



# MEDIA LAW LETTER

Reporting Developments Through February 25, 2016

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## UPCOMING MLRC EVENTS

**Legal Issues Concerning  
Hispanic and Latin American Media**  
March 7, 2016, Miami, FL

**Legal Frontiers in Digital Media**  
May 19-20, 2016, Mountain View, CA

For more, visit [www.medialaw.org](http://www.medialaw.org)

## *From the Executive Director's Desk* **A New Guest Column**

*Last month Deputy Director Jeff Hermes inaugurated a new column in this monthly LawLetter entitled “The Monthly Daily: A Roundup of Media Law Developments from the MediaLawDaily.” Simply put, it was terrific. Sadly, it was at the back of the book, and I fear not everyone saw it. In Jeff’s words, it “will step back from the torrent of stories that we cover to get a broader perspective, summarizing activity over the past month...” It was written in a light and breezy style, and should be must-reading for those of you who might have skipped some of the Daily Reports, but also for those of you who read them religiously but who will find Jeff’s personal take and categorizations of the monthly developments to be both informative and entertaining.*

*So I thought to get you hooked on this new column, wherever it appears next month, I would cede my ordinary space and place Jeff’s column in the front of the book this month. I am sure you will enjoy it.*

*– George*



**George Freeman**

## **The Monthly Daily: A Roundup of Media Law Developments**

**By Jeff Hermes**

As promised in last month’s column ([go read it](#), I’ll wait), we’re back with another review of significant cases, legislative developments, and other events in the world of media law in the past month. As usual, we’ll chew the fat on domestic legal issues and eschew the fat as far as general media business news and events overseas. After all, some of you still read this in print and presumably want room in your mailbox for other things. (I remember print. That’s text without hyperlinks, right? There’s all kinds of stuff hidden in the links, so if you can’t click you’ll miss the fun.)

On with the show.

### **Supreme Court**

The obvious lead for this month is the passing of Associate Justice of the Supreme Court Antonin Scalia. There was a tornado of speculation regarding what the Justice’s passing would do to the Court’s jurisprudence — Ron Collins in particular has an interesting analysis of what

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will happen to the [Court's 5-4 First Amendment rulings](#). Even more sound and fury was directed at the future composition of the Court in light of the upcoming election, including the [President](#) and [Sen. Chuck Grassley](#) sparring in competing posts on SCOTUSblog. Sigh.

In other Supreme Court news, The Court heard argument in a pair of patent disputes about the proper standard for awarding [enhanced damages under 35 U.S.C. § 284](#), which it last considered over 50 years ago. Pair that argument with the Court's upcoming consideration of fee awards in copyright cases in *Kirtsaeng II*, which we mentioned last month, and you've got an interesting time for the money side of IP cases.

We've got the likes of Man Booker Prize winners JM Coetzee, Margaret Atwood, Peter Carey, Yann Martel, and others with treasured places on my wife's bookshelves [filing an amicus brief](#) – [among many others](#) -- in support of cert in the *Authors Guild v. Google* copyright dispute. Hmm...the Booker now welcomes Americans, while Commonwealth writers show up in the Supreme Court...? I'm calling it, reunification is nigh.

The Court rejected cert in two cases watched by the media bar. The justices will not hear the appeal of a [Mississippi high school student suspended over her rap lyrics](#) (so it looks like [Elonis](#) is the Court's last word on online musical threats for the time being), or the appeal of objectors to a [\\$42 million right-of-publicity settlement](#) between NFL players and the league. Note that the players who opted out of that settlement were worse off – the dismissal of their claims was affirmed by the 8th Circuit this month (see below).

Finally, a new petition to watch (but probably not worry about): Tom Scholz, frontman for the band Boston, [petitioned for cert](#) on a ruling by Massachusetts' top court that comment on the motive for band-mate Brad Delp's [suicide was inherently a matter of opinion](#). Scholz now argues that ruling was a departure from *Milkovich*, but, not to put too fine a point on it, duh – Massachusetts has broader protection for opinion under its Declaration of Rights.

### Reporters' Privilege

A&E's "The First 48" is gearing up its legal defenses in case its [footage of a Minneapolis double homicide investigation](#) is subpoenaed; Philadelphia Media Network is asserting the shield law in response to a demand for [documents allegedly leaked to the Daily News](#) by embattled Pennsylvania AG Kathleen G. Kane; and the Manhattan DA is attempting to force a New York Times reporter to testify about an interview with the man charged with the [murder of Baby Hope](#).

The antics of the Center for Medical Progress have ticked off another square in MLRC bingo by showing up in this section. This time, we have N.D. Cal. ruling that an anti-abortion blogger doesn't have to reveal [who provided him with videos that CMP shot](#) at the National Abortion Federation's annual meeting, after CMP staffers denied under oath that they leaked

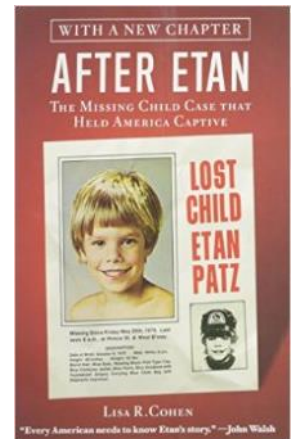
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the footage in violation of an injunction. That said, the judge – no fool – said he’d revisit the ruling if the folks from CMP turned out to be fibbing.

We also saw two other wins in reporters’ privilege cases, with the New York Supreme Court quashing a subpoena to a journalist who wrote a book about the [disappearance of Etan Patz](#), and the Washington Court of Appeals holding that the state’s shield law protects against forcing a domain name registrar to disclose the operators of an online [opposition newspaper based in Kazakhstan](#).

New York’s Joint Commission on Public Ethics is reaching into reporter/source communications with [a decision targeting “grass-roots lobbying.”](#) While the intent is to shine a light on indirect pressure on government, the new rule would require any source employed by an entity with a stake in a particular public issue to report contacts with a reporter.



## Defamation

### New Cases

*Fifteen* new defamation suits to report. For criminy's sake, folks, isn't February supposed to be when we huddle together in the dark and whisper sweet nothings to our loved ones?

Attorneys of various stripes featured prominently as plaintiffs this month, but we'll start with a patent attorney sanctioned for bad behavior in his own divorce case who filed not one but two defamation claims against media outlets. The first was in federal court in West Virginia, where he alleged a TV station [engaged in malicious video editing](#) to make him look bad. The second was a suit in New York state court, where he [sued the Post and the Daily News](#) over their coverage of his travails. He hasn't quite reached [Joseph Rakofsky](#) levels of absurdity yet, but give him time.

Speaking of suing the Internet, several plaintiffs suing about online publications are signing up to get schooled as the spring semester begins. In Opinion 101, it's [pop star versus rap star](#) as Ciara sues ex-boyfriend Future in Georgia over the kind of tweets that often attend a bad breakup (ah, closure). In Section 230, a couple in Cook County, Illinois, are taking a crash course by suing [TheDirty.com over anonymous user comments](#). And down in the science labs, a software company is studying the Streisand Effect in S.D.N.Y. by [suing an online reviewer over a forum post](#). Hope you get your tuition's worth, folks.



**Future and Ciara**

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In broadcast media we have: a Tenn. TV station facing a lawsuit from a [DA accused of blackmail](#); two suits in Florida, with CNN sued by a doctor over a [report of child fatalities](#) and A&E sued by two attorneys over [an episode of “American Takedown”](#); and ESPN sued by [Little League parents accused of cheating](#) their way to a national title. In print media, the Bitterroot Star of Montana was sued over its report that [a politician stiffed the paper on his bill](#) for an ad, and Ebony magazine faces a refiled claim from the parents of [two students named as possible murder suspects](#). Christian Slater is being sued by his father over [statements made in an interview](#) last year in the *National Enquirer*, although the paper doesn’t appear to have been named in the suit. Crossing the media divide, an ABC News story following the [Boston Marathon bombings](#) triggered a case that swept in a bunch of other outlets both domestic and foreign.

And a related pair of new cases in Massachusetts shows what happens when local political spats spill into court: [city councilor sues](#) newspaper and activist, [activist sues](#) blogger — this is not the way, people.

### *Defense losses*

In California Superior Court, James Woods [fought off an anti-SLAPP motion](#) over tweets calling him a coke addict and sex offender. (The defense had secured a [tentative ruling](#) that the tweets were obvious hyperbole, but the judge changed his mind in a one-page final order.) A jury in Georgia Superior Court [awarded a former county official \\$600K](#) in a lawsuit against a local blogger, and a federal jury in Nevada awarded a [businessman compared to Bernie Madoff a whopping \\$38 million](#). And a Texas trial court judge yanked back an award of \$1.3 million in anti-SLAPP sanctions in a [“revenge porn” defamation suit](#), granting plaintiffs a new trial.

More tragic is the fact that a New Mexico woman has just started a year’s sentence of probation [on a criminal libel conviction](#), based on the content of a complaint she filed against a police officer. New Mexico’s criminal libel law was held unconstitutional in 2006, but a series of procedural missteps prevented her appeal from being heard.

### *Defense wins*

Time for some better news, with several anti-SLAPP wins in the trial courts. On Oklahoma circuit judge [knocked out a suit](#) brought by an ex-DA over a failed petition to investigate her conduct. Texas’ anti-SLAPP law defeated a claim against [a Beaumont newspaper](#). California’s law shifting fees for successfully quashing attempts to unmask anonymous speakers led a [disgruntled dentist to drop his lawsuit and fork over \\$12K](#) for Paul Alan Levy’s time.

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Oh, and another Cosby matter — [Cosby and Marty Singer](#) received a tentative ruling dismissing Janice Dickinson’s defamation claim against them under Cali’s anti-SLAPP law. I’m *sure* none of us at the MLRC feel weirdly conflicted about that, right? If it helps with your internal conflict, the judge has since [delayed a final ruling](#) to the end of March and ordered additional briefing.

Also in the trial courts: A libel claim over [sordid business in Kazakhstan](#) was kicked out of D.D.C., for failure of personal jurisdiction over some defendants and failure to plead actual malice as to the rest. D.N.J. booted a claim over a [book about former Nazis in America](#), finding that statements about the plaintiff were not defamatory.

Attorneys can breathe a sigh of relief after a positive result in a pseudo-defamation matter we covered last month: The Michigan lawyer facing a bar complaint that was plainly an end run around libel law was [cleared by the state’s attorney grievance commission](#).



### *Appeals*

The *Myrtle Beach Sun News* has petitioned the South Carolina Court of Appeals for rehearing on a decision upholding [last month’s \\$650K verdict](#) against the paper. Meanwhile, the Texas supreme court has agreed to hear a dispute between a newspaper and the son of a deputy sheriff that focuses on the [definition of a “matter of public concern.”](#)

Plenty of good news in the appellate courts. A California appellate court left [Courtney Love’s “twibel” win](#) intact. The Maryland Court of Special Appeals found that an ex-convict and frequent litigant hadn’t shown that [assorted bloggers’ accusations of pedophilia](#) were false. And the Ohio Court of Appeals affirmed a defense ruling on the [fair report privilege and innocent construction](#) rule. The First Circuit paused an appeal in a D. Me. case we mentioned last month, involving accusations of pedophilia against the owner of a Haiti orphanage, to let the district court consider [whether diversity jurisdiction was proper](#). The Second Circuit found that it had no jurisdiction over a plaintiff’s [interlocutory appeal from a partial anti-SLAPP victory](#) below. The 3rd Circuit affirmed two defendants’ wins, finding in one case that the [use of a stock photo](#) didn’t make the associated article “of and concerning” the photo’s subject, and in another that an [“energy healer”](#) had failed to prove falsity and actual malice. Meanwhile, the D.C. Circuit kicked out, for lack of personal jurisdiction, a suit arising out of [controversy surrounding the “Ground Zero Mosque.”](#)



A few plaintiffs had wins on appeal. The Texas supreme court held that the state had jurisdiction over a claim by a [Mexican pop star against Mexican broadcasters](#), finding that the broadcast had been targeted across the border. In Maryland, an appellate court held it was error

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to apply a “clear and convincing” standard to [a question of abuse of a conditional privilege](#). The Massachusetts Appeals Court reached a [mixed decision in a case against a hospital](#), holding that the case could continue but that certain statements were protected by the commonwealth’s anti-SLAPP law. Anti-SLAPP arguments ran aground in both Oklahoma’s appellate courts, which held that the state’s 2014 anti-SLAPP law [did not apply retroactively to an ex-DA’s 2013 complaint](#) (the same Oklahoma ex-DA who had a different suit dismissed, as discussed above), and Louisiana’s Fifth Circuit Court of Appeal, which held that the defendant didn’t establish that its [reporting on a local convenience store](#) was protected by the First Amendment.

### *Miscellaneous*

Let’s end this section with Trump. I was going to be outraged about [his recent comments on libel law](#), but his [contempt](#) for [free speech](#) other than his own is really nothing new and I can’t pretend that it’s any worse than expected. I haven’t heard someone talking more about the restoration of a country’s glory with less of an intent to preserve its values since Augustus Caesar.



At least he [settled his defamation and other claims against Univision](#) arising out of the networks’ decision to drop the Miss Universe and Miss USA pageants. The terms of the settlement are confidential, but if we have one less reason to see this particular name in the news, it’s a good thing. Yes, it’s like bailing out the ocean with a thimble, but still.

### **Privacy**

#### *Right of Publicity*

The big news in privacy this month is the Ninth Circuit’s long-awaited ruling in the *Hurt Locker* case, involving right of publicity claims over elements of the film drawn from the life of Army bomb disposal expert Jeffrey Saver. The [opinion](#) has left the folks in the MLRC office scratching our heads a bit; [we agree with Prof. Volokh](#) that the court’s attempt to reframe its past right of publicity rulings by rewinding all the way back to *Zacchini* doesn’t quite hang together.

There was also a less controversial but still important decision from the Eighth Circuit in [Dryer v. NFL](#). The case involved ROP claims arising out of game and interview footage that the NFL repackaged and used in various ways; the Court of Appeals affirmed summary judgment for the NFL, finding the claims to be preempted by copyright law.

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We reported on the end of several other right of publicity cases this month. The [holder of a world record for consecutive hacky sack kicks](#) sued over an ad depicting a person “beating the record for hacky sack” under an energy drink’s influence. The court (N.D. Ill.) kicked out the case. In the Middle District of Florida, [Hasbro settled](#) with choreographer [Deney Terrio](#) over the toymaker’s cartoon gecko “[Vinne Terrio](#).” (If you clicked that last link – yes, there is a wiki for *everything*.) And Reese Witherspoon settled a claim in California state court over [the use of her name to sell jewelry](#) — but did they use her [stunt double](#)? (With Leo’s Oscar win, how could I resist? Thanks to ace librarian Marie Cloutier for tracking down the link– librarians rock.)

Never fear, though, we have four new ROP claims to keep things interesting. A young woman sued CBS News over [a retweeted meme with the woman’s picture](#) over the caption “Everything that’s wrong with America.” [Living 90’s meme Carmen Electra](#) sued a Queens strip club in E.D.N.Y. for using her photo. In Illinois state court, we’ve got a putative class action against [online lawyer website Avvo](#), alleging that the site misappropriates attorneys’ professional identities. Finally, in S.D.N.Y., a potential class action has been filed on behalf of models against Getty images, alleging [a photographer misrepresented the models’ consent](#).



### *Private Information*

An NBC station is facing suit in D. Colo. after it — am I reading this correctly? — allegedly [aired a picture of a 14-year-old’s genitals](#) and identified him in the accompanying news story. It seems the station was reporting on the teen’s being blackmailed with the image. Guess the blackmail’s not a problem anymore. A new lawsuit was filed in Florida state court by Giants defensive end Jason Pierre-Paul against ESPN, after his [medical records relating to a fireworks mishap](#) and a missing finger were posted online. In another medical privacy case, NY’s highest court heard argument that it should reinstate claims over [an episode of ABC’s “NY Med”](#) that depicted a man’s medical treatment and death.



Meanwhile, in the Eastern District of Michigan, two magazine companies reached different results: The court approved a \$7.5 million class settlement with [Meredith over the state's Video Rental Privacy Act claims](#) in one case, but [dismissed a separate class action against Time](#), which had been accused of illegally selling subscriber information to

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marketers. Speaking of video privacy, the Eleventh Circuit [denied Dow Jones' motion for summary affirmance](#) of the dismissal of a VPPA class action.

Lastly in California Superior Court, claims against Errol Morris related to his documentary *Tabloid* went out with a whimper, [dismissed for lack of prosecution](#).

