



# MEDIA LAW LETTER

Reporting Developments Through April 25, 2016

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*From the Executive Director's Desk*

## **MLRC Institute Freelancers Workshop a Smashing Success**

*And Looking Ahead to Legal Frontiers in Digital Media, May 19-20 in California*

One consequence of the new media environment is that many journalists no longer have the benefits of legal training or a corporate staff attorney available to help them on a day-to-day basis. Many bloggers work from their homes; even large media entities are saving money by engaging large numbers of freelancers who are relatively unconnected to their publisher; and scads of new and independent journalists have no support team at all.

When the MLRC Institute had an evening “retreat” to rethink its mission and consider what new agenda it could undertake after its grant monies ran out and its leader, who had run its Speakers Bureau, departed, it decided to attack the problem of “Journalists Without Lawyers” by offering a plan to put on legal workshops around the country aimed at just this audience.

Last week, the Institute presented the first of such workshops at the New York Times building in New York. (The Times graciously donated their conference center space, and First Look Media helped subsidize lunch.) By all accounts, it was a smashing success. 150 journalists – from wannabes, independent bloggers and fledgling reporters to experienced freelancers for mainstream publications and even a publisher of a group of small newspapers – attended. While our registration data showed many attendees came from



**George Freeman**

Brooklyn and Queens, I also ran into people from Boston and as far away as Seattle.

It was a hard-working, all day program covering the usual media law subjects. Our faculty were experienced New York media lawyers from MLRC member companies and law firms. Katie Townsend of the Reporters Committee for Freedom of the Press was the lecturer who won the award for coming the farthest, training up from Washington to give helpful



**150 journalists – from wannabes, independent bloggers and fledgling reporters to experienced freelancers – attended.**



advice on FOIA. A session on content – libel and privacy – started promptly at 9:30 and the morning ended with newsgathering after 1:00. Participants were served lunch – a bargain for them since the cost of admission was only \$15 – and in the afternoon Relationship with Sources/Reporters’ Privilege and Copyright and Digital Law were followed by a very practical session on what one should do about obtaining insurance and getting a lawyer. Finally, we put on a Journalists’ Roundtable, with successful reporters and editors from BuzzFeed, Gawker, the Times and Sirius Radio giving career advice and help on pitching stories.

The biggest challenge, I felt, in putting this program together was in getting an audience. Since our target audience generally work from home and were relatively unconnected to identifiable companies, how to find them? My younger colleagues at MLRC and some of the younger participants at our retreat assured me that social media was the answer. So all our promotion was by putting out the word on social media platforms.

When the Times generously offered us their conference center for the event, I was asked how many people I expected, how big a room did we need? I responded that my best guess was 50-70, that 100 would be a huge success, but that I hoped to reach 50. As it turned out, we reached those numbers within 10 days of our first tweet, and ended up well exceeding the fire marshal’s limit for the expanded space of 150. We offered spots for 175 registrants and had a waiting list of another 25.



**Nick Poser and Julia Atcherley talk newsgathering**



**Kate Bolger and Rob Balin talk Reporters' Privilege**



**Nabiha Syed and Jake Goldstein talk copyright**



**Journalist roundtable, left to right: John Cook, Gawker; Bill Carter, Sirius Radio; Danielle Ivory, New York Times; and Anita Badejo, BuzzFeed**

While we haven't yet tabulated the evaluation forms, it was clear from word-of-mouth at the breaks and at the end of the conference that the workshop was both very well received and very much needed. The question I was most interested in was one seeking to find out whether the level of the substantive talks was too fundamental or too complicated; a vast majority of respondents answered "just right."

Our next goal is to take the show on the road to a site near you. We are considering Washington DC, Boston, Los Angeles, Miami, San Francisco and Chicago, among other possible locations. In some cases, to cut costs, we may try to put on a workshop the day before another MLRC conference in that city. The Institute believes – now with confirmation – that these workshops fill a true need and so it is excited about putting on these programs around the country.

\* \* \*

One of the frustrations I had planning programs as head of the First Amendment and Media Litigation Committee of the ABA's Litigation Section was the time lag required from the time one had to submit the proposed program to the actual event. It was in the 6-9 months timeframe – a long enough lag to effectively prevent most programs from being timely. The ABA's Forum on Communication Law was less bureaucratic and officious, and required a lesser time lag, but it still was not easy to put on programs in reaction to recent events.

That is why I am pleased and gratified at how quickly we pivoted in response to the recent Apple-FBI encryption standoff. Our lineup for programs for our [Legal Frontiers in Digital Media](#) conference in Mountain View, CA on May 19-20 was pretty well set when the case became the talk of the digital world. It clearly needed to be the focus of one of our sessions at the conference, so we quickly eliminated one of our less important sessions and substituted the Apple case in its place.

Even though the California case might have been resolved, we'll certainly see other iterations of these issues continue to arise. And we've gathered a great cast to discuss the topic: Ted Boutros of Gibson Dunn (who represented Apple in the California case about the San Bernardino iPhone), our colleague Jim Dempsey from the Berkeley Center for Law & Technology, Daniel Kahn Gillmor (a technologist and policy analyst with the ACLU). We're also negotiating with the DOJ to bring out a speaker from Washington, D.C., whom we hope to announce soon. The panel will be moderated by Sarah Jeong of Vice Motherboard, who has brought her legal savvy to coverage of these evolving issues.

Other panels will be worthwhile and entertaining too: programs on the legal implications of ad blocking and live digital video; the increasing complexity of managing takedown notices worldwide, and the problem of copyright overreach, among others. I hope to see you at the Computer History Museum in Mountain View.

\* \* \*

Finally, two follow-ups to this column and other MLRC activity. Last month's column on [Donald Trump and Hulk Hogan](#) commented on Trump's bloviation to "open up the libel laws," Trump-speak for making them more plaintiff-friendly. I noted that this might be a statement against interest since given all his playground broadsides against real and perceived enemies, at least in the context of this campaign he is far more likely to be a libel defendant than a libel plaintiff.

Sure enough, within weeks of my column, Trump was sued for libel by a Republican political consultant who according to a Trump tweet had "begged" for a job. Trump went on to describe her as a "real dummy" and a "major loser," adding that "she went hostile" when the Trump campaign refused her a position.

The complaint seems like a non-starter. Whether or not she "begged" – a favorite Trump word – for a job hardly is the stuff of libel cases, and the rest of Trump's tweets seem clearly to be protected opinion. And that's not even to mention that if these defenses were to fail, Trump doubtless would be defending on actual malice grounds – the very defense he seems to want to eliminate.

Lastly, it's worth returning to our September Conference in London where yours truly led a brave band of 24 MLRCers to North London to see Tottenham Hotspur host league favorite Manchester City. At the time Tottenham was in the middle of the Premier League. But after a 4-1 thrashing of the favored Man City team, Tottenham kept rolling and catapulted to the top of standings. The season is set to end this month, and it looks likely that Tottenham will surpass all expectation and finish second in the League – trailing only 5,000-1 odds Leicester City. If only we could have the same influence in the American court system.

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



# The Monthly Daily – April

## *Notes on the Month's Media Law News as Seen in MLRC's MediaLawDaily*

By Jeff Hermes

Like many of you, I've been reading the MediaLawDaily since it started publishing, long before I joined the MLRC staff. But while I've come to depend on the Daily as a critical resource to keep me up to speed on the world of media law, there were a few things that I never expected to learn about – such as a dystopian future revealed by a copy of my [hometown newspaper traveling back in time](#) from 2017, or the subset of sexual fetishists known as “[furries](#).” Well, I guess my world is a little broader now. Thanks a bunch, MLD.

Oh, and you folks at the *Globe*? I'm going to be mightily upset if you wind up erasing your own existence this way. [Time travel is not for amateurs](#). But at least there are still newspapers in 2017.

Enough. Let's get started.



### Legal Frontiers in Digital Media

The MLRC's [Legal Frontiers in Digital Media](#) conference will take place on May 19-20 in Mountain View, CA. You know want to attend, [so register](#). It'll take just a second. [I'll wait](#).

### Supreme Court

The dance around the nomination of Judge Merrick Garland to the Supreme Court continued this month [without obvious progress](#); Garland spent a month meeting with Senate Republicans without much to show for it, and a media push by the White House [hasn't shaken Republican resolve](#). Meanwhile, Garland opposition leader Sen. Chuck Grassley took to the media to argue that that the Supreme Court is doing just fine with an empty seat, and [what's so magical about the number nine](#), anyway?

Well, plenty, according to the nine California school teachers whose First Amendment claim foundered last month in *Friedrichs v. California Teachers Association* on a 4-4 split, and who are now asking the Court [to rehear the case once they're back up to full strength](#). Also looking for relief from the Supreme Court is the U.S. Patent & Trademark Office, which [petitioned for review of the Federal Circuit's decision in \*In re Tam\*](#) (the “Slants” case), which held that the federal ban on registration of scandalous and disparaging trademarks violates the First Amendment.

And in an unusual move, the Washington Redskins – the plaintiff in the *other* big “disparaging trademark” case – are [asking the Court to hear their appeal if the Court takes \*Tam\*](#), even though the football team’s case is still pending before the Fourth Circuit. The team’s petition drew attention not only for its procedural posture (the Court can elevate an appeal that is still pending below, though this is not common), but for the [degree of disdain](#) it showed toward Simon Tam’s lawyers. Sigh.

Regardless of whether the Slants are joined by the Redskins, I suspect that the Trademark Office will have more luck getting before the Court than some of the other IP cases that the Justices have bounced recently. Those hoping for a new high court opinion on fair use (or just a smackdown for Google) were disappointed when the Court denied cert on the Second Circuit’s detailed explication of the “transformative purpose” doctrine in [Authors Guild v. Google](#). The Court also [rejected a couple of other IP-related petitions](#), one of which (*Vermont v. MPHJ Technology Investments*) was sort of interesting because it related to whether allegedly unfair and deceptive threats sent by a patent troll create a federal cause of action based on the underlying merit of the patents at issue. (According to the Fed. Circuit: “No.”) And POM Wonderful was left subject to a 2010 FTC ruling that it [engaged in false advertising](#), after the Court denied its petition for review of a D.C. Circuit ruling last year.

On the other hand, the Court did take a case about the limitation of [copyright with respect to useful articles](#) (specifically, cheerleader outfits), the application of [laches with respect to patent claims](#) (specifically, for adult diapers). Meanwhile, the Court heard argument in *Kirtsaeng v. John Wiley & Sons*, about whether Thai professor Supap Kirtsaeng is entitled to [recover attorneys’ fees](#) for successfully invoking the first sale doctrine the last time he was before the Court. The same day, the Court drew the attention of [holders of technology patents](#) for the argument in *Cuozzo Speed Technologies v. Lee*, involving [standards for patent invalidity](#) in *inter partes* proceedings under the America Invents Act. And in the last argument of the Term, the Court heard former Virginia Governor Robert F. McDonnell’s argument that the [First Amendment protects his communications with political supporters](#), immunizing him from corruption charges.



The Supreme Court also proposed [a change to Fed. R. Crim. P. 41](#) that would allow law enforcement to obtain search warrants to access computers remotely regardless of their location. Critics are concerned that the amendment will expand FBI hacking activities.

With all that, it’s easy to forget that [we actually had a First Amendment opinion](#) this month, in *Heffernan v. City of Paterson*. The case involved a police officer whose superiors mistakenly thought that he was supporting their political rival and demoted him. The Supreme Court held that the officer could bring a First Amendment retaliation claim against the city even though he hadn’t been exercising First Amendment rights as the defendants believed. The Court focused on the fact that the First Amendment is phrased in terms of prohibiting efforts to suppress



speech rather than protecting the exercise of speech rights; it also noted that allowing the officer to sue would help to stem any chilling effect that the defendants' actions would have on other would-be speakers. That seems right to me, and very much in line with why we allow overbreadth arguments even when the particular speech at issue in the case might be constitutionally proscribed.

### **Reporters' Privilege**

The LAPD came a-knockin' at the NY headquarters of American Media this month, serving a search warrant for information about an audio recording that might have captured Charlie Sheen threatening a former fiancée. [The company declined to cooperate](#), asserting that the warrant was illegal under state and federal law. There are so many reasons to love the Privacy Protection Act of 1980, but among other things I just get a kick out of looking at a statute with a section number like "2000aa."

New York Times reporter Frances Robles won't be compelled to testify or turn over notes about her [interview with the man accused of murdering Baby Hope](#), with a judge of the New York Supreme Court holding that she was protected by the state's shield law. Over in S.D.N.Y., Bill Cosby was denied permission to conduct a fishing expedition into [New York magazine's unpublished materials](#) regarding interviews with his accusers. And in Clark County, Nevada, a judge held that the state's shield law protected a [documentary filmmaker](#) against compelled disclosure of notes and outtakes.

### **Defamation**

So, what Alabama high school student Tyler Harris did was neither wise nor admirable, taking an article about a school coach charged with having sex with a student and substituting the photo of a different, innocent teacher. Even dumber was arresting the kid and [charging him with criminal libel](#) under a statute held unconstitutional by the state supreme court a decade and a half earlier. [The charges were, of course, dropped](#), but did that stop the madness? Of course not. That's why a bill is now making its way through the state legislature [to revive criminal libel](#) in the state.

As I always say, there's no kill like overkill. Moving on.

### *New Complaints*

It was inevitable we'd see a libel lawsuit against Donald Trump this year. [GOP consultant Cheryl Jacobus sued the candidate](#) over tweets asserting that she was upset after Trump campaign refused to give her a job, and calling her "really dumb" and a "major loser" with "zero credibility." Jacobus claims that it was Trump who tried to recruit her, and that she

declined. (NB: I refuse to use the term coined in the Courtney Love case for this type of online libel claim. Just put your portmanteau back on top of the wardrobe where it belongs.)

We've got a convoluted libel-by-conduct claim in the state courts of Florida, where radio host Russ Rollins is accused of – let's see if I've got this right – [setting up his estranged wife to look vicious](#) by duping her process server into serving divorce papers on him while he was on the air. Okay, seriously, what is it with Florida radio personalities? Is a lawsuit a rite of passage for these guys? And does [Todd Schnitt even have the \\$700K?](#)

In the Northern District of Illinois, a private investigator has asserted defamation claims against a group involved in the [documentary \*Murder in the Park\*](#), which he alleges falsely portrayed him as having conspired to frame an innocent man in order to secure the release of a death row inmate. In Texas state court, a former halftime dancer for the Kansas City Chiefs sued *Texas Monthly* over an article entitled “A Deadly Dance,” which allegedly portrayed the dancer as the femme fatale in a [noir-esque tale of deceit, adultery, jealousy and murder](#).

April also brought us two new cases from Texas state court. The normal one involves a [drug-compounding business suing the Dallas Morning News](#) over a report of federal fraud investigation. The wacky one involves [Whole Foods Market suing a Texas pastor](#) for defamation, claiming that the pastor added a gay slur to a custom cake he purchased in order to fabricate a basis to sue the store for discrimination. This could wind up being a really special one – there's blurry surveillance video and everything. More likely that the whole mess vanishes like the morning dew, however.



### *Pending Cases*

Blake Shelton will be able to proceed with his [defamation and false light case against \*In Touch Weekly\*](#) in C.D. Cal. over allegations of alcoholism, with the court denying the defendants' anti-SLAPP motion. Warren Redlich, a Libertarian Party candidate for NY Governor in 2010, will go to a Manhattan jury with his claims that he was defamed when three people involved with the Republican campaign that year sent [leaflets to 150,000 homes accusing him of being a sexual predator](#). And the defamation case against Bill Cosby in D. Mass. goes on, [despite Cosby's bid for a stay](#) while criminal proceedings move forward against him in Pennsylvania (but to avoid Fifth Amendment issues, Cosby will be relieved from responding to discovery in the Mass. case during the pendency of the criminal action).

In Nevada state court, an online reviewer won her [anti-SLAPP motion against a tax preparation service](#), with the judge calling her allegations of malpractice a non-actionable “evaluative opinion.” In D.N.J., a self-publishing company escaped on a motion to dismiss based on the single publication rule, with a ruling that publication of a [soft-cover edition did not restart the limitations clock](#). And in Massachusetts, a consultant to companies with

# Blake Shelton's Libel Suit vs. In Touch Survives Anti-SLAPP Motion to Dismiss

## *Sufficient Evidence of Falsity and Fault to Proceed*

In April, a California federal court allowed Blake Shelton's libel suit against *In Touch Weekly* to proceed, denying the magazine's anti-SLAPP motion to strike. [\*Shelton v. Bauer Publ'g Co.\*](#), No. 2:15-cv-09057 (C.D. Cal. Apr. 18, 2016). The court held the magazine cover could reasonably be interpreted as creating the false and defamatory implication that Shelton was in rehab. The court notably rejected the magazine's argument that there is nothing inherently defamatory about seeking treatment for drinking. And Shelton also provided sufficient evidence of actual malice to defeat a motion to strike.

### Background

In September 2015, *In Touch Weekly* published a cover story on Blake Shelton, the famed country singer and judge on the television program *The Voice*. The headline read "REHAB For Blake" with several subheads, including one reading "He Finally Hits Rock Bottom." Shelton sued the magazine's publisher, Bauer, in state court for libel and false light invasion of privacy, alleging that he had not, and did not plan to, enter rehab. The magazine removed the case to federal court and filed an anti-SLAPP motion to strike.

### Anti-SLAPP Analysis

The court first determined that California's anti-SLAPP law applied since the case arose from the magazine's exercise of its free speech rights in connection with a public issue. The court relied on Shelton's own admission that he is a "country music superstar" with a public reputation as a drinker. Among other things, the court noted, Shelton had



once jokingly posted on social media that he “was so drunk he just defrosted his cat . . . In the microwave.”

Though Shelton objected to numerous other statements in the body of the article (including partying with strippers), the court’s decision rested on its finding that the cover alone could support a claim for defamation and false light by suggesting Shelton had entered rehab — even if this suggestion was corrected in the body of the article. The court also rejected the magazine’s argument that Shelton had such a public reputation for drinking that he was “libel proof” on that issue. The court noted that, even if Shelton could not be libeled as an excessive drinker, the claim that he entered rehab was a different and specific assertion of fact. The court also dismissed defendants’ argument that the rehab allegation was a “minor factual error” on the same grounds.

Notably, the court rejected the magazine’s argument that there is nothing inherently defamatory about seeking treatment for drinking. Defendants argued that it would be entirely commendable for Shelton to have sought treatment. The magazine analogized the situation to case law over allegations of acting as a police informant – an allegation that courts have repeatedly found not defamatory in the eyes of a “right-thinking person.” However, the court here stressed that several courts have found accusations of alcoholism to be libelous per se. And it noted the absence of any case law holding that “defamation claims premised upon false reports of treatment in rehabilitation must fail, as a matter of law.”

The defendants also argued that the headline did not imply that Shelton *had* entered rehab but merely that his friends had *suggested* that he do so. However, the court found the magazine cover could reasonably be read to imply the former, and thus it presented a factual question for trial.

As to fault, the court held Shelton established a reasonable probability that he could produce clear and convincing evidence of actual malice (based on testimony of an editor and reporter that they did not intend to imply that Shelton was in rehab). Thus, according to the court, a jury could find they subjectively knew the implication was false. As the court explained, “while a reasonable jury may ultimately agree with defendants’ reading of the headlines and may further find their statements of intent to be credible, it is not the province of the Court to make any such determination here.”

*Defendants are represented by Elizabeth McNamara, Alonzo Wickers IV, and Jack Browning of Davis Wright Tremaine. Blake Shelton is represented by Stanton L. Stein and Ashley Yeargan of Liner LLP in Los Angeles.*

**The magazine cover could reasonably be interpreted as creating the false and defamatory implication that Shelton was in rehab.**



# Court Tosses Case Against ESPN Brought By Syracuse Coach's Wife

*Plaintiff a Public Figure; ESPN "Conducted a  
Painstakingly Thorough Investigation"*

By Tom Curley

A federal court recently granted summary judgment to ESPN in a highly publicized lawsuit arising out of allegations of sex abuse leveled against an assistant coach for the celebrated Syracuse University men's basketball team. [\*Laurie J. Fine v. ESPN, Inc. et al.\*](#) 5:12-CV-0836 (N.D.N.Y. March 25, 2016) (Peebles, M.J.). (The parties consented to have the case proceed before Magistrate Judge David E. Peebles.)

