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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through October 25, 2014

MLRC

A VIEW FROM THE INSIDE *(OUR NEW IN-HOUSE LAWYER COLUMN)*

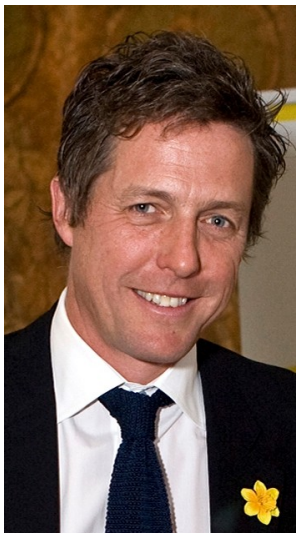
LIBEL & PRIVACY

MEDIA LAW RESOURCE CENTER

ANNUAL DINNER

WEDNESDAY, NOVEMBER 12, 2014

Privacy in the Public Eye: A Conversation with Hugh Grant



Hugh Grant
Actor, and more recently campaigner

Katie Couric
Global Anchor of Yahoo News

Cocktail Reception at 6:00 P.M.

Sponsored by AXIS PRO

Dinner at 7:30 P.M.

Grand Hyatt New York
Empire Ballroom, 109 East 42nd Street at Grand Central Station

RSVP by Friday, October 31, 2014

Business Attire

MEDIA LAW RESOURCE CENTER

ANNUAL DINNER — WEDNESDAY, NOVEMBER 12, 2014

RSVP for Dinner by Friday, October 31, 2014

Reservations are not refundable for cancellations received after Monday, November 3, 2014

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Contact Person: _____

Address: _____

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Phone: _____ Fax: _____

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Please reserve: ____ Single seat(s) at $450 each

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Amount Enclosed for Dinner Reservations: $ _____

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2014 MLRC Pre-Dinner Forum

Controlling Data, Forgetting Data: What U.S. Lawyers Need to Know About the Right to Be Forgotten

Wednesday November 12, 3:45-5:45 p.m.

Grand Hyatt, NYC, Broadway-Juliard Room, Conference Level

Speakers

Patrick Carome, Partner, WilmerHale (Moderator)
Media lawyer and author of a Special Report on Google Spain and the Right to Be Forgotten

David Price, Products Counsel, Google
Lawyer and search engine specialist who has been closely involved with the company's response to the Google Spain decision.

Mark Stephens, Howard Kennedy FSI
UK-based solicitor and internationally renowned privacy and free expression law expert.

Joaquín Muñoz, Partner, Abanlex Abogado
The lawyer who represented Mario Costeja González in the *Google Spain* case.

Adam Holland, Project Coordinator, Harvard University's Berkman Center for Internet & Society
Attorney who works on the organization's Chilling Effects Project which is monitoring the worldwide impact of the Right to Be Forgotten.

Matthew Leish, Assistant General Counsel, New York Daily News
In-house lawyer and author of "A View From The Inside: Responding To Take-Down Requests" in this issue of the *MediaLawLetter* (p. 44).

No Fee. MLRC Members Only

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MLRC Forum 2014 Sponsored by

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From the Executive Director's Desk

By George Freeman

I have recently returned from a Conference on Courts and Communication in Budapest. But I write not to give you a travelogue but, rather, to praise the value of an exchange of ideas with jurists away from the familiarity of home - - and to ask you to consider a process common in Europe, but rare in our country, of having court spokesmen aiding the press and of issuing court press releases about recent opinions.

First, some context: my parents were Hungarian, having grown up in Budapest and barely survived the disasters of the Holocaust there. Since I heard Hungarian at home since birth, I can understand the language, though hardly speak it. So the trip was a kick in light of my going back to familial roots and surprising natives with my Magyar language skills. But I was there for the Conference, which brought together about 100 judges and court spokesmen, 1/3 Hungarians and 2/3 from the rest of Europe, and whose purpose was an exchange of ideas with judges and court administrators from diverse lands.

George Freeman

Thus, the focus of the Conference was on how courts and judges should communicate with the media. I was asked to speak on a subset of that issue – how courts and judges use social media. As you can imagine, that part of my talk was very short. The last thing judges anywhere want to do is start tweeting about their cases or engage in interactive discussions with facebook friends.

On the other hand, I did talk a little about the white elephant in our system, that jurors quite possibly routinely use social media in their jury room during our endless trial breaks to discuss what they have witnessed with their friends and, worse, surf the web for information about the defendant to discover often inadmissible facts about him. But that had little import to the Europeans since, in the main, with a slight exception for the UK, EU nations do not have jury trials.

Having concluded that topic in minutes, I spent some time proselytizing about First Amendment values, an endeavor particularly appropriate to Hungary, where the current regime has been quite conservative and authoritarian, and uses a Media Authority to curb and control the press. So tales of the Pentagon Papers and the Times' warrantless wiretapping stories in the face of Pres. Bush's pleas not to run them, hopefully told diplomatically, seemed apt.

But I also spent time responding to many of the talks given earlier in the day. For example, to the many speakers who emphasized a balance between the administration of justice and individual rights, I emphasized that our prime concern was not the privacy rights of the parties – after all, by going to trial in the US parties normally leave their privacy rights at the courtroom door – but the individual's right to a fair trial. But, again, the First Amendment-Sixth Amendment tension is not much of a factor in Europe since, without juries, the whole notion of prejudicial pre-trial publicity is a non-issue.

When it came to the nub of the meeting, how courts communicate with the media and the public, I said that other than basic factual information which can be found on court websites, judges communicate only through their judicial opinions.

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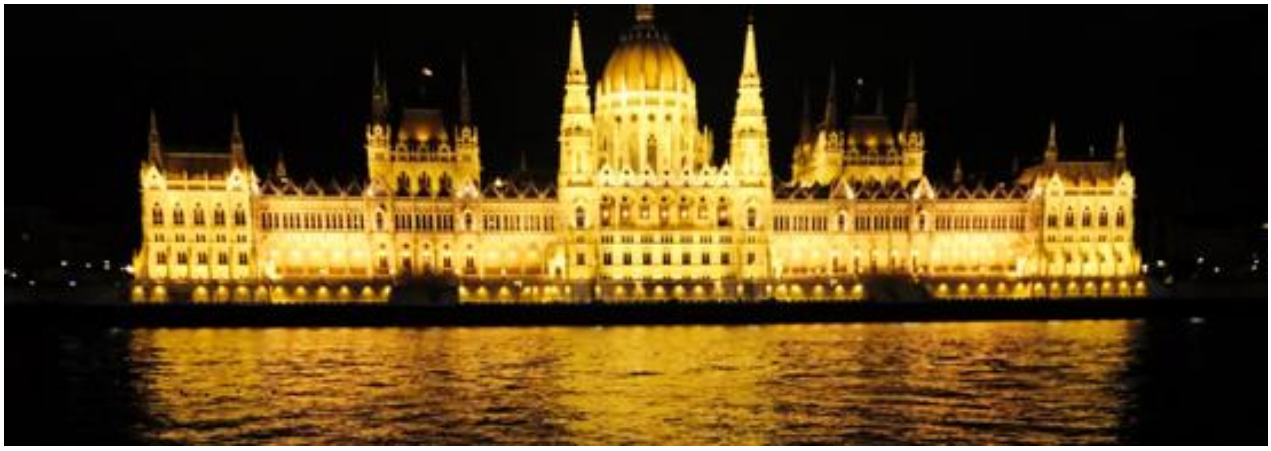

Hungarian Parliament at night from a Danube River cruise.

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But that is where we divide company with our friends across the pond. Most European courts have court spokesmen (I will use that term for brevity though the majority of those that attended the conference were, in fact, spokeswomen) who answer press inquiries about cases and decisions. And most courts, when important cases are decided, issue press releases, written by court spokesmen and their staffs, summarizing and explaining those decisions.

Of course, I explained that American judges believe that their opinions speak for themselves (notwithstanding many are loaded with legalese that many reporters, most of whom have not gone to law school, hardly can understand). They would not want a court spokesman, even with a legal education, to interpret their words or, perish the thought, simplify them to make them understandable to the lay reader. Indeed, imagine Justices Scalia and Sotomayor reviewing a court press release summarizing a decision they disagreed on, and the conflicting ways they would want to edit such an admittedly non-binding court release. (I don't know how the Syllabi at the start of Supreme Court decisions are edited, but they generally are more confusing than the decisions themselves.)

The European model deserves serious consideration and might well make for a more cooperative relationship between judges and the press – and, at the same time, may foster more accurate reporting.

But I had to admit that sometimes court reporters do need exactly that kind of help. I recalled that bizarre scene in December 2000 when television networks showed their reporters poring through the Bush v. Gore opinion the moment it was distributed, trying to figure out, while on air, what it meant. (My recollection is that Dan Abrams, perhaps in part due to his familial and legal training, came up with the quickest and most accurate report.) A questioner pointed to the more recent Obamacare decision, when many first reports about the result were wildly off the mark. It's hard to deny that these bizarre scenes and often inaccurate reports would be significantly improved by a cogent 2-page press release, handed out contemporaneously with the opinion, aimed to help the media comprehend the decision.

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Indeed, I had lunch with the court spokesman of the European Court of Justice. After lunch, he gave me a well-written and very helpful 3-page press release explaining the Gonzalez v. Google right to be forgotten decision.

Just as press releases, press spokesmen could be valuable conduits between judges and the media. Due either to finances or to judges' view either that silence is golden or that no one should speak for them or their writings, only a small minority of American courts have such folks. But in Europe, they are commonplace.

First, they can answer questions if the media don't understand opinions or parts of the judicial process. They can consult with the judges, and essentially be their mouthpieces without the judges directly communicating with the press.

Moreover, they can protect judges. For example, think of when judges get unfairly pilloried for their opinions or sentences, when they merely follow the law or sentencing guidelines. These decisions often engender a public backlash. That happened in New York a number of times: a judge, following guidelines, gives a lenient sentence; the defendant is let free, or, worse, then commits another crime; the judge gets hammered by the public, but can't respond because of ethical restrictions. A court spokesman could run interference for the judge and explain the sentence in a way the judge himself would be unable to do.

In the New York state courts in New York City, there is such a court spokesman; interestingly, he got his start by being the court administrator coordinating pool television coverage back when TV cameras were allowed in New York courts. (After OJ, they, for the most part, are prohibited, a bizarre position for the media capital of the world.) Though the court spokesman doesn't interpret or answer questions about opinions, he serves as a valuable conduit between the court and the press, and has been very helpful in access matters, especially in turning judges around when their first instinct is to close a courtroom or seal a document.

To conclude, I firmly believe the European model deserves serious consideration and might well make for a more cooperative relationship between judges and the press – and, at the same time, may foster more accurate reporting, which is in everyone's best interest. In any event, we sometimes can learn from the processes of other countries – which is why I warmly encourage everyone to attend our international conference in London next September 27-29.

We welcome responses to this column at gfreeman@medialaw.org; they may be printed in next month's MediaLawLetter.

Court Affirms Summary Judgment for CBS on Former Journalist's Defamation, Privacy Claims

Reporter a Public Figure; No Expectation of Privacy in Source's Backyard

By Matthew E. Kelley

A public-figure plaintiff alleging defamation by implication under Illinois law must show that the defendant was subjectively aware of or recklessly disregarded the implied meaning, an intermediate Illinois appellate court has ruled. *Jacobson v. CBS Broad. Inc.*, 2014 IL App (1st) 132480 (Sept. 30, 2014).

The Illinois Appellate Court for the First District affirmed a trial court's grant of summary judgment dismissing a former Chicago television reporter's defamation and invasion of privacy lawsuit against CBS. The appellate court agreed with the Cook County court's conclusions that the reporter was a public figure, that she failed to produce sufficient evidence to raise a jury question about actual malice, and that the location and activities CBS recorded were not private.

Jacobson, already a "well-known local personality and high profile reporter," injected herself into the controversy by working to "own" the story.

Background

Amy Jacobson, a former reporter for NBC's Chicago station, sued CBS over its 2007 report about her presence at the backyard pool of a man whose wife's disappearance Jacobson had been covering. A CBS reporter and videographer in the neighborhood had recorded Jacobson and her two children, clad in swimsuits, in the man's backyard. Jacobson's supervisors at NBC fired her after learning about the incident, which was reported by both of Chicago's major daily newspapers before CBS aired the broadcast at issue.

Appellate Court Decision

Asserting claims for defamation and false light invasion of privacy, Jacobson asserted that the report falsely implied that she used sex to obtain stories and, specifically, had engaged in sex with the missing woman's husband, whom Jacobson said was a confidential source. The appellate court affirmed dismissal of these claims on the ground that Jacobson, a public figure, had not offered evidence sufficient to support a jury finding of actual malice.

The appellate court agreed with the trial court that Jacobson was a limited-purpose public figure, applying the three-part test articulated in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980). First, the court found that the story Jacobson was covering – the disappearance of a suburban mother and the suspicion cast on her estranged husband – was a public controversy, noting that the story was the focus of nightly news coverage, spurred debate among members of the public, and tied into the larger issue of domestic violence.

Next, the court found that Jacobson, already a "well-known local personality and high profile reporter," injected herself into the controversy by working to "own" the story, cultivating close relationships with the families involved and with law enforcement, and participating in a search for the woman on her day off. "It was the plaintiff's existing notoriety," combined with these activities, that "thrust her even further into the public spotlight, invited scrutiny of her methods, and gave rise to the ethical predicament in which she found herself," the court said.