## Access/FOIA

### *New cases*

There's a [head-scratcher of a FOIA matter](#) being fought in California, Pa., where an attorney is fighting to gain access to video of an officer roughing up a jailed suspect. The Chief of Police claims that the video could compromise security, but he'd already let one reporter review the video and another examine the cell in person.

Four new federal access fights also came to our attention. In D.D.C., a watchdog nonprofit is suing for CIA records regarding the [prosecution of John Kiriakou](#), the former agent who leaked the agency's use of waterboarding to the press. In the same court, the *Washington Post* is fighting to unseal records related to an [investigation of ex-D.C. mayor Vince Gray's](#) 2010 campaign. In D.N.J., news outlets are trying to lift the seal on court records in the [Bridgegate criminal case](#). And in a battle that started last month but that we only noted recently, seventeen news organizations challenged the [retroactive censorship of the transcript](#) of a public hearing held at Guantánamo in 2015.

We also saw the *Hollywood Reporter* and *Los Angeles Times* oppose a motion to seal [civil court records dealing with Sumner Redstone's health](#), and Iowa's Public Information Board decide to [prosecute the Des Moines County Attorney](#) over her failure to release law enforcement reports relating to a police shooting.

### *Current cases*

In the win column: The Florida Supreme Court held that the [City of Jacksonville owes the Times-Union \\$174K](#) in connection with open meetings violations. Not to be outdone, the Kentucky Appeals Court whacked a state agency for \$1 million for its failure to turn over records on [child-abuse deaths and injuries](#). A Colorado Springs judge unsealed an [affidavit for the arrest](#) of a man who traded gunfire with cops. E.D.N.Y. lifted the seal on a report filed as part of [a money-laundering case](#) involving HSBC. A judge in S.D.N.Y. indicated that she would release redacted documents in the [Sheldon Silver corruption case](#), subject to a delay to allow appeals. Finally, a D.D.C. judge in the ongoing Clinton e-mail case ordered the [release of all non-exempt e-mails](#) by the end of February (the government announced at the end of

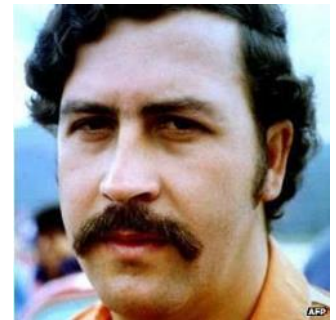
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January that it will withhold [22 “top secret” e-mails](#)), and [allowed discovery to go forward](#) with respect to Clinton’s private e-mail system.

In the pyrrhic/questionable column: the DOJ released the [text of a transatlantic privacy agreement](#) to end a lawsuit in D.D.C., a mere six months after the agreement was publicly released in Europe. An Oklahoma court held that video of a college running back punching a female student is a public record, but [copies of the video seem to have mysteriously gone missing](#). Meanwhile, a county judge in Michigan [awarded ESPN a portion of its fees and costs](#) for access to police reports on student-athletes from Michigan State University, but a hefty bill remained. And after more than a decade of litigation, the ACLU has secured the release of around 200 photos showing the abuse of detainees in U.S. military custody; but this is [no more than 10% of the responsive documents](#).

In the loss column: In D. Wyo., a journalist was denied access to Yellowstone National Park to witness [a gathering of bison for slaughter](#). In D.D.C., a judge who had originally decided to declassify documents related to the CIA’s role in the [death of Pablo Escobar](#) vacated his earlier order. In N.D. Cal., a pair of reporters were denied access to [racist emails written by former federal judge Richard Cebull](#). In N.J. Superior Court, a judge has held that [only New Jersey residents](#) may take advantage of the state’s public records law. Good lord, *McBurney v. Young* sucks.



We’re waiting on a ruling from the 7th Circuit on the release of grand jury transcripts related to an attempt in 1942 to indict the [Chicago Tribune for its Battle of Midway reporting](#). At the recent oral argument in the case, the key issue seemed to be setting precedent for other grand jury proceedings rather than anything sensitive in the transcripts themselves. After all, if it’s more or less all right by now to discuss plot points in *The Force Awakens*, I think we’re probably good to talk about World War II. (Spoiler alert: Enigma? Not so secure.)

### *Legislation*

The water crisis in Flint, Michigan, fueled new calls for the [governor’s office](#) to be subject to public records requests. A bill in California would require the government to provide [more information about withheld documents](#); another Cali bill would open up records on [police misconduct and use of force](#). The [Massachusetts senate passed a bill](#) to improve response times, reduce costs, and reimburse attorneys’ fees; government entities have [ramped up their objections](#) as the bill moves forward. And in Kansas, we have [bills to improve access](#) on a number of issues, including transparency for [government employee collective bargaining](#) and [private e-mails on government business](#).

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In the face of criticism, a New Jersey legislator has said that he intends to water down a pending bill blocking [access to 911 calls and police video](#) — but a [new bill in Missouri](#) would circumscribe access to body cam footage, while [a Utah senate panel](#) recently approved a similar bill. Meanwhile: the Utah House approved a bill to limit public access to [school district records](#); Washington state has put the brakes on legislation [to speed up record requests](#); there's momentum in the Florida legislature to make the [award of attorneys' fees in public records cases discretionary](#); a Wisconsin bill would give those [exonerated for wrongful convictions](#) the right to seal all records in their cases; an [Indiana senate committee approved a bill](#) that would exempt PD's at private colleges from the state's public records law; and the Colorado senate [killed a bill to improve digital access](#) to public records (but the opposition is apparently looking for a compromise position, [so there's still hope](#)).

A Virginia senate committee passed two bills on public employee salaries, one [raising the dollar threshold](#) for disclosing salary amounts to the public and one (yikes!) to [withhold the names, agencies, and employment dates](#) of all public employees. Because terrorism, apparently. Luckily, [the latter bill was tabled](#) by a House committee, killing it for this year.

### *Bonus Puzzler*

So, the [Seattle Police Department holds an online Q&A session on a NextDoor community website](#). NextDoor is a platform for neighborhood and regionally-oriented forums. The Seattle NextDoor site and terms of service impose certain restrictions on access: only users who can confirm their address within the city can join, and users are barred from publicly reposting anything said on the site. A reporter who broke the rules and reported some of the comments during the session was kicked off the site.

**QUESTION:** Did Seattle's selection of the NextDoor site as a forum for its meeting violate the state's open meetings law, or otherwise violate the First Amendment? Responses to jhermes [at] medialaw.org; best answer, as judged entirely subjectively by George, will be reposted in next month's MediaLawLetter.

### **Newsgathering**

Fear of drones falling out of the sky at the Super Bowl might just have been [the most exciting thing about the game](#), but since then, the noise around drones has receded to a faint buzz. However, [a late-breaking amendment to the FAA reauthorization bill](#) would free up news organizations to use low-risk "microdrones" in most circumstances, so watch this space.

The Ninth Beatitude: "Blessed are the sources, for they shall lead us to the light." And, like the others mentioned in the Sermon on the Mount, they're likely to find themselves in hot water

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in the meantime. In the Ohio Court of Common Pleas, a Cleveland attorney was whacked with \$11K in highly questionable sanctions after he [alerted the press to upcoming arguments](#) in a case. Meanwhile, the [two hospital workers who leaked medical information](#) to ESPN about the Giants' Jason Pierre-Paul were fired. Well, yeah.

Not, of course, that reporters (and reporter-like people) are immune from prosecution. The host of an online talk show found himself swept up in the arrests at the Malheur Federal Wildlife Refuge in Oregon; he argued that [his activities at the Refuge were in connection with his "Internet news show"](#). A bit further south in California, the trial of a [news photographer's false arrest claim against the California Highway Patrol](#) has recently started. And a terrible decision from the Eastern District of Pennsylvania this month on recording the police; the court held that there is no First Amendment right to record the police [except while one is engaged in expression](#). The usual commentators have pointed out the [obvious flaw](#), i.e., that the First Amendment is implicated by newsgathering as well as actual publication.

In happier news, a Texas grand jury has recommended a [criminal trespass charge](#) against a Galveston cop who arrested and searched the vehicle of a civil rights activist filming at the police station. Also, Bahrain followed suit with Iran's actions last month, and [released four American journalists](#) who had been accused of participating in an illegal assembly. Welcome home.

### **Prior Restraint**

As mentioned above, the Center for Medical Progress was questioned over the leak of video that a judge in N.D. Cal. had enjoined from distribution. The [preliminary injunction in question](#) had issued earlier in the month. We saw also saw a more direct form of prior restraint in Chicago, where a witness to a police shooting was [detained so she couldn't talk to reporters](#); she's suing the police department. Jeez, usually they just grab your *phone*.

And in N.D. Ind., an archery company sued a LARPer over the patent for foam-tipped arrows; more troublingly, they've fired off (sorry) a motion for a [gag order to prevent the would-be Legolas from commenting](#) on the case. "LARP" is Live-Action Role Playing, for those of you who have never wandered around the Pine Barrens with a wizard's staff. Hey, you had your fun in college, I had mine.

A bill introduced Illinois that would [outlaw the posting of video of a crime](#) being committed with the intent to promote that activity. Introducing bills that obviously fail *Brandenburg*? Alas, still not a crime.

Twitter is continuing to fight for the right to disclose information about government requests it receives in national security investigations, and now it has picked up some support from [Medium, Reddit, Wikipedia, BuzzFeed, and the Washington Post](#). Remember, there's a world

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of difference in saying you've received "between 0 and 999 requests," and saying you've received "between 1 and 999 requests."

### **Broadcast/Cable/Satellite**

The top story for the FCC in February was its decision to [force competition in the market for set-top boxes](#), moving forward with a proposal to compel cable companies to make programming available through third-party devices and software. The [National Association of Broadcasters](#) likes the measure; needless to say, the [cable industry does not](#).

In other FCC news, Google has announced that it [will not participate in the upcoming spectrum auction](#), to the relief of incumbents – except the low-power TV stations that are likely to be [collateral damage](#) in the effort to overhaul the airwaves. [Several LPTV operators](#) asked the D.C. Circuit to force the FCC to let them participate in the auction. Meanwhile, the FCC is facing an upcoming argument in the 3rd Circuit on its decision to treat [TV joint sales agreements as ownership interests](#).

### **Internet/New Media**

Before we start with the substance, [congratulations to Judge Lucy Koh](#), who has been nominated to the 9th Circuit. It seems like every major tech decision from the Northern District of California in recent years has had Koh's name on it.

#### *Section 230*

[Section 230 turned 20 years old this month](#). Just imagine what will happen when it's old enough to drink. That said, it's not a perfect defense: it hasn't stopped Backpage.com from [facing a contempt vote](#) this month in the U.S. Senate; it hasn't stopped this case in D. Utah over [summaries of third-party complaints](#); and it doesn't do anything to stop contract claims under consumer non-disparagement clauses, like [this case from Texas](#). That last one is why we need the [Consumer Review Freedom Act](#).

#### *Net neutrality*

The controversy over zero rating is heating up. T-Mobile's "Binge On" program was described as ["likely illegal"](#) in a new report from Stanford, and Verizon's decision to [exclude its own video platform from its data caps](#) is causing an uproar.

*(Continued on page 15)*



*(Continued from page 14)**Hate, threats & terror*

The drumbeat around social media and terrorism continues, and not all of it was about Apple (more on that later). The Obama administration [gathered tech and entertainment executives](#) for a [meeting at the Department of Justice](#) to ideas on counterterrorism efforts, while the Department of Homeland Security is building tools to vet the [social media presence of visa applicants](#). Twitter reported the [deletion of 125,000 ISIS-related accounts](#) since mid-2015, although there's no way to know how many of those were accounts re-opened by serial offenders. Nevertheless, a new report suggests [the site's efforts are actually working](#), and has irritated ISIS supporters enough that [new death threats](#) have been made.

In regular old domestic nastiness, the Washington Court of Appeals held that a teenager's "[mean-spirited hyperbolic expressions of frustration](#)" via tweet couldn't support her cyberstalking conviction. And the North Carolina Supreme Court heard argument this month on whether the [state's cyberbullying statute](#), which prohibits the posting of personal or sexual information "with the intent to torment," is constitutional.

That last one in particular is one to watch – the [mid-level appellate opinion](#) in the case was a mess. Emotional impact is a non-speech element of communication? [Really?](#)

*Fantasy Sports*

The hubbub over fantasy sports also appears to have settled down a bit, now that the various federal lawsuits filed against FanDuel and DraftKings have been [consolidated in D. Mass.](#) by the Judicial Panel on Multidistrict Litigation. Still, we had [Rhode Island's AG](#) announcing that the games are legal there, and [Indiana's bill](#) to regulate the field passed the state senate. But none of this might matter, given that [a key payment processor](#) has announced that it's getting out of that business. As [Backpage learned](#), legal rights are great, but they're not worth much if your customers can't pay you.

*Miscellaneous*

A potpourri of other matters digital:

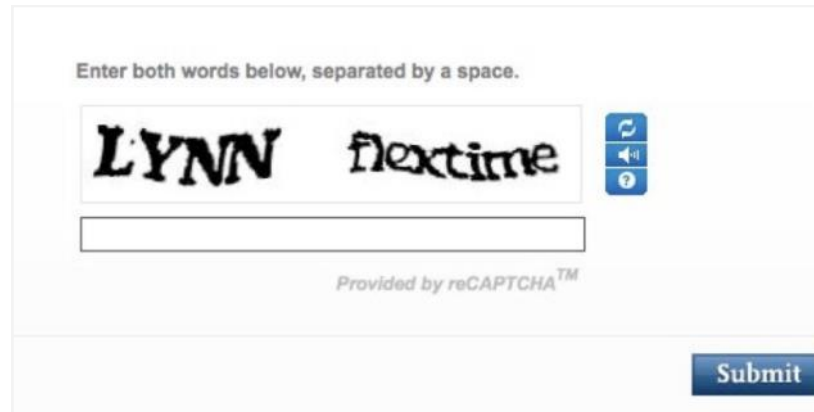
The U.S. Congress passed a law making permanent the [federal ban on states and localities taxing Internet access](#).

The 2nd Circuit upheld a [\\$450 million settlement by Apple](#) in an antitrust suit over e-book price fixing. Speaking of which, did we mention that the MLRC's 50-State Libel Survey is now available [in an attractive e-book format](#)?

*(Continued on page 16)*

(Continued from page 15)

N.D. Cal. held that Google doesn't unjustly enrich itself at users' expense by [presenting them with two CAPTCHA words](#). You know, these things:



The plaintiff had argued that asking a user to type in *two* words was just Google's attempt to get some extra assistance with its optical character recognition. The court basically said "Whatcha gonna do?" and booted the case.

The Appellate Division of the New Jersey Superior Court, home of the [Dendrite](#) decision itself, held that [defamation plaintiffs had satisfied their burden](#) to learn the identity of a Doe defendant tossing around online accusations of an extramarital affair.

Facebook has [banned person-to-person firearm sales](#) across the site, in response to charges that the site was being used to avoid background checks. At the risk of encouraging another [stupid stunt by a South Carolina legislator](#), I approve.

Oh, and on top of all of this, it's been discovered that Amazon Web Services is [legally prepared for the zombie apocalypse](#). Because if there's one thing you don't want to happen while you're holding off the ravening hordes with a hockey stick in one hand and a shotgun in the other, it's a lawsuit.

## Internet Privacy

Let's start with the story that has been flooding this section with updates since it first broke. The House Judiciary Committee announced that it is finally ready to take up [long awaited reforms to the Electronic Communications Privacy Act](#) in March.

Oh, wait – there was something about Apple, wasn't there?

The basics: About a week after a bill was introduced in Congress to kill state bills [requiring manufacturers to weaken smartphone security](#), a magistrate judge in C.D. Cal., invoking the All Writs Act, ordered Apple to [assist the FBI to gain access to a locked iPhone](#) in furtherance of executing a search warrant. For reasons complex and disputed, this would require Apple to create a new version of its operating system. Apple has [flatly refused](#), citing the privacy

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interests of its users and the dangers of allowing a tech company to be co-opted in this fashion. Did I mention that the phone was used (but not owned) by one of the San Bernardino shooters?

So, cue a firestorm of [confused information](#), with Apple and the FBI waging the personal privacy vs. national security battle [in the public eye](#) and commentary [all over the map](#). The parties are raring to go in court, too: the [FBI filed a motion to compel](#) Apple to comply with the order before Apple had a chance to object, and [Apple filed its motion to quash](#) ahead of the deadline. Complicating matters, at the very end of the month Apple succeeded in fighting off [another All Writs Act order in E.D.N.Y.](#) to unlock an earlier version of the iPhone that is, if anything, easier for Apple to access.

