



# MEDIA LAW LETTER

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*From the Executive Director's Desk*

## **A New Conference - For European Media Lawyers**

When I started at MLRC in September, one of the new initiatives I planned was to spread our sphere of influence into Continental Europe. After all, over the last decade we have played a role in the UK and we count many British lawyers as our members and friends. Moreover, the



**George Freeman**

Continent could use a dose of First Amendment proselytization, with its overly high regard for privacy interests and its panoply of laws outlawing hate speech.

I had my own rude awakening about 8 years ago when the Times was sued in Paris on an article reviewing what had happened to Grace Kelly's family 25 years after the Princess' death, crashing off a road high above Monaco. The article discussed the wildlife of her daughter Caroline and noted that her third and current husband Prince Ernst of Hanover "made a name for himself with drunken boorish behavior". We received a complaint based on that phrase, and I worriedly called the reporter to ask for his support for that statement. While on hold, a quick Google search revealed that Ernst had been in rehabilitation numerous times, had been in a handful of barroom brawls and had peed on the Turkish Embassy. So I hung up, and instead called the plaintiff's lawyer to ask where was the libel. Who said there was falsity, he replied; notwithstanding all these events had been publicly reported, this was a claim for privacy. But he's a public figure, a Prince, wife of the famed Caroline and all of this was public. No matter, he responded, it's embarrassing to him and therefore he has a claim. When I called two French lawyers, and they both said it was a 50/50 case, I knew that French law was in some serious need of reform.

I had no illusions it would be easy. After all, the EU consists of numerous countries speaking several different languages, each with different, and often conflicting histories, cultures, values and laws; more significantly, their laws, taken in the aggregate, are radically different from ours across the pond.

But it seemed worthwhile to make the attempt, and within two months the Charlie Hebdo tragedy only made this initiative more timely and poignant. To begin the process, and to at least have the Europeans understand our First Amendment values and legal rules, we thought a conference in Continental Europe was the way to start.

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Our first challenge was the none-too-easy task of identifying the leading European media lawyers and getting them under one roof. Then find a site, a program, some speakers and sponsors.

The result was a one day conference earlier this week at the Jones Day offices in Paris, just off the Place de la Concorde, the former residence of Talleyrand (the French foreign minister in the Napoleonic era) and a past site of the American Consulate.

As I stated in my welcoming introduction, spoken in my best high school French (all speakers were translated into French or English), we

had two goals: first, to put on a conference that would be interesting and educational; and second, to get European media lawyers together to form a cohesive team to strengthen press and speech laws in their respective countries.

On the first goal, we certainly succeeded. Some 65 lawyers attended from France, Spain, Italy, the Netherlands, England, Switzerland, Germany and even Russia. And the audience was fully engaged and paid rapt attention to our five panels. We had been told by our colleagues Jean - Fredric Gaultier and Legipresse (the French law journal) that the Europeans know of our First Amendment, but really don't know where it comes from or how it applies to media law. So on our first panel, I focused on US libel and privacy law - the Bill of Rights, *Sullivan*, public and private figures, the fault standards and so on.

But the fireworks started when we got into privacy law. Jean-Frederic displayed a photo of a couple kissing in a town square. We said what's the problem - it's in open, public space, it's not offensive; they said it may be embarrassing, it's not newsworthy and it invades their privacy. Next flashed the famous photo of Gary Hart and Donna Rice on the sailboat *Monkey Business*; why is the private life of a public figure of public concern, they asked, noting that the mistress of the President of France had just successfully sued a tabloid for a picture showing her in her car on her way to meet him. It was clear that the French lawyers strongly adhered to their concept of privacy - which, fundamentally different from ours - protects sensitive acts which occur in public places and even activities which are of common knowledge. To try to get behind

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these differences , I asked what's in our cultures that forms the bases for these differences.

Despite vigorous audience participation until then, interestingly, no one had an answer.

Our second panel featured judges from the UK, France and Holland who continued this discussion upon questioning by my colleague David Heller. The British judge noted that many Commonwealth countries had considered adopting Sullivan, and, yet, not one had done so. But he also pointed out that British law has moved closer to American libel law in the last decade, inquiring whether the publisher had acted responsibly, not so far a cry from our fault standard. But he did posit that a test based on whether the article is of legitimate public interest seems more appropriate than a test based on the category of the plaintiff. (Fwiw, I've always believed the *Rosenbloom* standard makes more sense than the public/private figure dichotomy.)

Following a lunch where high energy discussions took place all over the reception room, the keynote panel on the appropriateness of hate speech laws in the wake of Charlie Hebdo took place. And a real donnybrook ensued. We had put together a panel with two free speech partisans, including Charlie's lawyer, and two speakers in favor of hate speech restrictions. And, indeed , they spent most of the panel arguing - actually, screaming - at each other.

But when the dust settled - and when they tried to grapple with Rob Balin's question of how to explain why on the same day when a million people marched in favor of free expression, an anti-Semitic comedian was arrested for a pro-terrorism riff - all their answers seemed to point to the dangers of provocation, insult and a lack of order. To be sure, a very long way from inciting imminent lawless action. When we asked other delegates why did they argue so passionately if they basically agreed that some hate speech restrictions were appropriate, the answer was unanimous : because they are French.

The next panel was of four journalists, questioned by Adam Cannon of the Telegraph about the difficulties of newsgathering in Europe. Suzanne Daley, former Paris Bureau Chief of The New York Times made a critical point: it's easy to run afoul of the laws in Europe , but since the damages are so small, it's akin to having your wrist slapped.

Finally , our host Peter Canfield took Google's chief European lawyer, Mark Stephens and two French privacy authorities through the paces of the right to be forgotten - or as one speaker emphasized, de-listed - quandary, a timely discussion, as Peter noted, just a month after the first anniversary of the Google Spain case. Though there were sharp differences among the panelists, there was a unanimous view that the court's opinion was severely lacking.

So as you can see from this description, our second goal was far from fully realized. Indeed, the divide between our laws and assumptions and the Europeans' was wider than most of us

**The keynote panel on the appropriateness of hate speech laws in the wake of Charlie Hebdo took place. And a real donnybrook ensued.**

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imagined. But the MLRC did plant its flag on the Continent; we made new friends, and perhaps even members; we did begin to establish a fraternity - to use a historic French term- of collegial European media lawyers; we certainly did educate the Europeans as to the beauties of the First Amendment and began a discussion about its value; and we might have emboldened these lawyers to occasionally take a stronger free speech position deriving from our exchanges. So as I fly away from Paris, I am reminded that progress is inevitably slow, but I think our conference was a worthwhile beginning .

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



## MLRC London Conference September 27-29, 2015

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# MLRC Issues Model Policy on Police Body-Cam Footage

## *Memo Explaining the MLRC's Model Policy on Police Body-Worn Camera Footage*

Across the nation, police departments and other law enforcement agencies have increasingly embraced the technology of body-worn video cameras (BWCs). Several organizations, both within the law enforcement community and various public interest and advocacy groups, have studied when and where law enforcement agents should deploy such technology, and have promulgated “best practices” recommendations regarding the retention of, and right of public access to, recordings made by police BWCs.[1]

In 2014 and 2015, a number of state legislatures[2] and other governmental bodies have considered amendments to their open records statutes to address specifically the recordings made by police BWCs.[3] Not surprisingly, the various “stakeholder” groups and public interest organizations have not agreed, and do not, necessarily agree on a single policy for retention of and access to such police BWC recordings. Each organization applies its own mission, function, values and unique perspective in weighing the competing interests of governmental transparency, concerns over individuals’ privacy interests, logistical and financial burdens to be borne by police departments, interference with prosecutions and other law enforcement functions, etc. For example, the American Civil Liberties Union, devoted to protecting civil liberties in the Bill of Rights, has balanced its commitment to the “public’s right to know” what its government is up to, against private citizens’ rights of privacy and freedom from a governmental surveillance state, and has issued a policy statement (revised once)[4] in accordance with its commitment to promoting those competing values. In contrast, the Radio and Television Digital News Association has recently issued its own position statement with regard to public access to police BWC videos [5], that places a decidedly greater emphasis on the public’s right to know than the ACLU policy reflects.

Given the multitude of legitimate positions on these issues, the Media Law Resource Center, on behalf of its members (who include the nation’s leading newsgathering and reporting entities), hereby lends its voice and perspective to this ongoing public discussion via the attached “Model Policy on the Retention of, and Public Access to, Police Body-Worn Camera

**A number governmental bodies have recently considered amendments to their open records statutes to address recordings made by police BWCs. Not surprisingly, the various stakeholder groups have not agreed on a single policy.**

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Recordings.” First, we offer a few caveats and explanations for what is *not* included in this Model Policy. Then, we offer some explanation and justification for the positions set forth in the Model Policy.

### **What the Model Policy Does *Not* Address**

Unlike some of the previous studies and reports mentioned above, the MLRC’s Model Policy takes no position on *when BWCs should be utilized* by police and other law enforcement agencies (nor how the deployment of such cameras and recording devices should be funded, etc.). Recognizing that these issues present significant public policy matters for state legislatures, local governments, and individual law enforcement agencies, the MLRC has never advised law enforcement agencies on which technology to deploy in performing their law enforcement functions, nor on which records to generate or in what format. Nevertheless, MLRC recognizes that some of the personal privacy and other concerns about the *disclosure* of

highly personal and intimate matters can and should be addressed at the “front end,” by adopting policies about when BWCs should *not* be used.

**The MLRC believes that recordings made in the course of official conduct, by governmental agents are, fundamentally, “public records” which the public has a presumptive right to inspect.**

Nor does the Model Policy take a position on the logistical details (*e.g.*, storage medium, costs) of maintaining the recordings made by BWCs. Again, the MLRC recognizes that issues concerning costs, logistical and technological challenges, etc., posed by the massive amounts of data that BWCs will inevitably generate, pose significant public policy issues as well. Once again, however, the MLRC respectfully leaves such matters to legislators, and local policymakers to resolve in accordance with multiple competing budgetary and human resources demands.[6] In contrast, the issue of how long such

records should be maintained *is* of interest and concern to the MLRC. The MLRC Model Policy states that, as a general rule, the issues of retention and access are best resolved in accordance with states’ and local jurisdictions’ existing statutory and legal framework for such matters. It is the MLRC’s view that these official public records are not, in any *qualitative* way, fundamentally different from any other public records, generated by law enforcement agencies.

### **Justifications for the MLRC Model Policy on Retention of, and Public Access to, Police Body-Worn Camera Recordings**

Turning then to what *is* included in the Model Policy: the MLRC Model Policy addresses only issues of retention of, and public access to, the recordings made by police BWCs. Like the

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RTDNA's Position Statement, the MLRC believes that recordings made in the course of official conduct, by governmental agents (whether they be police officers, schoolteachers, city council members, mayors, or governors) are, fundamentally, "public records" which the public has a presumptive right to inspect, pursuant to not only the First Amendment, but various states' and political subdivisions' statutes that provide for access to "public records," including those made, maintained, or kept by law enforcement agencies.[7]

Like the RTDNA's Position Statement, the MLRC's Model Policy is premised on the foundational assumption that all recordings made by police BWCs, in accordance with departmental policies, are subject to states' and local jurisdictions' statutes governing public access to public records. And, like the RTDNA, the MLRC Model Policy presumes that without further amendments to such state and local statutes, existing exemptions for confidential informants, personal privacy interests, trade secrets, etc., adequately protect the persons and businesses whose activities are captured in such recordings from the harms attendant with disclosure of such material.

To the extent that legislators consider revising or amending existing statutes providing access to public records, the Model Policy sets forth a **series of principles** to guide any such legislative reform. Once again, these principles begin with the foundational principle that all records generated by any governmental entity that document, capture, and/or memorialize the discharge of public functions, are entitled to a strong presumption of public access for purposes of inspection and copying. *See, e.g., Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 283 P.3d 853, 870 (N.M. 2012) ("Transparency is an essential feature of the relationship between the people and their government."); *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 518 (1984) ("Without some protection for the acquisition of information about the operation of public institutions . . . by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance." (Stevens, J., concurring) (internal marks and citation omitted)); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) ("[O]fficial records and documents open to the public are the basic data of government[.]").

Despite this strong presumption of public access to BWC recordings, existing statutes and sound public policy recognize that in particular circumstances, countervailing interests (including ongoing law enforcement investigations, confidential informants, gang-related threats of retaliation, and highly personal and intimate private facts) may, on occasion,

**The MLRC Model Policy presumes that without further amendments to state and local statutes, existing exemptions for confidential informants, personal privacy interests, trade secrets, etc., adequately protect the persons and businesses whose activities are captured in such recordings from the harms attendant with disclosure of such material.**

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appropriately -- and consistent with Supreme Court guidelines suggesting limiting access as narrowly as possible to serve the appropriate privacy interest -- outweigh the right of public access to *portions of*, or, in some cases the entirety of, those recordings.

