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MEDIALAWLETTER

Reporting Developments Through October 25, 2016

INTERNATIONAL

COMMERCIAL SPEECH

MEDIA LAW RESOURCE CENTER

ANNUAL DINNER
WEDNESDAY, NOVEMBER 9, 2016

MLRC will bestow its
WILLIAM J. BRENNAN, JR. DEFENSE OF FREEDOM AWARD on

Daniel Ellsberg

The Tension Between National Security and an Independent Media

Apple v. FBI, the Snowden Disclosures, and the 45th Anniversary of the Pentagon Papers Case

Daniel Ellsberg

Max Frankel
Former Executive Editor, New York Times

Noreen Krall
Chief Litigation Counsel, Apple Inc.

Edward Snowden

Moderated by:
Floyd Abrams
Cahill Gordon & Reindel LLP

Cocktail Reception at 6:00 P.M.
Sponsored by AXIS PRO

Dinner at 7:30 P.M.

New York Marriott Marquis
Broadway Ballroom – 6th Floor 1535 Broadway, between 45th and 46th Streets

RSVP by Friday, October 21, 2016

Business Attire

MEDIA LAW RESOURCE CENTER

ANNUAL DINNER — WEDNESDAY, NOVEMBER 9, 2016

RSVP for Dinner by Friday, October 21, 2016

Reservations are not refundable for cancellations received after Monday, October 31, 2016

Firm/Organization: _____

Contact Person: _____

Address: _____

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Phone: _____ Fax: _____

E-mail: _____

Please reserve: ____ Single seat(s) at $495 each

____ Table(s) for 10 at $4,950 each

____ Table(s) for 11 at $5,445 each

____ Table(s) for 12 at $5,940 each

Amount Enclosed for Dinner Reservations: $ _____

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266 W 37th Street, 20th Floor, New York, NY 10018

We appreciate your payment by check; to order please use this form and enclose payment. Individual tickets only may be purchased online at www.medialaw.org; just click on MRLC Annual Dinner.

Dietary restrictions/requests: _____

For further information please contact Debra Danis Seiden at dseiden@medialaw.org or 212-337-0200 ext. 204

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Family style lunch will be served

12:00 NOON to 2:00 P.M.

Meeting will begin promptly at 12:30 P.M.

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MLRC
DEFENSE COUNSEL SECTION

2016 ANNUAL MEETING

$65.00 per person includes lunch.

To reserve your seat and pay by credit card
go to www.medialaw.org and click on DCS Annual Meeting

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Complete the form below and send payment by check payable to:

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Please reserve _____ seats at the DCS Annual Lunch Meeting for:

Firm Name: _____

Address: _____

Phone: _____ Fax: _____

Please list names of individuals attending below (print clearly)

Name: _____ E-mail: _____

Name: _____ E-mail: _____

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Reservations are not refundable for cancellations received after Friday, November 4, 2016.

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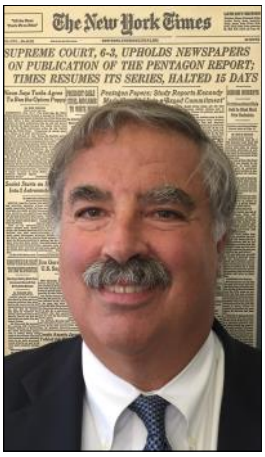
From the Executive Director's Desk

MLRC Publishes Controversial Trump Litigation Analysis

ABA's Censorship an Object Lesson in Need for Anti-SLAPP Legislation

I am very pleased that in this edition of the *LawLetter* we are running a very interesting and thorough summary of Donald Trump's speech-related litigations in an article by Susan Seager entitled "Donald J. Trump is a Libel Bully but also a Libel Loser." How MRLC came to obtain this article is in itself fascinating – and an object lesson as to why we need a federal anti-SLAPP law.

For reasons I am unaware of, Susan's article was aimed for publication in the ABA Forum of Communications "Communications Lawyer" (CL). But the ABA administrators demanded significant editing of the piece – including, for example, eliminating its title and lede – a demand neither Susan nor the CL's editors, Lee Brenner, Dave Giles and Amanda Leith, nor the Forum's Chair Carolyn Forrest, were prepared to accept. The ABA seemed unaware of the irony of, in effect, censoring a First Amendment committee's publication; it also fell victim to Trump's litigious reputation in not publishing an article about how anti-SLAPP laws are needed to protect publications from being cowed to self-censor exactly this kind of article about this kind of "libel bully."