## Background

The defamation suit was brought by the coach's wife, Laurie J. Fine, who alleged that ESPN's news reports suggested she was aware of the alleged sexual abuse by her husband but did not intervene to stop it. More than a decade ago, ESPN's newsmagazine *Outside the Lines* began investigating a claim by Robert Davis, who said that he had been sexually abused while a teenager by a Syracuse basketball coach. Reporter Mark Schwarz and producer Arthur Berko

interviewed Davis extensively in 2003, as well interviewing experts on child sexual abuse and other individuals who knew Davis and the Fines during the relevant time period.

Now an adult, Davis alleged that long-time Syracuse assistant basketball coach Bernie Fine had sexually abused him over a multi-year period while ostensibly serving as Davis' mentor while growing up. At times Davis lived with the Fines while a teenager and served as a ball boy for the Syracuse men's basketball team. Davis claimed that coach Fine showered him with attention and special privileges, like trips to basketball tournaments, expensive dinners, time with famous basketball players, and free admission to Fine's basketball camp.

Davis also told ESPN that the coach's wife, Laurie Fine, had confided in Davis that she knew he was being abused by her husband. Davis also claimed he later had a sexual relationship with Mrs. Fine after he turned eighteen.

In support his allegations, Davis gave ESPN a tape of a phone conversation with Laurie Fine that Davis had recorded without her knowledge in October 2002. The tape recording would become a critical piece of evidence in Mrs. Fine's subsequent defamation suit against ESPN.

**The defamation suit was brought by the coach's wife, Laurie J. Fine, who alleged that ESPN's news reports suggested she was aware of the alleged sexual abuse by her husband but did not intervene to stop it.**

As a result of its reporting, ESPN came to the conclusion in 2003 that Davis' allegations were credible. And ESPN further concluded that the tape recording demonstrated that Laurie Fine likely knew that her husband had molested Davis and perhaps other males when they were minors, and that she had later engaged in a sexual relationship with Davis.

However, ESPN's investigation was unable to identify another person, aside from Davis, claiming personal, first-hand knowledge of abuse by coach Fine. As a result, no story was broadcast in 2003.

However, some eight years later in November 2011, the news broke that former Penn State assistant football coach Jerry Sandusky had been indicted for sexual abuse. Shortly after that news became public another individual called ESPN reporter Schwarz alleging that he too had been abused by Bernie Fine as a teenager.

The individual, Michael Lang, was Davis' stepbrother and Lang too had spent time with Mr. Fine growing up and had introduced his younger sibling Davis to the popular Syracuse basketball coach.

ESPN had spoken with Lang in 2003 but he was reluctant to be interviewed. Lang denied he was a victim at that time, although he told ESPN that he believed Davis' allegations to be true. In 2011, Lang told ESPN in an emotional interview that he too had been sexual abused by Bernie Fine while a teenager.

As Schwarz and Berko began to re-report the story in light of Lang's allegations in 2011, they learned that Syracuse police had come into possession of the taped phone recording and were pursuing an investigation of their own. ESPN then reported the allegations against Mr. Fine on November 17, 2011 and news of the police investigation. Coach Fine was put on leave and later fired from his position with the basketball team.

Mr. Fine briefly brought suit against ESPN alleging defamation but voluntarily withdrew his complaint. In his complaint and in a statement issued by his attorneys after ESPN's news reports, Mr. Fine denied the abuse allegations. He did not testify in his wife's suit against ESPN.

With respect to Mrs. Fine, she was not the subject of the initial reports concerning the allegations against her husband by Davis and Lang. Instead, ten days later and in the midst of intense media coverage and an ongoing police investigation, ESPN broadcast reports addressing the significance of the taped phone call between Mrs. Fine and Davis made in 2002. ESPN unsuccessfully attempted to obtain comment from the Fines prior to the reports.

In May 2012, Mrs. Fine held a televised news conference to announce that she would file suit against ESPN. At that news conference and in her subsequent complaint, she alleged the tape of the phone call was "doctored" or otherwise manipulated to distort its meaning.

Specifically, the complaint claimed as false and defamatory (1) any suggestion that Ms. Fine knew of or had concerns about her husband molesting Davis and (2) Davis' allegation that Mrs. Fine had sexual relationship with him when Davis was no longer a minor.

Following discovery, ESPN moved for summary judgment on multiple grounds, including that the two allegedly defamatory statements were true. According to the court, "[t]here is an

abundance of evidence in the record strongly suggesting that plaintiff engaged in sexual contact with Davis, as reported by defendants.” *Fine v. ESPN* at 33. Similarly, the Court observed that “[t]he telephone recording between Davis and plaintiff ... is replete with suggestions that plaintiff was aware of the abuse and did nothing to stop it.” *Id.*

On summary judgment, Mrs. Fine withdrew her contention that the tape recording had been doctored or manipulated. She instead argued that she was simply being sarcastic or inattentive to what Davis was saying during the conversation, or that she was making remarks that were misinterpreted as being of a sexual nature when that was not what she intended. Regardless, the Court acknowledged Mrs. Fine’s continuing denial of the truth of the two challenged statements and declined to grant summary judgment on this basis. *Id.* at 33-35.

The ESPN defendants next argued that Mrs. Fine was a limited purpose public figure and there was no evidence of actual malice, let alone clear and convincing proof. In the alternative, ESPN argued that, even if Mrs. Fine was a private figure, its reporting was not “grossly irresponsible” within the meaning of *Chapeadeu v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196 (1975) and its progeny.

Finally, ESPN also moved on the basis that the news reports were protected by New York’s statutory “fair report” privilege, as the allegations recounted in the reports were consistent with the allegations of the police investigation. *See* New York Civil Rights Law § 74. Here, law enforcement authorities conducted their own wide-ranging investigation, and concluded that Mr. Fine’s accusers, Davis and Lang, were credible, *see* Op. at 8 n.7, although no charges were brought arising out of the investigation.

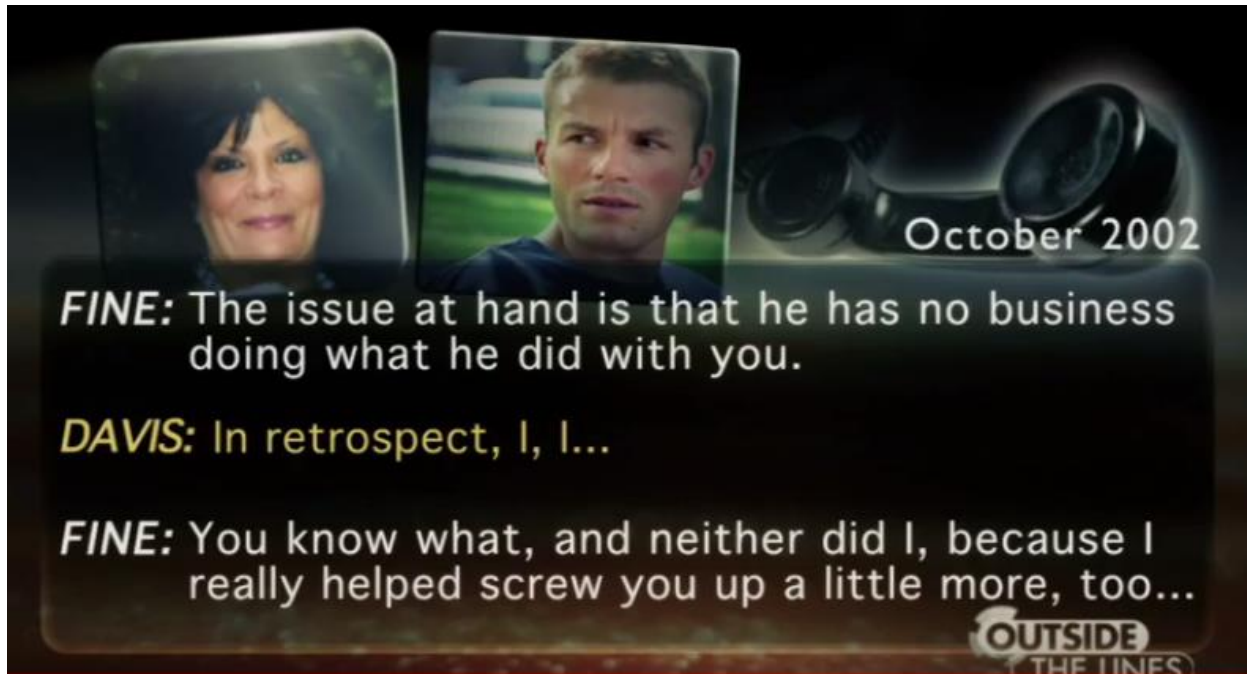
For his part, the local district attorney viewed the taped conversation as “‘devastating’ evidence against Bernie Fine, and, were it not for the statute of limitations, [Mrs. Fine] herself might face charges of endangering the welfare of a child based on her admissions made during the tape recorded conversation.” *Id.* at 9 n.7.

However, the Court declined to take up the fair report privilege argument, and confronted instead in a lengthy and detailed analysis whether Mrs. Fine was a limited purpose public figure such that she must come forward at summary judgment with evidence of actual malice of convincing clarity. *See id.* at 17-31 (applying limited purpose public figure test as set forth in *Lerman v. Flynt Distributing Co.*, 745 F.2d 123, 136-137 (2d Cir. 1984)).

With respect to her public figure status, Mrs. Fine attempted to portray herself as the relatively unknown wife of an assistant basketball coach. However, she had sought and received substantial public attention in Syracuse as a local television and radio commentator on the subjects of the men’s basketball team and the cause of child welfare, holding herself out as a philanthropist for at-risk youth. Op. at 18-20.

As the Court emphasized: “In 2011, the issue of at-risk youth, and specifically those prone to sexual abuse by adults in leadership positions, was clearly a topic of widespread concern,

**Mrs. Fine’s own Complaint contained references to her notoriety in connection with the popular Syracuse basketball program.**



**ESPN's Outside The Lines investigated sex abuse allegations against former Syracuse assistant basketball coach Bernie Fine.**

particularly in view of the increasing number of reports of sex abuse scandals by members of the clergy and athletic coaches.” *Id.* at 22.

Mrs. Fine’s own Complaint contained references to her notoriety in connection with the popular Syracuse basketball program and with respect to charitable causes for youth programs. Under the circumstances the Court held Mrs. Fine to be a limited purpose public figure. *See id.* at 20 (“[P]laintiff has taken advantage of her public notoriety to portray herself as philanthropist that charitable organizations competed to employ.”).

The Court then turned to the issue of actual malice. Surveying the evidentiary record the Court emphatically concluded that “*there is not one shred of evidence within the comprehensive record now before the court to suggest that defendants knew, at the time of publication, that their reports were false ...* Indeed, defendants have staunchly defended the truth of the publications from the time of publication to the date of filing of the motions now pending before the court.” *Id.* at 38 (emphasis added).

For example, the Court noted that the taped phone recording supported Davis’ allegations, citing this exchange:

Laurie Fine: “[Bernie] always – thought that, that ‘You, you used to make everybody so uncomfortable here [at the Fine’s home].’ I said: ‘You know why? Because I knew what was going on, and it was uncomfortable for everybody involved.’”

Bobby Davis: “Yeah.”



Laurie Fine: “And the kids that came over were young kids, and you know, when you’re young you really don’t speak your mind. You just think that maybe it’s right, what’s going on. I don’t know the way kids think.”

*Id.* at 33. The Court also pointed to this exchange:

Laurie Fine: “No, I think – see, the money isn’t the issue here. He lured you with the money. See, he knew full well what he was doing.”

Bobby Davis: “Yeah, I know that.”

Laurie Fine: “It had – it really had nothing to do with why you took what or what you did, who or – see, that’s not even the issue. The issue at hand is that he had no business doing what he did with you.”

Bobby Davis: “In retrospect –”

Laurie Fine: “And you know what? Neither did I because I really helped screw you up a little more, too.”

*Id.* at 34-35.

Summarizing this and other evidence available to defendants at the time of publication, *see id.* at 40-41, the Court concluded that “defendants Schwarz and Berko conducted a painstakingly thorough investigation.” *Id.* at 39. “The record here contains no evidence from which a reasonable factfinder could conclude that the defendants had serious reservations or doubts concerning the accuracy of their reporting, or reasonably should have.” *Id.*

Mrs. Fine’s defamation case and her husband’s short-lived suit were not the only lawsuits which arose out of Davis’ allegations as reported by ESPN. Following ESPN’s reports, Syracuse head basketball coach Jim Boeheim publicly questioned the credibility and motivations of Davis and Lang, and they responded with a defamation claim against Boeheim and the school.

That case was settled in August 2015, and Syracuse University issued a statement that “Coach Boeheim regrets that he made those statements and that he questioned the integrity of Bobby Davis and Michael Lang.” *See New York Court of Appeals Reinstates Libel Claim Against Coach Jim Boeheim*, November 2014 MediaLawLetter.

*ESPN, Mark Schwarz and Arthur Berko were represented by Nathan Siegel, Tom Curley, Rachel Strom, Paul Safier, and Lizzie Seidlin-Bernstein of Levine Sullivan Koch & Schulz, LLP.*

*Lawrence H. Fisher and Kevin W. Tucker of Pittsburgh represented plaintiff Laurie J. Fine.*

# School Board Member a “Public Official” For Allegedly False Statements that “Insinuate” Criminal Conduct

By Meredith Jeanes and George Padis

The Texas Supreme Court held that a member of a school district board of trustees suing for defamation was a public official who must prove actual malice to survive an anti-SLAPP motion to dismiss—even if the false statement did not mention or directly relate to actions he took as a school board member—if the false statement implies or insinuates criminal wrongdoing. [\*Greer v. Abraham\*](#), No. 14-0669, 2016 WL 1514425 (Tex. Apr. 15, 2016). The Court reasoned that a charge of criminal conduct, “no matter how remote in time or place, can never be irrelevant to an official’s . . . fitness for office.”

The longest serving member of a school district’s board of trustees, Salem Abraham, sued AgendaWise, a politics blog, and its executive director, Daniel Greer, for libel. The trial court granted Defendants’ anti-SLAPP motion to dismiss. The Amarillo Court of Appeals reversed, holding that actual malice was not an element of his defamation claim because the blog post—discussing Abraham’s removal from a state-representative candidate’s campaign event about 200 miles from Abraham’s school district—did not mention or relate to his official conduct or his fitness for office on the school board.

The Texas Supreme Court reversed and remanded, holding that Abraham’s pleadings and other evidence established that he was a public official and alleged that the blog posts “insinuate that Abraham’s conduct at [the] campaign event was criminal.” The Court did not rule on other issues—including whether Greer is a journalist for purposes of the journalist’s privilege or whether assertion of the journalist’s privilege under Texas’s expedited anti-SLAPP procedure (the Texas Citizens Participation Act or TCPA) violates constitutional Due Process—leaving these issues open for the court of appeals on remand.

**The Court reasoned that a charge of criminal conduct, “no matter how remote in time or place, can never be irrelevant to an official’s . . . fitness for office.”**

## Background

Abraham’s fellow school board member, King, was running for state representative. Landtroop, King’s opponent, claimed that King had acted fiscally irresponsibly when he served on the school board. Believing these statements to be false, Abraham traveled about 200 miles to Landtroop’s campaign event, which then Governor Rick Perry also attended. Abraham

asked Landtroop a question, and then a campaign worker asked Abraham to leave, at which point Abraham handed out printed materials.

After the event, AgendaWise posted an article stating that Abraham was a campaign treasurer and contributor to King and that “Abraham had to be forcefully removed from a . . . campaign event this week by Governor Perry’s DPS detail.” After Abraham complained, AgendaWise posted a correction that “Abraham was asked to leave a . . . campaign event for heckling. Mr. Abraham cooperated.” Abraham complained again, objecting to the word “heckling.” AgendaWise acknowledged and corrected the error and apologized. Abraham then sued for libel.

The trial court dismissed Abraham’s case under the TCPA, concluding that Abraham was a public official who had not established actual malice by clear and specific evidence. Abraham had sought limited discovery to gather evidence as to Greer’s state of mind, which the trial court granted; however, Greer refused to reveal his sources, relying on the journalist’s privilege. The trial court ruled on the TCPA motion to dismiss before ruling on Abraham’s motion to compel Greer to disclose his sources.

The Amarillo Court of Appeals reversed and remanded, holding that actual malice was not an essential element of Abraham’s defamation claim because the blog post was unrelated to Abraham’s conduct or duties on the school board. The court did not reach Abraham’s arguments that an internet blogger is not entitled to the journalist’s privilege or that the application of the journalist’s privilege to prevent actual-malice discovery under the TCPA violates Due Process.

**Abraham’s pleadings and other evidence established that he was a public official.**

### Analysis

In an opinion by Justice Devine, the Court rejected Abraham’s argument that he was acting as a private citizen by speaking out at a legislative candidate’s campaign event. The Court reasoned that Abraham’s pleadings asserted that the false statements implied that he was guilty of criminal trespassing, necessitating his forceful removal by the governor’s DPS detail. The Court relied on the U.S. Supreme Court’s 1971 holding in *Monitor Patriot Co. v. Roy* that “a charge of criminal conduct,” (in that case a newspaper’s statement that a U.S. Senate candidate was a “former small-time bootlegger”) “no matter how remote in time or place, can never be irrelevant to an official’s or a candidate’s fitness for office” for the purposes of *New York Times v. Sullivan*’s actual-malice test.

The Court also rejected Abraham’s argument that a connection between the blog post and his official capacity could not be implied because it was published on the internet, an international forum, whereas his position on the school board was local. The Court reasoned “an express reference in a newspaper article to the individual’s official capacity is unnecessary”

for those public officials “so well known in their communities that the general public automatically associates them with their official positions.” The Court distinguished its earlier decision in *Foster v. Laredo Newspapers, Inc.*, explaining that “the relative obscurity of Foster’s office” as county surveyor was different from Abraham’s official position as school board trustee: “Unlike the county surveyor,” school board trustees “are the public’s link to public education,” the Court reasoned. The Court concluded that “the visibility of his office and his presence in the community are quite different from that in *Foster*.” The Court remanded to the court of appeals for consideration of the remaining issues.

*Meredith Jeanes and George Padis are associates in the Dallas office of Vinson & Elkins, L.L.P. Petitioners Daniel Greer and Fix the Facts Foundation d/b/a AgendaWise were represented by Joseph M. Nixon, Brendan J. Montminy, and James E. “Trey” Trainor, III of Beirne, Maynard & Parsons, L.L.P. Respondent Salem Abraham was represented by John H. Lovell and Courtney Miller at Lovell, Lovell, Newson & Isern, L.L.P.*



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# Texas Supreme Court Gives Guidance on Anti-SLAPP Fee Award

By Meredith Jeanes and George Padis

The Texas Supreme Court reversed the Amarillo Court of Appeals' decision about the attorney's fees awarded in connection with a successful motion to dismiss under the Texas Citizens Participation Act ("TCPA"), holding that it was inappropriate to consider "justice and equity" to reduce the amount of the fees awarded. [\*Sullivan v. Abraham\*](#), No. 14-0987, 2016 WL 1513674 (Tex. Apr. 15, 2016).

## Background

Plaintiff Salem Abraham sued Michael Quinn Sullivan for defamation, and Sullivan moved to dismiss the suit under the TCPA. According to the statute, "If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party: (1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and (2) sanctions..." § 27.009(a). The trial court granted Sullivan's motion to dismiss, but awarded him only \$6,500 in attorney's fees and \$1,500 in expenses. Sullivan appealed, challenging the adequacy of the award, as he had requested \$67,290 in attorney's fees and \$4,3801.01 in costs and expenses, as well as sanctions. On appeal, the Amarillo Court of Appeals affirmed, holding that the TCPA required an award of "reasonable attorney's fees" but that the trial court also retained discretion to reduce the amount awarded if "justice and equity" so dictated. Sullivan appealed, arguing that the award of attorney's fees should be measured solely by reasonableness, not by "justice and equity."

**TCPA requires an award of "reasonable attorney's fees" to the successful movant.**

At the Texas Supreme Court, Sullivan argued that the court of appeals' fee analysis was incorrect because the considerations of "justice and equity" only apply to the award of "other expenses," and not to "reasonable attorney's fees." In response, Abraham contended the better reading of the statute suggests that "justice and equity" modifies the entire series: court costs, reasonable attorney's fees, and other expenses.

