information about companies whose securities are traded in American markets."

The court also rejected Swatch's argument that, because it claimed Bloomberg had provided the analyst call to the subscribers of the BLOOMBERG PROFESSIONAL® service, there was a factual question as to whether such use was merely "commercial." It found that, while there was no dispute that Bloomberg is a commercial enterprise that charges customers for access to its information service, "it would be misleading to characterize the use as 'commercial exploitation' and it 'would strain credulity to suggest that providing access to Swatch Group's earnings call more than trivially affected the value of that service.'"

Turning to the issue of good faith, the Second Circuit accepted for purposes of the appeal the truth of Swatch's allegation that Bloomberg had somehow "surreptitiously gained access to" and recorded the call. (In fact, as Bloomberg stated in its pleadings in the district court, at the request of a party who had been invited to participate on the call, a third party transcript service created a sound recording and prepared a written transcript of the call, which Bloomberg lawfully obtained.)

The court further assumed that Bloomberg had been fully aware that its use of the recording was contrary to Swatch's instructions. Even so, the court found that Bloomberg acted not with the intent to gain a commercial advantage over Swatch, but rather to report on information generated by Swatch that was itself newsworthy and of interest to Bloomberg's readers.

The court also addressed, and rejected, Swatch's argument that Bloomberg did not "transform" the call and therefore could not claim fair use. It found that, while transformative use generally qualifies as fair use, "some core examples of fair use can involve no transformation" and, in the context of news reporting, "the need to convey information to the public accurately may in some instances make it desirable and consonant with copyright law for a defendant to faithfully reproduce an original work rather than transform it." As the court explained:

> Here, Bloomberg provided no additional commentary or analysis of Swatch Group's earnings call. But by disseminating not just a written transcript or article but an actual sound recording, Bloomberg was able to convey with precision not only *what* Swatch Group's executives said, but also *how* they said it. This latter type of information may be just as valuable to investors and analysts as the former, since the speaker's demeanor, tone, and cadence can often elucidate his or her true beliefs far beyond what a stale transcript or summary can show. (At p. 24).

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Nor was Bloomberg's "fair use" defense undermined by the fact that it copied the entirety of the call, given that doing so served an important journalistic interest. As the Second Circuit noted, "the public interest in the information contained in the recording is better served by the dissemination of the information in its entirety."

Against this backdrop, the court found that Bloomberg's legitimate interest in reporting on the call outweighed Swatch's interest in maintaining exclusive rights to what was said on the call. In that regard, the court found that Swatch's copyright was "thin" at best because of its "manifestly factual character and purpose to convey financial information." And, while the call was not "published" under the statutory definition of "publication," the court found that Swatch "was not deprived of the ability to "control the first public appearance of [its] expression," including "when, where, and in what form" it appeared. In addition, the court noted that Swatch had admitted in its answer to Bloomberg's counterclaims that it "did not seek to profit from the publication of the [call] in audio or written format."

Moreover, Swatch's claim that it had the right to know and control precisely who heard its call "is far outweighed by the public interest in the dissemination of important financial information." The court also found inapplicable those cases, relied upon by Swatch, which "concerned the appropriation of secondary sources that had compiled or commented on financial news." Here, by contrast, Bloomberg's reporting reflected "the use of a primary source that itself *was* financial news."

The court concluded that Bloomberg's use:

> served the important public purpose, also reflected in Regulation FD, of ensuring the wide dissemination of important financial information. In addition, Swatch's copyright is exceedingly thin, as the recording is thoroughly factual in nature. Indeed, the whole purpose of the conference call was to convey financial information about Swatch Group to analysts and investors around the world. And while Bloomberg used the recording it its entirety, doing so was reasonably necessary in light of Bloomberg's purpose. Finally, we are confident that this type of use will neither significantly impair the value of earnings calls to foreign companies that convene and record them, nor appreciably alter the incentive for the creation of original expression. In sum, Bloomberg's use is fair use.

From a copyright perspective, the court's decision is notable for finding fair use in a commercial, non-transformative use of an entire, unpublished copyrighted work. In a broader sense, the decision marks a victory for the news media in the United States and establishes important precedent protecting news organizations in seeking to serve the public purpose by bringing transparency to the markets and reporting on matters of legitimate concern to their readers.

Thomas Golden and William Ried, Willkie Farr & Gallagher LLP in New York, represented Bloomberg L.P. in this case. Swatch was represented by Joshua Paul, Collen IP, Ossining, NY.

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MLRC memo representing some of the key points from the Final Rule publication.

2014 Report on Trials and Damages
MLRC's 2014 Report on Trials and Damages updates our study to include 12 new cases from 2012 and 2013. Our trial database now includes trial and appellate results in 632 cases from 1980-2013.

Resource Materials on the Definition of "Journalist" and "Media" in Litigation and Legislation
This updated report offers a review of that question by examining legislative developments and court decisions in a variety of situations, ranging from libel and right of publicity issues, to state shield laws and reporter's privilege changes, to application of state and federal open records laws.

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Virginia Supreme Court Affirms JNOV for Virginian-Pilot Newspaper

Court Analyzes Defamation by Implication Standards

By Brett Spain

Over the past several years, the number of "defamation by implication" claims filed in Virginia has increased dramatically. Virginia precedent, coupled with its unique procedural rules governing dispositive motions, seemed to allow plaintiffs to survive to trial by alleging virtually any implication, regardless of how implausible. Virginia courts not only disfavored dispositive motions, but the legislature imposed strict rules prohibiting the use of affidavits or deposition testimony in any form to support a motion for summary judgment. As a result, in the face of allegations that language implied a defamatory meaning, cases routinely proceeded to trial, leaving it to the jury to determine whether the implication was reasonable. The Supreme Court's decision in *Phillip Webb v. Virginian-Pilot*, 287 Va. 84, 752 S.E.2d 808 (2014), has reversed this trend, making clear the "gatekeeping" function of the trial judge.

Virginia precedent, coupled with its unique procedural rules governing dispositive motions, seemed to allow plaintiffs to survive to trial by alleging virtually any implication, regardless of how implausible.

Background

The *Webb* case arose from a December 18, 2009 article in the *Virginian-Pilot* reporting on the sentencing of Kevin Webb, then a seventeen-year-old student, and his brother, Brian Webb, following their convictions on misdemeanor assault and related charges arising out of an altercation at the house of another student (Patrick Bristol) at 1:00 a.m. Kevin Webb was charged as an adult with malicious wounding, assault, and trespassing. Brian was charged with three felonies. Both were found guilty of misdemeanors. Kevin Webb received a suspended jail sentence but no punishment of any kind from the school system, notwithstanding written policies giving the school system a wide range of disciplinary options. The Webb boys were the sons of the plaintiff, Philip Webb, who was an assistant principal at another local high school.

The article reported that Kevin Webb had "regularly shoved and taunted [Patrick] Bristol, a special education student," and that Kevin and his older brother Brian went to Bristol's home and beat both Patrick Bristol and his 53-year-old father. The incident occurred the night after Patrick Bristol and a group of his friends went to the Webb house to confront Kevin Webb. The Webbs denied the accusation of bullying and claimed that Patrick Bristol was the instigator and a member of a gang. The trial court limited the evidence either side could introduce regarding the underlying events, but Patrick Bristol did appear as a witness and did not come across as a helpless victim.

As background for the article, the reporter explained that Kevin Webb could have been suspended or expelled from his high school under established school policies, but that he was allowed to remain at school and participate in sports programs. The article described Kevin Webb as a "track star," who was allowed to graduate with his class. In contrast, Patrick Bristol, the alleged victim, dropped out of school and got his GED after declining an offer from school officials to transfer. The article referenced various general disciplinary policies and quoted the school system's spokesperson, stating that Kevin Webb "did not get preferential treatment because of his dad's position." The reporter had asked about possible preferential treatment after the Bristol family raised the issue.

The reporter, Louis Hansen, had asked Philip Webb to comment on the story at the sentencing, but Webb declined. When Hansen persisted in questioning him, Webb threatened to have the reporter arrested. The reporter advised an editor of the threat in an email the same day, which he concluded by saying, "I love the smell of napalm in the morning."

Philip Webb sued the newspaper and the reporter claiming the article falsely implied that he had engaged in unidentified unethical conduct to secure preferential treatment for his son. He alleged that multiple references to

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his position as an assistant principal, the contrasting report of the victim (e.g., dropping out of school), and raising the question of preferential treatment all implied not only that Kevin Webb received preferential treatment, but also that the plaintiff secured it for him. The plaintiff argued that quoting the school's spokesperson as saying that Kevin Webb "did not get preferential treatment because of his dad's position," implied exactly the opposite. The plaintiff argued that simply raising the issue of preferential treatment, without any proof that it occurred, implied its existence and was the equivalent of asking, "When did you stop beating your wife?"

The plaintiff originally sought $5 million in damages, but amended his complaint to seek $10 million. Just prior to trial, plaintiff dropped his claim for punitive damages (which would have been capped at $350,000 under Virginia law), dismissed the reporter and proceeded against the newspaper. After a three-day trial, the jury returned a verdict in plaintiff's favor in the amount of $3 million in compensatory damages. The case was tried under an actual malice standard after the newspaper successfully moved to have the plaintiff declared a public official based upon his status as an assistant principal.

The Supreme Court held unequivocally that the question of whether an article is reasonably capable of conveying the defamatory meaning alleged by the plaintiff is a question of law for the trial court to decide.

Defendants maintained from the beginning of the case through the appeal that the article was not capable of creating the defamatory implication alleged by the plaintiff. While defendants conceded that the article could be read to imply that Kevin Webb received preferential treatment, there was nothing in the article that suggested the plaintiff did anything to secure that preferential treatment. Other than mentioning his name and position, and his prior experience in the school system, the article did not mention any acts taken by the plaintiff. Defendants argued that they could not be held liable for simply publishing the plaintiff's name, nor could they be held liable for accurately quoting an official school spokesperson on the theory that the public would believe the exact opposite of what was stated. The trial court, however, overruled the defendants' demurrer (the Virginia equivalent of a motion to dismiss for failure to state a claim), finding that these issues should be submitted to the jury for resolution.

During discovery, the mystery concerning Kevin Webb's lack of discipline was explained. Notwithstanding its written disciplinary policies which included various disciplinary options, the school system had an unwritten policy not to discipline any student for off-campus conduct, even if the student was charged with a serious crime. At trial, the school system's witnesses confirmed the unwritten policy and further confirmed that the reporter could not have known the policy when he wrote the story. Because there was no way to know the actual policy, the trial court set aside the judgment finding that the plaintiff had failed to establish actual malice by clear and convincing evidence.

The plaintiff subsequently sought a writ of error from the Supreme Court of Virginia. (Virginia's intermediate court of appeals does not have jurisdiction over general civil litigation). The Supreme Court of Virginia initially granted the appeal only on the question of whether the plaintiff was a public official. After the plaintiff filed a motion for reconsideration, the Court expanded the scope of the appeal to include the issue of whether the plaintiff had established actual malice by clear and convincing evidence, denying the newspaper's request to expand the appeal to the question of whether the article was capable of creating the defamatory implication alleged by the plaintiff. Immediately after the original argument on appeal, however, the Supreme Court sua sponte granted the newspaper's assignments of cross-error and ordered new briefing and a second oral argument.

Virginia Supreme Court Decision

In January of 2014, the Supreme Court issued its opinion holding the article was not capable of creating the defamatory implication alleged by the plaintiff. In its opinion, the Supreme Court held unequivocally that the question of whether an article is reasonably capable of conveying the defamatory meaning alleged by the plaintiff is a question of law for the trial court to decide. The fact that the plaintiff's witnesses testified to having seen the implication and the fact the jury returned a verdict in the plaintiff's favor were not dispositive. As the Court explained, "[e]nsuring that defamation suits proceed only upon statements which actually may defame a plaintiff, rather than those which merely may

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inflame a jury to an award of damages, is an essential gatekeeping function of the court." 287 Va. at 90.

While the impact of the *Webb* decision is unknown, it appears to be a welcome break from past precedent. For example, in *Hyland v. Raytheon Technical Services Co.*, 277 Va. 40 (2009), the Supreme Court of Virginia held that, "[o]nly if a plaintiff unequivocally has admitted the truth of an allegedly defamatory statement, including the fair inferences, implications, and insinuations that can be drawn from that statement, may the trial judge award summary judgment to the defendant on the basis that the statement is true." Id. at 48.

In contrast, *Webb* may offer a mechanism for Virginia practitioners to have a pretrial determination whether a defamatory implication has been created.

Brett A. Spain and Conrad Shumadine, Willcox & Savage, P.C., Norfolk, VA, represented the newspaper in this case. Plaintiff was represented by Jeremiah Denton III, Virginia Beach, VA.

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Doctor Awarded $2 Million in Libel Trial Against Pennsylvania Newspaper

On March 20, 2014, a Pennsylvania jury awarded a doctor two million dollars in compensatory and punitive damages in a libel case against a local newspaper. *Menkowitz v. Peerless Publications, Inc.*, 98-07291 (C.C.P. Montgomery Cty). Plaintiff's seventeen year-old case against the Pottstown, Pennsylvania newspaper *The Mercury* alleged that his career as a prominent orthopedic surgeon was ruined by an article citing rumors that his hospital privileges had been suspended because of his "misconduct regarding his treatment of an older female patient."

Background

Dr. Elliot Menkowitz was a prominent orthopedic surgeon who resides in, and practiced his whole career in, the small town of Pottstown, Pennsylvania. Dr. Menkowitz had long-standing staff privileges at the Pottstown Memorial Medical Center, where he and his surgical group were responsible for more "in-patient days" than any other group of physicians. At the end of March 1997, Dr. Menokwitz was suddenly absent from the hospital.

A Pennsylvania jury awarded a doctor two million dollars in compensatory and punitive damages in a libel case against a local newspaper.

Erik Enquist, a staff reporter for the local newspaper, the *Pottstown Mercury*, investigated why Dr. Menkowitz was no longer performing surgery at the hospital. Based upon Enquist's reporting, the paper published an April 18, 1997 article noting that "[a] prominent physician has been suspended by [the Hospital] after 25 years on the hospital staff," that the "reported six-month suspension was handed down" after a "peer review" of Dr. Menkowitz by the hospital's medical executive committee and its board of directors, and that "Dr. Menkowitz's sudden absence from the hospital has spawned rampant rumors of professional misconduct regarding his treatment of an older female patient." The reporter received his information from a single confidential source. The paper also published three follow-up pieces on the story, including two others written by Enquist.

Although plaintiff and his lawyer refused to comment for the story, Menkowitz later stated that his suspension had nothing to do with his treatment of a female patient and was instead made in retaliation for his complaints about the quality of patient care at the hospital and/or because Dr. Menkowitz suffered from attention deficit hyperactivity disorder and the hospital refused to accommodate his disability.