Finally, the CBS broadcast was germane to Jacobson's participation in the controversy because her presence at the

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man's home "affected the way the public perceived her reporting" on the story.

The court then held that Jacobson had failed to present sufficient evidence to create a jury issue on whether the CBS journalists knew that their report could convey the claimed sexual implication to a reasonable viewer or recklessly disregarded whether it could do so. In the first such decision by an Illinois state appellate court, the three-judge panel held that to prove actual malice in a case alleging defamation by implication, a public-figure plaintiff must show that the defendant "was subjectively aware of the implied meaning, or at least recklessly disregarded the potential for such implication."

The court adopted the reasoning of two Seventh Circuit cases that articulated this principle, *Saenz v. Playboy Enterprises, Inc.*, 841 F.2d 1309 (7th Cir. 1988), and *Woods v. Evansville Press Co., Inc.*, 791 F.2d 480 (7th Cir. 1986).

All of the CBS employees involved in the broadcast testified that they did not intend a sexual implication, did not perceive that a viewer could understand the report that way, and did not, themselves, believe that Jacobson and Stebic were engaged in a sexual relationship. The appellate court noted that while the defendant's denials are not enough, in and of themselves to preclude a finding of actual malice, the plaintiff has the burden on summary judgment to "present actual evidence" that "such subjective knowledge existed." Jacobson failed to do so, the court said, holding that Jacobson's evidence regarding a competitive rivalry between CBS and NBC and her claims of ill will by CBS employees were insufficient.

The court also rejected Jacobson's argument that the sexual connotation was the only reasonable interpretation of the broadcast, and thus CBS must have intended to convey it. The court held that while some viewers might have gotten that impression from the broadcast, there were other reasonable interpretations, particularly since the broadcast included footage of Jacobson's children with their faces obscured.

Jacobson also claimed that CBS invaded her privacy by recording video of her and her children in a private backyard while she was dressed in a swimsuit. The court rejected this claim, too, agreeing with the trial court that Jacobson had no reasonable expectation of privacy in the backyard, particularly given that the house was the focus of media and law enforcement attention, and the video recording did not capture any activities considered private for purposes of the tort.

The court noted that while the backyard was surrounded by a fence, it was at the bottom of a slope and thus visible from the street and sidewalk behind the open grassy area that bordered the yard, as well as from the neighbor's home from which CBS shot the video. And although Jacobson made much of the fact that CBS used a zoom lens to record the video – arguing that the recording was invasive because it captured details that were "not visible to the naked eye" – the court held that Jacobson could point to no Illinois case law indicating that the use of a zoom lens could be dispositive. Regarding the "private facts" element of the intrusion tort, the court found that footage of the plaintiff walking around in a bikini with a towel around her waist and talking on her cellphone were not invasive of her privacy.

Jacobson had no reasonable expectation of privacy in the backyard, particularly given that the house was the focus of media and law enforcement attention.

Jacobson also had raised tag-along claims for intentional infliction of emotional distress and tortious interference with a business expectancy. Despite the plaintiff's "shifting theory of liability with respect to these claims," the court held those claims failed because they were premised on her failed defamation and intrusion claims.

CBS Broadcasting Inc. was represented by Anthony Bongiorno and Naomi Waltman of the CBS Law Department, Lee Levine, Jay Ward Brown, Ashley Kissinger, Katharine Larsen, and Matthew E. Kelley of Levine Sullivan Koch & Schulz, LLP, and Brian Sher of Bryan Cave L.L.P. Plaintiff was represented by Kathleen T. Zellner and Douglas H. Johnson of Kathleen T. Zellner & Associates.

Dismissals in Two States Over Police-Supplied Photos of Wrong Suspects

By Bruce S. Rosen and Sarah L. Fehm

New Jersey plaintiffs voluntarily dismissed a defamation case seeking to hold media defendants responsible for using surveillance photographs of purported thieves from a "Toys for Tots" drop-off bin supplied by local police. Ninety miles to the north, a Brooklyn trial court justice reluctantly dismissed a similar action against two other media defendants who used NYPD-supplied photographs of a possible sexual assailant.

In both cases – classic fair reports – police had distributed the images while seeking assistance from the public in identifying the individuals. However, in the New Jersey case (against Philadelphia television stations owned by ABC, NBCU, and CBS as well as Gannett's *Courier Post*) it turns out there had been no theft. In the New York case (against Tribune Media's WPIX-TV and the *NY Daily News*), a different suspect was arrested and police never notified the media that the photograph was not that of the suspect ultimately arrested and charged. None of the plaintiffs were named in the reports.

In both cases – classic fair reports – police had distributed the images while seeking assistance from the public in identifying the individuals.

New Jersey Case

The New Jersey case, *Newbill v. Walgreens, et al*., 1:13-cv-07479, involved plaintiffs, who were volunteers for the U.S. Marine Corps Reserve's "Toys for Tots" program, and were accused of stealing toys from a Toys for Tots bin at a Walgreens drug store on December 12, 2012. They alleged that a pharmacist at the store reported the theft to Cherry Hill Police and provided police with surveillance video capturing plaintiffs' movements within that store.

Police proceeded to provide information to the media through the police department's public Facebook page, including plaintiffs' images from store surveillance, while asking for assistance in identifying the persons on the image. Later, police cancelled their alert, attributing the mistake to "an error in judgment by a Toys for Tots employee," who "forgot to identity himself, as he normally does and proceeded to collect the gifts." Plaintiffs, who alleged emotional distress and other damages, are continuing their lawsuits against Cherry Hill and Walgreens.

Newbill, filed in New Jersey Federal District Court by a Philadelphia firm, was especially vexatious because the N.J. licensed-lawyer whose name was signed on the complaint was no longer with the filing firm and denied he signed or authorized the signature. Following notice from the media defendants, Senior U.S. District Judge Joseph Rodriguez held a hearing concerning whether the complaint was properly filed and, without issuing a finding, allowed plaintiffs to refile their complaint with a different lawyer licensed in the state.

Media defendants, relying on New Jersey's strong fair report privilege as set forth in *Salzano v. North Jersey Media Group*, 201 N.J. 500 (2010), pushed plaintiffs to drop their case and ultimately plaintiffs relented.

New York Case

In *Acadio Rodriguez v. Daily News, LP. et al*., Index No.: 2058/14, the NYPD had sent an email press release containing a photographic image of an individual wanted for questioning in connection with an attempted rape, and requested the public's assistance to identify that individual. WPIX published on its website (www.PIX.com) and on its morning news broadcast, and the *Daily News* on its website, fair and true reports of the NYPD press release, and both parties sought application of New York State's Fair Report statute: N.Y. Civ. Rights Law § 74 ("Section 74").

Police issued an updated email press release four days after the initial April 14, 2013 plea for information, stating an individual other than Plaintiff was arrested for rape and other charges.

However, the updated NYPD email press release did not amend the previous information regarding the individual photograph that had been disseminated four days earlier, nor did it in any way indicate that the individual in the photograph was not the person charged.

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Plaintiff disputed that the email press release was adequate as an official publication under the law, and also alleged that his counsel notified both entities months after publication that he was wrongly identified, yet the entities failed to take the photograph down until a lawsuit was filed. Thus, he argued, the media defendants should be liable at least for leaving the images up after the notices were received.

Both entities said they had no record of receiving the notices, but even if they had they had, there was no obligation to take the image down under Section 74. In addition, the Daily News noted that it did, in fact, take down the photograph after receiving a subsequent notification from plaintiff's counsel. WPIX's News Department never received the notices from counsel, but took down the photo once it became aware of this matter through the filing of the complaint.

Brooklyn Justice Edgar G. Walker ruled that the matter was covered by Section 74, and although he noted that he could not find legal authority that would hold media defendants liable for failure to promptly remove the photograph or issue a retraction, he appeared to be disappointed he could not find it. "While the court finds it unconscionable that a publisher, whether malicious or not, may refuse to remove a news article/report from its website that it knows to be false, this is a matter for the legislature, not the courts, to address." Plaintiff has since filed a notice of appeal.

Bruce S. Rosen is a partner and Sarah L. Fehm, an associate, at McCusker, Anselmi, Rosen & Carvelli, PC, Florham Park, N.J. Bruce represented CBS and NBCU in Newbill v. Walgreens. Gayle C. Sproul, Levine, Sullivan Koch & Schulz, LLP, Philadelphia, represented ABC. Thomas Cafferty, Gibbons PC, Newark, N.J., represented Gannett. Plaintiff was represented by Carl E. Watts, Richmond, Berenbaum and Associates, Philadelphia, PA. In Rodriguez v. Daily News, Bruce S. Rosen and Sarah L. Fehm represented WPIX. The Daily News was represented by Matthew A. Leish, Vice President and Asst. General Counsel. Plaintiff was represented by Kelner & Kelner, New York, N.Y.

Libel and Privacy Claims Over Photo Error Dismissed

Claims Barred by Single Publication Rule

A Pennsylvania federal district court recently dismissed libel and privacy claims against KDKA-TV for mistakenly using plaintiff's photo in reports about an escaped prisoner. *Ghrist v. CBS Broadcasting* No. 2:13-cv-1544 (W.D. Pa. Aug. 21, 2014) (Hornak, J.).

The plaintiff is named Christopher William Ghrist. In 2011, another Pennsylvania man named Christopher Wayne Ghrist was arrested on drug and other charges, escaped police custody and was the subject of a multistate manhunt until his recapture.

KDKA-TV, a CBS station in Pittsburgh, obtained plaintiff's photo from a county prison database under the name Christopher W. Ghrist. Plaintiff alleged he alerted the station to the mistake, but his photo remained on the station's website until shortly after he sued for libel and privacy violations.

Although the court found it troubling that the mistaken photo remained on the television station's website until suit was filed, the complaint was untimely since it was filed outside of Pennsylvania's one year statute of limitations for libel and privacy claims. The court rejected plaintiff's request to treat his claims as "refreshed" each day the story remained accessible online. Pennsylvania, the court noted, does not recognize a continuing tort theory of recovery and instead adheres to the single publication rule.

Plaintiff was represented by Joseph M. Gaydos, Jr., Gaydos, Gaydos & Associates, P.C., White Oak, PA. CBS Broadcasting was represented by Carolyn McGee and Daniel McLane, Eckert Seamans Cherin & Mellott, Pittsburgh, PA.

New York Appellate Court Affirms Dismissal of Libel Claims Brought by Brooklyn Judge

New York Court of Appeals Denies Leave to Appeal

By Lisa Zycherman and Laura R. Handman

On July 17, 2014, a unanimous panel of the New York Supreme Court, Appellate Division, First Department affirmed the dismissal of all claims brought by Kings County Supreme Court Justice Larry D. Martin against the Daily News, LP and former columnist Errol Louis ("Daily News"). *Martin v. Daily News, L.P.*, 2014 WL 3510973 (1st Dep't July 17, 2014).

In the 50th anniversary year of *New York Times v. Sullivan*, the decision underscores the importance of "breathing space" for factual errors and for "vehement, caustic, and sometimes unpleasantly sharp attack [] on government and public officials," including "judges [who] are to be treated as 'men of fortitude, able to thrive in a hardy climate.'" 376 U.S. 254, 270, 273 (1964). On October 23, 2014, the New York Court of Appeals denied Justice Martin's motion for leave to appeal.

In affirming summary judgment for defendants, the First Department held that Justice Martin failed to meet his burden of showing, with convincing clarity, that the Daily News acted with reckless disregard for the truth. The Court held it was not unreasonable for the columnist commenting on a conflict of interest to rely on documentary evidence showing that the attorney retained by a party to settle a real estate dispute being heard by Justice Martin had also previously represented Justice Martin. In further affirming the lower court's dismissal of Justice Martin's second action claiming that the re-posting of the columns at issue constituted republication of the defamatory statements, the First Department held that no exception to the single publication rule applied where the columns were restored to correct an "inadvertent" deletion of the columns from the Daily News' site and the re-posting was not aimed toward reaching a new audience.

The panel ultimately concluded that Justice Martin failed to "clear the demanding hurdle presented by the standard set in New York Times v. Sullivan," and affirmed dismissal of Justice Martin's defamation suit.

Background

Plaintiff Larry D. Martin, a New York state trial court judge sitting in Brooklyn, filed his original libel action in January 2008 in State Court in Manhattan against the Daily News and its then op-ed columnist Errol Louis, based on four publications in January and February of 2007: two columns, a Daily Politics blog post and a subsequent post by Louis. Suit was also brought against attorney Ravi Batra for two posts on the Daily News website. Martin's complaint alleged that the publications portrayed him as a "corrupt" jurist who improperly presided over a case in which he was accused of having a conflict of interest.

The conflict of interest allegedly arose because Jerome Karp, the lawyer who had defended Martin three years before in proceedings before the New York Commission on Judicial Conduct ("CJC"), was said to be involved as "shadow counsel" behind the scenes in a series of eleven related real estate disputes, one of which was before Martin. When the issue was raised in the proceeding before Justice Martin, he refused to recuse himself. The alleged conflict became the basis for a lawsuit brought by Batra's client, Martin Riskin, against Karp in November 2006. The allegations in the Karp suit and supporting documents were the basis for the columns and blog posts in suit.

On defendants' motion to dismiss, in its July 14, 2009 decision, No. 100053/08, 2009 WL 2221457 (N.Y. Sup. Ct. N.Y. County), Justice Martin Shulman dismissed all claims against Batra and claims against the Daily News Defendants based on three of the four publications as not susceptible of a defamatory meaning as to Justice Martin. The court denied dismissal of the claim pertaining to Louis' February 2007 column ("Weed Out Bad Judges: More resources will help

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nail corrupt jurists"), which was primarily a call for more resources for the CJC to investigate judicial wrongdoing.