George Freeman

At various times the ABA cited regulatory prohibitions against a 501c3's electioneering, the ABA's own policy of non-partisanship, and the fear of being sued by Trump for its demand to make substantial edits. All these issues were rebutted by the ABA editors in a phone call (which I, as a CL Advisory Board member and a past victim of almost the exact same situation, participated in).

Given that the article is a serious legal study of seven cases, and barely mentions the election and doesn't at all refer to Hillary Clinton or the Democratic Party, it's hard to see how the publishing the article in an on-line magazine, not distributing it at the polls, could be considered electioneering in any way. In fact, to its credit, in a letter written by its Deputy Executive Director a few days after the phone call, the ABA seemed to abandon this issue.

However, the ABA strongly argued that because there were some ad hominem arguments and language in the article – read the piece and judge for yourself – it transformed the article from a scholarly article into a partisan attack. The ABA's position was that such a partisan attack would create the impression that the ABA was aligning with one party against the other and therefore hurt its credibility with members – a fear we at the MLRC have managed to

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overcome: we have confidence our members are intelligent enough to realize this article is a critique of these litigations, written in a somewhat caustic style, not a statement of the MLRC's institutional view of the current election. (It has none.)

First, the editors proposed to run a line saying that the views expressed in the article were solely those of the author, not the ABA's, but that didn't satisfy the ABA. But, second, and most important, is the journalistic question of what is partisan in the context of the presidential campaign of a narcissist who has a daily penchant of lying and just making stuff up. I began a discussion of this critical question – whose answer seems to have changed significantly in this election cycle in a past column and will explore it some more in our Forum prior to our Annual Dinner on November 9 – one day after the election. But, in brief, my answer is as follows: Assume Mr. A lies and Mr. B tells the truth. The press need not – indeed, should not, treat them equally. In fact, an article saying clearly that Mr. A is a liar and Mr. B is not, with supporting evidence, seems to me good journalism, meeting the media's responsibility to its readers, and is fair and accurate reporting, not partisanship or bias. Looked at through this lens, I tend to disagree that Susan's article is partisan.

The ABA insisted on changing the title and lede sentence which calls Trump a libel bully and loser. We explained that libel bullies are exactly what the anti-SLAPP laws are designed to protect against, so those words are both accurate and significant.

But the ABA goes on to contend that "the gratuitous use of the ad hominem attacks will increase the risk of the ABA being sued by Mr. Trump." First, the Forum editors offered to represent the ABA pro bono in the unlikely event of a lawsuit. Second, a look at some of the edits the ABA proposed in this regard show that the words they worried about are clearly protected opinion, and thus unlikely to be sued upon even by Trump. For example, they took out the word "crankiest" in a clause, "Trump filed his first and crankiest lawsuit…" And they would have deleted the last sentence which stated that "Instead of labeling frivolous, speech-targeting lawsuits "SLAPP suits," perhaps we should call them "Trump suits."

Other proposed edits are hard to justify. They wanted to take out a sentence saying "Trump's birther campaign likely helped catapult Trump to the GOP presidential nomination there years later," a non-controversial, non-partisan statement. And they wanted to delete the sentence, "No wonder Trump wants to change libel law; he doesn't understand it," a conclusion easily come to from his public statements and his meeting with the Washington Post editorial board.

More interesting, the ABA insisted on changing the title and lede sentence which calls Trump a libel bully and loser. We explained that libel bullies are exactly what the anti-SLAPP laws are designed to protect against, so those words are both accurate and significant – one theme of the article is that though Trump lost most of the suits studied, he made his opponents expend HUGE legal expenses. Indeed, you might think that the ABA would support an article

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critical of a man who brags at filing losing suits because he knows the financial harm it will exact from his opponents – that is not something guardians of the values of our legal system ought to protect. But to no avail. Neither did the ABA see the humor in calling a man who accuses scores of others, including presidential candidates from his own party, "losers", when he, in fact, lost many of the suits considered in the article.