Litigation Ensues

Menkowitz sued *The Mercury* and Enquist for defamation, false light and tortious interference based on the articles published by the paper. In the lawsuit, Dr. Menkowitz contended that the reference to "professional misconduct regarding his treatment of an older female patient" insinuated that he had engaged in improper sexual activity, abhorrent malpractice or some other form of unethical sexual conduct with the patient. Plaintiff claimed that the publication caused a loss of reputation that ended his career and required him to undergo a lifetime of psychological treatment.

During the course of the lawsuit, the company that owns *The Mercury*, the Journal Register Company, twice filed for Chapter 11 bankruptcy. In the bankruptcy proceedings, plaintiff agreed not to seek a recovery from the Journal Register entities and to look solely to the proceeds available under the newspaper's insurance policy.

The litigation went on for years while the defense sought to obtain critical internal documents from the hospital that were protected as confidential by Pennsylvania law governing physician peer review. Ultimately, hospital meeting minutes obtained in discovery demonstrated that the hospital's decision to suspend plaintiff was based on alleged "patient abuse" in conduct affecting a 79 year-old female patient, specifically, that Dr. Menkowitz had "yelled" at the elderly woman, as well as another male patient.

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Trial

One important document obtained from the Hospital – minutes of a meeting of the Hospital's Board of Directors – which would likely have helped demonstrate that the incident with the elderly woman was the direct cause of plaintiff's suspension – were inexplicably excluded from evidence at trial, even after the plaintiff's counsel showed an excerpt from the minutes to the jury. Significantly, the plaintiff testified that he had no recollection of the 79-year-old patient or of being questioned about his conduct with her by a hospital official.

Plaintiff, his wife and son, all testified about Dr. Menkowitz becoming depressed as a direct result of the article. Further, plaintiff's psychologist testified that prescription medications for depression needed to treat the plaintiff caused physical side-effects that prevented him from continuing to practice as a surgeon. Also testifying for the plaintiff were a journalism expert and a damages experts who had calculated Dr. Menkowitz's lost earnings at $9.4 million. Witnesses for the defense included the journalist, Erik Enquist, and the physician who questioned plaintiff, and wrote up a report, on the incident involving Menkowitz and the 79-year old woman.

After a 5-day trial, the jury, on March 20, 2014, found for defendant on the false light and tortious interference claims, but found in favor of the plaintiff on his defamation claim. Instructed under a negligence standard, the jury awarded one million dollars in compensatory damages to the plaintiff ($800,000 for past and future lost earnings, $200,000 for harm to reputation, and $0 for emotional distress). Further, the jury found that the plaintiff had established that the articles were published with actual malice, and awarded the plaintiff an additional $1 million in punitive damages.

Post Trial Considerations

Chief among the grounds defendant will use to argue for overturning the verdict was the exclusion of the hospital board of directors minutes. Further, the defendant will argue, *inter alia*, that the judge failed to require the plaintiff to prove factual falsity or false implication by "clear and convincing" evidence under *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) and its progeny.

The defendants were represented by Gregory M. Harvey, Montgomery McCracken Walker & Rhoads LLP, Philadelphia, PA. Plaintiff was represented by Alan B. Epstein, Spector Gadon & Rosen, P.C., Philadelphia, PA.

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Pennsylvania Court Orders Third Trial in Long-Running Newspaper Libel Case

Holds Trial Court Erred on Proof of Damages Issues

On appeal from a bench trial verdict in favor of the defense, a Pennsylvania Superior court reinstated libel claims against the *Citizens' Voice* newspaper in a long-running libel suit over a series of articles discussing an FBI raid of plaintiffs' businesses. *Joseph v. The Scranton Times, L.P.*, No. 929 MDA 2012 (Pa. Super. March 11, 2014). The court ordered what would be the third trial in the case if the present decision survives a planned appeal.

Background

The case, now more than a decade old, was brought by Thomas A. Joseph and his son, Thomas J. Joseph, who allege they and their airport limousine and call-center businesses were defamed by a series of 10 articles discussing an FBI search of plaintiffs' businesses as part of an investigation into William D'Elia, the reputed head of organized crime in northeast Pennsylvania. D'Elia was subsequently convicted of money laundering and witness tampering. No charges were brought against plaintiffs.

According to the Superior Court, the trial court determined that plaintiffs met their burden of proof as to all elements of their claims except for proof of damages and the trial court erred in requiring proof of harm to reputation.

The case was first tried without a jury in 2006 before former Luzerne County Court of Common Pleas Judge Mark A. Ciavarella who ruled the newspaper defamed the father and one of the businesses and awarded $3.5 million in compensatory damages. Judge Ciavarella is now in jail on racketeering charges for taking money to steer juvenile defendants to private detention facilities. The Pennsylvania Supreme Court vacated the verdict against the newspaper because of evidence the case was steered to Judge Ciavarella by another judge involved in the racketeering scheme.

The case was tried for the second time in 2011 before Luzerne County Court of Common Pleas Judge Joseph Van Jura who entered a defense verdict. He ruled in favor of the newspaper largely on the ground that plaintiffs failed to prove any damage to reputation or lost business as a result of the newspaper articles. Plaintiffs' evidence about loss of reputation was dismissed as not credible. And their expert testimony on business harm was speculative.

Superior Court Decision

According to the Superior Court, the trial court determined that plaintiffs met their burden of proof as to all elements of their claims except for proof of damages and the trial court erred in requiring proof of harm to reputation. The trial court should have considered plaintiffs' evidence of personal humiliation and mental anguish as actual harm compensable in damages.

The Court similarly held it was error to dismiss plaintiffs' false light claims for lack of evidence of damage. The Superior Court also held that statements about plaintiffs' businesses were "of and concerning" plaintiffs and could have been used to prove damages. The trial court also erred in not making a factual finding on actual malice.

A more complete update on the case from the newspaper's counsel will be published in the April issue of the *MediaLawLetter*.

The defendants were represented by Kevin C. Abbott of Reed Smith in Pittsburgh and Timothy J. Hinton Jr. of Haggerty, McDonnell & Hinton in Scranton, Pa. The plaintiffs were represented by George Croner of Kohn, Swift, & Graft, P.C. in Philadelphia and Timothy P. Polishan of Kelley Polishan Walsh & Solfanelli, LLC in Old Forge, Pa.

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Activist Wins $563,000 Defamation, Negligent Infliction Emotional Distress Verdict

A Massachusetts jury awarded $563,052 to a prison-rights activist on claims of defamation and emotional distress against the *Boston Herald*. Almost the entire verdict was made up of damages for negligent infliction of emotional distress. *Marinova v. Boston Herald*, Inc., No. 10-1316-H (Mass. Super. jury verdict March 19, 2014).

The plaintiff said she was harmed by an article alleging that a state legislator snuck her into a state prison to visit the plaintiff's convict boyfriend and that the plaintiff had previously engaged in "sexual acts" on a prior visit with the convicted murderer in the visitor room. The jury awarded $13,052 for defamation and $550,000 for negligent infliction of emotional distress.

Background

In 2008, plaintiff Joanna Marinova was employed with non-profits working to use media to empower disenfranchised youth, and Marinova was active in the cause of prison reform, prisoner rights and alleged abuse of prisoners. Inmate Darrell Jones was in touch with Marinova about producing an anti-crime video with inmates at the prison at which he was incarcerated. During the course of that project and others, Marinova and Jones became a couple.

A Massachusetts jury awarded $563,052 to a prison-rights activist on claims of defamation and emotional distress against the Boston Herald. Almost the entire verdict was made up of damages for negligent infliction of emotional distress.

State Rep. Gloria Fox and Marinova went to Old Colony Correctional Center on May 7, 2009 to meet with Jones and to investigate his complaint of being mistreated by prison guards. As a legislator, Rep. Fox had less restricted access to state prisons. After the women were led to an interview room with Jones, a guard recognized Marinova as Jones' girlfriend. Subsequently, Marinova was removed from the room and Rep. Fox continued a lengthy visit with Jones on her own.

Jessica Van Sack, a *Boston Herald* reporter, began to investigate the visit. On May 28, 2009, the *Herald* published an article about the visit entitled "Sources: Fox aided beau in prison visit with killer." The article reported that "Fox is under state scrutiny for allegedly sneaking a murderer's girlfriend—previously bagged for engaging in 'sexual acts' with the killer con—into a Bridgewater prison in Bridgewater." The article also reported that "Fox and the woman were bagged by a vigilant guard who recognized the 'aide' as Jones' girlfriend—a woman previously written up for engaging in prohibited 'sexual acts' in the visitor room with Jones." Marinova did not provide a comment in response to the reporter's request.

After the article was published, Marinova and Jones responded. Van Sack wrote another story about that response, which made reference to an online post made by Jones publishing pages of his disciplinary report indicating that the charge of "sexual acts" was dismissed. After a visit Marinova paid to Jones at the prison, correctional offices wrote a disciplinary report, citing Jones for "engaging in sexual acts with another" because the two had kissed and Jones had placed his hand on Marinova's leg. A hearing was held on the report, and the charge for "engaging in sexual acts with another" was dismissed. Marinova sued the *Herald* and Van Sack for defamation, intentional infliction of emotional distress (IIED) and negligent infliction of emotional distress (NIED).

On a motion for summary judgment, the defendants argued the article was not capable of a defamatory meaning, that the plaintiff could not prove falsity, and that her claims were barred by the fair report privilege. The trial court denied the motion. On a subsequent motion for summary judgment on the defamation, IIED and NIED claims, the judge rejected the defense argument that Marinova was necessarily a limited purpose public figure, and reserved that issue for decision at trial. The court also denied summary judgment on the issue of actual malice. However, the court subsequently dismissed plaintiff's claim for IIED.

Trial

During the trial, the reporter's three correctional sources did not fully corroborate her understanding of what they had told her. The sources were a press secretary, a union steward

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and the president of the Correction Officers Union. For example, Steven Kenneway, then-president of the Correction Officers Union and the reporter's initial source about the visit, said he was not the person who sent Jones' disciplinary records to the reporter.

State Rep. Fox testified that she would not have allowed Marinova to accompany her if she had known of Marinova's romantic relationship with Jones. But the legislator denied identifying Marinova as her aide and using that as a ruse to sneak her into the prison. Defense expert Paul Niwa, an associate professor of journalism at Emerson College, opined that the reporter had met appropriate journalistic standards, including trying multiple ways to get Marinova's side of the story.

The judge excluded Marinova's medical records, but she testified that the article caused depression, loss of sleep and anxiety. The plaintiff was also allowed to introduce negative online comments posted to the digital version of the original story, including comments inferring that Marinova had had sex with Jones in the visitors' room. Further, the judge permitted the plaintiff to introduce evidence showing that she was harmed by the comments when she and her father read them.

The trial judge deferred the decision on whether Marinova was a private figure or a limited purpose public figure until evidence on the issue was introduced. While the defense argued that Marinova's visit to the prison would not have taken place unless she was involved with prison-reform activism through social media, media production and lobbying, Judge James F. Lang ruled that Marinova was a private figure for purposes of the article. While the court acknowledged that Marinova had injected herself into a public controversy over prison reform issues, it found that the article was focused on an alleged breach of prison security and did not address any public issues involving prison-reform or prison-rights activism.

However, the judge had the jury decide claims under both a negligence and an actual malice standard in case he was reversed on appeal with respect to Marinova's status as a private figure.

After 13 days of testimony, the 15-member jury deliberated for approximately two and a half days. All jurors were allowed to deliberate. The jury found that the article contained three false statements of fact about Marinova:

> 1) "State Rep. Gloria L. Fox is under state scrutiny for allegedly sneaking a murderer's girlfriend-previously bagged for engaging in 'sexual acts' with the killer con—into a state prison in Bridgewater, the Herald has learned."
>
> 2) "But Fox and the woman were bagged by a vigilant guard who recognized the 'aide' as Jones' girlfriend—a woman previously written up for engaging in prohibited 'sexual acts' in the visitor room with Jones."
>
> 3) "After Marinova was booted from the prison, Fox spent four hours and 10 minutes with Jones, according to a visitor's log."

The jury found that the first two statements, but not the third, were defamatory and negligently published by a preponderance of the evidence.

The jury also found that the plaintiff proved by clear and convincing evidence that the first two statements were published by the defendants with knowledge of their falsity or with reckless disregard for their truth or falsity. The jury rejected the application of the fair report privilege to any of the statements.

The jury also found that Marinova had proven by a preponderance of the evidence that the defendants had negligently caused her emotional distress. In Massachusetts, NIED plaintiffs must prove that their emotional distress is evidenced by physical harm manifesting in objective symptoms, that the distress was caused by the defendant's negligence and that a reasonable person would have suffered emotional distress under all the circumstances.

Co-defendants Sunbeam Management, Inc., and WHDH TV., Inc., entered into a confidential settlement prior to the trial. The *Herald* is seeking a reduction of the jury verdict to account for any such settlement amount. The *Herald* also will seek a remittitur on the grounds that the large amount of NIED damages appears to be punitive and is disproportionate to the amount of defamation damages.

The defendants were represented by Peter A. Biagetti, Joseph D. Lipchitz and Nicholas Cramb of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. in Boston. The plaintiff was represented by David H. Rich and Megan C. Deluhery of Todd & Weld in Boston.

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Libel Suit Over "Bag Men" New York Post Report Survives Motion to Dismiss

Paper Implied Men Were Suspects; Fair Report Privilege Rejected

A Massachusetts Superior Court this month denied the New York Post's motion to dismiss libel and emotional distress claims brought by two men featured on the newspaper's cover during the intense hunt for the Boston Marathon bombers. *Barhoum v. NYP Holdings, Inc.*, No. 13-2062 (March 5, 2014) (Fabricant, J.). The cover, emblazoned with the headline "Bag Men," showed plaintiffs near the finish line of the marathon and reported that "Feds seek this duo."


NEW YORK POST Page Six
LATE CITY FINAL
BAG MEN
Feds seek these two pictured at Boston Marathon
SEE PAGES 4, 5, 6, 7

In denying the motion to dismiss, the court held that reasonable readers could understand the cover and article to imply that plaintiffs were the bombers or suspected of being the bombers. The court rejected the fair report privilege defense, finding the report was not a fair and accurate summary of an FBI email to law enforcement across the country seeking the identity of plaintiffs. Plaintiffs also stated a claim for intentional and negligent infliction of emotional distress given the horrific nature of the Boston Marathon bombing, the nationwide hunt to find the perpetrators, and plaintiffs' distress in appearing on the front page of the newspaper under the circumstances.

Background

The Boston Marathon bombing occurred on April 15, 2013, killing three and wounding over 200 people. The bombing triggered an intense law enforcement hunt for the perpetrators – as well as intense nationwide media coverage.