Three years of what the court called "lengthy and somewhat contentious discovery" on claims based on the remaining column ensued, including three days each of deposition of the judge and the columnist, and a battle over production of non-public CJC documents. Ultimately, Batra was ordered to produce his complaint to the CJC about Justice Martin's alleged conflict of interest, a complaint that was, in fact, pending at the time the February 2007 column was published.

On December 3, 2012, the lower court issued its decision granting the defendants' motion for summary judgment made after the close of discovery. The court rejected Martin's arguments that bias and actual malice were demonstrated and instead found that "[a] review of the parties' submissions, including Louis's deposition testimony, fails to reveal" that defendants published the column "either with knowledge that it contained false information or with reckless disregard for whether or not the information contained therein was false." The court noted that Louis' deposition testimony established that he was aware of questions regarding the reliability of Batra as a source, and that he addressed that issue in his prior column by acknowledging Batra's notoriety and framing the source's usefulness thus: "Who better to expose a rotten system than a man who once participated in it?"

The parties filed cross-motions to exclude expert witness testimony, which the lower court found to be moot in view of its decision on summary judgment. The plaintiff offered the testimony of Glenn Guzzo, a former editor and now journalism instructor at the University of North Florida, as an expert in the field of journalism. Defendants moved to exclude Guzzo's testimony on, among other grounds, that (1) his opinion on journalism standards was irrelevant where the question presented was whether defendants acted with actual malice, which goes to a subjective state of mind; and (2) plaintiff's contention that Guzzo would opine on defamatory meaning was unfounded because Guzzo was not qualified as a linguistic expert and expert testimony about what a reasonable reader would understand is impermissible.

Defendants offered the testimony of Professor Bruce A. Green, the director of the Louis Stein Center for Law and Ethics at Fordham University and an expert on judicial and lawyer ethics, to opine on questions of judicial ethics in connection with defendants' motion for summary judgment. Plaintiff moved to exclude Professor Green's testimony principally on the ground that his opinion misapplied the law and/or usurped the function of the court.

In March 2011, more than three years after the initial suit, plaintiff filed a second action alleging that, because the column still in suit had been restored to the Daily News' website in March 2010, after having "fallen off" the site during a conversion from one content management system to another, and because of the added features it exhibited (such as share buttons), the column had been republished triggering a new statute of limitations.

In its February 10, 2012 decision, *Martin v. Daily News, L.P.*, No. 103129/11, 2012 WL 1313994 (N.Y. Sup. Ct. N.Y. County), the court dismissed the new lawsuit finding that, under the single publication rule, the reposting did not constitute republication triggering the statute of limitations. The restoration of the columns without significant alteration was viewed as "akin to delayed circulation of the original," not republication, and the hyperlinks to social media and networking sites was not reaching a "new audience," even if arguably an expanded one. See Anne B. Carroll, "Online Article With 'Share Button' Not A New Publication," MLRC Media Law Letter, Feb. 2012, at 7.

The First Department's Decision

Writing for a unanimous court of four judges after a fifth judge had to recuse, Justice Saxe first rejected the Daily News' assertion that the contents of the columns at issue were not reasonably susceptible of a defamatory interpretation. With regard to the first column, the appellate court disagreed with the lower court's finding of no defamatory meaning and instead held that when "read in light of the topic heading, situated above the column's headline, namely, the word 'Corruption,'" and the "opening words of the column, referring to '[t]he complicated world of judicial corruption in Brooklyn,'" the statement in the first column describing the case before Justice Martin as a "multi-million dollar" real estate case, which Batra alleged Karp was trying to "rig" by representing a party and Justice Martin "implicitly asserts that Justice Martin is part of that case-rigging." When viewed

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together, the Court held that the first column supported a claim that the "content of this publication was defamatory by implication."

As to the second column, the panel held that reading the column "as a whole," which discussed two other judges who were "either removed or sent to prison" and then proceeded to state "'[t]ake the case of Larry Martin,'" could be viewed by the average reader as suggesting "Justice Martin were another example of a judge who should be removed or sent to prison."

The panel rejected the Daily News' contention that the two columns were protected opinion, first noting that their position on the "Opinion" page of the newspaper was "not dispositive of the issue." The Court further held that although "a statement that a judge is incompetent or unfit for office merely expresses an opinion about the judge's performance in office …, a published statement that a judge is corrupt is not equivalent to an opinion about the judge's fitness for office."

The Court also rejected the Daily News' contention that the columns were protected fair reports of the complaint filed in the Karp litigation. With regard to the first column, although the column contained assertions as to what Riskin alleged in the Karp complaint, the panel held that reporting Riskin's claim that Karp tried to "rig the case" was not a fair and true report insofar as it was premised on errors of fact that were "more than technical inaccuracies" and "lie at the heart of the defamation by which Louis conveyed to the reader the accusation that Justice Martin" acted "despite a disabling conflict of interest."

However, the panel ultimately concluded that Justice Martin failed to "clear the demanding hurdle presented by the standard set in *New York Times v. Sullivan*," and affirmed dismissal of Justice Martin's defamation suit. The Court concluded that Justice Martin failed to meet his burden of showing, with convincing clarity, that the Daily News acted with reckless disregard for the truth.

Citing Errol Louis' deposition testimony, the Court found that Louis' reliance on a letter which authorized Karp to act as one of the parties' agent to negotiate a settlement in a case proceeding before Justice Martin "was not entirely unreasonable" and, therefore, Louis' testimony failed to "rise to the level of establishing that he 'entertained serious doubts as to the truth of his publication,' or acted with a 'high degree of awareness of [its] probable falsity.'" This finding may have been assisted by the Daily News' proffered expert testimony that it was not unreasonable for Louis to believe, based on applicable judicial ethical standards, that Justice Martin's conduct constituted a conflict of interest. Although the Court did not cite the expert opinion as support, it expressly found "unavailing" Justice Martin's arguments against its consideration. The court made no reference to Plaintiffs' journalism expert.

The Court also reviewed the lower court's dismissal of Justice Martin's second claim that the re-posting of the columns at issue in 2010 constituted an actionable republication of the defamatory statements. The panel affirmed dismissal, concluding that no exception to the single publication rule applied because the "inadvertent deletion" of the columns "during a changeover to a new computer-management system, and their restoration once that inadvertent deletion was discovered, was not geared toward reaching a new audience." The intended audience remained the same – visitors to the Daily News website. In this manner, the Court found, "their restoration was, as characterized by the motion court, akin to a delayed circulation of the original."

No exception to the single publication rule applied because the "inadvertent deletion" of the columns and their restoration was not geared toward reaching a new audience.

Laura R. Handman, Lisa B. Zycherman, and Erin N. Reid, Davis Wright Tremaine LLP, represented The Daily News and Errol Louis. Anne B. Carroll, Vice President and Deputy General Counsel for the Daily News, did the principal drafting of the motions to dismiss and summary judgment. Since her retirement at the end of August 2012, Matthew Leish, Vice President and Assistant General Counsel, has represented the Daily News and Errol Louis. Louis left the Daily News in November 2010 and is now host of Inside City Hall on New York One. Harold Schwab of Lester Schwab Katz and Dwyer, LLP, represented Justice Martin before the lower court. Stuart Blander of Heller, Horowitz & Feit, P.C. represented the Plaintiff on appeal.

Alleged Cyberbully Loses Defamation Lawsuit Over Arrest Report

TV Station's Reports About Teen's Arrest Were Privileged

By Adrianna C. Rodriguez

A Florida federal court dismissed defamation and defamation by implication claims brought by a teenager against Florida Panhandle television station WJHG challenging accurate reporting of her arrest for felony cyberbullying for running a Facebook smut page called *Panama City's Trashiest.* The claims were part of a lawsuit that also included various civil rights claims against the local sheriff and a police investigator. *Jeter v. McKeithen et al.*, No. 5:14-cv-00189-RS-EMT (N.D. Fla. Oct. 17, 2014).

Dismissing both claims against the Gray Television Group station, and addressing an obvious but open issue in Florida defamation law, Judge Richard Smoak rejected the plaintiff's claim that fair report privilege did not apply to implied defamation claims: "For the avoidance of doubt: the qualified news media privilege does apply to defamation by implication claims in Florida."

Judge Richard Smoak rejected the plaintiff's claim that fair report privilege did not apply to implied defamation claims .

Background

The claims for defamation and defamation by implication brought by the plaintiff, who sued under her initials "K.J.," were premised on two news reports about her felony criminal case for cyberbullying, which the prosecutor's office later abandoned.

In the first broadcast, WJHG reported that K.J., along with another administrator of the *Panama City's Trashiest* page, had been arrested and charged with aggravated cyberstalking. Based on information from investigators, WJHG reported that the teens used the page to publicly humiliate dozens of other teens, and they could be charged as adults under state law. The broadcast included the booking photos of K.J. released by the sheriff's office. The newscast also quoted a sheriff's investigator saying that the website was the worst case of cyberbullying he'd ever seen, and describing the page as "malicious."

The state later dropped the charges against K.J. and the others. In a follow-up broadcast, WJHG reported directly from the court record in which prosecutors' dismissed the charges, providing five reasons for the decision: (1) the victims did not suffer substantial emotional distress; (2) the victim who initially reported the case requested the charges be dismissed and to not participate in further proceedings; (3) the teens charged were not responsible for all the comments on the website; (4) K.J. and the other three teens charged apologized to the victims; and (5) the website was removed from the internet.

In the lawsuit, K.J. alleged that the accurate statements in WJHG's initial report, that the minors could face charges as adults, created a defamatory implication that there was more evidence against her and the other three teens in this case than in most cases of minors facing charges as adults. She also claimed that the broadcasting of her mug shot with the word "suspect" over it implied that she was guilty.

K.J. further alleged the station's reporting of the investigator's statements about the website in the first story, and the station's reporting from the court document dismissing the charges in the second story, was defamatory. She made these allegations despite conceding in her complaint that the station accurately reported the information obtained both from the investigator and the court document.

WJHG moved to dismiss the defamation and defamation by implication claims.

District Court's Decision

In his nine-page order granting the motion to dismiss, Judge Smoak found "entirely without merit" K.J.'s argument that the fair report privilege did not extend to defamation by implication claims. He relied on the Florida Supreme Court's holding in *Jews For Jesus, Inc. v. Rapp*, that "[a]ll of the protections of defamation law that are afforded to the media

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and private defendants are therefore extended to the tort of defamation by implication." 997 So. 2d 1098, 1106 (Fla. 2008).

Judge Smoak further held that the statements in the broadcasts were substantially accurate, and that no reasonable viewer of the broadcast could have perceived the initial story to imply that there was more evidence against K.J., and the other three administrators of *Panama City's Trashiest*, than other minors charged with serious crimes. Judge Smoak also held that the statements based on information given to the station by investigators were privileged.

Charles D. Tobin and Adrianna C. Rodriguez with Holland & Knight LLP's Washington, D.C. office, and Kevin Cox, from the firm's Tallahassee, FL, office represented Gray Television Group Inc., owner of WJHG-TV. Plaintiff K.J. was represented by Marie A. Mattox, of Marie A. Mattox, P.A., in Tallahassee, FL.

The End of the Line for Defamation Claims by Railroad and Its CEO Against Trade Newsletter

By Sigmund D. Schutz and Benjamin S. Piper

In a victory for media defendants, the federal district court in Maine, granted summary judgment dismissing libel and false light claims brought by a railroad and its CEO against a small trade newsletter (Atlantic Northeast Rails & Ports) and its publisher. *Pan Am Systems Inc. v. Hardenbergh*, 2014 U.S. Dist LEXIS 137780 (D.Me. Sept. 30, 2014). Judge Nancy Torresen found that the statements at issue were either not defamatory or were materially accurate.

In an earlier order dismissing the complaint, but granting leave to amend, 871 F.Supp.2d 6 (D.Me.2012), the court had concluded that the trade newsletter qualified as a media defendant and that the speech at issue implicated matters of public concern. After plaintiffs amended their complaint, the court had granted the newsletter's motion to bifurcate discovery to forestall inquiry into fault so as to (at least) postpone inquiry into the newsletter's confidential sources.

The court recited the typical Fed.R.Civ.P. 56 summary judgment rubric, but cited authority outside the First Circuit for the propositions that "[p]rocedures like summary judgment take on an added urgency in suits that have the 'potential of ... chilling constitutionally protected speech" and that "[t]he threat of being put to the defense of a lawsuit ... may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." With these considerations in mind, the Court vetted each of the challenged statements with care.

Judge Nancy Torresen found that the statements at issue were either not defamatory or were materially accurate.

Statement No. 1 – "Horrendously Dilapidated Railroad System."

The railroad argued that the re-publication of a statement by the Chair of the New Hampshire Rail Transit Authority characterizing derailment of a freight train as a "perfectly predictable accident" caused by a "horrendously dilapidated railroad system" was defamatory and false because the cause of the derailment was not the state of plaintiff's rail tracks but rather a faulty rail car owned by a different rail company.

The court disagreed, explaining the phrases "perfectly predictable" and "horrendously dilapidated" are hyperbole. Neither "can be reduced to anything approaching a precise, testable fact." The court reasoned that it could not "objectively verify whether a risk of derailment has crossed the line from 'hard to predict' to 'predictable' to 'perfectly predictable." Likewise, it could not chart whether a railroad system has fallen from "ship-shape" to "could use some work" to "horrendously dilapidated." These are "the kind of loose, subjective judgments necessary for the vigorous, freewheeling debate that the First Amendment protects."