Poignantly for me, all of this mirrored an experience I had with the ABA in 2001 when I was Chair of the Forum and wrote a column for CL criticizing the Supreme Court for its hypocritical decision in Bush v. Gore. Just like last week, the ABA administrators balked at running my column. Their reasoning: I would be disadvantaged if I were to argue before the Court (seemed very unlikely and, unfortunately, has never come to pass), because the justices would remember it and take it out against me (seems unlikely the justices read CL, I hate to say, and even more unlikely that they would bear such a grudge). I was incensed at both their cowardice and paternalism, and ultimately to get the piece published agreed to one or two tiny, non-substantive edits which allowed them to save face.

At bottom, however, both these stories are sad sagas. An article stresses the need for anti-SLAPP laws. It cites a supposed billionaire's lawsuits targeting speech which are lost, but which succeed in making the legitimate speakers expend huge sums and be chilled from future speech. And then that very article is rejected by a speaker, publishing a First Amendment committee's magazine, because of the fear of a unjustifiable and surely losing lawsuit by that very person. It's more than ironic; if it weren't so sad, I'd laugh. Enjoy Susan's article.

The article cites a billionaire's lawsuits targeting speech which are lost, but which succeed in making legitimate speakers expend huge sums and be chilled from future speech. And then that very article is rejected by administrators of a First Amendment committee's magazine. It's more than ironic; if it weren't so sad, I'd laugh.

* * *

Far be it for me to plug one of our events, but our Annual Dinner on Wednesday night, November 9, should be a fascinating and historic event. Entitled "The Tension Between National Security and an Independent Media", our dinner program will bring together an all-star cast who will discuss their personal experiences dealing with this issue. Highlighting the panel will be the two leading "leakers" of the past 50 years, Daniel Ellsberg, who gave The New York Times the Vietnam Archive, later known as the Pentagon Papers, and on Skype or somesuch from Moscow, Edward Snowden, whose controversial disclosures have raised serious questions on what information the

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Government keeps on all of us and whether its actions in that regard and in aid of the War on Terror violate our right to privacy.

The kickoff idea for this program came from the fact that this year marks the 45th anniversary of the U.S. v. The New York Times litigation of June/July 1971. But the MLRC Board felt that rather than do a retrospective alone on that landmark case, we update the discussion by also considering more recent iterations of the Government v. Press conflict. Enter Mr. Snowden and Noreen Krall, V.P. and Chief Litigation Counsel for Apple who quarterbacked her company's battle with the FBI last year when the FBI demanded Apple's help to get inside a cryptographically protected Apple iphone of one of the San Bernardino terrorists. Not only will Snowden and Krall discuss their situations, we also will call on them to give their take on the Pentagon Papers case and ask whether that history affected them in any way.

Daniel Ellsberg will be presented with the MLRC's William J. Brennan, Jr. Defense of Freedom Award.

Conversely, Mr. Ellsberg and Max Frankel, former executive editor of The New York Times and Washington Bureau Chief at the time of the Pentagon Papers case (and one of my favorite clients, whose deposition testimony read like a well-edited essay), will give some of the backstory of that precedent-making and dramatic case, involving conflicts within The Times as well as with the Government. Moreover, they also will opine on Mr. Snowden's and Apple's actions, and the balance which needs to be struck between all citizens' support for the Government's attempts to keep us secure and the First Amendment values in keeping the people informed and in maintaining the media's independence from Government. Also at the Dinner, Mr. Ellsberg will be presented with the MLRC's William J. Brennan, Jr. Defense of Freedom Award, which has not been awarded since 2011 (to the late Anthony Lewis).

Vaunted First Amendment attorney Floyd Abrams, who represented The Times in the litigation 45 years ago, will moderate the discussion. It should be quite a night. We hope to see you there.

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

Jeff Hermes' column, The Monthly Daily,
will be published as a standalone this month.
Look for it in your inbox later this week.

Donald J. Trump Is A Libel Bully, But Also A Libel Loser

By Susan E. Seager

Donald J. Trump is a libel bully. Like most bullies, he's also a loser, to borrow from Trump's vocabulary.

