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MEDIA LAW LETTER

Reporting Developments Through May 25, 2014

INTERNET

ECJ	European Court of Justice Recognizes “Right to Be Forgotten”05
	<i>Decision That Search Engines Must Delink Causes Huge Controversy</i>
	Google v. Spain
S.D.N.Y.	First Amendment Protects Search Engine Results07
	<i>Plaintiffs Sued Chinese Search Engine for Not Linking to Pro-Democracy Sites</i>
	Zhang v. Baidu.com Inc.
N.Y.	New York Court of Appeals Refuses to Dismiss Criminal Conviction for Online Impersonation10
	<i>Statute Is “Broad Enough to Capture Acts Intended to Cause Injury to Reputation”</i>
	People v. Golb
NAF Arb.	“Parody” Websites Transferred To Sun-Times Media via National Arbitration Forum14
	<i>Panel Found Respondent to Be a “Serial Cybersquatter”</i>
	Sun-Times Media IP, LLC v. WUITAS, Inc.

MLRC

	MLRC Partners with Berkeley for Legal Frontiers in Digital Media Conference16
--	--

LIBEL & PRIVACY

Conn. App.	Section 230 Bars Liability for Linking to and “Endorsing” Allegedly Defamatory Content17
	<i>Court Affirms Dismissal of Claims Against NBCUniversal</i>
	Vazquez v. Buhl
S.C. Cir.	Jury Awards \$650,000 to Lobbyist in Libel Suit Against the Sun News20
	<i>Articles About Campaign Donation Published with Actual Malice</i>
	Kelley v. Sun Publishing Co.
W.D. Tenn.	Tennessee Fair Report Privilege Shields Fox Affiliate from Defamation Claims21
	<i>Broadcast Was Fair and Accurate Summary of Police Press Release</i>
	Hill et al. v. Fox Television Stations, Inc.
N.D. Cal.	O’Bannon Judge Weighs In Again On Alleged Rights Of Publicity In Sports Game Broadcasts24
	<i>Media Groups Challenge Judge’s Right of Publicity Ruling</i>
	In re NCAA Student–Athlete Name & Likeness Licensing Litigation
Iowa	Iowa Supreme Court Protects Candidate and His Campaign Ad27
	<i>Court Analyzes Actual Malice in Context of Campaign Ad</i>
	Bertrand v. Mullin

Tex.	Texas Court Affirms in Part Jury Verdict for “Talking Trash” About Corporate Competitor.....	30
	<i>Retains Doctrine of Defamation Per Se, But Limits Damages</i>	
	Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings Inc.	

N.Y. Sup.	Fraud and Deceptive Conduct Claims Dismissed Over BBB Rating and Accreditation.....	32
	<i>No Personal Jurisdiction; Ratings Protected Opinion</i>	
	Steinmetz v. BBB	

NEWSGATHERING

NTSB	News Media Coalition Weighs in to Support Drone Photographer in NTSB Litigation.....	34
	<i>Media Weigh in Regulating Civilian UAS</i>	
	FAA v. Pirker	

	Sidebar: Publishing Drone Video That Falls from the Skies.....	36
--	---	-----------

REPORTERS PRIVILEGE

E.D. La.	Times-Picayune Reporters Testify About Alleged Grand Jury Leak.....	37
	<i>Murder Defendants Sought to Have Indictments Dismissed</i>	
	U.S. v. Howard et al.	

ACCESS

Wis. Cir.	Newspaper Wins Records Battle For Emails Seized in John Doe Investigation.....	38
	<i>DA Seized Email Records as Part of Investigation into Governor Walker Campaign</i>	
	In the Matter of a John Doe Proceeding	

Va.	VA Supreme Court Denies Public Records Request for Climate Change E-mails.....	40
	Justices Adopt Broad Definition of ‘Proprietary’ Information	
	American Tradition Institute v. University of Virginia	

D.C. Cir.	Court Rejects Access to Warrantless Wiretapping Cases Involving Acquittals, Dismissals.....	41
	<i>Privacy Trumps FOIA</i>	
	American Civil Liberties Union v. Department of Justice	

	Access Roundup: Other Recent Cases of Note.....	41
	<i>In the Matter of Empire Center for New York State Policy; State Ex Rel. Korry L. Ardell; City Press Communications, LLC v. Tennessee Secondary School Athletic Association</i>	

INTERNATIONAL

Netherlands	Dutch Broadcaster Wins Libel Case Brought by Ryanair.....	43
	<i>Questions About Flight Safety Not Defamatory</i>	
	Ryanair Ltd., v. Katholieke Radio Omroep	

ETHICS

	ABA Weighs In on Ethical Boundaries of Social Media Research on Jurors in Voir Dire.....	45
--	---	-----------



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European Court of Justice Recognizes “Right to Be Forgotten” *Decision That Search Engine Must Delink Causes Huge Controversy*

By Gavin Millar QC

The Court of Justice of the European Union (“CJEU”) in Luxembourg decided that a Spaniard could force Google to remove two old newspaper articles from its search index against his name. [Google v Spain](#) (May 3, 2014).

Everyone knows that plaintiff asserted before the Court a *right to be forgotten* recognised in the privacy law of some European states. But how did these issues end up being considered by this Court? What exactly did the CJEU say and what are the implications?

Background

The EU promulgates *directives* to member states. They must then amend their law to ensure that the directive’s principles apply in their country. Sometimes disputes arise in domestic courts about how a directive (and the local law implementing it) should be interpreted. These can be turned into questions and referred to the CJEU for an interpretive ruling on the directive.

Google v Spain was such a ruling about a 1995 [Directive \(95/46\)](#) on the protection of individuals with regard to the processing of data.

Directive 95/46 protects the privacy of *natural persons* in relation to the *processing* of *personal data*. Any legal entity, public or private, that processes by retrieving or disclosing (Article 2(d)) such personal data is known as a *data controller*.

The definition of *personal data* is very wide indeed and goes well beyond what might normally be understood as private information. It covers *any information relating to an identified or identifiable natural person...; an identifiable person is one who can be identified directly or indirectly from the data*.

The controller must process the data *fairly and lawfully*. And under Article 6(c)-(e) the data being processed must be:

adequate, relevant and not excessive in relation to the purposes of the processing;

where necessary, kept up to date;

and kept...for no longer than is necessary for the purposes of the data processing.

Under Article 7(f) one of the criteria considered in deciding whether processing is legitimate under Article 6 can be that it is:

...necessary for the legitimate interests pursued by the controller or by the third parties to who the data are disclosed, except where such interests are overridden by the interests of fundamental rights and freedoms of the data subject which require protection...

The latter include the data subject’s privacy interests.

The domestic law implementing 95/46 must enable the data subject to enforce compliance by controllers.

Plaintiff Costeja Gonzalez was arguing in Spain about two pages, published in a Catalan newspaper in 1998, reporting his bankruptcy and legal proceedings to recover his debts. He is now a solvent businessman and wanted to prevent Google including when his name is searched.

The information in the articles was neither private nor was it false. It had been lawfully in the public domain since 1998.

But it was *personal data* for the purposes of Directive 95/46 because it identified him.

The Spanish court asked the CJEU to give rulings, essentially, on three questions:

There is no appeal from this decision. The war has started and local battles over the application of this ruling will be fought in member states.

(Continued on page 6)

(Continued from page 5)

Was Google *processing* the personal data as a *data controller* within the meaning of 95/46 when it located and indexed the articles - so that it could in principle be required by the Spanish authorities to remove them if they were being processed incompatibly with 95/46?

Was Google within the territorial reach of the directive?

Did Mr Gonzalez's desire to see the articles removed prevail over the *economic interest* of Google in processing the information and the *interest of the general public* in having access to the information through a search?

The CJEU answered the first in the affirmative. Google argued that it was not *data processing* because it retrieved and indexed all relevant data on the internet when it searched, without selecting *personal* as opposed to other data. It was not a *controller* in relation to the indexed data because it has no knowledge or control over what comes up on its searches. The CJEU rejected these arguments. If it had accepted them it would have severely restricted the scope of 95/46. It held that Google's activity fell squarely within the broad wording of Directive Art 2(b) defining data processing.

It gave a "yes" answer to the second as well. It did not matter that Google Search is based in the US. Google Spain has separate legal personality, with a seat in Madrid and sells advertising space on the website in Spain. This was enough to mean that the processing was *in the context of the activities of an establishment of the controller on the territory of the member state* within Art 4 of the Directive.

It is the ruling on the third question that has ignited the greatest controversy. The short answer was again "yes." The devil is in the detail.

The CJEU considered that the indexing of articles in 2014 was *inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine*. It was therefore incompatible with Articles 6(c)-(e).

Such processing was not saved by Article 7(f), as necessary for the legitimate interests of the controller or third parties, since any authorisation provided by this had to

continue for the *entire period during which it is carried out...* Article 7(f) was no longer made out in 2014.

Moreover a data subject in Mr Gonzalez's position could establish a presumptive right to removal of the old data even if continued indexing would cause him him/her no *prejudice*.

In this way the Central European "right to be forgotten" was smuggled into the Directive.

A search engine faced with a Gonzalez type request could, said the CJEU, conclude that the presumptive right was defeated. The processing might remain compatible with Article 6(e)-(f) and Art 7(f) might apply, in certain circumstances. It gave as an example where:

...for particular reasons, such as the role played by the subject in public life, the interference with fundamental rights is justified by the preponderant interest of the general public in having...access to the information in question.

But this is cold comfort to search engines faced with such requests, which must either block or assume the burden of justifying the indexing in public interest terms. If they do the latter the data subject can challenge their decision before data protection authorities and courts in the member state concerned.

The CJEU's conclusion is plainly wrong, as being incompatible with the free flow of information and ideas on the internet. A number of the steps in the reasoning are self-evidently flawed. In particular Mr Gonzalez was not protecting a privacy interest. He was protecting himself from continuing embarrassment. And the public interest in knowing about his past, especially when doing business with him, is obvious.

But there is no appeal from this decision. The war has started and local battles over the application of this ruling will be fought in member states. The politics of the judgment should not be underestimated. Central Europe holds dear the right to be forgotten.

There were Central European judges on the panel and the feeling generally in Europe, post-Snowden, is against the big American ISPs and their huge profits. Luxembourg did not see much in the way of a legitimate interest on Google's side of the balance.

Don't expect the battles to be won in many member states.

Gavin Millar QC is a barrister at Doughty Street Chambers in London.

First Amendment Protects Search Engine Results

By Carey R. Ramos and Jacob J. Waldman

In a scholarly and closely reasoned opinion issued in *Zhang v. Baidu.com Inc.*, 2014 WL 1282730 (S.D.N.Y. Mar. 28, 2014), Judge Jesse M. Furman of the SDNY forcefully declared that the First Amendment shields an Internet search engine from an action challenging its “editorial judgments about which political ideas to promote.”

The decision dismissed an action seeking to sanction Baidu—the most popular search engine in China—for allegedly depriving plaintiffs of their First Amendment rights by not returning links to their “pro-democracy” works in its search results. The Court found that plaintiffs’ attempt to enlist the courts to sanction Baidu ran afoul of the First Amendment’s protection against compelled speech. In reaching this conclusion, Judge Furman was called upon to address what he characterized as a “question of first impression” in the Second Circuit—“whether search-engine results constitute speech protected by the First Amendment”—which he answered in the affirmative, “at least in the circumstances presented here.” *Id.* at *1–2.

Background

Plaintiffs were eight Chinese individuals, living in the United States, who allegedly created written, audio, and/or video works advocating the democracy movement in the People’s Republic of China. Plaintiffs claimed that, although their works were available on “any of the well known search engines,” Baidu censors its results to exclude content that “deals with the Democracy movement in China,” in compliance with applicable laws of the PRC. Plaintiffs asserted violations of 42 U.S.C. §§ 1981, 1983, and 1985 on the grounds that Baidu’s alleged policies infringed the free speech clause of the First Amendment. They also asserted causes of action under New York State and local laws for discrimination against plaintiffs on Baidu’s search engine, which they characterized as a “place of public accommodation,” on the basis of plaintiffs’ purported “creed”—their “political belief in democracy and the

democratic process for the citizens of China.” Plaintiffs sought \$16 million (\$2 million per plaintiff) in unspecified damages.

The Decision

Judge Furman framed the issue presented as “whether the First Amendment protects as speech the results produced by an Internet search engine,” and concluded that “at least in the circumstances presented here, it does” since “allowing Plaintiffs to sue Baidu for what are in essence editorial judgments about which political ideas to promote would run afoul of the First Amendment.” *Id.* at *1.

In reaching this conclusion, the court turned to the Supreme Court’s decisions in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), which struck down a Florida statute requiring newspapers to permit political candidates a “right of reply” to editorials, and *Pacific Gas & Electric Co. v. Public Utility Commission of California*, 475 U.S. 1 (1986), which invalidated a rule requiring a utility company to include a consumer group’s critical newsletter in its bill mailings. *Id.* at *3.

“Taken together,” Judge Furman declared, these and other cases establish the principles that the Government “may not tell a private speaker what to include or not to include in speech about matters of public concern,” that this rule applies not just to the press but to corporations and ordinary individuals, and that it applies irrespective of whether the speaker “articulates, or even has, a coherent or precise message” or “generated the underlying content in the first place” and regardless of the Government’s justification for seeking to include or exclude certain speech. *Id.* at *4. The Court then explained that, “[i]n light of those principles, there is a strong argument to be made that the First Amendment fully immunizes search-engine results from most, if not all, kinds of civil liability and government regulation,” *id.* at *4, particularly because in performing its data retrieval, “search

(Continued on page 8)



(Continued from page 7)

engines inevitably make editorial judgments” about the content and presentation of their results. *Id.*

The Court further held that sanctioning Baidu for allegedly “design[ing] its search-engine algorithms to favor certain expression on core political subjects over other expression on those same political subjects” would “violate the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message,” and that punishing Baidu for editorial judgments “would contravene the principle upon which ‘our political system and cultural life rest’: ‘that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.’” *Id.* at *7.

Whether Baidu chooses “to disfavor speech concerning democracy”—as plaintiffs allege—was immaterial, the court reasoned, since “the First Amendment protects Baidu’s right to advocate for systems of government other than democracy (in China or elsewhere) just as surely as it protects Plaintiffs’ rights to advocate for democracy.” *Id.* at *9. Indeed, the court recognized that its dismissal of the case “is itself ‘a reaffirmation of the principles of freedom and inclusiveness that [democracy] best reflects, and of the conviction that our toleration of criticism . . . is a sign and source of our strength.’” *Id.*

The court found plaintiffs’ arguments to the contrary “wholly unpersuasive.” *Id.* at *7. Plaintiffs asserted that Baidu was merely discriminating and not actually speaking, but the Court noted that plaintiffs’ “own theory of the case” was that Baidu’s “editorial discretion” favored one form of speech over another. *Id.* at *8.

Plaintiffs argued that their private suit did not involve Government regulation of speech, but the Court found that “plaintiffs’ attempt to ‘enlist the government—through the exercise of this Court’s powers—to impose ‘a penalty on the basis of the content’ of Baidu’s speech,” would “inescapably dampen[] the vigor and limit[] the variety of public debate.” *Id.* at *8 (quoting *Tornillo*, 418 U.S. at 256).