Prof. Orin Kerr has a careful [three part analysis](#) of the situation. Also worth a read is [Prof. Yochai Benkler's commentary](#), where he argues that the fundamental issue is that distrust of the government led us to turn to technology to protect our rights. For what it's worth, my perspective is that the government should no more be able to compel a manufacturer of communications software and devices to become its forensics department than it should be able to compel a reporter to function as its investigator. See [U.S. v. LaRouche Campaign](#), 841 F.2d 1176, 1182 (1st Cir. 1988) for some interesting language on point. The impact is very much the same: a layer of the communications infrastructure is shifting resources away from facilitating speech to hiding speech, and that's a problem.

In any event, this case will inevitably have an effect on the [broader encryption debate](#) and [ongoing calls by law enforcement](#) for Congress to prevent online surveillance from "going dark." For example, confirmation that the federal government [subpoenaed Carnegie Mellon for information about Tor users](#), a revelation that takes on new meaning in light of the Apple fracas, it has also been confirmed. (Speaking of Tor, kudos to New Hampshire for its new bill that would allow [public libraries to run Tor relays](#) – as I said before, librarians rock.) A [new congressional commission](#) has been proposed to manage this mess; good luck with that.

A brief note on transatlantic data privacy -- on February 2nd, transatlantic negotiators announced the ["EU-US Privacy Shield,"](#) an agreement in principle that will [keep the Article 29 Working Party at bay](#) in Europe while the details are figured out. [The text of the agreement has been released](#), and it appears the U.S. will continue bulk surveillance in certain circumstances while its compliance will be overseen by an administration official. [Initial responses from Europe](#) are predictably skeptical, but it might help that President Obama [signed the Judicial Redress Act](#) this month.

## Intellectual Property

### *Copyright – new cases*

New York wins the bi-coastal battle for new copyright suits this month, with infringement claims in S.D.N.Y. over: the appearance [LeBron James' tattoos](#) in the "NBA 2K" video game

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(did we learn nothing from [The Hangover Part II](#)?); [illustrations on the cover of a unique Wu-Tang Clan album](#) owned by Martin Shkreli; music on Jay-Z's [Tidal streaming platform](#); a [photograph of Willie Nelson](#) used by Boston Red Sox (the Red Sox in a New York court...will they install bleachers?); and Justin Timberlake and Will.i.am's ["Damn Girl."](#)

But my favorite new copyright action is a lawsuit in E.D.N.Y. over fonts and ponies. Yes, you read that correctly. Hasbro is being sued over its [unauthorized use of a proprietary font](#) called "[Generation B](#)" in connection with cartoon megahit "[My Little Pony: Friendship is Magic](#)." It's pretty clear that Hasbro isn't just using a look-alike font, but the font itself was inspired by the titles of Disney's 1961 movie "The Parent Trap." Is the font original? [You be the judge](#).

We have just one new suit in C.D. Cal., over a [photo of Carlos Santana](#). Suits elsewhere included those in: W.D. Tex., against NBCUniversal over [photographs used on "The Today Show"](#); D. Or., by the producers of the [film "Queen of the Desert"](#); N.D. Ga., over the right to publish the [Georgia Administrative Rules and Regulations](#); and M.D. Tenn., where [sci-fi/fantasy authors are squaring off](#) over elements of two book series that each follow "an elite band of warriors that must protect the human world from the unseen paranormal threat that seeks to destroy humans as they go about their daily lives." A lot like First Amendment lawyers, in other words.

### *Copyright – pending cases*

In S.D.N.Y., a holder of [rights in Run-DMC's music](#) was awarded \$1.4 million in costs and fees after fighting off an infringement suit. In C.D. Cal., a case against Jay-Z over ["Big Pimpin'"](#) was dismissed for lack of standing, while Warner/Chappell Music paid [\\$14 million to settle the "Happy Birthday" case](#). In N.D. Cal, we got the final order dismissing the [monkey selfie case](#), and a ruling that [Oracle cannot add new copyright claims against Google](#) in its long-running case. In D. Mass., a complaint over the [design of Iron Man's armor](#) was dismissed for lack of personal jurisdiction. And in N.D. Ill., a judge granted summary judgment against [porn company and serial copyright plaintiff Malibu Media](#), because it could not link a Doe defendant or his IP address to the alleged infringement.

We saw only three plaintiffs' wins in the trial courts. First, a judge in S.D.N.Y. held that a gossip site could not invoke fair use to protect its use of [leaked Playboy nudes](#). Second, Dish Network settled its fight with Fox by agreeing to [disable ad-skipping on Dish Hopper for a week](#) after programs are first aired. Third, the RIAA got a \$22 million default judgment against [music link service MP3Skull](#); the judgment invokes the All Writs Act in ordering domain registrars to turn over control of the relevant websites to the record labels.

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Meanwhile, on the eve of trial in S.D.N.Y., Fox and North Jersey Media [settled a closely-watched case](#) over the Facebook posting of an iconic 9/11 photo.

### *Copyright – appeals*

The Ninth Circuit upheld a ruling that [Superman co-creator Jerry Siegel transferred his rights](#) to Warner Bros., and heard argument on whether a merchandise company willfully infringed [photographs of Run-DMC](#) (seriously, what is it with photographs of musicians this month?). Meanwhile, the [sports](#), [music](#), [television](#), [film](#), and [creative](#) industries all piled on Alki David's FilmOn streaming service, arguing the court should overturn a district court ruling that FilmOn might be eligible for a statutory license.

Even worse luck for David in the Second Circuit: the court [affirmed a finding of civil contempt](#) and sanctions for violation of an injunction. Also in the Second Circuit: the full panel of the court denied en banc review of a panel ruling that EMI's rights in "[Santa Claus Is Comin' to Town](#)" will expire later this year; a different case against Jay-Z over "[Big Pimpin](#)" and other songs was held to have been filed 10 years too late; and it looks like an appeal over performance rights in pre-1972 sound recordings will be [referred to the New York Court of Appeals](#) for comment on the state's copyright law.

### *Patent*

Two doozies this month for plaintiff's wins. In the Eastern District of Texas, a jury ruled that [Apple owes patent troll VirnetX \\$625.6 million](#) for infringement of patents used in Apple's FaceTime and VPN services. But Apple got off easier than [Marvell Technology](#), which agreed to pay \$750 million to Carnegie Mellon University to settle an infringement action. A more mixed result in S.D.N.Y. for [Barnes & Noble](#), which failed to overturn a jury finding of infringement on two e-book patents, but won a new trial on damages after one of the patents was invalidated.

A few clear defense wins as well. [TiVo](#) had three patents, including a core targeted-advertising patent, declared invalid in S.D.N.Y. in an infringement action. Facebook, Google, and other major tech firms got a ruling in the Western District of Texas that an [e-mail patent](#) asserted against them was invalid. [Facebook](#) also scored a win in the Federal Circuit, with the court upholding a jury verdict of non-infringement on patents related to online diaries; so did [Samsung](#), which received a ruling that it didn't infringe one of Apple's patents and that two others were invalid (and there goes a \$120 million verdict for Apple).

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*(Continued from page 19)**Trade Secret*

We don't see many trade secret claims come through the Daily. This month, we have such a claim in California in a case over an [unauthorized biopic about boxer Chuck Wepner, who inspired the film "Rocky."](#)

**Commercial Speech***Trademark*

At issue in this month's new trademark complaints: the name of the ["Krusty Krab" restaurant](#), also used by a [fictional restaurant](#) in Viacom's SpongeBob SquarePants universe; the term "[Verge](#)," used by both Vox Media and another tech blog since 2011; and the term "[Buzzr](#)," used by a social media site and by the production company behind *American Idol*. In Oscar news, the Academy has objected in court to the use of its marks on [unauthorized Oscars "gift bags"](#) containing some, shall we say, adult items. And Michael Jackson's estate has sued over the launch of [popcorn website KingOfPop.com](#).

In C.D. Cal., Fox has defeated a lawsuit by record label Empire over its hit TV series of the same name, with the judge ruling that [Fox's use was protected by the First Amendment](#). (So now can we get the rest of season two? I'm dying here!) Uber was ordered in N.D. Fla. to limit the reach of its online presence to avoid infringing the [local trademark of Uber Promotions](#). And S.D. Fla. killed another keyword advertising lawsuit, [rejecting the initial interest confusion theory](#) and finding that keyword buys are now standard business practice.

The Ninth Circuit heard argument this month on whether it should revive a suit by Gibson Guitar over use of its ["Flying V" mark on a SpongeBob SquarePants ukulele](#). (Who knew that the Pineapple Under the Sea was such a hotbed of trademark controversy?) The Court of Appeals quickly reinstated the claims against the manufacturer of the uke, [but let Viacom go](#), finding the media company didn't control that aspect of the design.

*False advertising*

In the federal Courts of Appeals, the 7th Circuit upheld a [10-year sentence for infomercial huckster Kevin Trudeau](#), following his conviction for fraud in connection with the sale of weight loss products. The 9th Circuit reinstated a potential class action over [advertised features in video game "Grand Theft Auto V"](#) that weren't immediately available. In the District of Utah, a judge allowed a case over [astroturfing Amazon reviews](#) to proceed, noting that this could violate the FTC's online endorsement guidelines as well.

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There was a defense win in the Eastern District of Pennsylvania, where [Maine Antique Digest avoided Lanham Act claims over a review of a concluded auction](#). Oddly, as Rebecca Tushnet points out, the case was dismissed for lack of competition between the parties, not for the obvious reason that the review was in no way commercial speech.

### *Advertising Restrictions*

The Ninth Circuit upheld a California law that [banned depictions of handguns on gun store advertisements](#). Because that would be...what? Informative?

### *Professional speech*

The Eleventh Circuit has vacated its recent decision on whether Florida can restrict [doctors' speech to patients about guns](#) – the “Docs v. Glocks” law – and will rehear the case.

Turning from doctors to lawyers, the California state bar has cautioned attorneys that their [personal blogs can be subject to professional conduct restrictions](#), if used to tout their legal skills. Doesn't seem too surprising, but I can see questions coming up as to whether a blog in which a California attorney comments on legal matters (see, e.g., [Naffe v. Frey](#)) will be interpreted as showing off their lawyer-fu.

## **Miscellaneous**

### *Academia*

Battles over free speech on campus found their way to the courthouse this month. The *University Daily Kansan* filed a federal suit against the school, alleging that it allowed the student senate to [slash the paper's budget in retaliation for an editorial](#). Campus groups sued the University of South Carolina in federal court over the school's speech policies, after students faced [questioning for holding a university-approved event](#) at which other students felt “triggered.” Headed up to the Eighth Circuit is an appeal by Iowa State University, which is seeking to overturn a ruling that the university violated students' speech rights by barring them from using the [school logo on marijuana-themed T-shirts](#).

Oh, and [Melissa Click was fired](#). Want more? The Foundation for Individual Rights in Education has released its 2016 list of the worst schools for free speech; [check it out here](#).

### *Signage & Public Display Regulations*

The Fourth Circuit held that a [Norfolk, Va., sign ordinance](#) was a content-based restriction on speech. The Middle District of Pennsylvania held that a case brought by an [atheist](#)

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[organization against the Lackawanna County Transit System](#) over bus ads would survive a motion to dismiss. And in a case testing the outer limits of the implications of *Reed v. Town of Gilbert*, the Eastern District of New York held that [mandatory safety sign requirements](#) at construction sites had to survive strict scrutiny as compelled non-commercial, non-governmental speech and couldn't meet that standard. [Really?](#)

### *Political Speech*

The Sixth Circuit held this month that an Ohio ban on [knowingly or recklessly false statements about candidates](#) was unconstitutional. The opinion relied on my favorite Supreme Case case, *U.S. v. Alvarez*. In state court, Texas' highest criminal court held that the [state's political coercion statute was vastly overbroad](#), negating charges against Gov. Rick Perry for threatening to use his veto power to force the resignation of a rogue county DA.

\* \* \*

Aaaaand....breathe.

That's it for February (or at least as much as I can fit in this article). Thanks for reading, and e-mail me if (1) you're seeing trends that you think we should be watching in future issues, (2) you want to jump in on any of the pleas for audience participation I've included, or (3) you want to comment on anything you've read here. Again, that email address is jhermes [at] medialaw.org.

Otherwise, I'll see you next month, when we'll have [Gawker/Hogan trial stories](#) to discuss!

## UPCOMING MLRC EVENTS

**Legal Issues Concerning  
Hispanic and Latin American Media**  
March 7, 2016, Miami, FL

**Legal Frontiers in Digital Media**  
May 19-20, 2016, Mountain View, CA

For more, visit [www.medialaw.org](http://www.medialaw.org)

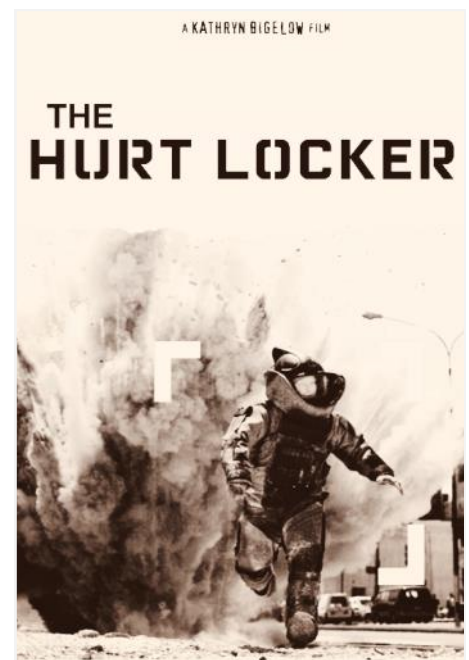
# 9th Circuit Confirms The Hurt Locker Is Fully Protected By The First Amendment

## *Army Sergeant's Right of Publicity Claim Was Properly Dismissed*

**By David Halberstadter**

The U.S. Court of Appeals for the 9<sup>th</sup> Circuit has finally issued its decision in an appeal that has been pending since 2011, affirming that the makers and distributors of the Academy Award<sup>®</sup>-winning motion picture *The Hurt Locker* is protected by the First Amendment from claims by a real-life Army bomb disposal technician that the film both violated his right of publicity and defamed him. [\*Sarver v. Chartier et al.\*](#), 2016 WL 625362 (9<sup>th</sup> Cir. February 17, 2016).

The appellate court left no room for doubt that the First Amendment “safeguards the storytellers and artists who take the raw materials of life – including the stories of real individuals, ordinary or extraordinary – and transform them into art, be it articles, books, movies, or plays.” But by reaching this constitutional issue rather than applying the test established by California’s Supreme Court for balancing creators’ rights of free expression against individuals’ rights of publicity, the panel may have been struggling with how to reconcile this case with contrary decisions it issued in 2013 and 2015 in cases involving realistic video games, despite the fact that video games are entitled to the same First Amendment protections as other expressive works.



### **The Sergeant, the Screenwriter, the Article and the Film**

Sergeant Jeffrey Sarver was an explosive ordnance disposal (EOD) technician in the U.S. Army who was deployed to Iraq in 2004, one of approximately 150 EOD technicians stationed in Iraq at that time. Mark Boal, a journalist embedded with various units serving in Iraq during 2004, spent approximately two weeks with Sarver’s unit. During that time, Boal interviewed Sarver at length as part of the research he was conducting on EOD teams working in Iraq. Boal subsequently wrote a non-fiction article for *Playboy* magazine that focused on Sarver and his experiences.

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Boal subsequently wrote the screenplay for *The Hurt Locker*. A fictional work about fictional characters, the screenplay was drawn from Boal's creative imagination, military history and the research Boal conducted while embedded in Iraq. The film initially premiered at overseas film festivals, and had its U.S. premiere on June 26, 2009, which Sarver attended. *The Hurt Locker* was nominated for nine Academy Awards® and won six, including Best Picture, Director and Original Screenplay.

### Defendants' Anti-SLAPP Motion Is Granted

On March 2, 2010 – five days before the Academy Awards® ceremony – Sarver commenced his action against *The Hurt Locker's* filmmakers and distributors in federal court in New Jersey, where he was stationed at the time. Sarver alleged that the film misappropriated his likeness and life experiences, defamed him, invaded his privacy and intentionally caused him emotional distress. The defendants succeeded in having the case transferred to the U.S. District Court for the Central District of California, following which they filed a special motion to strike the complaint in its entirety pursuant to California's "anti-SLAPP" statute, Code of Civil Procedure section 425.16.

The district court issued a tentative ruling on the anti-SLAPP motion, proposing to strike all of Sarver's claims *except* for the misappropriation of his likeness. The district court tentatively concluded that Sarver had made a sufficient *prima facie* showing that he was identifiable as the film's main character and that his "life story" was the sole basis for the film. At the hearing on the motion, the defendants argued that basing a fictional character upon an actual person is not the legal equivalent of using a person's name, voice, or likeness; that many fictional characters are based to one degree or another on real people; that the court appeared not to have engaged in the California Supreme Court's First Amendment versus right of publicity balancing test; and, that had the court done so, it would have concluded that the film was a prototypically transformative work that is entitled to First Amendment protection.