Unlike the ACLU's Policy Statement, which presumes a legitimate expectation of privacy on the part of non-law enforcement agents when they encounter such peace officers on a public street or other public location, the MLRC Model Policy is grounded on a well-recognized body of law holding that individuals do *not* have a reasonable expectation of privacy with respect to their being photographed, videotaped, or recorded without their consent, when they are visible to the human eye and audible to the human ear, in any public place. Indeed, the Restatement (Second) of Torts declares that for all but the most intimate and personal aspects of one's life,

there is no legal liability for intrusion when an individual is photographed in public:

**Unlike the ACLU's Policy Statement, the MLRC Model Policy is grounded on a well-recognized body of law holding that individuals *do not* have a reasonable expectation of privacy with respect to their being photographed, videotaped, or recorded without their consent, in any public place.**

The defendant is subject to liability under the rule stated in this Section only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs. Thus there is no liability . . . for observing him or *even taking his photograph while he is walking on the public highway*, since he is not then in seclusion, and his appearance is public and open to the public eye.

§ 652B cmt. c (1977) (emphasis added).[8] In order to recover for an intrusion upon seclusion, "the plaintiffs must show that *some aspect of their private affairs* has been intruded upon," and, therefore, the tort "does not apply to matters which occur in a public place or a place otherwise open to the public eye." *Fogel v. Forbes, Inc.*, 500 F. Supp. 1081, 1087 (E.D. Pa. 1980) (emphasis added);[9] *Mark v. Seattle Times*, 635 P.2d 1081, 1094 (Wash. 1981) ("On the public street, or in

any other public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there. *Neither is it such an invasion to take his photograph in such a place*, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which anyone would be free to see." (emphasis added) (internal marks and citation omitted)); *Dempsey v. Nat'l Enquirer*, 702 F. Supp. 927, 931 (D. Me. 1988) ("taking a photograph of the plaintiff in a public place cannot constitute an invasion of privacy based on intrusion upon the seclusion of another"); *Salazar v. Golden State Warriors*, No. C-99-4825, 2000 WL 246586, at \*2 (N.D. Cal. Feb. 29, 2000) ("There is no intrusion into a private place when the plaintiff has

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merely been observed, or even photographed *or recorded*, in a public place. The plaintiff must show he had an objectively reasonable expectation of privacy.” (emphasis added) (internal marks and citation omitted)); *Jackson v. Playboy Enters., Inc.*, 574 F. Supp. 10, 13-14 (S.D. Ohio 1983) (dismissing claim based on photographs taken of plaintiff on public sidewalk); *Mulligan v. United Parcel Serv., Inc.*, No. 95-1922, 1995 WL 695097, at \*2 (E.D. Pa. Nov. 16, 1995) (holding that “party has no claim for invasion of privacy because of surveillance where he or she is not in a private place or in seclusion,” and that plaintiff had no expectation of privacy when he was repairing a walkway in front of his home).

While individuals unquestionably enjoy a reasonable expectation of privacy within their homes or other private quarters, *see, e.g., Wilson v. Layne*, 526 U.S. 603 (1999),<sup>[10]</sup> the same is not true for the expectations of those in business settings and other private property locations that are generally open to the public. *See, e.g., Med. Lab. Mgmt. Consultants v. ABC*, 306 F.3d 806, 812-15 (9th Cir. 2002); *Desnick v. ABC*, 44 F.3d 1345, 1352 (7th Cir. 1995).

Therefore, in recognition of the case law set forth above, the MLRC’s Model Policy extends a presumption of public access to all police BWC footage of individuals filmed on a public street, park, sidewalk, or private business location that is readily accessible to the public. BWC recordings of individuals inside their homes, apartments, places of residence or other private property, in contrast, are not subject to that same presumption of public access, unless the conduct recorded is itself a legitimate matter of public concern.<sup>[11]</sup> And even in the case of ordinary, routine executions of warrants or other authorized home entries or entries onto private property, particular circumstances may warrant public disclosure of such recordings; law enforcement officials should be given discretion, in those circumstances, to make such BWC recordings available to the public, particularly with any private or sensitive information redacted (see below). In addition, the public should be permitted the right to petition a court for an order granting access to such recordings on the same basis, and to challenge the extent of any redactions.

As to the privacy expectations of the peace officers whose actions are captured on the BWC recordings, it is well established that “a public officer has no cause of action [for invasion of privacy] when his . . . activities in that capacity *are recorded*, pictured, or commented on in the press.” Restatement (Second) of Torts § 652D cmt. e (emphasis added); *see also Johnson v. Hawe*, 388 F.3d 676, 683 (9th Cir. 2004) (police officer has no legitimate expectation of privacy in his conduct “while he was on duty performing an official function in a public place”); *Hornberger v. ABC*, 799 A.2d 566, 594 (N.J. Super. Ct. App. Div. 2002) (holding that police officers have no legitimate expectation of privacy in their interactions with members of the public in discharging their official duties).<sup>[12]</sup>

With respect to certain BWC recordings in which private individuals are captured in private settings or in ways that implicate other legitimate public interests warranting withholding that information from public inspection, the Model Policy – consistent with both the federal FOIA

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and most states' Open Records Act – calls upon release of such records in redacted form, to eliminate such legitimate privacy concerns while allowing the public the maximum amount of access to information concerning the operations of government.[13] The records requester should have the right to challenge the extent of redactions in a court of law. The Seattle Police Department is reported to be developing a technological means to facilitate such redaction, and will share that technology with other law enforcement agencies.[14]

## **The MLRC's Model Policy on the Retention of and Public Access to Police Body-Worn Camera Recordings**

Recordings made by police body-worn cameras (BWCs) should generally be made available for public inspection and copying in accordance with each jurisdiction's existing statutes governing public access to "public records," including those of law enforcement agencies.

Such existing statutes have a host of exemptions from disclosure of "public records" that adequately protect individuals' privacy and other societal interests, that may be implicated by public release of BWC recordings, on a case-by-case basis.

To the extent that any jurisdiction considers adopting statutes, rules, or regulations that are specifically directed to police BWC recordings, such laws should include the following:

- There should be a strong presumption of public access to all such recordings made in public places and other non-private areas (areas in private property open to the public). Neither citizens nor law enforcement agents generally have a "reasonable expectation of privacy" in the recordings of their interactions in non-private venues.
- Recordings of home searches or other lawful entries into private property are not subject to the same presumption of public access, but should nonetheless be available as public records if the requester demonstrates a legitimate public interest in the subject matter of the events that occurred inside the home or other private property.
- Even in cases of ordinary, routine and lawful home entries (where the event is not of unusual public interest), particular unique circumstances may warrant public disclosure of such recordings; law enforcement officials should be given discretion, in those circumstances, to make such BWC recordings available to the public, particularly with any private or sensitive information redacted. In addition, the public should be permitted

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the right to petition a court for an order granting access to such recordings on the same basis.

- Highly personal and intimate details recorded by police BWCs during interactions with civilians in a private place may be redacted or blurred prior to those recordings being made available for public inspection and copying. The public should be permitted the right to petition a court for an order granting access to any redacted material on a showing that such material is subject to legitimate public interest.
- Police, sheriffs, etc. should retain all BWC recordings for a period of several weeks (not days), unless a citizen complaint or a request to inspect the tape has been filed, in which case the recording should be retained until the matter is fully resolved, including exhaustion of all appeals. § The cost to the public of accessing the non-confidential and/or redacted recordings made by police BWCs should not be so high as to discourage or prohibit citizens from accessing these public records.

## Notes

[1] See, e.g., Leadership Conference on Civil and Human Rights, Civil Rights Principles on Body Worn Cameras (May 2015), <http://www.civilrights.org/press/2015/body-camera-principles.html>; Marc Jonathan Blitz, Police Body-Worn Cameras: Evidentiary Benefits and Privacy Threats, (Am. Const. Society May 13, 2015), [https://www.acslaw.org/sites/default/files/Blitz\\_-\\_On-Body\\_Cameras\\_-\\_Issue\\_Brief.pdf](https://www.acslaw.org/sites/default/files/Blitz_-_On-Body_Cameras_-_Issue_Brief.pdf) ; Jay Stanley, Police Body-Mounted Cameras: With Right Policies in Place, a Win for All, ACLU (2d ed. Mar. 2015), <https://www.aclu.org/police-body-mounted-cameras-right-policies-place-win-all>; Alexandra Mateescu et al., Police Body-Worn Cameras, Data & Soc'y Res. Inst. (Feb. 2015), <http://www.datasociety.net/pubs/dcr/PoliceBodyWornCameras.pdf> ; The Constitution Project Committee on Policing Reforms, The Use Of Body-Worn Cameras By Law Enforcement: Guidelines For Use & Background Paper (January 28, 2015), <http://www.constitutionproject.org/wp-content/uploads/2015/02/TCP-The-Use-of-Police-Body-Worn-Cameras.pdf>; Police Executive Research Forum, Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned, U.S. Dep't of Justice Office of Community Oriented Policing Programs (2014), <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>; Eugene P. Ramirez, A Report on Body Worn Cameras, (2014) [http://www.parsac.org/parsac-www/pdf/Bulletins/14-005\\_Report\\_BODY\\_WORN\\_CAMERAS.pdf](http://www.parsac.org/parsac-www/pdf/Bulletins/14-005_Report_BODY_WORN_CAMERAS.pdf); Antonia Merzon, Police Body-Worn Cameras: A Report for Law Enforcement (Colo. Best Practices Comm. for Prosecutors 2013); A Primer on Body-worn Cameras for Law Enforcement, U.S. Dept. of Justice, Nat'l Inst. of Justice (Sept. 2012), <https://www.justnet.org/pdf/00-Body-Worn-Cameras-508.pdf>; see also Considering Police Body Cameras, 128 Harv. L. Rev. 1794 (Apr. 10, 2015), <http://harvardlawreview.org/2015/04/considering-police-body-cameras/>.

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[2] Ryan J. Foley, State bills would limit access to police body cam videos, Associated Press (Mar. 24, 2015), <http://www.policeone.com/police-products/body-cameras/articles/8481000-State-bills-would-limit-access-to-police-body-cam-videos/>, (reporting that "[l]awmakers in at least 15 states have introduced bills to exempt video recordings of police encounters with citizens from state public records laws, or to limit what can be made public."); Mike Cavender, Police body cams: The new FOIA fight, Radio Television Digital News Ass'n (Apr. 22, 2015), [http://www.rtdna.org/article/police\\_body\\_cams\\_the\\_new\\_foia\\_fight#.VT25mLLnYZ4](http://www.rtdna.org/article/police_body_cams_the_new_foia_fight#.VT25mLLnYZ4) ("There are at least 18 state legislatures considering bills to regulate (or deny) release of body cam video. And there are many more municipalities which are setting their own rules. Few, if any, are expected to be favorable to open public disclosure."); Susannah Nesmith, With more police wearing cameras, the fight over footage has begun in Florida, Columbia Journalism Review (March 9, 2015), [http://www.cjr.org/united\\_states\\_project/florida\\_police\\_body\\_cameras.php](http://www.cjr.org/united_states_project/florida_police_body_cameras.php); Peter Hermann & Aaron C. Davis, As police body cameras catch on, a debate surfaces: Who gets to watch?, Wash. Post (Apr. 17, 2015), [http://www.washingtonpost.com/local/crime/as-police-body-cameras-catch-on-a-debate-surfaces-who-gets-to-watch/2015/04/17/c4ef64f8-e360-11e4-81ea-0649268f729e\\_story.html](http://www.washingtonpost.com/local/crime/as-police-body-cameras-catch-on-a-debate-surfaces-who-gets-to-watch/2015/04/17/c4ef64f8-e360-11e4-81ea-0649268f729e_story.html).

[3] The MLRC's State Legislative Developments Committee has compiled state statutes addressing police BWCs at <http://www.medialaw.org/committees/state-legislative-affairs-committee/item/2778> (restricted to MLRC members; password required).

[4] See Stanley, *supra* n. 1.

[5] See Cavender, *supra* n. 2.

[6] It is worth noting, however, that the Seattle Police Department has adopted an extremely cost-effective means of storing and providing access to its BWC videos, by posting them on a YouTube channel, at no cost to the Department for storage fees: <https://www.youtube.com/channel/UCcdSPRNt1HmzkTL9aSDfKuA>.

[7] See Reporters Committee for Freedom of the Press, Open Government Guide at Section IV.N.4 "Police Records – Investigatory Records," <http://www.rcfp.org/open-government-guide> (searchable by outline topic headings).

[8] The Restatement does note that "[e]ven in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters." *Id.*

[9] The Restatement further recognizes that:

Those who commit crime **or are accused** of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed. **The same is true as to those who are the victims of crime or are so unfortunate as to be present when it is committed.**

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Restatement (Second) of Torts § 652D cmt. f (emphasis added).

[10] In *Wilson*, the Supreme Court held that the police had violated the Fourth Amendment when they brought reporters from the *Washington Post* to accompany them in their execution of a search warrant inside a private residence. Notably, however, the court observed, "it might be reasonable for police officers to themselves videotape home entries as part of a 'quality control' effort to ensure that the rights of homeowners are being respected, or even to preserve evidence." *Wilson*, 526 U.S. at 613 (citation omitted).

[11] The Restatement also makes clear that when information is contained in a public record (one generated by a government agent documenting the governmental actions and open to the public), its subsequent publication by the media cannot give rise to a claim for "publicity given to private facts." Restatement (Second) of Torts § 652D cmt. b (1977) ("there is no liability to giving publicity to facts about the plaintiff's life that are matters of public record" provided the record is open to inspection). Accordingly, publishing information captured by police BWC in documenting their discharge of official duties, if publicly available, cannot give rise to a claim for "publication of private facts." See, e.g., *Fry v. Iona Sentinel-Standard*, 300 N.W.2d 687, 731 (Mich. Ct. App. 1981) (holding, *inter alia*, that information about plaintiff recorded in police incident report could not form basis for invasion of privacy claim); *Lindemuth v. Jefferson Cnty. Sch. Dist. R-1*, 765 P.2d 1057, 1059 (Colo. App. 1988) (holding that information in a public record can never be considered "private" for purposes of an invasion of privacy claim).