Trump and his companies have been involved in a mind-boggling 4,000 lawsuits over the last 30 years and sent countless threatening cease-and-desist letters to journalists and critics.[1]

But the GOP presidential nominee and his companies have never won a single speech-related case filed in a public court.

This article examines seven speech-related cases brought by Trump and his companies, which include four dismissals on the merits, two voluntary withdrawals, and one lone victory in an arbitration won by default. Media defense lawyers would do well to remind Trump of his sorry record in speech-related cases filed in public courts when responding to bullying libel cease-and-desist letters.

Trump's lawsuits are worthy of a comedy routine, as when Trump sued HBO comedian Bill Maher for suckering Trump into sending his birth certificate to prove he was not the "spawn" of an orangutan, and Trump hit back with a $5-million breach-of-contract lawsuit, only to withdraw it after the Hollywood Reporter ridiculed it. Can anyone say Hustler v. Falwell? [2]

Orangutans and joking aside, this examination of Trump's libel losses also provides a powerful illustration of why more states need to enact anti-SLAPP laws to discourage libel bullies like Trump from filing frivolous lawsuits to chill speech about matters of public concern and run up legal tabs for journalists and critics.

Media defense lawyers would do well to remind Trump of his sorry record in speech-related cases filed in public courts when responding to bullying libel cease-and-desist letters.

A. Trump Sues Architecture Critic

Trump filed his first and crankiest libel lawsuit in 1984 against the Chicago Tribune and the newspaper's Pulitzer Prize-winning architecture critic, Paul Gapp. Trump filed his libel lawsuit in the U.S. District Court in the Southern District of New York.[3] Trump claimed he suffered $500 million in damages.[4]

Gapp, who won the Pulitzer Prize for criticism in 1979, dared to publish a "Design" column in the Sunday Tribune Magazine on August 12, 1984 ridiculing Trump's proposal to build the tallest building in the world: a 150-story, nearly 2,000-foot tall skyscraper on a landfill at the southeast end of Manhattan.[5]

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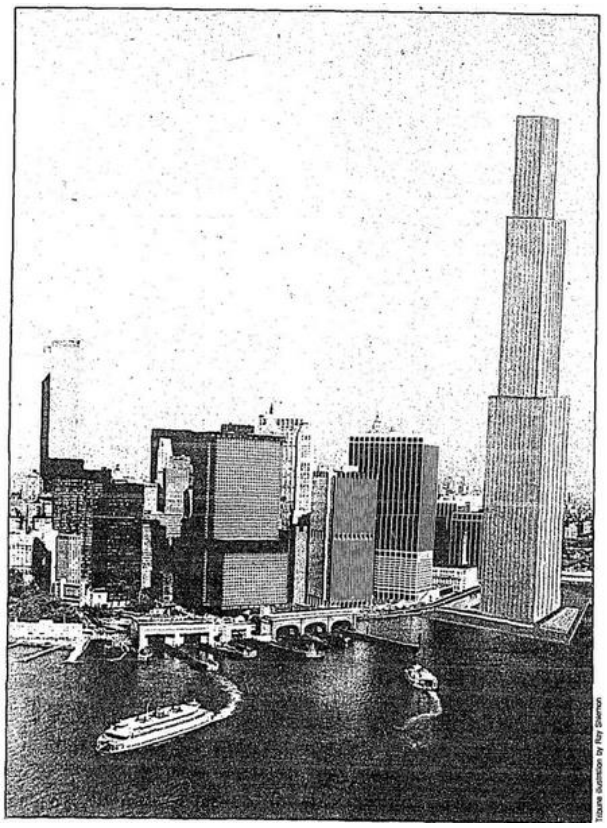
Gapp wrote that Trump's planned office tower was "one of the silliest things anyone could inflict on New York or any other city" and a kind of "Guinness Book of World Records architecture." Gapp's column said the "only remotely appealing aspect" of Trump's planned office tower was that it would "not be done in the Fence Post Style of the 1970s." The architect critic slammed the already-built Trump Tower as a "skyscraper offering condos, office space and a kitschy shopping atrium of blinding flamboyance." Gapp wrote that Trump's claim that the 150-story skyscraper would architecturally balance the two World Trade Center towers on the opposite side of lower Manhattan was mere "eyewash."[6]



From Chicago Tribune Aug. 12, 1984. Artist's conception of Donald Trump's proposed 150-story skyscraper.