Finally, plaintiffs claimed Baidu’s speech was commercial, and therefore entitled to less protection, but the Court found Baidu’s search results “relate to matters of public concern and do not themselves propose transactions,” and

Baidu’s “profit motive” did not “deprive it of the right to free speech any more than the profit motives of newspapers in *Tornillo* and [*N.Y. Times v. Sullivan*, 376 U.S. 254 (1964)] did.”

Other Authority

Zhang v. Baidu adds to a small but growing body of judicial authority concerning the application of free speech principles to search engines. In one of two other cases cited by Judge Furman, the District of Delaware rejected in three paragraphs the search-engine defendants’ unanswered argument that a *pro se* plaintiff’s demand for prominent placement of his advertisements in their search results was barred by the First Amendment. *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007).

Similarly, in *Search King, Inc. v. Google Tech., Inc.*, 2003 WL 21464568 (W.D. Okla. May 27, 2003), the court found that Google’s search-result ranking expressed “opinions of the significance of particular web sites as they correspond to a search query,” that such rankings could not be deemed “false,” and therefore Google’s selection enjoyed Constitutional protection. *Id.* at *4. In a third decision, not addressed by the court, the Northern District of California in

Kinderstart.com LLC v. Google, Inc., 2007 WL 831806 (N.D. Cal. 2007), dismissed plaintiff’s free speech claims for failure to demonstrate that Google’s actions were state action. *Id.* at *13. Notably, the court rejected plaintiff’s argument that the “emanation of third-party speech from a search engine somehow transforms that privately-owned entity into a public forum.” *Id.* In other words, a search engine is a private space—not a town square.

Despite the dearth of case law on the subject, Judge Furman noted that the application of the First Amendment to search-engine results “has been the subject of vigorous academic debate.”

The Court cited several articles, including Stuart A. Benjamin’s *Algorithms and Speech*, 161 U. Pa. L. Rev. 1445 (2013), which maintains that “[s]o long as humans are making substantive editorial decisions, inserting computers into the process does not eliminate the communication via that editing” (*id.* at 1494), and Michael J. Ballanco’s article

(Continued on page 9)

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(Continued from page 8)

for the George Mason University Civil Rights Law Journal, *Searching for the First Amendment: An Inquisitive Free Speech Approach to Search Engine Rankings*, 24 GMUCRLJ 89 (2013), which argues essentially that search engine results are entitled to similar degrees of First Amendment protection as other speech (“When a search engine is providing a mere opinion, its result should be treated as a fully protected free speech opinion” but, when search results are more like commercial speech, they should be treated accordingly, *id.* at 111).

Judge Furman’s decision heeds these scholarly arguments by confirming that search engine results are entitled to protection coextensive with the expression of opinions and editorial decisions, and, critically, need not express anything beyond what the operators of the search engines wish to express.

Baidu was represented in this matter by Carey R. Ramos, a partner at Quinn Emanuel Urquhart & Sullivan, LLP, and Jacob J. Waldman, an associate at the same firm. Plaintiffs were represented by Stephen N. Preziosi, P.C.



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New York Court of Appeals Refuses to Dismiss Criminal Conviction for Online Impersonation

Statute Is “Broad Enough to Capture Acts Intended to Cause Injury to Reputation”

By Henry R. Kaufman and Michael K. Cantwell

The New York Court of Appeals recently upheld the criminal conviction of the son of a University of Chicago professor for criminal impersonation and forgery after he was found to have engaged in an elaborate internet campaign to discredit and attack scholars who disagreed with his father. [*People v. Raphael Golb*](#), No. 72 (May 13, 2014).

Background

The dispute involved the arcane issue of whether the Dead Sea Scrolls originated in Qumran, where they were found, or were written in Jerusalem and later brought to Qumran, as the defendant's father, Prof. Norman Golb, had long argued. In addition to his anonymous and pseudonymous attacks on scholars who supported the mainstream view that the Scrolls were written in Qumran by the Essenes, a minor Jewish sect, the defendant created email accounts through which he impersonated his father's critics as well as other academics.

In perhaps his most byzantine scheme, the defendant first used the pseudonym “Jerome Cooper” to engage in an email exchange with one of his targets, University of North Carolina professor Bart Ehrman, who had been slated to lecture about the origin of the Scrolls. Golb then anonymously denounced the selection of Ehrman as lecturer in an anonymous blog in which he published some of the emails he'd received from Ehrman. The final element in the defendant's scheme was to create an email address in the name of Frank Cross, a retired professor at Harvard and Dead Sea Scrolls scholar. Using the newly created email address to impersonate Cross, the defendant then sent emails to Ehrman's colleagues at the University of North Carolina that linked to the blog and concluded “Bart [had] put his foot in his mouth again.” Slip op. at 6.

But the defendant's most insidious scheme involved an attack on NYU professor Lawrence Schiffman. The defendant began by pseudonymously publishing an article entitled “Plagiarism and the Dead Sea Scrolls: Did NYU department chairman pilfer from Chicago historian's work?” The defendant then created an email account “larry.schiffman@gmail.com” and used that account to impersonate Schiffman in emails to Schiffman's students and administrators at NYU that included a link to the article. In the emails “Schiffman” also “confessed” to and expressed regret for “his” plagiarism:

Apparently, someone is intent on exposing a failing of mine that dates back almost fifteen years ago. It is true that I should have cited Dr. Golb's articles when using his arguments, and it is true that I misrepresented his ideas. Slip op. at 7.

After NYU launched an investigation, the defendant – again posing as Schiffman – forwarded the ensuing email exchange between “Schiffman” and the NYU administrators to the NYU school newspaper, “asking that they not mention this matter and stating that his ‘career is at stake.’” *Id.* at 8.

The opinion provides little information on the impact of these attacks on the defendant's targets. (One of defendant's targets, a Ph.D student at UCLA, testified that “everyone in his department, people in the press room, the Provost of UCLA, and his dean asked him ‘what the hell is going on, what is this all about?’” Slip op. at 5.). Apparently, however, the attack on Schiffman proved defendant's undoing, as Schiffman apparently had contacts in the FBI, who provided the name of an Assistant DA to call, adding “Tell him you spoke to us.”

(Continued on page 11)

The defendant created email accounts through which he impersonated his father's critics as well as other academics.

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This led to a grand jury charging the defendant with numerous counts of identity theft, criminal impersonation, forgery, aggravated harassment, and unauthorized use of a computer and his conviction on 2 counts of identity theft in the second degree, 14 counts of criminal impersonation in the second degree, 10 counts of forgery in the third degree; 3 counts of aggravated harassment in the second degree, and 1 count of unauthorized use of a computer. The Court of Appeals vacated five of the convictions for criminal impersonation, all the convictions for aggravated harassment and all the convictions for unauthorized use of a computer. Significantly, however, the Court affirmed the convictions for 9 of the 14 counts of criminal impersonation and all of the counts of forgery. *Id.* at 3.

The Majority Opinion

Penal Law § 190.25 provides that a person is guilty of criminal impersonation in the second degree when he or she “impersonates another and does an act in such assumed character with intent to obtain a benefit or to injure or defraud another.” The defendant argued that the statute was unconstitutionally overbroad and also that the trial court’s refusal to properly limit and define “injure” and “benefit” constituted reversible error because it allowed the jury to interpret the statute as covering *any* benefit or harm. *Id.* at 10-11.

The Court acknowledged that cases applying the statute “have traditionally involved monetary fraud or interference with government operations.” *Id.* at 11. The Court also agreed with the defendant that the statute should not be applied to “*any* injury or benefit, no matter how slight.” *Id.* at 12 (italics in original). Noting, however, that many people, and particularly academics, “value their reputations as much as their property,” the majority concluded that “the Legislature intended that the scope of the statute be broad enough to capture acts intended to cause injury to reputation” and went on to hold that the statute applies to “a person who impersonates someone with the intent to harm the reputation of another.” *Id.*

Does the Court’s expansion of both statutes to cover acts intended to cause injury to reputation mean, as defendant’s attorney has argued, that this is a case of criminal libel in disguise?

The Court affirmed the conviction on most of the counts of criminal impersonation, but held that the statute did not reach the mere creation (as opposed to the use) of an email account in the name of another, nor did it reach the use of such an email without proof of “the requisite intent to cause injury, either to reputation or otherwise.” *Id.* at 13. On this basis, the Court reversed 5 of the 14 counts for criminal impersonation.

As to the remaining counts, the Court also affirmed the conviction for forgery in the third degree, holding that there was “sufficient evidence to show that defendant deceived people by sending emails from accounts in the names of Schiffman, Seidel and Cross.” *Id.* at 16. (“A person is guilty of forgery in the third degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument,” Penal Law § 170.05.)

The Court went on to strike down the statute for aggravated harassment in the second degree, ruling that it was unconstitutionally vague and overbroad. Finally, the Court held the evidence insufficient to support the convictions for unauthorized use of a computer and identity theft in the second degree.

Chief Judge Lippman’s Dissent

Chief Judge Lippman, who would have reversed all convictions, issued an opinion concurring in part and dissenting in part.

He begins by arguing that Penal Law § 190.25 is unconstitutionally overbroad:

There is, of course, nothing in the language of the statute to prevent its use in the manner proposed by the majority – but that is the problem. The statute, as written, allows a criminal conviction for impersonation provided only that it is meant to be harmful or beneficial in any way. It is hard to imagine any pseudonymous communication that could not be prosecuted under this statute. And, in an age in which pseudonymous communication has become

(Continued on page 12)

(Continued from page 11)

ubiquitous, particularly on the internet, this statute, literally understood, criminalizes a vast amount of speech that the First Amendment protects.

Dissent at 2.

He then goes on to reject the majority's attempt to cure the statute's overbreadth by limiting its operation to acts "intended to cause real harm," arguing that "many things said using an assumed identity are constitutionally protected from civil or criminal sanction, even though they are more than pranks and are intended to cause real harm or to obtain real benefit." *Id.* at 3.

Chief Judge Lippman also argued that the statute was not only unconstitutional on its face but unconstitutional as applied – that is, even assuming that the limitations proposed by the majority could have cured the alleged statutory overbreadth, the defendant was denied the benefit of those limitations:

Although defendant, after the denial of his motion to dismiss on the ground, among others, of statutory overbreadth, sought to have the jury charged so as to limit the statute's reach, the trial court's charge did not do that and there is no basis now to suppose that the convictions at issue were rendered in observance of the distinction this Court has retrospectively drawn; five of the criminal impersonation convictions concededly were not, and it is entirely speculative that the remaining nine were.

Id.

Chief Judge Lippman would also have vacated the convictions for third degree forgery on similar grounds: "Treating pseudonymous emails as forgeries when they are made with some intent to 'injure' in some undefined way is

no different than penalizing impersonation in internet communication for the same amorphous purpose." *Id.* at 4.

Finally, he argues that any reputational injury caused by the defendant can – and should – be treated as a civil tort and not a crime:

Criminal libel has long since been abandoned (see *Garrison v Louisiana*, 379 US 64, 69 [1964]), not least of all because of its tendency in practice to penalize and chill speech that the constitution protects (see *Ashton v Kentucky*, 384 US 195, 200-201 [1966]), and it has been decades since New York's criminal libel statute was repealed. The use of the criminal impersonation and forgery statutes now approved amounts to an atavism at odds with the First Amendment and the free and uninhibited exchange of ideas it is meant to foster.

Id. at 4.

Discussion

Both the majority and the dissent in *People v. Golb* agree that the penal statutes under which the defendant's conviction was upheld were historically limited to punishing monetary fraud. Does the Court's expansion of both statutes to cover acts intended to cause injury to reputation mean, as defendant's attorney has argued, that this is a case of criminal libel in disguise? Or, as Chief Judge Lippman argues, that the Court has "give[n] prosecutors power they should not have to determine what speech should and should not be penalized?"

These fears seem overblown. None of the counts as to which the defendant's conviction was affirmed involved statements made in his anonymous blog or pseudonymously published article. That is, the Court did not apply any penal statute to the defendant's own speech, but only to speech that he intentionally and falsely placed in the mouths of third parties.

Moreover, nothing in the opinion does – or indeed could – override Supreme Court holdings that prohibit the use of

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Nothing in the opinion does – or indeed could – override Supreme Court holdings that prohibit the use of criminal libel statutes to sanction constitutionally protected speech.

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criminal libel statutes to sanction constitutionally protected speech. The rub, for Golb, was the difficulty of claiming the benefit of this precedent when his speech was intentionally false and thus would not have been constitutionally protected in the first place under *Sullivan* and its progeny.

That said, it is both unfortunate and troubling that the majority did not respond in any manner to the dissent. The majority opinion therefore leaves one to speculate whether there might be other circumstances where the Court of

Appeals would affirm a criminal conviction in a case involving speech that traditionally has been protected by the Constitution. And the majority's failure to speak more clearly could certainly embolden prosecutors to bring charges against speakers whose message they oppose.

Henry R. Kaufman and Michael K. Cantwell practice media, publishing and IP law with Henry R. Kaufman, P.C. in New York City. The defendant in the case was represented by Ronald Kuby. Vincent Rivelles of the New York County District Attorney's office argued the case on appeal.

Ships in Early June

Media Privacy and Related Law 2014-15

MEDIA PRIVACY & RELATED LAW 2014-15

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“Parody” Websites Transferred To Sun-Times Media via National Arbitration Forum

Panel Found Respondent to Be a “Serial Cybersquatter”

By **Damon E. Dunn**

In an arbitration between Sun-Times Media IP, LLC. (“Sun-Times”) and the registrant of the <chicagasuntimes.com> internet domain name, a Panel of the National Arbitration Forum ordered the disputed domain name transferred to the Sun-Times. See [*Sun-Times Media IP, LLC v. WUITAS, Inc. d/b/a ABILICOM / Manager Domain*](#), FA 1525208 (Nat. Arb. Forum Nov. 24, 2013).

The registrant, WUITAS, Inc., had argued that the domain name resolved to a protected “parody” of the *Chicago Sun-Times* newspaper, headed: “CHICAGA SUN-TIMES: Nuze, Sperts, Weetha, an’ Bitcharys translaterated into Chicaga Gangsta.” The Sun-Times believed not only that the domain name was confusingly similar but also the website was publishing excerpts of copyrighted content after converting the text into the purported “gangsta” dialect.

Background

After learning of the website, the Sun-Times consulted WHOIS records and identified PrivacyProtect.org as the nominal registrant for the domain. The Sun-Times therefore determined to proceed through ICANN’s Uniform Domain Name Dispute Resolution Policy and served a Complaint for Decision and Annexes on PrivacyProtect, seeking transfer of the disputed domain name to the Sun-Times. After PrivacyProtect identified WUITAS as the actual registrant, an amended complaint was served naming WUITAS as Respondent.

The Complaint alleged “typosquatting” and the three elements necessary to transfer or cancel a domain name: that the name was confusingly similar to the famous CHICAGO SUN-TIMES® trademark, the Respondent had no legitimate interest in the name and that the name was registered and/or being used in bad faith. To demonstrate Respondent’s commercial purpose in diverting Internet users, the filings embedded screen shots from the resolving website of

activated pop up advertising displays from “Ad Choices” and pay-per-click hyperlinks to third-party websites.