In addition, there is no cognizable claim for invasion of privacy by "publication of private facts" if the publication at issue addresses a matter of legitimate public concern. See, e.g., *Cape Publ'ns, Inc. v. Hitchner*, 549 So. 2d 1374, 1377-79 (Fla. 1989) (child abuse report provided to a member of the press in violation of state statute addressed a matter of public concern); *Bowley v. City of Uniontown Police Dep't*, 404 F.3d 783, 788-89 (3d Cir. 2005) (same with respect to police report that was provided to the press in violation of state statute declaring such records confidential).

[12] This is true because "a public official . . . has no right of privacy as to the manner in which he conducts himself in office." *Rawlins v. Hutchinson Publ'g Co.*, 543 P.2d 988, 993 (Kan. 1975) (emphasis added); see also *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457 (1977) (holding that public official enjoys a right of privacy only with respect to government-held information concerning "matters of personal life *unrelated to any acts done by them in their public capacity*" (emphasis added)).

[13] See, e.g., *Freeom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 900 n.3 (Colo. 2008) ("By providing the custodian of records with the power to redact names, addresses, social security numbers, and other personal information, disclosure of which may be outweighed by the need for privacy, the legislature has given the custodian an effective tool to provide the public with as much information as possible, while still protecting privacy interests when deemed necessary.").

[14] Lizzie Plaugic, Seattle's police department has a Youtube channel for its body camera footage, *The Verge* (Feb. 28, 2015), <http://www.theverge.com/2015/2/28/8125671/seattle-police-body-cameras-youtube-channel>.

# 9th Circuit Reverses Innocence of Muslims Copyright Injunction

## *Whither Copyright Injunctions In The Post-Garcia World?*

By Laurence Pulgram and Todd Gregorian

In the Ninth Circuit's *en banc* decision in *Garcia v. Google*, 2015 U.S.App. Lexis 8105 (9th Cir., No. 12-57302, May 18, 2015), the court reversed and vacated the broad preliminary injunction issued by a three-judge panel that had required Google to remove all instances of *Innocence of Muslims* from Google's services. But in doing so, the decision raises more potential questions than it answers about copyright ownership and enforcement, and the border of copyright and free expression.

**Both the finding that Garcia's brief performance could provide her with a copyright interest, and the secret but all-encompassing take down order from all Google resources, drew widespread public attention and no less than 15 amicus briefs during rehearing en banc.**

### Background

In 2011, Plaintiff Cindy Lee Garcia agreed to play a small role in an action film called *Desert Warrior*. She delivered two lines while wearing a concerned expression. In subsequent production, writer and director Mark Basseley Youssef renamed the film *Innocence of Muslims* and changed it into an anti-Islamic screed, including depictions of the Prophet Muhammad as a murderer and pedophile. Basseley also uploaded a trailer to YouTube that contained a few seconds of Garcia's scene with sound overdubbed to make her appear to ask: "Is your Muhammad a child molester?" The film caused protests in the Middle East, and some originally identified it as a potential cause of the attack on the U.S. consulate in Benghazi. It drew a fatwa against Youssef and all others involved in its making, and Garcia herself received death threats and public condemnation.

Garcia requested Google remove *Innocence of Muslims* from YouTube, including by sending DMCA notices in which she claimed a copyright in her performance. Google refused, and Garcia then sued both Google and Youssef and moved for a preliminary injunction against Google on a copyright infringement theory. The district court denied the motion because (i) Garcia had not shown an irreparable harm capable of redress, given the already widespread dissemination of the film, and (ii) it found her unlikely to establish that she owned an independent copyright in her performance and/or had not licensed it for use in the film.

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By a 2-1 vote, the three judge Ninth Circuit panel held on appeal that Garcia likely did hold a copyright interest in her individual performance that she had not licensed to Youssef for *Innocence*, and that she had shown irreparable harm in the threat to her life. Finding Google likely liable for infringing her copyright by displaying the video after notice of its infringing nature, the panel ordered Google to remove all instances of *Innocence of Muslims* from YouTube and to take all reasonable steps to prevent future uploads to YouTube and any other Google platform. The panel originally issued the injunction in secret, purportedly to discourage further distribution of the video that might occur if the public knew of its impending removal from Google's services. Both the finding that Garcia's brief performance could provide her with a copyright interest, and the secret but all-encompassing take down order from all Google resources, drew widespread public attention and no less than 15 amicus briefs during rehearing *en banc*.

### ***En Banc* Decision**

In an opinion by Judge McKeown, the *en banc* majority reversed the panel and vacated the injunction on three grounds. *First*, Garcia had disclaimed any rights of joint authorship in the entire film, but instead claimed she owned a copyright in her brief performance alone. The majority rejected that theory. Relying on the statutory definition of an audiovisual work and the Copyright Office's rejection of Garcia's copyright application, it found *Innocence of Muslims* to be a single work. Further, attempting to assign fractional copyright interests to creative contributors who are not joint authors would be practically unworkable, allowing anyone from a "costume designer down to an extra or best boy to claim copyright in random bits and pieces of a unitary motion picture without satisfying the requirements of the Copyright Act." *Second*, the court found Garcia did not meet copyright's fixation requirement: Garcia's performance was fixed in the film and only the film, and that was done by and under the authority of others, thereby preventing her assertion of rights in a work that she had not fixed (and, indeed, in a work that was fixed by dubbing lines she never said). *Third*, the court held that Garcia had not shown irreparable harm because the harms she identified (threats and her association with a hateful message) were not associated with rights of authorship that copyright seeks to protect. Rather, the irreparable harm she feared did not derive from the diminution or usurpation of the value of her performance, but was "attenuated" and "collateral" harm derived from the unauthorized use of Garcia's persona in a manner that generated humiliation and death threats—harms protected by privacy laws but not by copyright.

Judge Kozinski submitted a strident dissent echoing, but with more color, his majority opinion for the three judge panel. His dissent argued, among other things, that (i) the fact that Garcia's portion of the performance was added into a larger film did not deprive it of

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copyrightability that it possessed independent of the film as an at least “minimally creative” work, and (ii) the fact that Garcia, like many musicians or actors, did not herself fix the work that she performed should have no bearing on her ownership interest in the recording of her performance.

### Consequences

The rejection of Garcia’s copyright claims elicited a collective sigh of relief from the frequently adversarial content and technology communities. Both Hollywood and Silicon Valley avoided the spectre of fragmented claims of ownerships in films and other works created by multiple participants, each with unascertainable potential rights. But the rationale for this decision opens many fertile grounds for future disagreements.

***Does the First Amendment Impose a Real Limit on Copyright Injunctions?*** Garcia has already been declared a victory for free speech. The *en banc* court claims the original panel’s censorship of information about a matter of public importance “gave short shrift to the First Amendment values at stake.” But the court fails to answer either how much shrift should be

given, or the extent to which the public interest in the content that is copyrighted affects the balance. Other than noting that its own decision better serves the public’s right to receive such information, the *en banc* opinion specifically declined even to consider the public interest factor within the test for issuing an injunction and thus provides virtually no guidance for future cases. Should a removal order be any more tolerable if the work were a celebrity sex tape that satisfy albeit not “politically significant.” The court also did not address Judge Reinhardt’s critique that by failing to rehear the case on an expedited basis, it undermined First Amendment interests by leaving the injunction in place for an additional year.

**The Garcia decision now combines with other Ninth Circuit precedent to further limit copyright plaintiffs’ ability to obtain a preliminary injunction.**

### ***Narrowing the Circumstances in Which a Copyright Preliminary Injunction Will Issue.***

The Garcia decision now combines with other Ninth Circuit precedent to further limit copyright plaintiffs’ ability to obtain a preliminary injunction. *Perfect 10, Inc. v. Google*, 653 F.3d 976 (9th Cir. 2011), already required an independent showing of irreparable harm causally connected to the defendant’s behavior and suggested that widespread availability of a work may preclude an injunction against a particular alleged infringer. Garcia further adds to these limits the requirement that the injunction address a *copyright* harm, and immediately excludes death, privacy, reputational harms, emotional distress, and authors’ desire to exert control over their works’ portrayal (“moral rights”) from the list. At least, that will usually be the case: the decision “do[es] not foreclose” the possibility that “a court could consider collateral consequences as part of its irreparable harm analysis and remedy” in a “different circumstance

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with a strong copyright claim”—though how strong a claim must be, and what consequences might qualify for consideration, remain unclear.

In all events, given the speed of internet transmissions and the fact that damages often adequately compensate the remaining permissible harms (*i.e.*, lost sales or royalties), the circumstances under which a preliminary injunction will issue seem to have narrowed. A major motion picture release that infringes a copyrighted script may still devalue the script irreparably. A technology designed to cause widespread infringement may still create an untraceable web of harms best addressed through an injunction. But copyright holders who are slow to act or whose works have a clearly ascertainable market value may now lose out on preliminary relief.

***The Door Remains Open to Broad Takedown and Staydown Injunctions.*** Judge Kozinski’s dissent accuses the majority of “haste to take internet service providers off the hook for infringement.” The majority does recognize that its decision benefits such providers, who formed a chorus requesting such protection as *amici*. As downstream distributors of creative content, they often have no means to obtain the evidence required to sort out work for hire and licensing issues when faced with dubious, conflicting or fragmented ownership claims.

Because it did not reach the balance of hardships or the public interest factors that generally inform injunctive adjudications, however, the decision actually does little to address online service providers’ central concerns with the injunction. For example, the injunction to remove all copies from Google’s resources failed to account for the fact that, while one person’s upload may be infringing, other uploads may constitute fair use, be subject to license, or otherwise be lawful – it required the takedown of both infringing and non-infringing postings alike. The injunction also created a significant burden to comply by requiring affirmative monitoring of the YouTube service to prevent new instances of the film from appearing. The foremost tools for automated identification are simply too expensive for many providers and are still imperfect, requiring manual review. Service providers may lack the personnel or financial resources even to attempt compliance with one or more staydown orders. But because it left these issues unaddressed, *Garcia* does not necessarily pose an insurmountable obstacle to a future court inclined to impose a similarly broad injunction. By finding “a strong copyright claim,” less “attenuated collateral consequences,” and/or a less “politically significant” dispute, a future court might try to duck the First Amendment concerns that *Garcia* found prevented such an injunction.

*Laurence Pulgram and Todd Gregorian are lawyers at Fenwick & West, San Francisco. Fenwick submitted an amicus brief on behalf of Adobe Systems Inc.; Automattic Inc.; Facebook Inc.; Gawker Media, LLC, IAC/Interactivecorp; Kickstarter, Inc.; Pinterest Inc.; Tumblr Inc.; and Twitter, Inc. Google was represented by Tim Alger of Perkins Coie, Palo Alto. Plaintiff was represented by M. Cris Armenta, The Armenta Law Firm ACP, Los Angeles, California; Credence Sol, La Garenne, Chauvigng, France; and Jason Armstrong, Bozeman, Montana, for Plaintiff-Appellant.*

# Federal Anti-SLAPP Bill Introduced in House of Representatives

## *Recent D.C. Circuit Ruling Highlights Need for Federal Legislation*

By Laurie A. Babinski

On May 13, U.S. Representatives Blake Farenthold (R-TX) and Anna Eshoo (D-CA) introduced federal anti-SLAPP legislation to provide relief against meritless lawsuits intended to chill free expression. The [SPEAK FREE Act of 2015](#) (H.R. 2304) would provide a mechanism for the quick dismissal of Strategic Lawsuits Against Public Participation (“SLAPPs”) pending in federal court.

The bipartisan bill was introduced less than a month after the D.C. Circuit Court of Appeals ruled in [Abbas v. Foreign Policy Group LLC](#), No. 13-7171 (April 24, 2015) that the D.C. Anti-SLAPP Act – which is similar to state statutes across the country – was preempted by the Federal Rules of Civil Procedure and could not be applied to claims brought in or removed to federal court.

**The bipartisan bill was introduced less than a month after the D.C. Circuit ruled that the D.C. Anti-SLAPP Act was preempted by the Federal Rules of Civil Procedure and could not be applied to claims brought in or removed to federal court.**

The ruling in *Abbas* highlighted the need for federal legislation to ensure that plaintiffs cannot simply avoid state anti-SLAPP statutes by filing their baseless claims in federal court. The SPEAK FREE Act would eliminate that runaround. Its protections, which are modeled on the Texas and California statutes, provide for the following:

### **Special Motion to Dismiss**

The Securing Participation, Engagement, and Knowledge Freedom by Reducing Egregious Efforts (“SPEAK FREE”) Act of 2015 bill provides that a party against whom a SLAPP is brought may file a special motion to dismiss if the lawsuit “arises from an oral or written statement or other expression, or conduct in furtherance of such expression ... made in connection with an official proceeding or about a matter of public concern.”