As for the statement that the cause of the derailment was the state of the "railroad system," the court found that the "system" encompasses not just train tracks but the trains and rail cars that run on them. In fact a rail car had been severely corroded and this caused the derailment.

The court also suggested that the neutral reportage privilege protected the republication of statements by the Chair of the Rail Transit Authority. The Court stopped short of adopting the neutral reportage privilege recognized in *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir.1977), but said that the privilege would be well suited to the article in question. The article reported on a "contentious issue of public concern" and presented "multiple viewpoints without adopting" any one as the publication's own. The reporting was balanced, having prominently reported the railroad's own assessment of the likely cause of the derailment.

Statement No. 2 – Broken Promise of Service

The railroad argued that an article reporting that it had broken a promise to offer a certain level of service to customers was false and defamatory. After finding that the word "promise" has several possible meanings and may only be a declaration of intent to do or refrain from doing something, the court found that an authorized representative of the railroad had in fact submitted an unequivocal sworn

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statement to a federal agency representing that it planned to provide the relevant level of service. Although the railroad arguably had not made a legally binding commitment, the term "promise" had not been used in that sense and the reporting was, therefore, materially accurate.

Statement No. 3 – Lost Rail Cars

The railroad argued that a report, from an anonymous source, that the railroad lost rail cars on a consistent ongoing basis, including one car lost for over 60 days was false and defamatory. Relying on punctuation in the sentence as published – that "loses" and "lost" were in quotation marks – and that it was unclear in context whether those terms were meant literally or rather as euphemisms for something else, the court concluded that the statement was "too cryptic and oddly structured to communicate anything concrete enough to be considered easily ascertainable and objectively verifiable."

Statement No. 4 – CEO's Resignation

The railroad's final argument was that a statement that its CEO had been fired was defamatory since the CEO had in fact resigned. In fact, the owner of the railroad had directed the CEO to either assume the role of president (as well as CEO) and take back full control of the railroad or to relinquish power and resign. The CEO opted to resign. Under Maine law a false allegation that an individual has been fired, without providing defamatory reasons for the firing, is not actionable. "An employee may be discharged for any one of a multitude of reasons unrelated to his honesty, integrity or occupational skill, or indeed for no reason at all," so it is the reason for the discharge only not the fact of the discharge itself which can render a statement actionable as defamation in Maine.

The court concluded that the newsletter had not reported any reason why the CEO had been fired, so the reporting was not defamatory. The false light claim was premised on the same allegation and that too failed for the same reason.

Conclusion

The court seemed to require a high level of factual specificity before concluding that the statements were sufficient to support a defamatory meaning, perhaps reflecting an unsympathetic view of the largest railroad in New England's attempt to silence a small newsletter. Even with a bifurcated discovery order forestalling inquiry into fault (and protecting the newsletter's sources), a lot of effort went into defending a claim that had been (to paraphrase the court) a "pretty mealy apple" all along and that had not "aged well with further discovery." On October 24, 2014, plaintiffs filed a notice of appeal.

Sigmund D. Schutz and Benjamin S. Piper of Preti Flaherty LLP in Portland, ME; and Russell B. Pierce, Norman Hanson & DeTroy in Portland, ME, represented defendants Chalmers Hardenbergh and Atlantic Northeast Rails and Ports. Plaintiffs Pan Am Systems, Inc., Springfield Terminal Railway Co. and David Andrew Fink were represented by Thad B. Zmistowski of Eaton Peabody in Bangor, ME.

Washington State's Highest Court to Decide Constitutionality of Anti-SLAPP Statute

By Bruce E.H. Johnson and Ambika Kumar Doran

Earlier this month, the Washington Supreme Court agreed to decide a case involving constitutional challenges to the state's 2010 Act Limiting Strategic Lawsuits Against Public Participation ("SLAPPs"). It will also decide whether the statute bars claims that former board members of a food co-op violated the board's bylaws and policies by adopting a boycott of Israeli products.

The dispute in *Davis v. Cox,* 180 Wn. App. 514, 325 P.3d 255 (2014), began in 2009, when a cashier at the Olympia Food Co-Op proposed a boycott of Israeli goods in solidarity with the Palestinian cause. A team of employees could not reach consensus and reported their failure to the board. The board asked them to try again. And when they failed a second time, the board resolved the disagreement and adopted the boycott.

The plaintiffs, Co-Op members who disagreed with the decision, ran for election to the board based on an anti-boycott campaign. They lost.

They then sent a letter to defendants, sixteen board members who adopted the boycott, threatening to file suit if the boycott was not rescinded, and to make the process "considerably more complicated, burdensome, and expensive than it has been already." Plaintiffs then sued, alleging defendants acted ultra vires and breached their fiduciary duties. They sought an injunction preventing enforcement of the boycott and damages from each of the defendants.

Defendants brought a special motion to strike the complaint under Washington's new anti-SLAPP statute, RCW 4.24.525, which the Washington Legislature modeled after the California anti-SLAPP statute, Cal. Code Civ. Proc. § 425.16. The trial court granted the motion and awarded the defendants their attorneys' fees and $10,000 each in statutory damages, for a total award of $221,846.75.

The Court of Appeals affirmed on April 7, 2014, in a unanimous opinion, finding the boycott was an exercise of the right of free speech protected by the statute and that the plaintiffs had failed to show a probability of prevailing on the merits because the Co-op bylaws and Washington law expressly confirmed the board's authority to make these management decisions on behalf of the Co-op.

The Washington Supreme Court granted review October 9, 2014, just a week after hearing argument in *Dillon v. Seattle Deposition Reporters*, 179 Wn. App. 41, 316 P.3d 1119 (2014), in which amici ACLU—long a proponent of anti-SLAPP statutes in other jurisdictions—and the Washington State Association for Justice Foundation (formerly the Washington State Trial Lawyers Association) argued that the anti-SLAPP statute is unconstitutional because it infringes the right to a jury trial. Signaling that it may not decide the constitutional issues in *Dillon*, the Court gave the parties in *Dillon* an opportunity to brief the constitutionality issues again before argument in *Davis*.

In *Davis*, the plaintiffs argued the anti-SLAPP statute is unconstitutional under a variety of theories, including that the burden of proof and presumptive discovery stay violate the separation of powers and right of access to courts, and that the burden of proof is impermissibly vague.

Supplemental briefing in *Davis* and *Dillon* is due in early November. The Court has not yet set a date for argument in *Davis*.

Bruce E.H. Johnson and Ambika Kumar Doran of Davis Wright Tremaine in Seattle, WA., represent the defendants in Davis v. Cox.

KTRK Awarded Over $250,000 in Fees and Mandatory Sanctions Under Anti-SLAPP Law

By Laura Lee Prather and Alicia Calzada

In what is the second largest attorneys' fees award in the Texas anti-SLAPP statute's three-year history, a judge in Harris County, Texas awarded KTRK Television over $250,000 in attorney's fees on remand after the station won an anti-SLAPP appeal. *Robinson v. The Walt Disney Comp. at al.*, No. 2011-54895 (Oct. 8, 2014).

Background

In October 2010, Houston television station KTRK accurately reported on the closing of a charter school due to, among other things, a lack of adequate funds, allegations of financial mismanagement and failure to properly account for state funds. Theola Robinson, the school's former superintendent, sued the station and its indirect parent corporations, including Disney alleging defamation. Robinson originally tried to sue just Disney in federal court (on two different occasions) – to no avail. Ultimately, almost a year after the broadcast at issue, Robinson sued both KTRK and Disney in state court.

While Robinson was forum shopping, trying to reach the ultimate parent company, the Texas Legislature was busy enacting the Texas Citizens Participation Act – an anti-SLAPP statute prohibiting meritless lawsuits, like this one, filed out of retaliation for the exercise of First Amendment rights. The anti-SLAPP statute went into effect in June, 2011, and Robinson's claims ultimately landed in state court when she filed her third lawsuit against Disney (and first against KTRK) in October, 2011.

Anti-SLAPP Motion

Shortly thereafter, KTRK filed a motion to dismiss under the Texas Citizens Participation Act which, at the time, was a new and untested statute. The trial court denied the motion, and KTRK filed an interlocutory appeal of the denial which is permitted and handled on an expedited basis under the statute. The First Court of Appeals of Texas reversed the trial court's denial of the anti-SLAPP motion, holding the broadcasts had not accused Robinson of the commission of a crime and, thus, there was no basis for her libel per se claim. Robinson's claim was dismissed, and the case was remanded for a determination of fees and sanctions. Before the trial court could make its monetary award, Robinson filed more than half a dozen appellate challenges.

In classic SLAPP-suit fashion, the cost of resolving the litigation was driven up significantly by these persistent meritless efforts to challenge the appellate court's ruling on the law. By the time Robinson's voluminous challenges were over and the trial court heard the motion for fees on remand, the cost of defending the litigation mounted to $258,708.32 in attorneys' fees, expenses, and court costs.

The trial court awarded the amount in its entirety. Furthermore, Plaintiff's tireless efforts to reach Disney's deep pocket were stymied when the Court granted its Special Appearance and held there was no jurisdiction over Disney.

Under the TCPA, when a court dismisses a legal action under the statute, it shall award to the moving party "court costs, reasonable attorney's fees" and "sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions." To date, KTRK's award is the second largest attorney's fees award under Texas' anti-SLAPP law.

In August, another Harris County court awarded $350,000, in attorneys' fees and $250,000 in sanctions, when granting an anti-SLAPP motion in *Schlumberger Limited and Schlumberger Technology Corporation v. Charlotte Rutherford*, No. 2014-13621 (127th District Court, Harris County, TX, August 27, 2014). The Schlumberger opinion has been appealed.

Other large anti-SLAPP attorneys' fees awards have included an award of $250,001.44 in *John Moore Services, Inc. & John Moore Renovation, LLC v. The Better Business Bureau of Metropolitan Houston, Inc.*, No. 2012-35162 (269th Dist. Ct., Harris Cty, Tex., August 8, 2014) (awarded

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on remand after an appeal); and *Kristina Head v. Chicory Media, LLC d/b/a/ Starcasm.net; American Media, Inc., d/b/ a/ Star Magazine; Perez Hilton Management, Inc. d/b/a perezitos.com*, 415 S.W. 3d 559 (Tex. App. - Texarakana, 2013, no pet.) No. 2013-0040 (71st Dist. Ct., Harrison County, Tex. Sept 25, 2013) ($187,309 total attorney's fees awarded to defendants AMI, Chicory, & Perez Hilton Management. Inc and $55,000 combined in sanctions to defendants). An appeal of the *Head* case was dismissed for want of prosecution.

In addition to fees, the Texas anti-SLAPP statute requires imposition of sanctions – with the amount being discretionary. Whether sanctions were mandatory has been the topic of some fodder by Texas trial courts; however, in the recent case of *Sullivan v. Abraham*, Texas' Seventh Court of Appeals in Amarillo held that "[t]hrough use of the word 'shall,' the legislature evinced its intent to impose upon the trial court an obligation to assess sanctions." *Sullivan v. Abraham*, 07-13-00296-CV, 2014 WL 5140289 (Tex. App.—Amarillo Oct. 13, 2014, no. pet. h.). In holding that sanctions, as well as attorney's fees, were mandatory, the *Sullivan* court reversed a trial court's failure to award sanctions on remand in an anti-SLAPP case.

While, at first blush, these recent substantial awards may seem extraordinary; however, they demonstrate both the oppressive cost of SLAPP suits on defendants and the effectiveness of the statute in shifting the burden of these costs to plaintiffs who file meritless claims which create a chilling effect on the exercise of defendants' First Amendment rights.

Laura Lee Prather, a partner, and Alicia Calzada an associate, at Haynes and Boone, Austin, TX, represented KTRK.

Pennsylvania Federal Court Dismisses Libel Claims

Lack of Personal Jurisdiction and Lack of Defamatory Meaning

By Matthew L. Schafer

An article suggesting that a businessman asked the SEC to stop trading in his company's stock amid fraud concerns is not susceptible of a defamatory meaning. *Bukstel v. DealFlow Media, Inc.*, No. 13-3287, 2014 WL 3952842 (E.D. Pa. Aug. 13, 2014) (Rufe, J.).

Moreover, the businessman-plaintiff's general allegations that the CEO of the defendant media company was involved in the publication of the allegedly defamatory article failed to support a finding of personal jurisdiction over the CEO.

The decision is a reaffirmation of the rule that alleging that someone is a government informant or whistleblower – even if that allegation is false – is not defamatory as a matter of law. The decision also requires plaintiffs suing out-of-state media defendants and their employees to allege specifically that each defendant had some direct role in the publication of the underlying defamatory article in order to support personal jurisdiction under the *Calder v. Jones*' "effects" test.

The decision is a reaffirmation of the rule that alleging that someone is a government informant or whistleblower – even if that allegation is false – is not defamatory.

Background

In this litigation, plaintiff Edward Bukstel, CEO of VitaminSpice, Inc., alleged that he was defamed by an article published by *The DealFlow Report*, a financial newsletter, titled "VitaminSpice CEO Says He Requested Trading Halt Amid Dispute Over Stock Manipulation." The lede read, "The chief executive of ... VitaminSpice, Inc. (VTMS) says that he asked the [SEC] to issue an order halting trading in the company's stock, amid a dispute with his former attorney who he accuses of stock manipulation."