Respondent WUITAS denied that the domain was confusingly similar and argued that (i) it made a *bona fide* offering of goods or services prior to the dispute, (ii) it was commonly known by the domain name, and (iii) the resolving website was published for parody purposes and so was a fair use of the domain name. Respondent explained:

Respondent purposefully chose the disputed domain name with the deliberate misspelling of the name ‘Chicago’ to ‘Chicaga’ because it comports with the theme of Respondent’s website, which is a parody of the Chicago Sun-Times website and translates the site into Ebonics, called “Gangsta” throughout the site, the soundex of this particular dialect often replaces the sound of the letter ‘o’ or the suffix ‘er’ at the end of a word with the sound of the letter ‘a,’ hence the word ‘gangster’ becomes ‘gangsta,’ ‘Chicago’ becomes ‘Chicaga,’ ‘Ohio’ becomes ‘Ohia,’ etc.

Respondent famously maintains over 100 similar sites which are similarly translated into such as dialects as ‘Gangsta,’ ‘Redneck’ (a southern United States dialect), and Piglatin.

The Sun-Times countered that the resolving website was not a true parody but rather served as a vehicle for profiting off the Sun-Times’ mark by using pirated content to leverage advertising. Even were the site noncommercial, Respondent’s confusingly similar domain name did not signify a parody on its face and its site did not critically comment on the *Chicago Sun-Times* newspaper. Instead of a protected parody, the Sun-Times argued that Respondent’s

The Complaint alleged “typosquatting” and the three elements necessary to transfer or cancel a domain name.

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admitted unauthorized translation of newspaper content constituted an infringing derivative work.

Arbitration Proceeding

The NAF Panel agreed that the Sun-Times had proved all three requisite elements and ordered the transfer. It rejected Respondent's claim that its actions were constitutionally-protected parody, finding instead that Respondent intentionally sought to attract Internet users to its website, for commercial gain, by creating a likelihood of confusion with the CHICAGO SUN-TIMES® trademark.

The Panel found that Respondent's domain name was confusingly similar because, but for the addition of the non-distinctive generic top level domain (".com") and the "trivial omission of hyphenation," the disputed domain name differed from the Sun-Times registered trademark by only one letter.

The Panel disagreed entirely with the Respondent's argument that "a reasonable person with even a *de minimis* amount of intelligence would have no difficulty distinguishing the two." Observing that the resolving website displayed pop-up advertising from "Ad Choices," with click-through links to third-party websites including those of Amtrak, Charles Schwab, Xfinity, and Dell, the Panel also found "[t]he evidence is that the domain name resolves to a commercial website that uses a name almost identical to Complainant's trademark which takes material directly from Complainant's newspaper or online location."

Even accepting that Respondent is "merely a holding organization for domain names," the Panel found "none of the usual indicia required to show that a domain name registrant might be commonly known by another name." It noted that the disputed domain name was only registered earlier that year and Respondent had provided no figures to establish circulation, readership or online following.

The Panel also agreed with the Sun-Times that the "parody" defense was inapplicable under the Policy, noting that "as Complainant rightly points out in its additional submissions, the enquiry as to whether the use of the domain name is for parody or some other fair use for the purposes of paragraph 4(c)(ii) of the Policy is unnecessary since the evidence is that the use of the disputed domain name is for commercial gain and has a clear capacity to mislead consumers who are aware of Complainant's trademark."

For these reasons, the Panel rejected Respondent's

argument that it was using the domain name in connection with a *bona fide* offering of goods or services for the purposes, stating:

"The disputed domain name and the resolving website deliberately imitate Complainant's trademark. The resolving website lifts material from Complainant's newspaper and renders it in Ebonics. Whether that is done for parody or not (and whether or not that action could properly be described as parody) is, for the purposes of a *bona fide* offering analysis, irrelevant since without Complainant's permission it is not good faith behavior to mimic Complainant's trademark, take copyright or other material originating with Complainant and translate it, and then offer that translated material at a revenue generating location."

Finally, the Panel found bad faith under paragraph 4(b) (iv) of the Policy, because it was more likely than not that Respondent was using the domain name to attract, for commercial gain, internet users to Respondent's website or other on-line location, by creating a likelihood of confusion with the Sun-Times' trademark.

After the domain name was transferred, the Sun-Times discovered two more typosquatting domain names, <chicagasuntimez.com> and <chicagosuntimez.com>, which also resolved to sites that "translated" newspaper content into purported slang/dialects with hyperlinks to third party businesses. The Sun-Times filed a consolidated action and a new NAF panel found Respondent to be a "serial cybersquatter" and ordered transfer of these domain registrations as well. [Sun-Times Media IP, LLC v. Manager Domain/WUITAS, Inc. d/b/a ABILICOM/PrivacyProtect.org](#), Claim Number: FA1402001542793 (Nat. Arb. Forum March 22, 2014).

After Respondent failed to file timely appeals, all three domain names were transferred. The Sun-Times also followed up with a cease and desist letter, resulting in suspension of Twitter and Facebook sites operating in conjunction with the transferred domain names.

Damon E. Dunn and Glen Rice of Funkhouser Vegosen Liebman & Dunn Ltd in Chicago represented Sun-Times Media, LLC. WUITAS, Inc. appeared pro se.

MLRC Partners with Berkeley for Legal Frontiers in Digital Media Conference

On May 15-16, 2014, MLRC held its Seventh Annual Legal Frontiers in Digital Media Conference in Silicon Valley. This year MLRC partnered with the Berkeley Center for Law & Technology and convened at the Computer History Museum in Mountain View. We gratefully acknowledge our Conference co-chairs Rosemarie Ring, Munger Tolles & Olson; and Regina Thomas, AOL Inc.; and Chairs Emeritus Mark Kahn, Evernote; Timothy Alger, Perkins Coie; and Kurt Wimmer, Covington & Burling; and Conference supporters: Axis Pro, Backpage.com, Covington & Burling, Davis Wright Tremaine, Dentons, The Guardian, Jackson Walker, K&L Gates, Kelley Drye, Lathrop & Gage, Microsoft, Munger Tolles & Olson, Perkins Coie, SheppardMullin, WilmerHale, and reception sponsor Google.

The opening session of the conference addressed new business models in the age of digital video convergence. Brian Andersen, LUMA Partners, discussed among other things, the trend towards a data driven approach to programming. Andersen's presentation was followed up by a panel discussion, moderated by Jordan Gimbel, Yahoo, with Bob Heldt, Netflix; Karen Kramer, Zing Legal; Tara Maitra, TiVo; and Shashi Seth, Tribune Digital Ventures.

Next up was a panel titled, "Scraping Content: the CFAA, DMCA, and Terms of Use," moderated by Benjamin Glatstein, Microsoft with Jonathan Blavin, Munger, Tolles & Olson; Neel Chatterjee, Orrick, Herrington & Sutcliffe; Hanni Fakhoury, Electronic Frontier Foundation; and Aaron Schur, Yelp. Panelists addressed the civil and criminal reach of the Computer Fraud and Abuse Act and similar provisions (including terms of use) – often used in conjunction with technical blocking measures – to protect content from scrapers.

Last on Thursday was a panel addressing legal challenges faced by digital companies when served with process in national security investigations. The session, dubbed "Digital Media in the Age of NSA Surveillance," was moderated by Peter Canfield, Jones Day. Canfield walked the panel through a series of hypothetical scenarios involving a government official – expertly portrayed by Stewart Baker, Steptoe & Johnson – approaching a fictional startup media company, "My World," for which Nate Jones, Microsoft, assumed the role of in-house counsel. Marc Zwillinger, ZwillGen, served as outside counsel to My World, and Susan Freiwald, University of San Francisco School of Law, a "friend" of the of the fictional entity's in-house counsel, advised My World on civil liberties and privacy concerns.

Day two of the conference began with a session called, "Is Mobile Different?" To help answer that question, Dan Waggoner, Davis Wright Tremaine, led a series of presentations given by three experts on the subject: Sue Glueck, Microsoft; Mark Kahn, Evernote; Gerard Waldron, Covington & Burling. Among the reasons the technology is different: shorter interaction time, smaller screen size, location-based services, and the dominance of Apps. As discussed by the panel, these differences create a number of legal challenges, particularly in the areas of privacy and security.

The next session "Online Advertising Mashup" was moderated by Meredith Halama, Perkins Coie, with panelists Ken Dreifach, ZwillGen; Joanne McNabb, Office of the California Attorney General; Laura Pirri, Twitter; and David Wainberg, AppNexus. The session centered around privacy policy transparency and current standards and practices with respect to personally identifiable information and Do Not Track protocols.

The final session – Digital Media Venture Capital 2014 – discussed digital media trends from the perspective of venture capital professionals. The session was moderated by Stephanie Zeppa, Sheppard Mullin, with panelists Stephen Bernardez, ONSET Ventures; Saad Khan, CMEA Capital; Ray Rothrock, Venrock; and Robert Siegel, XSeed Capital. Among the major challenges for digital media startups are identifying great content, understanding the mindset of a new generation of so-called "digital natives" and grappling with global rights issues.

Section 230 Bars Liability for Linking to and “Endorsing” Allegedly Defamatory Content

Court Affirms Dismissal of Claims Against NBCUniversal

By Erik Bierbauer and Elizabeth Alicea

The Connecticut Appellate Court in a 3-0 decision held that Section 230 of the Communications Decency Act immunizes a website from liability for linking to and “endorsing” allegedly defamatory content posted by a third party elsewhere on the Internet. [*Vazquez v. Buhl*](#), No. 35319, WL 1795574 (Conn.App. May 13, 2014). The decision is significant because it analyzes in detail the applicability of Section 230 when a website operator finds and chooses to link to third-party content, a common factual situation that surprisingly few courts have addressed.

Background

In January 2012, CNBC.com published an article titled “The Sex and Money Scandal Rocking Hedge Fund Land,” which summarized and hyperlinked to online reports about certain incidents involving a Connecticut currency trader. In particular, the CNBC article summarized and linked to online reporting by Teri Buhl, a journalist and blogger. The CNBC article described Buhl as a “veteran financial reporter” who “knows her way around the Connecticut hedge fund beat.” The hyperlink to Buhl’s blog was on the word “report” in the statement, “I don’t want to steal Buhl’s thunder, so click on her report for the big reveal.”

Mitchell Vazquez, the trader in question, sued Buhl and NBCUniversal, the owner and operator of CNBC.com, for defamation, false light and negligent infliction of emotional distress based on four specific statements in Buhl’s report about actions taken against Vazquez in the past by financial regulators. None of the challenged statements appeared in the CNBC article. Rather, Vazquez alleged that NBCUniversal was liable because it had “published, distributed, endorsed and promoted” the defamatory statements by linking to Buhl’s report.

The decision is significant because it analyzes in detail the applicability of Section 230 when a website operator finds and chooses to link to third-party content.

NBCUniversal moved to strike the complaint on the ground that it was protected from liability by Section 230 of the CDA, which states, in relevant part, “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” The trial court granted NBCUniversal’s motion. Vazquez appealed on procedural and substantive grounds.

Motion to Strike Appropriate to Decide Section 230 Issue

In Connecticut procedure, a motion to strike is similar to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), in that the motion to strike challenges only the legal sufficiency of a pleading. Vazquez argued that a motion to strike was not the proper vehicle to decide the applicability of Section 230 because he claimed there were factual questions, such as whether CNBC had communicated with Buhl about the CNBC article. The appellate court rejected this argument. It concluded that the application of Section 230 in this case raised no factual questions.

The Court left open the possibility that, in some circumstances, a plaintiff might be entitled to limited discovery to resolve factual issues about the applicability of Section 230. Vazquez, however, had not requested such discovery in the trial court.

Section 230 Applies to Linking

Turning to the substantive grounds for the appeal, Vazquez argued that the trial court incorrectly interpreted the phrases “provided by” and “information content provider” in Section 230.

(Continued on page 18)

(Continued from page 17)

Vazquez claimed that the phrase “provided by” means that a provider of an interactive computer service, such as CNBC.com, may invoke the protection of Section 230 only where the information at issue is “*directly transmitted*” to it, such as when a third party submits comments to be posted on a defendant’s website. Vazquez argued that Buhl’s allegedly defamatory content was not “provided by” a third party for purposes of Section 230 because CNBC “itself discovered the articles and posted a hyperlink to them on its website.”

Vazquez sought support in *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), in which the Ninth Circuit analyzed whether an email sent to, and then posted by, the editor of an online newsletter was “provided by” the email’s author when the author claimed he had never intended to have his email posted online. The Connecticut Appellate Court concluded that Vazquez’s reliance on *Batzel* was misplaced because “[t]he Ninth Circuit was not concerned with whether the third party had directly transmitted the e-mail to the editor of the newsletter (because he did), but instead, was cautious about expanding the scope of § 230 (c) (1) for ‘speech never meant to be broadcast over the Internet.’” Buhl’s article, on the other hand, “was undoubtedly meant to be disseminated on the Internet.”

The appellate court also analyzed evidence of Congressional intent, decisions from other jurisdictions that applied Section 230 protection to linking, and conventional dictionary definitions. It concluded that the phrase “provided by” does not limit the protection of Section 230 to content that is “directly transmitted” to the website, but also covers information that a third party makes generally available on the Internet. The court used a decidedly analog analogy:

[The] ordinary meaning of “provided” is clarified within the context of a library. When it places books on its shelves, a library provides them to its readers. This does not change when it later checks them out to individual readers. Under both scenarios, it has provided its books; all that has changed in the second scenario is that we know specifically to whom it provided the books. In this case, as

when the library places books on its shelves, Buhl provided, without knowing specifically to whom, the allegedly defamatory statements by posting them to her website.

“Endorsement” and “Promotion” Does Not Compromise Section 230 Immunity

Vazquez also argued that CNBC became an “information content provider” by providing the hyperlink to Buhl’s article and “endorsing” and “promoting” Buhl’s report with statements that, according to Vazquez, validated Buhl’s credibility.

The appellate court concluded that an interactive computer service provider does not become an information content provider simply by linking to and endorsing third-party content. The court noted that Section 230 defines “an

information provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” See 47 U.S.C. § 230 (f) (3). The court then interpreted “development in part”:

[T]he meaning of “development in part,” as defined in case law interpreting the language of § 230 (f) (3), covers conduct ranging from “material contribution” to “solicitation” of the information at issue (internal citations omitted). The

plaintiff has not alleged any actions, individually or in combination, from which to conclude that the defendant “materially contributed,” “prompted,” “specifically encouraged,” “apparently requested,” or “actively solicited” the defamatory statements in Buhl’s articles. Rather, the actions alleged by the plaintiff are fairly characterized by him to have “amplified,” “endorsed,” and “adopted” those statements. **It is immaterial whether the defendant amplified, endorsed, or adopted the defamatory statements,**

The appellate court concluded that an interactive computer service provider does not become an information content provider simply by linking to and endorsing third-party content.

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because the defendant played no role in their composition. (Emphasis added.)

Since the allegations in Vasquez's complaint addressed only "NBCUniversal's conduct after the actionable statements were conceived, written and published by Buhl," the court found that NBCUniversal was not an information content provider within the meaning of Section 230.

Court's Concern About Scope of Section 230

While the appellate court's decision provides a strong precedent for Section 230 immunity, at oral argument and in a footnote in its decision, the court joined some other courts and commentators in expressing concern about "the statute's

broad scope." It questioned whether the policy reasons behind Section 230 remain relevant given the development of the Internet since the statute was enacted in 1996. The court concluded that Section 230 will bar claims like Vasquez's unless Congress sees fit to amend the statute.