After considering the linguistic arguments offered by each side, the Court concluded that the statute's language and punctuation suggest that the TCPA only requires courts to consider reasonableness when determining attorney's fee amounts, not justice and equity. With respect to punctuation, the Court noted that the absence of a comma after "other expenses incurred in defending against the legal action" indicated that "justice and equity" was not meant to apply to the entire series. Additionally, the Court noted that the use of the Oxford (or serial) comma between "reasonable attorney's fees" and "and," coupled with the inclusion of the word

“other,” suggests that the Legislature only intended justice and equity to modify “other expenses.”

### Judgment

In an opinion by Justice Devine, the Court reversed the court of appeals’ judgment and held that the TCPA requires an award of “reasonable attorney’s fees” to the successful movant. The Court added that the determination of reasonableness rests within the trial court’s discretion, but that discretion should not include considerations of “justice and equity.” Although Sullivan asked the Texas Supreme Court to determine the reasonable amount of fees he could recover based on his affidavit, the Court remanded the case so that the trial court could consider the parties’ competing affidavits regarding the reasonableness of the fees under the lodestar approach.

*Meredith Jeanes and George Padis are associates in the Dallas office of Vinson & Elkins, L.L.P.*

*Petitioner Michael Quinn Sullivan was represented by Joseph M. Nixon, N. Terry Adams, Jr., Kelly Leonard, and James E. “Trey” Trainor, III of Beirne, Maynard & Parsons L.L.P. Respondent Salem Abraham was represented by John H. Lovell and Courtney Miller at Lovell, Lovell, Newson & Isern, L.L.P.*



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# Appellate Court Affirms Final Judgment Dismissing Case Against Media Defendant Under Texas's Anti-SLAPP Statute

By Laura Lee Prather and Catherine Lewis Robb

The First District Court of Appeals in Texas on March 31 affirmed a lower-court judgment that dismissed with prejudice a defamation lawsuit against a Houston ABC affiliate. In affirming the dismissal of the case under the Texas Citizens Participation Act ("TCPA"), Texas's Anti-SLAPP statute, the appellate court also affirmed an order awarding attorney's fees and costs to the media defendant, KTRK Television, Inc. [\*Theaola Robinson v. KTRK Television, Inc.\*, et. al.](#), Case No. 01-14-00880-CV, in the First District Court of Appeals for the State of Texas (March 31, 2016).

## Background

Theaola Robinson, founder of a charter school named Benji's Special Education Academy, filed suit in 2011, claiming that a series of KTRK broadcast news report and accompanying online articles about a state agency's closure of her charter school for mismanagement and accounting irregularities were defamatory. Robinson also contended that public comments posted on KTRK's website established the defamatory nature of the broadcasts.

**The court started by noting that it had already ruled that the TCPA does permit an interlocutory appeal.**

In 2012, a Houston trial court denied KTRK's anti-SLAPP motion to dismiss the case. The First District Court of Appeals reversed the following year, ordering the trial court to dismiss the case and award fees after concluding that the station had not accused Robinson of a crime; that the broadcasts were true; and that the public comments could not support Robinson's libel per se claim.

In 2014, the trial court dismissed all of the plaintiff's claims and awarded more than \$250,000 in attorneys' fees, with additional prospective fee awards for further appeals.

Ms. Robinson appealed, alleging that: (1) the First District appellate court erred in concluding that it had jurisdiction to hear KTRK's interlocutory appeal from the trial court's denial of the anti-SLAPP motion to dismiss; (2) the appellate court, in considering KTRK's interlocutory appeal, failed to safeguard Ms. Robinson's constitutional rights to substantive due process under the United States and Texas Constitutions; (3) the trial court's award of fees to KTRK was punitive and in violation of the open courts provision of the Texas Constitution; (4) the *Noerr-Pennington* doctrine precludes an award of attorney's fees against her under the TCPA; and (5) the TCPA does not apply to the case.

### Court of Appeals Decision

The court started by noting that it had already ruled that the TCPA does permit an interlocutory appeal from the trial court's denial of an anti-SLAPP motion to dismiss.

The court found no evidence that Ms. Robinson had claimed at trial that KTRK's interlocutory appeal violated her constitutional rights to due process, nor had she argued at trial that the attorney's fee award violated the *Noerr-Pennington* doctrine. As such, the appellate court ruled, Ms. Robinson waived those claims on appeal.

The appellate court likewise ruled that Ms. Robinson had not properly preserved her claim that the attorneys' fee award was punitive and in violation of the open courts provision of the Texas Constitution. Even absent waiver, however, the court concluded that these constitutional claims were "still unavailing because the TCPA has been held constitutional and not a violation of the open courts doctrine."

Finally, the court rejected Ms. Robinson's contention that the TCPA does not apply to the case.

*Laura Lee Prather, Catherine Lewis Robb, Thomas J. Williams and Alicia Calzada of Haynes & Boone, LLP, Austin and Fort Worth, Texas, represented KTRK Television, Inc. Theaola Robinson appeared pro se.*

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# D.C. Court Finds First Amendment Protects True and Non-Provably False Statements, Barring Tort Liability

By Rachel Mueller

The District of Columbia Court of Appeals recently reversed a sizable jury award for intentional interference with a prospective contractual relationship in a non-media case, finding that the First Amendment shielded the defendant from liability for her true or non-provably false statements. [\*Thompson v. Armstrong\*](#), No. 14-CV-792 (D.C. Ct. App. April 7, 2016) (*Armstrong II*).

The Court of Appeals, D.C.'s equivalent of a state supreme court, also held that the plaintiff was a public official, the statement in question related to his official conduct, and the statements involved issues of public concern, finding that the First Amendment fully protected the statements and barred liability.

## Background

The plaintiff, a former special agent with the U.S. Treasury Inspector General for Tax Administration (TIGTA), sued his colleague after she authored six letters warning his prospective employer, the U.S. Department of Agriculture (USDA), of an internal investigation of the plaintiff. In an earlier appeal in the same case, the Court of Appeals recited that he was under investigation by TIGTA for “serious integrity violations” including accessing sensitive records databases to “see how other similarly situated agents were being treated.”

*Armstrong v. Thompson*, 12-CV-1197 (D.C. Ct. App. Nov. 21, 2013) (*Armstrong I*).

TIGTA suspended his supervisory authority, removed his government computer, and stripped him of his badge, credentials, and government vehicle as a result of the investigation. The former agent quit his job at TIGTA and accepted a new job for a similar law enforcement role with the USDA.

Upon discovering that the USDA had extended a job offer to the agent, his former colleague wrote six letters to the USDA, informing it of the investigation and voicing concerns about the agent's ethics. The USDA rescinded its offer of employment. In response, the agent brought five tort claims against the author of the letters: defamation, invasion of privacy (false light), invasion of privacy (publication of private facts), intentional infliction of emotional distress, and intentional interference with contractual relationship.

**The First Amendment barred liability for any state torts because her statements were true or non-provably false.**

The trial court granted summary judgment in favor of the defendant after discovery concluded. The agent appealed, and the Court of Appeals initially affirmed all on counts, except it reversed and remanded the intentional interference with a contractual relationship judgment. On remand, a jury found for the agent on the intentional interference with a contractual relationship claim, awarding significant damages for the loss of his prospective job with the USDA. The defendant appealed again, arguing that her statements were truthful or non-provably false and therefore were protected speech under the First Amendment.

### Court of Appeals Decision

In the second appeal, the Court of Appeals agreed with the defendant, finding that the First Amendment barred liability for any state torts because her statements were true or non-provably false. First, the court held that while First Amendment protections are “most prominently” applied in defamation suits, the same protections bar liability in other state tort suits including intentional interference with a contractual relationship.

As with defamation suits, the court explained, the First Amendment bars liability for other torts – including intentional infliction of emotional distress, false light invasion, and intentional interference with a contractual relationship – only if the published statements are true or non-provably false. Moreover, the court noted, if the published statements concern a public official, that official must prove the statements were made with actual malice.

The court then considered whether the agent was a public official, whether the statements related to his or her official conduct, and finally whether the statements involved an issue of public concern. First, the court found that the agent was a public official at the time the letter was written. His supervisory authority, role in law enforcement, access to sensitive information, and position of “heightened public trust and responsibility” factored into finding he was a public official.

Next, the court found that statements in question related to the agent’s official conduct because they touched on his fitness for office. The letters revealed the agent’s potential

KAREN THOMPSON, Appellant,  
v.  
WILLIAM H. ARMSTRONG, Appellee.

No. 14-CV-792.

District of Columbia Court of Appeals.

Argued February 29, 2016.  
Decided April 7, 2016.

Joshua J. Fougere, with whom Joseph R. Guerra, Noah T. Katzen, and Arthur B. Spitzer were on the brief, for appellant.

Kevin Byrnes for appellee.

Before BLACKBURN-RIGSBY and BECKWITH, Associate Judges, and FARRELL, Senior Judge.

*This opinion is subject to formal revision before publication in the Atlantic and Maryland Reporters. Users are requested to notify the Clerk of the Court of any formal errors so that corrections may be made before the bound volumes go to press.*

#### JUDGMENT

This case came to be heard on the transcript of record and the briefs filed, and was argued by counsel. On consideration whereof, and as set forth in the opinion filed this date, it is now hereby:

ORDERED and ADJUDGED that the judgment for the appellee is reversed, and the matter is remanded with instructions for the trial court to enter judgment in favor of the appellant.

FARRELL, Senior Judge.

A jury awarded William H. Armstrong sizable damages in his suit alleging intentional interference with a prospective contractual relationship by Karen Thompson. Before us is Ms. Thompson’s appeal contending, mainly, that she was erroneously denied judgment as a matter of law because the suit, premised on true or non-provably false statements she had made to a government agency about Mr. Armstrong’s fitness for a law enforcement position, was precluded by the First Amendment. In light of what we conclude was Mr. Armstrong’s status as a public official at the time, we agree with Ms. Thompson and reverse the judgment in Mr. Armstrong’s favor.<sup>[1]</sup>

“dishonesty, malfeasance, or improper motivation” – traits which “undeniably related to [his] fitness to hold another law enforcement position.”

Finally, the court found that the statements in the letter were “quintessential” matters of public concern because the ethics of a supervisory law enforcement officer relate to his or her fitness for that office. Though the author may have been a disgruntled employee, writing the letters for personal gain, the First Amendment provides “breathing space” to speech about public official’s fitness, regardless of whether that speech is motivated by ill-will. The interest in disclosure of substantially true information to federal agencies making hiring decisions outweighed any concerns about personal motive.

For the court to affirm the intentional interference with a contractual relationship judgment, the agent had to show actual malice. The court found that he could not do so because the statements in the letters were all either substantially true or unverifiable expressions of opinion. Substantial truth and unverifiable opinion both preempt actual malice. Therefore, none of the author’s statements provided a basis for liability. The court reversed the judgement for the agent and remanded to trial court to enter judgment for the author.

*Rachel Mueller is an associate with Holland & Knight LLP in Washington, D.C. Plaintiff/appellee was represented by Kevin Byrnes. Defendant/appellant was represented by Joshua J.*

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# Wall Street Journal Reporter Can Depose Casino Auditor to Defend Hong Kong Libel Action

In April the Third Circuit rejected an appeal by casino developer Sheldon Adelson seeking to quash a deposition subpoena to a former employee whose testimony is sought by a reporter. Adelson is suing for defamation in Hong Kong. [In re Application of Kate O’Keeffe for Assistance Before a Foreign Tribunal](#), No. 15-3129 (3d Cir. Apr. 12, 2016) (unpublished). The Court held the requested discovery touched directly on the statement at issue in the Hong Kong defamation case.

## Background

In December 2012, the Wall Street Journal published an [article](#) by Hong Kong-based reporter Kate O’Keeffe concerning an employment dispute within the Las Vegas Sands Corp., whose chair and CEO is casino magnate Sheldon Adelson. In the article, Adelson was described as “a scrappy, foul-mouthed billionaire from working-class Dorchester, Mass.”

Objecting to the term “foul-mouthed,” Adelson filed suit against O’Keeffe for libel in a Hong Kong court. In order to support the defense of truth, O’Keeffe asked the New Jersey federal district court to subpoena a partner at PricewaterhouseCoopers, the Sands’ former auditor. PwC had reportedly terminated its relationship with Sands based on “personal tension” with Adelson, and O’Keeffe sought from PwC evidence of Adelson using foul or offensive language.

The magistrate judge denied Adelson’s motion to quash the subpoena, and the district court affirmed. Adelson appealed to the Third Circuit, which affirmed the district court.

## Propriety of Using § 1782

The subpoena itself was sought under 28 U.S.C. § 1782, which allows federal courts to provide assistance in obtaining evidence for use in foreign tribunals. Both parties agreed that the statute could apply, but Adelson argued that, under established precedent, the district court should have exercised its discretion to deny the request. Three factors identified by the Supreme Court as relevant to this determination were contested: (1) the receptivity of the foreign tribunal to U.S. judicial assistance, (2) whether the subpoena was an attempt to circumvent foreign evidence-gathering restrictions, and (3) whether the request was unduly intrusive or burdensome.

On the first factor, the court rejected Adelson’s argument, noting that Adelson had failed to present clear proof that the evidence would not be admissible. Moreover, the court found that



## Fired Executive Rankles Casino Business

Former Sands China Chief's Wrongful Termination Suit Puts Spotlight on U.S. Operators in Chi



Las Vegas Sands Chairman Sheldon Adelson, left, pictured in 2010 with Steve Jacobs, whose suit is roiling the lucrative Macau casino business. AGENCE FRANCE-PRESSE/GETTY IMAGES

**Wall Street Journal article - [click to read.](#)**

Hong Kong, as a signatory to the Hague Evidence Convention, would likely be receptive to the assistance of the federal courts.

On the second factor, Adelson noted that O’Keeffe had not sought a letter rogatory in the Hong Kong court. However, the Third Circuit found this fact to be irrelevant, observing that §1782 allows a federal court to comply with either a letter rogatory from a foreign tribunal or a request from any interested person.

Finally, on the issue of whether the request was overly burdensome or intrusive, the court noted that the only burden fell on the subpoenaed partner from PwC, and he himself had not challenged the subpoena.

### Fishing Expedition?

Adelson also objected that the subpoena was a fishing expedition, and he pointed to the decision of a federal magistrate judge in Florida quashing another subpoena from O’Keeffe regarding one of Adelson’s other professional relationships. However, the Third Circuit distinguished the two subpoenas, noting that the Florida subpoena related to a short-lived business relationship from around 1990, whereas PwC and Sands had worked together for about twenty-five years, up until 2013. Moreover, O’Keeffe had presented a basis for her belief that PwC might have evidence of foul-mouthed language: the news reporting about PwC’s break with Adelson.

Adelson argued that the subpoena should be quashed because it sought irrelevant and potentially inflammatory information. However, the court found that the requested information would bear on the issue of whether Adelson was “foul-mouthed,” and so it did not constitute an improper fishing expedition.

*Laura Handman and Constance Pendelton of Davis Wright Tremaine represented Kate O’Keeffe. Robert Byer, Duane Morris, Pittsburgh, represented Sheldon Adelson and the Sands Corp.*

# Falun Gong Members' Suit Against Chinese Journalist Dismissed

## *Plaintiffs Alleged Journalist Incited Chinese Guards to Violence*

By Bruce S. Rosen

A federal judge in Hartford, CT has finally ended the 12-year-old ordeal of Zhao Zhizhen, an acclaimed Chinese science journalist who was accused of aiding the persecution and torture of the Falun Gong religious sect by inciting police and prison guards and others in China through writing and broadcasts of hate speech.

U.S. District Judge Robert N. Chatigny ruled in [\*Chen Gang v. Zhao Zhizhen\*](#) No. 04-cv 1146 on March 31, 2016 that several expatriate Falun Gong members cannot file a third amended complaint against Zhao under the Alien Tort Statute (“ATS”) because it fails to allege activity that “touches and concerns” the United States as required by the U.S. Supreme Court’s 2013 decision in [\*Kiobel v. Royal Dutch Petroleum Co.\*](#)

The second amended complaint was [dismissed in 2013](#). The law permits aliens to sue other aliens in the United States for violations of recognized international law. The original complaint was filed in 2004 and a motion to dismiss was filed, but after an unexplained delay of six years, had to be refiled because of changes in the law.

### Background

Zhao Zhizhen was head of Wuhan Television in the 1990s and created China’s version of Nova. He is still an active writer and producer of science programming. He had written a series of articles in China about the Falun Gong long before the Chinese government outlawed them. His articles alleged that the sect’s spiritual leader, Li Hongzhi, was a charlatan and that his ideas, such as avoiding medicine and abandoning traditional family while pledging their devotion to Li as a deity, were dangerous. Zhao sent a film crew to Li’s hometown and obtained critical footage, but never broadcast the materials, although it was ultimately used by Chinese Central Television in “Li Hongzhi, A Man and his Deeds,” a critique of Li that was widely broadcast in China and is available to watch on YouTube.

That CCTV broadcast, which Zhao claims to have had no involvement, belittles Li and his beliefs. Because it was a critical view of a public figure it would have been difficult to find it

**A federal judge finally ended the 12-year-old ordeal of Zhao Zhizhen, an acclaimed Chinese science journalist who was accused of aiding the persecution and torture of the Falun Gong religious sect.**

libelous under contemporary US standards. Nor could it be found to constitute incitement under any international law recognized by the United States. Nevertheless, plaintiffs, a group of Falun Gong members who are Chinese expatriates, claimed that the video incited prison guards and police to torture them, and that Zhao had an additional role in this and other articles and broadcasts as a director of the Chinese Anti-Cult Association.

Zhao said in his papers that that he sees himself as an objective journalist who should be protected by free-speech principles and that the ATS should not be used in a way that undercuts the First Amendment. He said the CCTV documentary was similar to that aired on “60 Minutes” and other programs that have reported on cults and cannot be seen as hate speech. He also said he was not aware of the abuses alleged.

Judge Chatigny never ruled on the free speech issues; instead, he focused on how the Supreme Court’s rulings prohibited the application of the ATS. He also said in the recent ruling that he was concerned about the undue delay in bringing new allegations and the prejudice to Zhao. He also agreed with Zhao that it would be problematic for Zhao to defend himself in view of the time lapse and access to witnesses in China.

The case was one of about two dozen cases brought in U.S. Courts by the Falun Gong’s litigation arm, the Human Rights Law Foundation, using the Alien Tort Statute and the Torture Victims Protection Act as a means of publicizing the allegations and embarrassing Chinese officials by charging them civilly with horrendous crimes. Jurisdiction is granted over aliens under the ATS with personal service and Zhao was served with the lawsuit in New Haven while in his daughter’s apartment shortly after she graduated from a Yale graduate program in 2004. Other attempts to serve Chinese officials took place on the street or in airports. None of these cases were ultimately successful, nor was the Falun Gong’s recent attempt under the ATS to find Cisco Systems responsible for shipment of electronic equipment allegedly used by the Chinese government for surveillance.

**Judge Chatigny never ruled on the free speech issues; instead, he focused on how the Supreme Court’s rulings prohibited the application of the Alien Tort Statute.**

The plaintiffs, in their third effort to expand their suit, sought to show that the allegations had connections to the United States, to meet the *Kiobel* requirements. They claimed that Zhao arranged for distribution of anti-Falun Gong material in the United States and participated in trips to this country to build support for anti-Falun Gong activities, and that it had fomented violence during scuffles in Flushing, N.Y. Zhao argued these allegations were pure speculation that did not meet federal pleading requirements.

*Bruce S. Rosen, a partner in McCusker, Anselmi, Rosen & Carvelli PC in Florham Park, NJ and Manhattan, represented defendant. Plaintiffs were represented by Terri Marsh of the Human Rights Law Foundation in Washington, D.C.*

# Across the Pond: Updates on UK and European Media Law

## *Celebrity Threesome Injunction; CFA's and Article 10; Serious Harm Test; and More*

By David Hooper

### UK Supreme Court to Rule on Celebrity Threesome Injunction

At the time of writing this article, the Supreme Court have heard argument on whether there should be a reinstatement of the injunction and has yet to rule on whether the injunction should be continued, preventing the naming of the celebrity entertainer who indulged in a sexual threesome in 2011, on the grounds that his privacy has been breached.