A “matter of public concern” is broadly defined as “an issue related to ... health or safety; environmental, economic, or community well-being; the government; a public official or public figure; or a good, product, or service in the marketplace.”

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### **Burden of Proof**

Like many anti-SLAPP statutes across the country, the proposed legislation puts the initial burden on the moving party to make a prima facie showing that the claim falls within the definition of a SLAPP. If that prima facie showing is made, the burden shifts to the party that filed the claim to demonstrate that it is “likely to succeed on the merits.” If the moving party meets its burden but the party who filed the claim does not, the motion “shall be granted and the claim dismissed with prejudice

The bill exempts several categories of claims from dismissal under the Act, including enforcement actions brought by the federal government or a state (defined to include the District of Columbia) or local government, claims brought against a person primarily engaged in commercial speech, and claims that are in the public interest.

A claim is in the public interest if it “is brought solely on behalf of the general public where private enforcement is necessary that places a disproportionate financial burden on the plaintiff in relation to the plaintiff’s stake in the matter” and “that, if successful, enforces an important right affecting the public interest and confers a significant benefit on the general public.”

### **Time for Filing Special Motion to Dismiss**

The legislation gives a party 45 days after service of the SLAPP to file a special motion to dismiss if the claim is filed in federal court or 30 days after the date of removal if the claim was filed in state court. It also permits courts to grant extensions of time.

### **Hearing on Special Motion to Dismiss**

The bill requires a court to hold a hearing no later than 30 days after service of the special motion to dismiss. The hearing may be postponed for no more than an additional 60 days if “the docket conditions of the court require a later hearing,” “there is a showing of good cause,” or “the parties agree to postpone the hearing.” Notwithstanding these postponements, the legislation requires that a hearing take place no later than 90 days after the date of service of the special motion to dismiss.

### **Ruling on a Special Motion to Dismiss**

The bill requires the court to rule on the special motion to dismiss no later than 30 days after the date the final paper on the motion is filed or the date the argument is heard, whichever is later.

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### **Stay of Discovery**

In deciding the special motion to dismiss, the bill calls for the court to consider “pleadings and affidavits stating the facts on which the liability or defense is based.” It dictates that a court must stay discovery “until a final and unappealable order is entered” unless a party shows “good cause for specific discovery.” If the court orders any specific discovery, it may consider that discovery and set a hearing date not later than 120 days after the service of the special motion to dismiss.

### **Right to Interlocutory Appeal**

The legislation provides for an “immediate interlocutory appeal from an order granting or denying in whole or in part” a special motion to dismiss.

### **Motion to Quash**

The legislation also provides a mechanism for filing a motion to quash to a person whose personally identifying information is sought in connection with a SLAPP. There, the movant has the initial burden of making a prima facie showing that the order seeks personally identifiable information. The burden then shifts to the party seeking the information to demonstrate “with an evidentiary showing” that the claim is likely to succeed on the merits of “each and every element of the claim.”

The bill further notes that “[n]o determinations made in deciding a motion to quash ... shall impede or otherwise diminish the availability” available under the provisions for filing a special motion to dismiss.

### **Removal to Federal Court**

The bill includes a controversial removal provision that would allow a party seeking to file a special motion to dismiss to remove a civil action filed in state court to the federal court in the “judicial district and division embracing the place where the civil action is pending.” The grounds for removal “need not appear on the face of the complaint but may be shown in the petition for removal” and removal is not limited by the amount of damages sought. However, removal “may not be requested ... on the basis of a third-party claim or a cross claim asserted by a defendant.”

If the case is removed and the federal court enters an order denying a special motion to dismiss in its entirety and the order “is not appealed within the time permitted by law or all

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potential appellate proceedings have been exhausted,” the court must remand all remaining claims.

The bill also allows a party seeking to quash a subpoena to remove the action if it asserts a defense based on the First Amendment or other federal law.

Opponents of the removal provision say they are concerned about the burden of such cases on the federal courts. Proponents say the removal provision is necessary to ensure that the protections of the federal statute are available to those who live in states without anti-SLAPP statutes to ensure uniform protection against litigation intended to chill free speech.

### **Fees, Costs and Sanctions**

The bill requires courts to award attorneys’ fees, expert witness fees and costs to a person who “files and prevails on a motion to dismiss ... or a motion to quash.” A party prevails not only if the court orders that a claim be dismissed or a subpoena be quashed, but also if “a claim or discovery request is voluntarily dismissed or withdrawn after the filing of a special motion to dismiss.”

However, the legislation also allows a court to award fees and costs against the moving party if it finds that the motion to dismiss, motion to quash, or notice of removal was “frivolous or ... solely intended to cause unnecessary delay.”

Federal and state governments are exempt from this provision.

### **Broad Interpretation and Preemption**

The SPEAK FREE Act states that it should be “construed broadly to effectuate the purpose and intent” of the legislation.

It also provides that nothing in the Act “shall preempt or supersede any Federal or State statutory, constitutional, case, or common law that provides the equivalent or greater protection for persons engaging in activities protected by the First Amendment to the Constitution of the United States.”

The preemption language is critical to ensure that federal courts that do apply state anti-SLAPP laws continue to do so if the state statute provides greater protections than the federal statute.

The SPEAK FREE Act has been referred to the House Committee on the Judiciary where it awaits consideration.

*Laurie A. Babinski is co-chair of the MLRC Legislative Affairs Committee and an attorney in the Washington, D.C. office of Baker Hostetler LLP.*



# Washington State Supreme Court Strikes Down State Anti-SLAPP Statute

By **Bruce E. H. Johnson, Eric M. Stahl, and Ambika Kumar Doran**

The Washington Supreme Court invalidated the state's broad anti-SLAPP statute, holding in a unanimous [opinion](#) that the law violates the constitutional right to a jury trial. The decision strikes the statute in its entirety, finding the constitutional problem undermined the law's "mainspring." The decision, [Davis v. Cox](#), is the first in the nation to hold an anti-SLAPP statute unconstitutional.

Passed in 2010, Washington's anti-SLAPP law, [RCW 4.24.525](#), provided a mechanism for early and efficient disposition of lawsuits targeting "public participation and petition," including speech and publication on issues of public concern. Like similar statutes in California and elsewhere, the law enabled defendants facing such claims to require the plaintiff to prove at the outset that the claim had merit. The law also deterred defamation and other claims targeting the exercise of First Amendment rights, by providing attorneys' fees and a statutory award to defendants who won an anti-SLAPP motion.

The state Supreme Court decision holds that the law violates the state constitutional protection for the right to trial by jury. Specifically, the court held that the requirement that a plaintiff "establish by clear and convincing evidence a probability of prevailing on the claim" meant that the trial court had to weigh and decide disputed factual evidence, which is the purview of a jury. Other courts, in Washington and elsewhere, have held that this provision is akin to a summary judgment procedure. But the Supreme Court declined to read RCW 4.24.524 (4) that way, holding the law's plain language requires a judge deciding an anti-SLAPP motion to rule on factual issues and dismiss even non-frivolous claims if they do not meet the "clear and convincing" standard. That, the court held, "creates a truncated adjudication of the merits of a plaintiff's claim," and "invades the jury's essential role of deciding debatable questions of fact."

DWT represents the defendants in the case, [Davis v. Cox](#), which was brought by members of the Olympia Food Co-op against Co-op board members because of their stance on a boycott of Israeli goods. Defendants won an anti-SLAPP motion, but the case will now be sent back to the trial court.

The decision is significant because it holds the anti-SLAPP statute unconstitutional on its face, meaning it cannot be applied in any circumstance. Because the basis is the state constitution, the Washington Supreme Court's opinion is the last word, pending any future legislative fix. It therefore appears that, for now at least, media defendants and others have lost an important protection against baseless lawsuits targeting their First Amendment activities.

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# Texas Supreme Court Hands Down First Rulings on the State's Anti-SLAPP Statute

By Laura Lee Prather

In 2011, Texas joined the growing list of states to pass an anti-SLAPP statute, the [Texas Citizens' Participation Act](#) ("TCPA"). On April 24, 2015, in its first two rulings interpreting the statute, the Texas Supreme Court held that the statute broadly applies to all communications about matters of public concern, even those made outside of a public forum, and also interpreted the evidentiary standard required for a plaintiff to defeat an anti-SLAPP motion to dismiss.

In [Lippincott v. Whisenhunt](#), No. 13-0926, (Tex. 2015)(per curiam), the Court held that the statute applies to both public *and* private communications about matters of public concern. In that case, Whisenhunt, a nurse anesthetist, sued Lippincott and Parks, administrators at a surgery center that had contracted with Whisenhunt, for tortious interference, conspiracy and defamation, after Lippincott sent emails questioning health care services Whisenhunt provided. Lippincott and Parks filed an anti-SLAPP motion to dismiss, which the trial court granted as to the tortious interference and conspiracy claims but denied as to the defamation claim. The Sixth Court of Appeals in Texarkana reversed the dismissal of the tortious interference and conspiracy claims on the grounds that the statute did not apply to private communications made outside a public setting.

In its per curiam decision, the Supreme Court looked at the statutory definitions and found no basis for the Court of Appeals' limited view of the TCPA's applicability. The TCPA defines the "exercise of free speech rights" as "a communication made in connection with a matter of public concern." Tex. Civ. Prac. & Rem. Code sec. 27.001(3). The Supreme Court concluded that the statute "defines 'communication' to include any form or medium, including oral, visual, written, audiovisual, or electronic media—regardless of whether the communication takes a public or private form. The plain language of the statute imposes no requirement that the form of the communication be public. Had the Legislature intended to limit the Act to publicly communicated speech, it could have easily added language to that effect." [Lippincott v. Whisenhunt](#), Slip op. 3. Further, because the email communications discussed the provision of medical services by a health care professional, there was no debate as to whether this was a discussion of a matter of public concern. *See also*, Tex. Civ. Prac. & Rem. Code sec. 27.001(7)(definition of "matter of public concern"). Finally, the Court noted that the Legislature had directed the courts to construe the Act "liberally to effectuate its purpose and intent fully." Tex. Civ. Prac. & Rem. Code sec. 27.011.

On the same day, the Supreme Court also interpreted the evidentiary burden a plaintiff must

**The Court held that the statute applies to both public and private communications about matters of public concern.**

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meet to defeat an anti-SLAPP motion to dismiss. That case, [\*In re Steven Lipsky\*](#), No. 13-0928, 2015 WL 1870073 (Tex. 2015), arose out of a dispute between a landowner (Lipsky) and a drilling company (Range Resources Corp.) in which Steven Lipsky and his wife Shyla sued Range for contamination of their well-water, and Range counter-sued Lipsky, his wife, and environmental consultant Alisa Rich for defamation per se, business disparagement and conspiracy to defame. The Lipskys and Rich filed anti-SLAPP motions to dismiss, all of which the trial court denied.

After declining to hear an interlocutory appeal directly, based on a since-amended provision of the TCPA, the Second Court of Appeals at Fort Worth allowed a challenge to the denial as an original proceeding mandamus and dismissed all claims against Shyla Lipsky and Alisa Rich and all civil conspiracy claims, but allowed Range's defamation per se and business disparagement claims to proceed against Steven Lipsky. The Supreme Court agreed that the claims against Rich and Shyla Lipsky and all conspiracy claims should be dismissed, but denied Steven Lipsky's mandamus as to Range's remaining claims.

**One cannot just  
make general  
allegations and recite  
the elements of the  
claim and expect to  
survive an anti-  
SLAPP motion to  
dismiss.**

The TCPA requires dismissal of a claim when the statute applies unless the respondent can prove by "clear and specific evidence a prima facie case for each essential element of the claim in question." Tex. Civ. Prac. & Rem. Code sec. 27.005(c). The Supreme Court analyzed the "clear and specific evidence" standard and whether Range met that standard.

In doing so, the Court held that the "clear and specific" standard does not impose a higher burden of proof than required at trial, nor does it categorically reject circumstantial evidence, but does require more than notice pleadings. One cannot just make general allegations and recite the elements of the claim and expect to survive an anti-SLAPP motion to dismiss. Instead, the evidence presented by the plaintiff "must provide enough detail to show the factual basis for its claim." The plaintiff's evidence must "establish the facts of when, where, and what was said, the defamatory nature of the statements, and how they damage the plaintiff." [\*In re Steven Lipsky\*](#), Slip op. 3, 13.

As to Range's business disparagement claim, the Court found an affidavit of Range's Senior Vice President insufficient proof of damages to support that claim, holding that conclusory affidavits do not satisfy the statutory standard, and that "general averments of direct economic losses and lost profits, without more [do not] satisfy the minimum requirements of the TCPA." [\*In re Steven Lipsky\*](#), Slip op. 17. However, because Range also alleged a defamation per se claim against Steven Lipsky, for which the Court concluded that "proof of particular damage is not required," Steven Lipsky's mandamus petition was denied.

*Laura Lee Prather is a partner at Haynes & Boone in Austin, Texas.*

# New York Times Wins Libel Suit Brought By Libertarian Professor

*Professor Was Quoted Stating  
“Slavery Was Not So Bad”?*

By David McCraw and Jeremy Kutner

A federal judge in Louisiana has thrown out a libel suit brought by a New Orleans professor who claimed that he was portrayed as a racist and supporter of slavery in a New York Times story about the libertarian thinkers who are backing Rand Paul for president. [\*Block v. New York Times\*](#), No. 14-2200 (E.D. La. April 16, 2015).