It is also worth noting that neither the trial nor appellate court reached an alternative argument raised by NBCUniversal, which is that hyperlinking does not satisfy the required element of "publication" for purposes of defamation and related torts.

Erik Bierbauer is a Senior Litigation Counsel, and Elizabeth Alicea is a Law Clerk, at NBCUniversal. Defendant was represented by Mr. Bierbauer, and by Alan Neigher and Sheryle S. Levine of Byelas & Neigher in Westport, CT. Plaintiff was represented by Ryan O'Neill and Mark Sherman of The Law Offices of Mark Sherman in Stamford, CT.

Recent MLRC Publications

[MLRC Bulletin 2014 Issue 2: Legal Frontiers in Digital Media](#)

All Native Advertising is Not Equal — Why that Matters Under the First Amendment and Why it Should Matter to the FTC • The Google Books and HathiTrust Decisions: Massive Digitization, Major Public Service, Modest Access • The Authors Guild v. Google: The Future of Fair Use? • The Computer Fraud and Abuse Act – Underused? Overused? Misused?

[Key Points on DOJ Policy](#)

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: 2014 Update](#)

Who qualifies as "the media," it seems, is the perennial million-dollar question in an age when the "pen," the camera, and the "press" are all combined in a single device that fits easily in your purse—if not your back pocket—and everyone is a potential publisher. 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.

[Non-Competes in the Broadcast Industry](#)

Eight states and the District of Columbia have laws that target the broadcast industry and limit broadcast employers' ability to enforce non-compete agreements with their on and off screen talent. This paper describes the elements of those laws and their impact. It also addresses several alternative approaches for broadcast employers' efforts to retain employees and the impact of the broadcast non-compete ban laws on those alternatives.

South Carolina Jury Awards \$650,000 to Lobbyist in Libel Suit Against the Sun News

On May 8, 2014, a jury in Horry County, South Carolina, rendered a verdict in favor of Myrtle Beach-area lobbyist, Mark Kelley, in his libel suit against The Sun News, and investigative reporter, David Wren. *Kelley v. Sun Publishing Co. Inc.*, File No. 2012-CP-26-3804 (S.C. Cir.). Kelley sued over a series of articles examining gubernatorial campaign contributions made in 2009 to Republican primary candidate Gresham Barrett. Barrett was defeated in the primary by now-Governor Nikki Haley.

Background

The plaintiff Mark Kelley is a lobbyist and former elected South Carolina state legislator. At issue were newspaper reports about a private luncheon the plaintiff attended in 2009 at which the president of the Myrtle Beach Area Chamber of Commerce, Brad Dean, gave then-gubernatorial candidate, Gresham Barrett, an envelope of cashier's checks totaling \$84,000. The newspaper reported that a local civic group suspected the donation was connected to a previously enacted local tourism tax that benefited the chamber of commerce. The newspaper also noted that the donation raised suspicions because most of the checks were from one bank, were sequentially numbered, and came from some companies without any revenue.

Kelley filed suit in 2012, over three articles written by David Wren published on May 20, May 23, and May 25, 2010, and an editorial in the paper published on May 30, 2010. Plaintiff alleged the articles and editorial falsely connected him to the campaign donation and implied he violated state ethics laws by soliciting or handling the donation.

Chief among the statements plaintiff claimed was defamatory was an assertion in the May 23rd article stating that "Dean, along with chamber lobbyist Mark Kelley, delivered about \$84,000 [in] contributions to Barrett in June."

On the newspaper's motion for summary judgment, the court held that plaintiff was a public figure for purposes of the suit, but that there was sufficient evidence of actual malice to send the case to a jury. To prove fault, plaintiff relied heavily on an email from the reporter stating that

"everybody is trying to protect Mark Kelley" from accusations that he was involved in the donation. Plaintiff argued this meant the reporter had obvious doubts about his statement that plaintiff "delivered" the contribution at the luncheon.

Libel Trial

Trial commenced on May 5, 2010 before a jury of eight men and six women with Circuit Court Judge Larry Hyman presiding. At trial, plaintiff testified that he was at the luncheon because of his friendship with the candidate and was unaware that a campaign contribution was going to be made and that he had no involvement with it. Plaintiff called as a witness the deputy director of the state's Ethics Commission. She was quoted in the articles saying that no laws appeared to have been violated and lobbyists are in the same room with candidates all the time. Plaintiff also introduced evidence that the donation was investigated by the FBI but no charges were brought against anyone.

The defense argued that the articles did not accuse plaintiff of any wrongdoing in connection with his attendance at the luncheon, and that plaintiff suffered no loss of reputation.

In his closing, plaintiff's lawyer asked the jury to tell the Sun News "to quit taking their pen and using it as a sword and slashing the flesh of a reputation." In closing, the defense noted that the role of the press is "to look into dark places."

After deliberating a little over four hours, the jury found unanimously in favor of plaintiff, and awarded him \$400,000 in actual damages and \$250,000 in punitive damages for the three news articles. The editorial was found not defamatory. Post trial defense motions for remittitur, for a new trial, and to set aside the punitive damages award were denied by the trial court. The deadline for appeal is June 12, 2014.

Plaintiff was represented by Jim Stevens and Natalie Stevens-Graziani, Stevens Law Firm, Loris, SC. Defendants were represented by Jay Bender, Baker, Ravenel & Bender, Columbia, SC. MLRC has asked defense counsel to provide more details on the trial.

Tennessee Fair Report Privilege Shields Fox Affiliate from Defamation Claims

By J. Bennett Fox, Jr. and Lucian T. Pera

The United States District Court for the Western District of Tennessee dismissed defamation claims against Fox Television Stations, Inc., holding that the Tennessee's fair report privilege barred claims against its Memphis station, WHBQ-TV, because its brief "Crimestoppers" segment was a fair and accurate summary of a Memphis Police Department press release upon which the news story was based. [*Hill et al. v. Fox Television Stations, Inc., et al.*](#), No. 2:13-cv-02677 (W.D. Tenn. May 20, 2014) (Judge John T. Fowlkes, Jr.). Other claims remain pending against one other non-media defendant.

On February 9, 2013, plaintiffs Pamela Hill and her son, plaintiff Dylan Hill, went to an Old Navy store in Memphis, Tennessee, to buy some clothes, paid for them with a personal check, received a receipt, and left the store. On Monday, February 11, a resident of nearby Olive Branch, Mississippi, (not Plaintiff) noticed an unauthorized charge on her bank account dated February 9 from Old Navy. She notified the Olive Branch (Mississippi) Police Department, which presumably contacted the Memphis Police Department ("MPD").

After an investigation, the MPD issued a press release to numerous local news outlets, distributed by email. That press release, dated February 13, 2013, stated:

On Monday, February 11, 2013, officers responded to a Forgery call at 8085 Giacosa Place, Old Navy. The complainant advised that someone had created and forged a check using her information. This forged check was used to pay for merchandise at the Old Navy store.

The responsible male and female were caught on video surveillance cameras.

Still shot photos and video of the suspects are available.

Anyone with information on the identities and the whereabouts of these suspects is asked to call Crime Stoppers at 528-CASH or the Economic Crimes Bureau at 636-3350.

Based on this press release, WHBQ ran a brief news story about the incident on February 14, 2013, stating:

Two thieves are caught on camera forging a check to steal some clothes. Alright this is video of the duo at Old Navy on Giacosa Place. Investigators say they created and forged a check under another woman's identity. Then they used the check to pay for the merchandise from the store. Now if you recognize either person call Crimestoppers. Police want your help. The number is 528-CASH.

Images of the plaintiffs, taken from Old Navy security cameras and provided by the police with the press release, were shown on the screen while the reporter spoke. The report ran once on WHBQ.

In her later lawsuit, Mrs. Hill alleged that, when she arrived at work on the day the news report was broadcast, many of her co-workers asked her about what they had seen on the news. Mrs. Hill then found the story on the internet, causing her great distress. She left work and went to her bank to inquire about any suspicious activity. Mr. Hill's bank determined that nothing appeared to be abnormal. Mrs. Hill then realized that the account number on the Old Navy receipt was different than her bank account number by one digit. Mrs. Hill then contacted the MPD, met with its Economic Crimes Unit on February 15, the day after the WHBQ broadcast, explained what had happened, and the police contacted Old Navy. Old Navy claimed their system was error proof, but the detective closed the file on Mrs. Hill and allowed her to leave.

WHBQ's report of the incident at Old Navy was a fair and accurate summary of the police press release upon which it was based.

(Continued on page 22)

(Continued from page 21)

Mrs. Hill later claimed that, during the day the report was broadcast and in the days following, she received many inquiries from family and friends about the situation. She claimed that the broadcast caused her significant emotional distress. Plaintiffs also later claimed that WHBQ never ran a retraction of the story, even though other news stations ran retractions. However, no evidence was ever produced regarding other new stations' reporting of the incident or any retractions these stations may have made. Further, plaintiffs never offered any evidence that they had contacted WHBQ requesting any retraction, and WHBQ made clear in the record that plaintiffs had not contacted the station about the story, and that the station's first notice of any claim by anyone that its report was in error was receipt of the lawsuit.

Mrs. Hill, her son Dylan, and her husband Adam filed suit against Old Navy and Fox, alleging negligence, defamation and libel, false light invasion of privacy, intentional infliction of emotional distress, and negligent infliction of emotional distress. Fox responded with a motion for summary judgment as to all claims against it, based on the Tennessee fair report privilege.

The district court found that WHBQ's report of the incident at Old Navy was a fair and accurate summary of the police press release upon which it was based. Significantly, neither party disputed that the press release on which the news report was based was an official action and communication that fell under the fair report privilege. Plaintiffs did, however, dispute whether the report was a fair and accurate summation of the MPD press release sent to various new entities. Plaintiffs attempted to argue (citing Oklahoma law) that the issue of the fairness and accuracy of the report was a question of fact for a jury to decide. The district court rejected this argument, stating that Tennessee law clearly regards the application of the fair report privilege as a question of law.

Plaintiffs' argument that the WHBQ broadcast was not fair and accurate rested on the use of two words in the broadcast: "thieves" and "steal." Plaintiffs claimed that these words carried the connotation of a conclusion of guilt and that they unnecessarily sensationalized the contents of the press release. Plaintiffs argued that a fair and accurate report would have referred to plaintiffs Pamela and Dylan Hill as suspects so that viewers would have realized that they had not

yet been found guilty of forgery and theft. WHBQ countered that the report accurately summarized the "gist" of the press release, that the broadcast's use of the words "thieves" and "steal" was not inaccurate because forgery is classified as a form of theft in Tennessee, and that the use of these words did not denote ultimate guilt since it was clear from the broadcast that the subjects of the press release had not yet been arrested. WHBQ reasoned that the public would realize that suspects who had not yet been apprehended would certainly not have been convicted at that point. In addition, WHBQ pointed to its use of the MPD Crimestoppers phone number and the appeal in the broadcast that police needed the public's help, which clearly indicated to viewers that the report was based on a communication from the police.

In finding that the report of the incident at Old Navy was a fair and accurate summary of the police press release upon which it was based, the district court noted that use of the words "thieves" and "steal," instead of "suspects," did not skew the contents of the MPD press release. The press release indicates that "the responsible male and female were caught on video surveillance cameras" illegally obtaining merchandise by forging a check. The WHBQ reporter, during the one and only news segment, indicated that "two thieves are caught on camera forging a check to steal some clothes." In the Tennessee, individuals who forge checks are prosecuted for theft of property; therefore,

the court reasoned, the news report was not an inaccurate description based on the MPD press release's characterizations. In addition, the use of these two words alone did not overly sensationalize the news report or cause it to be misleading: the report as a whole was a straightforward restatement of the press release. Therefore, the district court found, the Tennessee fair report privilege applied to this broadcast news report.

On this finding, the district court found, in order to defeat the fair report privilege, Plaintiffs had to prove by clear and convincing evidence that WHBQ acted with actual malice. In finding that plaintiffs could not meet this burden, the district court noted that it would have been impossible for WHBQ to have determined that any mistake had been made and that the individuals mentioned in the MPD press release and shown in the surveillance video did not actually commit a crime. After

(Continued on page 23)

**Use of the words
"thieves" and "steal,"
instead of "suspects,"
did not skew the
contents of the MPD
press release.**

(Continued from page 22)

all, MPD sent out its press release on February 13, 2013; the broadcast aired on February 14, 2013; and plaintiff met with police on February 15, 2013. At the time of the broadcast, neither WHBQ nor the MPD knew the individuals' actual identities; Mrs. Hill had not yet come forward to resolve the matter; and both MPD and Old Navy would, at that time, have supported the truth of the gist of the broadcast. In addition, nothing in the police press release suggested that it

was false, and WHBQ had no reason to question the press release's accuracy, especially since the purpose of such press releases is to aid police in the apprehension of individuals suspected of committing crimes. On this basis, the district court dismissed all claims against Fox. Claims remain pending by the plaintiffs against Old Navy.

Lucian Pera and Ben Fox are members of Adams and Reese LLP and practice in the firm's Memphis office. They represented Fox Television Stations, Inc., in this lawsuit.

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O'Bannon Judge Weighs In Again On Alleged Rights Of Publicity In Sports Game Broadcasts

By Nathan Siegel

The closely-watched consolidated lawsuits by current and former NCAA athletes dubbed “In re NCAA Student-Athlete Likeness Litigation” is only now about to begin the first of two trials, but the case has already had a substantial impact on the relationship between the First Amendment and the right of publicity.

Last year, the portion of the case known as *Keller v. Electronic Arts*, 724 F.3d 1268 (9th Cir. 2013) produced an interlocutory decision by the Ninth Circuit holding that Electronic Arts video games are not protected by the First Amendment for purposes of the athletes’ publicity claims, a decision echoed by the Third Circuit in *Hart v. Electronic Arts*, 717 F.3d 141 (3d Cir. 2013). Those claims against Electronic Arts (but not the NCAA) have tentatively been settled, though no class settlement has yet formally been approved by the Court.

More recently, the focus of much of the case has shifted from video games to the actual broadcasts of NCAA football and basketball games, by far the most lucrative source of revenue generated by collegiate athletics. Specifically, in the portion of the case known as *O'Bannon v. NCAA* the class plaintiffs contend that NCAA amateurism rules prohibiting student-athletes from entering into “group licenses” for the use of their images in live game broadcasts and re-broadcasts violate the antitrust laws.

As a result of both pre-trial rulings and the plaintiffs’ narrowing of their claims, *O'Bannon* now seeks solely injunctive relief requiring the NCAA to permit athletes to attempt to negotiate such group licenses with respect to game broadcasts, video games, and other related uses.

Last November the NCAA moved for partial summary judgment on the claims relating to whole game broadcasts. The NCAA argued that no such group licensing market could exist because collegiate games are newsworthy matters of public interest, so the First Amendment bars any asserted right of publicity by athletes who appear in game broadcasts. The Plaintiffs argued in turn that game broadcasts are

commercial speech, and further maintained that the NCAA’s First Amendment arguments are hypocritical because the NCAA itself grants purportedly exclusive licensing rights to broadcasters, thereby excluding all others from broadcasting the same games.