The Court of Appeal had discharged the injunction in the light of worldwide publicity which disclosed the identity of the claimants and it may very well be that the Supreme Court will uphold that decision. Until that ruling is given the injunction remains in place and I am precluded in this jurisdiction either from telling you who the claimants are or even from directing you to a well-known countrywide US publication which has named them or to the Canadian or Scottish publications who have also named them or the various blogs in this country which have likewise named them.

In the unlikely event that you do not know who the claimants are, I can only tell you to do your own research which only takes a minute or two on the internet. At present all that I can tell you is that an anagram of the claimants' anonymised initials produces the word PYJAMS. I cannot even speculate whether that was the product of the sense of humour of court officials.

The background to the case was that the claimant who is in the entertainment business and married with young children had had a relationship with a third party in 2008. In December 2011 he was asked by his former lover whether he (if one assumes for the sake of argument that the claimant might be a man – a 50/50 bet) was "up for a three-way."

As the law report of [\*PJS v News Group Newspapers Limited\* \[2016\] EWCA Civ 393](#) quaintly puts it "*the three met for a three-way sexual encounter which they duly carried out.*" The two other participants in the threesome decided in early January 2016 they should share the news with the editor of *The Sun on Sunday*. When the claimant was asked about this by the newspaper he sought an injunction.

**In the unlikely event that you do not know who the claimants are, I can only tell you to do your own research which only takes a minute or two on the internet.**



This was initially refused by the judge at first instance Mr Justice Cranston. He was persuaded by the newspapers' argument that the claimant had put many details of his marriage and children in the public domain and that although one could not say that the publication would contribute to any ongoing public debate, there was a public interest in publication to correct the public image he presented of his family life. The claimant had portrayed an image of commitment and there was a public interest in correcting it when there was evidence of him engaging in casual sexual relationships.

The claimant immediately appealed to the Court of Appeal where a two judge court ([\(2016\) EWCA Civ 100](#)) accepted that the claimant's marriage was one of commitment where a loving home was provided for their children even if not accompanied by marital fidelity in an open relationship. Commitment may not, they felt, involve monogamy. The Court of Appeal found fault with the ruling of Mr Justice Cranston in that he did not explain how he had taken the rights of the children into account. They were also unimpressed by the argument that there was a public interest in correcting any image which the claimant may have portrayed about his family life and marriage.

The Court felt that it was entitled to look again at the evidence and carry out its own balancing exercise between the privacy rights under Article 8 of the European Convention of Human Rights and Article 10 relating to freedom of speech. In carrying out their balancing exercise the Court would look at the criteria set out by the Grand Chamber of the Strasbourg Court in [Axel Springer AG v Germany \[2012\] 55 EHRR 6](#) where one looks at such matters in the balancing of rights such as: contribution to a debate of general interest; how well known is the person concerned and what is the subject of the report; the prior conduct of the person concerned; the method of obtaining the information and its veracity; and the content, form and consequences of the publication. The Court of Appeal therefore imposed an injunction.

The injunction was effective for 11 weeks but on 6 April 2016 a widely read magazine in the USA – *Wild Horses* – published an account of the claimant's sexual activities naming those involved. Over the next few days other publications in America, Canada and, perhaps surprisingly, Scotland which has its own jurisdiction, published similar articles. Some intrepid bloggers in the United Kingdom also published articles which either named the claimant or published teasers which would readily identify the claimant asking why such and such a name was trending. It was accepted that these activities were not at the instigation of the defendant newspaper.

The newspaper appealed to what was now a three person Court of Appeal claiming that there was a material change of circumstances given the worldwide publicity. The grant of injunctions in such circumstances is governed by [section 12 Human Rights Act 1998](#). Under

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section 12(3) an injunction is not "*to be granted so as to restrain publication before trial unless the Court is satisfied that the applicant is likely to establish that the publication should not be allowed*" and under section 12(4)(1):

*"The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims or which appears to the Court to be journalistic, literary or artistic material (or to conduct connected with such material) to –*  
*(a) the extent to which –*  
*(i) the material has, or is about to, become available to the public ..."*

This the Court recognised involves a fact-sensitive assessment as to: (a) what has occurred; (b) what will occur prior to the trial; and (c) what the result will be at the trial. The court noted that the internet and social networking have a life of their own and that the Court has little control over what foreign newspapers and magazines may publish. The case indicated how the internet has undermined jurisdictional boundaries.

The Court highlighted the distinction between claims based on a misuse of private information and claims, such as in the *Spycatcher* litigation, based on breach of confidence. Claims for confidentiality generally fail once information has passed into the public domain. Law, however, extends greater protection to privacy rights than rights in relation to confidential material.

In the view of the Court of Appeal, a claim for misuse of private information can and often will survive when information is in the public domain. It was accepted that the original injunction *was* correctly granted in that the claim related to unquestionably personal information where there was no sufficient public interest in publishing it. The question was whether the injunction could be continued in the altered circumstances of April 2016. It would still be open to the claimant to bring a claim for damages which might be difficult for the newspaper to defend. However, these claims are essentially about obtaining injunctions rather than collecting damages which are still relatively modest – certainly in *Hulk Hogan* terms, although significantly increased in the phone-hacking litigation.

The Court of Appeal now had to do a fresh balancing exercise. It concluded that it was difficult to accept that the claimant was likely to obtain a permanent injunction and the Court also had to look at the extent to which the material had become available to the public (as required by section 12(3) and (4)). The Court noted that knowledge of the relevant matters was now so widespread that confidentiality had probably been lost and that much of the harm which

**The Supreme Court noted the arguments of Gavin Millar QC for NGN that once a story has currency on the internet it does become the subject of discussion between people in the jurisdiction.**

the injunction was intended to prevent has already occurred and the identity of the Claimants was likely to continue to be a matter of speculation. As a result of recent events the weight attaching to the Claimant's Article 8 right to privacy has been reduced. Equally, it was felt that the Court should not make orders which are ineffective. The injunction was discharged.

A panel of five Justices have reviewed the matter in the Supreme Court. It appeared that they were focussing on the same practical difficulties as a result of the worldwide publicity highlighted by the Court of Appeal and the impact of section 12 Human Rights Act. The Supreme Court noted the arguments of Gavin Millar QC for NGN that once a story has currency on the internet it does become the subject of discussion between people in the jurisdiction. The information was out there on the internet to be seen, it might not always be desirable but it was the factual position and as the Court of Appeal had noted the interests of the children were not a trump card. One had to be realistic about the possibility that publicity would occur and about the steps which could be taken to protect the children. The Supreme Court will give its judgment shortly and it has continued the injunction until the decision is given.

### **Article 10, Conditional Fee Agreements and After The Event Insurance**

In privacy and defamation litigation in England, litigation costs far outstrip the damages likely to be recovered and this can place a very large burden on an unsuccessful media defendant. This liability has been increased by the ability of claimants' lawyers to recover success fees which may permit them to double the amount of their fees to reflect the fact that they bore the risk of no-win-no-fee.

In England in libel and privacy cases the claimant's lawyers do not have to take a share of the damages which tend to be too small to allow sufficient remuneration for the cost of the trial. On top of this, a claimant can recover the very expensive premium that he may have paid for After The Event (ATE) insurance which covers him up to a given sum in respect of his liability to pay the defendant's costs if his claim is unsuccessful. What is unusual about the arrangement is that the premium is not actually paid beforehand by the claimant. It only becomes payable if the defendant loses, when it is added to the costs bill. If it is the claimant who loses, the insurers take it on the chin and do not get their premium. It is a distinctly unusual and very claimant-friendly form of insurance.

The European Court of Justice was distinctly unimpressed by Conditional Fee Agreements (CFAs). It could, however, see some virtue in after the event insurance in that it afforded some access to justice to impecunious claimants who could not otherwise vindicate their reputation against powerful media organisations. In [\*MGN v United Kingdom\* \[2011\] ECHR 66](#), the European Court of Human Rights considered that the requirement that the applicant pay success fees to the claimant *was* disproportionate having regard to the legitimate aims sought to

be achieved and exceeded even the broad margin of appreciation accorded to the government in such matters. Accordingly, the Court found that there had been a violation of Article 10 of the European Convention of Human Rights.

However, the English House of Lords (the predecessor of the Supreme Court) had in [\*Campbell v Mirror Group Newspapers Limited \[Costs\] \[2005\] UKHL 61\*](#), decided that success fees could *not* be disallowed on the basis that they interfered with a publisher's Article 10 rights and that ATE insurance premiums *should* be recoverable. The House of Lords felt that under Article 10(2) the right to freedom of expression under Article 10(1) was subject to restrictions or penalties prescribed by law which are necessary in a democratic society for a legitimate social purpose. Allowing a successful claimant to recover ATE insurance premiums satisfied those requirements by removing the powerful disincentive to a claimant of the liability to pay a defendant's and their own legal costs.

The question has therefore arisen as to whether English courts should follow the 2005 House of Lords' decision or the 2011 ECtHR decision. The English courts have decided to follow under our Rules of Precedent the House of Lords' decision upholding the recoverability of success fees under CFAs and ATE premiums but they have effectively referred the matter to the Supreme Court by allowing the leapfrog procedure whereby the appeal can go directly to the Supreme Court without the necessity of an appeal in the Court of Appeal which would likewise be bound by the House of Lords' decision. The cases which will be considered by the Supreme Court in the leapfrog appeal will be [\*Flood v Times Newspapers Limited \(No.3\) \[2013\] EWHC 4075\*](#); [\*Miller v Associated Newspapers Limited \[2016\] EWHC 397\*](#); [\*BNM v Mirror Group Newspapers Limited \[2016\] EWHC B1 \(Costs\)\*](#); and [\*8 Representative Claimants v MGN Limited \[2016\] EWHC 855\*](#).

The recoverability of CFA success fees and ATE premiums has been discontinued in all litigation *except* publication and privacy proceedings by virtue of section 46 Legal Aid, Sentencing and Punishment of Offenders Act 2012 but libel and privacy claims are still caught by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No 5 and Saving Provision) Order 2013 Article 1(2). This is the result of the turmoil following the Leveson Report and the politics relating to the regulation of the press in the United Kingdom and the ability of claimants to sue the media which is still unresolved.

One gets some indication of the relative size of the sums involved in that in the *BNM* case a privacy claim which was settled for a relatively £20,000 damages costs of no less than £241,817 were sought which claimed success fees in the region of 60%-75% *plus* an ATE premium of £61,480 which provided relatively paltry £165,000 cover. In the event, the costs judge allowed success fees of 33% and the ATE insurance premium.

In the phone-hacking case, *8 Representative Claimants v MGN Limited [2016] EWHC 855*, in respect of 12 settled cases the success fees were said to total a sum in excess of a thumping £600,000 and the insurance premiums total more than £200,000. In the eight cases that went to



trial the success fees exceed a mouth-watering £1.4m and the ATE premiums exceed £632,000. The sums are therefore very considerable.

In the *8 Representative Claimants* case, Mr Justice Mann has concluded that on the basis of binding English authority, the English legislative regime which permits the recovery of the additional liabilities is *not* incompatible with Article 10 of the Convention and it remains to be seen what the Supreme Court makes of this when it hears the matter later in the year.

### Another Ruling On The Need For Serious Harm In Libel Claims

In [\*Sobrinho v Impresa Publishing SA\* \[2016\] EWHC 66](#), the claimant was a citizen of Angola and Portugal and President of the Angolan subsidiary of a Portuguese bank. He had some links with England being the founder and chairman of a charity registered in England. He sued a weekly broadsheet newspaper in Portugal called *Expresso*. It had a hard copy circulation of just under 90,000 in Portugal and but no more than 136 in England with 52 digital subscriptions in England. The bank collapsed and required a bail out from Portugal's Central Bank.

On the face of it the allegations in the article were very serious ones relating to the circumstances in which loans of sum US\$5.7 billion had been granted without adequate collateral and the suggestion that the claimant has misappropriated millions of dollars from funds held by the bank. The procedure which the case followed is an increasingly common one namely that there was a trial of preliminary issues relating to the meaning of the words complained of; whether [section 1 Defamation Act 2013](#) relating to serious harm was satisfied and whether the action should be dismissed as an abuse of process.

Mr Sobrinho does appear to have overreached himself. He commenced both civil and criminal proceedings for libel in Portugal but he discontinued those when he was exonerated by a parliamentary commission. He, however, wished to continue with the English libel action where not surprisingly the defendant did not seek to justify what they had written.

The case is a good example of how a defendant can successfully contend that no serious harm has in fact been suffered or is likely to be suffered, even though the allegation is a serious one. The judge, Mr Justice Dingemans said that assessing serious harm was not simply a numbers game. One looked at all the circumstances. He concluded that publication in England and Wales of the article had *not* caused serious harm to his reputation in England and Wales nor was it likely to do so. The judge took account of such factors as the very limited extent of publication in England and Wales and the fact that the text of the article set out Mr Sobrinho's defence and that he had established a good reputation in England and Wales which meant that no one appeared to have believed the article so far as it concerned Mr Sobrinho.

**The case is a good example of how a defendant can successfully contend that no serious harm has in fact been suffered or is likely to be suffered, even though the allegation is a serious one.**

After the collapse of the bank and the parliamentary enquiry, Mr Sobrinho had been able to give evidence which allowed him to put the matter straight and the judge concluded that Mr Sobrinho had suffered no serious harm. Furthermore, given the fact that the proceedings in Portugal had been discontinued the judge concluded that the litigation was "*not worth the candle and served no legitimate purpose*" and that it would be an abuse of process for it to continue.

### **Photographs in a Public Place**

[\*Weller v Associated Newspapers Limited\* \[2015\] EWCA Civ 1176.](#)

The Supreme Court has refused Associated Newspapers Limited permission to appeal against the decision awarding damages and an injunction to the three children of the singer, Paul Weller, in respect of publications in an English newspaper of photographs taken of them in a public place in California. The children have been awarded £10,000 damages by Mr Justice Dingemans in March 2014 [\[2014\] EWHC 1163](#) and this had been upheld by the Court of Appeal. Details of this case appear in [my earlier article](#) but the Court took account of such factors as this being a private family outing the absence of consent and the fact that there had been an objection to the taking of the photographs and that the claimants were children and that there was no public interest defence applicable. The publication of the photo would have been legitimate under Californian law but amounted to a misuse of private information when published in the UK.

### **Changes to Defamation Law in Scotland**

Much has been written about the failure of that libel tourism venue, Northern Ireland's failure to amend their libel law in line with England and Wales. Scotland has its own legal system and did not adopt the changes in the Defamation Act 2013. However, the Scottish Law Commission has published a [discussion paper on defamation](#) which raises a number of questions for discussion where a response is sought by 17 June 2016. These include things such as whether there should be a requirement of serious harm; a defence for website operators; whether actions should be permitted on behalf of those who are no longer alive. Change it seems is on the way.

*David Hooper is a Consultant for RPC in London.*

# Media Coalition Successfully Opposes Request for a Gag Order

By Steve Mandell, Brendan Healey & Danielle Twait

An attempt to muzzle the parties in a high profile northern Wisconsin criminal case fizzled when several media organizations intervened to contest a motion for a gag order.

In early April, a coalition of television companies, newspaper companies, and media industry organizations moved to intervene in a case involving two brothers charged with fraud.

Brian and David Eliason are prominent northern Wisconsin businessmen, and the State brought charges against them after the collapse of their real estate investment fund.

Shortly after the filing, counsel for the Eliason brothers issued a press release responding to the charges. The State immediately filed a motion seeking the court to enter an order “prohibiting the parties to this case from talking with the media ....”

The State later clarified that it was seeking only to prohibit the parties “from making statements which they reasonably believe will be disseminated by means of public communication that would have the likelihood of materially prejudicing proceedings in this matter ....”

According to the State, such an order would merely mandate compliance with the Wisconsin rule of professional conduct on pretrial publicity. Although an order simply requiring conformance to existing rules is seemingly inoffensive, the coalition responded that any order restraining speech must be supported by a clear and present danger or threat of imminent harm to an impartial jury.

The State contended the relatively small venire (Vilas County has slightly more than 20,000 people and is tucked into the far northwest corner of Wisconsin) made the case particularly vulnerable to tainting of the jury pool.

The media coalition opposed the gag order on the grounds that it would be an unconstitutional prior restraint on their First Amendment rights to receive protected speech from willing speakers and to generally gather the news. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976).

The coalition argued the State’s proposed order was so vague and overbroad it essentially prohibited the parties from making almost any statement concerning the criminal proceedings.

This issue is one of first impression in Wisconsin. Although the Wisconsin Supreme Court had previously recognized that the media have a right to gather news, it has not determined whether a gag order is a prior restraint on the media’s First Amendment rights. *Oak Creek v.*

**Although the Wisconsin Supreme Court had previously recognized that the media have a right to gather news, it has not determined whether a gag order is a prior restraint on the media’s First Amendment rights.**

*King*, 148 Wis. 2d 532, at 561 n.5 (1989). The media coalition argued that the State, to overcome a presumption of unconstitutionality, could not establish that defendants' and their attorneys' conduct was "a serious and imminent threat to the administration of justice." *CBS, Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975).

The State had a high burden because the defendants also vigorously opposed the requested gag order. Further, the media coalition argued, if there were a need to mitigate alleged prejudicial pretrial publicity, the court had other reasonable alternatives that would have a lesser impact on First Amendment rights.

After almost two hours of oral argument, the Judge agreed with the media coalition, finding that there were less restrictive means of dealing with pretrial publicity that do not directly impact the media's First Amendment rights. Accordingly, the Judge denied the request for the gag order.

The media coalition comprised Gray Television Group, Inc. (WSAW/WZAW in Wausau, WEAU in Eau Claire/La Crosse, and WMTV in Madison), Journal Sentinel Inc. (Milwaukee *Journal Sentinel*), Lakeland Printing, Inc. (*The Lakeland Times*), Madison Newspapers Inc. (*Wisconsin State Journal* and *The Capital Times*), Quincy Media, Inc. (WAOW in Wausau, WQOW in Eau Claire, WKOW in Madison, and WXOW in La Crosse), Rockfleet Broadcasting/Northland Television, Inc. (WJFW in Rhineland), Gannett Co., Inc.'s USA TODAY NETWORK-Wisconsin (Wausau *Daily Herald*), the Wisconsin Broadcasters Association, and the Wisconsin Newspaper Association.

*The Media Intervenors were represented by Steve Mandell and Steve Rosenfeld of Mandell Menkes LLC. Assistant Attorneys General Amber Hahn and Christopher Liegel represent the State of Wisconsin. Defendant David Eliason is represented by Stephen Kravit of Kravit Hovel & Krawczyk SC, and Dean Strang of Strang Bradley represents defendant Brian Eliason.*

**Gag order rejected in Wisconsin fraud case**

Jonathan Anderson, USA TODAY NETWORK-Wisconsin 7:43 p.m. CDT April 13, 2016

Lawyer Steven Mandell talks about why news organizations, including USA TODAY NETWORK-Wisconsin, challenged a proposed gag order in a fraud case.

**EAGLE RIVER** - A pair of brothers charged with securities fraud and their lawyers will be allowed to talk to journalists, a judge ruled Wednesday in a white-collar crime case that has shaken the trust of northern Wisconsin residents.

The decision comes after a coalition of news organizations, including USA TODAY NETWORK-Wisconsin, moved to oppose a gag order the state Department of Justice sought in the case.

"I'm not convinced at this point that we need a gag order," Forest County Circuit Judge Leon Stenz said at a nearly two-hour hearing Wednesday afternoon. "There is always a risk that there is going to be pretrial publicity."

The subject of that publicity: Vilas County brothers Brian and David Eliason, who were charged in late February with 10 felony counts of securities fraud on accusations that they failed to tell prospective investors that their company, Eliason Inc., was in the midst of a financial meltdown.

The firm lost millions of dollars and had debt upwards of \$60 million in the late 2000s, according to court documents. A fund the brothers had created to invest in rental properties tanked in last decade's financial crisis, causing at least 31 people to lose



# Florida Appellate Court Unseals Court Records in Hulk Hogan v. Gawker



**By Robert L. Rogers, III, Charles D. Tobin, and Timothy J. Conner**

On the eve of March’s multi-million dollar jury verdict awarded to former wrestler Terry Bollea a/k/a Hulk Hogan against Gawker, [a group of media companies who intervened](#) in the case – First Look Media, Inc., The Associated Press, the *Tampa Bay Times*, and several stations in the Scripps Media family of properties – won an appellate ruling quashing a series of trial court orders that had sealed hundreds of pages of motions, memoranda, and hearing transcripts.