Law enforcement officials believed that the perpetrators brought bombs to the area in duffel bags or backpacks. They sought the public's help in contributing and reviewing surveillance photographs from the marathon. Photographs of plaintiffs at the finish line began circulating online. On April 17, plaintiffs learned of these photographs and voluntarily went to the police where they were interviewed and cleared in the early morning hours of April 18.

In the midst of these developments the FBI sent out a press release stating that some press reports about the investigation were inaccurate and asking the media to "exercise caution" in reporting developments.

Later on the morning of April 18, the New York Post published its cover story with plaintiffs' photographs. The text box on the cover reported that:

"Investigators probing the deadly Boston Marathon bombings are emailing law-enforcement agencies photos of these two men seen on surveillance near the finish line, The Post has learned. One is carrying a duffel bag and the other has a backpack –

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> which is not visible in a later photo. There is no direct evidence linking them to the crime, but authorities want to identify them."

The Post learned about law-enforcement's interest in identifying plaintiffs from an April 17th email sent by a Buffalo-area FBI agent who contacted police around the country, including the Boston PD, with the following note:

> "The attached photos are being circulated in an attempt to identify the individuals highlighted therein. Feel free to pass this around to any of your fellow agents elsewhere. This is unclassified, but I believe it is Law Enforcement Sensitive still."

The newspaper further reported that law enforcement was circulating photographs of plaintiffs to identify them, that officials had identified two potential suspects on surveillance videos, but that "it was not immediately clear if the men in the law enforcement photos are the same men in the surveillance videos."

Denying the motion to dismiss, the court held that reasonable readers could understand the cover and article to imply that plaintiffs were the bombers or suspected of being the bombers.

Later that day the men in the surveillance video were identified as brothers Dzhokhar Tsarnaev and Tamerlan Tsarnaev. On April 19, following a city-wide manhunt, Tamerlan was killed and his brother captured.

Plaintiffs later filed suit against the publisher of the New York Post for defamation, infliction of emotional distress, and false light invasion of privacy. (The false light claim was dismissed because the claim is not recognized under Massachusetts law.)

Decision

On the motion to dismiss the defamation claims, the newspaper argued that its report was not false and was protected as a fair report of the FBI email seeking to identify plaintiffs. Denying the motion, the court held that reasonable readers would understand the article to mean that law enforcement was not only seeking to identify plaintiffs, but that they were the bombers or at least suspected of being the bombers. In a footnote the court noted that Massachusetts courts have not addressed whether a publisher must intend or endorse a defamatory implication, but reasoned that a jury could find the implication was intended based on the "inflammatory" cover and an article designed to attract reader interest.

Stressing the factual nature of the article, the court reasoned that "the headlines, sub-headlines, photographs, and placement" and references to a backpack seen in one photo and absent in another, all "contributed to the impression that the men were suspects." A cautionary statement in the article that "there is no direct evidence linking them to the crime" was deemed ineffective in the midst of the larger headlines.

Similarly the fair report privilege failed, according to the court, because it was not a fair or accurate summary of the FBI email to law enforcement. Instead, the newspaper implied police were seeking plaintiffs as suspects, not to learn their identity.

The court also held that plaintiffs stated claims for intentional and negligent infliction of emotional distress. A jury could find the newspaper's conduct was sufficiently extreme and outrageous based on the nature of the crime, the strong public reaction, the FBI's cautionary note about media coverage, and the intense hunt for the bombers. That, coupled with plaintiffs' physical and emotional reaction to being featured on the newspaper cover, was sufficient to state a claim.

Plaintiffs are represented by Max D. Stern of Stern Shapiro Weissberg & Garin LLP, and C. William Barrett of Esdaile, Barrett & Esdaile, Boston, MA. Defendants are represented by Jeffrey S. Robbins and Joseph D. Lipchitz, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Boston, MA; and Kevin Baine and James McDonald, Williams & Connolly, LLP, Washington, D.C.

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Texas Court Affirms Dismissal of Libel Case Against New York Times

Plaintiff Failed to Show Actual Malice

By David McCraw

A Texas appellate court has affirmed 2-1 a grant of summary judgment dismissing a libel suit brought against The New York Times and one of its journalists by a Texas political activist who became an undercover informant for the FBI. *Darby v. The New York Times Company*, No. 07-12-00193-CV (Feb. 26, 2014).

The majority at the Seventh Court of Appeals in Amarillo found that the plaintiff, Brandon Darby, had failed to show that either The Times or its reporter James McKinley had acted with actual malice.

Background

The suit arose from a February 2011 Times article that said Darby had "encouraged" a plot by two Texas anarchists to hurl Molotov cocktails at a parking lot filled with police vehicles during the 2008 Republican National Convention in St. Paul, Minnesota. The attack never took place, but the two anarchists were arrested after Darby contacted his FBI handlers.

Darby contended he was libeled by a single sentence in the Times piece saying he had "encouraged" the two men to commit acts of violence.

The two men acknowledged in their guilty pleas that they had not been entrapped by Darby, who had secretly volunteered to help the FBI months earlier. However, they and the others in their anarchist group insisted that Darby, a well-known veteran of left-wing politics, had egged the younger members of the group on to violence. The group had traveled with Darby to Minnesota to engage in protests at the convention.

In his defamation suit filed in March of 2011, Darby contended he was libeled by a single sentence in the Times piece saying he had "encouraged" the two men to commit acts of violence. According to Darby, the admission by the two that they were not entrapped proved that the story was false and, in effect, accused him of a crime.

Discovery proceeded over the next nine months but no depositions were ever taken. The Times and McKinley moved for summary judgment based on documents, affidavits, and interrogatory responses.

In February of 2012, a trial court judge in Hays County granted summary judgment to the defendants. His decision did not disclose the basis for his ruling. The Times had asserted seven grounds for dismissal.

Court of Appeals Decision

The Court of Appeals appeared to struggle with the case. The three judges managed to generate a majority opinion, two dissents, and two concurrences. And the judge writing the majority decision labored at length to reject one after another of the defendants' arguments before finally landing on the finding of no actual malice.

Of particular note, The Times had argued that the article did not accuse Darby of a crime because informants routinely and legally "encourage" targets to engage in wrongdoing, and the story made clear he was working for the FBI, not participating in the criminal plot. Two judges of the court (one in the majority, the other the dissenter) disagreed. They said that the fact that an informant may not be prosecuted for a crime in some situations did not provide a basis for summary judgment as a matter of law. The third judge (who ultimately gave the defendants the second vote on actual malice) went the other way, writing that no reasonable reader could have concluded that the article was accusing Darby of committing a crime.

The "encouragement" issue was significant because Darby conceded he did not have actual damages. As a result, his claim could survive under Texas law only if he showed

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that The Times had engaged in libel per se – accusing him of a crime, one of the four categories of per se statements.

The court also rejected defense arguments that the statement about Darby was an opinion and that it fell under Texas's third-party-allegation rule, which permits journalists to report on the charges and countercharges being made in a public dispute.

The tide finally turned for The Times with actual malice. The two-judge majority noted that McKinley had talked to several sources, including an activist who long knew Darby and a lawyer who had represented one of the convicted men. They were among the many people who believe Darby encouraged the two anarchists to engage in violence. McKinley said he had never heard of Darby prior to researching the story and attempted to reach him without success before writing the article. The Darby paragraph was a minor part of the article, which was actually about an entirely different case – the firebombing of the governor's mansion. Because the Texas anarchists were suspects in that attack, McKinley included two paragraphs of background late in the story on the St. Paul convictions and Darby's role.

The Court of Appeals appeared to struggle with the case. The three judges managed to generate a majority opinion, two dissents, and two concurrences.

The majority found that the evidence put in by The Times was enough to show prima facie that McKinley and his editors did not act with reckless disregard for the truth – at which point Darby "had an obligation to present evidence disproving malice, as a matter of law." While the court found The Times's affidavits "of a type that could be readily controverted," Darby took no depositions and provided no evidence to contradict them.

Darby did put in two emails sent to McKinley post-publication by journalists who had earlier reported on the St. Paul case and suggested that the story was in error. The court found them irrelevant. "That the comments were made after the fact render them inconsequential to the issue before us. We reiterate that actual malice is determined by what the writer knew or thought at the time of the writing or publication, not what was discovered thereafter." (Shortly after the suit was filed and The Times learned for the first time of Darby's objections to the sentence, the paper published a clarification online that pointed out that there had been no entrapment. Darby's lawyers tried unsuccessfully to say that there were two publications as a result: the story before the clarification and the online story after the clarification.)

Darby also tried to make his actual malice case by claiming that McKinley had to know that the two anarchists had admitted they were not entrapped. The court did not buy the argument, holding that entrapment and encouragement are not the same thing, no matter how similar they might be. "To conclude otherwise would be to say that an apple must be as sour or bitter as a quince because both look the same and grow on trees," the court wrote.

The dissenting judge, who would have sent the actual malice question to a jury, appeared to conflate actual malice with the "substantial truth" defense, giving birth to an opinion marked mainly by confusion. He found that once Darby raised a fact issue about whether the challenged statement was true or false, summary judgment could not be granted on actual malice. He did not explain why that would be so.

Darby continues to live in the Austin area and remains a controversial figure. He is the subject of two widely distributed documentaries ("Better This World" and "The Informant"). Both track Darby's conversion to FBI informant after his earlier prominence as a charismatic left-wing activist who organized a well-regarded citizens' effort to help the people of the Lower Ninth Ward in New Orleans following Hurricane Katrina. Since disclosing publicly in late 2008 that he had been an undercover FBI operative, Darby has become aligned with various right-wing causes. He is now a contributor to the right-wing websites founded by the late Andrew Breitbart (biggovernment.com and bigjournalism.com).

Some of his conservative allies rallied behind him in the litigation, urging him to bring the suit as a way to get back at the liberal media.

David McCraw is Vice President & Assistant General Counsel The New York Times Company. The Times and James McKinley are represented by Laura Prather and Catherine Robb of Haynes and Boone in Austin. Brandon Darby is represented by Robert Kleinman, Don Cruse, and Rain Levy Minns, all of Austin.

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Colorado Court Dismisses Libel Case Against Homicide Hunter Program

Crime Reenactment Was Substantially True

By Steve Zansberg

On March 7, 2014, Colorado state district court judge Gregory R. Werner granted a motion to dismiss a libel, invasion of privacy, and emotional distress case brought against cable network The Discovery Channel, the production company (Jupiter Entertainment), and the star and namesake of the documentary series, *Lt. Joe Kenda – Homicide Hunter*. *Cooley v. Kenda*, No. 13CV31974.

All of the plaintiff's claims were premised upon a November 2012 episode of *Homicide Hunter* entitled "Primal Fear," which depicted the plaintiff, Moses Cooley, as a trouble-making high school student who set into motion a series of events that resulted in the death of a fourteen-year-old.

Historical Reenactment Takes Artistic License

The focus of the "Primal Fear" episode was a tragic shooting in November 1995, just blocks from a Colorado Springs high school, in which fourteen-year-old J.L. Jackson was shot dead while a passenger in the plaintiff's car. The murderer continued firing his MAC -11 assault rifle at the plaintiff even after he fled his car to take cover in a nearby retail store.

Colorado Springs homicide detective Lt. Joe Kenda (now retired but appearing on screen both in the present tense, and as portrayed by a younger actor in reenactment scenes) arrives at the crime scene and proceeds to track down the culprit. As Kenda's investigation unfolds, he is seen interviewing the victim's family who state that Jackson had begun associating with a group of kids who were troublemakers. Jackson's surviving father and sister point to one youth in particular, the plaintiff Moses Cooley, as someone who got into trouble in the past, had sold dope, and was "an instigator and antagonist [who] would start stuff and get everyone else to back him up."

While there were certain discrepancies between the actual events and the depiction of those events in the "Primal Fear" program, none would produce a different effect upon a reasonable viewer than the true facts would produce.

In the central reenactment scene, Cooley is depicted inside the high school lunchroom where he confronts a large Samoan boy tossing the lunch tray on the Samoan boy; the Samoan boy rises to his feet and shoves Cooley. Then, two groups of students separate the two boys. As Cooley is being shooed out of the lunchroom, he shouts at the Samoan boy, "You're dead today after school," while making gun gestures with his fingers.

As the story unfolds, we learn that the Samoan boy in the lunchroom was part of a family that had recently moved to Colorado from Los Angeles to escape the gang culture there. This boy took Cooley's threat seriously – although the narrator and Kenda both say it was merely posturing and that Cooley did not mean it. The Samoan boy places a phone call to his older brother who, having been immersed in the California gang environment, takes Cooley's death threat literally.

Later that afternoon, when the school bell rings, several of Cooley's friends pile into his car and drive off the school grounds. The Samoan boy's older brother, Gene Tuiletufuga, armed with the MAC-11, fires 32 rounds into the back of Cooley's car. Two of those bullets hit J.L. Jackson in the head, killing him.

Cooley's Claims and Allegations of Falsity

In his complaint, Cooley alleged defamation, invasion of privacy through misappropriation, and both negligent and intentional infliction of emotional distress. Cooley claimed that the episode falsely depicted him as a bully and a drug user, and as the initiator of the confrontation with the younger Samoan boy, which resulted in the death of J.L. Jackson.

Cooley claimed that he was not a student in the high school, that he had never ever set foot inside the high school. He also claimed that he had not initiated the confrontation

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with the younger Samoan boy or issued any threat; that he had never actually spoken with the Samoan boy; and that the true facts were that he was a victim of the shooting, not the party primarily responsible for causing it.

Motion to Dismiss Based on Official Police Reports

The defendants' motion to dismiss quoted extensively from, and attached as exhibits, the entirety of the Colorado Springs Police Department reports of the homicide investigation. In Colorado, as in many other jurisdictions, the court may take judicial notice of official public records (including police reports), especially when they are referenced in the complaint. Several times in his complaint, Cooley had asserted that the police department investigation file accurately stated the facts.

The police reports indicated that on the day of the shooting, at lunchtime, Cooley had driven his car, with two fellow Crips gang members, into the high school parking lot and had confronted a student named Brian Lynch. Several witness statements confirmed that the two boys in Moses' car had communicated to Lynch that they had a gun and were prepared to shoot members of the rival Blood gang, but that they had no bullets for the gun. They told Lynch they would return after school with bullets, and would shoot the Bloods.

Lynch then walked from Moses' car to the group of Blood students standing on the sidewalk, including the younger Samoan brother, Matt Tuiletufuga, and told them what the boys in Moses' car had said. Later that day, as depicted in the program. Matt Tuiletufuga's older brother Gene followed Moses' car out of the parking lot and unleashed his fatal assault upon it.