On April 11, 2014 Judge Claudia Wilken denied the NCAA’s motion in a lengthy opinion. [*In re NCAA Student-Athlete Name & Likeness Licensing Litigation*](#), 2014 WL 1410451 (N.D.Cal., April 11, 2014). As a preliminary matter, Judge Wilken accepted the NCAA’s argument that “to establish the existence of a “group licensing” market” for purposes of their antitrust theories, the “[p]laintiffs must show that, absent the NCAA’s restraint on student-athlete

pay, student-athletes would have cognizable rights of publicity in the use of their names, images, and likenesses in live game broadcasts and archival game footage.” *Id.* at *6. She also rejected the athletes’ claims that game broadcasts are commercial speech for First Amendment purposes. However, she nonetheless proceeded to blaze new ground by concluding that athletes do enjoy a right of publicity in whole game broadcasts that is not constrained by the

First Amendment.

The Court reasoned that the athletes’ claims are functionally identical to the “performer’s right of publicity” that was at issue in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), which held that the First Amendment did not give a local news station the right to broadcast a human cannonball performer’s entire 15-second act without his consent. Judge Wilken held that “[t]he Court’s reasoning in *Zacchini* strongly suggests that the First Amendment does not guarantee media organizations an unfettered right to broadcast entire sporting events without regard for the participating athletes’ rights of publicity.” *In re NCAA*, 2014 WL 1410451 at *7.

Judge Wilken also relied on a more recent Seventh Circuit case in which several news organizations asserted a First Amendment right of access to stream public high school

(Continued on page 25)

The focus of much of the case has shifted from video games to the actual broadcasts of NCAA football and basketball games.

(Continued from page 24)

football games on the internet. *Wisconsin Interscholastic Athletic Association v. Gannett Co., Inc.*, 658 F.3d 614 (7th Cir. 2011). Relying on *Zacchini*, the Seventh Circuit rejected any right of access and held that the First Amendment did not preclude Wisconsin's public high school athletic association from licensing exclusive streaming rights to the particular entity of its choice. Judge Wilken reasoned that "[t]here is no principled reason why the First Amendment would allow the NCAA to restrict press access to college football and basketball games (via exclusive licensing agreements) but, at the same time, prohibit student-athletes from doing the same (via right-of-publicity actions)." *In re NCAA*, 2014 WL 1410451 at *8.

Subsequently, the NCAA moved to certify the issue of publicity rights in game broadcasts for an interlocutory appeal. In support of that motion, a coalition of broadcasters and related entities (including Fox, CBS, NBC, ABC, Turner Broadcasting, NPR, Discovery, AETN and the Reporter's Committee for Freedom of the Press) filed a [brief amicus curiae](#). At bottom, the brief argued that the Court (and to some degree, both of the parties) misconstrued the import of the relevant case law as it relates to sports broadcasting.

First, the amicus brief argued that it was unnecessary to reach the First Amendment issue because no state's law has, or would, recognize that participants in a sporting event have a right of publicity to control the broadcast of their images or performances. The brief argued that dating back to the inception of radio broadcasting in the 1930s, courts have consistently recognized that producers of sporting events (which might be a team, a league, a conference, etc.) enjoy a quasi-proprietary right to exclusively license the original broadcast of the games they sponsor. *See, e.g., Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F.Supp. 490 (W.D. Pa. 1938). The Seventh Circuit's more recent decision in the *WIAA* case was likewise about the rights of football game producers (Wisconsin's high school equivalent of the NCAA), not the publicity rights of athletes, and the decision was merely the latest in an unbroken line of cases confirming producer licensing rights.

By contrast, the brief pointed out that no case has ever recognized an analogous right of publicity enjoyed by every

participant in a sporting event, which by definition would negate the ability of game producers to offer exclusive broadcasting rights. Several cases have considered whether such a right of publicity may be asserted by athletes and other game participants, and all rejected it on various different grounds. *See Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir. 1986); *National Football League v. Alley, Inc.*, 624 F.Supp. 6 (S.D.Fla.,1983); *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 487 (3d Cir. 1956); *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354 (1952). The brief further argued that the recognition of such a right would invite practical and legal chaos. Hundreds of people contribute to the entertainment value of game broadcasts – players, coaches, referees, cheerleaders, trainers – and in theory every such person could separately attempt to control the depiction of their particular image in a live game.

The Supreme Court's decision in *Zacchini*, the brief contended, was at bottom another case about producers' ability to control broadcasting rights that involved the more unusual scenario where the producer and performer of an entertainment event was one and the same person. Hugo Zacchini put on his own human cannonball act, and the Court specifically analogized his position to that of a team that charges admission fees –

logic that could not also apply to the players on a football team. The confusion often occasioned by *Zacchini* arises because the Ohio Supreme Court labeled Zacchini's cause of action a "right to the publicity value of his performance" (in contrast to Ohio's lower courts, which called it conversion, common-law misappropriation, and/or common-law copyright infringement), but the U.S. Supreme Court's decision noted that theory was different than the typical right of publicity claim premised on the mere use of someone's name or likeness.

Finally, the brief argued that even if a state law right of publicity for every participant in a team sporting event were recognized, the First Amendment would preclude its assertion. *Zacchini* recognized that the plaintiff in that case should enjoy rights to license events for broadcast because otherwise he and other producers would lack incentives to organize such events in the first place. By contrast, athletes

(Continued on page 26)

Recognizing theoretical publicity rights in hundreds of game participants would produce an enormous chilling effect.

(Continued from page 25)

and other game participants are usually already rewarded handsomely for playing popular sports and there is no evidence that a right of publicity is necessary to incentivize people to play basketball or football.

Rather, the *amici* noted that the plaintiffs' fundamental grievance is that they claim the system under which they play unfairly compensates them. That has nothing to do with the right of publicity, and many other disputes between players, owners and leagues about the fairness of compensation have been adjudicated without any need to reach publicity theories. Finally, recognizing theoretical publicity rights in hundreds of game participants would produce an enormous chilling effect on the ability of any broadcaster to secure the necessary rights to air a game in the first place, which alone would merit First Amendment protection for such programs.

On May 23 the Court denied the NCAA's motion for interlocutory certification. Notably, however, the Court did not address the merits of her prior ruling, reasoning that even if might have been in error it did not meet the requirements for an interlocutory appeal. Moreover, the Court reasoned that regardless of whether the law protects broadcasters from right of publicity claims, "some broadcasters might have sought to purchase such group licenses . . . simply as a

precaution to avoid potential liability in the face of uncertain legal precedents. Thus, even if the Court of Appeals were to support the NCAA's position on the First Amendment question, that ruling would not, on its own, suffice to dispose of any of Antitrust Plaintiffs' claims in this action." In this respect the Court's most recent opinion differed from its summary judgment ruling, and could be construed as essentially confining that opinion to *dicta* with respect to the existence of publicity rights in game broadcasts.

Trial in the *O'Bannon* case is scheduled to commence on June 9, and so it seems likely that we have not heard the last of the important questions this landmark litigation continues to raise. Trial in the *Keller* case is currently scheduled to begin in March 2015.

Nathan Siegel, Celeste Phillips and Matthew Schafer of Levine Sullivan Koch & Schulz LLP, and Dean Erwin Chemerinsky of the University of California-Irvine School of Law represented the amici curiae. Kent Raygor and Valerie Alter of Shepard Mullin Richter & Hampton represented amicus curiae First Amendment Coalition, which filed its own brief. Glenn Pomerantz and Kelly Klaus of Munger, Tolles & Olson LLP and Gregory Curtner of Schiff Hardin LLP represent the NCAA. Michael Hausfield and Hausfield LLP are lead class counsel for the Plaintiffs.

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Iowa Supreme Court Protects Candidate and His Campaign Ad

Finding No Actos Malice

By Michael A. Giudicessi and Leita Walker

The Actos and the Rozerem

In reversing \$231,000 in libel verdicts for a winning Iowa Senate candidate against his opponent and the Iowa Democratic Party, the Iowa Supreme Court prescribed *New York Times v. Sullivan* as the cure for defamation claims stemming from charges of unethical marketing of prescription drugs.

The Court's May 16, 2014 opinion ruled:

Among public figures and officials, an added layer of toughness is expected, and a greater showing of culpability is required under our governing legal standards to make sure the freedom of political speech, even when it sounds like speech far removed from the dignity of the office being sought, is not suppressed or chilled.

In its decision in *Bertrand v. Mullin and The Iowa Democratic Party*, No. 12-0649 (filed May 16, 2014), Iowa's high court engaged in a lengthy analysis of the state of mind of Democratic candidate Rick Mullin at the time he ran a counter-attack political advertisement entitled "Secrets" in his 2010 general election campaign against Republican Rick Bertrand.

The Court concluded its opinion with a ringing endorsement of *New York Times*:

While the Constitution has delivered the freedom of speech to all with just a few simple words, the history and purpose of those iconic words are immense and powerful, and have solidified a long-standing right for people in this country, including public officials, to criticize public officials.

Mullin's television ad attacked Bertrand's association with Takeda Pharmaceuticals and tied him to purported misconduct by the drug company.

Bertrand worked in the metabolic division of Takeda, where the diabetes drug Actos was manufactured and sold. He also owned local companies in the Sioux City, Iowa area.

The campaign ad, however, centered on conduct by another division of Takeda, where the prescription sleep drug Rozerem was developed and purportedly marketed to children in one advertisement.

Mullin's campaign research disclosed FDA concerns with Actos, FDA criticism of the marketing of Rozerem and a Sydney, Australia report quoting an advocacy group's declaration that Takeda "was the most unethical drug company in the world."

Using this research, the "Secrets" ad was developed by Mullin and the Iowa Democratic Party, revised after Mullin rewrote it to be "less vile" and first broadcast on October 17, 2010.

Screen text for the ad stated in bold caps, "BERTRAND'S COMPANY MARKETING SLEEP DRUG TO CHILDREN" and its audio stated:

Rick Bertrand said he would run a positive campaign but now he is falsely attacking Rick Mullin. Why?

Because Bertrand doesn't want you to know he put his profits ahead of children's health.

Bertrand was a sales agent for a big drug company that was rated the most unethical company in the world. The FDA singled out

**The jury returned
verdicts of \$31,000
against Mullin and
\$200,000 against the
Iowa Democratic Party.**

(Continued on page 28)

(Continued from page 27)

Bertrand's company for marketing a dangerous sleep drug to children.

Rick Bertrand. Broken promises. A record of deceit.

Side Effects:

A Successful Election and a Winning Lawsuit

On October 21, 2010, at their first joint campaign appearance following the telecast of "Secrets," Bertrand called the commercial false and asked Mullin to discontinue airing it.

The next day Bertrand filed suit seeking injunctive relief and monetary damages.

Mullin assessed that the lawsuit was a campaign ploy and continued running the "Secrets" ad. Its run ended on October 31, two days before the general election.

Bertrand won the election, by 222 votes, and continued his lawsuit at the district court.

He won there, too.

Although the presiding judge struck Bertrand's punitive damages count, and eight of the 10 statements Bertrand identified as libelous on the grounds they were not defamatory as a matter of law, two statements were submitted to the jury.

Specifically, the trial court allowed the jury to determine if the statement "The FDA singled out Bertrand's company for the marketing of dangerous drugs to children" and the written screen text, "Bertrand's company marketed sleep drug to children" were libelous or constituted a libel by implication.

The court submitted those statements, noting a reasonable jury could "find that these statements imply a false fact, namely that Rick Bertrand personally sold a dangerous sleep drug to children, or that he owns a company that sold a dangerous sleep drug to children."

The jury returned verdicts of \$31,000 against Mullin and \$200,000 against the Iowa Democratic Party.

On a post-trial motion, the district court found no reasonable jury could find that Takeda was Bertrand's company and struck the verdict insofar as it rested on a claim based on that statement. It upheld the award of damages on the statement that Bertrand personally sold Rozerem based on

the implication flowing from "the language and juxtaposition of the phrases."

The Antidote of the Actual Malice Test

On appeal, the Iowa Supreme Court disposed of the case solely on an assessment of fault under the actual malice test of *New York Times v. Sullivan*, holding that neither Mullin nor the Iowa Democratic Party knew and intended for any false statement or implication and likewise did not harbor subjective doubt about the accuracy of the political ad.

In a 27-page slip opinion authored by Chief Justice Mark Cady, the Court provided sweeping endorsement s of the First Amendment solicitude given political speech and speakers.

In doing so, the Court stated:

"Candidly, the New York Times standard tilts the balance strongly in favor of negligent defendants"

"[W]hen defamation is implied, the evidence must affirmatively show the author subjectively endorsed or intended the inference."

"The broader background setting of the advertisement must also be considered. Modern political campaigns exist within news cycles that often require overnight action, especially as the campaign closes in

on the day of the election.

This backdrop supports the need for "breathing room" recognized by the First Amendment to permit meaningful political speech to survive. It is a part of this case and militates against the finding of a subjective awareness of falsity needed to support actual malice."

"We next consider the claim by Bertrand that actual malice was established because the very purpose of the commercial was to attack, and thereby negatively affect, a candidate's reputation. An "intent to inflict harm" is insufficient to demonstrate a reckless disregard for the truth."

(Continued on page 29)

On appeal, the Iowa Supreme Court disposed of the case solely on an assessment of fault under the actual malice test.

(Continued from page 28)

“It is not enough to assert that the ordinary purpose of a defamation action is to vindicate and protect a person’s common law reputational interest. The First Amendment protects public discourse—even in the form of withering criticism of a political opponent’s past dealings or associations—unless the lodged attack is clearly shown to be false and made with actual malice.”

“The actual malice standard cannot be applied to make a speaker who negligently makes an

inaccurate statement liable based on evidence that may amount to a good-faith refusal to back down. Such a result is anathema to the First Amendment both as originally conceived and in the context of the *New York Times* doctrine laid down half a century ago.”

The Court concluded that the evidence failed to establish actual malice and while failure to write the political ad “in a way to avoid the false implication in this case may have been negligence” it did “not rise to the level of reckless disregard for the truth.”

Ships in Early June

Media Privacy and Related Law 2014-15

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Texas Court Affirms in Part Jury Verdict for “Talking Trash” About Corporate Competitor

Retains Doctrine of Defamation Per Se, But Limits Damages

While Texas Disposal and Waste Management were competing for two municipal solid waste contracts, Waste Management circulated a memo that criticized the engineering design of the Texas Disposal landfill. Most landfills have a synthetic composite liner at the bottom and a “blanket” (continuous) leachate collection system to trap liquids. Texas Disposal’s landfill, however, had no synthetic liner and used rudimentary “finger drains” instead of the continuous leachate blanket. Although Texas Disposal’s “performance” design was controversial, it had been approved by regulators (over dissent). Texas Disposal won both contracts, lost no business, and had increased income every year. Nevertheless, Texas Disposal sued Waste Management for libel, business disparagement, and libel *per se*. Texas Disposal is a for-profit corporation and a public figure, and Waste Management’s memo is speech on matters of public concern.