In its final order, the district court reversed its tentative conclusion about the misappropriation claim and struck all of Sarver's causes of action. The district court ultimately agreed with the defendants that "even if the Will James character was based on Plaintiff, no reasonable trier of fact could find that the [film] was not transformative." The court found that the defendants "unquestionably contributed significant distinctive and expressive content . . .

**The court left no room for doubt that the First Amendment "safeguards the storytellers and artists who take the raw materials of life – including the stories of real individuals, ordinary or extraordinary – and transform them into art, be it articles, books, movies, or plays."**

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through the writing of the screenplay, and the production and direction of the movie.” Sarver timely appealed.

### **Appeal Is Deemed Submitted, Then Submission Is Deferred**

The appeal was fully briefed by September 2012 and the 9<sup>th</sup> Circuit heard arguments in May 2013. But immediately after the argument had concluded, the appellate panel vacated and deferred the submission of the appeal pending a determination whether the 9th Circuit would consider *en banc*, in an unrelated matter, if California’s anti-SLAPP law should have any application in federal courts. (*Makaeff v. Trump University, LLC*, 2013 WL 1633097 (9th Cir. 2013).)

Then in July 2013, the 9th Circuit decided *Keller v. Electronic Arts Inc.*, 724 F.3d 1268 (9th Cir. 2013), in which it ruled that EA’s *NCAA Football* series of video games did not qualify for First Amendment protection under the “transformative use” test developed by the California Supreme Court. In September 2013, Electronic Arts filed a petition for certiorari in the U.S. Supreme Court for review of this decision, as well as a similarly-decided 3rd Circuit ruling. (*Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013)). Soon after that happened, the 9th Circuit panel assigned to *Sarver* issued another order further deferring submission of Sarver’s appeal pending the disposition of EA’s petition in *Keller*.

In late November 2013, the 9th Circuit issued an order in the *Makaeff* appeal denying rehearing *en banc*. In September 2014, the parties to *Keller* and *Hart* settled and EA dismissed its writ petitions. That cleared the way for the 9th Circuit to decide Sarver’s appeal. But for unknown reasons, nothing happened until December 2015, when the 9<sup>th</sup> Circuit “resubmitted” the appeal.

### **Going Straight to the First Amendment**

In its published decision, the appellate court first disposed of all preliminary issues in the filmmakers’ favor, finding that the district court properly applied New Jersey’s choice-of-law rules and correctly concluded that California’s substantive law applied to Sarver’s claims. The Ninth Circuit panel next found that the anti-SLAPP motion had been timely filed, and that the filmmakers had satisfied the first “prong” of the anti-SLAPP statute’s requirements, observing that the film’s focus “on the conduct of the Iraq War . . . its dangers, and soldiers’ experiences were subjects of longstanding public attention” and that “the film and the narrative of its central character . . . speak directly to issues of a public nature.”

Turning to the “second prong” of the anti-SLAPP test – *i.e.*, whether Sarver had demonstrated a probability of prevailing on his claims – the appellate panel concluded that

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allowing Sarver to pursue his right of publicity claim against the filmmakers would infringe their constitutional right to free speech, and that if California's right of publicity law permitted Sarver to pursue such a claim, then that law was "simply a content-based speech restriction" that is "presumptively unconstitutional . . . unless Sarver can show a compelling state interest in preventing the defendants' speech."

The court began its analysis with a review of the only U.S. Supreme Court decision to review the constitutionality of a state's right of publicity law. (*Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).) As interpreted by the Ninth Circuit, the Supreme Court in *Zacchini* determined that the First Amendment interest in broadcasting Zacchini's entire performance was minimal, but the threat to the economic value of that performance was substantial; and, thus, "the First Amendment did not prevent Ohio from protecting Zacchini's right of publicity."

The appellate panel in *Sarver* then explained that the 9<sup>th</sup> Circuit has interpreted *Zacchini* to "uphold the right of publicity in a variety of contexts where the defendant appropriates the economic value that the plaintiff has built in an identity or performance." It cited as examples Paris Hilton's image and her "that's hot" catch phrase (*Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010)) and the likenesses of both college and professional football players that were incorporated into EA's video games without consent. (*Keller and Davis v. Electronic Arts, Inc.*, 775 F.3d 1172 (9th Cir. 2015).) The court noted in a footnote that these cases addressed the First Amendment "only through the lens of California's 'transformative use' doctrine." Without explaining why, the panel concluded that it "need not and do not reach the question of whether such a defense applies in this case."

**For now, it would appear that in the Ninth Circuit, storytellers in all media safely may incorporate "the raw materials of life" into their works.**

The Ninth Circuit panel found these cases, as well as those involving the use of celebrity likenesses in commercial advertising, to be inapplicable to Sarver's appeal. *The Hurt Locker* is not speech proposing a commercial transaction, the court observed, and "unlike the plaintiffs in *Zacchini*, *Hilton*, and *Keller*, Sarver did not 'make the investment required to produce a performance of interest to the public.'" According to the court, "Sarver is a private person who lived his life and worked his job" and, "while his life and story may have proven to be of public interest, . . . [t]he state has no interest in giving Sarver an economic incentive to live his life as he otherwise would."

It is not entirely clear how the Ninth Circuit might reconcile its decisions in the future, were it forced to consider a situation in which the work at issue was a documentary or "docu-drama" about a celebrity or athlete who had invested a great deal of time and effort in his identity or her performance and which attempts to "literally recreate" that celebrity "in the very setting in

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which he has achieved renown.” But for now, it would appear that in the Ninth Circuit, storytellers in all media safely may incorporate “the raw materials of life” into their works.

*David Halberstadter, a partner with Katten Muchin Rosenman LLP, Los Angeles, represented defendants in this case. Plaintiff was represented by Michael R. Dezsi, Law Office of Michael R. Dezsi, PLLC, Detroit.*



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### Motion to Quash

LMC moved to quash Kazakhstan's subpoena, claiming that the Washington Shield Law, RCW 5.68.010, applied because the purpose of the subpoena is to identify a confidential source. The trial court denied the motion but the Court of Appeals reversed, relying on subsection (3) of the Shield Law. This protects non-news media parties (e.g., eNOM, Inc.) from forced compulsion to turn "over communications relating to business transactions between such non-news media party and the news media." Subsection (1) of RCW 5.68.010 protects against disclosure of the identity of a source of news or information. Because the Kazakhstan subpoena sought to identify the domain name registrants as the hackers or because such information could lead to the hackers, these purposes are protected by the Shield Law.

The court found that the subpoena fell within the plain language of the statute, which is very broad. "It protects against the disclosure of the identity of a source of *any* news or information. It also protects against the disclosure of any information that *would tend to* identify a source." Therefore LMC was entitled to rely on the news Shield Law to protect against the disclosure of domain name registration information that was essential to the operation of Respublika.

This case is a strong win for advocates of Shield Laws and protection of free speech. The authors of the nine year old Shield Law should be proud of its broad application that reached across the ocean to protect journalists subject to a repressive regime.

*Judy Endejan is a partner at Garvey Schubert Barer in Seattle, WA.*



Media Law  
Resource Center  
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**March 7, 2016**  
**University of Miami**

## LEGAL ISSUES CONCERNING HISPANIC AND LATIN AMERICAN MEDIA

# Ohio Appellate Court Affirms Directed Verdict for Television Station

## *“Child Porn Found on Laptop” Banner Capable of Innocent Construction*

By Stephen J. Rosenfeld

An Ohio appellate court affirmed a directed verdict for a television station, finding that an allegedly defamatory banner was capable of an innocent construction when viewed in the context of the entire broadcast. [\*Sabino v. WOIO\*](#), No. 10257 ((Feb. 11, 2016). The claim arose from a WOIO broadcast concerning an ongoing investigation of a high school art teacher accused of giving his students access to a personal laptop that allegedly contained adult and child pornography.

The news broadcast focused on a search warrant for a forensic investigation of the teacher’s laptop that issued weeks after the initial incident. Although the reporter emphasized during the broadcast that the investigation was ongoing and that no charges were pending (and for that reason the teacher was not even named), WOIO placed a banner across the bottom of the screen that read “TEACHER UNDER FIRE – CHILD PORN FOUND ON LAPTOP.”

The teacher’s claims against WOIO and the reporter concentrated on the banner, which he argued was defamatory because the police had not found (nor did they ever find) child pornography on his computer. In affirming the trial court’s directed verdict in favor of the media, the appellate court engaged in a detailed contextual analysis to determine that the statement was capable of an innocent construction.

**The appellate court focused its analysis on the innocent construction rule.**

### Background

Georgio Sabino was a 44-year-old professional photographer whom Cleveland Heights High School (the “High School”) hired as a full-time teacher for the Fall term of 2011. Just a few months into his employment as a full-time teacher, two of Mr. Sabino’s female students complained to school officials that they had found adult and child pornography on a laptop Mr. Sabino had allowed them to use for their school assignments. One student claimed that when she opened a file named “teen,” she found a video of a young couple having sex and estimated their ages to be 14 to 15 years old. Another student claimed she found links to a porn website on Mr. Sabino’s computer. The High School immediately placed Mr. Sabino on administrative leave pending the results of an ensuing investigation, called the police, and sent a message to

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all parents advising that “a teacher has been placed on leave pending an investigation [into] allegations as to inappropriate materials on his personal computer. . . .”

The Cleveland Heights police removed Mr. Sabino from the school a day after the students’ complaints and seized his computers at that time. Later that day, WOIO ran a short story on its website that named Mr. Sabino and stated that he was placed on leave pending a criminal investigation into “inappropriate material found on [his] personal computer.” Although that article initially named Mr. Sabino as the teacher, his name was removed from the article one day later. The article was not in contention at trial because the statute of limitations ran before Mr. Sabino filed his lawsuit in February 2013 (and because Mr. Sabino admitted at trial that the article was 100% true).

On February 20, 2012, two months after the initial incident, WOIO broadcast a report on the continuing criminal investigation. Ed Gallek, WOIO’s crime and courts reporter, found search warrant documents that the county prosecutor had filed with the Court detailing the complaints Mr. Sabino’s students had made in their police statements and stating that the affiant had probable cause to believe that evidence of a crime would be located on Mr. Sabino’s seized computers. Mr. Gallek prepared a 1 minute and 10 second-long news broadcast that reported on the status of the investigation as stated in the search warrant documents and Mr. Gallek’s brief conversation with plaintiff’s criminal lawyer. Mr. Gallek closed his report by cautioning, “No charges yet, so we’re not naming the teacher ... everyone’s still waiting for findings.”

However, after Mr. Gallek had written the script and filmed his report, a graphic banner was prepared without his knowledge or involvement and was placed at the bottom of the screen, which read: “19 News Investigation – TEACHER UNDER FIRE – CHILD PORN FOUND ON LAPTOP.” It is this banner upon which Mr. Sabino primarily based his claims.

On April 4, 2012, months after the report aired, the police issued a report of their forensic investigation of Mr. Sabino’s computer, finding adult pornography but not child pornography. No charges were ever filed against Mr. Sabino.

### **The Lawsuit**

Mr. Sabino filed a seven count complaint against WOIO and Mr. Gallek, asserting claims for defamation per quod and defamation per se (for both the initial article and the follow-up broadcast), negligence, false light, and intentional infliction of emotional distress. The complaint sought compensatory and punitive damages. The trial court denied defendants’ motion for summary judgment, but before trial, the plaintiff agreed to dismiss his claims for negligence, intentional infliction of emotional distress, and defamation for the initial article.

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### The Trial

In late 2014, the matter proceeded to trial on Mr. Sabino’s false light invasion of privacy claim, and defamation per quod and defamation per se claims for the broadcast. At trial, Mr. Sabino admitted that everything in the broadcast was either true or opinion with the exception of the banner. With regard to the banner, he admitted that the gist or sting of the report had to do with the students’ allegations and if the banner referred to the students’ allegations, it too would be true.

On defendants’ motion for a directed verdict, the trial court found for defendants on the defamation per se claim on the basis that the broadcast could not be defamatory per se because extrinsic evidence was needed to identify the plaintiff. The court next found no liability for Mr. Gallek because there was no evidence that any of his statements—which did not include the banner—were false. With regard to the remaining claims against WOIO, the trial court found: (1) the banner was “a fair statement of fact” if construed under the innocent construction rule to mean that the students—not the police—found child pornography on the computer; (2) that the fair report privilege protected the statements if so construed under the innocent construction rule; and (3) that plaintiff failed to prove causation as to any damages related to WOIO’s conduct (as apart from the initial allegations of the students, etc.). Thus, the trial court granted a directed verdict for defendants as to the entire case and awarded WOIO and Mr. Gallek costs.

**Taken as a whole, “the newscast could not have been reasonably understood to claim that Sabino had child pornography on his computer.”**

### The Appeal

Plaintiff appealed the trial court’s direct verdict. On appeal, plaintiff challenged the trial court’s ruling in favor of WOIO and Mr. Gallek, arguing *inter alia* that the court erred by granting a directed verdict for defendants based on the fair report privilege and innocent construction rule. (Plaintiff did not appeal the trial court’s directed verdict on the false light invasion of privacy claim.)

The appellate court focused its analysis on the innocent construction rule, finding that the trial court believed the statement, “Child Porn Found on Laptop,” could refer to the student who claimed she found child porn on the laptop and thus was not defamatory because it could be interpreted as a fair statement of fact when looking at the entire broadcast. Although, “[o]n its face, ‘Child Porn Found on [Laptop]’ if false, and if shown to be about Sabino, “appears to

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be a clear defamatory statement,” “[c]ourts do not look at an allegedly defamatory statement in a vacuum.” Instead, the appellate court emphasized that a court must consider the totality of the circumstances and view the statement in context.

Like the headline of an article, an onscreen banner must be viewed in the context of the entire publication. On this point, the appellate court drew heavily from a Tennessee case, *West v. Media Gen. Operations*, 120 F. App’x 601 (6th Cir. 2005), 250 F. Supp. 2d 923 (E.D. Tenn., 2002), discussing the myriad elements of a television broadcast. The court then engaged in a detailed contextual analysis, focusing on the use of qualifying language in both the lead-in and throughout (e.g. “He is *suspected* of having child pornography,” “what his students *may* have seen,” “What *they say they saw*,” “One *student says*” “No charges yet ... everyone’s still waiting for findings” (emphasis in opinion)). The court further analyzed the timing and placement of the banner, noting that it did not appear for the entire broadcast, was a smaller print size than other graphics, and was surrounded by other banners, audio, and visual elements. In sum, “the alleged defamatory banner was just one of many visual elements to the broadcast”; it did not “dominate[] the story to the point where it deserves significantly more weight when balanced against the rest of the broadcast.”

The court rejected plaintiff’s argument that two other so-called errors in the broadcast—(1) stating that the teacher was “suspended” from school instead of being “placed on leave” and (2) stating that he received information from “recently filed court records” without indicating the records were a search warrant, not an indictment—coupled with the banner, could lead a reasonable viewer to think Mr. Sabino had child pornography on his computer. Rather, the court emphasized that a journalist need not describe legal proceedings in technically precise language, and that those statements were not defamatory in nature and did not indicate that Mr. Gallek was intentionally misleading the audience.

The appellate court concluded that taken as a whole, “[t]he newscast could not have been reasonably understood to claim that Sabino had child pornography on his computer”—but merely that he was being investigated. Thus, the trial court’s interpretation of “Child Porn Found on Computer” was supported by the innocent construction rule. Although the appellate court did not condone what it viewed as a “sensationalistic tone of the broadcast,” it held that as a matter of law, the “Child Porn Found on Computer” statement was not defamatory in context.

*WOIO and Mr. Gallek were represented at trial and on appeal by Stephen J. Rosenfeld of Mandell Menkes LLC and Melissa DeGaetano of Baker & Hostetler LLP. Mr. Sabino was represented at trial and on appeal by John A. Huettnner and David B. Waxman and Michael R. Blumenthal of Waxman Blumenthal LLC.*



## MLRC's Next Gen Committee Hosts Webinar On Reporting On Hacked Materials



MLRC Next Generation Committee members **Anna Kadyshevich**, senior counsel at HBO, **Adrianna Rodriguez**, associate at Holland & Knight in Washington, D.C., and **Elizabeth Seidlin-Bernstein**, associate at Levine Sullivan Koch & Schulz, LLP in Philadelphia, hosted a webinar discussing issues that may arise at various stages of reporting on hacked materials.