According to Bukstel, the article defamed him by stating, falsely, that he had asked the SEC to suspend trading in his company. He alleged that such a request made it appear that his "business judgment was seriously impaired" and suggested that he had acted "in dereliction of his fiduciary duty to VitaminSpice."

Bukstel brought suit against DealFlow Media, Inc., the publisher of *The DealFlow Report*, as well as the CEO of DealFlow Media, the editor-in-chief, and the journalist who wrote the allegedly defamatory article.

Defendant's CEO moved individually to dismiss for lack of personal jurisdiction, asserting that plaintiff failed to allege that he played any role in the publication of the article and that his status as CEO did not create supervisory or other liability, making personal jurisdiction under the *Calder* effects test improper. The court agreed, finding that plaintiff failed to clear the first hurdle of the effects test, which requires pleading that "the defendant committed an intentional tort." *Id.* at *4-5. General allegations that all defendants defamed him and the defendant CEO's status in the corporate hierarchy alone were insufficient alone to support personal jurisdiction under *Calder*.

Defamatory Meaning

Additionally, all defendants moved to dismiss Bukstel's complaint for failure to state a claim, arguing that the allegedly false and defamatory statements regarding Bukstel's request for a trading halt were not defamatory. These statements were not defamatory, defendants argued, because "they describe[d] Bukstel as aiding the SEC in order to protect his shareholders, without implying that he did so in order to escape punishment for his own acts." *Id.* at *6.

Defendants pointed out that Bukstel improperly asked the Court to view the allegedly defamatory statements in isolation, apart from the context of the article, which described a bitter feud between Bukstel and his investors and the former general counsel of his company, whom he had accused of stock fraud. Bukstel did not deny that he had given the SEC a copy of a judicial opinion denying the investors' motion to dismiss his stock fraud claim, as reported

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in the article. Defendants thus argued that, at most, Bukstel was characterized as a government whistleblower, which, as a matter of law, is not capable of defamatory meaning.

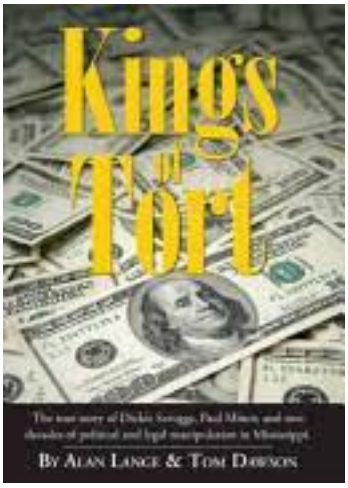
The court agreed, falling in line with what it called the "general rule that 'identifying someone as a government informant is not defamatory as a matter of law'": "Statements indicating that Bukstel voluntarily asked a federal law enforcement agency to take an action to prevent further wrongdoing and protect the investing public, even if false, hardly paint him as dishonest, lacking in integrity, or guilty of criminal wrongdoing." *Id.* Indeed, even though such actions may have been "unusual," the court concluded that it could not "find that an article reporting that Bukstel took such an action in light of suspected stock price manipulation is capable of blackening Bukstel's reputation in the financial community." *Id.*

The court granted both motions to dismiss the complaint. Although it "believe[d] that further amendment would be futile," plaintiff was granted leave to file a motion for leave to file a third amended complaint within twenty-days. Plaintiff did not move to amend his complaint or file a notice of appeal.

The defendants were represented in this matter by Gayle C. Sproul and Chad R. Bowman of Levine Sullivan Koch & Schulz, LLP, with the assistance of Matthew L. Schafer. The plaintiff was represented by Brian M. Andris, Esq. of Andris Law, LLC.

Mississippi Appeals Court Affirms Summary Judgment for Book Authors

Former FBI Agent Sued Over "Kings of Tort" Book



The Mississippi Court of Appeals affirmed summary judgment in favor of the authors of the book "Kings of Tort" which recounts the prosecution of trial lawyer Richard "Dickie" Scruggs and judicial corruption in Mississippi. *Neilson v. Dawson*, No. 2012-CA-01792 (Miss. App. Sept. 16, 2014).

The book was written by defendants Tom Dawson, a former Assistant U.S. Attorney involved in the corruption prosecutions, and writer Alan Lange.

Plaintiff, a former FBI agent, sued over statements in the book describing him as "untrustworthy." A passage in the book states that prosecutors "had lost confidence" in him; that the investigation into corruption could not be successful if he was involved or even knew about the investigation; and that plaintiff had to be removed from the investigation.

The trial court granted summary judgment to defendants. Dawson and other prosecutors involved in the investigation submitted detailed affidavits stating why they believed plaintiff was untrustworthy. In response, plaintiff sent the trial judge for in camera review a Department of Justice report that plaintiff claimed cleared him of wrongdoing. The trial judge held the document was not properly filed and refused to consider it.

Affirming summary judgment, the Court of Appeals held that defendants' affidavits were essentially uncontroverted and that plaintiff failed to produce any admissible evidence to support his claim.

California's New Consumer Comment Law Leaves Questions and Potential Loopholes

By Jeff Hermes

On September 9, 2014, California Gov. Jerry Brown signed into law Assembly Bill No. 2365, adding a new Section 1670.8 to the California Civil Code. The new law was passed in response to a practice among some businesses of requiring consumers to waive their right to comment on either the business or its goods and services.

This issue came to public attention in 2011, when reports surfaced of doctors using form contracts that purported to bar their patients from disparaging them or their services; other versions of these contracts included provisions purporting to transfer the copyright in any commentary by the patient to the doctor.[1] Another event (which directly inspired California's new law) involved KlearGear.com, a website selling novelty gifts that had a non-disparagement clause in its terms of use. Over three years after a Utah customer's wife posted a negative online review about the site, KlearGear.com demanded a payment of $3,500 for violation of the non-disparagement clause. When the customer and his wife refused to pay, the site reported the non-payment as a debt to a credit reporting agency causing the couple extensive hardship.[2]

The new law was passed in response to a practice among some businesses of requiring consumers to waive their right to comment on either the business or its goods and services.

Section 1670.8 now provides that in California:

> A contract or proposed contract for the sale or lease of consumer goods or services may not include a provision waiving the consumer's right to make any statement regarding the seller or lessor or its employees or agents, or concerning the goods or services.

Cal. Civ. Code § 1670.8(a)(1). The statute also makes it

> unlawful to threaten or to seek to enforce a provision made unlawful under this section, or to otherwise penalize a consumer for making any statement protected under this section.

Cal. Civ. Code § 1670.8(a)(2). Attempted waivers of the statute's provisions are void and unenforceable against public policy. Cal. Civ. Code § 1670.8(b).

The statute allows for civil penalties "to be assessed and collected in a civil action brought by the consumer, by the Attorney General, or by the district attorney or city attorney of the county or city in which the violation occurred." Cal. Civ. Code § 1670.8(c). The amount of the penalty is capped by statute, up to $2,500 for the first violation of its provisions, up to $5,000 for each subsequent violation, and up $10,000 for willful, intentional, or reckless violations, Cal. Civ. Code § 1670.8 (c, d).

The most obvious effect of the statute is to prevent businesses and professionals from suppressing negative consumer commentary through contracts that avoid the normal burdens of proof in a defamation action. While the term "consumer" is not defined in the text of the statute itself, it is likely that California will define that term to be limited to individuals, as it does in other parts of the Civil Code. See, e.g., Cal. Civ. Code § 1761(d) ("'Consumer' means an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes."). Thus, the statute is unlikely to affect business-to-business transactions or vendor relationships. On the other hand, despite comments in its legislative history highlighting issues with contracts of adhesion (and particularly online terms of service),[3] the statute is not limited to such contracts. Although the statute is plainly intended to address a power imbalance in consumer contracts, businesses that negotiate with consumers will also be affected.

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The statute raises other questions, however, that are not as easy to resolve. For example, Section 1670.8(a)(1) applies to contracts "for the sale or lease of consumer goods or services." It is not clear whether this applies to all contracts in the consumer-business context, or if a business could avoid the statute through a separate agreement presented to a consumer that is supported by minimal but sufficient independent consideration.

It is also unclear whether subsection (a)(2), which prohibits "otherwise penaliz[ing] a consumer for making any statement protected under this section," would bar a business from filing a defamation lawsuit against the consumer. The "statement[s] protected under this section" would, under subsection (a)(1), appear to include "any statement regarding the seller or lessor or its employees or agents, or concerning the goods or services." There is no explicit limitation in subsection (a)(1) to "lawful" statements or statements "protected by the First Amendment." Thus, defamatory statements published by consumers might fall within the statute's protection.

The statute is also likely to be invoked both as an affirmative defense and as the basis for a counterclaim in any defamation action against a California consumer.

A court could, however, read a limitation to lawful content into the statute. Subsection (a)(1) is written in terms of protecting "*the consumer's right* to make any statement." This might be interpreted as meaning that the provisions of the subsection only relate to statements that a consumer actually has a "right" to make in the first place. Under this interpretation, defamation lawsuits against consumers might be permissible, as would contractual clauses prohibiting defamation (but not lawful criticism).[4] The civil penalties in the statute could thus create a system akin to an anti-SLAPP law, where a business could sue for defamation but be subject to statutory penalties if a consumer's statements were determined to be within her rights.[5]

The statute is also ambiguous as to whether it would prohibit contractual clauses purporting to transfer the copyright in any comments the consumer makes. These provisions are sometimes sought by businesses because they can face significant difficulty when attempting to remove negative or defamatory reviews from third-party websites. Third-party sites ordinarily enjoy broad immunity from liability for content posted by their users under Section 230 of the federal Communications Decency Act, even if they refuse to remove that content. 47 U.S.C. § 230(c)(1). Section 230 does not, however, immunize websites against claims of copyright infringement arising out of user content. 47 U.S.C. § 230(e)(2). Accordingly, some targets of negative comments have attempted an end-run around Section 230 by acquiring the copyright in the comments and then threatening the hosting website with an infringement lawsuit if they do not remove the material.

The legitimacy and efficacy of the use of copyright law to suppress critical speech has been the subject of commentary elsewhere.[6] For present purposes, it is enough to note that California's new statute might not prohibit this practice. Section 1670.8(a)(1) states that those selling or leasing consumer goods "may not include a provision waiving the consumer's right to *make* any statement," but a transfer of copyright in a consumer's statements does not prevent the consumer from making those statements in the first place. Similarly, while Section 1670.8(a)(2) prohibits "penaliz[ing] a consumer for making any statement protected under this section," it says nothing about approaching third parties. Given that the entire purpose of copyright transfers in this context is to facilitate the suppression of speech, a court would likely be sympathetic to an argument that such transfers should be banned. It is another question, however, whether invoking copyright to compel a third party to remove a negative review is a "penalty" for the consumer within the meaning of the statute.

It is also worth noting that nothing in the statute prevents a third party website from voluntarily removing a consumer's comments. Another part of the Communications Decency Act, 47 U.S.C. § 230(c)(2), expressly immunizes online intermediaries from liability for decisions to remove user comments. The new California statute contains a carve-out which reflects that immunity, stating, "This section shall not be construed to prohibit or limit a person or business that hosts online consumer reviews or comments from removing a statement that is otherwise lawful to remove." Cal. Civ. Code § 1670.8(e). Again, it is unclear whether it is a "penalty" to

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the consumer for a business to request (or even pressure) a third party to exercise this discretion.

Finally, the statute does not define whether the civil penalties will accrue on a per-contract or per-consumer basis. This is particularly problematic for subsection (a)(1)'s prohibition of non-disparagement clauses in proposed contracts as it relates to website terms of use. If the penalties are per-contract, granting individual consumers a cause of action could generate substantial confusion if multiple consumers sue simultaneously but only one can receive an award. If the penalties are per-consumer, fines could accumulate extremely rapidly if terms of use are deemed to be "proposed" to any visitor to the site.

Clarification through case law could come through multiple channels. It is easy to imagine a class action on behalf of California consumers against a consumer-directed website that is too slow to amend its terms of use, demanding a fine for each visitor. The statute is also likely to be invoked both as an affirmative defense and as the basis for a counterclaim in any defamation action against a California consumer. Until clarification is obtained, those doing business with California consumers would be wise to adopt a broad reading of the statute's terms.

Jeff Hermes is a Deputy Director of the Media Law Resource Center in New York.

Notes

1. Timothy B. Lee, *Doctors and dentists tell patients, "all your review are belong to us"*, Ars Technica (May 24, 2011, 12:30AM EDT), http://arstechnica.com/tech-policy/2011/05/all-your-reviews-are-belong-to-us-medical-justice-vs-patient-free-speech/.

2. Pamela Brown, *Couple fined for negative online review*, CNN.COM (Dec. 26, 2013, 9:32AM EST), http://www.cnn.com/2013/12/02/tech/couple-fined-for-negative-review/

3. Cal. State Legislature, Assembly Floor Analysis, 2013-14 Sess. (Cal. August 13, 2014) http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml;jsessionid=a127272cc08ab872972e9c1f0f3f#

4. On the other hand, one might contend that the general prohibition on prior restraints reflects a right to make even defamatory statements, subject to later penalty. It does not appear that the California State Legislature reached these levels of detail in drafting the statute.

5. California's actual anti-SLAPP law might also be applicable; the provisions of the new law are not an exclusive remedy. Cal. Civ. Code § 1670.8(e).

6. See, e.g., Eric Goldman, *The Dangerous Meme That Won't Go Away: Using Copyright Assignments to Suppress Unwanted Content–Scott v. WorldStarHipHop*, TECHNOLOGY & MARKETING LAW BLOG (May 14, 2012), http://blog.ericgoldman.org/archives/2012/05/the_meme_that_w.htm.