In *Waste Management I*, the jury found libel but no actual damages, and the court entered a take-nothing judgment. *Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings Inc.*, 219 S.W.3d 563, 574 (Tex. App.—Austin 2007, pet. denied). The Court of Appeals initially affirmed but then reversed on rehearing, holding that Texas Disposal was entitled to a jury question on the theory of libel *per se*. *Id.* at 593. In *Waste Management II*, the jury found \$450,592.03 in damages for reasonable and necessary remediation expenses to repair reputation and \$0 in lost profits. But the jury also found libel *per se* and, being instructed that “no evidence is required of damages,” it further found \$5 million in reputational damages and \$20 million in exemplary damages based on its finding that Waste Management had published the Action Alert with actual malice. *Waste Mgmt. of Texas, Inc. v. Texas Disposal Sys. Landfill, Inc.*, No. 03-10-00826-CV, 2012 Tex. App. LEXIS

4005, at *5 (Tex. App.—Austin, May 18, 2012, pet. granted). The trial court treated the \$5 million award for reputational injury as non-economic damages and, therefore, applied the statutory cap on exemplary damages to reduce that portion of the award to \$1,651,184.06. *Id.* The Court of Appeals affirmed.

The parties filed cross-petitions in the Texas Supreme Court. Texas Disposal argued that the court erred by categorizing its reputation damages as non-economic for purposes of the statutory cap on exemplary damages. Waste Management argued, among other things, that claims for defamation *per se* against corporations are improper and that the evidence was insufficient to support the damages awards. A number of media organizations submitted an amicus brief and urged the Court to abolish the distinction between defamation *per se* and defamation *per quod* and to abandon the doctrine of presumed damages and require proof of actual damages in all defamation cases or, at the least, to limit presumed damages to nominal damages.

The Supreme Court of Texas affirmed in part, reversed in part, and remanded the case for recalculation of exemplary damages and pre- and post-judgment interest. First, the Court held that corporations may suffer reputation damages, including those resulting from defamation *per se*. *Waste Management of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, No. 12-0522, 2014 Tex. LEXIS 381, at *16–17 (Tex. May 9, 2014). The Court explained that it had repeatedly held that corporations may sue for defamation, and it declined to apply its jurisprudence differently when the statements at issue constitute defamation *per se*. *Id.* Although the Court acknowledged *Amici*’s argument that it should abolish the distinction between defamation *per se* and defamation *per quod*, it declined to

(Continued on page 31)

**The Court
acknowledged *Amici*’s
argument that it should
abolish the distinction
between defamation *per se*
and defamation *per quod*,
it declined to
“consider these
broader issues.”**

(Continued from page 30)

“consider these broader issues.” *Id.* at *3. Second, the Court held that the trial court had properly characterized Texas Disposal’s reputation damages as non-economic damages for purposes of the statutory cap on exemplary damages. *Id.* at *30–31. The Court distinguished between general damages, which are non-economic damages such as for loss of reputation, and special damages, which are economic damages such as for lost income. *Id.* at *29–30. Third, the Court held that the evidence was sufficient to support the award for reasonable and necessary remediation expenses but insufficient to support the \$5 million award of reputational damages. *Id.* at *45–47. Texas Disposal’s presentation of invoices for costs relating to its response to the Action Alert adequately supported the award for its remediation expenses but could not support the reputational damages.

Although Texas Disposal’s CEO estimated the value of the corporation’s reputation at \$10 million, that estimation, “[w]ithout any supporting evidence of actual damages for injury to its reputation,” could not support the award for reputational damages, even in a case where actual malice had been proved. *Id.* at *43, *45. Accordingly, the Court held that Texas Disposal’s presumed damages for defamation *per se* were limited to nominal damages. *Id.* at *45. Although the Court declined *Amici*’s invitation to abandon the doctrine of presumed damages entirely, it effectively embraced the alternative suggestion to limit presumed damages to nominal damages in the absence of proof of actual harm. *See id.*

Kent Piacenti is an associate at Vinson & Elkins in Dallas. Defendant Waste Management of Texas, Inc. was represented by Robert M. (“Randy”) Roach, Jr., Daniel W. Davis, and Amy J. Schumacher of Roach & Newton, LLP.; Thomas R. Phillips of Baker Botts LLP; William Ogden and Thomas M. Gregor of Ogden, Gibson, Broocks, Longoria & Hall, LLP; and Mollie C. Lambert of Cohn & Lambert. Plaintiff Texas Disposal Systems Landfill, Inc. was represented by John J. (“Mike”) McKetta, III and James A. Hemphill of Graves, Dougherty, Hearon & Moody, PC. Amici Curiae, Belo Corp., Dow Jones & Company, Inc., Fox Television Stations, Inc., NBCUniversal Media LLC, News Corp, Reporters Committee for Freedom of the Press, Reuters America, Scripps Media, Inc., and Texas Association of Broadcasters, were represented by Thomas S. Leatherbury, Marc A. Fuller, and R. Kent Piacenti of Vinson & Elkins LLP.



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Fraud and Deceptive Conduct Claims Dismissed Over BBB Rating and Accreditation

No Personal Jurisdiction; Ratings Protected Opinion

By **Julia C. Atcherley**

A New York trial court dismissed allegations of common-law fraud and violations of General Business Law §§ 349 and 350 for deceptive trade practices, brought by New York resident Michael Steinmetz against the Council of Better Business Bureaus, Inc. ("CBBB") and Better Business Bureau of Nashville, Tennessee, Inc. ("NBBB"). *Steinmetz v. Energy Automation Systems, et al.*, No. 500554/13 (N.Y. Sup. April 23, 2014) (Schmidt, J.).

The Complaint claimed that Mr. Steinmetz was defrauded by co-defendant and Tennessee-based corporation Energy Automation Systems, Inc. ("EASI") when he entered into an agreement to serve as a distributor of EASI's energy conservation products and services. The Complaint further alleged that, after Mr. Steinmetz complained to NBBB about a history of complaints against EASI, NBBB continued to attribute an "A+" rating and accreditation to EASI, which it publishes on NBBB's website, making both BBB defendants equally liable with EASI for damages.

Justice Schmidt dismissed the complaint against the BBB defendants on multiple grounds, including that the NBBB's website was insufficient to give rise to jurisdiction in New York, and that letter grades and ratings constitute protected expressions of opinion.

First, the court found that it lacked personal jurisdiction over NBBB. The court agreed with the BBB defendants that NBBB, a Tennessee based non-profit corporation, managed and financed independently from the national association of BBBs, the service area for which was limited to 45 counties in Tennessee and southern Kentucky, does not conduct business in New York sufficient to support the exercise of jurisdiction under CPLR 301. While NBBB publishes a website that is accessible to persons in New York (and around the world), the court found that "this sort of incidental contact is not sufficient to establish general jurisdiction under CPLR 301."

NBBB's website was insufficient to give rise to jurisdiction in New York, and letter grades and ratings constitute protected expressions of opinion.

The court further held that NBBB's conduct was insufficient to confer personal jurisdiction under CPLR 302 (a)(1), the state's long arm statute. This requires a showing that the NBBB has "purposefully availed itself of the privilege of conducting activities within New York." In analyzing personal jurisdiction in the internet context, the court adopted New York's "sliding scale of interactivity" formulated in *Zippo Manuf. Co. v. Zipp Dot Com, Inc.*, 952 F. Supp. 1119, 1125-26 (WD. Pa. 1997), whereby websites are classified as "interactive," "middle ground" or "passive."

Unlike interactive websites, which "knowingly transmit goods or services to users" or even middle ground websites which "permit the exchange of information between users in another state and the defendant," the NBBB site "is limited to providing information about businesses located in the counties it serves reaching out to the Nashville BBB by visiting its website." Because the NBBB website merely makes information available to users, it could only be classified as passive, and therefore, not subject to personal jurisdiction under New York's long arm statute. Even if the website was interactive or middle ground, however, NBBB did not rate businesses in New York and had not otherwise "purposefully" directed its activity in a substantial way to New York. As a result, it could not be said that postings on NBBB's website—accessible to anyone in the world—were expressly targeted to anyone in New York. The remaining provisions for jurisdiction under CPLR 302 were held to be inapplicable on similar grounds.

Next, the court dismissed the complaint on the merits, as against both NBBB and CBBB. Regarding the statutory deceptive conduct and advertising claims under General Business Law §§ 349 and 350, the court recognized that "the critical factor in determining if particular speech may be regulated or barred by government is whether it proposes a commercial transaction" and "as consumer protection laws,"

(Continued on page 33)

(Continued from page 32)

sections 349 and 350 had not been applied to “general expressions of opinion about public matters.” Here, Mr. Steinmetz did not allege that the BBB defendants were involved in any consumer transactions with him or the public as required to establish a claim under those laws. Indeed, the court found that “neither of the BBB defendants may be deemed a seller of goods or services,” and in any event, “courts have held that ratings systems do not propose any offer of sale or other commercial transaction to consumers.”

Mr. Steinmetz suggested that an endorsement by the BBB may constitute commercial speech subject to regulation. The court rejected this argument, explaining that here, there was no allegation that the BBB defendants disseminated any advertisements proposing commercial transactions, only that co-defendant EASI had done so. Accordingly, this cause of action was dismissed.

Next, the court found that Mr. Steinmetz had failed to plead any of the elements of his common-law fraud cause of action with the requisite particularity required by CPLR 3016. According to the court, the “main (and fatal) defect of the complaint” in establishing fraud, “is that it alleges that all of the allegedly fraudulent statements or omission of fact upon which plaintiff relied in entering into his transaction with EASI *were made by EASI*, and not by either of the BBB defendants.” Furthermore, Mr. Steinmetz only informed NBBB about the history of consumer complaints against EASI “*after* his transaction with EASI.”

Addressing each fraud element in turn, the court noted that rankings and ratings of businesses are not statements of “fact” as required to establish fraud, and Mr. Steinmetz did not allege that the representations assigned to EASI “were known by the defendants to be false at the time they were made.” Moreover, the complaint failed to allege any facts

indicating that the accreditation or ranking attributed to EASI were “made with the intent to deceive for the purpose of inducing plaintiff to rely on them,” or that Mr. Steinmetz even relied on those representations at all. Lastly, the complaint did not allege facts demonstrating that any monetary loss by Mr. Steinmetz resulted from his reasonable reliance on NBBB’s representations about EASI. As a result, the common-law fraud cause of action was also dismissed.

Even if the court had found that the claims had been sufficiently pleaded, Justice Schmidt went on to hold, “a reasonable reader would conclude that the accreditation and rating by grade (A+) were conveying BBB’s opinion of EASI, rather than facts about the company.” Because statements of opinion constitute non-actionable expression under the Federal Constitution and the Constitution of the State of New York, the causes of action all failed as a matter of law. Mr. Steinmetz argued that the representations concerning EASI do not constitute opinion because they are based on “a set of objective, verifiable criteria to evaluate companies,” which could not be satisfied.

The court rejected this argument, finding that the factors upon which the BBB bases its ratings and accreditations are “objective and subjective components,” and that BBB’s weighting of the objective data in its evaluative process rendered it subjective opinion. “As such,” the court held, “the rating is not sufficiently factual to be susceptible of being proved true or false and is therefore protected under the First Amendment.”

Defendants Council of Better Business Bureaus, Inc. and Better Business Bureau of Nashville, Tennessee, Inc. were represented by Jay Ward Brown and Julia C. Atcherley of Levine Sullivan Koch & Schulz, LLP. Plaintiff Michael Steinmetz was represented by Howard A. Gutman of the Law Offices of Howard A. Gutman.

New MLRC Task Force To Focus on SLAPP Laws and Litigation

MLRC is putting together a SLAPP Task Force, which will focus on SLAPP litigation generally, but also on various state anti-SLAPP laws – which ones work, which ones don’t, and how to improve SLAPP protections overall. The object is to share information about new developments and current case strategy, provide a clearinghouse on current SLAPP legal issues (such as the scope and applicability of anti-SLAPP laws in diversity cases in federal court), analyze new state anti-SLAPP bills, promote SLAPP reforms (including a possible federal anti-SLAPP law), collect anti-SLAPP briefs and forms, and develop a model anti-SLAPP law. If you are interested, please contact the Task Force chair, Bruce Johnson of Davis Wright Tremaine LLP at brucejohnson@dwt.com.

News Media Coalition Weighs in to Support Drone Photographer in NTSB Litigation

By Charles D. Tobin and Christine N. Walz

A coalition of news organizations, arguing that the use of unmanned aerial systems "UAS" or "drones") for newsgathering should not constitute a "business purpose" under federal regulation, is supporting a drone photographer's administrative appeal of a \$10,000 fine.

This is the first organized effort by a group of news media to engage with the federal government in the growing debate over regulating civilian UAS use in the United States.

The coalition has appeared as [news media amici](#) before the full National Transportation Safety Board in support of Raphael Pirker, who was fined \$10,000 for flying a camera-equipped model aircraft around the University of Virginia. He successfully challenged the fine before an administrative law judge from the NTSB. The judge ruled that the Federal Aviation Administration's stringent regulation of commercial drones was unenforceable because the agency had failed to adopt it through appropriate procedures. The FAA has now appealed that ruling to the full NTSB.

While unmanned aircraft have traditionally been used for military and civil applications, recent technological advances have made journalists eager to deploy for news use the same inexpensive model aircraft popular with hobbyists. The FAA, however, has taken the position that the use of UAS for newsgathering would constitute an impermissible "business purpose" under the same FAA policy document that Pirker has challenged.

The administrative law judge ruled that the policy document was unenforceable because it was not enacted under the strictures of the Administrative Procedures Act. In its appeal, the FAA in the appeal argues that the general body of regulations that apply to commercial airplanes, the Federal Aviation Regulations, furnish broad authority to ban UAS use. Pirker counters that the FAA's broad interpretation absurdly would permit it to regulate frisbees, golf balls,

boomerangs, bullets, and children's toys. According to Pirker, the FAA's failure to issue regulations through proper notice and comment procedures precludes any penalty for UAS use.

A coalition of eighteen media companies and nonprofit journalists' associations have filed an *amicus* brief in support of Piker. The news media organizations have criticized the FAA's heavy-handed approach and complete ban on UAS, especially as it would apply to journalism. Newsgathering, the coalition argues, does not fall within "business purposes" in the sense of a commercial sale of goods or services. The news media's brief directed the NTSB to a number of federal policies that have carved out protections for the news media, including: exceptions to temporary flight restrictions over disaster sites; postal rates; campaign expenditure rules; broadcast licensee requirements; and subpoenas to journalists. The brief asks the NTSB, in adjudicating Pirker's appeal, to likewise recognize the public's and the news media's First Amendment interests in news gathering and dissemination.

The news media's brief also highlights the many ways that drones will aid news coverage, pointing the NTSB to coverage of recent news events, including fires and protests that incorporated video footage provided by drone hobbyists. The brief also cites a survey conducted by the National Press Photographers Association, under the leadership of its General Counsel Mickey Osterreicher, in which journalists anticipate using drones to obtain footage despite obstructions, safety concerns, police restrictions, or hazardous environments and expect that drones will improve their ability to report on fires, accidents, weather conditions, natural disasters, and construction sites. The NPPA's paper *Charting the Course for the Use of Small Unmanned Aerial Systems in Newsgathering*, includes the full survey results and is [available here](#).

(Continued on page 35)



(Continued from page 34)

Responding to calls for additional privacy regulations relating to the use of drones, the news media *amici* argue that privacy concerns relating to this technology do not require a new set of federal laws. Instead, state laws, including invasion of privacy laws, as well as trespass laws, nuisance laws, state electronic eavesdropping or wiretapping laws, and anti-stalking laws, can address those concerns, as they have addressed other developing technologies.