Substantial Truth Bars Defamation Claims

In his 6-page ruling, Judge Gregory Werner held that Cooley had failed to state a cause of action for defamation, because comparing the broadcast as a whole to the eyewitnesses' accounts in the police reports, Cooley could not demonstrate material falsity(or the lack of substantial truth) as a matter of law. While there were certain discrepancies between the actual events and the depiction of those events in the "Primal Fear" program, none would produce a different effect upon a reasonable viewer than the true facts would produce.

The court found that the editorial decision to relocate the confrontation between the two student gangs from the parking lot to the school cafeteria was no more significant than the fact that the program had shown Cooley driving a Chrysler when, in fact, he drove a Chevrolet. Similarly, the court found that there was no material falsity in portraying Cooley as the one who delivered the threat to shoot the Bloods after school, when multiple witnesses identified the threat as emanating from the group in Cooley's car, and under both civil tort law and criminal conspiracy law, Cooley would be equally liable for those threats. (Although the court did not address Cooley's claim that he was defamed by the allegation he had used drugs, the defendants demonstrated that Cooley had, prior to the telecast of the program, been convicted of distributing a controlled substance and had served three years in federal prison.)

Because none of the discrepancies between the actual facts and those portrayed in the "Primal Fear" episode were materially false, Cooley had not stated a claim for defamation.

Involvement in Shooting Bars Claim for Misappropriation

Applying well settled Colorado law, *see Joe Dickerson & Assocs. v. Dittmar*, 34 P.3d 995 (Colo. 2001), the court found that Cooley's uncontested involvement in the fatal shooting incident precluded his claim for misappropriation of likeness as a matter of law: "There is a First Amendment privilege that permits the use of a plaintiff's name or likeness when the use is made in the context of, and reasonably relates to, a publication concerning a matter that is newsworthy or of legitimate public concern."

The court also rejected Cooley's claim that because the defendants allegedly profited from the production and telecast of the "Primal Fear" episode, the speech in this case was commercial in nature.

Finally, the court dismissed Cooley's claims for negligent and intentional infliction of emotional distress on grounds that they were premised exclusively upon the defendants' constitutionally protected speech.

Steve Zansberg and Tom Kelley of Levine Sullivan Koch & Schulz, LLP, and Aaron Holbert and Savalle Sims of Discovery Communications represented defendants. The plaintiff was represented by Steven Hill of Riggs, Abney, Neal, Turpen, Orbison & Lewis, P.C. of Denver, CO.

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Emotional Distress Suit Over Suicide Broadcast Dismissed

By Chris Moeser

An Arizona trial court has dismissed claims for intentional and negligent infliction of emotional distress against Fox News Network, L.L.C., stemming from the network's live coverage of an 80-mile police chase that ended in the suspect's suicide. *Rodriguez v. News Corporation*, No. CV 2013-008467 (Jan. 30, 2014) (minute order dismissing claim).

Background

The lawsuit, filed by Angela Rodriguez on behalf of three children of the criminal suspect, JoDon Romero, alleged Fox News needlessly inflicted emotional distress on Romero's family by failing to use a time delay on the telecast. Although Romero's children were in school at the time of the coverage, the lawsuit alleged they saw the video on the Internet after hearing about it at school.

On September 28, 2012, Romero stole a car at gunpoint in West Phoenix and later fired shots at a police helicopter as he led officers on a pursuit on Interstate 10, according to police. The chase ended when Romero exited the vehicle in the desert and shot himself. Fox News' coverage, shot from a camera in a news helicopter nearby, showed Romero falling to the ground. Fox News anchor Shepard Smith promptly apologized to viewers for airing the shooting.

In dismissing both claims on January 30, Civil Presiding Judge of the Maricopa County Superior Court John Rea held that the complaint was barred by the First Amendment and did not satisfy the common law elements for each tort. Addressing the negligent infliction of emotional distress claim, Judge Rea noted that the claim "did not fall within any Arizona authority."

Fox News argued that the complaint should be dismissed because the telecast involved truthful news coverage of an issue of public concern. In addition, Fox News argued that accurate news coverage of this public incident cannot constitute "outrageous" conduct as a matter of law, and that the Plaintiff did not meet Arizona's "zone of danger" rule for negligent infliction of emotional distress claims.

Rodriguez's attorney, Joel Robbins, asserted that the broadcast was beyond the scope of First Amendment protection. He relied primarily on cases limiting the public's right of access to attend prison executions and inspect death scene images under public records laws.

Defendant countered that the plaintiff's authorities were inapplicable to news coverage of an ongoing police situation that unfolded in public, on public roadways. Accurate, live news coverage of an issue of public concern, involving public safety and law enforcement efforts, cannot give rise to civil liability, Fox News argued.

Plaintiff's lawyer told the *Associated Press* last month that his client plans to appeal the ruling. A similar case filed against Fox News by Romero's sister remains pending in Arizona Superior Court.

Chris Moeser is an associate at Steptoe & Johnson LLP who, together with David J. Bodney, a partner in the firm's Phoenix office, represented Fox News Network, L.L.C. in this matter. Plaintiff was represented by Joel Robbins, Robbins & Curtin PLC, Phoenix, AZ.

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Mugshot Website Entitled to Five-Day Notice of Defamation Suit

Website a "Media Defendant" Under Florida Notice Law

A plaintiff suing a mugshot website for defamation must give at least five days notice before filing the lawsuit because the website is a media defendant, a Florida federal court has ruled. *Intihar v. Citizens Information Associates*, No. 2:13-cv-00720 (M.D. Fla. March 4, 2014). No Florida state court had determined whether websites qualify as media defendants under the notice statute, the court noted.

"While plaintiff belittles the newsworthiness of the content of the website, arrest information is historically considered 'news' and is routinely published in newspapers and other periodicals," U.S. District Judge John E. Steele opined.

Background

Plaintiff Scott Intihar argued he was defamed by Mugshotsonline.com which alleged that Intihar was arrested for cocaine possession and other crimes. The website, operated by Citizens Information Associates, LLC, publishes mug shots and other information about arrests in Florida.

Intihar alleged he tried several times to have the statements taken down, but that the defendant demanded payment first and/or ignored the requests. Florida Stat. § 770.01 requires that plaintiffs provide five days of notice before filing their defamation lawsuits over publications in "a newspaper, periodical, or other medium." If notice is not given, the plaintiff's complaint must be dismissed.

Florida appellate courts have already held that the special notice requirement only applies to media defendants, but no appellate court had ruled yet whether a website qualifies as "other medium" within the meaning of the statute. The court noted that Florida courts applied the notice requirement to media defendants defined as defendants "engaged in the dissemination of news and information." The court then stated:

> The Court concludes that under the factual allegations of the Complaint, CIA is a media defendant which has made a publication or broadcast in another medium. The Complaint alleges that CIA is a business entity, and that it "publishes and circulates mug shots and other information that pertains to arrests and criminal charges..." on a website to the general public. The website may apparently be viewed by the general public, since plaintiff alleges that his family, friends, and community members have accessed the information. While plaintiff belittles the newsworthiness of the content of the website, arrest information is historically considered "news" and is routinely published in newspapers and other periodicals.

After the court granted the defendant's motion to dismiss, the plaintiff refiled an amended complaint on March 18.

Adam Mark Balkan of Balkan & Patterson, LLP in Boca Raton, FL., represents the plaintiff. Scott Konopka of Page, Mrachek, Fitzgerald & Rose, P.A. in Stuart, FL.; and Joseph F. Centrich and Lance C. Winchester, of Clausen & Centrich, PLLC. Woodlands, TX, represent the defendant.

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Illinois Supreme Court Strikes State Eavesdropping Law As Unconstitutional

By Samuel Fifer,
Natalie J. Spears and Gregory R. Naron

In two decisions issued March 20, 2014, the Illinois Supreme Court struck down the State's eavesdropping statute as unconstitutionally overbroad under the First Amendment. The decisions -- *People v. Clark*, 2014 IL 115776 and *People v. Melongo*, 2014 IL 114852 -- were the capstone to a long history of criticism and challenges directed against this statute, particularly in the context of citizens recording the "conversations" of on-duty law enforcement officers.

The Illinois eavesdropping statute, 720 ILCS 5, Article 14, is among the nation's strictest; it makes it a felony to record any conversation without the consent of all parties. The Act provides: "A person commits eavesdropping when he . . . [k]nowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation . . . unless he does so . . . with the consent of all of the parties to such conversation. . . ." 720 ILCS 5/14-2(a)(1)(A).[1]

The Illinois eavesdropping statute, 720 ILCS 5, Article 14, is among the nation's strictest; it makes it a felony to record any conversation without the consent of all parties.

Challenges to the statute date back to the 1980s. Reversing a defendant's conviction for recording law enforcement officers, the Court in *People v. Beardsley*, 115 Ill. 2d 47 (1986) significantly reined in the statute's scope, holding that the statute applied only where circumstances entitled the parties to a recorded conversation "to believe their conversation is private and cannot be heard by others who are acting in a lawful manner. . . ." *Clark*, ¶ 15. The Court reaffirmed *Beardsley* in *People v. Herrington*, 163 Ill. 2d 507 (1994), squarely holding that "there could be no expectation of privacy where the person recording the conversation is a party to that conversation:" *Clark*, ¶ 16.

However, in response to *Beardsley* and *Herrington* (and lobbying efforts by law enforcement) the Illinois General Assembly amended the Act in 1994 to encompass conversations where there *is no reasonable expectation of privacy*. "The purpose of the 1994 amendments was to make clear, in contrast to *Beardsley*'s interpretation, that the consent of all parties to recording a conversation is required, regardless of whether the parties intended their conversation to be private." *Clark*, ¶ 16 (citing 88th Ill. Gen. Assem., Senate Proceedings, Apr. 21, 1994, at 139 (statements of Senator Dillard)). The 1994 Amendment enacted the current definition of "conversation": "any oral communication between 2 or more persons *regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation*." 720 ILCS 5/14-1(d) (emphasis added).

On top of this sweepingly broad definition of "eavesdropping," the law further provides that if a police officer or court official is recorded without his or her knowledge, the punishment is enhanced: recording such individuals is a Class 1 felony, 720 ILCS 5/14-4(b), carrying a sentence of four to fifteen years, 730 ILCS 5/5-4.5-30; recording anyone else is a Class 4 felony, 720 ILCS 5/14-4(a), carrying a sentence of one to three years, 730 ILCS 5/5-4.5-45.

In recent years, both the courts and legislature have questioned the validity of the eavesdropping law, specifically challenging its constitutionality in the context of citizens recording law enforcement officers in the performance of their duties. Legislation that would have amended the law to make it legal for citizens to record law enforcement officers who are on duty and in public went down to defeat in 2012. *See* HB 3944, 98th Ill. Gen. Assem. However, the Seventh Circuit issued an opinion the same year that granted essentially the same relief, enjoining enforcement of the Illinois eavesdropping statute as applied to such recordings. *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012). The *Alvarez* court found that "[t]he Illinois eavesdropping statute restricts a medium of expression commonly used for the preservation and communication of information and ideas, thus triggering First Amendment scrutiny," and the statute badly flunked even intermediate scrutiny; it "restricts far more speech than necessary to

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protect legitimate privacy interests; as applied to the facts alleged here, it likely violates the First Amendment's free speech and free-press guarantees." *Id.* at 586-87. The court held the government's purported interest in "protecting conversational privacy" was "not implicated when police officers are performing their duties in public places and engaging in public communications audible to persons who witness the events." *Id.* at 586.

The successful as-applied challenge in *Alvarez* laid the groundwork for the Illinois Supreme Court's broader rulings in *Clark* and *Melongo*. The Court agreed with *Alvarez*' premise that audio and audiovisual recordings are "medias of expression commonly used for the preservation and dissemination of information and ideas and thus are included within the free speech and free press guarantees" of the First Amendment. *Clark*, ¶ 18 (citing *Alvarez*, 679 F.3d at 595).

In *Clark*, the defendant secretly recorded conversations with an attorney representing the opposing party in a child support matter, and the judge, acting in the course of his official duties in that matter, without the consent of either. One conversation was in the courtroom; another in the courthouse hallway. Defendant was indicted on two counts of eavesdropping; the trial court dismissed the indictment on grounds that the eavesdropping statute violated defendant's constitutional rights to substantive due process and under the First Amendment. The trial court deemed defendant's First Amendment challenge an "as-applied" challenge, and found that neither the courtroom proceedings nor the hallway conversation were sufficiently "private" so as to justify banning the audio recording thereof. *Clark*, ¶ 6.

In recent years, both the courts and legislature have questioned the validity of the eavesdropping law, specifically challenging its constitutionality in the context of citizens recording law enforcement officers in the performance of their duties.

On appeal, defendant argued that the trial court's decision should be affirmed on First Amendment overbreadth grounds; the Illinois Supreme Court rejected the State's argument that defendant waived the overbreadth argument by not raising it below, and affirmed dismissal of the indictment on that basis.

The State conceded "that the purpose of the eavesdropping statute is to protect conversational privacy"; the issue before the Court was "whether the means the legislature has chosen to further this interest in conversational privacy places a substantially greater burden on speech than is necessary to further the interest." *Id.*, ¶ 20. The Court readily found it did, noting that, after the 1994 amendments, "the statute now essentially deems *all* conversations to be private and not subject to recording even if the participants themselves have no expectation of privacy." *Id.*

The Court held that while "[a]udio recordings of truly private conversations are within the legitimate scope of the statute," its "blanket ban on audio recordings sweeps so broadly that it criminalizes a great deal of wholly innocent conduct" -- including, for example, recording "(1) a loud argument on the street; (2) a political debate in a park; (3) the public interactions of police officers with citizens (if done by a member of the general public); and (4) any other conversation loud enough to be over-heard by others whether in a private or public setting. None of these examples implicate privacy interests, yet the statute makes it a felony to audio record each one." *Id.* ¶¶ 21-22.

In finding the statute "burdens substantially more speech than is necessary to serve the interests the statute may legitimately serve," and was unconstitutionally overbroad and invalid under the First Amendment, the Court commonsensically observes:

> If another person overhears what we say, we cannot control to whom that person may repeat what we said. That person may write down what we say and publish it, and this is not a violation of the eavesdropping statute. Yet if that same person records our words with an audio recording device, even if it is not published in any way, a criminal act has been committed. The person taking notes may misquote us or misrepresent what we said, but an audio recording is the best evidence of our words. Yet, the eavesdropping statute bars it. Understandably, many people do not want their voices broadcast to others or on the Internet to be heard around the world. But, to a certain extent this is beyond our control, given the ubiquity of devices like smartphones, with their video and audio recording capabilities and

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> the ability to post such recordings instantly to the Internet. Illinois' privacy statute goes too far in its effort to protect individuals' interest in the privacy of their communications. Indeed, by removing all semblance of privacy from the statute in the 1994 amendments, the legislature has "severed the link between the eavesdropping statute's means and its end."