TVEYES Not Dimmed By Claims of Infringement for Complete Copying

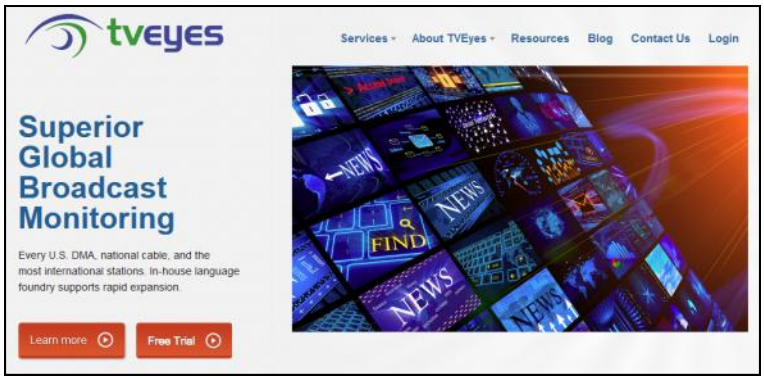
Media Monitoring Service Held to Be Fair Use

By Judith A. Endejan

Following in the footsteps of *Author's Guild, Inc. v. HathiTrust,* 755 F.3d 87 (2d Cir. 2014) and *Author's Guild, Inc. v. Google, Inc.*, 954 F.Supp.2d 282 (S.D.N.Y. 2013), the Southern District of New York again found that wholesale copying of copyrighted works that are indexed and excerpted for commercial use does not violate federal copyright law. On September 9, 2014, Judge Alvin K. Hellerstein held that TVEyes' wholesale copying of television broadcast was protected by the fair use doctrine. *Fox News Network, LLC v. TVEyes, Inc*., 2014 WL 4444043.

Background

TVEyes monitors and records all content broadcast by more than 1,400 television and radio stations 24 hours a day, 7 days a week. It then transforms this content into a searchable database for its subscribers who pay $500 a month for this service, which is not available to the general public. All TVEyes subscribers must agree to limit use of downloaded clips to internal purposes and may not reproduce, publish, rebroadcast or otherwise publicly display the clips.



TVEyes monitors and records all content broadcast by more than 1,400 television and radio stations 24 hours a day, 7 days a week

Entities such as the United States Army, the White House and local and state police departments purchase the service to track news coverage of particular events.

Fox News Network, LLC ("Fox News") sued TVEyes claiming copyright infringement. The central issue before the Court was whether TVEyes' product was protected by fair use. Fox News claimed that because TVEyes provided its subscribers with video clips of Fox News content, the fair use doctrine did not apply.

Fair Use Analysis

The court engaged in the four factor fair use analysis but found that the pivotal factor was the first factor which requires courts to consider "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1). The Court found that TVEyes service was transformative because it serves a new and different function from the original work. The Court found TVEyes service to be no different than the service at issue in both *Author's Guild* cases.

In the *HathiTrust* case, the Second Circuit found that wholesale scanning of books into a digital library was protected by fair use because it created only a "full text searchable database that is quintessentially transformative use [and] the result of a word search is different in purpose, character, expression, meaning and message from the page and the book from which it is drawn." In the second *Author's Guild* case, Google created a digital library index of all the words scanned in each book allowing only a snippet view of the page in which a search word appears.

The Court found that the TVEyes service was clearly transformative because its subscribers gain access through the searchable database not only to the news that is presented, but to the presentations themselves "as colored, processed, and criticized by commentators and as abridged, modified, and enlarged by news broadcasts." In addition, TVEyes creates a

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database of *everything* that television channels broadcast 24 hours a day 7 days a week, which is otherwise unobtainable. The clips that Fox News claimed infringed are integral to the TVEyes service "of monitoring and reporting on all the news and opinions presented by all television and radio stations."

The fact that TVEyes is a commercial company did not alter the fair use finding. The second factor ("value of the materials used") did not weigh for or against the finding of fair use. The third factor ("the amount and substantiality of the portion used") also did not tip the balance for or against a fair use finding because TVEyes had to copy *everything* in order to enable its transformative purpose because the essence of TVEyes is to establish a fully reliable, all inclusive service. The fourth factor, ("affect of the use upon the potential market") did not apply because "economic harm caused by transformative uses does not factor into the fair use analysis."

The Court addressed Fox News' failure of proof with respect to economic harm. In essence, Fox News could not prove that viewers used TVEyes as a substitute for watching Fox News channels thereby losing revenues. The Court also analyzed the public benefit from the TVEyes service, which has a number of beneficial uses such as political campaign monitoring, monitoring of media coverage for military purposes, and police monitoring for ongoing crimes. On balance, because TVEyes uses the material for an al- together different purpose, it is not a substitute for the actual Fox News product. The Courts then rejected claims of hot news misappropriation and general misappropriation, finding them preempted by the Copyright Act.

The Court's finding was limited to that portion of the TVEyes service that indexes and clips services for its subscribers. It did not decide the issue of fair use for all of TVEyes services such as features that allow subscribers to save, archive, download, email and share clips of Fox News' television programs. It also refused to make such a finding with respect to the date and time search function that allows subscribers to search for television clips by date and time instead of by key word or term.

The TVEyes decision adds to the growing body of law that finds that wholesale copying of copyrighted works is allowable when put to a new use that does not replace, or substitute for, the original work.

The *TVEyes* decision adds to the growing body of law that finds that wholesale copying of copyrighted works is allowable when put to a new use that does not replace, or substitute for, the original work. Key factors are the limitations that the copier put in place to limit the use of the copyrighted work, and the use's socially beneficial purpose (i.e. education or law enforcement).

However, this provides cold comfort to the copyright owner that must stand by and watch other entities benefit form the sweat and money expended to create the work in the first place. Perhaps these cases mean that copyright protection only goes so far.

Judith A. Endejan is a partner at Garvey Schubert Barer in Seattle, WA. Fox News Network was represented by Dale Cendali, Kirkland & Ellis LLP, New York. TVEyes was represented by Todd Anten, Jessica Rose and Andrew H. Schapiro, Quinn Emanuel Urquhart & Sullivan LLP, New York.

Dow Jones Awarded $5 Million in Hot-News Misappropriation Case

By Jay Conti and Craig Linder

When *The Wall Street Journal* in 2013 broke the news that Twitter Inc. was about to set a price range for its hotly anticipated initial public offering, the first people in the world to find out were subscribers to Dow Jones's DJ Dominant newswire, a real-time news feed that includes first access to scoops and analysis from Wall Street Journal/Dow Jones journalists around the world.

The second people to hear the news were subscribers to a website and squawk service called Ransquawk, a London-based company that blasts out real-time news relevant to traders and others without engaging in substantive reporting, analysis, or commentary.

Ransquawk's audio service broadcast a word-for-word copy of Dow Jones's Twitter IPO news, attributed to "Source: Newswires", just *two seconds* after the news appeared on DJ Dominant. Ransquawk's text service published a headline about the news within a minute of Dow Jones's report. In fact, Ransquawk's squawk and headline both appeared before Dow Jones published the Twitter IPO news on Dow Jones Newswires, on WSJ.com, or anywhere else in the world.

Ransquawk was systematically copying and pasting the work of Dow Jones's journalists on a daily basis without any permission to do so.

After investigating the service, it became clear this is a company with a business model as simple as it is illegal: Ransquawk was systematically copying and pasting the work of Dow Jones's journalists on a daily basis without any permission to do so, and then selling that content to the same customers Dow Jones targets. Despite our attempts to resolve the matter short of litigation, Ransquawk not only made no effort to cease its misappropriation of the hot news that Dow Jones's journalists broke, it actively sought to frustrate efforts by Dow Jones's outside counsel at Patterson Belknap Webb & Tyler LLP to monitor Ransquawk's activity (for additional information, see this blog post).

That left litigation as the only practical option. In January 2014, Dow Jones sued Real-Time Analysis & News Ltd. (as Ransquawk is formally known) in federal court in Manhattan alleging hot-news misappropriation and tortious interference with contractual relationships. The complaint details dozens of instances during a single thirty-day period in which Dow Jones had observed Ransquawk copying Dow Jones's scoops within moments of their publication on DJ Dominant. The complaint also highlighted Ransquawk's extensive business connections to New York.

Dow Jones properly served Ransquawk in London pursuant to the Hague Convention, but Ransquawk decided to not appear in the litigation. Instead, the company's chief executive told a Reuters reporter that defending the case "would bankrupt us as a company."

Following a hearing on May 14, Judge Jesse Furman entered a default judgment against Ransquawk on liability and issued a permanent injunction barring Ransquawk from disseminating Dow Jones-originated news prior to Dow Jones's own publication of that news on WSJ.com, Barrons.com, MarketWatch.com, or in a print version of any Dow Jones publication. The injunction also barred Ransquawk from attempting to induce subscribers to Dow Jones's services from violating their subscription agreements by providing Ransquawk with news from those services.

Judge Furman referred Dow Jones's request for damages from Ransquawk to an inquest before a magistrate judge. In a report issued on September 15, Magistrate Judge Gabriel W. Gorenstein noted that the Court was "not able to find any cases specifically discussing the proper measure of damages for 'hot news' misappropriation claims arising under New York law."

Analogizing to a misappropriation of trade secrets claim, the Court noted that a plaintiff's damages "are typically calculated based on 'the revenue plaintiff would have made

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but for the defendant's wrongful conduct,' or alternatively 'the profits unjustly received by the defendant.'" The Court noted, however that in cases in which it is difficult to assess the amount of profits at issue—as in this case—courts have determined "a plaintiff can recover the value of a 'reasonable royalty'—an amount that attempts to approximate 'what the parties would have agreed to as a fair licensing price at the time that the misappropriation occurred.'"

Dow Jones submitted evidence noting that if each of the estimated 15,000 Ransquawk customers paid the monthly rate to get access to the DJ Dominant wire ($249), it would total $3.735 million per month.

Here, Judge Gorenstein said that Dow Jones's claimed damages of $3.735 million for each month that Ransquawk misappropriated Dow Jones's news was a "reasonable royalty", and "reflects Dow Jones's actual damages with 'reasonable' certainty." As such, he awarded the full $5 million in damages that Dow Jones sought in the complaint.

Judge Furman, in an October 7 order, adopted the report and recommendation approving both Judge Gorenstein's methodology and the $5 million damages award. *Dow Jones & Co v. Real-Time Analysis & News Ltd.*. This decision provides a helpful precedent for future hot news misappropriation actions in which it is difficult to calculate damages with precision. In addition, the $5 million award sends a strong message to any would-be content thieves that such violations are costly.

The Ransquawk suit is the latest example in Dow Jones's ongoing effort to aggressively protect its journalists' work: In 2010, Briefing.com paid a "substantial amount" and admitted liability in resolving Dow Jones's claims that it engaged in copyright infringement and hot-news misappropriation. Similarly, in 2012, Cision AB (Sweden) and Cision US Inc. paid a "significant sum" to resolve Dow Jones's copyright-infringement assertions stemming from Cision's unauthorized use of content from Dow Jones's publications in its services.

Jay Conti is Deputy General Counsel and Chief Compliance Officer, and Craig Linder, Counsel, at Dow Jones & Company, Inc. Bob LoBue of Patterson Belknap represented Dow Jones in the Ransquawk, Briefing.com and Cision matters.

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Death Certificates Are Public Records Under Indiana's Records Law

Public Interest in Access Outweighs Privacy Right

The Indiana Supreme Court has ruled that death certificates must be disclosed under the Indiana Access to Public Records Act. *Evansville Courier & Press v. Vanderburgh County Health Department*, No. 82S04-1401-PL-49 (Ind. Oct. 7, 2014).

Background

At issue in the case was whether death certificates filed by doctors, coroners and funeral directors with Indiana county health departments are public records.

County health departments are responsible for collecting and producing individual death certificates, while the state Board of Health compiles and analyzes the records in order to make recommendations for healthcare public policy in the state.

Indiana Code Section 16-37-3-3(a) requires that the last physician to care for a person who has passed away or the official in charge of funeral arrangements to file a certificate of death with health officials in the county in which the person died. Copies of these death certificates must be maintained by county health departments, although Indiana has developed a state database for those records.

Separately, Indiana Code Section 16-37-1-8(a) requires local health departments to provide a certification of birth, death or stillborn birth to parties who have a "direct interest in the matter" and need the certification "for the determination of personal or property rights or for compliance with state or federal law." Section 16-37-1-10 has similar language prohibiting the state registrar from permitting a member of the public from inspecting vital statistics records without having a direct interest or legal issue at stake.

When the *Evansville Courier & Press* requested all death records created under Section 16-37-3-3 in Vanderburgh County, the county Health Department denied the request because it said all its records were filed in the state database. The health department also denied the request because the newspapers could not make a request under Section 16-37-1-8.

Another requester Rita Ward also was denied access to death records.

The trial court rejected the plaintiffs' request to access the death records after finding that the general language of 16-37-3-3 conflicts with the specific language of 16-37-1-8 and 16-37-1-10 on who may legally obtain a copy of a death certificate. The trial court reasoned that the public has the right to access death record information except for cause of death information --unless parties can show they have a direct interest in the matter and they need certification to comply with state or federal law or for the determination of their personal or property rights.

The Indiana Court of Appeals affirmed.