The Florida Second District Court of Appeal’s four-paragraph order repudiated the trial judge’s decision to keep large swaths of filings under seal.

Hogan’s attorneys had persuaded the trial court to seal judicial records in the case related to key pre-trial decisions, including Gawker’s motion for summary judgment, Hogan’s expansive motion asking the court to appoint an expert to take electronic discovery from Gawker and its attorneys (which the court granted), Gawker’s motion for sanctions alleging that Hogan lied to the court under oath, and numerous other court filings. The sealing of records became a labyrinth of rulings – the parties filed more than twenty motions seeking to “determine the confidentiality” of such records, based on a typical agreed protective order related to discovery.

The trial court had identified three purported interests implicated by the documents filed under seal: (i) the interests in “avoid[ing] substantial injury to a party by disclosure of matters protected by a common law or privacy right” not inherent in the type of proceeding; (ii) an interest in “comply[ing] with established public policy set forth under” the Florida or U.S.



Constitutions or Florida statutes, rules or cases; and (iii) the interest in "avoid[ing] substantial injuries to innocent third parties."

In a succinct and pointed order, the Court of Appeal quashed the trial court's orders, and agreed with the media intervenors that the sealed documents must be made public, both because they were inherent to the litigation and because sealing was unwarranted under Florida law.

The Court explained that the sealed records "consist of motions, responses to motions, and other documents filed in support of the motions and responses, as well as transcripts of hearings. ... Litigants do not have a reasonable expectation of privacy in matters inherent to a civil proceeding." It then "concluded that confidentiality of the items at issue is not necessary to avoid substantial injury to innocent third parties, that the information sought to be kept confidential is inherent in the proceeding pending in the trial court, and that confidentiality is not required to comply with established public policy."

The victory is significant as the trial judge had allowed Hogan to effectively conduct much of the case in private. Through its ruling, the Court of Appeals made clear that private litigation will not be tolerated in Florida's courts.

On May 2nd, Hogan filed a new lawsuit in Pinellas County Circuit Court against Gawker—although the majority of Hogan's claims seek relief for an alleged conspiracy between several radio personalities, agents and lawyers and their employers (but not Gawker) to extort Hogan into paying them \$1 million to not release recordings containing racially insensitive remarks.

In the Complaint's final two counts, Hogan claims that Gawker caused him emotional distress and intentionally interfered with his employment by releasing a written transcript of those remarks that had been sealed by the Circuit Court to the National Enquirer, who subsequently published them. Notably, Hogan acknowledges that the sealed transcript was later ordered unsealed by a Florida appellate court. The new case has been assigned to Judge Pamela A.M. Campbell, who presided over Hogan's prior lawsuit against Gawker.

*Charles D. Tobin (Washington D.C.), Timothy J. Conner (Jacksonville, FL), and Robert L. Rogers, III (Orlando) of Holland & Knight, LLP, represent First Look Media, Inc., WFTS-TV and WPTV-TV, Scripps Media, Inc., WFTX-TV, the Journal Broadcast Group, and The Associated Press, and Alison Steele of Rahdert, Steele, Reynolds & Driscoll, P.L., in St. Petersburg, FL, represents Times Publishing Company.*

Filing # 40950062 E-Filed 05/02/2016 12:17:59 PM

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA professionally known  
as HULK HOGAN,

Plaintiff,

vs.

Case No. \_\_\_\_\_

DON BUCHWALD & ASSOCIATES, INC.;  
TONY BURTON; MICHAEL CALTA aka  
"Cowhead"; MATTHEW CHRISTIAN LOYD  
aka "Matt Loyd" aka "Spice Boy"; KEITH M.  
DAVIDSON; KEITH M. DAVIDSON &  
ASSOCIATES, P.L.C.; COX RADIO, INC.,  
TASHA NICOLE CARREGA; LORI  
BURBRIDGE and GAWKER MEDIA, LLC,

Defendants.

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, Terry Gene Bollea, professionally known as "Hulk Hogan" ("Plaintiff" or  
"Mr. Bollea"), sues Defendants, Don Buchwald & Associates, Inc. and Tony Burton  
(collectively, the "Buchwald Defendants"), Michael Calta aka "Cowhead," Matthew Christian  
Loyd aka "Matt Loyd" aka "Spice Boy," and Cox Radio, Inc. (collectively, the "Cox  
Defendants"), Keith M. Davidson, Keith M. Davidson & Associates, P.L.C., Tasha Nicole  
Carrega and Lori Burbridge (collectively, the "Davidson Defendants"), and Gawker Media, LLC  
("Gawker"), (together collectively, "Defendants"), and alleges as follows:

NATURE OF THIS ACTION

1. Over the past several years, Mr. Bollea has been repeatedly victimized by the use,  
disclosure, dissemination and exploitation of surreptitiously recorded and illegally obtained

# Fla. High Court Rejects Common Law “Good Faith” Exception to Fee Shifting Provision in Public Records Act

By Robert L. Rogers, III

The Supreme Court of Florida applied common sense to reconcile conflicting opinions construing the mandatory fee shifting provision in Florida’s Public Records Act, effectively removing a “good faith” exception read into that statute by several Florida courts. [\*Board of Trustees, Jacksonville Police & Fire Pension Fund v. Lee\*](#), 2016 WL 1458515 (Fla. Apr. 14, 2016). The decision stands as an important victory for open government in Florida, at a time when that very fee-shifting provision has come under fire in the Florida Legislature.

At issue in *Board of Trustees v. Lee* was Fla. Stat. § 119.12, which provides, “If a civil action is filed against an agency to enforce the provisions of this chapter and if the court determines that such agency unlawfully refused to permit a public record to be inspected or copied, the court shall assess and award, against the agency responsible, the reasonable costs of enforcement including reasonable attorneys’ fees.”

The plaintiff, a citizen who had sought public records from a police and firefighters’ pension fund, filed suit against the fund seeking a judgment declaring that certain conditions the fund imposed before allowing him to inspect the records violated Florida’s Public Records Act. The trial court determined that two of the fund’s conditions—an hourly photocopying fee and an hourly supervisor fee—did indeed violate the Act.

Lee then moved for attorneys’ fees under Section 119.12. The pension fund opposed the motion by claiming that any violation of the Public Records Act was done without knowledge or malicious intent, relying upon cases from several Florida courts which refused to award fees under Section 119.12 absent proof that an agency violated the Act “unreasonably or in bad faith.” The trial court agreed and denied Lee’s motion for attorneys’ fees on grounds that the fund had not knowingly or maliciously violated the Public Records Act. The First District Court of Appeals reversed on grounds that the absence of knowledge or malicious intent provided no basis under Section 119.12 to deny attorneys’ fees.

In affirming the appellate court’s decision, the Supreme Court of Florida began by recognizing that the right of access to public records is a “cornerstone of our political culture,” and that the Public Records Act must be “liberally construed so as to best enforce the promotion of access to public records and in favor of open government to the extent possible to preserve our basic freedom.” The Court further recognized that suits by citizens against agencies alleging violations of the Public Records Act are the primary means of enforcing the

**The decision stands as an important victory for open government in Florida, at a time when that very fee-shifting provision has come under fire in the Florida Legislature.**

act. Section 119.12 therefore “has the dual role of both deterring agencies from wrongfully denying access to public records and encouraging individuals to continue pursuing their right to access public records.”

The Supreme Court then resolved the conflict among Florida’s appellate courts by focusing on the 1984 amendment to Section 119.12, in which the Florida Legislature removed the language authorizing fees only when a public agency “unreasonably refused” to permit inspection or copying, and replaced the word “unreasonably” with “unlawfully.” This amendment eliminated the ability of courts to deny attorneys’ fees “just because the public agency acted reasonably in violating the Public Records Act.” An “unlawful” refusal, “by its common definition, encompasses any refusal not ‘permitted or recognized’ by the Public Records Act or some other law.” “The public agency’s failure to comply, rather than its good or bad faith in doing so, became the relevant inquiry.”

The Supreme Court further noted the inclusion of knowledge or willfulness in other provisions of the Public Records Act, and recognized that the Legislature has had ample opportunity to explicitly impose a good faith requirement in Section 119.12. “The absence of any such standards in section 119.12—whether good or bad faith, reasonable, or knowingly and willfully—clearly indicates that section 119.12 is not contingent on a finding of the public agency’s unreasonableness or bad faith before allowing an award of attorney’s fees under the Public Records Act.”

The Court further rejected the argument (embraced by the two dissenting justices) that the Legislature intended to incorporate a good faith requirement into Section 119.12 through its enactment in 2007 of a separate provision (Fla. Stat. § 119.07(1)(c)) that requires custodians of public records to respond to requests to inspect and copy public records “in good faith.” Although a violation of this “good faith” requirement would obviously warrant an award of attorneys’ fees, “it does not follow that where there are violations of other sections of the Public Records Act, such as in this case, the Legislature intended to also require a violation of [this section] before attorneys’ fees can be awarded.”

In further support of open government, the Court elaborated, “If an individual is required to enforce his or her entitlement to public records through the filing of a civil action and prevails, the purpose of the statute is frustrated if the prevailing individual must incur the attorney’s fees—rather than the public agency that violated the Public Records Act—merely because the individual is unable to establish that the public agency acted unreasonably or in bad faith.”

Notably, this may not be the last word on Section 119.12. In 2015, the Florida Senate and Florida House of Representatives entertained bills aimed at replacing the mandatory fee-shifting language in Section 119.12 with discretionary language, although neither was passed. But for the time being, so long as Section 119.12 remains in its present form, *Board of Trustees v. Lee* stands as an important victory for open government by effectively reversing cases that neutered Section 119.12 by reading into it discretion that was never codified, effectively permitting courts to refuse to award fees whenever an agency cries good faith in violating the Public Records Act.

*Robert L. Rogers, III is a media and business litigation attorney with Holland & Knight LLP and works in the firm's Orlando office. The Petitioner was represented by Robert David Klausner, Stuart Andrew Kaufman, Adam Phillip Levinson, and Paul A. Daragjati of Klausner, Kaufman, Jensen & Levinson. The Respondent was represented by Robert Michael Dees of Milam Howard Nicandri Dees & Gillam, P.A.*



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# NJ Appeals Court Denies Open Records Request for Email Log

## *Plaintiff Is Seeking NJ Supreme Court Review*

By Raymond Baldino

In [\*Paff v. Galloway\*](#), New Jersey held for the first time under its Open Public Records Act (“OPRA”), *N.J.S.A. 47:1A-1 et seq* that “OPRA does not require public agencies to create records that do not already exist,” applying that doctrine to a request for a compilation of electronically stored information. As a result, Plaintiff John Paff was not entitled to an “email log,” or index of certain data fields from public emails that he had requested. The case is a potentially far-reaching decision that is out of step with the evolving state and federal law on access to electronic records, and is currently the subject of a Petition to the New Jersey Supreme Court by Plaintiff’s counsel.

### Background

In June of 2013, Paff requested a “log” of emails between the Township Clerk and Chief of Police for the Township of Galloway in southern New Jersey over a designated period of time, described as an “itemized list showing the sender, recipient, date, and subject of all emails.” (Note: the designated time period coincided with the time period of an internal affairs investigation in the Township, a fact that defendants and their amici pointed to on Appeal, in identifying what they saw as the potentially serious implications of releasing email logs). The Township refused Paff’s request, on the basis that no such record existed, and that it would be required to compile the information from the emails themselves. However, Galloway had in the past established a practice of providing the logs before changing its policy. At trial, the Township’s IT professional admitted that the logs would take, at most, 2-3 minutes to compile in response to a query!

At trial Plaintiff’s counsel argued that Paff was entitled to the “metadata” of public emails under the plain language of OPRA. Persuaded that release of the email logs would be minimally burdensome, and relying on OPRA’s definition of a public record that specifically refers to “information stored or maintained electronically” as a record subject to access, as well as the prominent open records cases *O’Neill v. City of Shoreline* and *Lake v. City of Phoenix* that ordered disclosure of metadata where that metadata was part of a record subject to

**The case is a potentially far-reaching decision that is out of step with the evolving state and federal law on access to electronic records, and is currently the subject of a Petition to the New Jersey Supreme Court by Plaintiff’s counsel.**



disclosure, the trial court held that creation of the email log was required by OPRA. Defendants appealed.

By way of background, Paff is a member of New Jersey's libertarian party and also a board member of the National Freedom of Information Council subsidiary organization in New Jersey, "NJFOG" (New Jersey Foundation for Open Government) and a longstanding open government activist. He has been the Plaintiff in more than 25 OPRA decisions in the courts, including cases that decided important questions under the statute. He is also in his own right extremely knowledgeable of open records law. He places requests throughout New Jersey to test both the law and agency compliance thereto. He blogs about open records and open meetings law developments, and also maintains a blog solely devoted to publishing information about settlements made by government agencies in New Jersey. At trial, when asked about the reason for his request, Paff's testimony did not identify any particular need or interest that motivated him to seek the information in the "email logs."

### Appellate Court Decision

On appeal, Plaintiff focused on the language of OPRA that states "information stored or maintained electronically" is a public record, as well as the requirement that under the statute that it be construed broadly, in favor of access. As a result Plaintiff contended, OPRA requires that computer data or information be accessible *qua* data or information, whether it is called "metadata" or simply "data" – and further, in an age where government records are increasingly in electronic form, and government harnesses the awesome power of electronic records systems for its own use, citizens must have access on commensurate terms.

Plaintiff also addressed the Defendants' argument that Paff's request was an improper request for the agency to "create a record" and cited to numerous decisions from sister state jurisdictions, primarily state supreme court authority (and every state to consider this issue) which reached the conclusion that such requests do not ask the agency to "create a record." Such requests for "data runs" or electronic compilations simply retrieved "information stored or maintained electronically." Indeed, as the Supreme Court of Tennessee held when addressing the issue, "once information is entered into a computer, a distinction between information and record becomes to a large degree impractical." *Tennessean v. Electric Power Bd. of Nashville* (1998). Plaintiff pointed further to the inherent unfairness, where, when an agency could fulfill a request for a log within 2-3 minutes, it adopted the position that requestors should be required to play a guessing game when seeking emails, rather than review the available emails using the same indexing or filing capabilities of the agency.

As Plaintiff argued, he was requesting the same "card catalog" that the agency had available to it to navigate its vast stores of electronic information. What was being requested was no

more complicated than asking for an agency to pull out a row from a card catalog and supply it to the requestor to review.

However, the New Jersey Appellate Division disagreed, holding that the “plain language” of OPRA required that Paff was not entitled to an email log. However, the Court did not address the meaning of OPRA’s definition of “information stored or maintained electronically” as a “government record.” In a tersely reasoned footnote to the persuasive state authority cited by Plaintiff, the Court mischaracterized the cases as decisions that held that “metadata included in the computerized form of a public record is discoverable as part of a request for the discoverable record itself,” when in fact the cases were state Freedom of Information (“FOI”) decisions holding that non-extraordinary requests for extracted data must be fulfilled under their respective FOI laws. *See*, e.g. *Tennessean v. Elec. Power Bd. of Nashville*, 979 S.W. 297, 302-304 (Tenn. 1998); *Hamer v. Lentz*, 547 N.E.2d. 191, 195 (Ill. 1989); *Seigle v. Barry*, 422 So.2d 63, 66 (Fla. Dist. Ct. App. 1982); *State ex rel Stephen Harder*, 230 Kan. 573, 577 (1982).

The Appellate Division indicated that it saw a need to “draw a line” to prevent overly burdensome requests (a concern that was voiced by the panel at oral argument). Thus, as the Court stated: “We acknowledge that the creation of an email log in the circumstances before us would not present a particularly burdensome task for the Clerk. However, once the email log is generated, redacting it...could require substantial effort” and further “while the request under review might not present a burdensome task, we can easily envision requests of a similar nature that would present a serious burden.” Thus, the Court relied on fears of scenarios not present in the record to support its decision.

“Our holding-that OPRA does not require the creation of a new government record that does not yet exist at the time of the request, even if the information sought to be included in the new government record is stored or maintained electronically in other government records-should provide a clear demarcation line in this case, as well as future cases,” the Court held.

*Raymond Baldino is a member of MLRC’s Next Gen Committee and is counsel to plaintiff in this matter together with Walter M. Luers, Luers Law LLC, Clinton, NJ.*

# FAA Panel Recommendations Would Allow Drone Use Over People

By Joel E. Roberson, Charles D. Tobin and Christine N. Walz

In early April, a panel of industry experts assembled by the Federal Aviation Administration (FAA) submitted [a report](#) recommending a new regulatory framework for the flight of unmanned aircraft systems (UAS), or drones, over people. The report is a major step forward in efforts to win government approval for journalists to safely use UAS to gather news in cities.

This recommendation – which sets forth the consensus position of more than two dozen organizations, including a coalition of 22 news media organizations – presents the FAA with a risk-based approach to allow for small UAS flights over people under certain conditions. The FAA plans to use this report to develop a notice of proposed rulemaking expected to be released by December 2016.

Based on presentations from scientists, industry experts, and foreign governments on risks of UAS to people and current operational limits and UAS regulations in other countries, the Aviation Rulemaking Committee (“ARC”) recommended a four-tier performance-based framework for allowing certain UAS flights over people.

The following are the four categories recommended by the ARC:

**Category 1:** For a small UAS that weighs less than 0.55 pounds (250 grams), operations over people would be permitted with very limited restrictions. Category 1 is designed for a toy UAS or a small UAS approximately the size of a smartphone that poses a low risk when flown over people. Based on the low risk, the ARC report also recommends that the FAA develop a more flexible initial aeronautical test for operators of Category 1 small UAS. However, the manned aircraft participants of the ARC objected to creating lower operator requirements for these small UAS based on their view that all UAS operators should have minimum knowledge.

**Category 2:** For a small UAS that creates a low risk of serious injury based on their energy profile, operations over people would be permitted as long the operator maintains a minimum distance of 20 feet above people’s heads or 10 feet laterally away from people on the ground. Experts presenting to the ARC estimated that Category 2 small UAS would likely be below 4-5 pounds, depending on the impact energy consensus standard. There are a number of small UAS currently on the market that are expected to fit within this category.

**Category 3:** For a small UAS that creates a moderate risk of serious injury based on their energy profile and meet certain manufacturer certification requirements, operations would be permitted over some people if the people are incidental to the operation. In this category, operators would not be permitted to fly over crowds of people, but could fly over a closed or restricted access work site or over transient or incidental pedestrians so long as the overhead flight was not sustained. Experts presenting to the ARC estimated that Category 3 UAS would likely be below 6-8 pounds, depending on impact energy consensus standard.



**In early April, a panel of industry experts assembled by the FAA submitted a report recommending a new regulatory framework for the flight of unmanned aircraft systems over people, a major step forward in efforts to win government approval for journalists to safely use UAS to gather news in cities.**

**Category 4:** For a small UAS that creates a moderate risk of serious injury based on their energy profile and meet certain manufacturer certification requirements, operations over people would be permitted in accordance with a required documented risk mitigation plan. The documented risk mitigation plan would have to meet voluntary consensus standards to be established later. It is expected that risk mitigation plans would include items like (1) minimum pilot or operator qualifications or training requirements; (2) possible pooling agreements or limitations on the number of drones that could be flown within a given airspace and/or (3) coordination with local officials or first responders. In Category 4, operations over crowds would be permitted. In the same manner as Category 3, experts presenting to the ARC estimated that Category 4 UAS would likely be below 6-8 pounds, depending on impact energy consensus standard.

These recommendations only pertain to flights over people. Flights that are not conducted over people will be subject to the requirements of the general small UAS rulemaking, which is expected to be released this summer.

The FAA will now move forward with a formal rulemaking to address small UAS flights over people. The agency expects that a proposed rule addressing small UAS will be issued by December 2016 with a final rulemaking in 2017. Meanwhile, Congress is also considering FAA reauthorization legislation that would include statutory requirements for small UAS flights over people.