Finally, the news media *amici* argue that, where First Amendment rights are implicated, it is critical that Congress and regulatory agencies provide clear, constitutional standards that avoid improperly limiting the rights to free speech and a free press. The FAA's *ad hoc* restrictions on the use of unmanned aerial systems do not currently provide clear standards. As a result, media organizations are at risk of facing enforcement actions like that brought against Pirker. This risk flatly contravenes the First Amendment.

Through their brief, the *amici* have encouraged the FAA to undertake a proper notice-and-comment rulemaking to establish a workable, constitutional regulatory framework for the safe and lawful use of UAS by the news media.

In addition to the news media's brief, the NTSB has also received *amicus* briefs from the National Agricultural Aviation Association (supporting the FAA's position), and from a coalition of drone users who have received cease-and-desist letters from the FAA and a technology consulting company that provides services for non-military, commercial uses of drones (supporting Pirker).

The litigation before the NTSB is just one forum in which the public policy debate over UAS regulation is playing out.

Congress in 2012 ordered the FAA to issue a comprehensive plan for integrating UAS into the air traffic system by 2015. As part of that goal, the law requires the FAA to issue a rule specifically addressing the use of small UAS. In late 2013, the FAA issued a "roadmap" laying out its plan for the safe integration of UAS, which begins with the establishment of six experimental test sites located around the country to experiment with the use of UAVs in areas with diverse climate, geography and ground infrastructure. Two of the test sites are currently operational. All of the test sites are expected to begin operation before the end of the summer.

The following news media organizations participated in the *amici* brief: Advance Publications, Inc., A. H. Belo Corporation, the Associated Press, Cox Media Group, LLC, Gannett Co., Inc., Getty Images, Gray Television, Inc., Hearst Corporation, The McClatchy Company, the National Press Photographers Association, the National Press Club, The New York Times Company, Reporters Committee for Freedom of the Press, the Radio-Television Digital News Association, Scripps Media, Inc., Sinclair Broadcast Group, Inc., Tribune Company, WP Company LLC/*The Washington Post*).

Charles D. Tobin and Christine N. Walz are attorneys in the Washington, D.C. office of Holland & Knight LLP. They, along with Gary Halbert from the Washington, D.C. office of Holland & Knight LLP, represent the coalition of news media amici in Huerta v. Pirker (NTSB Docket CP-217). On appeal, the FAA is represented by Susan Caron, Office of the Chief Counsel, Federal Aviation Administration. Photographer Raphael Pirker is represented by Brendan M. Shuman with the New York office of Kramer, Levin, Naftalis, & Frankel, LLP.

2014 UPCOMING EVENTS

MLRC/NAA/NAB Media Law Conference

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MLRC Annual Dinner

November 12, 2014 | New York, NY

DCS Annual Lunch & Meeting

November 13, 2014 | New York, NY

Sidebar: Publishing Drone Video That Falls from the Skies

By Charles D. Tobin and Christine N. Walz

It's clear that the FAA currently considers it unlawful for a newsroom to strap a camera onto a drone, take images, and publish them. Whether the ban will survive the current litigation, or be replaced by a properly promulgated set of regulations, remains to be seen. Also uncertain is whether the FAA's dubious approach of sweeping newsgathering under the definition of proscribed "business purposes" will survive.

Until then, some newsrooms have wondered what to do when hobbyists take these aerial images on their own, then deliver them to their favorite newspaper, television station, network, or web host. Will the FAA come after journalists who publish these source materials without participating in the aerial photography themselves?

Recently, the FAA has made concerning statements suggesting that merely publishing drone footage could result in FAA enforcement action. Specifically, after a drone operated by hobbyists in Ohio captured video footage of a fire, a FAA spokesperson recommended that a news publication "err on the side of caution" because it "would require more legal review to determine if it was a fineable offense to publish the video on [a news] site." See Tristan Navera, *Why You Won't See Drone Footage From Downtown Fire on Our Site*, Dayton Biz Blog (April 4, 2014).

Despite this chilling warning from the FAA, U.S. Supreme Court precedent holds that the government may not punish publication of lawfully obtained information that is truthful and a matter of public significance, absent an interest of the highest order and a narrow tailored remedy. For this reason, in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the Court held that the First Amendment protected a broadcaster's publication of an illegally taped telephone conversation that he lawfully obtained from someone else, and that recorded a matter of legitimate public concern.

Since *Bartnicki*, courts consistently have held that government officials lack any authority to threaten citizens who have done nothing more than publish information of legitimate public concern. For example, in *Jean v. Massachusetts State Police*, 492 F.3d 24 (1st Cir. 2007), the First Circuit upheld an injunction prohibiting police from threatening to prosecute a woman who posted illegally-recorded video of a warrantless police search of someone else's home. Regardless of the homeowner's violation of state eavesdropping laws in creating the video, the First Amendment permitted her to publish. The appeals court noted specifically that even if the woman knew the homeowner broke the law, *Bartnicki* protected her since she had no hand in the recording.

Bartnicki and its progeny suggest that, while the FAA may not like seeing drone photography on the internet, journalists are fully protected where a photographer provides the footage and the newsroom did not participate in or request the recording. Of course, given the FAA's recent statements, newsrooms will individually have to weigh the risk and expense of defending against a potential enforcement action before publishing drone photography.

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Key Points on DOJ Policy

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.

Times-Picayune Reporters Testify About Alleged Grand Jury Leak *Murder Defendants Sought to Have Indictments Dismissed*

A federal judge recently ruled that two murder defendants could subpoena reporters from the *Times-Picayune* for an evidentiary hearing to try and prove that the FBI violated grand jury secrecy rules and sought to influence grand jurors' decision to indict. [*United States v. Howard*](#), No. 2:12-cr-00001 (E.D. La. March 26, 2014) (Feldman, J.). The court narrowed the subpoena to allow questioning only about a single meeting between FBI agents and reporters and a subsequent article that predicted that defendants would be indicted.

In May, after conducting a hearing at which the reporters testified, the court denied the defendants' motion for dismissal and/or sanctions, finding no evidence that the timing of the newspaper article was influenced by the FBI or that defendants suffered any prejudice. *United States v. Howard*, No. 2:12-cr-00001 (E.D. La. May 29, 2014).

Background

The defendants are alleged part of notorious New Orleans crime family. They are charged with murdering four people, possessing illegal guns and drugs, assaulting victims with deadly weapons, money laundering, lying under oath and obstructing justice.

Prior to defendants' indictment, two FBI agents met with newspaper reporters, John Simerman and Gordon Russell. The meeting was held three days before Simerman, the sole author of the article, published his piece and one week before the grand jurors voted in favor of a second superseding indictment in the case. The article predicted the indictment of the defendants.

The FBI agents conceded that they provided the reporters with information that was published in the article and a chart that went with the article. Moreover, a copy of the newspaper containing the article was present in the grand jury deliberation room.

Several defendants argued their indictments should be dismissed because of the violation of Federal Rule of Criminal Procedure 6(e) protecting grand jury secrecy. Defendants subpoenaed the FBI agents and reporters seeking

wide ranging disclosure of press law enforcement discussions in other cases as well.

In March, the court narrowed the subpoena, but held that the reporters' testimony about the meeting with the FBI and their article would be relevant, material and useful to the defendants. "Only Mr. Simerman, the author of the October 13th article, can confirm the identity of his sources," the judge said.

Denouement

On May 29, the court ruled against the defendants' motion to dismiss their indictment and/or sanction the government. The two reporters and two FBI agents both testified during the hearing, according to the *Times Picayune*.

After hearing two days of evidence, the court credited the government's argument that the FBI agents only disclosed the results of their independent investigation of the case to the reporters—not grand jury information. The point of the meeting was to make disclosures that would ensure the safety of law enforcement officers during the post-indictment arrests.

"This record fails to persuade that whatever the agents said at the meeting had any influence whatsoever on the timing of the publication of the article or the indictment, except, possibly, hard work by the reporter," Judge Feldman wrote.

The defense didn't have any better luck with the fact that a newspaper containing the article was present in the grand jury room. Having the article present in the grand jury room did not establish that the panel's independence was corrupted. The prosecutor "to his credit, specifically and emphatically admonished the grand jury to disregard the article," and it was an isolated incident during a yearlong grand jury investigation involving dozens of witnesses, the judge concluded.

Loretta G. Mince and Rebecca Sha of Fishman Haygood in New Orleans represented the Times Picayune and the two journalists.

Newspaper Wins Records Battle For Emails Seized in John Doe Investigation

By Steven Mandell, Steven Baron, and Natalie Harris

In May 2010, the Milwaukee County District Attorney initiated a secret John Doe proceeding to investigate allegations that public employees and officials were misusing public resources for political purposes in connection with the gubernatorial campaign of then-Milwaukee County Executive, Scott W. Walker.

In Wisconsin, a John Doe is an investigative proceeding in which the judge has the power to subpoena and examine witnesses under the cloak of a secrecy order to ascertain whether a crime has been committed. (*See* Wis. Stat. § 968.26.)

During the John Doe investigation, the Milwaukee County District Attorney seized “secret” e-mails exchanged among County employees as well as the electronic equipment they used to keep those communications under the radar. Under the Wisconsin Public Records Law, those seized communications are “records” subject to “a presumption of complete public access”. (Wis. Stat. §§ 19.31 and 19.32(2).)

However, Milwaukee County failed to provide *Milwaukee Journal Sentinel* reporter David Umhoefer access to certain requested records covered by the John Doe seizure, presumably because those records remained in the exclusive custody of the District Attorney who had been leading the John Doe investigation.

The John Doe investigation led to the conviction of six individuals, including three former aides of then-County Executive Scott Walker. On February 13, 2013, the John Doe proceedings were closed, but the secrecy order remained in place.

Following the closure of the John Doe proceedings, David Umhoefer made a renewed public records request for certain seized records—this time directed to the John Doe judge. The John Doe judge denied the request citing the previously-entered secrecy order.

Shortly thereafter, the *Milwaukee Journal Sentinel* wrote a letter to current Milwaukee County Executive Chris Abele,

requesting that he take action to restore the Milwaukee County records seized in the John Doe to the county’s possession. The Milwaukee County Executive failed to take any action to restore the records, effectively relegating them to a “black hole” beyond the public’s reach, indefinitely.

On September 18, 2013, the *Milwaukee Journal Sentinel*, Journal Sentinel, Inc. and David Umhoefer (the “Newspaper”) filed a motion to intervene in the John Doe proceeding for the purpose of requesting that the sealed records be returned to Milwaukee County.

While the Newspaper’s motion was pending, one convicted former aide filed an appeal and the Wisconsin Court of Appeals ordered certain records seized in the John

Doe related to her prosecution unsealed. The unsealed records—representing only a small portion of the seized Milwaukee County records—confirmed that numerous Milwaukee County employees, including former Milwaukee County Executive Scott Walker, his former Chief of Staff, former Deputy Chief of Staff and numerous others, used personal e-mail accounts and/or a “secret router” to conduct official Milwaukee County business..

The Newspaper supplemented their motion with information gleaned from the unsealed records and requested a public hearing.

In response to the Newspaper’s motion, the Milwaukee County District Attorney argued, among other things, that the Wisconsin intervention statute does not apply to John Doe proceedings and that the Newspaper lacked standing to challenge the scope of the John Doe secrecy order or demand return of the records to the Milwaukee County Executive.

On May 21, 2014, the John Doe judge convened the first public session of the proceedings. Following extensive oral arguments on behalf of the Newspaper, Milwaukee County Executive and Milwaukee County District Attorney, the John Doe judge issued a ruling from the bench, granting the Newspaper’s motion in its entirety.

(Continued on page 39)

The Milwaukee County District Attorney seized “secret” e-mails exchanged among County employees as well as the electronic equipment they used to keep those communications under the radar.

(Continued from page 38)

As a result, the seized records are no longer subject to the John Doe secrecy order and the Milwaukee County District Attorney must return them to the office of the Milwaukee County Executive. At long last, Milwaukee County records that have been cloaked in secrecy will be available to the public in accordance with Wisconsin Public Records law. That law states that “a representative government is dependent upon an informed electorate,” and the ruling upholds the public’s right “to the greatest possible information regarding the affairs of government and the

official acts of those officers and employees who represent them”. (Wis. Stat. § 19.31)

The Milwaukee Journal Sentinel, Journal Sentinel, Inc. and David Umhoefer are represented by Steven Mandell, Steven Baron, and Natalie Harris of Mandell Menkes LLC, Chicago. Milwaukee County District Attorney John Chisholm is represented by Milwaukee County Assistant District Attorney Bruce J. Landgraf and Deputy District Attorney James J. Martin, Milwaukee. Milwaukee County Executive Chris Abele is represented by Milwaukee County Deputy Corporation Counsel Mark A. Grady, Milwaukee.



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VA Supreme Court Denies Public Records Request for Climate Change E-mails

Justices Adopt Broad Definition of 'Proprietary' Information

The Virginia Supreme Court adopted an expansive definition of what constitutes proprietary information exempt from public records requests in rejecting a conservative legal nonprofit's request for access to a former University of Virginia professor's e-mails and other documents. [*American Tradition Institute v. University of Virginia*](#), No. 130934 (Va. April 17, 2014).

Justice Donald W. Lemons, writing for the court, noted that the Virginia Freedom of Information Act does not define what "data, records or information of a proprietary nature" produced at public universities on medical, scientific, technical or scholarly issues is exempt from disclosure.

The court adopted the definition of "proprietary" advanced by the university: a right customarily associated with ownership, title, and possession. It is an interest or a right of one who exercises dominion over a thing or property, of one who manages or controls." The court applied its 1980 decision in *Green v. Lewis*, 221 Va. 547 (1980), in reaching that definition.

The requestor, the American Tradition Institute (since renamed The Energy and Environment Legal Institute), sought access to emails and documents produced by climate scientist Michael Mann during his tenure at UVA. The group unsuccessfully argued that proprietary information is only information that involves a commercial competitive advantage and would financially injure the university if disclosed.

The Court held that ATI's definition of "proprietary information" was inconsistent with the "General Assembly's intent to protect public universities and colleges from being placed at a competitive disadvantage in relation to private universities and colleges." The Court added that "In the context of higher education research exclusion, competitive disadvantage implicates not only financial injury, but also harm to university-wide research efforts, damage to faculty recruitment and retention, undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression."

Without much discussion, the Supreme Court also ruled that a public entity may charge for reviewing documents to see if they are excluded from public-records disclosure.

In a concurrence, Justice William C. Mims said that legislators should enact a specific definition of "proprietary" to avoid extrapolations in future case law that "diverge from the General Assembly's true intent."

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2014 Report on Trials and Damages

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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.

Court Rejects Access to Warrantless Wiretapping Cases Involving Acquittals, Dismissals

A divided D.C. Circuit court panel ruled that it would be an unwarranted invasion of personal privacy for federal prosecutors to disclose the cases in which they obtained warrantless cellphone data to track defendants' whereabouts and did not obtain convictions. [*American Civil Liberties Union v. Department of Justice*](#), No. 13-5064 (D.C. Cir. May 9, 2014).

The six defendants who were acquitted or had their cases dismissed "have an especially strong interest in being let alone," Judge David S. Tatel wrote. "Although the fact that such defendants were accused of criminal conduct may remain a matter of public record, they are entitled to move on with their lives without having the public reminded of their alleged but never proven transgressions."