Around 100 MLRC members from across the country attended the webinar featuring panelists **Brian Barrett**, assistant general counsel to the Associated Press, **Kate Blogger**, partner at Levine Sullivan Koch & Schulz, LLP and **Jeremy Goldman**, partner at Frankfurt Kurnit Klein & Selz, PC.

During the hour-long presentation, the panelists addressed the legal issues that journalists, news organizations, and their counsel should consider at three stages of the reporting process: (1) accessing and obtaining hacked materials; (2) holding hacked materials; and (3) reporting on or reproducing hacked materials. The discussion included potential liability under the Computer Fraud and Abuse Act, the Stored Communications Act, copyright laws, and privacy laws, as well as the implications of *Barnicki v. Vopper*, 532 U.S. 514 (2001) in the reporting process.

The webinar is available online at <https://webinars.hklaw.com/p6upmusp9kj/>.

# D.C. Circuit Dismisses Defamation Suit: “We Didn’t Start the Fire” – Billy Joel

By John C. Henegan

In September of 2010, Vincent Forras, a former New York fire fighter and 9/11 first responder, filed a nuisance suit in New York state court against Imam Feisal Abdul Rauf, who had proposed in July 2010 along with others that an Islamic community center and mosque be built in Manhattan at 49-51 Park Place, a few blocks from where the World Trade Center once stood. Forras’s suit, like Rauf’s proposed development, received wide-spread media coverage. The New York state court dismissed Forras's suit in 2012 for failure to state a claim. *See Forras v. Rauf*, 975 N.Y.S. 2d 366 (N.Y. Sup. Ct. 2012).

Undeterred, Forras and Larry Klayman, the attorney for Forras in his suit against Rauf, filed a defamation action in February 2012 in D.C. federal district court against Rauf and his attorney in the New York suit, Adam Bailey, a resident of New York. The alleged defamation arose from a news story in the October 11, 2010 edition of the *New York Post*. The Post's reporter quoted a document that Bailey had filed in the New York proceedings which contended that Forras’s tort suit was based on ““blind bigotry.”” The DC federal district court dismissed the suit based upon limitations grounds and the D.C. Anti-SLAPP Act, D.C. Code § 16-5501-5505. Forras and Klayman appealed.

## DC Circuit Decision

By the time the DC federal appeals court heard their appeal, that court had already ruled that the D.C. Anti-SLAPP Act did not apply in federal court actions, citing *Hanna v. Plumer*, 380 U.S. 460, 463-64 (1965), and its ilk. *See Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328 (D.C. Cir. 2015). On February 12, 2016, the DC federal appeals court affirmed the dismissal of their suit but on grounds different from those of the DC District Court. [\*Forras v. Rauf\*](#), 2016 U.S. App. Lexis 2435 (D.C. Cir. Feb. 12. 2016).

Bailey had moved to dismiss Forras’s suit in the DC District Court on several grounds, including: (i) lack of subject-matter jurisdiction; (ii) lack of personal jurisdiction; (iii) statute of limitations; and (iv) the DC Anti-SLAPP Act, but the trial court had in the words of Circuit Judge Millett “leapfrogged over” the issues of jurisdiction when addressing the merits and dismissing the case. *Forras*, \*6.

Judge Millett noted that it was problematic – “far from clear” – whether the complaint, which failed to allege the resident citizenship of the parties and simply included their street

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addresses, adequately established the DC District Court's subject matter jurisdiction. *Forras*, \*8 n 4. But, "unlike the complicated subject-matter jurisdiction" issue, the court explained that "the absence of personal jurisdiction over Defendant Bailey is 'straightforward' and 'present[s] no complex question of state law,'" *id.* \*8, quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 587-88 (1999), and thus, it would take the counter-intuitive approach of ignoring subject matter jurisdiction and go directly to personal jurisdiction. *Id.*

In doing so, Judge Millett applied now well-established jurisdictional rules. "[T]here is no unyielding jurisdictional hierarchy" when a federal district addresses such issues. *See Ruhrgas*, 526 U.S. at 578. "In appropriate circumstances . . . a court may dismiss for lack of personal jurisdiction without first establishing subject-matter jurisdiction." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007). Thus, Judge Millett framed the issue for review:

The question in this case is whether the United States District Court for the District of Columbia properly exercised personal jurisdiction over the Defendant, Adam Bailey, when (i) the Plaintiffs, Larry Klayman and Vincent Forras, are not District of Columbia residents; (ii) Defendant Bailey never set foot in the District in the two decades prior to the lawsuit; (iii) the lawsuit arises from allegedly defamatory statements Bailey made in a New York state court filing that (iv) were later published by a New York reporter (v) in a New York paper, and (vi) the statements concern Klayman's and Forras's roles in New York litigation concerning (vii) a controversial construction project in New York City.

**The Judge explained that no nexus existed between the allegations about Bailey's alleged tortious conduct in the prior suit and any activities in D.C.**

*Forras*, \*1-2. Judge Millett addressed plaintiffs' contentions in detail and explained that the court lacked the authority to exercise personal jurisdiction over Bailey under any of the three relevant prongs of D.C.'s long-arm statute, D.C. Code § 13-423(1)-(2), (4). *Id.* at \*8-15.

When doing so, Judge Millett noted plaintiffs had not alleged that Bailey's contacts within D.C. subjected him to the general personal jurisdiction of the D.C. courts. *Id.* at \*9 n.5. The Judge explained that no nexus existed between the allegations about Bailey's alleged tortious conduct in the prior suit and any activities in D.C., *id.* at \*10-11, and even accepting plaintiffs' allegations that the injury to plaintiffs' reputation was felt in D.C. or that Bailey's intent was to incite Muslims who lived in DC to attack and harm plaintiffs, the DC courts had previously ruled that the DC long arm

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statute did not permit specific jurisdiction over Bailey since his allegedly defamation was published outside the District. *Id.* at \*11-15 & n. 6.

Finally, Judge Millett rejected the contention that the exercise of personal jurisdiction over Bailey was permissible under *Calder v. Jones*, 465 U.S. 783 (1984), because the DC long-arm statute's "reach is far more cabined" than the Federal Constitution. *Forras*, \*15-16. In any event, unlike *Calder*, where "California [was] the focal point both of the story and of the harm suffered," *see id. citing Calder*, 465 U.S. at 789, *Forras*' defamation claim "involves the alleged defamation in New York of a non-District resident by a New York resident arising out of New York litigation over a New York land-development dispute. Neither the District of Columbia nor any conduct by any party within the District is even mentioned in the pleadings or the article at issue." *Forras*, 2016 U.S. App. Lexis 2435, \*1-2. As a result, Judge Millett concluded that the complaint made "no plausible allegation" of fact showing that the D.C. federal district court could exercise specific jurisdiction over Bailey. On that basis, the D.C. federal appeals court affirmed the judgment of the federal district court.

[John C. Henegan](#) is a member of Butler Snow, LLP, in its Ridgeland, Mississippi office. Plaintiff was represented by Larry Klayman. Defendant was represented by Christopher G. Hoge.

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# Defamation Suit Against *The Nazis Next Door* Dismissed

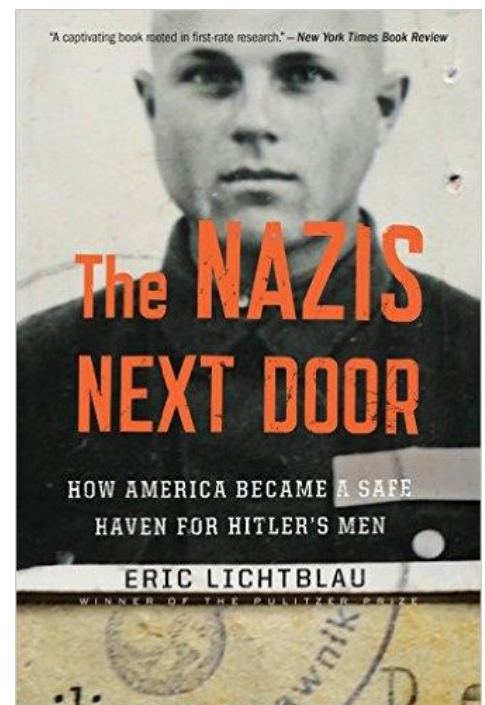
By Andrew Nellis

The New Jersey federal district court this month dismissed defamation and related claims against the author and publisher of the book *The Nazis Next Door: How America Became a Safe Haven for Hitler's Men*. [\*Soobzokov v. Lichtblau\*](#), No. 15-6831 (D.N.J. Feb. 16, 2016) (unpublished). The author and publisher were sued by the son of a suspected war criminal. The court held that the complaint failed as a matter of law to state a claim.

## Background

*The Nazis Next Door*, written by Eric Lichtblau and published by Houghton Mifflin Harcourt in 2014, is a book about Nazis who immigrated to the United States after World War II and evaded war crime prosecutions. One of the people mentioned in the book was Tscherim Soobzokov, who had been accused of being a Nazi war criminal prior to being murdered in 1985. Lichtblau contacted Soobzokov's son, the plaintiff Aslan Soobzokov, for information about his father, and the plaintiff met and cooperated with Lichtblau. Lichtblau ended up mentioning the plaintiff four times in the book, including thanking him for his help in the acknowledgments.

After the book was published, the plaintiff sued for defamation, invasion of privacy, and intentional infliction of emotional distress. The defendants moved to dismiss for failure to state a claim.



## Defamation

The court began by reciting the elements of defamation in New Jersey: “(1) the assertion of a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to a third party; and (3) fault amounting to at least negligence by the publisher.” The court observed that a showing of “actual malice” would be required rather than mere negligence if the statements implicated a matter of public concern. While the court found it

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likely that identifying former Nazis is a matter of public concern, it did not need to decide the point.

Next, the court found that New Jersey law limits defamation claims to statements “of and concerning” the plaintiff; one cannot bring a defamation claim over statements about someone else. Nor can a claim be brought on behalf of the deceased. Thus statements in the book about plaintiff’s father could not defame the plaintiff or form the basis of a claim for defamation on behalf of the father.

The court then analyzed each of the book’s four mentions of the plaintiff himself. Three of the mentions described the plaintiff’s: (1) “belief in his father’s innocence and efforts to defend his father’s name,” (2) trip back to the United States to be with his father as he was dying, and (3) subsequent struggle to get the government to investigate and prosecute his father’s murder. According to the court, these passages described behavior that was “understandable” and even “admirable” and thus did not defame the plaintiff.

The fourth mention of the plaintiff was in the book’s acknowledgments, where Lichtblau thanked him for his “cooperation.” According to the plaintiff, the implication that he helped prepare a book that accused his father of being a Nazi was defamatory. However, the court noted that the plaintiff did in fact cooperate with Lichtblau. Because truth is an absolute defense to defamation, the court found that this statement too was not defamatory.

### **Other Claims**

The plaintiff also alleged privacy invasion and intentional infliction of emotional distress. As to the former, the court found that a false light privacy invasion claim cannot succeed on the basis of a publication found not to be defamatory. Similarly, the court cited New Jersey precedent for the proposition that emotional distress claims that are “closely linked” to defamation claims cannot succeed consistent with the First Amendment if the defamation claims fail. As such, the privacy invasion and emotional distress claims were necessarily dismissed along with the defamation claims.

*Andrew Nellis, NYU Law School, is an MLRC intern. The plaintiff acted pro se. Defendants were represented by Robert Balin, Davis Wright Tremaine, New York.*



# Texas Court Dismisses Claims Against Media Defendants Under Texas's Anti-SLAPP Statute

By Margaret Dunlay Terwey

A District Court Judge for the U.S. District Court for the Eastern District of Texas recently dismissed all claims against six defendants pursuant to the Texas Citizens Participation Act (“TCPA”), Texas’s anti-SLAPP statute. [\*Walker v. Beaumont Independent School District\*](#), No. 1:15-cv-379 (E.D. Tex. Feb. 11, 2016) (“Order”); *Haynes v. Crenshaw*, No. 1:15-cv-437 (E.D. Tex. Feb. 11, 2016), *consolidated with Walker*, 1:15-cv-379. In two related cases, Plaintiffs Calvin Walker, Walker’s Electric, Walkers Electric, and Jessie Haynes sued more than 30 defendants for participation in an alleged conspiracy to ruin Plaintiffs’ reputations and businesses. The decision is notable for its application of the TCPA as well as its application of the substantial-truth doctrine and single-publication rule.

## Background

Plaintiff Calvin Walker initiated this suit in July 2015, asserting claims for defamation, tortious interference, civil conspiracy, RICO racketeering, and RICO conspiracy. Walker, a master electrician in Beaumont, Texas, and owner of Walker’s Electric, had a contract to provide the Beaumont Independent School District (“BISD”) with electrical maintenance and repair services. According to Walker’s complaint, various individuals and organizations in Beaumont conspired with the federal government to have him prosecuted and indicted for fraud related to invoices submitted to BISD.

In May 2011, Walker was indicted on multiple counts of fraud. After a trial, the jury failed to reach a verdict, and a mistrial was declared. To avoid a second trial, Walker accepted a plea deal in which he pled guilty to failing to pay taxes on more than \$1.5 million in income he received while working as an electrical contractor for BISD. As part of his guilty plea, Walker signed a Factual Basis and Stipulation. In that Stipulation, Walker admitted that BISD records “contained copies of bills of materials from third party electrical wholesale companies along with copies of unnegotiated checks drawn on [Walker’s] bank account in the same amounts, payable to said wholesalers.” Specifically, Walker admitted that “[i]ncluded in the wholesale invoices was an invoice in the amount of \$382,975.32 which had been altered to reflect that it was an invoice when in fact the document was a quote and not an actual purchase. [Walker’s]

**The decision is notable for its application of the TCPA as well as its application of the substantial-truth doctrine and single-publication rule.**

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check payable to that wholesaler in the amount of \$382,975.32 was never presented to the wholesaler or negotiated.”

A number of local publications, including the *Beaumont Examiner*, reported on Walker’s indictment and plea agreement. Walker claimed that the journalists were members of the conspiracy and that they mischaracterized his plea deal to further tarnish his reputation. Specifically, Walker alleged that the *Beaumont Examiner* and Beaumont journalist Jerry Jordan published defamatory articles that stated Walker admitted to defrauding BISD and agreeing to forfeit millions of dollars. Walker also accused Defendant Michael Getz, a Beaumont attorney, of making similar statements at a BISD Board of Trustees meeting. Walker claimed that BISD refused to award him a contract and that he lost business from other potential clients due to the conspiracy.

Plaintiff Jessie Haynes, the former Communications Director of BISD, joined Walker’s suit soon after it was filed. (Haynes also filed a second lawsuit asserting the same claims. That lawsuit has since been consolidated with the *Walker* case.) Haynes’s claims arose from an incident at a BISD meeting. Haynes attempted to block a member of the BISD Board of Trustees from attending a meeting by standing in front of the door to the meeting room. Haynes was charged and convicted of obstruction of a public passage. Haynes claimed that her conviction was a product of the conspiracy. As evidence of his participation in the conspiracy, Haynes alleged that Defendant Wayne Reaud, a Beaumont attorney and owner of the *Beaumont Examiner*, attended her criminal trial. Though Haynes alleged that members of the conspiracy also defamed her, Haynes asserted claims only for assault (against the board member) and RICO racketeering and conspiracy.

**A number of local publications, including the *Beaumont Examiner*, reported on Walker’s indictment and plea agreement.**

Defendants The Examiner Corporation, Don Dodd, and Jennifer Johnson (the “Examiner Defendants”), and Reaud moved to dismiss Walker and Haynes’s claims against them pursuant to the TCPA, which provides for the early dismissal of a legal action “based on, relat[ing] to, or . . . in response to a party’s exercise of the right of free speech, right to petition, or right of association.” Tex. Civ. Prac. & Rem. Code § 27.003(a). Getz and Jordan separately filed TCPA motions to dismiss. The Defendants argued that Plaintiffs could not meet their burden under the TCPA and asserted substantial-truth and limitations defenses. After a hearing, Magistrate Judge Keith F. Giblin recommended dismissal of all claims against the six Defendants pursuant to the TCPA. Though Plaintiffs objected, District Court Judge Marcia A. Crone adopted the Magistrate Judge’s report and dismissed the claims against these Defendants with prejudice.

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### The Magistrate Judge's Report and Recommendation

Under the TCPA, the movant must first show by a preponderance of the evidence that the legal action relates to the party's exercise of certain First Amendment Rights. *See* Tex Civ. Prac. & Rem. Code § 27.005(b). Once the movant makes this showing, the burden shifts to the nonmovant to "establish[] by clear and specific evidence a prima facie case for each essential element of the claim in question" to survive dismissal. *See id.* § 27.005(c). Even if the nonmovant makes this showing, the court must still dismiss the claim if the movant "establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim." *See id.* § 27.005(d).