*Joel E. Roberson and Charles D. Tobin are partners and Christine N. Walz is an associate with Holland & Knight LLP in Washington D.C. Holland & Knight represents a coalition of news media entities in their efforts discussed in this article.*

# Plaintiffs Strike Out against Yankees: Republication of Essay Privileged Under Section 201(c) of the Copyright Act

By Sigmund D. Schutz and Jonathan S. Piper

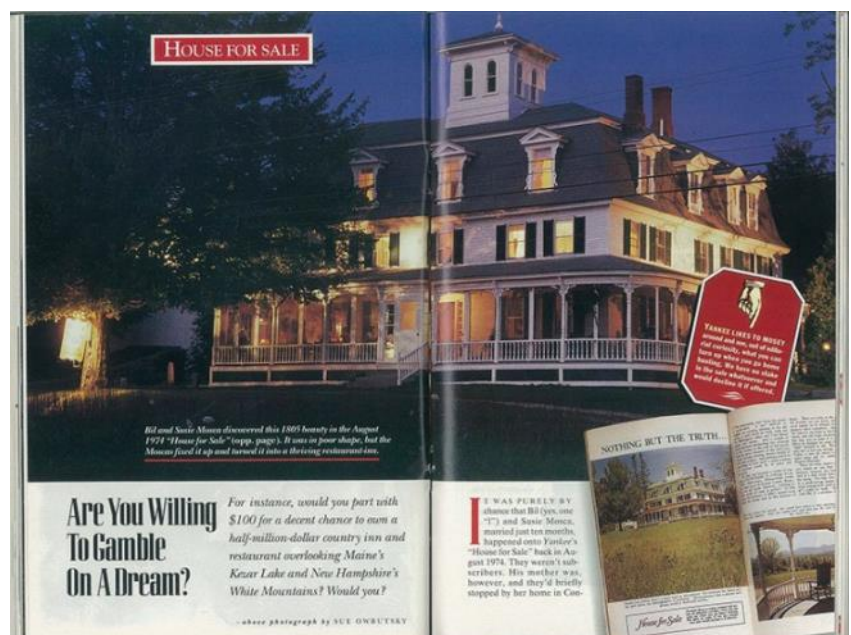
In an opinion involving a seldom litigated section of the Copyright Act bearing on contributions to “collective works” and privileges to republish them under certain circumstances, 17 U.S.C. § 201(c), the Maine federal district court ruled in favor of a magazine publisher and against the owner of the copyright in an essay. [\*Mosca v. Yankee Publ’g, Inc.\*](#), No. 2:15-CV-266-JDL, 2015 WL 9304738, at \*1 (D. Me. Nov. 25, 2015) *report and recommendation adopted* No. 2:15-CV-000266-JDL, 2015 WL 9305649 (D. Me. Dec. 21, 2015).

## Background

In the early 1990s, Yankee Magazine published articles on an essay contest run by the owners of the Center Lovell Inn, a small nineteenth century inn in the hills of rural western Maine. The owners of the Inn, William and Susan Mosca, used the essay contest to sell the Inn. They collected entrance fees. The winner of the contest received the Inn. As a result of publicity in Yankee, followed by coverage in the national media, the Moscas ended up receiving thousands of entries. The essay contest rules stipulated that entrants assigned to the Moscas their copyright upon submittal of an essay.

Grateful for the publicity Yankee had helped to generate for their contest, the Moscas orally granted permission for Yankee to publish the winning essay, “I Would Like to Own and Operate an Old-Fashioned Country Inn.” The essay appeared in the October 1993 issue of Yankee. A few months later, on December 9, 1993, the Mosca’s registered the copyright in that essay.

Fast forward a little more than 20 years ... the winners of the Moscas’ essay contest, Richard and Janice Cox, decided to launch a new essay contest for the Inn. With renewed public interest in the





Inn and the essay contest, Yankee republished its original October 1993 article containing the winning essay. A short time later Yankee found itself on the receiving end of a federal lawsuit by the Moscas for copyright infringement. The Moscas alleged that Yankee infringed by republishing the winning essay without receiving any further permission. They claimed that the publication damaged them by, among other things, hurting sales of their self-published book about the essay contest. Their book also contained the winning essay.

The case turned on section 201(c) of the Copyright Act, which bears on contributions to “collective works:”

Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

17 U.S.C. § 201(c). A “collective work” is “a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.” *Id.* § 101.

Yankee argued that its republication of the Center Lovell Inn Composition in a later issue of Yankee Magazine constituted a privileged reproduction of that piece in a “later collective work in the same series[.]” namely, a later issue of Yankee Magazine. 2015 WL 9304738, at \*4. The Moscas responded “that the defendant’s interpretation would swallow the rule of section 201’s three narrow presumptive privileges, enabling ‘[a] newspaper [to] republish a freelance author’s individual contribution each day of the week without obtaining additional permission from the author.’” *Id.*

The precise issue was a novel one. According to the Court, “Insofar as appears from the case law cited by the parties and my own research, this discrete issue is one of first impression.” *Id.*

The Court determined that Section 201(c) is ambiguous and, therefore, turned to legislative history. “While I find no case holding that a subsequent edition of the same magazine does – or does not – qualify as a “later collective work in the same series for purposes of section 201(c), there is, as both sides recognize, legislative history bearing on the point.” *Id.* As Yankee had urged, the Court turned to legislative history quoted with favor by the Supreme Court in *New York Times Co. v. Tasini*, 533 U.S. 483 (2001):

In accord with Congress’ prescription, a “publishing company could reprint a contribution from one issue in a later issue of its magazine, and could reprint an

**Yankee argued that its republication constituted a privileged reproduction of that piece in a “later collective work in the same series.”**

article from a 1980 edition of an encyclopedia in a 1990 revision of it; the publisher could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work.

*Id.* \*5 (quoting 533 U.S. at 496–97, quoting H.R.Rep. No. 94–1476 at 122–23 (1976), as reprinted in 1976 U.S.C.C.A.N. 56597, 5738). Relying on this language, the Court found that, for purposes of the section 201(c) privilege, a subsequent issue of the same magazine (in this case, Yankee Magazine) qualifies as a “later collective work in the same series[.]” 17 U.S.C. § 201(c). When the House Report refers to an “entirely different magazine,” it meant “a different magazine, not a different edition of the same magazine.” The Court wrote, “For example, if the defendant had republished the Center Lovell Inn Composition in Old Farmer’s Almanac rather than Yankee Magazine, that usage would not have been privileged pursuant to section 201(c).” *Mosca*, 2015 WL 9304738 at \*5.

In response to the Moscas’ argument that a ruling in favor of Yankee would permit the republication of their essay an unlimited of times in Yankee Magazine, hurting the market for their work, the Court wrote:

While it is true, as the plaintiffs note, that a publisher theoretically could reprint an author’s article in the same magazine *ad nauseam* without further payment for the privilege, *see* Opposition at 6, the publisher could not reprint the article in any of its other publications, and the author would remain free to sell the article to different publishers. These are all significant rights favoring the author that did not exist, or at least did not clearly exist, prior to the 1976 revision. Moreover, on a practical note, it is difficult to imagine that any publisher hoping to increase or maintain its circulation would reprint the same article repeatedly in the same magazine. It is hardly surprising that, in this case, more than 20 years elapsed between the first and second publications.

**The precise issue was a novel one. According to the Court, “Insofar as appears from the case law cited by the parties and my own research, this discrete issue is one of first impression.”**

*Id.* \*6. The Court held, therefore, that pursuant to section 201(c) “an author is presumed to have ceded a publisher the right to reprint a contribution in a later edition of the same magazine, absent an express agreement otherwise.” *Id.*

As a fallback position, the Moscas had argued in their response to Yankee’s motion to dismiss that they in fact did have an express agreement with Yankee limiting the publication of their essay. If such an agreement existed, it had not been alleged in their initial complaint. They requested leave to amend their complaint to add this new theory, which the Court allowed.

Because the Court had agreed to allow amendment it also addressed Yankee's secondary argument that an allegation of willful copyright infringement is subject to *Twombly/Iqbal* pleading standards. *Id.* \*7. Here again, the Court agreed with Yankee. Following the holding in *Amini Innovation Corp. v. KTY Int'l Mktg.*, 768 F.Supp.2d 1049 (C.D.Cal. 2011) and rejecting contrary authority in *Blagman v. Apple Inc.*, No. 12 Civ. 5453(ALC)(JCF), 2013 WL 2181709 (S.D.N.Y. May 20, 2013) as "unpersuasive," the court held that "willfulness is an element of the statutory damages remedy that the plaintiffs seek[,] and is subject to *Twombly/Iqbal* pleading standards. The Court ordered that the Moscas willful infringement claim be dismissed with prejudice unless they amended their complaint to add facts "from which one could infer willful infringement." *Mosca*, 2015 WL 9304738 at \*5.

The case then settled.

*Defendant Yankee Publishing was represented by Jonathan S. Piper and Sigmund D. Schutz of Preti, Flaherty, Beliveau & Pachios, LLP in Portland, ME. Plaintiffs William and Susan Mosca were represented by James G. Goggin of Verrill Dana, LLP in Portland, ME.*

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# DMCA Protects Website Operator from Postings Made by Independent Contractors

## *Paid Contributors Are ‘Users’ Under DMCA Safe Harbor*

By Steven D. Zansberg

On April 25, 2016, the Tenth Circuit issued a published opinion on a matter of first impression, holding that paid independent contractor “stringer” contributors to a website constitute “users” for purposes of the DMCA safe harbor. [\*BWP Media USA, Inc. v. Clarity Digital Media Group, Inc.\*](#), No. 15□1154 (10th Cir. Apr. 25, 2016).

In so holding, the Court rejected the plaintiffs’ argument that paid contributors, acting pursuant to contractual duties and in accordance with general guidelines for content submissions, are excluded from that statutory definition of a “user.” Furthermore, because the website operator in this case satisfied all of the other statutory prerequisites for the safe harbor protection from copyright claims arising from “storage at the direction of users” on its server, it was entitled to immunity from plaintiffs’ copyright infringement claims. Accordingly, the District Court’s order granting summary judgment to the website operator was affirmed.

### Background Leading Up to the Ruling

Clarity Digital Media Group, LLC, n/k/a AXS Digital Media Group (hereinafter “Clarity”), is the owner and operator of the website Examiner.com. Examiner.com recruits, selects, and authorizes over 100,000 independent contractors, known as “Examiners,” who, once approved to do so, to post content on selected topics directly to their own webpage on Examiner.com. Other than reviewing, prior to publication, the first posting by each such Examiner, no one at Clarity reviews, edits, or approves any subsequent posting by Examiners to the Examiner.com website. Examiners post to Examiner.com on a broad variety of topics, from local government and high school sports, to national and international news, personal hobbies, and popular culture. Prior to being authorized to post content to Examiner.com, each Examiner must sign an independent contractor and license agreement, in which the Examiner commits to fully abide by Examiner.com’s Terms of Use and by its Editorial Guidelines. Both of those latter documents state, repeatedly, that Examiners are prohibited from posting any third-party content to Examiner.com without prior written permission from the copyright owner. Clarity also provides the Examiners with access to a library of professionally-taken photographs (Getty

**The Tenth Circuit issued a published opinion on a matter of first impression, holding that paid independent contractor “stringer” contributors to a website constitute “users” for purposes of the DMCA safe harbor.**

Images) for their use in posting photographs to accompany and illustrate their articles on Examiner.com, at no cost to the Examiners. Examiners who post two or more articles to the website per month are eligible to receive certain “incentive payments,” which are based upon the number of hits that the articles they post attract.

Since its inception in 2008, Examiner.com has prominently displayed contact information for its designated DMCA representative, which is also on file with the U.S. Copyright Office. Examiner.com promptly responds to and abides by DMCA take-down notices it receives. Examiner.com also has a repeat infringer policy, that is part of the independent contractor and license agreement, as well as its Terms of Use, and it has enforced that policy by terminating the posting authority of eleven Examiners.

### **Celebrity Photographs Prompt Copyright Troll to File Suit**

In early July 2013, the general counsel for Clarity received an unsigned letter, which was a standardized form, sent on behalf of two photo licensing groups, BWP Media USA, Inc., d/b/a Pacific Coast News, and National Photo Group, LLC. The letters were sent by their counsel, Craig Sanders of Sanders Law, PLLC, based in Garden City, NY.

Both Mr. Sanders and his clients are probably familiar to many of the readers of this publication. If not, simply search the terms “Craig Sanders copyright troll” in Google. According to Justia.com, BWP Media USA, Inc. has filed 232 lawsuits alleging copyright infringement as of May 2016.

In the July 2013 unsigned letter, Sanders asserted that twenty photographs owned by BWP Media (BWP) and/or National Photo Group (NPG) appeared, without permission, on the Examiner.com website. Sanders’ letter did not purport to be a DMCA take-down notice, but was instead a demand for payment of “statutory” damages for the infringements, as set forth in an unfiled federal court complaint that Sanders attached to that letter.

On July 24, 2013, AXS Digital responded to Sanders’ letter and notified him that it had been completely unaware of the presence of the putative plaintiffs’ photographs residing on the Examiner.com website, and that it had, as of that date, removed all such photos from its website. Clarity’s letter also noted that the company had no liability exposure for the posting of the photographs by independent third-party contributors, a/k/a Examiners.

Clarity did not hear anything further from Sanders until February 25, 2014, when the federal copyright infringement lawsuit was filed in the U.S. District Court for the District of Colorado. In that suit, BWP and NPG alleged that Clarity had committed direct, vicarious, and contributory copyright infringement by allowing the Examiners to post, without BWP’s or National Photo Group’s permission, 75 copyrighted photographs belonging to the plaintiffs.

**Examiner.com recruits, selects, and authorizes over 100,000 independent contractors, known as “Examiners,” to post content on selected topics directly to their own webpage on Examiner.com.**



### Summary Judgment Briefing and Ruling by the District Court

Shortly after filing its Answer, on May 15, 2014, Clarity moved for summary judgment, asserting that it was entitled to immunity under the safe harbor provision of the DMCA because all of the photographic works that served as the basis for the plaintiffs' claims had been "stored at the direction of users" of Clarity's interactive computer service platform, Examiner.com. And Clarity was entitled to such immunity because it had satisfied all of the requirements of 17 U.S.C. § 512(c).

Clarity noted in its briefing that it had promptly removed all of the photographs identified in the plaintiffs' complaint, and had so notified the plaintiffs. In support of its motion, Clarity filed two declarations from the head of content for Examiner.com and its former in-house general counsel, establishing that all of the Examiners were, in fact, independent contractors, that they had posted all of the photographs identified in the complaint at their own direction, and without any prior approval by, or discussion with, anyone at Clarity.

Clarity's declarations also established that Clarity had designated an agent with the U.S. Copyright Office for receipt of DMCA take-down notices, that it complies with proper DMCA take-down notices, and that it reasonably implements its repeat infringer policy. Lastly, Clarity's declarations established that Clarity did not and does not receive any direct financial benefit as a result of any particular posting to Examiner.com; that it instead derives revenues from web advertising that is not tied to any particular webpage, article, or photograph.

**Clarity moved for summary judgment, asserting that it was entitled to immunity under the safe harbor provision of the DMCA.**

In opposing Clarity's motion for summary judgment, BWP and National Photo Group argued that the safe harbor provision does not apply to Clarity in this case. Setting forth a novel theory, unsupported by any prior case law from any jurisdiction, plaintiffs argued that because the Examiners who posted the photographs at issue were "agents" of Clarity the safe harbor of § 512(c) did not apply because the Examiners did not fall within the intended definition of "users" of the Examiner.com interactive computer service. In the alternative, plaintiffs argued that Clarity had not shown, beyond any genuine issue of material fact, that it lacked (1) actual knowledge of infringing photographs being stored on its website or (2) an awareness of "facts or circumstances from which infringing activity is apparent" (a/k/a "red flags" knowledge); and (3) that it did not receive a financial benefit directly attributable to the infringing activity while having the right or ability to control such activity.

### District Court Opinion

On March 31, 2015, United States District Court Judge Philip Brimmer granted Clarity's motion for summary judgment. In a well-reasoned opinion, *available at* 2015 WL 1538366 and 114 U.S.P.Q.2d 1688, the court rejected plaintiffs' novel argument that the term "user" within

§ 512(c) of the DMCA was a “term of art” that meant something other than an individual who “makes use of” or “utilizes” an interactive computer service. Judge Brimmer agreed with Clarity that plaintiffs’ argument finds no support in the DMCA’s statutory text, its legislative history, or in any case law that has interpreted the provisions of § 512(c).

Indeed, in a case presently pending before the Second Circuit, *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500 (S.D.N.Y. 2013), the only case that had tangentially addressed this question, the issue that the court found would prevent the entry of summary judgment for defendant Vimeo was *not* whether the videos uploaded to that defendant’s website were loaded by a “user” when the undisputed evidence demonstrated that many of those videos had been loaded by Vimeo’s *employees*, *id.* at 518, but whether those videos were “stored at the *direction of*” those users or whether the infringing content was “stored at the *direction of*” Vimeo.

Thus, the District Court here concluded “that the Examiners are ‘users’ within the meaning of the statute. However, . . . the safe harbor protection does not extend to all user uploaded content, but only to content uploaded ‘*at the direction of* a user.’” § 512

(c)(1) (emphasis added).” Judge Brimmer restated the issue for the safe harbor under § 512(c)(1) as: “whether plaintiffs’ photographs were stored on defendant’s system at the direction of the Examiners at issue or whether plaintiffs’ photographs were stored on defendant’s system at the direction of [the] defendant.” This question, according to the District Court, could be answered by looking to the statutory provisions of § 512(c)(1)(A) – (C).

To this end, Judge Brimmer first found, based upon the undisputed record evidence, that there was no triable issue on the questions whether Clarity had either actual or “red flag” knowledge of the infringing works. Attempting to create a genuine issue of material fact, BWP relied on a set of e-mails that Clarity staff had sent out to subsets of Examiners, encouraging them to post articles and photo slideshows in connection with the “red carpet” outside of the Oscars® and other such Hollywood events. The District Court concluded that, notwithstanding these e-mails, there was no evidence from which a jury could conclude that Clarity played any role in actually directing any of the Examiners to post any of the infringing photographs at issue.

BWP also argued that Clarity should have been aware of the infringing nature merely by its very nature in seeking out articles with photographs from pop culture and celebrity events. Rejecting this contention, Judge Brimmer quoted the Ninth Circuit Court of Appeals in *UMG Recordings v. Shelter Capital Partners, LLC*, 718 F.3d 1006, 1022 (9th Cir. 2013), that “merely hosting a category of copyrightable content . . . with the general knowledge that one’s services could be used to share infringing material, is insufficient to meet the actual knowledge requirement under § 512(c)(1)(A)(i).” Likewise, the court ruled that “general awareness is insufficient to create a genuine dispute as to whether defendant had knowledge of or was

**Plaintiffs argued that because the Examiners who posted the photographs at issue were “agents” of Clarity the safe harbor of § 512(c) did not apply.**

willfully blind to the specific infringements alleged in this case.” *Id.*, citing *UMG Recordings v. Shelter Capital Partners, LLC*, 718 F.3d at 1023.

Judge Brimmer also found that there was no triable issue whether Clarity received a “financial benefit directly attributable to the infringing activity.” Rejecting plaintiffs’ argument that Clarity was cut from the same cloth as the infamous Mr. Fung and other internet defendants who were found to have *induced* infringing conduct, Judge Brimmer ruled “there is no evidence that defendant marketed to advertisers by pointing to infringing content, that users considered Examiner.com an reliable source of infringing content, that any users visited Examiner.com because it hosted infringing content, or that defendant actively promoted infringing content as a way of attracting more page views.” 2015 WL 158366 at \*10. As a result, the District Court granted Clarity’s motion for summary judgment and dismissed all of plaintiffs’ claims for direct copyright infringement and on their theories of secondary copyright infringement liability.. *Id.*

### **Tenth Circuit Affirms Grant of Summary Judgment**

Undeterred by the district court’s categorical rejection of its arguments, BWP and NPG appealed Judge Brimmer’s ruling to the Tenth Circuit. Following full briefing and oral argument, the Tenth Circuit issued its ruling on April 25, 2016, fully affirming Judge Brimmer’s rulings below.

Like the district court, the Tenth Circuit rejected BWP’s contention that the word “user” should be wrenched out of its context in the DMCA safe harbor and given an independent statutory meaning: “BWP attempts to divide [the safe harbor provision] into two distinct inquiries, asking who is a ‘user’ and who directed the infringing content to be stored. . . . The key to interpreting this requirement is not to isolate certain words but rather, to take the provision as a whole, giving meaning to each word in context.” Slip. Op. at 6.