Id. ¶ 23 (quoting *Alvarez*, 679 F.3d at 606).

In the companion decision, *Melongo*, the defendant surreptitiously recorded three telephone conversations with the Assistant Administrator of the Cook County Court Reporter's Office, in connection with a dispute over a transcript, and posted the recordings and transcripts of the conversations on her website. She was charged with three counts of eavesdropping (720 ILCS 5/14-2(a)(1)), and three counts of using or divulging information obtained through the use of an eavesdropping device (720 ILCS 5/14-2(a)(3)).

It does not appear that the Illinois Supreme Court merely gave the statute a "narrowing" construction or purported to "partially" invalidate the operative provisions. Instead, it holds that sections (a)(1)(A) and (a)(3) are unconstitutional and invalid on their face.

The trial court found the statute "both facially unconstitutional and unconstitutional as applied," stating that it 'appears to be vague, restrictive and makes innocent conduct subject to prosecution.'" *Melongo*, ¶ 14. Affirming dismissal, the Court echoed *Clark*'s conclusion that the statute's recording provision, 720 ILCS 5/14–2(a)(1), "burdens substantially more speech than is necessary to serve a legitimate state interest in protecting conversational privacy" and was "unconstitutional on its face because a substantial number of its applications violate the first amendment." *Id.* ¶ 31.

The Court further invalidated, as unconstitutionally overbroad, the "publishing provision" of the statute, 720 ILCS 5/14–2(a)(3), which purports to "criminalize[] the publication of any recording made on a cellphone or other such device, regardless of consent. This alone would seem to be sufficient to invalidate the provision." *Id.* ¶¶ 32-36. The Court noted that the State had conceded that "if the recording provision is found unconstitutional, the publishing provision must also fail, in light of the Supreme Court's decision in" *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (under First Amendment, state may not bar disclosure of information regarding a matter of public importance where information was illegally intercepted by another party who provided it to the disclosing party). *Melongo*, ¶ 34. In *Melongo*, it "matter [ed] not whether the contents of the recorded conversations were a matter of public interest because, unlike in *Bartnicki*, the recordings cannot be characterized as illegally obtained," and hence, "just as the media defendants in *Bartnicki*," defendant "could not be prosecuted for disclosing recorded communications." *Id.* ¶¶ 35-36.

Having found the statute's operative provisions -- criminalizing recording and "publishing" recordings without consent -- to be substantially overbroad, "the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction or partial invalidation." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503-504 (1985) (citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)).[2]

It does not appear that the Illinois Supreme Court merely gave the statute a "narrowing" construction or purported to "partially" invalidate the operative provisions. Instead, it holds that sections (a)(1)(A) and (a)(3) are unconstitutional and invalid on their face. Therefore, it is now up to the legislature to enact new provisions that comply with the constitution. It is unclear at this point what legislative action may be taken. And it seems doubtful that the State will seek further review of the Court's decisions by way of *certiorari* to the U.S. Supreme Court.[3]

Of course, even if the statute cannot be enforced to subject reporters to criminal penalties, they are still subject to potential civil tort liability (i.e., invasion of privacy by intrusion upon seclusion or disclosure of private facts), where, for example, private activity or conversations, in which persons have a reasonable expectation of privacy, are surveilled or recorded for publication. It should also be noted that neither of the Court's decisions address the constitutionality of section (a)(2), which criminalizes the possession of surreptitious eavesdropping (*i.e.*, wiretapping) equipment.[4]

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That being said, the Illinois Supreme Court's decisions invalidating the operative provisions of the State's draconian eavesdropping statute can only be seen as a significant victory for free speech and press interests.

Samuel Fifer and Natalie J. Spears are partners, and Gregory R. Naron is counsel at Dentons in Chicago, Illinois.

Notes

1. The statute does contain a limited exemption for the media; it exempts any recording made for "broadcast by radio, television, or otherwise" for live or "later broadcasts of any function where the public is in attendance and the conversations are overheard incidental to the main purpose for which such broadcasts are then being made." 720 ILCS 5/14-3(c).

2. *See also Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 483 (1989) ("Where an overbreadth attack is successful, the statute is obviously invalid in all its applications, since every person to whom it is applied can defend on the basis of the same overbreadth").

3. Even though the Illinois Court mentioned, in passing, the Illinois Constitution's free speech guarantee, Ill. Const. 1970, art. I, § 2 (*see Clark*, ¶ 3; *Melongo*, ¶ 14), it is unlikely that its decisions would be deemed to rest on "adequate and independent" State law grounds. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1042 (1983) (court "assume[s] that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law"); *Florida v. Powell*, 559 U.S. 50, 56-57 (2010).

4. *See* 720 ILCS 5/14-2(a)(2) (one who "[m]anufactures, assembles, distributes, or possesses any electronic, mechanical, eavesdropping, or other device knowing that or having reason to know that the design of the device renders it primarily useful for the purpose of the surreptitious hearing or recording of oral conversations or the interception, retention, or transcription of electronic communications and the intended or actual use of the device is contrary to the provisions of this Article," commits the crime of eavesdropping).

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D.C. Super.: "'L'etat C'est Moi' Is Not a Concept Recognized by Tort Law"

To Unmask Informant, Corporation Must Show Actual Business Harm

By Adrianna C. Rodriguez and Charles D. Tobin

In the latest development in a nine-year battle to protect an anonymous whistleblower, a District of Columbia trial court has quashed a subpoena issued to a software association in a defamation litigation filed by a defense contractor. The court's decision in favor of the Software & Information Industry Association (SIIA) also strongly reinforces the rule of law that corporations cannot maintain defamation actions absent a showing of actual pecuniary harm.

In *Solers, Inc. v. John Doe*, No. 2005 CA 003779 B (D.C. Super. March 21, 2014) — a defamation action filed against the anonymous informant in 2005 — D.C. Superior Court Judge Judith N. Macaluso ruled that the Virginia company had not demonstrated damages resulting from the whistleblower's allegation that it was pirating software. Previous decisions in the case had established that defamation plaintiffs must show damages before a court will unmask informants.

The court's decision in favor of the Software & Information Industry Association (SIIA) also strongly reinforces the rule of law that corporations cannot maintain defamation actions absent a showing of actual pecuniary harm.

In this important new ruling, the Superior Court held that because the company, Solers, Inc., failed to demonstrate the narrow types of defamation damages a corporation may recover, it could not overcome SIIA's or John Doe's First Amendment protections. Specifically, the court's new decision held:

- a corporation may recover for defamation "only if monetary loss can be proved";
- for a corporation to recover damages for general impairment of business reputation, it must demonstrate the impact on its actual business, through evidence of either the loss of particular customers or a general diminution of its business, along with evidence that these results flowed from the defamation; and
- Solers may have been able to enforce the subpoena had it provided *prima facie* evidence of "a general impairment of its reputation" notwithstanding the inability to quantify the loss, because "widespread loss of a reputation for business honesty is so likely to produce financial injury" that it would establish damages to quantified later. But the business's positive profits trend, coupled with its CEO's testimony, showed no general harm to its reputation.

The case has had a lengthy and meandering history. It began in May 2005 when an anonymous tipster submitted an online report to SIIA alleging that Solers was pirating software. On behalf of its members, SIIA operates an anti-piracy program that encourages people to report incidents of suspected software piracy. SIIA investigates the reports and decides whether to pursue an enforcement action. SIIA contacted Solers about the informant's allegations, but the company denied the report. SIIA decided that it would not pursue the matter.

Solers then sued the "John Doe" informant for defamation and tortious interference with its business, alleging that the report to SIIA was false and harmed Solers' reputation and business. It immediately issued a subpoena to SIIA seeking the informant's identity. SIIA moved to quash the subpoena on the grounds that the First Amendment protected the informant's anonymous whistleblower report, and, in 2006, initially prevailed in the trial court.

Solers appealed and, in a case of first impression, the District of Columbia Court of Appeals (D.C.'s equivalent of a

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state supreme court), in *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009), held that anonymous speech, including direct communications between people over the Internet, is protected by the First Amendment. Trial judges, according to that appellate ruling, may only issue subpoenas in cases that survive a five-part analysis. Judges must:

1) "ensure that the plaintiff has adequately pleaded the elements of the defamation claim"

2) "require reasonable efforts to notify the anonymous defendant"

3) "delay further action for a reasonable time" to allow the defendant to come forward with a motion to quash

4) require the plaintiff to "proffer evidence creating a genuine issue of material fact on each element of the claim that is *within its control* (emphasis is the court's)

5) "determine that the information sought is important to enable the plaintiff to proceed with his lawsuit"

The Court of Appeals remanded the case to the trial court "to give Solers an opportunity to present *evidence* supporting its claim of defamation." (emphasis is the court's).

Returning to the D.C. Superior Court in 2009, in support of a damages claim Solers' CEO submitted an affidavit that attested the company had devoted $7,144 executive time and incurred legal fees investigating the informant's allegations, and it asserted that only discovery would determine whether it had suffered any actual lost business. After permitting written discovery, on November 4, 2010, the trial judge found that the informant had not harmed Solers' reputation, but nevertheless ruled in favor of Solers and threatened to sanction SIIA unless it disclosed the informant's identity. The court in its ruling, however, questioned the lawsuit's purpose, noting that in the years of litigation Solers had never shown harm to its reputation.

SIIA appealed and again prevailed in the D.C. Court of Appeals. Overturning the trial court's decision, in *Software & Information Indus. Assoc. v. Solers, Inc.*, Case No. 10-cv-1523, 40 Media L. Rep. 1194 (D.C. Jan. 12, 2012), the Court of Appeals clarified that a corporate defamation plaintiff must show "damages suffered as a direct consequence of the alleged defamation for example, lost profits or customers deterred from dealing with the company." The appeals court held that Solers could not "bootstrap" its way into a defamation claim through self-imposed costs, such as executive time and attorneys' fees, incurred to investigate the informant's allegations: "[T]o accept Solers' argument (that these costs constitute special damages) would mean that a corporate plaintiff may overcome a speaker's First Amendment right to anonymity with little more than an allegation of defamation and its own decision to expend money in response." The Court of Appeals remanded the case, with no further instructions to the trial court.

On the second remand, rather than dismiss the subpoena, the Superior Court ordered more discovery and set an evidentiary hearing. The court directed each side to serve witness lists and determine whether it wanted to take depositions before the hearing. After ruling on a motion to compel and motion for protective order, and depositions, the Superior Court held an evidentiary hearing on July 11, 2013. The sole witness testifying at the hearing was Solers' founder and CEO.

In her March 21, 2014 decision quashing the subpoena, Judge Macaluso noted that Solers' CEO had not established corporate damages. To the contrary, she noted, its CEO testified that Solers continues to have a good reputation and its business is growing. She further found that the CEO could not identify anyone who told him their opinion had been affected because of Doe's statements; identify anyone who said they believed Solers infringed copyrights; or identify sales that were lost or people who took their business elsewhere.

She noted that the chief executive of the closely held company's testimony and demeanor demonstrate "that he feels Solers' reputation for honesty has been impugned in a personal sense."

However, she observed, "'L'etat c'est moi' ('I am the state,' attributed to 17th century French monarch Louis XIV) is not a concept recognized by tort law" because corporations are not alter egos of their executives.

Charles D. Tobin, Leo G. Rydzewski, and Adrianna C. Rodriguez of Holland & Knight LLP in Washington D.C. represent the Software & Information Industry Association in this matter. Daniel Tobin of Ballard Spahr LLP, Bethesda, MD, represents Solers, Inc.

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5th Circuit Issues First Texas Anti-SLAPP Decision

Court's Ruling Leaves Dentist Smiling, Questions Unanswered

By Marc Fuller

In its first case under Texas's anti-SLAPP statute, the U.S. Court of Appeals for the Fifth Circuit held that the collateral order doctrine gave it jurisdiction to review a district court's order denying a law firm's motion to dismiss defamation and other claims filed by the owner of dental clinics targeted by the firms' advertisements. *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 2014 WL 941049 (5th Cir. Mar. 11, 2014). The Fifth Circuit declined, however, to decide whether the Texas anti-SLAPP law applies in federal court, finding that the plaintiff waived that argument by not raising it in the district court. On the merits of the law firm's motion to dismiss, the Fifth Circuit affirmed the district court's denial, holding that the firm's advertisements fell within the anti-SLAPP statute's "commercial speech" exemption.

Background

Plaintiff Kool Smiles owns a chain of dental clinics, providing care primarily to underprivileged children. Like several similar clinics in Texas, Kool Smiles has been under investigation for alleged Medicaid fraud and substandard treatment of patients. Defendant Mauze & Bagby ("M&B") is a San Antonio law firm, which ran television, radio, and internet advertisements (including a website, www.koolsmilesclaims.com) that allegedly accused Kool Smiles of performing unnecessary, harmful procedures on children to obtain Medicaid reimbursements.

Kool Smiles filed suit against M&B for state-law defamation and related claims, as well as various Lanham Act claims. M&B moved to dismiss the claims under Texas's anti-SLAPP statute, which was enacted in 2011. The district denied the motion as to Kool Smiles's Lanham Act claims, and M&B did not appeal this ruling. But M&B did appeal the district court's denial of its motion as to Kool Smiles' state-law claims on the grounds that the speech at issue applied was "commercial speech" and therefore not protected under the Texas statute.

Federal Jurisdiction

Prior to reaching the merits of M&B's interlocutory appeal, the Fifth Circuit considered its jurisdiction. Applying the collateral order doctrine, the court explained that the following three conditions must be met: (1) the order must conclusively determine the disputed question; (2) it must resolve an important issue in the case separate from the merits; and (3) it must be effectively unreviewable on appeal from a final judgment. The court noted that, while no Fifth Circuit decision had considered the appealability of an order denying a motion to dismiss under the Texas anti-SLAPP statute, it had previously held that appellate jurisdiction did exist to review district court orders denying anti-SLAPP motions under Louisiana's statute. *See Henry v. Lake Charles Amer. Press*, 566 F.3d 164 (5th Cir. 2009). Nevertheless, because the two statutes are not identical, the court conducted its own independent analysis of the collateral order requirements under the Texas statute.

The court had little difficulty concluding that an order denying an anti-SLAPP motion to dismiss was "conclusive," as it meant that the case would proceed normally and the district court would be unlikely to revisit the order. On "separability," the court analogized the anti-SLAPP motion to an immunity defense, noting that an anti-SLAPP motion merely presents the issue of whether merits questions exist, but does not require the court to resolve those underlying merits issues. On this point, the court commented that "separability" under the Texas statute was "even clearer" than separability under the Louisiana statute because the Louisiana statute required an inquiry into a plaintiff's "probability of success on the claim," whereas the Texas statute "does not require so searching a review." Rather, the Texas statute only requires the plaintiff to "establish a prima facie case for each element of the claim." With regard to the reviewability of the district court's order, the court again likened the anti-SLAPP statute to an immunity defense, protecting the defendant from the burden of trial. In doing so, the court relied on the availability of an interlocutory appeal under the Texas statute.