In the Supreme Court

Justice Mark Massa, writing for the court, reversed the lower court rulings. First, he noted that county health departments are in violation of state law if they are not maintaining death certificates even though a state database has been developed for that purpose. "If the Department truly does not have the death certificates, it is in violation of Indiana Code Section 16-37-3-3(a)," Massa said.

Second, the court said that legislators have distinguished public access to certificates of death and certification of death registrations. Certificates of death are "intended to record cause of death data for use by health officials," while certifications of death registrations are intended to "authenticate the death for the purpose of property disposition." The court also noted that the Court of Appeals ruled almost 40 years ago that death certificates were public records under the Indiana Access to Public Records Act's precursor.

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Third, Massa said that the State Department of Health may not disclose information about death certificates unless there is a showing of direct interest or legal necessity. But that does not mean that local health departments cannot, the court said.

"We cannot say with certainty that this madness has no method," Massa opined. "The General Assembly could have intended to distribute the administrative burden of record production among local health departments rather than let it fall solely upon the State Health Department."

The court concluded that the public interest in transparent government outweighed the interest in keeping the details of a person's death private.

Patrick A. Shoulders and Jean M. Blanto, of Evansville Ind., represented the newspaper and fellow requester Rita Ward. Joseph H. Harrison Jr. and E. Lee Veazey, of Evansville, Ind., represented the county health department. The Indiana Coalition for Open Government, the Hoosier State Press Association Foundation and Attorney General of Indiana also filed amicus curiae briefs in the case.

Texas Courts Analyze Access to Juvenile Court Proceedings

By Thomas J. Williams

As the United States Supreme Court observed almost 50 years ago in *In re Gault*, 387 U.S. 1, 17 (1967), the juvenile justice system is "a peculiar system," one which is "unknown to our law in any comparable context." While juvenile court proceedings in some ways resemble the adult criminal justice system, juvenile proceedings in most jurisdictions are considered civil, not criminal cases, with procedural rules often encompassing aspects of both the civil and criminal justice systems.

One significant way in which the juvenile justice system typically differs from the criminal justice system for adult defendants is the issue of public access to court proceedings. Many states restrict public access to juvenile proceedings in a way which would be unthinkable in criminal cases involving adult defendants or even in other types of civil cases. The theoretical basis for this, as the Vermont Supreme Court once explained, is the notion that "confidential proceedings protect the delinquent from the stigma of conduct which may be outgrown," and that publication of an accused juvenile's name "may handicap his prospects for adjustment into society, for acceptance by the public, or it may cause him to lose employment opportunities." *In re J.S.* 438 A. 2d 1125 (Vt. 1981).

Many states restrict public access to juvenile proceedings in a way which would be unthinkable in criminal cases involving adult defendants or even in other types of civil cases.

Whatever validity that premise may have in cases involving minor offenses committed by juveniles who are otherwise "good kids," recent news events have shown that, sadly, those are not the only cases a typical juvenile court now hears. While those types of cases are certainly part of a juvenile court's docket, all too often juvenile courts must hear cases involving offenses such as assault, battery, sexual assault, intoxication manslaughter, and even murder, and the public interest in those cases is no less than it is when adults commit comparable offenses.

As in most states, Texas considers juvenile cases to be civil, not criminal, proceedings and a Texas statute addresses the issue of public access to juvenile proceedings. That statute, Section 54.08 of the Texas Family Code, provides that if the accused juvenile is at least 14 years old "the court shall open hearings…to the public unless the court, for good cause shown, determines that the public should be excluded."

If the accused juvenile is younger than 14, the presumption is reversed: in those cases, "the court shall close the hearing to the public unless the court finds that the interests of the child or the interests of the public would be better served by opening the hearing to the public."

Two appellate cases decided in Texas this summer, while not recognizing a constitutional right of public access to juvenile courts, nevertheless should limit the situations in which a juvenile court may exclude the press and public from hearings and trials and ensure greater public access rights to these courts.

Star-Telegram

One of the Texas cases decided this year was a media access case. In *In re Fort Worth Star-Telegram, et al.*, No. 02-14-00144-CV, 2014 WL 3906547 (Tex. App.—Fort Worth August 12, 2014) (orig. proceeding), the Fort Worth Court of Appeals held that a juvenile court judge may close a proceeding to the press and public only if there is "some evidence in the record supportive of a good cause finding that the public should be excluded." In *Star-Telegram*, a group of two newspapers and four television stations challenged a juvenile court's orders in a murder case closing to the press and public, without prior notice or public hearing, an adult certification hearing and a subsequent hearing to approve a plea bargain agreement.

The juvenile court trial judge indicated that the adult certification hearing was closed because of fear that evidence would be revealed which might be prejudicial to a jury if a jury trial were to follow, and that the plea bargain hearing was closed because of concern for the privacy of relatives of the victim if certain evidence were revealed. However, on neither occasion did a party to the case request closure: both times the accused juvenile neither requested nor opposed

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closure and both times the prosecutor explicitly opposed closure. Moreover, the trial court heard no evidence supporting closure, nor was there consideration of stipulated facts or self-authenticating documents, or judicial notice of facts.

Although the Court of Appeals declined to fashion a definition of "good cause" which might support a closure order, reasoning that to do so would "constitute an impermissible advisory opinion," the Court nevertheless held that the statute "imposes a duty to open hearings to the public" in cases in which the accused juvenile is at least 14 years old, and that before a proceeding may be closed there must be "some evidence in the record supportive of a good-cause finding that the public should be excluded." Because there was no such evidence, the Court of Appeals ordered the juvenile court to vacate its orders closing the two hearings and to release transcripts of the closed hearings to the press and public.

In Re A.J.S.

Shortly before *Star-Telegram* was decided, the El Paso Court of Appeals held in *In Re A.J.S.*, No. 08-12-00306-CV, 2014 WL 3732569 (Tex. App.—El Paso July 29, 2014, no pet. h.) that an accused juvenile has a constitutional right to an open hearing (similar to the right long recognized for defendants in adult criminal cases, but based upon the Due Process clause of the Fourteenth Amendment rather than the Sixth Amendment) and that before a juvenile court trial may be closed to the public, the party seeking closure must establish an overriding interest that would be prejudiced if the trial were open and that no reasonable alternative to closing the hearing will protect that interest.

The combined effect of these two cases should mean that first, a juvenile court proceeding in Texas may be closed to the press and public over the objection of the accused juvenile only in the most extraordinary circumstances, if ever; and, second, that even if the accused juvenile wants the proceedings to be closed, there must be evidence offered on the record showing the good cause for doing so.

Thomas J. Williams is a partner in the Fort Worth office of Haynes and Boone. He represented the Fort Worth Star-Telegram and television stations KXAS-TV, KTVT-TV, and KDFW FOX 4 in In re Fort Worth Star-Telegram, et. al.

Supreme Court to Decide "True Threats" Case Involving Online Speech

Is Proof of Subjective Intent Required to Convict?

The U.S. Supreme Court is set to consider a "true threats" case this upcoming term with possible implications for the Internet and social media, as well as music and other expressive genres. *U.S. v. Elonis*, 730 F.3d 321 (3d Cir. 2013) (Scirica, Hardiman, Aldisert, JJ.), *cert. granted* (U.S. June 16, 2014).

Last year the Third Circuit affirmed the criminal conviction of Anthony D. Elonis for making threats on his Facebook page against his estranged wife, law enforcement officials, and a local kindergarten.

The Supreme Court granted certiorari to consider whether under the First Amendment a conviction for threatening another person requires proof of defendant's subjective intent to threaten or whether it is sufficient to show that a "reasonable person" would understand the statements as threatening (the standard applied by the Third Circuit). The Court also asked the parties to brief whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U. S. C. § 875(c) requires proof of the defendant's subjective intent to threaten.

The U.S. Supreme Court is set to consider a "true threats" case this upcoming term with possible implications for the Internet and social media, as well as music and other expressive genres.

Background

The petitioner Anthony D. Elonis was convicted and sentenced to 44 months in federal prison for a series of online postings directed at his estranged wife, law enforcement officials and a local school.

Many of his Facebook postings were made in the style of violent rap lyrics mixed with references to true threat jurisprudence to the effect that his comments were protected speech. The statements are available in the Third Circuit opinion and include: "And if worse comes to worse I've got enough explosives to take care of the state police and the sheriff's department [link: Freedom of Speech, www.wikipedia.org]."

After a visit from the FBI defendant wrote: "Little Agent Lady stood so close Took all the strength I had not to turn the bitch ghost Pull my knife, flick my wrist, and slit her throat Leave her bleedin' from her jugular in the arms of her partner [laughter]."

Elonis was indicted for violating 18 U.S.C. § 875(c), which criminalizes the transmissions of threats to injure another person in interstate communications (i.e. the Internet). At trial, he testified that his postings were not meant as threats but were therapeutic expressions that helped him deal with the pain of his divorce and unemployment. He also claimed that rapper Eminem inspired a post in which he fantasized about shooting elementary school students.

Prior to the case going to the jury, U.S. District Judge Lawrence F. Stengel rejected Elonis' argument that his speech was protected. Elonis argued, under the U.S. Supreme Court's 2003 decision in *Virginia v. Black*, that the true threats exception to the First Amendment requires a showing that a speaker subjectively intended the threat. Instead, the judge applied a standard requiring the government to prove that a reasonable person would foresee Elonis' statements as threats. Stengel instructed the jury that "to constitute a true threat, the statement must communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals. This is distinguished from idle or carless talk, exaggeration, something said in a joking manner or an outburst of transistory anger. A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be

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interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury to take the life of an individual."

The jury convicted Elonis on all counts except for threatening the patrons and employees of the amusement park that had fired him.

Third Circuit

When the case reached the Third Circuit, Elonis again argued that the Supreme Court's decision in *Virginia v. Black* requires that a conviction for making a true threat must involve evidence of the speaker's subjective intent.

In that case, three men challenged their criminal convictions for violating Virginia's ban on cross burning with the "intent to intimidate a person or group of persons." In one of the cases, the jury was instructed, pursuant to a Virginia Model Jury Instruction, that the burning of a cross is sufficient evidence of intent to intimidate.

The Justices acknowledged that cross burning in the United States is often meant to be intimidating and to instill fear of violence. But Justice Sandra Day O'Connor, writing for the majority, held it was unconstitutional for the Virginia statute to treat every single cross burning as prima facie evidence of the intent to intimidate.

A four-justice plurality further ruled that the prima facie part of the statute, when interpreted by a jury through the lens of their instructions, "permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense."

Justice Antonin Scalia concurred in the judgment, but he dissented from the plurality's invalidation of the Virginia law on its face.

When the Third Circuit analyzed *Virginia v. Black*, Judge Anthony J. Scirica, writing for the court, said that the majority of circuit courts have found that *Virginia v. Black* does not require a subjective intent to threaten. The Ninth Circuit stands alone, Scirica said, in ruling in its 2005 decision in *United States v. Cassei* that, under *Virginia v. Black*, "speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as threat."

The Third Circuit disagreed as other circuit courts have, reasoning that *Virginia v. Black* does not require proof of a subjective intent to threaten in order to convict someone of making a true threat. The statute also requires proof of intent that someone "knowingly and willfully" made a true threat, Scirica said. "This objective intent standard protects non-threatening speech while addressing the harm caused by true threats," the circuit court concluded.

In the High Court

The Supreme Court has granted certiorari to Elonis on two issues: "(1) Whether, consistent with the First Amendment and *Virginia v. Black*, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten, as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island, and Vermont; or whether it is enough to show that a "reasonable person" would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort; and (2) whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten."

Elonis' counsel argued in his brief that, if prosecutors are not required to prove subjective intent when prosecuting pure speech that could pose a true threat, Section 875(c) would criminalize negligent speech in violation of the First Amendment. "Imposing criminal liability under a negligence standard would impermissibly chill speech," his lawyers said. "The vagueness, inconsistency and unpredictability of the 'reasonable person' standard deprives speakers of any certainty that their comments are lawful, thereby discouraging speech."

Elonis cited *Virginia v. Black* for the proposition that a subjective intent requirement is necessary to distinguish between intimidating expression that is unprotected by the First Amendment and from core political, artistic and ideological speech or other legitimate nonthreatening speech.

The government said a general-intent requirement is appropriate so long as a defendant won't be convicted on facts "that the defendant could not have reasonably known."

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The First Amendment allows the government to protect people from the fear and disruption caused by true threats without having to prove a speaker's "private and unexpressed intent." In fact, other unprotected speech like fighting words and obscenity don't require subjective proof of a speaker's intent.

The case is set for oral argument December 1. In addition to resolving the apparent circuit split, the Court may also clarify the somewhat murky law regarding "true threats" and the First Amendment. If fiery cross-burning--despite its loaded use by the Ku Klux Klan in favor of white supremacy--can require contextualization and more protection from the First Amendment, does online speech which is often taken out of context and ambiguous in meaning require the same thing?

Elonis is being represented by Ronald H. Levine and Abraham J. Rein of Post & Schell, P.C. in Philadelphia, John P. Elwood, Ralph C. Mayrell and Dmitry Slavin of Vinson & Elkins LLP in Washington, D.C., Daniel R. Ortiz of the University of Virginia School of Law Supreme Court Litigation Clinic and Conor McEvily of Vinson & Elkins LLP in Houston. Petitions and amicus briefs in the case are available on SCOTUSblog.

Recent MLRC Publications

MLRC Model Shield Law
The MLRC Model Shield Law was developed by the MLRC Model Shield Law Task Force. It will update a prior Model that we developed a number of years ago. The Model Shield Law has been designed to assist in the creation, or updating, of state shield laws.