## Background

The lawsuit was brought by Walter Block, an economics professor at Loyola University, and targeted a Times story published in January 2014. The front-page story surveyed the philosophy of notable libertarians and discussed how Paul’s own philosophical views were evolving. The two reporters on the story, Sam Tanenhaus and Jim Rutenberg, were also named as defendants.

The story contained two references to Block. An early paragraph said, “One economist, while faulting slavery because it was involuntary, suggested in an interview that the daily life of the enslaved was ‘not so bad – you pick cotton and sing songs.’” Later, the article continued: “Walter Block, an economics professor at Loyola University in New Orleans who described slavery as ‘not so bad,’ is also highly critical of the Civil Rights Act. ‘Woolworth’s had lunchroom counters, and no blacks were allowed,’ he said in a telephone interview. ‘Did they have a right to do that? Yes, they did. No one is compelled to associate with people against their will.’”

Block, who describes himself as an “Austrian school economist and anarcho-libertarian philosopher,” is a prolific commentator on libertarian politics and economic theory. He holds a Ph.D. in economics from Columbia University, has taught at Loyola University since 2001 and is currently a senior fellow of the Ludwig von Mises Institute in Alabama, which vigorously opposes government intervention in the economy.

No stranger to controversial statements, Block adheres to a notably absolutist form of libertarianism, and has written books and articles defending, for example, the economic roles of

**Block never denied making the statements in *The Times* – in fact, they can be found on his blog – but he argued that later section falsely implied that he favors slavery when in fact he opposes it because it is involuntary.**

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pimps and corrupt policemen and “voluntary slave contracts” and describing the harm posed by government institutions like the Federal Reserve. He previously found himself at the center of negative attention at Loyola following a lecture in which he stated, in response to a question, that one possible explanation for wage disparities between whites and African-Americans might be lower IQs among the latter group.

Block never denied making the statements in *The Times* – in fact, they can be found on his blog – but he argued that later section falsely implied that he favors slavery when in fact he opposes it because it is involuntary. While the earlier section made that point, his complaint asserted that readers would not connect the two sections when he was only named in the later one.

### **Motion to Strike**

Rather than answering, *The Times* moved to strike the complaint under Louisiana’s “anti-SLAPP” statute, and Judge Ivan Lemelle rejected out of hand Block’s claims in a decision issued on April 30.

Turning first to the issue of falsity, Judge Lemelle observed that Block admitted that he had, in fact, made the exact statements in question and that this alone precluded a finding they were untrue. The judge also held that because the article never actually claimed that Block was a racist or a supporter of slavery, the statements could not be viewed as defamatory *per se*. (To the contrary, the article had specifically noted that Block objected to slavery because of its involuntary nature and opposed the Civil Rights Act because he said it violated the First Amendment right to freedom of association.)

Instead, the judge found, Block’s claims were based on implication, but such claims are barred in Louisiana in cases involving public figures and matters of public interest. Even if the story could be read to imply that Block was a racist (and the court said that no such implication existed), Block has no claim under Louisiana law.

Finally, the judge found that because Block was accurately and directly quoted, there was no evidence of actual malice or reckless disregard of the truth.

The court also dismissed Block’s claim for false light invasion of privacy, citing much the same reasoning used to knock out the libel claim.

Block has not said whether he intends to appeal the dismissal to the Fifth Circuit Court of Appeals. Under the anti-SLAPP statute, *The Times* is entitled to reimbursement of its legal fees from Block.

*The Times and its two reporters were represented by Lori Mince and Alysson Mills of Fishman Haygood in New Orleans and The Times’s in-house counsel, David McCraw and Jeremy Kutner. The plaintiff was represented by Ward LaFleur of Mahtook and LaFleur of Lafayette, La.*



# North Carolina Appeals Court Finds Triable Issues of Actual Malice in Public Official Libel Case

By Mark J. Prak

Just when the media bar in North Carolina was hoping the climate for turning back public official libel claims would improve, North Carolina's intermediate appeals court unanimously affirmed the denial of the McClatchy Company interests' summary judgment motion in a long-running public official libel case in Raleigh. [\*Desmond v. McClatchy Newspapers, Inc. et al\*](#), No. 14-625 (May 19, 2015).

While the Court of Appeals reaffirmed and expounded upon the protections afforded the press under the state's common law fair report privilege, its analysis of the actual malice issue elided several critical issues.

The Court's 31-page opinion zeroed in on the use of ballistics experts as sources for the News & Observer's 2010 investigative reporting series on the North Carolina State Bureau of Investigation's work in a pair of murder cases. After extensive discovery that required the media defendants to produce numerous e-mail communications between reporters and editors at the News & Observer and submit to extensive deposition questioning by the plaintiff's counsel, the trial judge decided there was evidence that supported an argument that the lead reporter on the series knowingly attributed statements to experts that were not made, were not complete, or were the product of hypotheticals posed in questions by the reporter to a source that she allegedly knew to be false.

The trial judge denied the media defendants' summary judgment motion in its entirety, finding more than a dozen liability issues for the jury. Among the triable issues were several that rest upon the plaintiffs' allegations that the defendants published with constitutional malice.

**If that becomes that basis for finding triable issues of actual malice, virtually every public official libel case in which a source later denies saying what the reporter swears is accurately attributed to the source will be tried to a state court jury in North Carolina.**

## Court of Appeals' Decision

The Court of Appeals labored for six months following oral argument to decide the case. Ultimately, the Court relied upon two cases it decided not so long ago, *Boyce I*, 568 SE 2d 893

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(2002) (involving a claim over a political ad by a challenger in the race for state Attorney General) and *Lewis v. Rapp*, 725 SE 2d 597 (2012)(a libel suit by a sitting state court trial judge against an citizen who criticized her performance in office) in fashioning the legal support for its conclusions.

Both of those were cases in which the appeals court sent actual malice issues to the jury. And while both cases are distinguishable from what happened in the *Desmond v. McClatchy Newspapers* case, the real problem for the news media facing public official libel claims in North Carolina is the intermediate appellate court's unwillingness to articulate a rule that renders the constitutional malice standard its due and makes summary judgment the preferred method of disposition in these cases.

Unless the defendants are able to persuade the North Carolina Supreme Court to review the *Desmond* decision and overturn it, the McClatchy interests may be destined to having their reporter's sourcing and publishing motives tried to a state court jury - all because some of the sources for the story reportedly deny making some of the statements to the reporter that were eventually published.

If that becomes that basis for finding triable issues of actual malice in the news reporting context, virtually every public official libel case in which a source later denies saying what the reporter swears is accurately attributed to the source will be tried to a state court jury in North Carolina. And surely, that shouldn't be the law. Given the Court of Appeals willingness to posit ambiguity in witness testimony or the use of rhetorical hyperbole in a political ad as possibly constituting clear and convincing evidence of constitutional malice, it is time for the North Carolina Supreme Court to evaluate the issue.

*Mark Prak is a partner with Brooks Pierce in Raleigh, NC. He co-authored the amicus brief filed by the North Carolina Association of Broadcasters and North Carolina Press Association in this case together with John Bussian, The John Bussian Law Firm. Defendants in the case are represented by C. Amanda Martin and Hugh Stevens, Stevens Martin Vaughn & Tadych, PLLC. Plaintiff is represented by James T. Johnson, DeMent Askew, LLP.*

## **Model Policy on Police Body-Worn Camera Footage**

Several federal, state, and local bodies are presently considering policies regarding public access to police body camera recordings. The MLRC has developed and adopted a Model Policy on this topic, which states that such tapes should generally be available for public inspection, subject to exemptions in existing public records laws. A set of principles is also offered as a guide for legislators and policy-makers.

# MLRC Holds Annual Digital Media Conference in Silicon Valley

On May 14-15, 2015, the Media Law Resource Center held its eighth annual “Legal Frontiers in Digital Media” conference at the Computer History Museum in Mountain View, California.

## Net Neutrality

The first session, titled, “Preparing for the Next Round in Net Neutrality,” began with a technical tutorial on the architecture of the internet by **Jonathan Meyer, Cyberspace Fellow, Stanford University**, who gave a technological explanation of the many controversial issues surrounding the net neutrality debate, such as: throttling, blocking, peering arrangements and so-called “zero-rating” internet access, where free internet is provided but only for a limited number of sites.

A panel discussion, moderated by **Kurt Wimmer, Covington** followed, mostly focused on the FCC’s recent Open Internet rules, promulgated under Title II of the Communications Act of 1934, which call for no blocking or throttling of internet traffic by ISPs, no paid prioritization, and created a “catch-all” rule which prohibits ISPs from “unreasonably interfer[ing] with or unreasonably disadvantage[ing]” internet edge providers or end users.

While most of the panelist were supportive of the FCC order, one panelist, **Berin Szoka, TechFreedom**, provided a skeptical critique of the rules, and the FCC’s involvement in internet regulation. While agreeing in principle that there should be no blocking or throttling by ISPs – and that they should be transparent in their actions – Mr. Szoka indicated that the FCC was poised to begin regulating interconnection agreements, data privacy and other areas in which he believed the FCC was

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The 205 Conference was planned in coordination with the Berkeley Center for Law & Technology. This year’s conference was co-chaired by **Ben Glatstein, Microsoft** and **Jonathan Blavin, Munger Tolles & Olson**.

The Conference was generously sponsored by **Axis Pro, CNA, Cooley, Covington, Davis Wright Tremaine, Fenwick, Kilpatrick Townsend, Microsoft, Sheppard Mullin, WilmerHale, Munger Tolles & Olson**. The evening cocktail reception was sponsored by **Google**.



**Conference Co-chairs, left to right: Jonathan Blavin, Munger Tolles & Olson and Benjamin Glatstein, Microsoft.**

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exceeding its authority. In his view, the FCC, in promulgating its “catch-all” interference rule, created an atmosphere of uncertainty by giving itself the future authority to do whatever it thinks is reasonable.

Fellow panelist, **Evan Engstrom, Engine**, disagreed, citing the rules’ prohibition on paid priority access as eliminating an important element uncertainty that threatened start-up companies, i.e., whether they would be able to access the marketplace on a level playing field with incumbent competitors. In a similar disagreement, while Szoka referred to the FCC regulating the internet under Title II as “radical,” **Dave Kumar, Partner, Goldberg, Godles, Wiener & Wright LLP**, expressed the belief that what was actually radical was that the FCC had ever treated the internet as an “information service” given that its principal purpose is connectivity.

### **International Legal Needs of Digital Media**

Next up was a panel on “Managing the International Legal Needs of Digital Media,” moderated by **Matt Sucherman, Google**, a session that focused on the steps digital companies need to take to prepare for and handle international legal challenges in the global digital environment. **Ben Lee, Twitter**, acknowledged the difficulty of predicting usage patterns throughout the world, and indicated that Twitter calibrates each new service to legal risks throughout the world.

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Fellow panelist, **Ben Allgrove, Baker & McKenzie**, took a first cut at identifying the countries that create the most issues for digital companies, and which may serve as a proxy for world-wide compliance: Germany, France, Belgium, Brazil, Turkey, Korea, Australia, China and India. Allgrove added that a conservative digital company might analyze the laws in 50 or 60 countries, but strongly cautioned against attempting study the law of every country; “Don’t do 183 countries,” he advised, referencing a recent exhaustive project he had undertaken that he deemed to be overkill and a waste of money.

Interestingly, the top three issues Allgrove believed digital companies should consider before entering a market are taxes, data protection, and retail price maintenance. On the other hand, Allgrove suggested that content restrictions could be handled more reactively after a market has been entered. **Hilary Ware, Netflix** added that there is always a measure of uncertainty in international legal compliance and that it’s something of an impossibility to comply with all of the laws on the books everywhere.

She indicated that part of her process is to determine which laws really matter, i.e., those laws that concern regulators, are actually enforced, and carry the most severe penalties for non-compliance. In terms of selecting outside counsel in foreign jurisdictions, **Michelle Paulson, Wikimedia Foundation**, cautioned companies not to select lawyers “because they look good on paper” but to make sure they understand your company, your product, your values and your priorities.



**Fair Use Panel, left to right: Peter Menell, UC Berkeley; Joseph Gratz, Durie Tangri; Dave Green, Microsoft; Dale Cendali, Kirkland & Ellis; and Joseph Petersen, Kilpatrick Townsend.**

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### **Tech Journalists on Content Management in an Over-the-Top World**

The conference has traditionally included at least one panel of mostly non-lawyers discussing key digital business trends, and this year's conference featured such a discussion, dubbed "The New Networks: Tech Journalists on Content Management in an Over-the-Top World." The discussion was led by **Ned Desmond, TechCrunch** and included **Michael Gorman, Engadget, Bob O'Donnell, TECHanalysis Research** and **Martin Peers, the Information**. The Conversation focused on the wide array of video content now available "over-the-top" in various new platforms.

With all of the various devices – like Roku, AppleTV, and TiVo -- and services – like Netflix, Hulu, YouTube, HBO – delivering streaming content, one of the questions posed to the panel is why there isn't just one user-friendly "box" that delivers everything? Part of the problem, according to the panel, is that while companies like Google and Apple are great at creating software interfaces, they don't own any of the content most people want to see. At the same time, legacy media companies that create and own content are often reluctant to make their content available on every platform. According to the panel, going forward, there will be many challenges for companies like Apple, Netflix, ESPN and the cable companies to tweak their business models to be successful in the new landscape of digital content.