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(This analysis is even stronger now that the statute has been amended to clarify and confirm the existence of an interlocutory appeal.)

"Commercial Speech" Exemption

Turning to the merits of M&B's motion, the court agreed with the district court that the firm's advertisements fell within the statute's "commercial speech" exemption. Noting that the Texas Supreme Court has not yet ruled on the scope of this exemption, the court made an *Erie* guess that the firm's speech would not be protected under the state statute because it was designed to solicit potential clients and was primarily directed at those clients. The court distinguished Texas intermediate appellate courts' holdings that newspaper reporting and ratings by the Better Business Bureau were not "commercial speech." The court also distinguished California precedent holding that similar attorney speech was not exempt by holding that the California statute's "commercial speech" exemption required that the speech at issue consist of factual representations about the business or its competitors, whereas the Texas statute's "commercial speech" exemption contained no such limitation.

Outlook

As the court's "commercial speech" analysis shows, the Texas statute is still in its infancy. While there are encouraging signs in the Texas intermediate appellate courts that the statute will be interpreted as broadly and robustly as the legislature intended, we do not yet have any Texas Supreme Court guidance on the law. Moreover, the court's opinion demonstrates the importance for media counsel to educate Texas state and federal courts on the legislative intent behind the Texas statute and the ways in which courts in model jurisdictions, such as California, have interpreted their own anti-SLAPP statutes. Such guidance will minimize the risk that Texas courts get caught up in minor—and arguably meaningless—differences in statutory language.

For example, the Fifth Circuit's determination that the plaintiff's burden under Louisiana's "probability of success" standard is "[not] so searching" as Texas's "prima facie" standard overlooks the fact that, so far, these standards have been interpreted fairly consistently. For example, "probability of success" standards in anti-SLAPP statutes generally do not allow the trial court to weigh evidence. *See, e.g., Baxter v. Scott*, 847 So.2d 225, 231-32 (La. App. 2d Cir. 2003) (noting that Louisiana statute is "virtually identical" to California's and that a plaintiff satisfies his burden "through a prima facie showing of facts sufficient to sustain a favorable judgment"); *see also Taus v. Loftus*, 54 Cal. Rptr. 775, 778-79 (Cal. 2007) (California statute's "probability that the plaintiff will prevail" standard requires only that "the complaint [be] both legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited"). And the Texas "prima facie" standard requires the plaintiff to submit "clear and specific" evidence on each element, which Texas courts have described as an "elevated evidentiary standard." *See, e.g., Rehak Creative Servs., Inc. v. Witt*, 404 S.W.3d 716, 726 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) ("clear and specific evidence" standard requires plaintiff to submit evidence "unaided by presumptions, inferences, or intendments").

Finally, this case shows that there is also at least one big federal-law question that remains unanswered: Does the Texas statute apply in federal court? This court sidestepped that question on waiver grounds, finding that the plaintiff had not clearly and sufficiently raised its argument in the district court. Notably, the court did not cite precedent, including *Henry*, in which the Fifth Circuit had stated perfunctorily that the Louisiana statute does apply in federal court. *See* 566 F.3d at 168-69 ("Louisiana law, including the nominally-procedural Article 971, governs this diversity case."). This is curious given that Judge Edward Prado authored the opinions in *Henry* and this case. Whether this omission reflects disagreement within the Fifth Circuit, a reevaluation in light of subsequent developments (including, possibly, Judge Kozinski's recently-expressed reservations about Ninth Circuit jurisprudence on this issue), or nothing at all remains to be seen.

Marc Fuller is counsel at Vinson & Elkins in Dallas. Plaintiffs-Appellants were represented by Darren Lee McCarty, Michael Arthur Correll, and Sean Michael Whyte of Alston & Bird, L.L.P.. Defendants-Appellees were represented by Kimberly S. Keller of Keller Stolarczyk P.L.L.C.

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The Development of Shield Laws in Australia and the Growing Quest for Journalists' Sources

Peter Bartlett and Amanda Jolson

The Media Entertainment and Arts Alliance has called for uniform national shield laws. Christopher Warren, the Federal Secretary of the Alliance correctly referred to Australia's shield laws as "patchy and disparate."

According to Chris "it is appalling journalists are served with a subpoena that essentially would require them to breach their ethical obligation."

The comments followed this week's decision by Justice Janine Pritchard in the Supreme Court allowing us to seek special legal costs from Hancock Prospecting (Gina Rinehart). Hancock Prospecting had sought disclosure of sources from Fairfax's award winning journalist, Adele Ferguson.

Over recent years a number of Australian jurisdictions have adopted 'shield laws' that provide greater protection to the confidentiality of a source, and make it harder to compel journalists to reveal their sources to a court. These laws do not bestow an absolute privilege, but rather a discretion available to the court to excuse the journalist from identifying an informant.

Over recent years a number of Australian jurisdictions have adopted 'shield laws' that provide greater protection to the confidentiality of a source, and make it harder to compel journalists to reveal their sources to a court.

Where have shield laws been enacted?

The federal government and the state and territory governments of New South Wales (NSW), Victoria, Western Australia (WA), the Australian Capital Territory (ACT), have introduced shield laws through amendments to their respective Evidence Acts. While these laws are not uniform, they represent a significant increase in Australia's protection of freedom of speech and a journalist's right to protect the confidentiality of their sources.

Queensland, South Australia and the Northern Territory do not currently have specific laws to protect the relationship between journalists and their sources.

South Australia has introduced a Bill which would allow a professional journalist to avoid criminal or civil liability for failing to answer questions or produce material that may disclose the identity of an confidential informant. However an exception will be if the Court is satisfied it is in the public interest or in the interests of justice to make an order for disclosure or if the benefit of disclosing the identity of the informant or answering questions or providing relevant information outweighs the prejudicial effect that the disclosure would have on the informant or the journalist.

Although Queensland has expressed a preference for the adoption of uniform shield laws, journalists can currently rely on protection of their sources where a 'public interest disclosure' has been made – that is, where disclosure is made to a journalist after referral to an entity that had decided not to investigate the matter further.

Tasmania has not enacted journalism-specific shield laws, but does have a general 'professional confidential relationship privilege' which could operate as a shield law for journalists.

In addition, 'public interest disclosure' laws can protect the identities of whistleblowers in certain circumstances, such as by public officials, officers, employees or contractors, or entities that are performing a public function on behalf of the state, a public body or a public officer.

Who can use these laws?

In all cases, the laws can be invoked not only by the journalist but also his or her employer.

The Commonwealth and ACT Acts, and South Australian Bill are notable for their broad definition of a 'journalist'. The definitions cover anyone who 'is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium'. The original proposed definition of someone 'employed' in the publication of news was specifically changed to capture those who work unpaid or at an amateur level. As the definition of journalist does not make reference to the 'profession or occupation of journalism' (unlike the NSW provisions which are narrower),

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it would seem to cover journalists in mainstream media, citizen journalists, bloggers and independent media organisations. A 'news medium' will include 'any medium for the dissemination to the public or a section of the public of news and observations on news', which seemingly includes a blog or perhaps even publication that only reaches a small audience.

The NSW, Victorian and WA laws define journalists more narrowly, as someone 'engaged in the profession or occupation of journalism'. An amateur blogger would not be included. The NSW and WA jurisdictions are somewhat broadened by a 'professional confidential relationship privilege' law that allows the court to make similar orders in respect of those who are not considered journalists.

The Victorian amendments cover the professional publication of comments, opinions, and analysis, and so are arguably wider than other state laws covering 'news and observations on the news'.

When may shield laws be enforced?

Shield laws do not automatically protect all sources. In all jurisdictions, the journalist *must* have promised anonymity to the source to enliven the laws.

All jurisdictions have an exception that the court can decide against an application if it finds that the public interest in doing so outweighs:

- any likely adverse effect on the informant or any other person; and
- the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, the ability of the news media to access sources of facts.

Therefore the Acts do not provide comprehensive protection for journalists as they rely upon the discretion of the court.

Victoria

The source must provide the information to the journalist 'in the normal course of [the journalist's] work', with the expectation that the information may be published in a news medium. This means if the journalist has received a tip in a private capacity, such as speaking with family or friends, or in the course of a second job, the source will not be protected.

The Victorian laws will also not apply in certain proceedings including those conducted by the Independent Broad-Based Anti-Corruption Commission or the Office of Police Integrity.

Western Australia

The shielding presumption in WA can be overruled not only by a court, but also by a 'person acting judicially' if it is considered that the public interest outweighs the protection to the individual. It is important to note that 'a person acting judicially' will not include a member of parliament or a parliamentary committee member who has authority to hear, receive and examine evidence. In *Hancock Prospecting Pty Ltd v Hancock* [2013] WASC 290, which is referred to in more detail below, the Court held that a 'person acting judicially' includes an arbitrator.

WA was one of the first jurisdictions to have its shield laws tested in court in the *Hancock Prospecting* case. Justice Janine Pritchard set aside subpoenas sought by Hancock Prospecting against West Australian Newspapers, ruling them oppressive and an abuse of process in contravention of the shield laws. Though the WA laws do not specifically mention subpoenas for production of documents, her Honour found that failure to use the shield laws in this case would make them nonsensical.

Professional responsibilities

In addition to the protection afforded by statue, journalists have professional responsibilities consistent with the precepts of their profession.

Most journalists are members of the Media Entertainment and Arts Alliance (MEAA). Clause 3 of the MEAA Journalist Code of Ethics states that where confidences are accepted by an MEAA member, they must be respected in all circumstances. The Code also provides that a journalist should:

> Aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives

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and any alternative attributable source. Where confidences are accepted, respect them in all circumstances.

The significance of this principle was acknowledged by Justice Harper in the Victorian Supreme Court of Appeal, who held that *'one mechanism, appropriate in some but not all circumstances, by which journalists elicit the truth is to promise anonymity to those from whom they source their information. This too serves the public interest, an interest advanced not only by the code of ethics of The Age but also by that of the MEAA (of which the applicants are members)*'.

Recent cases

Despite the introduction of the new legislation, journalists' sources are under unprecedented challenge in our courts.

Hancock Prospecting / Steve Pennells and Western Australian Newspapers

Earlier this year, Gina Rinehart's company Hancock Prospecting issued subpoenas against journalist Steve Pennells and his employer Western Australian Newspapers in the Western Australian Supreme Court for the production of documents in an ongoing arbitration, a claim requiring the disclosure of confidential sources. It is one of the first opportunities a court has had to consider the new protections. Justice Janine Pritchard delivered her judgment on 6 August 2013. Justice Pritchard found the protection in section 20 of the WA Evidence Act applied so that a journalist could not be compelled to give evidence identifying confidential sources, accepting that an order of disclosure would '*constitute a breach of a fundamental ethical obligation*'. Despite this 'ethical obligation', Justice Pritchard found the action would have failed but for the enactment of the shield law legislation. '[T]*he so-called newspaper 'rule' is not, in fact, a rule at all*', she held, stating that the position at common law remained that '*the media and journalists have no public interest immunity from being required to disclose their sources of information when such disclosure is necessary in the interests of justice*'.

Hancock Prospecting / Adele Ferguson and Fairfax Media

Hancock Prospecting also sought disclosure of sources from Adele Ferguson, an award winning journalist employed by Fairfax Media. The application was withdrawn following the Pritchard J decision in the Pennells and Western Australia Newspapers case.

Helen Liu / Nick McKenzie, Richard Baker and Philip Dorling

Three respected investigative reporters employed by Fairfax Media, Nick McKenzie, Richard Baker and Philip Dorling, are facing two applications by businesswoman Helen Liu to disclose documents that would reveal information about their confidential sources for a series of stories published in *The Age* on the relationship between the Chinese-Australian businesswoman and federal Labor MP Joel Fitzgibbon. NSW Supreme Court judge Lucy McCallum ordered the journalists to disclose their sources and held that a journalist's pledge to keep a confidential source '*is not a right or an end in itself*' and could be overridden '*in the interests of justice*'. This decision was upheld on appeal to the Court of Appeal. The High Court refused the journalists' application for special leave to appeal from the Court of Appeal's decision. It is back in court on 11 April 2014. The NSW Shield laws were not in operation at the time of publication.

Note Printing and Securency / Nick McKenzie and Richard Baker and Fairfax Media

The Magistrates' Court of Victoria re-issued two witness summonses in December 2012 to Nick McKenzie and Richard Baker which required them to give evidence and produce documents in relation to their sources for an article they published. The evidence was sought in a committal proceeding for charges against former executives of Reserve Bank subsidiaries, Note Printing Australia Ltd and Securency International Pty Ltd. Although the Commonwealth laws were in place, the Victorian shield laws were yet to take affect. The journalists' application to set the summonses aside was refused and they sought judicial review of the Magistrate's decision that would have compelled them to

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comply with the summonses. The Supreme Court refused their application. This decision was appealed to the Court of Appeal, who set aside the witness summons. Justice Harper noted in the judgment that '*investigative journalists have a legitimate interest in uncovering the truth about a story such as this; and they serve an important public interest in having that truth revealed*'.

Nathan Tinkler / Paddy Manning

Paddy Manning, a then journalist with *The Sydney Morning Herald* newspaper was subject to a subpoena requiring him to hand over confidential information about a source relating to the business affairs of mining entrepreneur Nathan Tinkler. Mr Manning had appropriately sent an email to Mr Tinkler's PR team asking for comment prior to publication of a story about Mr Tinkler's liquidity and commercial dealings. A super-injunction was successfully imposed on the publication of information received from the source. An agreement between Mr Tinkler and Fairfax Media continues to suppress limited details of Manning's report but the super-injunction and the subpoena were lifted.

Sunland / Ben Butler and Fairfax Media

Property developer Sunland threatened Fairfax Media and business reporter Ben Butler with legal action if they did not 'immediately reveal' the source of an article about a controversial property deal in Dubai. The court issued an injunction preventing Fairfax Media reporting further details of a confidential deed. An out of court settlement was reached for non-publication of the deed.

Glenn Crisp / Adele Ferguson

Chartered accountancy firm RSM Bird Cameron issued proceedings for fraud and misappropriation of funds in the County Court of Victoria against Glenn Crisp, a former partner and an insolvency practitioner, liquidator and chartered accountant. Adele Ferguson obtained copies of the Writ and Statement of Claim. Crisp made an urgent inter parties application to the Supreme Court of Victoria for an injunction restraining *The Age* newspaper, Fairfax Media and Adele Ferguson from publishing any allegations defamatory of Crisp in the County Court documents. Crisp's application was eventually unsuccessful. However, as a result, in the course of the ongoing proceedings between RSM Bird Cameron and Crisp, Fairfax Media was served with a summons seeking a permanent injunction and disclosure by Ms Ferguson of her source of the court documents. Crisp had requested that each partner of RSM Bird Cameron swear under oath that they were not the source. The primary action settled and the subpoena has lapsed.