In a prior case, the court held that the Freedom of Information Act required the disclosure of case names and docket numbers of cases in which defendants were convicted of crimes after warrantless tracking of their cell phones. This prior disclosure reduces the value to FOIA requestor American Civil Liberties Union of obtaining information about these six other cases, Judge Tatel said.

In dissent, Judge Janice Rogers Brown said people who have been acquitted or have had their cases dismissed can be redeemed, but "in the modern world, the right to be left alone, once forfeited, is gone for good." The defendants have no privacy interest that can trump disclosing public records of criminal prosecutions, the dissenting judge said.

Access Roundup: Other Recent Access Cases of Note

Win for Access to Public Employee Information

The home addresses, but not the names, of retired public employees who receive retirement benefits are exempt from disclosure under New York's Freedom of Information Law, the New York Court of Appeals has ruled. [*In re the Matter of Empire Center for New York State Policy v. New York State Teachers' Retirement System*](#), Nos. 77 and 78 (N.Y. May 6, 2014). New York's Public Officer Law is clear on its face that the addresses, but not the names of retirees, are exempt from disclosure, the court said, while both the names and addresses of employees' beneficiaries are exempt.

The New York State Teachers' Retirement System and the Teachers Retirement System of the City of New York argued that retirees' names should be kept confidential to protect their privacy. The retirement systems both said it would not be that difficult for someone to find the retirees' home addresses and expose them to "intrusive communications" upon learning their names. The court said it

was speculative to assume that the retirees' privacy would be invaded.

Loss for Access to Public Employee Information

The Wisconsin Court of Appeals ruled that there is the public policy exception to the presumption that public records should be disclosed in order to protect the safety of public school employees. [*State Ex Rel. Korry L. Ardell v. Milwaukee Board of School Directors*](#), Appeal No. 2013AP1650 (Wis. Ct. App. May 6, 2014). The court concluded that a requester's reasons for seeking public documents is pertinent to conducting a fact-sensitive analysis on whether there is cause to override the preemption of access to public records.

Records requester Korry L. Ardell pled guilty to violating a domestic abuse injunction against having contact with an employee working for the Milwaukee schools. He served nine months in jail. When Ardell requested records of the

(Continued on page 42)

(Continued from page 41)

days the employee missed from work, disciplinary records and any investigations of her, the court said he was not requesting records to conduct public oversight of the workings of government. “In committing acts of violence against the MBSD [Milwaukee Board of School Directors] employee and ignoring the domestic abuse injunction, he forfeited his right to the documents he requests,” Judge Kitty K. Brennan said.

Access to De Facto Public Agency

A nonprofit association that coordinates interscholastic athletic competitions for most of the schools in Tennessee is the functional equivalent of a government agency and is subject to that state’s Public Records Act, the Tennessee Court of Appeals ruled. *City Press Communications, LLC v. Tennessee Secondary School Athletic Association*, No. M2013-01429-COA-R3-CV (Tenn. App. April 30, 2014). Under the totality of the circumstances, the Tennessee Secondary School Athletic Association is the functional equivalent of the Tennessee State Board of Education because it directs and manages the extracurricular sporting activities of almost every high school in Tennessee, the court opined.

While the association only receives two percent of funding directly from schools, it has indirect government funding through various championship tournaments that results in income received instead of the government having to provide that funding, the court said. The court also held that there is substantial governmental involvement in the control of the association because, among other reasons, its officers are drawn from public schools and its regulates athletic activities in lieu of the Board of Education doing so. As a result of the court’s ruling, the *City Paper*, based in Nashville, is entitled to records related to the association’s investigation of the removal of a football coach by a private school for possibly providing financial aid to students who did need it.



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Dutch Broadcaster Wins Libel Case Brought by Ryanair

Questions About Flight Safety Not Defamatory

By Tessel Peijnenburg and Jens van den Brink

In April, a court in Amsterdam dismissed a libel suit brought by Irish budget airline Ryanair against Dutch broadcaster KRO over news reports that raised air safety issues about the carrier. [Ryanair Ltd., v. Katholieke Radio Omroep](#), (April 16, 2014).

At issue were reports on KRO's Brandpunt Reporter of [28 December 2012](#) and [3 January 2013](#) that discussed Ryanair's corporate culture and the influence this may have on flight safety. The broadcasts included interviews with a number of Ryanair pilots who appeared anonymously. Among other things, they addressed an incident that occurred on July 26, 2012 above Valencia, Spain in which three Ryanair pilots had "fuel maydays."

Ryanair sued alleging the broadcasts falsely accused it of jeopardizing flight safety by its fuel policy and also making pilots fly when sick.

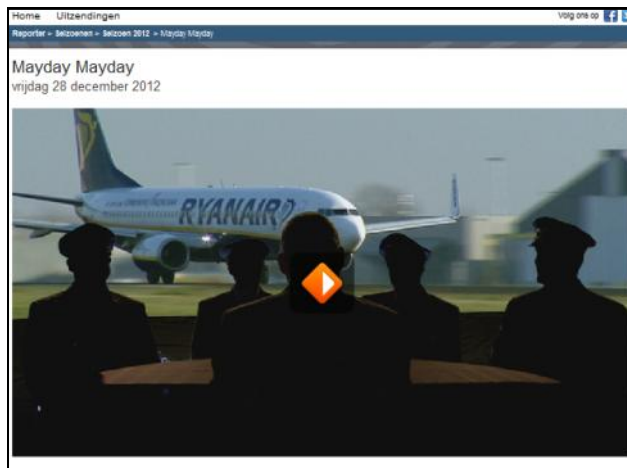
Court Ruling

The Court [ruled](#) that KRO had made a detailed investigation of the allegations and the broadcasts were supported by the facts disclosed or were fair comments about the issues. Therefore, KRO was justified to raise accusations about flight safety in its broadcasts.

The following considerations of the Court are particularly interesting.

4.4. *With the parties the Court establishes that on 26 July 2012 there was a hectic situation. A large number of airplanes tried to avoid storm cells above Madrid and some of them were*

subsequently above Valencia where there was only one landing strip and the airport had to deal with twelve diversions in twenty minutes time. The Court adjudicates the situation of the three Ryanair planes on 26 July 2012 as being potentially dangerous. It can also be established that it does not happen often that a plane must make a mayday call and that it is exceptional when three planes of one and the same airline have to make such a call on the same day.



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4.5 *KRO made a detailed investigation into the course of affairs and the circumstances that played a role in this context. KRO talked with various sources from the aviation sector and had a large amount of documentation available. On the basis of all available information, KRO came to the conclusion that there was a serious abuse: on the one hand, the corporate culture within Ryanair and, on the other hand, the associated safety risks.*

According to the Court, the nature of this abuse was such that KRO, being a news medium, must be able to comment on it and warn people about it. In principle, it is up to KRO to decide what is broadcast or not from the available material.

4.7 *The accusations made in the broadcast are supported to a large extent by statements of anonymous persons who say that they are pilots of Ryanair. In the light of the accusations made by them and in view of their dependent*

(Continued on page 44)

(Continued from page 43)

relationship with Ryanair, the Court deems the choice of KRO to make them unrecognisable understandable. The identity of these persons was verified by a notary in such a way – by means of their identification-company passes – that KRO could assume they were pilots of Ryanair. In the Court's opinion, their statements are moreover sufficiently supported by the many documents and other sources which KRO disposed of.

4.11. *The Court furthermore considers it important that also the (subjective) experience of pilots of Ryanair may influence flight safety, even if this could not be explained on the basis of the rules on fuel policy as included in the Operations Manual and the employment conditions of Ryanair. Apparently, various pilots experience the policy of Ryanair as a pressure which hinders them in their job, for instance when making a decision. It must be observed here that in all cases the decision to fly remains the responsibility of the pilot.*

4.13. *The Court therefore comes to the conclusion that the – serious – accusations made in the broadcasts were sufficiently supported by the available facts. The statements of the anonymous persons, of whom the KRO could assume that they worked as pilots at Ryanair, made in the broadcast are supported by (amongst other things) the above-mentioned exhibits, the correctness of which was not denied by Ryanair. The prior announcements on the website are only a summary of what is to be discussed in Broadcast I and II. It has not become evident that*

the texts on the website, apart from the broadcasts, are unlawful towards Ryanair.

In the broadcast, accusations were made by the various interviewees. This was followed by KRO voice-overs summarizing or commenting on these statements. The Court said KRO did not make these statements as its own. The Court said in this respect:

4.6 *This case concerns serious accusations against Ryanair. The accusations are embedded in interviews with sources from both within and outside Ryanair. The criticism on the policy of Ryanair made by the interviewees is of an equal nature and purport. It cannot be said that KRO has made these accusations its own, but it does attach conclusions thereto which are reported by a voice-over."*

Various media have reported that Ryanair will appeal against the judgment.

Incidentally, Ryanair's request for a provisional hearing of witnesses [was rejected](#) as unnecessary. The arguments of KRO were sufficiently supported by the facts. The Court argued that facts and circumstances that may be established afterwards cannot alter the lawfulness of the prior broadcasts.

At an earlier stage, Ryanair unsuccessfully sought to obtain the unedited videos of the interviews made by KRO. Ryanair argued that KRO used the statements out of its context. The Court rejected the request based on KRO's right not to disclose its journalistic information.

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Ethics Corner

ABA Weighs In on Ethical Boundaries of Social Media Research on Jurors in Voir Dire

Ignoring Jurors' Use of Social Media Is No Longer an Option

By Luke J. Gilman

Understanding the ethical duties and limits of researching jurors' activity on the internet, particularly on social media such as Facebook, Twitter, and LinkedIn has bedeviled both attorneys and judges in recent years. The American Bar Association has recently weighed in to provide some clarity to the ethical obligations and dilemmas posed by the use of social media by jurors in Formal Opinion 466, Lawyer Reviewing Jurors' Internet Presence (April 24, 2014).

Simply ignoring jurors' use of social media is no longer an option. The ethical duties owed by attorneys under the Model Rules of Professional Conduct of competence (Rule 1.1) and diligence (Rule 1.3) both incorporate a reasonable lawyer standard that is now understood to include an obligation to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." See Comment [8] to Model Rule 1.1.

Ethical considerations therefore inform not only what attorneys should refrain from doing with regard to jurors' social media but also what reasonable investigation attorneys may be obligated to undertake depending on the circumstances of the case.

Drawing the Line at Active Requests for Access

The ABA's Formal Opinion 466 distinguishes between an "active" request to access a juror's social media, i.e. making a "friend" request to a juror, and "passive" viewing of a juror's social media made publicly accessible by the juror through his or her privacy settings. A "friend" request (or equivalent request to connect to that juror's social media profile) seeks access to what the juror has not otherwise made public and therefore constitutes the type of *ex parte* communications prohibited by Model Rule 3.5(b).

However, Formal Opinion 466 also draws an important distinction between an active "friend" request made by the lawyer and an unintentional notification to the social media user/juror generated by the social media platform. The typical example is LinkedIn, which notifies profile owners when other users have viewed their profile.

In other words, the act of a lawyer passively viewing a juror's LinkedIn profile may inadvertently cause LinkedIn to notify the juror that the lawyer viewed his or her profile – is this improper *ex parte* communication? To the authors of Formal Opinion 466, "[t]he fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b)."

This pragmatic interpretation corrects a potential chilling interpretation taken in other formal opinions offered by two New York bar associations cited in ABA's Formal Opinion 466. The ABA offers a useful and accessible analogy for those less familiar or comfortable with the mechanics of the technology – social media as the juror's neighborhood:

Type of Social Media Access...	is Akin to...	and is deemed...
Passive review of publicly accessible social media information.	Driving down the street to where the prospective juror lives to observe the environs.	Ethical
Passive review of publicly accessible social media information that results in notice to the juror of the lawyer's review.	Neighbor recognizing the lawyer's car driving down the juror's street and alerting the juror.	Ethical by ABA Formal Opinion 466; <u>but not by other local bar opinions</u>
An active "friend" request to gain access to non-publicly accessible social media information.	Driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house.	Unethical

While such analogies may be undermined by changing technologies and practices, the 'driving down the jurors' street' analogy is for the time being both apt and accessible and strikes an appropriate balance in the tension between the obligations of competence and diligence and the prohibition on *ex parte* communication. Courts addressing this issue have drawn distinctions on similar lines. See *United States v. Watts*, 934 F. Supp. 2d 451 (E.D.N.Y. March 22, 2013) (acknowledging necessity of monitoring jurors' use of social media during trial in granting motion but limiting scope by prohibiting direct contact of jurors, including potentially inadvertent methods such as through LinkedIn).

Dealing with Juror Misconduct

Additional ethical questions arise if and when juror misconduct is discovered. The ABA's Formal Opinion 466 opines:

In the course of reviewing a juror's or potential juror's Internet presence, if a lawyer discovers evidence of juror or potential juror misconduct that is ***criminal*** or ***fraudulent***, the lawyer **must** take ***reasonable remedial measures*** including, if necessary, disclosure to the tribunal.

The ABA Formal Opinion 466 makes it clear that the standard outlined here is a recapitulation of Model Rule 3.3 and noted that other broader formulations of an affirmative duty to notify the court upon learning of *any* juror misconduct have been proposed but have not yet been adopted and incorporated into Rule 3.3.

It should nevertheless be noted that some jurisdictions have taken a broader and more forceful view of the attorney's obligation to report potential juror misconduct to the tribunal: "[a]n attorney's duty to inform the court about suspected juror misconduct trumps all other professional obligations, including those owed a client.

Any reluctance to disclose this information—***even if it might jeopardize a client's position***—cannot be squared with the duty of candor owed to the tribunal." *United States v. Daugerdas*, 867 F. Supp. 2d 445, 484 (S.D.N.Y. 2012). Thus, the point at which jurors' social media activity crosses a line from mere misconduct to that requiring counsel to notify the court remains murky. In the absence of clear guidance, the risk is that counsel may be tempted to report misconduct only if appears detrimental to the client's case.

As the *Daugerdas* case illustrates, judges may expect a higher standard. Therefore counsel may avoid such a quandary by seeking clarification on such issues at the outset. One opportunity to do so would be in making a request that the jury be instructed to refrain from improper use of social media during trial, particularly if the case involves anything of broader interest to the media.

(Continued from page 46)

Highlighting Need for Local Rules/Specific Jury Instructions

ABA's Formal Opinion 466 expressly recognizes the applicability and need for local rules, standing orders, or case management orders to clarify the expectations of the parties, counsel and judges regarding social media before an issue arises. One example is that proposed by Judicial Conference Committee on Court Administration and Case Management, [*Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate About a Case*](#) (June 2012).

It prohibits all jurors from communicating with anyone about the case and specifically identifies popular social media platforms as well as asking any juror to notify the judge if they become aware of any other juror doing so in violation of the instructions. Using such an instruction would put judge and counsel on the same page regarding social media, but put jurors on notice of these shared expectations as well.

A recent study surveyed jurors in federal and state courts on their use of social media during their jury service after receiving these *Proposed Model Jury Instructions*. Despite the specific instruction, approximately 8 percent of jurors who responded to the survey nevertheless reported being 'tempted' to communicate about the case. See Hon. Amy J. St. Eve, Hon. Charles P. Burns, & Michael A. Zuckerman, *More from the #Jury Box: The Latest on Juries and Social Media*, 12 DUKE L. & TECH. REV. 64 (2014).

It has become clear that the use of social media by jurors is becoming commonplace and should not and indeed cannot ethically be ignored.

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