In his report, the Magistrate Judge concluded that the Defendants met their initial burden to show that the TCPA applied to the Plaintiffs' claims. *See* Report and Recommendation, *Walker*, No. 1:15-cv-379, ECF No. 170 ("Report"). In their combined motion, the Examiner Defendants and Reaud argued that Walker and Haynes's claims against them stemmed entirely from First Amendment activity: the publication of two articles addressing Walker's plea agreement, Reaud's previous legal representation of a labor union's local chapter, and Reaud's attendance at Haynes's trial. Getz and Jordan also argued that the claims against them were related to their exercise of free speech. The Magistrate Judge agreed that the alleged conduct fell within the ambit of the TCPA. *Id.* at 10-12. The Magistrate Judge also relied on Plaintiffs' concession at a hearing before the Magistrate Judge that the TCPA applied to all of the claims in the case, including the RICO claims. *Id.* at 10.

**The Examiner Defendants and Reaud argued that Walker and Haynes's claims against them stemmed entirely from First Amendment activity.**

Next, the Magistrate Judge tested Plaintiffs' claims against the TCPA's "clear and specific evidence" standard. Only Walker asserted a defamation claim against the Defendants. Walker challenged two *Beaumont Examiner* articles that addressed his plea agreement. Walker claimed the articles falsely stated or implied that he admitted to submitting fraudulent invoices to BISD. The Magistrate Judge concluded that Walker could not show falsity with respect to any of the challenged statements in the two articles. One of the articles, which referred to a "signed plea agreement between Walker and the federal government wherein Walker admitted invoices submitted to BISD in order to secure payment were altered," was "nearly a direct quote from Walker's stipulation of facts." *Id.* at 16. The second article, which stated that Walker "admitted to falsifying invoices submitted to the school district for payment," was substantially true in light of his factual stipulation. *Id.* at 17. "Looking at the article as a whole and assigning to it the meaning a reasonable person would attribute," the Magistrate Judge concluded that "any distinction between the language of the factual basis and the article [was] insignificant." *Id.* Walker also challenged two other statements in the articles: the first article

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stated that Walker “was not required to submit a paid invoice for the materials billed to the school district,” and the second stated that Walker agreed to forfeit \$3.2 million. *Id.* at 16, 18. The Magistrate Judge found that the first statement did not alter the “sting” of the article, while the second statement could not be shown to be false as Walker did not “give any indication of the true amount that Walker agreed to repay.” *Id.* Thus, Walker could not show the falsity of either of the *Beaumont Examiner* articles.

Walker challenged similar statements by Jordan and Getz. As with the *Beaumont Examiner* articles, the Magistrate Judge found that the statements were “substantially true interpretations” of Walker’s plea agreement and indictment. *Id.* at 18-20.

The Magistrate Judge then turned to the degree of culpability required for liability for defamation in this case. At the hearing on the TCPA motions, Plaintiffs’ counsel also conceded that Walker and Haynes were public figures. Thus, Walker had to show that the Defendants acted with actual malice. Aside from conclusory allegations, the Magistrate Judge found no clear and specific evidence of actual malice. *Id.* at 20. Because Walker failed to show falsity or actual malice, the Magistrate Judge concluded that Walker failed to establish a prima facie case of defamation. The Magistrate Judge found that Plaintiffs’ allegations with respect to their RICO and other claims were insufficient to meet their burden under the TCPA as well.

Finally, the Magistrate Judge considered whether the Defendants had proved valid defenses by a preponderance of the evidence. Having already found that the challenged statements were substantially true, the Magistrate Judge focused on Defendants’ limitations defenses. In Texas, the statute of limitations for a defamation claim is one year. Each of the challenged statements was made well over a year before the lawsuit was filed. Applying the single publication rule to the online articles, the Magistrate Judge concluded that Walker’s defamation claim against these Defendants was time-barred. *Id.* at 36 (citing *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 142 (5th Cir. 2007)). Walker argued that the court could not dismiss his defamation claims without first allowing him discovery to determine if the articles had been subsequently altered or republished. The Magistrate Judge rejected that argument, as there was “no evidence that any of these articles have been altered or republished.” Report at 37. The Magistrate Judge also found this argument unpersuasive, as Walker had never sought discovery even though a court may allow discovery under the TCPA upon a showing of good cause. *Id.* at 37. As Walker’s remaining claims stemmed from his defamation claim, his other state-law claims were time-barred as well. *Id.* at 38-39.

### **The District Court’s Order**

Plaintiffs objected to the Magistrate Judge’s report, arguing for the first time that the TCPA did not apply in federal court or to federal claims. The District Court declined to consider these

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new arguments. The District Court noted that several courts in the Fifth Circuit had applied the TCPA to state claims in federal court. *See* Order at 4. Moreover, “[b]ecause . . . this [was] the first time that Plaintiffs have contested the issue—and, in fact, advanced the opposite position at the oral hearing” and because “Defendants have not been afforded an opportunity to brief or argue the issue,” the District Court concluded that Plaintiffs’ argument regarding the applicability of the TCPA to federal claims was not properly before the District Court. *See id.* at 6. In light of Plaintiffs’ concession, the District Court accepted the Magistrate Judge’s recommendation that the TCPA applied to Plaintiffs’ claims.

The District Court next addressed whether Plaintiffs had met their burden under the TCPA. Walker objected to the Magistrate Judge’s substantial-truth analysis, arguing that he failed to consider each article as a whole in light of the surrounding circumstances. *Id.* at 7. The court found this objection “without merit” and overruled it. *Id.* With respect to the statute of limitations defense, Walker also objected that the single publication rule did not apply to internet publications. *Id.* The court disagreed, noting that the Magistrate Judge had cited “significant legal authority” in support of his finding that the single publication rule did apply. *Id.* Finally, the District Court found that Walker’s failure to prove actual malice was fatal to his defamation claim “without regard to the outcome of the substantial truth and limitations issues.” *Id.* at 8. Accordingly, the District Court adopted the Magistrate Judge’s reasoning and dismissed with prejudice all of Plaintiffs’ claims against the six Defendants.

### Next Steps

If a court orders dismissal pursuant to the TCPA, the movant is entitled to court costs, reasonable attorneys’ fees, and other expenses incurred in defending against the legal action. *See* Tex. Civ. Prac. & Rem. Code § 27.009(a)(1). The court must also award sanctions “sufficient to deter the party who brought the legal action from bringing similar actions.” *Id.* § 27.009(a)(2). Reaud and the Examiner Defendants intend to seek attorneys’ fees and other such relief at the appropriate time.

*Harry M. Reasoner, Thomas S. Leatherbury, John C. Wander, Stacey N. Vu, Marc A. Fuller, and Margaret Dunlay Terwey of Vinson & Elkins LLP; Gary N. Reger, Gilbert I. Low, and Michael J. Truncale of Orgain Bell & Tucker LLP; L. DeWayne Layfield of the Law Office of L. DeWayne Layfield PLLC; and Mike C. Miller of the Law Office of Mike C. Miller PC represented Defendants Wayne Reaud, The Examiner Corporation, Don Dodd, and Jennifer Johnson. David Vann de Cordova, Jr. represented Defendant Michael Getz. Defendant Jerry Jordan represented himself. Maria –Vittoria Carminati of Carminati Law PLLC represented the Plaintiffs.*

# Appellate Court: “Preponderance of the Evidence” Overcomes Privilege in Private Figure Defamation Lawsuits

By Rachel Mueller

The Court of Special Appeals of Maryland has reversed the jury verdict from a circuit court case between two former colleagues at the University of Maryland, Baltimore County, because the trial court erroneously instructed the jury that the plaintiff had to present *clear and convincing evidence* to overcome a conditional privilege defense raised by the defendant. The Court of Special Appeals clarified that the correct burden of persuasion for overcoming the conditional privilege is proof *by a preponderance of the evidence* in cases like this one.

[\*Hosmane v. Seley-Radtke, et al.\*](#), No. 689 (Md. Ct. Spec. App. Feb. 24, 2016).

A chemistry professor sued his former colleague – also a professor in the chemistry department – for accusing him of theft, calling him an “unbalanced individual” and a “nutcase,” claiming he was banned from campus, claiming he commented to students about the defendant’s breasts and buttocks, and claiming that he attempted to convince a student to file a complaint against her. The defendant claimed her communications were privileged and confidential communications. The trial court agreed, finding that her statements were privileged. Based on this finding, the trial court instructed the jury that the allegedly defamed professor had to prove *by clear and convincing evidence* that his colleague abused the privilege. The jury found in favor of the defendant, denying the plaintiff’s defamation claim.

The allegedly defamed professor appealed, arguing in part that the trial court erred in applying the clear-and-convincing standard.

The Court of Special Appeals agreed with the defamed professor on the standard, finding that the allegedly defamed professor had to prove *by a preponderance of the evidence* that the privilege was abused – a lower burden. The appeals court emphasized that the preponderance-of-the-evidence burden is specific to common law tort defamation cases between two private parties. On the other hand defamation cases governed by the First Amendment, such as public officials’ lawsuits, require the more stringent clear and convincing evidence to overcome the privilege.

The Court of Special Appeals reversed the judgment of the trial court and returned the case to the trial court for a new trial under the preponderance-of-the-evidence standard.

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**The trial court erroneously instructed the jury that the plaintiff had to present clear and convincing evidence to overcome a conditional privilege defense.**



# ECHR Clarifies Its Test for Intermediary Liability in Judgment Involving Hungarian News Portal

By Jonathan McCully

On 2 February 2016, the Fourth Section of European Court of Human Rights handed down its judgment on intermediary liability in *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (Application No. 22947/13)([\[2016\] ECHR 135](#)). The judgment attempts to clarify the Grand Chamber's findings in [Delfi v. Estonia](#), whilst distinguishing that case on the basis that it involved "clearly unlawful speech" amounting to hate speech and incitement to violence. However, did the Court go far enough to protect free speech online?

## Factual Background

This case concerned two Applicants, who were both operators of websites. The First Applicant, [Magyar Tartalomszolgáltatók Egyesülete](#) (MTE) was a self-regulatory body of content service providers in Hungary. As part of its regulatory activities, it operated an arbitration commission whose decisions were binding on its eleven members and published on its website. The Second Applicant, Index.hu Zrt, was the operator of a major Hungarian [online news portal](#). Both Applicants allowed registered users to comment on their online publications, and they both published disclaimers to the effect that user comments did not reflect the Applicants' own opinions and the authors of the comments were responsible for their content. The websites also indicated that comments infringing personality rights of others could not be uploaded to their website domains.

On 5 February 2010, MTE published an opinion piece concerning two real estate management websites. According to the piece, MTE had found the websites to have acted unethically in unilaterally and automatically charging users for its services following thirty days of free service. Index.hu subsequently published an opinion on the MTE story. Anonymous users of both websites posted comments claiming that the company operating the real estate management websites (the real estate company) was "sly", "rubbish", and a "mug company". Another user commented that "[p]eople like this should go and shit a hedgehog and spend all their money on their mothers' tombs until they drop dead".

**The judgment attempts to clarify the Grand Chamber's findings in *Delfi v. Estonia*, whilst distinguishing that case on the basis that it involved "clearly unlawful speech" amounting to hate speech and incitement to violence.**

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On 17 February 2010, the real estate company brought a civil action claiming an infringement of its personality rights on the basis that its right to a good reputation had been violated (Article 78 of the Hungarian Civil Code). The Applicants immediately removed the allegedly offending comments from their respective websites.

The Hungarian domestic courts found that the comments went beyond the acceptable limits of freedom of expression. The courts held that the Applicants could not rely on the protections available to intermediaries under the Hungarian law transposing EU [Directive 2000/31/EC](#) (Act No. CVIII of 2001). The Budapest Court of Appeal reasoned that this law only applied to information society-related services whose purpose was the sale, purchase or exchange of a tangible and moveable property. The *Kuria* (the Hungarian Supreme Court), on the other hand, found that the Applicants were not “intermediaries” under that law. The *Kuria* also stressed that, by allowing user comments on their website domains, the Applicants had assumed strict liability for any unlawful comments made by those users. Therefore, the mere fact that the comments were published on the Applicants’ website domains was enough to impose liability for infringement of the real estate company’s personality rights caused by those comments.

Following domestic proceedings, the Applicants were each ordered to pay a total of 116,000 HUF in court costs (including those costs incurred by the real estate company).

### Judgment

It was not in dispute between the parties that there had been an interference with the Applicants’ rights to freedom of expression under Article 10 ECHR. In the present case, the Court found that the Applicants could foresee, to a reasonable degree, the consequences of their activities under the domestic laws. In doing so, the Court placed considerable emphasis on the fact that the Applicants were a self-regulatory body and a media publisher running “a large internet news portal for an economic purpose”. As a result, the Court found that the interference was “prescribed by law”. The Court also accepted that the law pursued the legitimate aim of “protecting the rights of others”.

The Court then proceeded to make a number of interesting observations on whether the interference was “necessary in a democratic society”, they will be considered in turn.

### Could Article 8 be relied on by the real estate company?

The Court did not find it necessary to reach a decision on whether a company could justifiably rely on its right to reputation under Article 8 ECHR. Nonetheless, it observed that

**The Hungarian domestic courts found that the comments went beyond the acceptable limits of freedom of expression.**

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there was a difference between a commercial reputational interest and the reputational interests of natural persons, the latter usually having an interest in protecting their dignity rather than their commercial success or viability. The Court decided to give the domestic courts “the benefit of the doubt” that there was to be a balancing between the Applicants’ Article 10 rights and the real estate company’s Article 8 rights in this case. However, it clearly had its reservations as to whether Article 8 ECHR was actually engaged.

### **Application of *Delfi v. Estonia* criteria**

The Court then assessed whether the domestic courts correctly applied the *Delfi v. Estonia* criteria in their decisions. The Court recognised that these criteria were established in a case involving comments that amounted to hate speech and incitement to violence, but nonetheless deemed them to also be applicable to the present case. The relevant criteria were:

- **Context and content of the impugned comments:** The Court found there was a public interest context to the impugned comments, namely a debate involving consumer protection. The comments themselves were found to have been triggered by the frustration users had felt having been tricked by the real estate company. The Court also reasoned that, despite the fact the comments were on “a low register of style”, they were a common form of communication in the comments sections of Internet portals. The frequency of such comments on internet portals was found to reduce the impact that could be attributed to such comments. The Court also noted that the MTE website, as a website of a self-regulatory body, was unlikely to attract heated debate in its comments section.
- **Liability of the authors of the comments:** The Court was critical of the domestic courts for failing to consider the feasibility of identifying the users of the comments. For instance, the domestic courts did not investigate the system of registration that the Applicants had in place for their users. The Court also found it difficult to reconcile the imposition of strict liability on website portals for third-party content with the principle that journalists should only be punished for assisting in the dissemination of interviews with third-parties where there are strong reasons for doing so (see [Jersild v. Denmark](#)).
- **Measures taken by the applicants and the conduct of the injured party:** The Court noted the measures that had been adopted by the Applicants to prevent defamatory comments being made by third-parties (e.g. the disclaimer, the prohibition of comments injurious to others, and the “notice-and-take-down” procedure), and found that the domestic courts failed to perform any examination of the conduct of either parties. The

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Court also found that the domestic courts, in its reasoning that once content service providers allow unfiltered comments they should expect to be in breach of the law, had required excessive and impracticable forethought on the part of the Applicants that was capable of undermining freedom of expression online.

- **Consequences of the comments for injured party:** The Court found that the domestic courts failed to properly evaluate whether the comments reached a sufficient level of seriousness and whether they were made in a manner actually causing prejudice to a legal person's right to professional reputation. In this regard, the Court noted that there had already been inquiries into the conduct of the real estate company which may have reduced the likelihood of the comments making any "additional and significant impact on the attitude of the consumers concerned".
- **Consequences for the Applicants:** Despite the fact that the Applicants were not ordered to pay damages in this case, the Court considered it relevant that the finding of liability could have "negative consequences on the comment environment of an Internet portal". The Court further reasoned that this "chilling effect" could be "particularly detrimental for a non-commercial website" such as MTE. With this in mind, the Court criticised the domestic courts for not taking heed of the consequences of their decisions on freedom of expression.

**The Court opined that "the notice-and-take-down-system could function in many cases as an appropriate tool for balancing the rights and interests of all those involved."**

In light of the above, the Court found that there was a violation of the Applicants' rights to freedom of expression under Article 10 ECHR. In reaching this conclusion, the Court opined that "the notice-and-take-down-system could function in many cases as an appropriate tool for balancing the rights and interests of all those involved".