### **Section 230**

Friday's sessions began with "Probing the Outer Limits of Section 230," a session moderated by **Tim Alger, Perkins Coie**, which considered where we've been, where we are, and where we're going with the Communications Decency Act, a doctrine so fundamental to Silicon Valley's existence, it is often taken for granted. Joining the panel were **Patrick Carome, WilmerHale, Kai Falkenberg, Cardozo School of Law, David Gingras**, the attorney who most notably defended the gossip website *The Dirty* in a case brought by BenGal cheerleader, Sarah Jones, **Eric Goldman, Santa Clara University School of Law** and **Liz McDougall, Backpage.com**.

While it was noted that Section 230 law has developed in a way that clearly shields hosts of user-generated content in most cases, and that plaintiffs have mostly stopped going after ISPs, plaintiff's lawyers have increasingly gotten more creative in pleading around the CDA, in cases such as *Harding v. PDX* and *Doe v. Internet Brands*. In the *Internet Brands* case, as described by Mr. Carome, a sexual assault victim who was seeking work as a model sought liability against a modeling classified ads site where

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**Section 230 Panel (from left to right) Eric Goldman, Santa Clara University; Tim Alger, Perkins Coie; Kai Falkenberg, Benjamin N. Cardozo School of Law; David Gingras, Gingras Law Office; Pat Carome, WilmerHale; Liz McDougall, Backpage.com**

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she had posted a profile, under a theory that the site knew about predators using the site to find victims, but failed to warn the plaintiff.

After a panel of the Ninth Circuit initially held that Section 230 did not apply, the court granted a rehearing *en banc* which is currently pending. Mr. Gingras argued that by the logic of the panel decision, Twitter could be held liable for acts of terror under the theory that it is aware that ISIS uses the platform to recruit terrorists. Other subjects discussed by the panel: the merits of bringing a motion to dismiss vs. developing a full record for summary judgment; whether Section 230 law will apply to sites like Uber and Airbnb; and the implications of the federal SAVE Act, working its way through Congress, creating an exception to Section 230 for advertisements related to sex trafficking.

### **Transformative Use Doctrine**

Next up was “What’s Fair is Foul: Has The Transformative Use Doctrine Transformed Copyright Law For Better or Worse?” – a session moderated by **Dave Green**, Microsoft – which began with a presentation from **Peter Menell**, a professor at **UC Berkeley**, who gave an overview of the major developments in the law of fair use, from the 1970’s on through to present day, including the gradual rise of the

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transformative use defense. **Joe Gratz, Durie Tangri**, took the lead in defending the importance of “transformativeness” in fair use analysis, arguing that the test insures that original authors keep their incentive to create by rewarding them for *foreseeable* uses of the work, while at the same time, incentivizing others to create new works that were not foreseeable by the original artist.

**Dale Cendali, Kirkland & Ellis**, objected to the increasing importance of transformative use, noting that it is inconsistent with the Copyright Act in a number of respects and takes away incentives from content creators. **Joseph Petersen, Kilpatrick Townsend** took the view that the fair use test should focus on whether the new work “furthers the progress of science” as contemplated by the constitution. He defended the Supreme Court’s refusal to create bright-line rules, asking the rhetorical question if Google would even exist today if fair use was rigidly defined?

### **Digital Privacy & Security**

The final panel of the conference was “Recent Developments in Digital Privacy & Security,” moderated by **Matthew Brown, Cooley**, which discussed a number of different hot topics related to data protection. On the issue of federal data breach legislation, there seemed to be general agreement that one federal standard would be preferable to 47 different state laws, but **Nicole Ozer, ACLU of Northern California**, expressed concern that if a federal law were to preempt state regulation, that it should be a high standard (such as that of California) and not the least common denominator.

The discussion next turned to class action lawsuits, and among plaintiffs’ lawyer, **Ben Richman, Edelson P.C.** and the more defense-oriented panelists, **Rosemarie Ring, Munger Tolles & Olson**, and **Blake Lawit, LinkedIn**, there was general agreement that adverse counsel should openly communicate early in litigation to potentially resolve non-meritorious class action suits. Mr. Richman stated that his firm will walk away from a lawsuit if the defendant can explain to him that he’s misjudged the merits of the case. Mr. Lawit indicated that the same advice applies to dealings with government regulators; he advises digital companies to get to know their regulators, not to be defensive and “don’t get in the bunker.” What should digital companies do in the event of a data breach? According to Mr. Lawit, put your members first and don’t assume your regulator will view you as a criminal.

The Legal Frontiers in Digital Media conference will return to the Computer History Museum next year, May 19-20, 2016.



# Third Circuit Affirms Dismissal of Defamation Action Against Search Engines Based Upon CDA Immunity

By Robert L. Rogers, III

In a helpful per curium opinion construing the Communications Decency Act (the “CDA”), the Third Circuit Court of Appeals in [\*Obado v. Magdeson\*](#) affirmed the dismissal of defamation claims asserted against eight webhosts and search engines, including Google and Yahoo!, on grounds that they were immune under the CDA from liability for defamatory statements posted by others, even if they “manipulated search engines to maximize search results related to the alleged defamatory content.”

## Background

The case involved alleged defamatory statements made about Plaintiff Dennis Obado by a blogger known as “Mama Duka” and another individual, Diop Kamau, which were republished by the webhost and search engine defendants. Plaintiff Obado’s claims against the webhosts and search engines included actions for defamation, intentional and negligent infliction of emotional distress, and invasion of privacy.

Obado’s allegations were, for the most part, similar to those typically alleged against website operators—that even though the webhosts and search engines played no role in creating the alleged defamatory statements, they should nevertheless be liable for defamation and other common law torts for hosting the websites on which such statements were republished and/or failing to remove such information.

However, Obado added several less common allegations: (1) the defendants manipulated their search engines to increase the frequency with which others located the alleged defamatory statements of Kamau and Mama Duka; (2) the defendants failed to provide the same “manipulation” to Obado’s “rebuttal statements,” resulting in the defamatory statements being more easily located than Obado’s rebuttals; and (3) Kamau and Mama Duka’s defamatory statements were racist hate speech and fighting words not afforded protection under the First Amendment (and therefore for which, Obado claimed, the Defendants were not entitled to CDA protection).

**The Third Circuit provides additional support for search engine operators sued for tortious statements of others posted on their sites by confirming that practices that affect the frequency of republication of such statements, or the frequency of republication of the plaintiffs’ responses, are protected “editorial functions” that do not undermine CDA immunity.**

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Section 230(c)(1) of the CDA immunizes website operators for content posted on their websites by others by prohibiting "providers of interactive computer services" from being treated as "the publisher or speaker of any information provided by another information content provider." In Section 230(c)(2), the CDA immunizes website operators for their editorial activities, including actions to "restrict access to or availability of material that [they] consider to be obscene, lewd, lascivious, filthy, excessive, violent, harassing, or otherwise objectionable." Courts throughout the United States have construed these provisions to bar lawsuits seeking to hold website operators liable for their exercise of a publisher's traditional editorial functions—such as deciding whether to publish, remove, postpone, or alter content.

In *Obado*, the U.S. District Court for the District of New Jersey held that each defendant was immune under the CDA because each was a provider of internet computer services and Obado sought to impose liability upon those defendants solely as publishers, even though the alleged defamatory content was created by others, *i.e.*, Mama Duka and Kamau. On appeal, the Third Circuit affirmed these conclusions.

The Third Circuit also affirmed the District Court's rejection of Obado's arguments that his claims should not be dismissed because of his three less common allegations described above.

It held that the District Court correctly determined that Obado's allegations concerning the defendants' alleged manipulation of search engine results and failure to make Obado's rebuttal statements more widely available do "not affect their immunity from suit," and characterized such acts as traditional editorial functions.

The Circuit Court also held that the District Court correctly rejected Obado's First Amendment argument "and correctly reasoned that, because the CDA is meant to shield interactive computer service providers from liability for unprotected otherwise actionable speech originating from other information content providers, it applies regardless of whether the third-party speech itself is unlawful. The immunity provided by the CDA would be rendered meaningless if it applied only to protected speech."

The Third Circuit Court therefore provides additional support for search engine operators sued for tortious statements of others posted on their sites by confirming that their practices that affect the frequency of republication of such statements, or the frequency of republication of the plaintiffs' responses, are protected "editorial functions" that do not undermine CDA immunity.

*Robert L. Rogers, III is a media and business litigation attorney with Holland & Knight LLP and works in the firm's Orlando office. The Plaintiff/Appellant was not represented by counsel. The Defendants/Appellees were represented by Thomas B. Duffy, Esq.; David H. Kramer, Esq. and Jason B. Mollick, Esq. of Wilson, Sonsini, Goodrich & Rosati; Ian C. Ballon, Esq., Lori Chang, Esq., Roger B. Kaplan, Esq., and Aaron Van Nostrand, Esq. of Greenberg Traurig; Tyler L. Farmer, Esq. of Calfo Harrigan Leyh & Eakes; Kristen E. Polovoy, Esq. of Montgomery, McCracken, Walker & Rhoads; Venkat Balasubramani, Esq.; Sean M. McChesney, Esq.; Michael D. LiPuma, Esq.; and Harris N. Feldman, Esq., Theresa E. Loscalzo, Esq., Bradley A. Nankerville, Esq., and Han Nguyen, Esq. of Schnader Harrison Segal & Lewis.*

*From the Next Gen Committee:*

## Three Federal Courts Issue Opinions in May Construing the CDA

*One Contradicts Well-Established Precedent*

By Robert L. Rogers, III

May 2015 was a busy month for Communications Decency Act (“CDA”) jurisprudence, as three federal courts published opinions construing the federal law that shields website operators from civil liability for harmful statements posted by others on their websites. And although all three Courts upheld CDA immunity, one District Court deviated from well-established CDA precedents by suggesting how the plaintiffs might re-plead their claims to avoid CDA immunity.

Section 230(c)(1) of the CDA immunizes website operators for content posted on their websites by others by prohibiting “providers of interactive computer services” from being treated as “the publisher or speaker of any information provided by another information content provider.” In Section 230(c)(2), the CDA immunizes website operators for their editorial activities, including actions to restrict access to obscene, lewd, harassing, or otherwise objectionable content. Courts throughout the United States have construed these provisions to bar lawsuits seeking to hold website operators liable for their exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, remove, or alter content.

**May 2015 was a busy month for Communications Decency Act jurisprudence.**

The first CDA opinion in May was *Obado v. Magneson*, 2015 WL 2167683 (3d Cir. May 11, 2015), in which the Third Circuit Court of Appeals affirmed the dismissal of a defamation action asserted against eight webhosts and search engines, including Google and Yahoo! Like most plaintiffs in cases implicating the CDA, Obado sought relief against the website operators for statements posted on their websites by other users. But Obado also added the less common twist of claiming that the defendants “manipulated search engines to maximize search results related to the alleged defamatory content.”

In affirming the District Court’s dismissal with prejudice, the Third Circuit Court characterized any alleged manipulation by the website operators of search engine results as traditional editorial functions that do “not affect their immunity from suit” under the CDA.

One day later, the U.S. District Court for the Eastern District of Virginia issued the most troubling CDA opinion of the month in *Advanfort Co. v. International Registries, Inc.*, 2015 WL 2238076 (E.D. Va. May 12, 2015), in which the Court correctly dismissed a defamation action based upon CDA immunity, but incorrectly did so without prejudice.

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In *Advanfort*, several providers of maritime security services asserted defamation actions against their prior attorney (Cartner) who wrote an allegedly defamatory article about them and against The Maritime Executive, LLC (“TME”), which published Cartner’s article on its website. The District Court correctly dismissed the defamation action against TME based upon CDA immunity on grounds that the plaintiffs alleged that Cartner, not TME, wrote the defamatory article. But in dismissing without prejudice, the District Court permitted the plaintiffs the opportunity add allegations that TME “is responsible . . . for the creation or development” of Cartner’s article (and therefore not immune under the CDA), and in so doing, the Court provided a roadmap for the plaintiffs that contradicts opinions of other courts.

Specifically, the District Court stated that “if TME paid Cartner to write the Article, or has paid him in the past, an allegation to that effect might support a reasonable inference that TME was in part responsible for creating the Article or materially contributed to its alleged unlawfulness,” and that TME is therefore not immune under the CDA.

In fact, courts throughout the United States—including the *Advanfort* Court’s sister District Court—have held that websites that publish articles from freelance writers do not lose CDA immunity simply by paying for those articles. *See, e.g., Zeran v. America Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997); *Nasser v. WhitePages, Inc.*, 2013 WL 6147677, at \*4 (W.D. Va. 1993). The Eastern District Court of Virginia therefore misconstrued the latest major opinion construing the CDA’s “encouragement” exception, *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398 (6th Cir. 2014)—which did not involve allegations that a website paid for defamatory content it published.

Finally, on May 15th, the U.S District Court for the District of Massachusetts held that the operators of Backpage.com were immune under the CDA from claims by alleged victims of sex-trafficking who sought civil remedies under criminal statutes, in *Doe v. Backpage.com, LLC*, 2015 WL 2340771 (D. Mass. May 15, 2015).