The Tenth Circuit rather easily concluded that “the word ‘user’ in the DMCA is straightforward and unambiguous. Simply put, a ‘user’ is ‘one that uses.’” *Id.* On this front, the Tenth Circuit summarily rejected plaintiffs’ fallacious claim that applying the plain meaning of the word “user” would automatically render *all* ISPs immune from liability for *any* content posted by literally anyone: “Safe harbor protection is conditioned on various factors: An ISP will only qualify for safe harbor protection when it can show, *inter alia*, that the content was stored at the direction of a ‘user,’ that the ISP had no actual knowledge of the infringement, that there was no surrounding facts or circumstances making the infringement apparent, or that upon learning of the infringement, the ISP acted expeditiously to remove or disable access to the infringing material.” Slip Op. at 8, citing 17 U.S.C. § 512(c)(1)(A).

The Tenth Circuit expressly rejected plaintiffs’ argument that Clarity could not avail itself of

**The Tenth Circuit rejected BWP’s contention that the word “user” should be wrenched out of its context in the DMCA safe harbor and given an independent statutory meaning.**

the safe harbor immunity provision because the Examiners function as Clarity’s “agents.” First, the Tenth Circuit noted, the contractual agreement between the Examiners and Clarity expressly declared that the Examiners are to perform their services as independent contractors, and are not to be deemed an “agent, employee, legal representative, partner, or joint venturer” of Examiner.com.

Next, the Tenth Circuit rejected plaintiffs’ contentions that Examiners operate under “apparent authority” of Examiner.com, finding there was no “evidence of any agency relationship or any apparent authority.” Finally, the Tenth Circuit stated, that even if the Examiners did have apparent authority, which they do not, “this does not equate to an employee-employer relationship,” citing *Community for Creative Nonviolence v. Reid*, 490 U.S. 730, 741 (1989). The Tenth Circuit noted that “nowhere in *Reid* is there anything to support the assertion that apparent authority would automatically transform an agent into an employee.” Finally, the Tenth Circuit stated that the master-servant versus principal-agent distinction was meaningless in this context in any event: “Simply because someone is an employee does not automatically disqualify him as a ‘user’ under § 512.” Slip Op. at 10.

Casting aside BWP’s claims that a plain language interpretation of the word “user” would lead inevitably to a “lawless no-man’s land,” the Tenth Circuit held that “the relevant question isn’t who is the ‘user,’ but rather, *who directed the storage of the infringing content?*” Slip Op. at 10 (emphasis added). Thus, the court stated that “[w]hen an ISP ‘actively encourage[s] infringement, by urging [its] users to both upload and download particular copyrighted works,’ it will not reap the benefits of § 512’s safe harbor. . . . However, if the infringing content has merely gone through a screening or automated process, the ISP will generally benefit from the safe harbor’s protection.” Slip Op. at 10 (citations omitted). Again, surveying the record evidence put before the district court, the Tenth Circuit agreed with Judge Brimmer that “no reasonable trier of fact could find that the infringement [placed at issue in BWP’s complaint] was [done] at the direction of [Clarity].” Slip. Op. at 11. For these reasons, the Tenth Circuit concluded that Clarity had fully satisfied the initial threshold showing that is required to invoke the DMCA safe harbor of § 512(c).

Turning to the statutory conditions that would entitle an ISP to the protection of § 512(c)’s safe harbor, the Tenth Circuit again echoed Judge Brimmer’s finding that merely hosting a category of copyrightable content, such as music videos or photographs of Hollywood celebrities, with general knowledge that one’s services could be used to share infringing material, is not sufficient to qualify as either the actual or “red flag” knowledge requirements for defeating the DMCA safe harbor. Slip Op. at 12-13.

Finally, the Tenth Circuit held that plaintiffs had waived any argument that because the Examiners function as agents of Clarity, their *individual knowledge* of their infringing uses of the photographs should be imputed to Clarity for purposes of defeating the safe harbor. However, given the Tenth Circuit’s finding that, as a matter of law, the Examiners are not agents of Clarity, there would be no basis for imputing such knowledge in any event.

The Tenth Circuit’s ruling thus provides protection to website operators who (1) recruit

contributors, (2) compensate the contributors as independent contractors, (3) make clear that copyright infringement by contributors is not permitted, and (4) otherwise fully comply with all of the statutory prerequisites for an ISP under § 512(c)(1)(A) – (C) to qualify for the “storage at the direction of a user” safe harbor. Because numerous websites, like Examiner.com, operate in this fashion, the court’s ruling fully supports Congress’ objective in providing this federal statutory immunity: to promote the creation and sharing of diverse creative content on the internet.

*Steve Zansberg and Christopher P. Beall, of Levine Sullivan Koch & Schulz, LLP in Denver, CO represented Clarity Digital Media Group. BWP Media USA and National Photo Group were represented by Craig Sanders and Jonathan Cader of Sanders Law PLC in Garden City, NY.*



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(Continued from page 10)

environmental problems is trying to end its defamation case against two activists, but [they don't want to let the plaintiff out of the case](#) without an apology and a fee award.

[Alan Dershowitz's legal woes in Florida](#) have apparently come to an end, with cross-claims for defamation arising out of the Jeffrey Epstein sex trafficking case withdrawn by the parties. The accuser's lawyers have suggested that there [might have been a case of mistaken identity](#). The mind boggles. We also learned of confidential settlements this month in: a D. Me. case between the [CEO of a paper company and an industry newsletter](#) over use of the term "convicted" referring to a civil suit; an Illinois lawsuit between a [Chicago dentist and the local ABC affiliate](#) over an investigative report; and a Florida suit between the [Miami Herald and former U.S. Senate candidate Jeff Greene](#) over allegations of yacht parties and questionable real estate deals (a [parallel case](#) against the *Tampa Bay Times* continues).

And if you were wondering what "Jackie" would have to say under oath in the Rolling Stone case, you'll have to keep wondering; while [she was ordered to testify, her testimony has been sealed](#).

### *Appeals*

The Cosby mess also bubbled up to the California appellate courts this month, with Janice Dickinson [appealing the dismissal of her claims against Marty Singer](#). Again, tough remembering which side I'm on here. Another Cosby accuser is [appealing the dismissal of her own defamation case](#) to the Third Circuit.

Moving one state over, the Nevada Supreme Court heard argument in a defamation case brought by, quelle surprise, Sheldon Adelson; the Second Circuit had certified to Nevada the question of whether a [hyperlink to a report of an official proceeding](#) can support invocation of the fair report privilege.

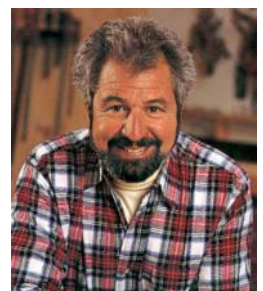
Meanwhile, the Texas Supreme Court [declined to review a ruling awarding fees and expenses](#) to Univision after dismissal of a Dallas attorney's defamation claim. And Florida's Second District Court of Appeal issued a [per curiam order](#) affirming the dismissal of defamation claims brought by a real estate lawyer against the *Sarasota Herald-Tribune* over an article about her mortgages.

### **Privacy**

#### *Right of Publicity*

Not much to report this month, following last month's key decision by the Ninth Circuit in *Sarver* (on which the panel has now [denied rehearing](#)) and the Supreme Court's denial of cert in *EA v. Davis*.

There's a new case in N.D. Ill., in which home improvement guru [Bob Vila sued a PR specialist](#) who, without permission, allegedly licensed Vila's name for



others' use. We also saw a defense win in an S.D.N.Y. case against Huntington Learning Center over the [use of actor likenesses in a commercial](#), after it was demonstrated that the actors had consented to the continuous replay of the ad.

### *Disclosure of Private Information*

No surprise, Gawker has [filed post-trial motions](#) to undo last month's \$140M verdict in the Hulk Hogan sex tape case. As I discussed last month, Gawker has some good arguments, but it's anyone's guess whether this particular judge will be more inclined to listen after seeing what earlier rulings have wrought. Hogan's lawyers are not resting, either; they've [sought access to Gawker's financial information](#) to see if the company's net worth is really as low as advertised.

On a related note, Erin Andrews has reached a [settlement with the operators of the hotel](#) where a peeping tom secretly filmed her, with respect to their portion of the \$55 million judgment. A New York hospital settled a claim over its allowance of a TV crew to [film two patients without their consent](#), agreeing to pay \$2.2 million.

The [MPAA is opposing a bill to criminalize revenge porn in Minnesota](#), citing First Amendment concerns with the breadth of the bill and its potential impact on "items of legitimate news, commentary, and historical interest." And after a heated debate, Vermont [rejected an amendment to its constitution](#) that would enshrine a right to privacy.

Finally, Consumer Reports became the target of allegations in S.D.N.Y. that it [sold its readers' subscription data](#) in violation of state law. Is that ironic? I can't tell.

**Consumer Reports®**

### **Access/FOIA**

#### *New Cases*

Another square in Trump bingo filled this month, as the *Washington Post* seeks to unseal documents in a class-action against the Orange One over [alleged racket Trump University](#). Media entities showed up on either side of an access battle in N.Y. state court, as the *San Antonio Express-News* and the *New York Daily News* sought access to [sealed records in cases involving Maxim magazine](#). In S.D.N.Y., the *New York Times* filed a pair of cases against the CIA and the Army, claiming that the Times' FOIA requests for documents concerning [chemical weapons in Iraq](#) were improperly denied. In the U.S. Virgin Islands, the *Virgin Islands Daily News* is suing under the territory's Open Records Act for documents on [public funding of private individuals and businesses](#).



Terrorism, surveillance and foreign intelligence were the subject of a number of new actions this month, including two journalist-initiated cases in D.D.C.: one attempting to unseal documents in [Abu Zubadayah's habeas corpus case](#), and another attempting to access [Homeland Security's file about the journalist himself](#). In N.D. Cal., EFF has sued the DOJ for access to [Foreign Intelligence Surveillance Court opinions on decryption](#). Finally, a group of nonprofits has filed a new suit against the United States over [fees for use of PACER](#).

### *Pending Cases*

Judicial Watch and the State Department have come to terms regarding the [scope and conduct of the depositions of three former aides to Hillary Clinton](#) in the ongoing FOIA fight over the former secretary of state's private e-mail system. The deal specifically identifies the subject matter about which the deponents may be questioned.

A few state supreme court arguments to note:

- Michigan: [How to define a "public official"](#) in the context of the state's open meetings law.
- Ohio: Whether police can [withhold files in criminal cases](#) until all chance of appeal is gone.
- Montana: Whether bestselling author Jon Krakauer is entitled to documents about the University of Montana's [decision to vacate the expulsion of Grizzlies QB Jordan Johnson](#) despite the school finding him guilty of rape.

And in the Third Circuit, a panel of judges was skeptical of whether [resealing publicly available documents](#) relating to an old case against Bill Cosby would serve any purpose.

### *Victories*

Media coalitions obtained access to sealed documents in several cases this month, including the [Gawker-Hogan trial in Florida](#) and the case of a [Planned Parenthood shooter in Colorado](#). The upcoming [trial over the health and care of Sumner Redstone](#) in California will be public, according to a ruling by the trial judge. The Commonwealth of Kentucky settled with the *Courier-Journal* and the *Lexington Herald-Leader* for approximately \$700K in a case over [records of child abuse deaths and injuries](#).

There were a few broad rulings as well: the Florida Supreme Court made clear that open records violations [trigger liability for attorneys' fees](#); the New Hampshire Supreme Court held that the public has a right to [government records in electronic format](#); and the Texas Court of Appeals held that public officials must disclose their [personal e-mail addresses if used for public business](#).



*Defeats*

With the spring upon us, I must admit that living in New York I miss the New England tradition of discovering all of the new potholes that were hidden by snow during the winter. (Yes, New Yorkers, [your roads are bad too](#), don't be jealous.) And indeed in the courts of New England, the road to access was not running smooth this month. The Supreme Court of the State of Rhode Island and Providence Plantations – remember the full name if you're ever in court there, because the judges have been known to quiz visitors – denied the *Providence Journal* access to [police records relating to a party at the governor's home](#) that resulted in the hospitalization of a minor. Further west, a superior court judge in Connecticut overturned an administrative decision to release [personal documents of the Sandy Hook shooter](#).

A New Jersey appellate court has held that the state did not have to create [an e-mail log that did not exist](#) in response to a records request, even if the information to be contained in such a log was stored electronically in other records. Look, the idea that the government doesn't have to create a record for you is well established, but the definition of a "record" has been getting murkier ever since the advent of digital databases. This is particularly true with search technology that allows many different views into data irrespective of the formal file structure into which that data is categorized. It is more or less arbitrary to claim that the particular view dictated by the file structure is a record while a view permitted by a search function is not.

A panel of the Ninth Circuit regrettably affirmed a district court's decision allowing the FDA to withhold information regarding egg-production farms. The court went so far as to issue a "[per curiam concurrence](#)" questioning the standard for appellate review of summary judgment grants in FOIA cases, suggesting that the case might have come out differently under a more liberal standard and urging the full court to reconsider. (I'm still trying to figure out why, if the whole panel agreed to the "concurrence," it wasn't simply part of the opinion. At least – with all due respect to Mr. Dooley – it wasn't a unanimous dissent.)

Finally, the D.C. Circuit rejected a bid by the ACLU to gain access to [DOJ records about drone strikes](#).

*Legislation*

On the federal side, a new House bill would bring [National Security Council records under FOIA](#), overturning a 1996 decision of the D.C. Circuit that the NSC is not a federal "agency" subject to the law. The Congressional Research Office has also released a helpful [summary and analysis of FOIA legislation](#) in the 114th Congress.

In the states, Gov. Terry McAuliffe of Virginia signed a bill requiring government agencies to release [nonexempt portions of public records](#) containing some exempt content; the bill overturned a decision of the Virginia Supreme Court allowing the withholding of entire

records. A [Kansas bill](#) would shut down the ability of public officials to hide their activity by using private e-mail accounts.

Unfortunately, Georgia has passed a bill we mentioned last month, allowing university athletic departments an [extended period to respond to public records requests](#). Let's keep that campus coverage light and fluffy, folks.

### **Newsgathering** *Courtroom Battles*

A questionable victory for the student press this month in the Ninth Circuit, with a ruling that a student journalist stated a First Amendment claim that he suffered retaliation as a result of his reporting – but with a statement that [“asking hostile questions and videotaping” might be punishable](#) as behavior “threatening or endangering health or safety.” Light and fluffy, I said.

The [family of murdered journalist Steven Sotloff](#) has filed a federal action against Syria in D.D.C., accusing the country's government of supporting Islamic State militants. In Missouri, [two journalists arrested in the Ferguson protests](#) are fighting the denial of their motions to dismiss the charges against them, filing petitions to terminate the cases.

### *Legislative Issues*

Commercial drone use moves ever closer to reality, with the [Senate passing the FAA Reauthorization Act](#) with provisions that would open up commercial use of small drones. The bill would also preempt state and local drone regulation (so that, for example, [Utahns](#) wouldn't be able to blow them out of the sky).



### *Other*

As I commented in a [research study](#) I published a couple of years ago, credentialing is one of the most important and least regulated intersections of press and government. I took this opportunity for a blatant plug because a pair of credentialing issues cropped up this month. The [Arizona House](#) denied several media organizations access after the organizations refused to allow House staff to conduct criminal and civil background checks on reporters; after the inevitable backlash, the House [dropped the requirement](#). The Secret Service, meanwhile, has taken on a disturbing new role in controlling press access to the [Democratic and Republican National Conventions](#) later this year, which had previously been the domain of the Congressional press galleries.

Finally, we should note the international reporting coup that is the [Panama Papers](#), with 400 journalists in more than 80





countries working in secret for a year to bring to light stories derived from 2.6 terabytes of data about Panamanian law firm Mossack Fonseca. (That's about 3,640 full CD-ROMs of material, for those of you who might wonder how many associates the document review would take. And if you just said, "Two, in a basement with a vending machine," shame on you.) Already the reporting has revealed a vast scheme to hide the assets of some of the world's most wealthy and powerful people. The consortium behind the reporting has also made clear that [it won't turn over materials to the Manhattan U.S. Attorney](#) in connection with a criminal probe launched as a result of the disclosures, so we'll watch this one for a reporters' privilege issue in coming months.

### Prior Restraint

The Massachusetts Supreme Judicial Court held this month that a "[harassment prevention order](#)" sought by a local planning board member against a critic was blatantly unconstitutional, and could support a malicious prosecution claim against the politician. In Wisconsin, a trial court judge denied a [gag order requested by the state](#) in a securities fraud case. On the other hand, a federal judge in N.D. Cal. who held that [National Security Letter gag orders](#) are unconstitutional has now changed her mind, citing changes in the law.

And the saga of the Planned Parenthood hidden-camera sting rolls on, with agents from the California state AG's office [seizing video files](#) from the apartment of the Center for Medical Progress activist who shot the video. Sure, that will help matters.

### Broadcast/Cable/Satellite

So, the big news of the month is that the [FCC and DOJ have approved Charter Communications' acquisition of Time Warner Cable and Bright House Networks](#), but not without conditions – including a prohibition against data caps on internet plans. The DOJ has filed a pro forma complaint against the various entities in D.D.C., along with a proposed final judgment that would back up the DOJ's conditions with enforcement authority in court. I look forward to the new branding on my cable bill.



The FCC's spectrum auction launched, with the agency [already deeming it a success](#) based on broadcaster participation and the spectrum available. The FCC was also involved in a couple of Comcast broadcast discrimination fights, receiving a complaint that [Comcast is bolstering its Spanish-language subsidiaries](#) at the expense of Estrella TV, and being sued itself in the D.C. Circuit over its dismissal of discrimination charges [brought against Comcast by the Tennis Channel](#).

Finally, the FCC's plan to [facilitate set-top box coalition](#) continues to draw comments and criticism, including [support from the White House](#), a [wide variety](#) of [industry commentary](#), and

a [request by the FTC](#) that any FCC rules do not interfere with the other agency's ability to regulate privacy.

### **Internet/New Media**

#### *Net Neutrality/FCC*

Inspired by the classic FDA nutritional information labels, the FCC has introduced [broadband "nutrition" labels](#) in order to promote better understanding of ISP services. ISPs that use the labels will qualify for a safe harbor for compliance with the Open Internet Order's transparency requirements.

At the end of the month, the FCC proposed [new rules for "business data services"](#) to put cable companies on the same footing as telcos when it comes to pricing bandwidth for data networks. Meanwhile, [the House has passed a measure](#) (H.R. 2666) that would gut the FCC's ability to pursue ISPs for unfair pricing. The White House has [promised to veto](#) the bill.

#### *Section 230*

A win cloaked in a loss for Google this month, as the Fifth Circuit held that the [search giant's efforts to shut down Mississippi AG Jim Hood's investigation of the company were premature](#). At the time that Google filed suit, the court held, Hood had made nothing more than vague threats and issued a non-self-enforcing subpoena. But the court also made clear that Google could properly file a new federal action if Hood were to take things further, and heavily hinted that any further enforcement efforts would be inconsistent with Section 230 and other federal laws. Google has [moved for reconsideration, while Hood has withdrawn](#) the original subpoena.

Google also had a straight-up 230 win in California's appellate courts, in a case involving a takedown demand directed at [search listings for an allegedly defamatory Ripoff Report post](#). It didn't help that the plaintiff waited six years to sue.

Online commercial arrangements seem to be a soft spot for Section 230 protection lately. Last year, we had the [FTC v. LeanSpa](#) decision, which was vague at best as to exactly what the intermediary did besides pass communications back and forth. Now, we have [Congoo v. Revcontent](#) from the District of New Jersey, which held that claims against a native advertising broker survived a motion to dismiss based on vague allegations of responsibility for content without any specific allegations as to the content the broker allegedly created. As I've commented before, with the quantum leaps in the complexity of online business relationships since the early days of Section 230, there is an increasing danger that courts will throw up their hands and assume some degree of responsibility for content.

#### *Fantasy Sports*

Fantasy sports continues to take up a surprising amount of legislative effort. The Commerce,

Manufacturing, and Trade subcommittee of the U.S. House has scheduled a [hearing on the legality of the games](#) for next month. In the states, the [AGs of Alabama and Tennessee](#) have come out against fantasy sports, though the [Tennessee legislature overrode its AG's opinion](#), passing a measure to legalize and regulate games.