### Comment

For many freedom of expression advocates, the judgment of the Court in *MTE and Index.hu v. Hungary* will be a step in the right direction following *Delfi v. Estonia*. For instance, the Court was at pains to emphasise the specific facts in *Delfi*, a case which involved a news portal's failure to take measures to remove "clearly unlawful comments" without delay following publication. In the present case, the Court was keen to attach weight to the sensible measures already adopted by the Applicants to prevent the publication of defamatory speech on its website domains.

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The Court also wished to highlight that, in many cases, the “notice-and-take-down-system” could function as an appropriate way of determining intermediary liability, and considered it relevant in this case that the injured party did not request that the content be removed before pursuing litigation. The Court also conducted a much more realistic assessment as to the nature of posts found in the comments sections of websites and their potential impact on a legal person’s reputation.

Nonetheless, the Court’s endorsement of the “notice-and-take-down-system” still lags behind the intermediary liability jurisprudence in a number of other jurisdictions, such as India (*Shreya Singhal v Union of India*), Spain ([Audiencia Provincial of Madrid, 9th Section, 19 February 2010](#)), and Argentina (*R.M.B c/Google y ot. s/ Ds y Ps*), where courts have found that intermediaries should only be found liable for “unlawful” content when they have failed to take action following notice from a judicial (or other competent) authority as to the illegality of the relevant content. After all, Intermediary service providers are often less well-placed than courts to consider the lawfulness of comments on their website domains. Therefore, from a freedom of expression perspective at least, the Court could have afforded a greater level of protection to intermediaries not directly involved in the publication of “unlawful” third-party content.

Despite its finding of a violation of Article 10 ECHR, this judgment will not completely allay news websites’ concerns, following *Delfi v. Estonia*, as to the added litigation risks that may accompany their enabling of user comments. For instance, what constitutes “clearly unlawful comments” is still up for debate. Nevertheless, for many, it is a welcome step in the right direction.

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# Washington Shield Law Protects Against Subpoena Targeted At Kazakhstan Dissident Online Publication

By Judy Endejan

Even the might of a moneyed, repressive government on another continent could not overcome Washington State's Shield Law. On February 22, 2016, the Washington Court of Appeals ruled that the Washington Shield Law protects against the disclosure of information about the domain name registrants for a website used by a publication critical of the Kazakhstan government. [\*The Republic of Kazakhstan v. Does 1 through 100\*](#), No. 73391-5-1, Feb. 22, 2016.

## Background

Irina Petrushova owns LMC, a Russian limited liability company, which operates the online publication, Respublika. This covers Kazakhstan and frequently expresses criticism of its political regime. In 2002, Petrushova left Kazakhstan in fear for her life. Petrushova and other Respublika journalists have been targets of an aggressive intimidation campaign to silence Respublika by the Kazakhstan government, including the use of human skulls and beheaded dog corpses.

This case arose out of an attempt by the Kazakhstan government to subpoena information from eNOM, Inc., an internet domain name registration company located in Washington. eNOM has registered the Respublika website and offers a domain privacy service called CourtID Protect, which shields a domain name registrant's personal identifying information.

Kazakhstan sought this information allegedly to discover the identity of defendants that hacked into Kazakhstan's government computer network and stole and published hundreds of privileged and confidential emails from high-ranking Kazakhstan officials. Kazakhstan has sued 100 John Doe defendants in California state court and sought the subpoena in Washington State in connection with this case.



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# *Fields v. City of Philadelphia:* Questioning a First Amendment Right

By Mickey H. Osterreicher

Just when citizens and journalists thought it was safe to photograph and record police performing their official duties in public, a federal court judge in the Eastern District of Pennsylvania ruled otherwise. In [\*Fields v. City of Philadelphia\*](#), U.S. District Court Judge Mark A. Kearny (who received his judicial commission in December 2014[1]) issued a Memorandum Opinion granting summary judgment to the Defendants on the first cause of action of First Amendment Retaliation by declining “to create a new First Amendment right for citizens to photograph officers when they have no expressive purpose such as challenging police actions.”[2]

The Court also granted summary judgment as to a claim of malicious prosecution. It did however deny summary judgment under a Fourth Amendment claim and one for use of excessive force and concluded by noting that “[a]t oral argument, Plaintiffs conceded a lack of supervisory liability against the City for their arrest, search, seizure and excessive force.”[3]

## Background

The following discussion will only address the First Amendment issues in *Fields* which involves two separate incidents. The first took place on September 13, 2013 when Philadelphia police officers arrested Temple University student Richard Fields who had stopped on a public sidewalk to use his cell phone to photograph a group of police officers standing outside a home. According to the [complaint](#), Mr. Fields was about 15 feet from the officers, took only one photo and did not say a word to anyone until questioned by an officer.[4]

The officer ordered Fields to move which Fields refused to do by stating “he was on public property and not interfering with any police investigation.”[5] Fields was subsequently cited for Obstructing Highway and Other Public Passages under 18 Pa. C.S. § 5507.[6] It is also alleged that police officers “searched the phone while it was out of Mr. Fields’ possession to try to locate photos or recordings of the police that they believed Mr. Fields had taken.”[7] Charges against Mr. Fields were withdrawn on the prosecution’s motion at his appearance for trial on October 31, 2013.

The second case considered by the Court in its ruling involved Amanda Geraci, a self-described “legal observer” who observes police and civilian interactions. On September 21,

**Just when citizens and journalists thought it was safe to photograph and record police performing their official duties in public, a federal court judge in the Eastern District of Pennsylvania ruled otherwise.**

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2012, while attending a public protest Geraci saw Philadelphia police attempting to arrest one of the protestors and moved to get a better view in order to videotape the incident. She claims that a police officer physically restrained her and prevented her from videotaping the arrest.[8] She was released after about three minutes and no charges were filed.[9]

### Qualified Immunity

Both Mr. Fields and Ms. Geraci claimed damages under 42 U.S.C. §1983 for, among other things, First Amendment retaliation for their peaceful attempts to observe and record police. In their motion for [summary judgment](#) Defendants argued that the officers were entitled to qualified immunity because Plaintiffs' First Amendment rights were not clearly established.

“Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”[10] In 2009 the U.S. Supreme Court reinforced its previously mandated two-step sequence for resolving qualified immunity claims. “First, a court must decide whether the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of a constitutional right. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was ‘clearly established’ at the time of defendant’s alleged misconduct.”[11] In other words courts considering officials’ qualified immunity claims do not need to consider whether or not the officials actually violated a plaintiff’s right if the facts alleged show that no such constitutional or statutory right existed in the first place, let alone whether or not the right was “clearly established” at the time of the incident.[12]

And that is exactly the finding in *Fields* where the court did not reach the second step in its qualified immunity analysis as it did “not find a right *ab initio*.”[13] Accordingly the court found that

Neither Fields nor Geraci assert they engaged in conduct “critical” of the government; both assert they were only “observing” police activity. They are not members of the press. Each engaged in activity they personally described as non-confrontational “observing” and “recording.” Unlike the situation contemplated by *Kelly* involving critical or expressive conduct, there is no dispute Geraci attended the protest against fracking intending to “observe” any interaction between the crowd and police. We do not find Geraci’s attempt to get a better look and possibly film protected speech the same as expressing or

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criticizing police conduct. Geraci may have filmed a peaceful arrest of an otherwise unruly protester. We do not find this conduct “expressive” simply because she attempted to film police activity. We reach a similar conclusion as to Fields. Fields does not allege he engaged in speech or expressive conduct critical of the police. Fields claims he was walking down the street and stopped to take a picture of something interesting to him.[14]

It is important to note at the outset the court’s statement “this case asks us only to study one snapshot in time through the lens of the First Amendment only: whether photographing or filming police on our portable devices without challenging police is expressive conduct protected by the First Amendment.”[15] By framing the case as an isolated moment in time the court has created a very narrow and selective portrait lacking a peripheral view of the totality of the circumstances surrounding the facts in these incidents and misread through the blurry eyes of undistinguished caselaw. The court seems also to misapprehend the entire concept of peacefully recording police activity as a First Amendment protected right to help ensure government accountability versus its newly established prerequisite that such actions must be accompanied by verbally expressed criticism in order to qualify for such consideration.

There are those who believe that the *Fields* court failed in the threshold step of its qualified immunity analysis “[i]n deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play.”[16] Although Judge Kearny cited to *Texas v. Johnson*, for that proposition, his subsequent analysis may have been flawed as to whether there was an intent on the part of the Plaintiffs “to convey a particularized message . . . and [whether] the likelihood was great that the message would be understood by those who viewed it.”[17]

Accordingly, the court analyzed Plaintiffs’ actions guided by the Supreme Court’s admonition “[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ ....”[18] yet when read in context the intent in *Texas v. Johnson* is somewhat different:

The First Amendment literally forbids the abridgment only of “speech,” but we have long recognized that its protection does not end at the spoken or written word. While we have rejected the view that an apparently limitless variety of conduct can be labeled “speech” whenever the person engaging in the conduct intends thereby to express an idea, *United States v. O'Brien*, supra, at 376, we have acknowledged that conduct may be “sufficiently

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imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments,” *Spence*, supra, at 409.[19]

The *Fields* court then went on the cite to a number of other cases finding that

[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. Expressive conduct exists where ‘an intent to convey a particularized message was present, and the likelihood was great that the message would be understood by those who viewed it. [T]his is a fact-sensitive, context-dependent inquiry, and ... the putative speaker bears the burden of proving that his or her conduct is expressive.”[20]

### **First Amendment Right to Observe and Record**

But First Amendment cases about pitching tents in a public park (*Clark*), affixing religious symbols to utility poles (*Tenafly*) or obtaining campaign posters (*Heffernan*) as examples of bearing the burden of proving expressive speech are a far cry from the inherently expressive act of taking a picture or recording video. Rather, “[t]o achieve First Amendment protection, a plaintiff must show that he possessed: (1) a message to be communicated; and (2) an audience to receive that message, regardless of the medium in which the message is to be expressed.”[21] Additionally, it has been argued that “the modern process of image capture is an essential element in producing, and ultimately disseminating, photos, videos, and montages which modern First Amendment doctrine solidly recognizes as protected media of communication”[22]

When compared with the other forms of expression cited above none can be said to also be protected by copyright as are photography and videography. In 1884 the Supreme Court took notice of what Lord Justice Bowen previously had to say “that photography is to be treated for the purposes of the [copyright] act as an art, and the author is the man who really represents, creates, or gives effect to the idea, fancy, or imagination.”[23] While these visual forms of communication may often appear as instantaneous and seemingly autonomic decisions, they are no less part of expressive speech. As noted by famed photographer, Henri Cartier-Bresson, “It is an illusion that photos are made with the camera . . . they are made with the eye, heart and head.”[24]

Even the Third Circuit noted “Heffernan need not prove he communicated a message verbally—and indeed, the record is devoid of such evidence—because expressive conduct also is protected under the First Amendment.”[25]

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In contrast to the finding in *Fields* that the Plaintiffs “offered nothing more than a ‘bare assertion’ of expressive conduct,”[26] the First Circuit articulated in its seminal decision – the self-evident nature of the right to record police:

What is particularly notable about *Iacobucci* is the brevity of the First Amendment discussion, a characteristic found in other circuit opinions that have recognized a right to film government officials or matters of public interest in public space. See *Smith*, 212 F.3d at 1333; *Fordyce*, 55 F.3d at 439. This terseness implicitly speaks to the fundamental and virtually self-evident nature of the First Amendment’s protections in this area. Cf. *Lee v. Gregory*, 363 F.3d 931, 936 (9th Cir.2004) (noting that some constitutional violations are “self-evident” and do not require particularized case law to substantiate them).[27]

What may also be self-evident in nature is the proof required by the *Fields* court that in order to prevail on a First Amendment retaliation claim, the Plaintiffs must prove “(1) each engaged in constitutionally protected conduct; (2) defendant officials took adverse action sufficient to deter a person of ordinary firmness from exercising constitutional rights; and (3) the constitutionally protected conduct was a ‘substantial or motivating factor’ in the decision to take adverse action against the plaintiff.” 26

Additionally, as the *Glik* court observed many of the cited cases involve a citizen, and not a journalist, gathering information about public officials or matters of public concern such as those in *Fields*. But such First Amendment rights to gather news or exercise free speech is not “one that inures solely to the benefit of the news media; rather, the public’s right of access to information is *coextensive* with that of the press.[28] As stated by the U.S. Department of Justice, “[t]he First Amendment right to record police officers performing public duties extends to both the public and members of the media, and the Court should not make a distinction between the public’s and the media’s rights to record here. The derogation of these rights erodes public confidence in our police departments, decreases the accountability of our governmental officers, and conflicts with the liberties that the Constitution was designed to uphold.”[29]

While the *Fields* court claimed to “instinctively understand the citizens’ argument, particularly with rapidly developing instant image sharing technology,”[30] unlike the *Glik* court, which recognized “that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew . . . [s]uch developments make clear why the news-gathering protections of the *First Amendment* cannot turn on professional credentials or status,”[31] the judge in *Fields* still believed he was required to “craft a *new* First Amendment right based solely on “observing and

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recording” without expressive conduct . . . consistent with the teachings of the Supreme Court and [the Third Circuit]”[32] which he declined to do.

Although the Third Circuit in *Kelly* did not explicitly recognize the right to record as being clearly established for qualified immunity purposes in a traffic stop case, it did recognize that videotaping or photographing the police in the performance of their duties on public property *may* be a protected activity.”[33] Despite the case law supporting such activity as being protected along with the right to gather and disseminate matters of public concern, the *Fields* court once again refused to acknowledge a “First Amendment right under our governing law to observe and record police officers absent some other expressive conduct.”[34]

But in an analogous case, the U.S. Supreme Court held that the First Amendment encompassed not only the right to speak but also the freedom to listen and to receive information and ideas. It also noted that the First Amendment guaranteed the right of assembly in public places and emphasized that “certain unarticulated rights” were implicit in enumerated guarantees and were often “indispensable to the enjoyment of rights explicitly defined.”[35]

The *Richmond Newspapers* Court also found “[t]o work effectively, it is important that society’s criminal process ‘satisfy the appearance of justice,’ and the appearance of justice can best be provided by allowing people to *observe* it.”[36] Although addressing open courtrooms, the High Court went on to state:

The right of access to places traditionally open to the public . . . may be seen as assured by the amalgam of the First Amendment guarantees of speech and press; and their affinity to the right of assembly is not without relevance. From the outset, the right of assembly was regarded not only as an independent right but also as a catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen. “The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.” People assemble in public places not only to speak or to take action, but also to listen, *observe*, and learn; indeed, they may “assembl[e] for any lawful purpose,” Subject to the traditional time, place, and manner restrictions, streets, sidewalks, and parks are places traditionally open, where First Amendment rights may be exercised.[37]

It may also be instructive to look at another case involving cameras in the courtroom where Justice Stewart observed, “I would be wary of imposing any per se rule which, in the light of future technology, might serve to stifle or abridge true First Amendment rights.[38] “The suggestion that there are limits upon the public’s right to know . . . causes me deep

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concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms.”[39]

Given the above reasoning and law what can be more direct and expressive than the act of taking a photograph or making a recording of police performing their official duties in a public place? And yet the *Fields* court is “left guessing as to the ‘expression’ intended by the conduct.”[40] As articulated by the Supreme Court and acknowledged by the *Fields* court, part one of the test for expressive conduct is that the “speaker” must intend to convey a particular message and the second part is that the expression must be reasonably understood by others. [41]

Here both Plaintiffs intended (and did) take a photo and made a recording of police performing their official duties in a public place as a way to provide for government oversight, which would have been understood by anyone who viewed the photo, including the officers involved, who by their very actions abridged those rights because they did not wish to be subject to such visual accountability, either in having a large group of officers gathered at a scene or when arresting a protestor.

Apparently the *Fields* court missed the point when it stated “[t]here is also no evidence any of the officers *understood* them [plaintiffs] as communicating any idea or message”[42] without some additional verbal expression by the plaintiffs, as the act of photographing or recording the scene was not meant to convey any message to the police themselves but rather to a greater audience.