Gapp also gave an interview to the Wall Street Journal, telling a reporter that Trump's plan was "aesthetically lousy" and complaining that the central part of Chicago "has already been loused up by giantism."

Trump filed a libel lawsuit in New York, claiming that Gapp's criticisms in the Tribune and the Journal were false and defamatory.

Trump added an implication allegation, alleging that the Tribune artist's conception of his planned building made the proposed skyscraper look like "an atrocious, ugly monstrosity" – injecting words that were never used by Gapp – and claimed that Gapp's statements and the Tribune illustration "torpedoed his plans" to build the office tower.[7]

The Tribune and Gapp filed a Rule 12(b)(6) motion to dismiss on the grounds that Gapp's statements and the artist's rendering were protected opinions, and U.S. District Judge Edward Weinfeld agreed, granting the motion to dismiss.[8]

Judge Weinfeld gave Trump a lesson in the First Amendment and politics: "Men in public life … must accept as an incident of their service harsh criticism, ofttimes unfair and unjustified – at times false and defamatory – and this is particularly so when their activities or performance may … stir deep controversy" …. "De gustibus non est disputandum, there is no disputing about tastes."[9]

Judge Weinfeld, then 84, reaffirmed the First Amendment rule that "[e]xpressions of one's opinion of another, however unreasonable, or vituperative, since they cannot be subjected to the test of truth or falsity, cannot be held libelous and are entitled to absolute immunity from liability under the First Amendment."[10]

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Judge Weinfeld explained that opinions expressed in the form of "rhetorical hyperbole," "rigorous epithets," and "the most pejorative of terms" are protected from liability, so long as the opinions do not veer to into factual accusations, such as accusing someone of a crime, unethical conduct, or the lack of professional integrity in a manner that would be proved true or false.[11]

Judge Weinfeld stated that "this court has no doubt that the statements contained in the Tribune article are expressions of opinion."[12] The court held that the "Design" heading and title "architecture critic" informed the reader that the article "embodies commentary" and is "cast in subjective terms," especially since calling a building "one of the silliest things" and not "appealing" are "highly personal and subjective" judgments." While "many … would disagree with Mr. Gapp's view … there is no way the Court could instruct a jury on the process of evaluating whether [a] statement is true" when it comes to such "aesthetic matters."[13]

The court also rejected Trump's claim that the Tribune artist's rendering of the proposed tower was "false" because it allegedly misrepresented his architectural plan.

Judge Weinfeld held that the sketch was not factual because it was described as an "artist's conception" and even if the drawing did imply that the planned 150-story tower was "an atrocious, ugly monstrosity," this is "precisely the same sort of individual, subjective aesthetic opinion" that is not capable of being subjected to "factual proof."[14]

The court also called out Trump's doublespeak to which the American public is now quite familiar.

Trump argued that the artist's illustration in the Tribune did not accurately depict "his proposal" for the building's specific "tapered" design, but "at the same time" Trump was "equally vehement in declaring that he has no plans and has not even engaged an architect." Judge Weinfeld said: "Plaintiff cannot have it both ways."[15]

Of course this was not painless victory for the Chicago Tribune; it spent $60,000 in legal fees to win the motion to dismiss.[16]

New York's anti-SLAPP statute is limited to claims arising from the right to petition the government, and does not protect speech outside of government proceedings, so the Tribune and Gapp could not use the statute to dismiss the libel claim. If New York had a SLAPP statute that protected speech about matters of public concern, the Tribune and Gapp could have argued that they were being sued over speech about a matter of public concern and brought a quick motion to dismiss based on their absolute immunity for opinion and sought reimbursement of their $60,000 in legal fees from Trump.[17]

B. Trump Sues Book Author for Saying He Is Not a Billionaire

Trump's next big libel lawsuit was filed in New Jersey state court more than 20 years later.