Australian Federal Police / Royce Millar, Nick McKenzie and Ben Schneiders

Royce Millar, Nick McKenzie and Ben Schneiders were charged with the offence of gaining unauthorised access to restricted information held on an ALP database. In an attempt to ascertain who provided access to the database, the Australian Federal Police raided *The Age*'s offices and the home of one of the journalists. Whilst the journalists refused to disclose their source, the AFP charged a fourth person who they believe had provided the username and password to the journalists which enabled them to access the information on the database. All four accused escaped conviction and were placed on a court diversion program in the Magistrates' Court of Victoria.

ASADA

The Australian Sports Anti-Doping Authority wrote to *The Age* newspaper requesting the source of a leaked confidential report on its doping investigation at the Essendon Football Club.

Conclusions

We acted for the reporters in all of these claims save for that against Steve Pennells. These applications were made against some of the best reporters in Australia, reporters who were just doing their job and doing it well.

These cases highlight the need for shield laws and uniformity. Despite some wins for the media, we are still left questioning why is it that the NSW law specifically covers subpoenas and the W.A. law does not, and why the definitions of "journalist" differs?

Peter Bartlett and Amanda Jolson are lawyers with Minter Ellison in Australia.

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NTSB Judge Shoots Down Drone Regulation in Photographer's Case

FAA Immediately Appeals Ruling

By Charles D. Tobin and Mickey H. Osterreicher

The Federal Aviation Administration (FAA) has appealed this month's ruling by an administrative law judge striking down a fine against paid photographer who had strapped cameras to a model airplane and photographed the University of Virginia. *See Huerta v. Pirker*.

The case, now pending before the National Transportation and Safety Board (NTSB), could alter the flight path of the current development of regulations and laws that will affect newsrooms' abilities to use drones to gather news.

On March 6, 2014, the NTSB administrative law judge rebuked the $10,000 fine issued to Raphael Pirker. The photographer received the fine in 2011 for operating a cameras-equipped Zephyr II RiteWingRC electric flying wing model aircraft.

The case, now pending before the National Transportation and Safety Board, could alter the flight path of the current development of regulations and laws that will affect newsrooms' abilities to use drones to gather news.

The FAA distinguishes model aircraft – defined as devices flown purely for recreation and hobby – from commercial drones, also known as unmanned aerial vehicles (UAVs). The FAA does not regulate flights of model aircraft flown below 400 feet and a sufficient distance from populated areas and full-scale aircraft. Instead, in 1991, the FAA in conjunction with the model aircraft hobbyists' association, issued guidelines for their use.

By contrast, under a 1997 published policy, commercial UAVs – currently defined as any pilotless aircraft that is flown for compensation – are ostensibly unlawful unless the FAA grants a special license. To date, the FAA has only granted one such license, to energy company ConocoPhillips for use only in the Arctic regions. Last year, the FAA banned experimental journalism classes at the University of Nebraska and the University of Missouri from operating UAVs without FAA licenses (which were later obtained).

In the case decided this month, the NTSB administrative law judge dismissed the fine against Pirker, who, they alleged, flew his drone near University of Virginia buildings, through a tunnel and around people, taking the aerial photographs and film for marketing purposes. In dismissing Pirker's fine, the judge noted that the FAA has never issued compulsory rules regarding model aircraft, and that guidelines for model aircraft they issued in 1991 are purely voluntary.

In another significant aspect of the decision for newsrooms, the judge also held that the FAA's policy prohibiting the use of commercial drones was invalid. The 2007 policy, according to the ruling, had not been issued within the proper timeframe following publication in the Federal Register. As a result, the judge held, it could not be enforced against Pirker.

The day after the ruling, the FAA issued a press release announcing the appeal. It said, "The agency is concerned that this decision could impact the safe operation of the national airspace system and the safety of people and property on the ground."

The appeal stays the ruling. This leaves the enforceability of the commercial-drone ban – at least for the moment – up in the air.

But the administrative law judge's decision may accelerate the FAA's efforts to integrate commercial use of drones into the national airspace. In 2012, Congress mandated in the FAA Modernization and Reform Act that the agency develop new regulations by 2015. Last November, the FAA released what it calls a "roadmap" for drone integration, outlining the establishment of six test sites that will reflect a diversity of climate, geography and ground infrastructure.

So far, however, the FAA is doing its best to duck the privacy issues that will inevitably become a focus for discussion with lawmakers over journalists' use of drones. Instead, the agency's roadmap reported that "although the FAA's mission does not include developing or enforcing policies pertaining to privacy or civil liberties, the test sites' operators will be required to establish privacy policies for

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testing at each." The roadmap states that the record of the tests performed under those policies "will help inform the dialogue among policymakers, privacy advocates, and the industry regarding broader questions concerning the use of" UAVs in national air space.

Earlier this month, the House of Representatives Aviation Subcommittee held a roundtable discussion on the FAA test sites. The discussion made clear that while some members of Congress are eager for the economic benefits drone use will foster, others oppose moving forward until their concerns about privacy are satisfied.

There has also been pushback from other UAV operators. In February, Pedro Rivera, a photojournalist for WFSB, a Hartford Connecticut TV station, heard about a fatal accident on his scanner and decided to take his DJI Phantom 2 Vision to the scene where he flew it over the accident. When police noticed the unmanned craft, officers ordered him to cease operating the device and leave the scene. Police also contacted his employer claiming he had interfered with their investigation. This resulted in Rivera's suspension for at least one week without pay. Shortly thereafter Rivera filed a federal lawsuit against the officers involved alleging violations of his First and Fourth Amendment rights.

The complaint states that "his device was hovering at an altitude of 150 feet" and that Rivera was

> standing in a public place outside of a cordoned off crime scene. It also states that Rivera was "operating his device in public space, observing events that were in plain view" and that Rivera "was not operating a 'civil aircraft' within the meaning of any state or federal regulations" when he was stopped and detained by police.

It alleged that "private citizens do not need local, state or federal approval to operate a remote- controlled model aircraft" and that police intended to "impede the exercise of" Rivera's "First Amendment "rights in monitoring the police response to a motor vehicle accident" along with chilling his free speech rights and thus depriving "the public at large to have video reports of what police officers do in the investigation of a crime."

According to reports, Rivera claimed he "did not take aerial video for compensation by WFSB" but acknowledged "passing on drone-gathered video to the commercial television station."

Other recent news events involve coverage by UAVs. In March, shortly after a catastrophic building explosion in East Harlem, NY a small UAV was seen hovering over the still-burning rubble. Aerial photos of the fatal accident site appeared in the *NY Daily News* and other news outlets. Reports state that when Brian Wilson first heard about the collapse he immediately took a taxicab to the scene bringing his quadcopter with him. "When the smoke cleared, you could see everything, where the buildings separated, where the walls fell, the debris scattered on the Metro-North tracks across the street," Wilson, who previously used the UAV to shoot real estate and sports events, said. "This was the first time I used it for breaking news," he added.

The Fresno Bee is also considering UAV use for newsgathering. They report "testing a small drone aircraft to see if it can be used for aerial photography of accidents, fires, farmland, lakes and waterways."

Wilson claims that police initially questioned him about his UAV but allowed him to fly it for about half an hour at between 150 to 200 feet above the rubble before it ran out of battery power. "At the end, the cops said they'd prefer if I didn't fly in the area anymore, so I stopped," he said.

The *Fresno Bee* is also considering UAV use for newsgathering. They report "testing a small drone aircraft to see if it can be used for aerial photography of accidents, fires, farmland, lakes and waterways." If the tests prove successful, the publisher at the California newspaper believes it would be less expensive to operate and more readily available than a helicopter.

Turning to sports – millions of viewers who watched the Sochi Winter Olympics saw spectacular never-seen-before views of many of the venues thru the lens of a camera-equipped UAV. Although this was not a first in sports coverage, use of a $40,000 HeliPOV was highly promoted. One veteran photographer noted that use of UAVs is now preferred for capturing aerial footage because the craft can get "really, really close" while also being "really quiet, so nobody is distracted."

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While such use in Russia was not prohibited, similar use by sports teams in the United States has brought FAA scrutiny. In early March, reports out of Florida indicate that the FAA is investigating the use of a UAV by the Washington Nationals during Spring Training at the Brevard County Space Coast Stadium.

Florida appears to be a hotbed of commercial UAV use for such ostensibly banned purposes as aerial photography for real estate listings and sales. Last year, the Orange County Sheriff's Office proposed using UAVs, which led to widespread and vocal concern by citizens over privacy and property rights. This in turn allowed Florida to become the first state to regulate law enforcement UAV use in April 2013.

But Florida was not the first state to legislate against the use of UAVs. A few days earlier, Virginia received that designation followed by Idaho, which enacted a law protecting individuals from unfettered surveillance by UAVs. That statute also restricts the private use of such unmanned vehicles but carves out certain exceptions. One thing absolutely prohibited is the use of UAVs to photograph or recording private property without the property owner's written permission.

It also restricts UAV use for "photography or recording of any individual for the purpose of publishing or disseminating the image or data." In the past year a total of 44 states have proposed or enacted similar measures including Texas which also restricts private citizens from using UAVs to photograph or record, but provides a broad list of exceptions to that prohibition for law enforcement. The Texas legislation also amended the bill to exclude a proposed newsgathering exception.

These incidents are just the latest examples of the ever-growing uses of UAVs. They help highlight the need for comprehensive and commonsense regulations that will strike an equitable balance between privacy and air safety concerns and the constitutional rights of citizens and journalists to use a new tool for newsgathering.

Chuck Tobin chairs the National Media Practice Team of Holland & Knight LLP and works in the firm's Washington D.C. office. Mickey Osterreicher is the General Counsel of the National Press Photographers Association (NPPA).

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Court Rules Lawyer's $1 Million Challenge Didn't Create Unilateral Contract

Unedited Dateline Interview Showed No Contract Was Made

It sounds like it was made for TV. A criminal defense lawyer on national television offers $1 million to anyone who can disprove part of his client's defense. The prosecution argued that his client flew roundtrip from Atlanta to Florida to commit murder, and returned from the Atlanta airport to his airport hotel five miles away within 28 minutes. His lawyer declared this last step wasn't humanly possible. A clever law student file suit against the lawyer arguing he performed the challenge. While the budding legal practitioner's lawsuit to get $1 million for his speedy deplaning might be *made* for TV, a court has ruled that there was no made-*on*-TV contract because the lawyer's unedited statements did not create an offer. *Kolodziej v. Mason*, 6:11-cv-859 (M.D. Fla. Jan. 29, 2014) (Honeywell, J.).

The Florida court described plaintiff's suit as a "prove me wrong" case, i.e., an action to enforce a promise of payment to anyone who can prove the offeror wrong regarding a particular claim.

Background

James Cheney Mason was one of the attorneys representing a defendant accused of murdering four people in central Florida. The murder defendant Nelson Serrano's alibi was that he was in Atlanta at the time of the murders, as evidenced by his appearance on a hotel security camera in Atlanta in the morning and the evening of the day of the murders. His attorney James Cheney Mason, appearing on NBC's *Dateline*, said the prosecution's theory that Serrano flew to and from Florida and got off the plane in Atlanta and back to the hotel in 28 minutes was preposterous.

The *Dateline* interview included the following exchange:

> Dateline: And the last part of the time line, the defense argued, was even more implausible. In less than half an hour, Serrano would have had to get off a wide-bodied jet, exit Atlanta airport, one of the busiest in the world and arrive back at his hotel five miles away, all in time to be photographed looking up at the surveillance camera.
>
> Mason: I challenge anybody to show me—I'll pay them a million dollars if they can do it.
>
> Dateline: If they can do that in the time allotted.
>
> Mason: Twenty-eight minutes, can't happen. Didn't happen.

Plaintiff Dustin S. Kolodziej, then a law student at South Texas College of Law, said he was entitled to $1 million because he accepted Mason's unilateral contract offer by performing the challenge: after his plane landed in Atlanta, he got to his hotel lobby in 19 minutes. Plaintiff originally filed suit in Texas, but that case was dismissed for lack of personal jurisdiction. He then refiled in Florida for breach of a unilateral contract.

Unilateral Contract Law Analysis

The Florida court described plaintiff's suit as a "prove me wrong" case, i.e., an action to enforce a promise of payment to anyone who can prove the offeror wrong regarding a particular claim. Such suits have been enforced. In one notable case, the operator of the "Jesse James Museum" in Missouri appeared on a nationwide television interview program and offered $10,000 to anyone who could disprove his contention that Jesse James was not murdered in 1882, but lived for many more years under an alias. A relative of Jesse James successfully sued for the $10,000 by producing affidavits of persons who had identified Jesse James' body in 1882. *See* *James v. Turilli*, 473 S.W.2d 757, 763 (Mo. App. 1971).

Here, however, plaintiff's claim failed because the unedited transcript of defendant's *Dateline* interview showed

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he was not issuing a challenge to the world at large but had directed his comments to the prosecution. In the unedited transcript, Mason stated:

> I challenge anybody to show me, and guess what? Did they bring in any evidence to say that somebody made that route, did so? State's burden of proof. If they can do it, I'll challenge 'em. I'll pay them a million dollars if they can do it.

The court held that plaintiff could not rely on the challenge presented in the unedited version because the plaintiff did not know about it. Moreover, the unedited version showed Mason was not leveling a general challenge to any member of the public but challenging state prosecutors to prove their theory, the judge said.

"The actual 'challenge' was not open to anybody, and that conclusively forecloses any opportunity Kolodziej has now to argue that the 'challenge' somehow constituted a valid offer and that he accepted that offer by his performance."

As a matter of law, no unilateral contract formed between plaintiff and defendants under these circumstances.

Plaintiff was represented by John Armando Boudet, Roetzel & Andress, LPA, Orlando, FL. Defendants were represented by Thomas K. Equels, Equels Law Firm, Orlando, FL.

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A View from the Inside: Keeping Communications Confidential

By Ashley Messenger

On February 15, the New York Times published an article revealing that an Australian ally of the National Security Agency (NSA) had captured confidential attorney-client communications between a law firm and its client, the Indonesian government, whom the firm was assisting with trade matters. This revelation came after a year of news stories about NSA capture of Americans' data, multiple leak prosecutions, search warrants for journalists' information, and numerous successful hacking attempts against media websites.

It should be obvious to even the most casual observer that, unless people take affirmative steps to protect themselves, it is easy for the government, hackers, or other third parties to obtain information derived from technologies we use daily, such as phones, email, text messaging, third party applications, and websites.