### **Persuasive Authority**

It also seems to have missed the point when determining some outside authority regarding the right to record as “it relates to shared images, or an intent to share images”[43] inapposite, by adding a new and never before cited requirement that plaintiffs did not make a showing that “they intended to share their images immediately upon image capture.”[44]

And it once again glossed over another case where a district court held there was “a constitutional right to video record public police activity,”[45] instead focusing on the “not clearly established at the time of the incident” part of the analysis.[46]

The *Fields* court summarily dismisses the opinions of several district courts in the Third Circuit that considered “the constitutional right to observe and record *may* exist in certain circumstances,”[47] with the assertion that “none has so held when there is an absence of protest or criticism,”[48] failing to recognize that such an “absence” may not be required. It then goes on to cite another case for the proposition that “the right to record matters of public concern is not absolute” yet when read in context what was stated was that and

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“even insofar as it is clearly established, the right to record matters of public concern is not absolute; it is subject to reasonable time, place, and manner restrictions.”[49]

Even in its footnote analysis of *Glik*, the *Fields* court tries to re-cast the facts in a light most favorable to its own position by stating “the plaintiff [Mr. Glik] expressed concern police were using excessive . . . .”[50] But the facts as stated by the First Circuit actually were, “Glik heard another bystander say something to the effect of, ‘You are hurting him, stop.’ Concerned that the officers were employing excessive force to effect the arrest, Glik stopped roughly ten feet away and began recording video footage of the arrest on his cell phone.”[51] Furthermore the complaint in *Glik* alleges that “Mr. Glik did not speak to the police officers nor did they speak to him until the suspect was in handcuffs.”[52] Although referencing the acknowledgment in *Glik* that “gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting ‘the free discussion of governmental affairs,’” [53] the *Fields* court declined to follow it.

Despite extensive persuasive case law to the contrary the *Fields* court was unwilling to accept any authority beyond the Third Circuit, instead remaining steadfast in its belief that to do so would “create a *new* First Amendment right for citizens to photograph officers when they have no expressive purpose such as challenging police actions.”[54]

**It is no surprise that the Plaintiffs are reportedly planning to appeal the court’s ruling in this case.**

### Police on Notice

It is hard to imagine that the trial court was unwilling to find that the right to record images exists, especially when such a right had previously been set forth in a Philadelphia Police Department Directive issued on November 9, 2012 (two months after the Geraci incident, but a year before *Fields*) stating, “Private individuals have a First Amendment right to *observe and record* police officers engaged in the public discharge of their duties. It has been determined that *observing*, gathering and disseminating information of public concern, such as the recordings of police officers engaged in public duties, is a form of free speech guaranteed by the First Amendment to the United States Constitution.”[55]

The fact that Philadelphia police officers may have had notice as to this right, whether or not such a right was “clearly established” in the Third Circuit at the time of at least one of the incidents may create a triable issue of fact and thus bring about a reversal on the summary judgment ruling for the Defendants on the First Amendment claim.

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### Conclusion

Given the triable issues of fact raised above, the failure to consider the totality of the circumstances in each incident, a record replete with legal incongruities and possibly conflated standards of review (where there may be a First Amendment right to record but still grant qualified immunity because that right was not clearly established at the time), it is no surprise that the Plaintiffs are reportedly planning to appeal the court's ruling in this case.[56]

*Mickey H. Osterreicher is the general counsel of the National Press Photographers Association (NPPA) whose letters to then Philadelphia Police Commissioner Ramsey regarding previous incidents concerning the right to photograph and record police officers are cited in the Plaintiffs' Statement of Facts in Opposition to Summary Judgment. He is also a member of the MLRC Newsgathering Committee.*

### Notes

- [1] See: [https://en.wikipedia.org/wiki/Mark\\_A.\\_Kearney](https://en.wikipedia.org/wiki/Mark_A._Kearney)
- [2] See: Memorandum Opinion at 15
- [3] Id.
- [4] See Complaint at 3
- [5] Id.
- [6] Id. at 4
- [7] Id.
- [8] See [Plaintiffs' Statement of Facts in Opposition to Summary Judgment](#) at 14
- [9] Id.
- [10] [Pearson v. Callahan](#), 555 U.S. 223 (2009)
- [11] Id. Citing *Saucier v. Katz*, 533 U. S. 194, 201 (2001)
- [12] Id.
- [13] Memorandum Opinion at 12
- [14] Id.
- [15] Memorandum at 2
- [16] *Texas v. Johnson*, 491 U.S. 397 (1989)
- [17] *Spence v. Washington*, 418 U.S. at 410-411.
- [18] Memorandum at 6, quoting *Texas* at 404, citing *O'Brien* at 376
- [19] *United States v. O'Brien*, 391 U.S. 367, 376 (1968); see also *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *Spence v. Washington*, 418 U.S. 405, 409 (1974). Quotation marks omitted.
- [20] Memorandum at 6, citing *Heffernan v. City of Paterson*, 777 F.3d 147, 152 (3d Cir. 2015), *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 161 (3d Cir. 2002) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, n.5 (1984)). Quotation marks omitted.
- [21] *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 568 (1995).
- [22] Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 381–86 (2011).

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- [23] *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884), citing *Nottage v. Jackson*, 11 Q.D.D. 627 (1883)
- [24] See: [http://www.azquotes.com/author/2572-Henri\\_Cartier\\_Bresson](http://www.azquotes.com/author/2572-Henri_Cartier_Bresson)
- [25] *Heffernan* at 152 (emphasis in the original).
- [26] Memorandum at 7.
- [27] *Glik v. Cunniffe*, 655 F.3d 78, 84-85 (1st Cir. 2011)
- [28] *Id.* at 83, quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring).
- [29] U.S. Department of Justice Statement of Interest at 2 in *Garcia v. Montgomery County*, No. 12-cv-03592-JFM (D. Md.)
- [30] Memorandum at 1.
- [31] *Glik* at 84 (emphasis in the original).
- [32] Memorandum at 1 (emphasis added).
- [33] *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010), quoting *Gilles v. Davis*, 427 F.3d at 212 (citing *Smith v. City of Cumming*, [212 F.3d 1332, 1333](#) (11th Cir. 2000)) (emphasis added in original).
- [34] Memorandum at 5.
- [35] *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980).
- [36] *Id.* at 571-572, quoting *Offutt v. United States*, 348 U. S. 11, 14 (1954) (emphasis added).
- [37] *Id.* at 577-578 (emphasis added, internal citations omitted).
- [38] *Estes v. Texas*, 381 U.S. 532, 603-604 (1965) (Stewart, J., dissenting).
- [39] *Id.* at 614-615.
- [40] Memorandum at 6.
- [41] *Heffernan* at 152 (quoting *Texas v. Johnson*, 491 U.S. at 404).
- [42] Memorandum at 6 (emphasis in the original).
- [43] *Id.* at 11.
- [44] *Id.*
- [45] *Garcia v. Montgomery County, Maryland*, No. 12-3592, 2015 WL 6773715 (D.Md. Nov. 5, 2015).
- [46] Memorandum at 11.
- [47] *Id.* at 8. (emphasis in the original)
- [48] *Id.*
- [49] *Fleck v. Trustees of Univ. of Pennsylvania*, 995 F. Supp. 2d 390, 403 (E.D. Pa. 2014), citing *Kelly* at 252.
- [50] Memorandum at 19 (Footnote 56)
- [51] *Glik* at 78.
- [52] See *Glik* complaint at <http://tinyurl.com/zzzax9c>
- [53] *Glik* at 82, citing *Mills v. Alabama*, 384 U.S.214 (1966).
- [54] Memorandum at 15 (emphasis added).
- [55] Philadelphia Police Department Directive 8.12 at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwib6N6G253LAhXicz4KHTWEDtEQFggfMAA&url=https%3A%2F%2Fwww.phillypolice.com%2Fassets%2Fdirectives%2FD8.12-PicturesVideoAndAudioRecordingsOfPoliceOfficers.pdf&usq=AfQjCNHKjpJ5cALeuygVXYwLldAuDvj8rw&cad=rja> (emphasis added).
- [56] See: ACLU plans challenge to ruling finding no First Amendment right to film police [http://www.philly.com/philly/news/20160225\\_ACLU\\_plans\\_challenge\\_to\\_ruling\\_finding\\_no\\_First\\_Amendment\\_right\\_to\\_film\\_police.html#y4IhcYAtbHHPxyup.99](http://www.philly.com/philly/news/20160225_ACLU_plans_challenge_to_ruling_finding_no_First_Amendment_right_to_film_police.html#y4IhcYAtbHHPxyup.99)

# News Drones Updates: Micro UAS and Privacy

By Charles D. Tobin and Christine N. Walz

This month, the federal agencies working on the integration of unmanned aircraft systems (“UAS”), commonly referred to as drones, have taken important steps toward resolving key issues slowing the take-off of daily UAS journalism. A coalition of nearly two dozen news organizations has played a key role in the discussions with these agencies, which are tasked with considering safety and privacy issues.

**Micro Drones and Overhead Flights:** On February 24, 2016, the Federal Aviation Administration (“FAA”), the agency responsible for the safety of the national airspace, [announced](#) the creation of an Aviation Rulemaking Committee to provide recommendations on which types of micro UAS should be permitted to fly directly over people.

Currently, commercial UAS use, which the FAA defines to include newsroom use, requires a special FAA exemption. Except in certain very specific circumstances, typically closed movie sets where all people on the ground are participating in the production, the FAA's exemptions ban all flights over people. For many newsrooms that restriction is an obstacle to daily UAS journalism.

The FAA's decision to take a fresh look at the issue, and invite stakeholder discussion, follows-up on FAA's rulemaking process addressing small UAS (all UAS weighing 55 lbs. or less), which began in early 2015. In that process, the FAA had invited comments about whether to create a separate “micro UAS framework,” which the FAA had contemplated defining as UAS models weighing 4.4 lbs or less. The FAA has now announced that this weight-based categorization will not be flexible enough. Instead, it has proposed a new framework that is “performance based” rather than weight or speed specific.

The announcement of an Aviation Rulemaking Committee on micro drones is a strong indication that the FAA is poised to ultimately allow certain types of small drones to fly directly over people, however, the timing of the announcement also suggests that this permission may come later than originally anticipated. Previously, it was anticipated that the release of a micro drone rule would be announced at the same time as the final small UAS rule. The announcement of this Committee suggests that the FAA may now release a single rule for all small UAS, with more stringent requirements, and later release a more permissive micro-drone rule based on the Committee's recommendations.

Along with manufacturers and industry trade associations, the FAA has [invited](#) representatives of a coalition of nearly two dozen news media entities to participate in the advisory committee, which will ensure that the FAA receives important input about newsgathering drones, including input on specific UAS models and specific news scenarios.

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The Committee is expected to conclude its work by April 1, 2016.

**Multistakeholder Negotiations on Voluntary Privacy "Best Practices":** On February 24, 2016, the National Telecommunications and Information Administration ("NTIA") – the agency tasked with facilitating a multistakeholder process to develop voluntary privacy best practices for the use of UAS – held its fourth public meeting and discussion on best practices. At this meeting, stakeholders considered a best practices [proposal](#) put forth by the news media coalition incorporating the following principles to ensure that First Amendment protections:

- Government-endorsed best practices cannot restrict the First Amendment or require journalists to defend use of images collected by UAS on a case by case basis;
- Existing technology-agnostic state laws, rather UAS specific-laws at either the federal or state level, are the appropriate way to address privacy concerns;
- Images and sounds gathered in public places are not private and should not be entitled to protection; and
- Editorial decisions, including decisions about data collection and retention, must be left to journalists.

This proposal is a contrast to other proposals under consideration, which have the potential to have a significant, technology-specific impact on the media's ability to gather, retain and use images taken by UAS in public places.

The multistakeholder process is on-going and participants are now considering whether consensus support can be reached for a best practices proposal. The next step is for participants to determine whether there is consensus for any of the current proposals, for another approach combining the proposals on the table, or for multiple best practices, including separate best practices for the news gathering community.

The next multistakeholder meeting will be scheduled for the end of March or early April.

*Charles D. Tobin is a partner and Christine N. Walz is an associate with Holland & Knight LLP in Washington D.C. Holland & Knight represents the coalition of news media entities working on drone regulation and policy issues.*



# Legislative Update: Privacy, Drones, FOIA and More

By Leita Walker

The Legislative Affairs Committee is currently tracking congressional and regulatory activity related to privacy and data security, drones, FOIA, and the so-called Consumer Review Freedom Act. The following updates were provided at the committee's last bi-monthly meeting. The next meeting is scheduled for 1 p.m. central on April 14. For call-in details, contact [leita.walker@faegrebd.com](mailto:leita.walker@faegrebd.com) or [sward@lskslaw.com](mailto:sward@lskslaw.com).

## Privacy and data security developments

**Data breach legislation:** Efforts to pass federal data breach legislation continue in Congress, although the timeline and prospect for such legislation remains unclear. In the House, bills have been passed by the House Energy & Commerce Committee and the House Financial Services Committee. In the Senate, several bills have been introduced, and discussions continue behind the scenes. Lawmakers are trying to resolve a number of issues, including the strength of any preemption clause, whether and what standards might be included in the bill, and the strength of consumer protections.

**Cybersecurity legislation:** Now that information sharing legislation has been enacted, the Administration is focused on developing and implementing the required guidelines and rules for sharing under the bill. In addition, the Department of Homeland Security is focused on automatic sharing of cyber threat indicators with private sector companies.

**The EU-US Privacy Shield has been agreed upon in principle, but the details will take several months to work out.**

**Safe Harbor/Privacy Shield—**The EU and US recently agreed on a replacement for the now-invalidated Safe Harbor framework for transatlantic transfers of data. The EU-US Privacy Shield has been agreed upon in principle, but the details will take several months to work out. In the meantime, a measure related to such transfers, the Judicial Redress Act, has passed Congress, creating a possible avenue for EU citizens to challenge federal agencies' misuse of their personal data.

## Drones

On February 10, 2016, the House Committee on Transportation and Infrastructure passed the Aviation Innovation Reform and Reauthorization Act—commonly referred to as the FAA

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Reauthorization bill. The bill includes a section intended to provide the FAA with additional tools and flexibility to integrate UAS into the national airspace. As relevant to the use of drones by the news media, if enacted, this legislation would codify the existing Section 333 exemption process, including the streamlined summary grant procedures used to review exemption applications that are similar to previously granted applications. The bill incorporates an amendment that would allow for the use of micro drones (drones under 4.4. lbs including payload) under certain circumstances without an aeronautical knowledge test or certificate of airworthiness. The bill would also direct the Department of Transportation to conduct a study on the privacy implications of UAS operations. Because it includes a controversial, unrelated provision that would privatize air traffic control, this legislation is not expected to move through the legislative process quickly.

### **FOIA**

On January 11, 2016, the House of Representatives passed the FOIA Oversight and Implementation Act. This legislation is similar to FOIA reform legislation that was passed by the Senate at the end of the last Congress. It would codify the presumption of openness currently in place through an executive order. Under this presumption, information is to be disclosed unless the agency reasonably foresees that disclosure would cause identifiable harm to an interest protected by a FOIA exemption or the disclosure is prohibited by law. The legislation would also limit the use of FOIA Exemption 5--which allows agencies to withhold documents that reflect their deliberative process--in two ways. First, it would limit the use of the deliberative process privilege for documents more than 25 years old. And second, it would provide that the privilege cannot be used to shield records that embody working law, effective policy, or the final decision of the agency. The legislation has a number of features to streamline the FOIA process. For example, it would create a single online portal for requests and require agencies to post frequently requested records online. The Senate has not indicated when they will act on this or similar legislation.

### **The Consumer Review Freedom Act ([S. 2044](#) and [H.R. 2110](#))**

This act would prevent businesses from contractually restricting customers from reviewing (and in particular criticizing) their goods and services. The legislation is intended to prevent the use of a contractual provision to stop a bad consumer review. Thus, the Act forbids “form”

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contracts that ban, impose penalties, or purport to obtain the intellectual property rights to written, verbal or even photographic consumer reviews.

These types of contractual provisions would become void and could not be enforced against the consumer. In addition, the federal government and state attorneys' general would be authorized to bring actions against business for attempting to use such provisions.

The federal legislation follows a similar law enacted in California as well as judicial decisions holding such provisions unenforceable. The FTC has also targeted the practice.

The House and Senate versions of the legislation are similar, but there are a few distinctions. For example, the House legislation authorizes the Justice Department to enforce the prohibition, while the Senate version authorizes the FTC. There is no individual civil right of action for damages.

The Act is limited to "form" contracts, which are defined as "a standardized contract used by a person and imposed on an individual without a meaningful opportunity for such individual to negotiate the standardized terms." This definition excludes individually negotiated non-disparagement clauses, for example.

By its terms, the Act also does not apply where the information disclosed by the consumer is a "trade secret."

Perhaps most pertinent for the MLRC, the Act does not seek to re-write the law of defamation in any sense. On the contrary, the legislation excludes "civil actions for defamation, libel, or slander" from its reach. This means the business can still sue the consumer for defamation. What the business cannot do is attempt to prohibit the consumer from speaking through the guise of a contractual provision.

The Act passed the Senate by unanimous consent in December 2015. It is awaiting action in the House.

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