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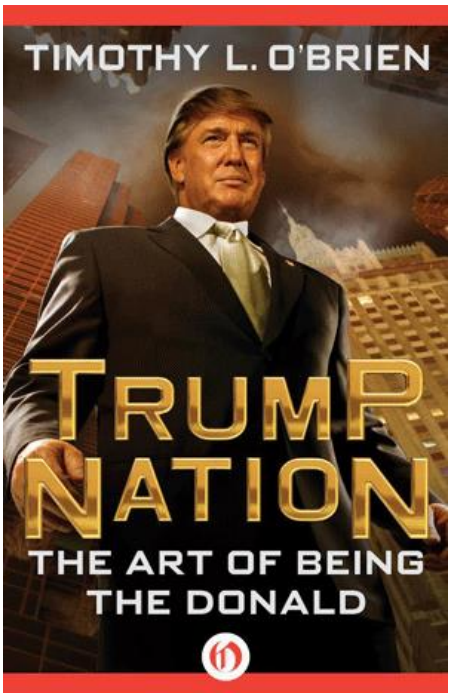

This time, Trump alleged a whopping $5 billion in damages [18] in his 2006 libel lawsuit against book author Timothy O'Brien and his book publishers, Time Warner Book Group, Inc. and Warner Books, Inc.[19]

Trump's lawsuit claimed that O'Brien's 2005 book, TrumpNation, The Art of Being The Donald, falsely reported that Trump was "only" worth between $150 million to $250 million, nowhere near the net worth claimed by Trump, which ranged from $4 billion to $5 billion to $6 billion to $9.5 billion.[20] Trump sued for libel, claiming he was really, really worth billions of dollars.

Once again, Mr. Trump saw his libel lawsuit tossed out of court, this time by New Jersey Superior Court Judge Michele M. Fox, who granted the defendants' motion for summary judgment based on no actual malice, which was affirmed by a New Jersey appellate court.[21]

"Nothing suggests that O'Brien was subjectively aware of the falsity of his source's figures or that he had actual doubts as to the information's accuracy," the New Jersey appellate court ruled.[22]

The appellate court concluded that "there is no doubt that Trump is a public figure" and that he failed to meet his burden of proving the book's statements about his net worth millions was false was published with actual malice.[23] "Nothing suggests that O'Brien was subjectively aware of the falsity of his source's figures or that he had actual doubts as to the information's accuracy," the New Jersey appellate court ruled.[24]

The court held that O'Brien, an experienced financial reporter and then the Sunday Business section editor at the New York Times, relied on three confidential sources who gave "remarkably similar" estimates of Trump's actual net worth of between $150 million to $250 million.[25]

Earlier in the litigation, a different trial court judge ordered O'Brien to produce the names of his confidential sources, but the New Jersey appellate court reversed, holding that the New Jersey's qualified reporter's privilege protected O'Brien's right to keep the identities of his confidential sources.[26] O'Brien produced his notes from his interviews of those confidential sources in discovery, however.

The appellate court also rejected Trump's argument that O'Brien published with knowing falsity because O'Brien rejected the financial information provided by Trump before the book was published.

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The court found that "it is undisputable that Trump's estimates of his own worth changed substantially over time and thus [Trump] failed to provide a reliable source" to O'Brien to rebut the confidential sources.[27]

Trump and his accountant were their own worst enemies in their depositions. The accountant who prepared Trump's 2004 Statement of Financial Condition admitted at his deposition that he never verified whether Trump had been honest in listing all his debts and liabilities for the accountant's report, which Trump had provided to O'Brien for the book.[28]

Trump was even more unreliable in his testimony about his net worth:

Q: Now Mr. Trump, have you always been completely truthful in your public statements about your net worth of properties?

A: I try.

Q: Have you ever been not truthful?

A: My net worth fluctuates, and it goes up and down with markets and with attitudes and feelings, even my own feelings but I try.

Q: Let me just understand that a little bit. Let's talk about that for a second. You said that the net worth goes up and down based on your own feelings?

A: Yes ….[29]

The court concluded that "Trump's estimates of his own worth changed substantially over time and thus failed to provide … reliable" evidence that proved O'Brien's book false.[30] In other words, Trump ran to the court complaining that the book falsely debunked Trump's claim of being a billionaire but utterly failed to provide any reliable evidence to prove falsity.

That, ladies and gentlemen, is a paradigm SLAPP lawsuit: good at harassing and draining the bank accounts of critics, but ultimately a loser in court.