In *Doe v. Backpage.com*, three underage women who claim to have been raped hundreds of times as a result of advertisements for escort services posted by their pimps on Backpage.com sought damages from the operators of Backpage.com under civil remedy provisions contained in the federal Trafficking Victims Protection Reauthorization Act and the Massachusetts Anti-Human Trafficking and Victim Protection Act. The plaintiffs acknowledged that the ads in question were created only by their pimps, but nevertheless argued that Backpage.com was responsible for their creation or development because of practices the plaintiffs claimed were aimed at promoting child prostitution. Those practices included: protecting the anonymity of the posting pimps by allowing them to pay and email through anonymous sources; posting illegal material in sponsored ads; stripping metadata from posted photos of the plaintiffs; and designing the escorts section of the website in a way that signals it sells sex with children.

In dismissing the plaintiffs’ claims with prejudice, the Massachusetts District Court held that “the allegedly sordid practices of Backpage . . . amount to neither affirmative participation in an

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illegal venture nor active web content creation,” since (1) nothing on Backpage.com requires users to offer or search for commercial sex with children; (2) “the creation of sponsored ads with excerpts taken from the original posts reflects the illegality (or legality) or the original posts and nothing more”; (3) stripping metadata from photographs is a standard practice; and (4) any passivity by Backpage.com in failing to perfect its filtering system to exclude or identify ads promoting child prostitution does “not transform Backpage into an information content provider.” The District Court also rejected the plaintiffs’ argument that the Court was authorized to construe the plaintiffs’ actions as “enforcement of . . . criminal statute[s]” under the immunity exception for criminal law enforcement codified in the CDA.

In reaching its decision, the District Court emphasized that it was “not unsympathetic to the tragic plight” of sex-trafficking victims. “Congress has made the determination that the balance between suppression of trafficking and freedom of expression should be struck in favor of the latter in so far as the Internet is concerned,” and the Court “has no choice but to adhere to the law that Congress has seen fit to enact.”

*Robert L. Rogers, III is a media and business litigation attorney with Holland & Knight LLP who works in the firm’s Orlando office, and is a member of the MLRC’s Next Generation Committee.*

*In Obado v. Magnesun, the Plaintiff/Appellant was not represented by counsel. The Defendants/Appellees were represented by Thomas B. Duffy, Esq.; David H. Kramer, Esq. and Jason B. Mollick, Esq. of Wilson, Sonsini, Goodrich & Rosati; Ian C. Ballon, Esq., Lori Chang, Esq., Roger B. Kaplan, Esq., and Aaron Van Nostrand, Esq. of Greenberg Traurig; Tyler L. Farmer, Esq. of Calfo Harrigan Leyh & Eakes; Kristen E. Polovoy, Esq. of Montgomery, McCracken, Walker & Rhoads; Venkat Balasubramani, Esq.; Sean M. McChesney, Esq.; Michael D. LiPuma, Esq.; and Harris N. Feldman, Esq., Theresa E. Loscalzo, Esq., Bradley A. Nankerville, Esq., and Han Nguyen, Esq. of Schnader Harrison Segal & Lewis.*

*In Advanfort Co. v. International Registries, Inc., the Plaintiffs were represented by David Glenn Barger, Esq. and Theresa Allyn Queen, Esq. of Greenberg Traurig LLP. The Defendants were represented by Thomas Gerard Connolly, Esq. of Harris Wiltshire & Grannis LLP; Charles Bennett Molster, III, Esq. of Winston & Strawn LLP; and Charles F.B. McAleer, Jr., Esq. and Timothy Patrick O’Toole, Esq. of Miller & Chevalier. In Doe v. Backpage.com, the Plaintiffs were represented by Ching-Lee Fukuda, Esq., John T. Montgomery, Esq., Aaron M. Katz, Esq., Christine Ezzell Singer, Esq., Dara A. Reppucci, Esq., and Jessica L. Soto, Esq. of Ropes & Gray LLP. The Defendants were represented by Ambika K. Doran, Esq. and James C. Grant, Esq. of Davis Wright Tremaine LLP, and Robert A. Bertsche, Esq. and Jeffrey Jackson Pyle, Esq. of Prince Lobel & Tye LLP.*

**“The allegedly sordid practices of Backpage . . . amount to neither affirmative participation in an illegal venture nor active web content creation.”**

# College Police Officers Subject to Ohio Open Records Act

## *Decision Creates More Police Transparency*

**By John C. Greiner**

In *State ex rel. Schiffbauer v. Banaszak*, the Ohio Supreme Court ruled that police officers employed by private colleges are subject to the Ohio Public Records Act. Therefore, the department can be compelled to produce public records. Anna Schiffbauer was the student journalist who brought the suit. Anna worked on the staff of the Tan & Cardinal, the student newspaper at Otterbein University in Westerville, Ohio.

### **Background**

**In the wake of recent events in Ferguson, Baltimore, and Cleveland it is more important than ever for the police to act in a transparent manner.**

Otterbein is a private university, but several years ago, it decided to employ a campus police department made up of officers trained as state police officers. An Ohio statute grants these campus police officers the same authority as municipal police officers or county sheriffs. This authority provides the campus police officers the ability to search and confiscate property, to detain, search, and arrest persons, to carry deadly weapons, and, in this case, pursuant to an agreement between the school and the city of Westerville, make arrests off campus.

When Anna asked for criminal incident reports from the Otterbein Police, however, they refused to provide them, stating that as a private institution Otterbein was not subject to the Ohio Public Records Act.

Anna filed a mandamus action in the Ohio Supreme Court to get the records.

Police incident reports are unquestionably public records under Ohio law. But when an entity won't comply with their duties under the law, the requesting party may initiate a mandamus action in the Ohio Supreme Court to make the entity obey the law.

### **Ohio Supreme Court Decision**

Despite Otterbein's intense foot dragging and other attempts to delay, the Supreme Court issued a "peremptory writ" compelling the Otterbein police to hand over the records.

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Interestingly, the Supreme Court ruled before the parties filed briefs or presented oral arguments. The Court grants a peremptory writ only when “the right to require the performance of an act is clear and it is apparent that no valid excuse can be given for not doing it.”

Otterbein argued that the campus police department is not a public office, subject to the Ohio Public Records Act, because Otterbein University is not a public entity and the campus police department is a subdivision of the university. However, the Supreme Court has held: “that a private corporation may be considered a public office for purposes of public records when it performs a government function.” This passage from the Court’s decision gets to the heart of the matter: “The department is created under a statute for the express purpose of engaging in one of the most fundamental functions of the government: the enforcement of criminal laws, which includes power over citizens as necessary for that enforcement.”

The power to arrest and kill is the ultimate expression of the state’s power. With this great power comes great responsibility. It is reasonable that citizens who are subject to this power have the right to check up on the actors who exercise it.

In the wake of recent events in Ferguson, Baltimore, and Cleveland it is more important than ever for the police to act in a transparent manner. This decision recognizes that principle by classifying the Otterbein police department as a public office which falls under the Ohio Public Records Act. By requiring the Otterbein police department to make incident reports public records, the decision creates a more transparent police department, subject to public scrutiny. This decision by the Ohio Supreme Court, to require the Otterbein police department to be a more transparent organization, is vital to the media. The media acts as an independent watchdog on the government and other

powerful organizations. Without the ability to investigate and get answers the media cannot function as this independent check, and it becomes all bark and no bite. The Ohio Supreme Court decision provides the media with greater power to act as the essential independent check it was created to be by allowing it to check up on a campus police department performing a strictly governmental function.

And hats off to Anna. She stuck with this case even after she graduated and stopped working for the Tan & Cardinal. It was a privilege to represent her.

*John C. Greiner is a partner at Graydon, Head & Ritchey, L.L.P. in Cincinnati. The University was represented by Richard S. Lovering, Bricker & Eckler, L.L.P.*

**The Ohio Supreme Court decision provides the media with greater power to act as the essential independent check it was created to be by allowing it to check up on a campus police department performing a strictly governmental function.**



# ECHR Grand Chamber Rules That France Violated Article 10 Rights of Lawyer

*“A great victory for the whole legal profession”*

**By Inger Høedt-Rasmussen and Dirk Voorhoof**

The Grand Chamber in its judgment of 23 April 2015 in the case of *Morice v. France* has overruled an earlier finding of non-violation of the right to freedom of expression of a lawyer (Chamber judgment Fifth Section, 11 July 2013). The Grand Chamber found that the applicant lawyer in the newspaper *Le Monde* had expressed value judgments with a sufficient factual basis and that his remarks concerning a matter of public interest had not exceeded the limits of the right to freedom of expression. Therefore it considered the lawyer's conviction for defamation of two investigative judges as a breach of Article 10 of the Convention. The Grand Chamber's judgment defines in an interesting way the role and responsibilities of lawyers in relation to society and in relation to their clients and to the administration of justice. It emphasises that lawyers, although being in a role that differs from the role of journalists, should be able to draw the public's attention to potential shortcomings in the justice system. In a first reaction in *Le Monde*, Morice (the applicant) called the judgment “une grande victoire pour l'ensemble de la profession des avocats”.

## **The criminal conviction of Morice and the Chamber's judgment**

The case deals with the criminal conviction, with an order to pay damages and costs, on account of the defamatory remarks concerning the proceedings in a high-profile case in which Morice was acting as a lawyer. The remarks had been published in an article in the daily newspaper *Le Monde*, which contained the text of a letter sent by Morice to the Minister of Justice seeking an administrative investigation against two investigative judges. According to the French courts the statements made by Morice were to be considered defamatory, tarnishing the good name and reputation and casting doubts on the integrity of the two judges at issue. In its judgment of 11 July 2013 the Court's Chamber found the criticism expressed by Morice particularly harsh and the accusations very serious, and it considered that Morice had overstepped the limits that lawyers had to observe in publicly criticising the justice system.

On request of Morice, the case was referred to the Grand Chamber. The Council of Bars and Law Societies of Europe (CCBE), the Paris Bar Association, the French National Bar Council and the Conference of Chairmen of French Bars were given leave to intervene as third parties in the written procedure before the Grand Chamber. They argued in favour of the recognition of a

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robust right of freedom of expression when criticising failures in the administration of justice. They also argued that like journalists, lawyers are “watchdogs of democracy”.

### **The Grand Chamber’s judgment**

After reiterating some of the general principles developed in the Court’s jurisprudence, the judgment notices that the specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Therefore lawyers play a key role in ensuring that the courts, whose mission is fundamental in a State based on the rule of law, enjoy public confidence. This however does not exclude lawyers from the right to freedom of expression, in particular to comment in public on the administration of justice, provided that their criticism does not overstep certain bounds. Those bounds lie in the usual restrictions on the conduct of members of the Bar, with their particular reference to “dignity”, “honour” and “integrity” and to “respect for ... the fair administration of justice” (*Charter of Core Principles of the European Legal Profession*, CCBE, 24 November 2006).

The Court also states that the question of freedom of expression is related to the independence of the legal profession, which is crucial for the effective functioning of the fair administration of justice. Therefore, it is only in exceptional cases that a restriction – even by way of a lenient criminal penalty – of a defence counsel’s freedom of expression can be accepted as necessary in a democratic society. In other cases, the use of a tone that was not insulting but caustic, or even sarcastic, in critical remarks about judges was regarded as compatible with Article 10 of the Convention. It must be ensured however that the criticism in such a context is not misleading or a gratuitous personal attack on members of the judiciary.

The judgment analyses more concretely

- the applicant’s status as a lawyer,
- the contribution to a debate on a matter of public interest,
- the nature of the impugned remarks,
- the specific circumstances of the case and
- the sanctions imposed.

As regards *(a) the applicant’s status as a lawyer*, the Court reiterates its case-law to the effect that a distinction had to be drawn depending on whether the lawyer was speaking inside or outside the courtroom. Remarks made in the courtroom remained there and thus warranted a high degree of tolerance to criticism, especially since the lawyer’s freedom of expression may

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raise a question as to his client's right to a fair trial: the principle of fairness thus also militates in favour of a free and even forceful exchange of argument between the parties. In the present case however the Court fails to see how Morice's statements could have directly contributed to his task of defending his client.

The Court also takes the view, contrary to the argument of the CCBE, that lawyers cannot be equated with journalists. It states that their respective positions and roles in judicial proceedings are intrinsically different:

“Journalists have the task of imparting, in conformity with their duties and responsibilities, information and ideas on all matters of public interest, including those relating to the administration of justice. Lawyers, for their part, are protagonists in the justice system, directly involved in its functioning and in the defence of a party. They cannot therefore be equated with an external witnesses whose task it is to inform the public” (§ 148).

Regarding **(b) the contribution to a debate on a matter of public interest**, the Court takes the view that the impugned remarks published in *Le Monde* concerned a high-profile case that created discussion about the functioning of the judiciary. As such a context of a debate on a matter of public interest calls for a high level of protection of freedom of expression, only a particularly narrow margin of appreciation is left to the domestic authorities. This finding at the same time legitimates a strict scrutiny by the European Court whether the interference at issue can be justified as being necessary in a democratic society.

As regard **(c) the nature of the impugned remarks** the Court is of the opinion that the remarks were more value judgments than pure statements of fact, as they reflected mainly an overall assessment of the conduct of the investigating judges in the course of the investigation. Furthermore the remarks had a sufficient factual basis and could not be regarded as misleading or as a gratuitous attack on the reputation or the integrity of the two investigative judges.