From an in-house perspective, information security is a serious concern. Those of us who represent journalists wish to protect them from government interference with or intrusion into source relationships, and all of us wish to protect our own attorney-client confidences. Individual media companies have to make choices about the technologies they use, but outside firms also need to understand and appreciate the information security concerns of clients.

From an in-house perspective, information security is a serious concern.

There are three things outside firms can do to help: First, familiarize yourself with the various information security threats that exist and the remedies available, so you can assist clients in selecting options that work best for their needs (and advocate for changes in the law). Second, adopt some of the secure communication methods to protect your own communications with clients. Third, help your clients engage in threat modeling. Threat modeling is the notion that you can't realistically protect against everything that could possibly go wrong, and thus you need to assess what threats are most realistic or concerning, and make choices based on those threats.

For media clients, the most obvious threats come from government subpoenas or seizure of information. In some cases, the government simply seeks records noting the existence of communications, but in other cases, it may capture the content of the communications. Outside counsel need to understand these threats and the technology that journalists can use to address them.

Searches & Subpoenas Seeking Existence of Communications

Three recent cases illustrate the risks of government investigations, typically arising from the desire to identify the source of a news report.

In 2010, former CIA officer Jeffrey Sterling was indicted on charges of providing New York Times reporter James Risen with information about a failed CIA attempt to sabotage Iran's nuclear program. Risen was subpoenaed but refused to reveal his sources. However, the prosecution subpoenaed and seized years of communications records between the two men that showed dozens of telephone calls and e-mails between Sterling and Risen.

Then, in April and May of 2012, the DOJ secretly obtained two months of telephone records of reporters and editors for the Associated Press (AP). The records listed incoming and outgoing calls, and the duration of each call, for the work and personal phone numbers of individual reporters, general AP office numbers, and the main number for AP reporters in the House of Representatives press gallery. The telephone records obtained did not include the content of phone calls, but they likely revealed the phone number of each and every caller on those lines for a period of weeks and, therefore, the identity of a number of confidential sources.

Lastly, about a week after the DOJ notified the AP that it had secretly seized the AP's phone records, *The Washington*

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Post uncovered a search warrant in another leak case that raised similar concerns. The Post reported that in 2010, a FBI counterespionage agent obtained a sealed search warrant for access to the Gmail account of James Rosen, Fox News's chief Washington correspondent. The agent also pulled records from the State Department showing Rosen's comings and goings, as well as telephone records showing phone numbers, times, and durations of calls. The various records and emails were sought as part of a leak investigation into a June 2009 story Rosen wrote reporting that North Korea would conduct a nuclear test in response to a critical United Nations resolution.

What the three cases have in common is that the government sought records in the possession of third parties or metadata that is easy to track and almost impossible to protect. Although the Privacy Protection Act and the DOJ Guidelines provide some minimal protection, neither was helpful in these cases. Moreover, no warrant is needed to obtain the content of older emails or texts stored by third parties, or any of the myriad types of metadata individuals generate when communicating, including who individuals email with, who individuals send text messages to, and the Internet Protocol addresses of the Internet sites individuals visit.

Unless people take affirmative steps to protect themselves, it is easy for the government, hackers, or other third parties to obtain information derived from technologies we use daily, such as phones, email, text messaging, third party applications, and websites.

In addition to targeting whistleblowers directly, the United States and other governments are engaged in large scale suspicionless surveillance that focuses on "collecting it all" and worrying about what was collected after the fact. Because it is difficult if not impossible to prevent such government intrusion, the best a firm can do is give guidance on avoiding the use of digital technology or third party providers (to the extent that is realistic or possible) and advocate for greater protections from government intrusion.

Government Spying on Contents of Communications

In addition to capturing metadata, the government sometimes captures the content of communications. Even more worrisome, the NSA offers minimal protections for attorney-client privilege. The NSA can intercept the communications of Americans if they are in contact with a foreign intelligence target but must follow so-called minimization rules to protect Americans' privacy, such as deleting the identity of Americans or information that is not deemed necessary to understand or assess the foreign intelligence, before sharing it with other agencies.

The NSA's minimization rules are narrowly crafted to allow use of attorney-client information for intelligence purposes, but not for prosecution of an American defendant. As noted above, it recently came to light that a law firm with a global practice was advising the Indonesian government on trade issues when an Australian ally of the NSA spied on their communications.

This disclosure offers a rare glimpse of a specific instance in which American communications that were supposed to be confidential were obtained by the NSA and shows the NSA's disregard for traditional notions of privilege. The potential capture of discussion is a large threat, as journalists want their communications with sources to be secret, and media companies want their communications with counsel to be protected, as well.

The good news is that it is much easier to protect the contents of communications than the existence of the communication. Encryption is a very successful tool for keeping communications secure. And, outside counsel should understand encryption technology, and the options available for using it.

Public-key cryptography, also known as asymmetric encryption, refers to a cryptographic algorithm that requires two separate keys, one of which is private and one of which is public. Although different, the two parts of this key pair are mathematically linked. The public key is used to encrypt plaintext or to verify a digital signature, and the private key is used to decrypt ciphertext or to create a digital signature.

Public-key algorithms are based on mathematical problems where it is computationally easy for a user to generate their own public and private key-pair and to use

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them for encryption and decryption but computationally unfeasible for a properly generated private key to be determined from its corresponding public key. Therefore, the public key may be published and used to encrypt messages without compromising security, and the private key allows users to read messages.

Asymmetric encryption can also be used to perform email signing to authenticate whether an email has not been tampered with. For this, the email sender encrypts a mathematical fingerprint, or "hash" of their file, producing a signature. Hashes are designed so that any small change to the message's text will produce a different hash value. Anyone reading the email can then decrypt the signature using the sender's public key, giving them the original hash value. They can then compute the hash value of the mail they received and compare the two. If the values are the same, the message hasn't been modified.

In practice the function of encrypting and digitally signing emails can be handled automatically using free open source email encryption software. Mozilla Thunderbird is a free and open source email client for receiving, sending and storing emails. Enigmail is an add-on developed for Thunderbird. It lets users access the authentication and encryption features provided by GNU Privacy Guard (GnuPG). GnuPG is a public key encryption program used to generate and manage the key pairs to be used in encrypting and decrypting messages, to keep email communications private and secure. Once the basic software is installed and the process of encrypting emails is explained, using the software is fairly simple to integrate into one's usual routine.

The James Risen and AP phone records cases show that metadata such as who called whom when can be used to identify whistleblowers. In light of the leaked documents revealing the details of global surveillance programs run by the NSA, there has been a major push to develop open source software applications that allow secure off the record conversations. Off-the-Record Messaging, commonly referred to as OTR, is a cryptographic protocol that provides strong encryption for instant messaging conversations. The primary motivation behind the protocol was providing perfect forward secrecy with plausible deniability for the conversation participants while keeping conversations confidential, like how talking off the record is supposed to work in journalism sourcing. This is in contrast with other cryptography tools that produce output which can be later used as a verifiable record of the communication event and the identities of the participants.

Many instant messaging service providers store logs of conversations and could hand them over to third parties from advertising companies to governments. There are Instant Messaging (IM) services that allow users to encrypt chats, so that they can only be read by their intended recipients. Pidgin is a free and open source client that lets you organize and manage your IM accounts and supports an OTR plug-in.

Outside firms would serve their clients well by familiarizing themselves with the threats faced by clients, advocating for strong legal protections, and leading the way by adopting and assisting in the adoption of secure communication technologies.

There are also iPhone and Android applications that aim to strike a balance between security and usability, but secure communications tools are difficult to create and newer applications claiming to effectively protect your privacy have been criticized for failures and potential weaknesses.. There is still a lot of work being done to bring end-to-end untraceable chat software to market, and this is definitely an area that should be followed closely for the foreseeable future.

Outside firms would serve their clients well by familiarizing themselves with the threats faced by clients, advocating for strong legal protections, and leading the way by adopting and assisting in the adoption of secure communication technologies.

Ashley Messenger is Senior Associate General Counsel for NPR and author of A Practical Guide to Media Law, a textbook published by Pearson. Credit is due to Brian Rideout, Counsel for NPR, for his assistance with the preparation of this article.

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Ethics, Aspirations, and the *Animal House* Standard

By Len Niehoff

You would think that the lawyers who drafted our legal ethics codes (being lawyers and all) would have honored the due process principle that those who are regulated should be able to understand what they can and cannot do. You would be wrong.

The mischief started early. The American Bar Association approved its first code—the Canons of Professional Ethics—in August of 1908. Many of the Canons used vague and abstract language that set a high moral tone but that did not work well in a regulatory instrument. For example, Canon 29 heroically declared that a lawyer "should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice." A lovely and chivalrous thought, this, but it is hard to tell when an attorney has run afoul of it.

The preamble to the Canons did not help the cause of specificity by announcing that "the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned." The Canons thus expressly included some mysteries—like what it means for a lawyer to "uphold the honor of the profession" or to "improve the law"—and hinted at an indeterminate number of unnamed additional ones. These unspoken rules may bring to mind the "double secret probation" imposed upon the Delta fraternity by the dean of Faber College in the film *Animal House*: undisclosed and unspecified—but available for gleeful enforcement by a vengeful authority.

Many states have now adopted "professionalism codes" that exhort lawyers to behave in civil, courteous, and non-obstreperous ways. In some jurisdictions, those codes are being enforced—and with severe sanctions.

The ABA attempted to address these shortcomings by, in 1969, adopting the Model Code of Professional Responsibility. The Code tried to provide greater clarity by dividing its imperatives into three categories: canons, which were broad statements of norms; ethical considerations, which were non-mandatory exhortations of the ideal behaviors toward which lawyers should strive; and disciplinary rules, which set the minimum level of conduct below which no attorney could fall without facing disciplinary action. Alas, the division was not that tidy. The Code declared that the ethical considerations could be consulted in interpreting the disciplinary rules; some of the ethical considerations were couched in mandatory language; and in a few instances the import of an ethical consideration and of a disciplinary rule seemed indistinguishable. In short, the Model Code drew a line between the aspirational and the mandatory, and then blurred the very line it had drawn.

The ABA therefore took another pass at this project, resulting in the Model Rules of Professional Conduct, adopted in 1983. The commission that drafted these rules was chaired by Robert Kutak of Nebraska, who made no bones about his goal of eliminating aspirational material from the new version. "The problem with aspirational standards," Kutak sagely observed, "is that too often they do not remain aspirational. They tend," he warned, "to become enforceable rules." The Model Rules underwent some significant changes in 2003 and now provide the framework for the attorney disciplinary codes of most states, although there are jurisdictional variations.

Notwithstanding these efforts, aspirational thinking proved difficult to exorcise from the rules. Indeed, we find instances of aspirational thinking in the preamble and in numerous rules and comments. A conspicuous example is rule 6.1, which describes the level of pro bono service that a lawyer should "aspire" to provide to the poor, but there are many others.

Furthermore, when the states adopted the Model Rules some injected additional aspirational elements. For example, Michigan rule 6.5(a) requires lawyers to treat with courtesy and respect all persons involved in the legal process—certainly a sound principle of etiquette and professionalism, but pretty mushy and misty-eyed as disciplinary regulations go. Readers interested in more examples and further analysis are invited to review my article "In the Shadow of the Shrine:

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Regulation and Aspiration in the ABA Model Rules of Professional Conduct," 54 Wayne L. Rev. 3 (2008).

But the persistent and pervasive influence of aspirational thinking does not end there. Many states have now adopted "professionalism codes" that exhort lawyers to behave in civil, courteous, and non-obstreperous ways. In some jurisdictions, those codes are being enforced—and with severe sanctions. An article from February of this year notes that 43 states and the District of Columbia have adopted some form of professionalism code and describes recent decisions from Florida where lawyers received substantial penalties for engaging in unprofessional behavior.

In one of those cases, the lawyer received a two-year suspension from practice—to be followed by an eighteen-month probationary period—even though his actions largely consisted of tirades before judges rather than the sort of rule violation that has historically supported a punishment of this severity, such as the commission of a crime, the misuse of funds held in a client trust account, or inappropriate sexual contact with a client. *See* Gregory P. Hanthorn, "When Breaches of Professionalism Become Sanctionable."

It is too soon to tell, but the trend may be toward putting teeth in these codes—and then putting those teeth to work.

There is some irony in this, because the effect of layering enforceable professionalism codes on top of legal ethics codes will be to reverse completely the work of the Kutak Commission, to reintroduce aspirational thinking—on steroids—into the disciplinary environment, and to make lawyers less certain than ever when they are, and are not, doing something for which they can be sanctioned.

These developments come at a particularly important time because recent charges of large-scale lawyer misconduct might lull attorneys into believing that if they aren't committing *New York Times*-headline-worthy acts of fraud, deceit, and misappropriation then they are behaving ethically and they won't be punished for any smaller missteps. It would be a grave mistake, though, to think that way. History suggests that—all efforts to the contrary notwithstanding—the irresistible creep of lawyer regulation lies in the direction of the vague, subjective, and aspirational.

Alas, it turns out that there are more rules in heaven and earth than are dreamt of in our philosophies.

And we're all on double secret probation.

Len Niehoff is Of Counsel to the Honigman law firm and is Professor from Practice at the University of Michigan Law School, where he teaches Media Law and Legal Ethics courses. The views expressed here are his own.

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Friday, May 16, 2014, 8:30 a.m. to 1:00 p.m.

Digital Video Convergence • Scraping Content •
Digital Media in the Age of NSA Surveillance •
Online Advertising & Privacy Regulations •
Mobile Legal Issues • Venture Capital

Register online at www.medialaw.org

CONFERENCE SCHEDULE

Thursday, May 15, 2014

Digital Video Convergence
1:10 p.m. to 2:25 p.m.

With all of the various video distribution platforms now in wide use, this panel will address the business environment, business models and legal challenges of putting together video content deals in the digital age.

Scraping Content: the CFAA, DMCA, and Terms of Use
2:40 p.m. to 3:55 p.m.

How and why are content hosting websites, such as LinkedIn, Craigslist, and Facebook using the CFAA to police third-party uses of their original and UGC content?

Digital Media in the Age of NSA Surveillance
4:10 p.m. to 5:25 p.m.

This panel will cover the implications of US spying and data-collection on American digital media, domestically and around the world, and explore how digital companies should respond in the wake of government demands for user information.

Friday, May 16, 2014

Is Mobile Different?
8:30 a.m. to 9:50 a.m.

This panel will explore the differing business models and legal issues that are special to mobile technologies, including FCC and regulatory, privacy and consumer protection and contracting issues.

Online Advertising Mashup
10:05 a.m. – 11:20 a.m.

This session will explore the biggest issues in online advertising today.

Digital Media Venture Capital 2014
11:35 a.m. – 12:50 a.m.

Venture capital professionals offer their views and forecasts on what to expect in the digital media landscape in the near term.

With experts from top companies, including

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