Trump later complained about the dismissal of the lawsuit, displaying his misunderstanding of the law of public figure and actual malice. "Essentially, the judge just said, 'Trump is too famous,'" he told the Atlantic magazine in 2013. "'He's so famous that you're allowed to say anything you want about him.'"[31] No wonder Trump wants to change libel law; he doesn't understand it.

Trump later boasted to the Washington Post that he didn't mind losing after five years of litigation. "I spent a couple of bucks on legal fees but they spent a whole lot more. I did it to make [O'Brien's] life miserable, which I'm happy about."[32]

That, ladies and gentlemen, is a paradigm SLAPP lawsuit: good at harassing and draining the bank accounts of critics, but ultimately a loser in court. New Jersey does not have an anti-SLAPP statute.

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C. Trump University Sues Former Student

In 2010, Trump switched gears and filed a libel suit on behalf of Trump University, his for-profit real estate "school." Trump U filed a $1-million libel lawsuit in 2010 in the U.S. District Court for the Southern District in San Diego against Tarla Makaeff, a former Trump U student, yoga instructor, and whistleblower.[33]

Trump U filed its libel lawsuit against Makaeff after she filed a class-action lawsuit as the lead plaintiff against Trump U and Trump for alleged deceptive business practices. In her class-action lawsuit, she claimed she was tricked into raising her credit card limit, ostensibly to buy real estate, but then Trump U persuaded her to use her credit card to pay nearly $35,000 to enroll in an "elite" Trump U class.[34]

Trump U sued Makaeff for her pre-litigation statements about Trump U when she posted on internet message boards and wrote a letter to the Better Business Bureau and her bank requesting a $5,100 refund for services charged by Trump U. Trump U claimed that she defamed the school by claiming in her letters that that Trump U and its affiliates engaged in "fraudulent business practices," "deceptive business practices," "grand larceny," "predatory behavior," "criminal" business practices, and used "trickery" and "fraud" to persuade her to open a new credit card, which she called "grand larceny" and "identity theft."[35]

Makaeff took advantage of California's anti-SLAPP statute to file a special motion to strike Trump U's libel counterclaim. The California statute allows defendants to bring quick motions to strike speech-related claims that target speech about a matter of public concern and are meritless because the plaintiff cannot show a probability of prevailing.[36]

Makaeff argued that Trump U's claim was subject to dismissal under the two-part test of the anti-SLAPP statute because: (1) the claim arose from her exercise of speech about a matter of public concern – Trump U's deceptive business practices and her statements about consumer protection; and (2) Trump U could not show a "probability of prevailing" on the merits of the defamation claim because Trump U was a public figure lacking evidence that Makaeff published with actual malice.[37]

U.S. District Judge Irma Gonzalez, who was initially assigned to the case, held that Trump U's libel claim came under the protection of the anti-SLAPP statute because the claim arose from Makaeff's statements about "consumer protection information," which was a matter of public concern. But Judge Gonzalez denied Makaeff's anti-SLAPP motion on the grounds that Trump U was not a public figure and had established a probability of prevailing on its libel claim under the negligence standard for private figures.[38]

The Ninth Circuit Court of Appeals affirmed the lower court's holding that Trump U's libel claim came under the protection of the anti-SLAPP statute, but reversed the lower court's holding that Trump U was a private figure, and held that the for-profit school is a limited

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purpose public figure due to its use of "aggressive advertising campaign" on the internet, newspapers, and radio, and sent the case back to the district court to decide if Trump U could prove actual malice.[39]

On remand, the case was assigned to U.S. District Judge Gonzalo P. Curiel, who granted Makaeff's anti-SLAPP motion and dismissed Trump's $1-million libel claim in 2014. The court held that Trump U could not meet his burden of showing a probability of prevailing because Makaeff believed the truth of her statements and Trump lacked evidence that Makaeff's statements were made with actual malice.[40]

The court also ordered Trump U to pay nearly $800,000 for Makaeff's attorney's fees and costs.[41] The legal fees order is on hold pending the outcome of the class action lawsuit.