### *Hate, Threats & Terror*

Less about terror this month than run-of-the-mill misery, with the [Guardian conducting an in-depth study](#) of nastiness in its website comments and [Reddit strengthening the tools](#) it offers to avoid other users – including not only those users' comments but entire threads that they created. By the way, if you decide to harass someone online, [don't count on your homeowner's insurance](#) for defense costs; a federal judge in W.D. Wash. held that a State Farm exclusion for intentional conduct let the insurer off the hook in a cyberharassment case.

Oh, and remember those halcyon days when Sarah Palin was the weirdest thing about the Republican ticket? Well, she's back, [threatening a lawsuit against rapper Azealia Banks](#) over tweets advocating that Palin be sexually assaulted; apparently, Banks took seriously a parody article attributing insensitive comments about slavery to Palin. I tend to agree with [Jack Greiner](#) that this one isn't going anywhere.

### *Miscellaneous*

- The Kentucky Supreme Court heard argument this month on whether [anonymous critics using the website Topix](#) can be unmasked in a suit for libel by a local politician.
- A judge in W.D. Wash. held that Amazon can be held liable for [failing to get parental consent for in-app purchases by kids](#), in a lawsuit brought by the FTC. The opinion was redacted, but a [technical glitch](#) revealed the redacted portions.
- BET has settled a case pending before the 11th Circuit over the [ownership of Facebook likes](#) on a fan page, on undisclosed terms.
- California jurors who misuse the internet to research or discuss trials on which they are sitting could be [fined up to \\$1,500 if a new state bill passes](#).
- AMC Entertainment is facing an Americans with Disabilities Act class action in S.D.N.Y. alleging that the [ticket-purchasing function of its website](#) is inaccessible to blind people.

### *Streisand Awards*

We won't do this every month (I hope), but we have two Streisand Award winners in April: [UC Davis](#), for dumping \$175,000 into reputation management companies who promised (incorrectly) they



could suppress bad online press about a November 2011 incident where students were pepper-sprayed; and [Florida Senate candidate David Jolly](#), who attempted to delete references to the Church of Scientology from his own Wikipedia entry. [Well done, both of you](#).

### **Internet Privacy**

#### *Hacking/CFAA*

Intrigue under the California sun in the case of journalist Matthew Keys, [sentenced to 24 months in prison](#) for facilitating the defacement of the L.A. Times website. Less than two hours before the sentencing hearing, a [detailed but anonymous letter](#) was delivered to the press taking responsibility for the hack and claiming that Keys was innocent. The parties and the court had received the letter earlier, but—with no way to verify its claims and no time left to investigate—had disregarded it. Will the mystery confessor come forward, and provide a basis for *habeas* relief? Will some other hacker dox the sender? Stay tuned.

A new bill in Rhode Island would create [a state-level CFAA](#). The bill has drawn criticism for penalizing access to information designated as confidential even if it is not protected from access in any way.

[Sony will pay out about \\$15 million](#) to settle the class action over disclosure of personal information in connection with the massive hack at the end of 2014. But if you want cash out of the Ashley Madison class action in connection with that notorious hack, don't expect to be able to collect secretly – a judge in E.D. Mo. has [disallowed pseudonymous claims](#) in the case.

#### *Control of Personal Information*

With all due respect to [Yakov Smirnoff](#), on the internet, TV watches you. The [FTC is looking into smart TVs](#), the use of viewing habit data by the ad industry, and transparency to consumers. Meanwhile, Senator Al Franken is conducting a similar inquiry into the [Oculus Rift virtual reality device](#), which offers opportunities to collect [whole new categories of data](#) about its users' digital activity. Think about it.



Finally, the First Circuit dropped a bombshell opinion applying the Video Privacy Protection Act to mobile apps, holding that [Gannett potentially violated the VPPA with its USA Today app](#). The app was alleged to disclose the titles of watched videos to Adobe along with a device identifier and GPS coordinates; moreover, the court held that the plaintiff was a “subscriber” under the app even though he never paid any subscription fees or incurred any continuing obligations.

#### *Encryption & Other Security Measures*

The highly-publicized Apple cases are coming to a close, with the final dismissal of the San Bernardino case, a [voluntary disclosure of a passcode](#) short-circuiting the E.D.N.Y. case, and

strong encryption meaning that Apple [lacks the ability to access data](#) on a phone at the center of a D. Mass. case. The government [doesn't seem to have found very much](#) on the California phone, and [isn't telling Apple](#) how the hack was done (though admitting that it cost [\\$1.3 million](#)); Apple [doesn't seem concerned](#), especially since the FBI has admitted that the California hack [doesn't work on newer phones](#).

It might seem like a colossal waste of time and effort with no clear resolution, but the issues are important and won't go away. As expected, [WhatsApp has switched on end-to-end encryption](#) on its service. On the other side of the equation, the FBI has [promised to share](#) its [1337 hax0r skillz](#) with local law enforcement. A [widely-reviled Senate bill](#) would criminalize device manufacturers' use of encryption that they cannot break themselves; the [White House](#) isn't backing it, and Sen. Ron Wyden is [threatening a filibuster](#). A similar California bill was [introduced and quickly defeated](#).

We'll delve into all of this next month at [Legal Frontiers in Digital Media](#), [so register already!](#)

### *Internet Surveillance*

Wait, is that motion on [Stored Communications Act](#) reform that I see? Why yes! The House [unanimously approved the Email Privacy Act](#), which would require a warrant to obtain older e-mails from tech companies. It's still got to make it past the Senate, of course, but it's a good start. Microsoft has also filed a new suit in W.D. Wash. [challenging the DOJ's use of gag orders](#) banning the company from letting people know that the government has obtained a warrant for their e-mails.

### *Transatlantic Privacy*

The WP29 has finally issued its [verdict on the new EU-US Privacy Shield](#): “not acceptable.” While praising the new pact as a “great step forward” from the old Safe Harbour, the group said that exceptions permitting mass surveillance of EU citizens are still triggering privacy issues.



### **Intellectual Property**

I owe you some answers, though no one guessed correctly: “uncopyrightable” is the longest English word with no repeating letters; “facetiously” contains all five vowels plus y in alphabetical order; and “strengths” has the highest consonant-to-vowel ratio of any standard English word (i.e., excluding irregular onomatopoeic terms like “tsktskings” and the trivial case of individual letters being considered the “word” for that letter). Actually, no one guessed



at all, meaning that I either need to make my quizzes simpler or that you aren't into linguistic puzzles.

Or, of course, that no one is reading these articles, but that would send me into an ontological spiral (if no one reads an article, is anyone *writing* them?), so I'll just keep going.

### *Copyright – New Cases*

I have to start with this case from C.D. Cal.: the [Ultimate Armwrestling League is suing the World Armwrestling League](#), saying that the WAL televised a photo of a former UAL star flexing his biceps without permission. So, first – there's such a thing as an armwrestling league? Second – there's more than one? Third – there's such a thing as an armwrestling *star*? I thought these were things that Sylvester Stallone just made up for [Over the Top](#), a movie whose [domestic gross](#) makes me feel better about the size of my own audience.



Not to be outdone, normal (I use that term advisedly) [wrestlers have charged into the ring](#) with a would-be class action against the WWE in D. Conn., claiming that the performance artists have been deprived of their fair share of streaming revenues from Netflix and the company's over-the-top network. Which has nothing to do with Sylvester Stallone.

We've also got: Oxygen Media hit with a lawsuit in N.D. Fla. by a woman who claims "[Preachers of L.A.](#)" ripped off her idea; Kendrick Lamar sued in C.D. Cal. by Bill Withers' publisher, who claims Lamar's "[I Do This](#)" infringes "Don't You Want to Stay"; a photographer suing Robert Mapplethorpe's foundation and a group of art galleries in S.D.N.Y., alleging that his [photos of the artist have been falsely sold as self-portraits](#); and the legal team behind the "Happy Birthday" case intent on bringing "[We Shall Overcome](#)" into the public domain.

In C.D. Cal., there's a new suit between GDC Technology and Dolby Labs over the [interoperability codes](#) that allow different elements of digital theater systems to work together. And in E.D.N.Y., Dish Network has sued a [Hong Kong-based streaming service](#) alleged to be transmitting unlicensed content into the U.S. from China.

### *Copyright – Pending Cases*

Led Zeppelin is going to trial in C.D. Cal. over claims that it stole the opening chords of Spirit's "Taurus" for "Stairway to Heaven"; the defendants' summary judgment motion went over like a...well, you know...with the court holding that [substantial similarities were enough to go to a jury](#). The potential jurors will face [questioning on their knowledge of classic rock, music downloading, and more](#). The jurors *won't* hear about Led Zeppelin's drug use, wealth or history of plagiarism, and the



judge has strictly limited the [sound recordings and expert testimony](#) that the plaintiff can present at trial.

Google and Oracle have agreed [not to conduct internet research on their jurors](#) at the second API copyright trial in the Northern District of California. Judge Alsup is [continuing to drop orders to keep the trial from getting out of hand](#), including limiting the use of photos to remind the jury of who the witnesses are. Apparently in some past trial the judge sat on, a lawyer photoshopped a picture of one of the opposing side's witnesses to make her look like "the Wicked Witch of the West." It's starting to feel like Alsup is driving a car with two kids in the back, and is preemptively threatening to climb back there if they don't behave.

Turning to defense wins in the district court, what do "a winged, taxidermied horse that appears to be in the process of breaking through the roof of a sleek lowrider" and "a massive, pink stuffed animal—specifically, a hybrid of a unicorn and Pegasus—strapped to the roof of a Toyota RAV4" have in common? Apparently [ideas but not expression](#), according to a judge in S.D.N.Y. who rejected a claim by creator of the former against the ad company behind the latter. By the way, the correct term for a unicorn/pegasus hybrid is apparently "[alicorn](#)," as I learned while researching the *My Little Pony* font copyright case in February. There goes another neuron.

In N.D. Tex., a website operator defeated a secondary infringement claim brought by celebrity photo licensing service BWP Media; while [the site fumbled its DMCA protection](#) by failing to register a copyright agent, the claim failed on its merits due to a lack of evidence that the site profited from the alleged infringement. In the wake of the Google Books cases, Cambridge University Press hit a wall with its claims against Georgia State University in N.D. Ga., with the court finding that the vast majority of the [university's "e-reserve" system](#) fell within the bounds of fair use. Everyone's favorite humanitarian [Martin Shkreli was dropped from a lawsuit](#) over the cover art on a unique Wu-Tang Clan album that he owns, which—schadenfreude aside—was probably the right result. And plaintiffs in music cases had a couple of defeats, with a judge in S.D. Fla. finding that rapper Rick Ross [didn't have a registered copyright for "Hustlin'."](#) and Marvin Gaye's family [left on the hook for their attorneys' fees](#) by C.D. Cal. in the "Blurred Lines" case (Gaye's family is appealing the ruling).

Universal Music and Capitol Records are headed to a jury in C.D. Cal. with a lawsuit against worldwide providers of in-flight entertainment over [airline in-flight music](#). The plaintiffs obtained a partial summary judgment ruling against the defendants, holding that they never licensed the plaintiffs' music.

Finally, in the *Axanar Productions* lawsuit, a language society has grabbed its [bat'leths](#) and waded into the fray with an amicus brief arguing that the [Klingon language is not protected by copyright](#).



*Copyright – Appeals*

There was a [major DMCA win in the Tenth Circuit](#) for online publishers this month. Examiner.com relies on independent contractors for the content on its “dynamic entertainment, news and lifestyle network”; BWP Media (the same photo licensing service mentioned above) sued the operators of the site for infringement. The court held that the site could claim DMCA protection for material posted by its freelancers; but more strikingly, the court held that even if the freelancers were considered employees, such a finding would not automatically disqualify the site from the DMCA safe harbor. The court further found that the site lacked actual or circumstantial knowledge of infringement. Notably, the court did not consider whether the knowledge of the freelancers could be imputed to the website on agency principles, because that argument had not been presented below.

In the Second Circuit, all eyes are on digital music. In one of the many “Flo & Eddie” cases, the court certified the question of whether New York law grants [performance rights in pre-1972 sound recordings](#) to the New York Court of Appeals. Meanwhile, the application of the [“first sale” doctrine to digital media](#) is on its way to the Second Circuit in a battle between used digital music market ReDigi and Capitol Records.

In the Ninth Circuit, [FilmOn picked up some support](#) from the Consumer Federation of America, which submitted an amicus brief arguing that granting the Aereo knockoff a compulsory license would create much-needed competition in the paid television space. The court also heard argument in a case involving [Madonna’s “Vogue.”](#) where the plaintiff sought reinstatement of its claim that sampling a single horn chord could be infringing. And finally, the Ninth Circuit held that the Clint Eastwood baseball flick [Trouble with the Curve](#) didn’t infringe the plaintiff’s script, citing numerous differences between the two. (I contemplated a baseball pun there, but...no.)

*Copyright – Other*

The period for submitting comments to the Copyright Office in connection with its wide-ranging Section 512 Study came to a close this month, and [more than 90,000 submissions](#) were received. [Some daring folks have](#) dug in to find some of the more interesting responses.

Recently I reported on a scam by a reputation management company that was filing bogus defamation cases to secure content removal orders in default judgments. This month has revealed another approach: [creation of fake news articles](#) incorporating the content to be removed, which are used as the basis for bogus DMCA notices.

Unlike Judge Garland, Dr. Carla Hayden – the President’s nominee to become the new Librarian of Congress – [did get her Senate hearing this month](#). Everything appears on track there, for what most folks seem to agree is a needed change.

*Patent*

A blow for those [seeking to shut down E.D. Tex. as a favorite for forum shoppers](#); the Federal Circuit held that if you ship into a federal district, venue is proper there. I can just see the Eastern District reverting to the stone age as manufacturers halt all technology at the border.

Apple settled a dispute in N.D.N.Y. with a patent troll over its [“Siri” voice system](#) for \$25 million. The Federal Circuit granted a pair of defense wins to Google in two cases, one involving a patent for a [desktop notification system](#), and the other a patent for [geographic searching](#). And in that weird case about a Spider-Man toy patent, Marvel Entertainment was [denied its attorneys’ fees](#) connected to an earlier win on patent royalties.

**Commercial Speech***Trademark*

A new trademark suit from Beyoncé this month, whose name is so well known that Microsoft Word corrected me when I inadvertently left off the accent over the last “e.” She’s suing an online company selling clothes and other products under the [“Feyoncé” label, using the tag line “He put a ring on it.”](#) See, it’s kind of a play on words, with “Feyoncé” clearly echoing the singer’s name while also sounding like “fiancée,” while riffing on Queen Bey’s “Put a ring on it” lyric, and...yeah. Anyway, she is not amused.



Booking.com has filed a lawsuit in E.D. Va. to compel the USPTO to [register the site’s name](#) as a trademark; the TTAB found that the name was descriptive and lacked secondary meaning. Atari, meanwhile, is trying to persuade the TTAB that it alone has the right to use the term [“Haunted House” in connection with interactive entertainment](#). I guess when your company is a ghost of its former self, it’s only (super)natural to try to scare off folks who want to move into your patch.

The Eleventh Circuit affirmed an injunction in favor of the company holding the IP rights for the Commodores, barring the [former lead guitarist from using the band name](#). The Western District of Kentucky tossed out a trademark claim by horse racetracks against a maker of electronic games that [referenced the historical results of real races](#), holding that identification of the tracks at which the races occurred was a fair use. And finally, billboard company Outfront Media (f/k/a CBS Outdoor) settled an [infringement claim by LGBT publication OutFront](#) in the District of Colorado.

*Restricted Subject Matter*

Speaking of Colorado, the state is cracking down on [medical marijuana ads](#) with a bill that would prohibit advertising that is likely to reach minors. San Francisco, meanwhile, is

embroiled in a battle in N.D. Cal. over an ordinance requiring [sugary drinks to carry warning labels](#).

### *False Advertising*

Kanye West has been accused of [falsely inducing consumers to subscribe to Tidal](#) with promises of an album completely exclusive to that platform; the singer, whose foot has more than a passing acquaintance with his mouth, was hit with a class action in N.D. Cal when the “exclusive” showed up elsewhere.

The Fifth Circuit has whacked the plaintiff in a deceptive advertising suit against Dish Network with [\\$64K in damages and fees over “frivolous” claims](#) that Dish failed to tell customers that its ad-skipping service had limitations.

### *Professional Speech*

Also in the Fifth Circuit, a lawyer who had his federal bar admission suspended after he [criticized the prosecution of his friend](#) (another lawyer, who shot himself during trial) had the suspension revoked. The Fifth Circuit held that the rule under which the lawyer was disciplined violated the First Amendment. Meanwhile, the Georgia Supreme Court heard argument on whether a law firm’s free speech rights were violated by a [judge’s ban on an ad targeting victims of nursing home abuse](#).

## **Miscellaneous**

### *Academia*

North Carolina is in the news for other civil rights scandals lately, but let’s not miss a new measure urged by the Lieutenant Governor that would [punish those who heckle speakers on college campuses](#) in the state. The idea of preventing protesters from actually shutting down someone else’s speech has some appeal, sure, but is this the right approach? How do you identify the particular protesters who tip the scale from protected speech into unlawful interference?

The Arizona Senate has passed a bill to grant attorneys’ fees to successful plaintiffs in [First Amendment claims against universities and community colleges](#). The house added an amendment that would enhance criminal penalties for blocking traffic with the purpose of interfering with access to a political campaign event. The added measure was inspired by protesters who blocked access to a Trump rally.

Speaking of Donald, the provost of Eleanor Roosevelt College at UC-San Diego apparently forgot about the First Amendment when he threatened “[the fullest sanctions](#)” against those who chalked pro-Trump/anti-immigration slogans on the university’s sidewalks. Really, there’s no



need for that. Chalking might be particularly persistent in San Diego – it’s one of the [driest cities](#) in the U.S. – but the soles of student shoes will eventually take care of the problem.

### *Government Licensing & Public Fora*

It’s not only college campuses in California that are threatening viewpoint discrimination inspired by Trump loathing. The [mayor of West Hollywood](#) stated that the city wouldn’t issue special event permits for a Trump rally – though as it turns out, the mayoralty is a rotating position that [doesn’t carry the authority](#) to make such things happen.



Turning to more seemingly subject matter, the Seventh Circuit issued an opinion in a case between [a pair of strip clubs and the City of Milwaukee](#) over licensing ordinances. The city repealed the ordinances in the face of a First Amendment challenge, and then tried to escape the case; the court held that the repeal didn’t moot the clubs’ claims for damages.

In contrast, the Northern District of Texas upheld the city of [Dallas’ decision not to allow the Exxxotica 2016 sex expo to return](#) to a convention center in the city. The court accepted the city’s argument that the denial of access was based on breaches of contract and local ordinances in past years, but the city’s decision has been criticized as a pretext for its dislike of the expo’s subject matter.

### *The True Miscellany*

The Massachusetts Supreme Judicial Court heard argument this month in *Commonwealth v. Carter*, in which it will consider whether [text messages that encouraged a teen to commit suicide](#) (and which are alleged to have been successful) can be constitutionally punished.

Ordinarily “The True Miscellany” is the last section, but I don’t want to leave you on a downer.

### *Hollywood Hijinx*

We’ve got three Hollywood idea theft cases in the news this month. In C.D. Cal., Legendary Pictures and Warner Bros. have been accused of stealing the ideas for the forthcoming [Kong: Skull Island from a television pitch](#), in breach of contract and interference claims. In M.D. Fla., similar claims were lodged against Warner Bros. in connection with the upcoming film [War Dogs](#).

Meanwhile, in a move that could impact the *Kong* case, the California Court of Appeal [ordered publication](#) of its [decision last month](#) in favor of James Cameron on claims that he and his production company stole the plaintiff’s ideas to use in *Avatar*. Critically, the court used a copyright-like “substantial similarity” test in determining that the defendants had developed

many creative elements of the film before being exposed to the plaintiff's work and that any similarities were at an abstract rather than detailed level. (A hat-tip to David Aronoff for flagging the importance of this move for us.)

\* \* \*

Well, that's that. I will be taking next month off from the Monthly Daily in order to focus on our [Legal Frontiers in Digital Media](#) conference (did I mention that you should [register right now](#)?). But don't worry – I'll be returning with a combined May/June edition to help you transition into the summer.

As always, comments are welcome at jhermes [at] medialaw.org, and look for me at the conference in Mountain View on May 19-20 if you'd like to say hello in person. And if you happen to send more newspapers back from the future, please send the financial section as well.

*Jeff Hermes is a deputy director at the Media Law Resource Center.*



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