MLRC Bulletin 2014 Issue 2: Legal Frontiers in Digital Media
All Native Advertising is Not Equal — Why that Matters Under the First Amendment and Why it Should Matter to the FTC • The Google Books and HathiTrust Decisions: Massive Digitization, Major Public Service, Modest Access • The Authors Guild v. Google: The Future of Fair Use? • The Computer Fraud and Abuse Act – Underused? Overused? Misused?

Key Points on DOJ Policy
MLRC memo representing some of the key points from the Final Rule publication.

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

Resource Materials on the Definition of "Journalist" and "Media" in Litigation and Legislation: 2014 Update
Who qualifies as "the media," it seems, is the perennial million-dollar question in an age when the "pen," the camera, and the "press" are all combined in a single device that fits easily in your purse—if not your back pocket—and everyone is a potential publisher. This updated report offers a review of that question by examining legislative developments and court decisions in a variety of situations, ranging from libel and right of publicity issues, to state shield laws and reporter's privilege changes, to application of state and federal open records laws.

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

Libertarian Senate Candidate Not Entitled to Participate in TV Debate

Holding that the First Amendment is not a rule of quantity at any cost, a Kentucky federal court has upheld a broadcaster's right to limit the number of candidates invited to election forums and debates to those who have a realistic chance of winning. *Libertarian National Committee, et al. v. Dr. Terry Holiday,* No. 14-63-GFVT (E.D. Ky. Oct. 11, 2014)(Van Tatenhove, J.).

The October 11, 2014 decision was issued less than 48 hours from the much anticipated and only joint appearance of incumbent Senator Mitch McConnell and Secretary of State Alison Lundergan Grimes, the Republican and Democratic candidates for United States Senate, on the Kentucky Educational Television (KET) public affairs program *Kentucky Tonight.*

Libertarian Party candidate David Patterson, along with the state and national Libertarian parties, had filed for an emergency injunction to be included on the program, claiming that KET violated his First Amendment rights by excluding him. The court rejected the request, as well as Patterson's argument that his political views played any role in KET's candidate invitation criteria. KET acted within the bounds of the First Amendment, according to the court.

Secretary of State Alison Lundergan Grimes and Senator Mitch McConnell, the Democratic and Republican candidates for United States Senate, at the KET hosted debate.

Findings of Fact

Following briefing and a day-long hearing on October 9, the court made its factual findings based primary on evidence in the form of internal KET emails obtained by Plaintiffs through an August open records request. The emails showed conversations among KET staff and KET counsel beginning in January 2014 concerning the establishment of pre-selection criteria for use in determining which candidates would be invited to participate in *Kentucky Tonight* election programming.

KET established and utilized objective criteria for inviting primary election candidates to participate in the *Kentucky Tonight* April programs. The primary election criteria was devised to satisfy Federal Election Commission requirements while also "giving KET the ability to NOT invite candidates who have only managed to get their names on a ballet [sic] but do not truly have a legitimate campaign underway."

As a side note, the Court recognized a disagreement between the parties as to whether the KET *Kentucky Tonight* programs including candidates were technically "public debates" that would implicate FEC regulations requiring pre-existing criteria to determine which candidates may participate. Though adamant that its regularly scheduled program was a forum and not a debate, KET nevertheless established objective criteria. Hence, the Court saw no need to decide the issue and evaluated the case under a debate framework.

After the primary, KET and its counsel revisited its criteria. Emails indicated that KET was stiffening criteria for its general election programs to eliminate nonviable candidates and reduce the potential for equal opportunity requests. In mid-June, KET finalized its new general election criteria, which required candidates to satisfy the following criteria by August 15, 2014: (1) he/she is a Kentucky resident and a "legally qualified candidate" under FEC guidelines; (2) the candidate maintains an active website devoted to the campaign that addressed at least three issues related to the race; (3) the candidate has accepted at least $100,000 in contributions; (4) if a professional public opinion survey by an independent political pollster has been conducted, the candidate must have received at least ten percent or more support.

In July 2013, the Libertarian Party of Kentucky issued a press release announcing it was half-way to having enough

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signatures to qualify its candidate David Patterson for a spot on the ballot. On July 23, 2013, KET announced that candidates McConnell and Grimes were the only candidates invited to the scheduled October 13 *Kentucky Tonight* Senatorial candidate forum. The same day, a write-in candidate was informed, upon inquiry, that she did not meet the criteria to be invited.

In early August, Patterson received enough signatures to be an official candidate in the U.S. Senate race. When the Kentucky Libertarian Party chair then asked if Patterson would be included on the October 13 program, KET responded by attaching the criteria and explaining that the only candidates who qualified were McConnell and Grimes. Patterson, admittedly, did not meet the criteria.

Patterson and the state and national Libertarian Parties filed their Complaint on September 28, alleging that KET deprived him of his First Amendment rights of free speech and of his Fourteenth Amendment rights to due process. He also filed a motion for emergency injunctive relief asking the Court to enjoin KET from enforcing its candidate criteria and to require KET to include Patterson in the October 13 *Kentucky Tonight* candidate forum. The Court held a hearing on October 9, 2014.

Voters may actually benefit by a forum or debate that included only those candidates that have a realistic chance of winning.

Conclusions of Law

In denying Patterson's demand to be included in the *Kentucky Tonight* candidate forum, the Court looked to the seminal case of *Arkansas Educ. Television Comm'n v. Forbes*, where the Supreme Court has already considered whether a state-owned public television station "had a constitutional obligation to allow every candidate access" to a debate. 523 U.S. 666, 669 (1998). The answer is no.

The Kentucky court noted that, in *Forbes*, like in the present case, the Arkansas Educational Television Commission (AETC) invited the Republican and Democratic candidates for federal offices to appear on debates but did not invite independent candidate Forbes. The Supreme Court held that the AETC debate was a nonpublic forum "from which AETC could exclude Forbes in the reasonable, viewpoint-neutral exercise of its journalistic discretion" and further that it was "beyond dispute that Forbes was excluded not because of his viewpoint but because he had generated no appreciable public interest." Analyzing Patterson's claims under parameters of *Forbes*, the court likewise rejected Patterson's claims of viewpoint discrimination by KET.

First, the court notes that Patterson presented no direct evidence of viewpoint discrimination and in fact admitted that there were no documents where KET even mentions his viewpoint. On the contrary, *Kentucky Tonight* host and producer Bill Goodman testified that a candidate's views played no role in who was or was not invited to participate on KET programs. Goodman testified that any candidate, including the self-proclaimed white supremacist write-in candidate, would have been invited to the candidate forum had they met the criteria.

The Court also rejected Patterson's reliance on circumstantial evidence to support a pre-text theory. Patterson argued that KET changed its candidate criteria for the general election to preclude voices like his from participating. But the Court disagreed with the implications Patterson assigned to various internal emails among KET staff, many of which included "careful consultation" with counsel. Rather than evidencing any kind of viewpoint discrimination, the Court concluded the following from the emails: When taken as a whole, the picture that emerges is of an institution trying to do the right thing. The most direct evidence of KET's intent in developing the criteria came from KET's Executive Director at the beginning of the process, namely "to follow the law, be fair to all concerned, protect and maintain KET's integrity and reputation for inclusion and fairness – and provide the best service to our viewers."

The Court summed up its lengthy, well-reasoned Opinion and Order with guidance for broadcasters and candidates beyond the case at hand:

> Patterson believes that it is enough that he is a thoughtful candidate, serious about his candidacy. Without question voters may be better informed, or at least exposed to more viewpoints if he is included. But the First Amendment is not a rule of quantity at any cost. What the Supreme Court understands is that there are very good reasons, informed by the values of the First Amendment, to permit

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KET to limit the number of candidates at its debate. Voters may actually benefit by a forum or debate that included only those candidates that have a realistic chance of winning rather than many voices competing for very limited time. What KET cannot do is pick and choose candidates based on their viewpoints. KET has not done so here. The fact that particular candidates were excluded as non-compliant with the objective criteria does not mean, *ipso facto*, that the criteria were designed to exclude those viewpoints.

Nothing about this circumstance, according to the court, weakens the First Amendment to the Constitution.

Plaintiffs are represented by Christopher Wiest, Chris Wiest, Atty at Law PLLC; Thomas Bruns, Freund, Freeze & Arnold; and Brandon Voelker. Defendants are represented by Deborah H. Patterson, Christopher Brooker and Allison Brown, Wyatt, Tarrant & Combs LLP.

A View From The Inside: Responding To Take-Down Requests

By Matthew Leish

Over the past two years, I have found myself spending an ever-increasing amount of time dealing with requests to take down articles from the Daily News' website. Sometimes the requester insists that the story in question is false; more often, he or she simply says that the story is embarrassing, outdated, or is making it difficult for the requester to find a job.

Unless the article in question is fundamentally inaccurate or there is some other extraordinary and compelling reason – such as a serious threat to someone's safety – we do not grant such requests. There is an important principle at stake here – removing content creates holes in the historical record, deprives the public of important information, and is akin to removing books from a library. As NPR puts it in its publicly-available Ethics Handbook, "our content is a matter of public record and is part of our contract with our audience. To simply remove it from the archive diminishes transparency and trust and, in effect, erases history. This is not a practice engaged in by credible news organizations or in line with ethical journalism."

Despite our general reluctance to remove content, we do review each request individually to determine whether a rare exception should be made. Our response depends on the nature of the story and the reason given for the request. While there can be a seemingly infinite variety of grounds given for requesting a takedown, the requests that we receive generally tend to fall into several recurring categories:

While there can be a seemingly infinite variety of grounds given for requesting a takedown, the requests that we receive generally tend to fall into several recurring categories.

"This story is false"

The first question to ask here is a practical one – is there any legal exposure? Obviously, we take very seriously any claim of falsity, and where a takedown request involves a current article we will review the claim carefully and determine whether a correction is warranted. In my experience, a genuine material factual error is rare. More often, the request comes from someone who has been charged with a crime or named as the defendant in a lawsuit and is claiming that the underlying allegations are false. Be that as it may, if the article was an accurate (and therefore privileged) report of the legal proceeding, there is no basis to take it down or revise it.

Things get more complicated when the request involves an older article where any claim would be time-barred. We always want to get the story right -- however, the older the article, the more difficult it is to evaluate the validity of a claim of falsity. The reporters who worked on a story may no longer have their notes and may not remember the details, and in some cases they may not even be employed by the Daily News any more. It may not be possible to go back and check with the original sources. Nor is it practical for lawyers and journalists to spend time re-investigating stories that may be have been written years ago, particularly given the increasing volume of such requests. In such cases, absent some clear evidence of error, we have to assume that our reporters got it right. There also may be particular reason for skepticism about a claim of falsity when the takedown request is made for the first time years after a story first appeared – why didn't the requester complain sooner?

If there is clear proof that an old story was inaccurate when published, we may consider correcting the inaccurate information. In such cases, we require a release of claims to ensure against any potential argument that revising or updating the story somehow constitutes a republication that would restart the limitations clock.

"This story was true when you wrote it, but things have changed"

Many of the takedown requests that the Daily News receives – perhaps a majority – come from people who claim that a subsequent event has rendered an article obsolete or misleading. Often, the subsequent event is a legal development - for instance, the article reported that someone was arrested or charged with a crime, and that person now

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says that he or she was subsequently acquitted or the charges were dropped. In such cases, the original story generally remains newsworthy and part of the historical record, and we will not take it down. However, depending on the circumstances, we will sometimes add an update or editor's note describing the subsequent legal development. In all such cases, we put the burden on the requester to provide clear proof of the subsequent event, and again, we may require a release before we publish any update.

In other cases, the subsequent development is a personal one – perhaps someone has gone through a divorce or had a falling out with a former business partner and would like an article highlighting the formerly happy relationship to be removed. Other requests come from people who admit they committed the crime or took the embarrassing action described in the article, but insist that "I've changed – I'm not that person any more." We generally do not grant such requests.

Many of the takedown requests that the Daily News receives – perhaps a majority – come from people who claim that a subsequent event has rendered an article obsolete or misleading.

"This story is true, but it is ruining my life – please take pity on me"

These can be the most difficult requests to deal with on a purely human level. The most common such request involves someone who committed a minor crime or participated in an embarrassing incident many years earlier, and who claims that the story is still showing up in Google search results and is preventing him or her from getting a job. While we sometimes (though not always) sympathize with people in such situations, this is almost never grounds for taking a story down.

"This story is true, and I agreed to an interview, and I posed for a picture, but I didn't realize the article would show up in internet searches and I'm embarrassed"

This type of request is, not surprisingly, the least likely to get a positive response. Absent truly extraordinary circumstances, we will not grant takedown requests in such cases of "source remorse" (a wonderful term that I first saw in an article by Chris Elliott of the Guardian. This simply is not a valid basis for expunging content from the historical record.

* * *

There is one more wrinkle that U.S. news organizations are likely to face with increasing frequency: we recently received our first takedown request from a European resident invoking the Google Spain decision, in which the European Court of Justice held that Google and other search engines may be required to delete, on request, links to articles containing personal information deemed to be inaccurate, obsolete, or irrelevant (whatever that means). We took – and will continue to take – the position that such E.U. law does not apply to us, both because we are a U.S. company with no European presence, and because the Google Spain decision on its face does not apply to news web sites. Nonetheless, this will be an area that warrants careful monitoring as the Google Spain decision is implemented and refined in the coming months and years.

Matthew Leish is Vice President and Assistant General Counsel at the New York Daily News