With regard **(d) the specific circumstances of the case** the Grand Chamber finds that significant weight is to be attached to the whole context and the “overall background” of the case. In that connection, the Court reiterates that lawyers cannot be held responsible for everything appearing in an interview published by the press or for actions by the press. Furthermore the Grand Chamber, in contrast with the findings by the French courts, considers that Morice's statements could not be reduced to the mere expression of personal animosity, as their aim was to reveal “serious shortcomings in the justice system” (§ 166).

The Court went on emphasising that:

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“The key question in the statements concerned the functioning of a judicial investigation, which was a matter of public interest, thus leaving little room for restrictions on freedom of expression. In addition, a lawyer should be able to draw the public’s attention to potential shortcomings in the justice system; the judiciary may benefit from constructive criticism” (§ 167).

With regard to the interest of maintaining the authority of the judiciary, the Grand Chamber considers that this cannot justify an unlimited restriction on the right to freedom of expression:

“(..) while it may prove necessary to protect the judiciary against gravely damaging attacks that are essentially unfounded, bearing in mind that judges are prevented from reacting by their duty of discretion (..), this cannot have the effect of prohibiting individuals from expressing their views, through value judgments with a sufficient factual basis, on matters of public interest related to the functioning of the justice system, or of banning any criticism of the latter” (§ 168).

Although the defence of a client by his lawyer must be conducted not in the media, but in the courts of competent jurisdiction, involving the use of any available remedies, the Grand Chamber accepts that there might be “very specific circumstances” justifying a lawyer making public statements in the media, such as in the case at issue. The Court finds that Morice’s statements were not capable of undermining the proper conduct of the judicial proceedings, and that his conviction could not serve to maintain the authority of the judiciary.

Finally with regard to *(e) the imposed sanction*, the Court refers to its findings on many occasions that interference with freedom of expression may have a chilling effect on the exercise of that freedom, especially in cases of criminal defamation.

In view of the foregoing, the Court finds that the judgment against Morice for defamation can be regarded as a disproportionate interference with his right to freedom of expression, and was not therefore “necessary in a democratic society” within the meaning of Article 10 of the Convention. The Grand Chamber reaches the conclusion, unanimously, that there has been a violation of Article 10 of the Convention.

### Comments

In several cases the European Court has dealt with interferences in the right to freedom of expression because of defamation of members of the judiciary. In some cases which concerned defamatory criticism of judges (*Barfod v. Denmark*, *Prager and Oberschlick v. Austria*,

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*Schöpfer v. Switzerland, Hrico v. Slovakia, Perna v. Italy* (Grand Chamber) and *Karpetas v. Greece*), the European Court has shown reluctance in finding a violation of Article 10 of the Convention, especially considering the maintenance of the public's confidence in the authority of the judiciary (see also M. Addo, *Freedom of Expression and the Criticism of Judges. A comparative study of European legal standards*, Aldershot, Ashgate Publishing Limited, 2000). The chamber judgment's message in the case of *Morice v. France* (11 July 2013) confirmed this approach.

In other cases however the European Court gave priority to the right to freedom of expression of lawyers (*Kyprianou v. Cyprus* (Grand Chamber); *Foglia v. Switzerland, Kabanov v. Russia; Gouveia Gomes Fernandes and Freitas e Costa v. Portugal; Mor v. France* and *Ümit Bilgiç v. Turkey*). By emphasizing the importance of the contribution to a debate on a matter of public interest related to issues of the administration of justice, the Grand Chamber has now amplified the right of lawyers to be able to draw the public's attention to certain problems related to the functioning of the justice system. According to the Grand Chamber the judiciary may even benefit from "constructive criticism", and therefore critical statements and value judgments about the judiciary, with a sufficient factual basis, are to be protected under Article 10 of the Convention. This also applies when harsh criticism and allegations cast doubts on the integrity of judges.

It is remarkable that the Grand Chamber does not situate this case in the framework of a balancing test between the lawyer's freedom of expression (Art. 10) and the right of reputation of the two judges as guaranteed by Article 8 ECHR. The Grand Chamber explicitly refers to the fact that the parties agreed "that the aim of the interference was the protection of the reputation or rights of others", while the Court saw no reason "to adopt a different view" (§ 143). In such circumstances one would expect that the Court considers the case as one of balancing of conflicting rights, as in *Axel Springer AG v. Germany, Print Zeitungsverlag GmbH v. Austria, Belpietro v. Italy*, and also in *Anselmo Augusto Lopes v. Portugal* (dec.). It seems however that in cases in which the defamatory allegations clearly concern the professional functioning of public persons (*Karakó v. Hungary; Polanco Torres and Movilla Polanco v. Spain, Pipi v. Turkey* (dec.) and *Ümit Bilgiç v. Turkey*) the Court, like in *Morice v. France*, is less inclined to use the framework of the balancing test of Article 8 and 10 rights. It remains unclear however why the European Court, after its Grand Chamber's judgments of 7 February 2012 in *Von Hannover v. Germany* (no. 2) and *Axel Springer AG v. Germany*, in some cases opts for the balancing test with its predefined five or six criteria, while in other cases the Court analyses the interference at issue solely from the perspective of Article 10 of the Convention, applying other criteria and further narrowing the margin of appreciation of the national authorities of the defendant state.

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The strong emphasis on the freedom of expression of lawyers and their participation in public debates is specifically relevant for developing the lawyer's identity and role in society, as this right can only be exercised actively by a personal decision, based on a person's will, voluntarism, identity and choice of how to perform a lawyer's identity (Inger Høedt-Rasmussen, *Developing Identity for Lawyers – Towards Sustainable Lawyering*, CBS, Copenhagen 2014, pp. 80-91). The expression of one's ideas and opinions is linked to personal performance and perception of identity and to the professional environment, including the administration of justice. It is relational and covers expressions in court, in writing, in participation in professional and public discussion or interviews in the media. This approach has now been clearly confirmed in the Grand Chamber's judgment in the case of *Morice v. France*, fully recognising the lawyers' right to take part in or to initiate debate of public interest related to (potential) shortcomings in the functioning of the judicial system.

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# Right to Record Police a “Clearly Established Right”

## *Journalist’s First Amendment Claim Survives Motion to Dismiss*

By Brittany Berckes

In a case between a freelance journalist covering the Occupy Wall Street protest and the City of New York (“City”), a New York district court held that the First Amendment generally protects the video recording of police and that this right is clearly established. *Higginbotham v. City of New York*, No.14-cv-8549 (S.D.N.Y. May 12, 2015).

District Judge P. Kevin Castel found that Douglas Higginbotham’s false arrest and First Amendment claims were properly alleged due to the lack of probable cause to arrest and case law consensus that a reasonable officer would have been on notice that retaliating against a non-participant, professional journalist for filming public police activity under the alleged circumstances would violate the First Amendment.

**Judge Castel found that Higginbotham’s false arrest and First Amendment claims were properly alleged due to the lack of probable cause to arrest and case law consensus that a reasonable officer would have been on notice that retaliating against a non-participant, professional journalist.**

### Background

On the morning of November 15, 2011, Higginbotham reported to lower Manhattan to cover the Occupy Wall Street demonstration as a freelance video-journalist for TV New Zealand. During his coverage of the protest, Higginbotham, while allegedly wearing visible press credentials, climbed to the top of a telephone booth in order to get a better angle for shooting. Higginbotham recorded a police arrest that resulted in a significant injury to the protester being arrested. A police officer ordered Higginbotham to climb down but he was unable to immediately comply with the order because of the crowds of people surrounding the booth.

The complaint alleges that as Higginbotham climbed down from the phone booth, police officers pulled Higginbotham’s legs from under him which caused him to fall to the ground. Higginbotham was then arrested and alleges that he spent three hours in handcuffs resulting in bruising and pain to his wrists. He was charged with a single count of disorderly conduct based upon the allegation that with the intent to cause public inconvenience, annoyance, or alarm, or recklessly causing a risk thereof, he congregated with other persons in a public place and refused to comply with a lawful order of the police to

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disperse. These charges were dismissed on February 17, 2012. Higginbotham sued the City and the officers under 42 U.S.C. § 1983 alleging violations of his First, Fourth, Eighth, and Fourteenth Amendment rights on grounds that police:

- Unlawfully arrested him for recording police activity;
- Engaged in malicious prosecution against him;
- Used excessive force in placing him under arrest;
- Committed illegal intentional and violent assault against him;
- Instituted a policy and practice of making mass arrests without probable cause, encouraging the use of excessive force, and impeding and arresting those individuals who were observed photographing, videotaping or otherwise recording the illegal and unconstitutional acts of officers; and
- Retaliated against him for filming a violent arrest.

The court dismissed all claims except the false arrest and First Amendment claims.

### **No Probable Cause for Arrest**

The court found that Higginbotham adequately alleged that there was no probable cause to arrest him for any violation. Additionally, the court found that the defendants were not entitled to qualified immunity at this stage in this case.

Defendants contended that there was probable cause to arrest Higginbotham for a violation of several statutes. First, N.Y. Penal Law § 240.20(6), prohibits “congregat[ing] with other persons in a public place and refus[ing] to comply with a lawful order of the police to disperse,” “with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof.” The court found this statute was inapplicable to Higginbotham because the defendants’ order to climb down from the telephone booth was not an order to “disperse,” which is used in the statute to mean to “separate, go different ways.” According to the court, the order given to Higginbotham was to go into the crowd rather than to separate. Additionally, the court found that an individual cannot disperse alone and that there was no evidence that Higginbotham ever “refused” to comply with the order. Thus, Higginbotham could not have violated section 240.20(6).

**The court denied the defendants’ request for qualified immunity because it found that the right to record police activity in public, at least in the case of a journalist who is otherwise unconnected to the events recorded, was in fact clearly established at the time of the events alleged in the complaint.**

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Next, the defendants contended that there was probable cause to arrest Higginbotham for violation of N.Y. Penal Law § 240.20(7), which prohibits creating a hazardous condition serving no legitimate purpose, and violation of N.Y. Penal Law § 120.20, which prohibits recklessly engaging in conduct which creates a substantial risk of serious physical injury to another person. The defendants argued that Higginbotham could have fallen off the phone booth or dropped his camera, putting the crowd below him at risk of injury and that climbing onto the phone booth to obtain a better vantage point did not amount to a legitimate purpose. However, based on the facts alleged, the court disagreed that Higginbotham created a hazardous condition or a substantial risk of serious physical injury to another person and thus plausibly alleged a lack of probable cause for arrest under sections 240.20(7) and 120.20.

In addition, the court applied this reasoning to whether the police had probable cause to arrest Higginbotham under N.Y. Penal Law § 145.25. Section 145.25 prohibits reckless conduct which creates a substantial risk of damage to the property of another person in excess of two hundred and fifty dollars. Since there was no evidence of the characteristics of the phone booth and whether it would be damaged by Higginbotham, the court could not find that there was probable cause to arrest Higginbotham under this statute as well.

Lastly, the defendants argued that even if no probable cause existed to arrest Higginbotham, there was “arguable probable cause” to arrest him, and thus, they are entitled to qualified immunity. However, the court found that the defendants merely “summarize[d] their version of the facts and assert[ed] that the officers were objectively reasonable and patently not incompetent” and were not entitled to qualified immunity at this stage in the litigation.

### **Right to Record Public Police Activity is “Clearly Established”**

The court found that Higginbotham adequately pled a First Amendment retaliation claim and held that the right to record public police activity is clearly established.

First, defendants argued that Higginbotham’s recording was not protected by the First Amendment because it was not “expressive conduct.” However, the court disagreed with this proposition and declined to follow *Pluma v. City of New York*, No. 13-cv-2017 (S.D.N.Y. Mar. 31, 2015), which held that recreational photography or filming for personal use is not protected by the First Amendment because it lacks an “identifiable message sought to be communicated and an identified audience.” Instead, the court held that while videotaping an event is not itself an expressive activity, “it is an essential step towards an expressive activity, at least when performed by a professional journalist who intends, at the time of recording, to disseminate the product of the work.”

Next, the defendants argued whether a right to record police activity exists and if the right does exist, it is “insufficiently defined” entitling them to qualified immunity. The court

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acknowledged that neither the Supreme Court nor the Second Circuit has decided whether a right to record police activity exists. However, the court agreed with a number of circuit court cases that have concluded that the First Amendment protects the right to record police officers performing their duties in a public space, subject to reasonable time, place, and manner restrictions.

Furthermore, the court denied the defendants' request for qualified immunity because it found that the right to record police activity in public, at least in the case of a journalist who is otherwise unconnected to the events recorded, was in fact clearly established at the time of the events alleged in the complaint. The court looked to the First, Ninth, and Eleventh Circuits which had all concluded by the date of the incident that this right existed. It found that at the time of Higginbotham's arrest, there was a "robust consensus of persuasive authority" in favor of the right and was thus clearly established for qualified immunity purposes.

The court did put some possible limitations on the right to record police activity. For example, the right may not apply in particularly dangerous situations, if the recording interferes with police activity, if it is surreptitious, if it is done by the subject of the police activity, or if the police activity is part of an undercover investigation. However, as a professional journalist covering a public demonstration, none of these limitations applied to Higginbotham's claim.

*Brittany Berckes is a Legal Fellow at the MLRC.*

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