Six years into her class-action lawsuit, which has still not gone to trial, Makaeff was shell-shocked how she had been "put through the wringer," developed health problems, and was having a hard time finding work due to the high-profile nature of the case, and she was permitted by Judge Curiel to withdraw as lead plaintiff in 2016.[42]

As for Judge Curiel, he has been subjected to repeated verbal attacks by Trump, who called the judge "a hater of Donald Trump" with "hostility toward me." Trump incorrectly claimed that the Indiana-born Latino judge was "Spanish" and "Mexican" and contends that the judge is biased against Trump due to his campaign pledge to build a wall between the United States and Mexico. Trump never filed a recusal motion, and has hinted that he might bring a "civil" lawsuit against Curiel after the election.[43]

The court held that Trump U could not meet his burden of showing a probability of prevailing because Makaeff believed the truth of her statements and Trump lacked evidence that Makaeff's statements were made with actual malice.

D. Trump Sues Miss Pennsylvania

Trump's corporate lawyer Michael Cohen recently cited the sole Trump & Co. defamation victory – a default judgment – to bully another reporter.

"Do you want to destroy your life?" Cohen asked a Daily Beast reporter last year. "It's going to be my privilege to serve it to you on a silver platter like I did that idiot from Pennsylvania in Miss USA, because I think you are dumber than she is." Cohen said. "Sheena Monnin, another one that wanted to defame Mr. Trump and ended up with a $5 million judgment. That's going to be nothing compared to what I do to you…. So I'm warning you, tread very fucking lightly, because what I'm going to do to you is going to be fucking disgusting. You understand me?"[44]

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Monnin, a former Miss Pennsylvania, tangled with Trump when she entered the 2012 Miss USA Pageant along with 50 other contestants, and was soon eliminated.[45]

While waiting in the wings during the telecast, Monnin claims that another contestant confided that she had seen a list of the five finalists and the ultimate winner – Miss Rhode Island – and the outcome had been predetermined by pageant officials.[46]

The next day, Monnin told her agent she was resigning from her post as 2012 Miss Pennsylvania and from the Miss Universe pageant because she believed the Miss USA pageant was "rigged" and because she did not agree with the pageant's decision to allow transgendered contestants.

Monnin posted on her Facebook page about her resignation, saying she was quitting "an organization I consider to be fraudulent, lacking in morals, inconsistent and in many ways trashy."[47] The next day, Monnin posted on her Facebook page the details about the reputed list, saying the "show must be rigged" and was "dishonest."[48]

Trump, who helps run the Miss USA pageant as an equity partner with the Miss Universe L.P. company, quickly escalated the dispute by appearing on Good Morning America to refute Monnin's Facebook claims, saying she had "loser's remorse" and that her allegations were "disgraceful." Monnin responded by appearing on The Today Show to explain and repeat her allegations from her Facebook page.

Trump's Miss Universe pageant filed a $10-million claim against Monnin with JAMS, the private arbitration service mandated by Monnin's Miss USA contract, asserting claims against Monnin for defamation, tortious interference with prospective economic advantage, and breach of contract.[49]

Monnin said she got bad advice from her lawyer, who repeatedly told her that she was not required to attend the arbitration, only to tell Monnin later that he could not represent her because he was not admitted to practice law in New York.[50]

With Monnin and her attorney absent from the arbitration proceeding, no one provided any evidence to rebut testimony that Miss USA supposedly suffered $5 million in damages because the oil company BP, formerly known as British Petroleum, allegedly backed out of its reputed plan to provide a $5-million sponsorship fee due to BP's alleged concern about Monnin's allegations.[51]

The JAMS arbitrator, retired U.S. Magistrate Judge Theodore H. Katz, held that Monnin's statements were false, defamatory, and published "with actual malice," and awarded the Miss Universe company its full $5 million defamation damages claim.[52] The arbitrator dismissed the tortious interference and contract claims.

Monnin filed a motion in the U.S. District Court for the Southern District of New York to vacate the $5-million defamation award, arguing that Monnin failed to receive proper notice of the arbitration, received ineffective counsel from her lawyer, the arbitrator exceeded his

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authority and exhibited "manifest disregard for the law" by finding liability without any evidence that BP cited Monnin's comments as the reason for withdrawing its planned pageant sponsorship.[53]

As Monnin pointed out, the arbitrator awarded the full $5-million sponsorship fee award to Trump's pageant company even though no one from BP testified at the arbitration. The arbitrator relied solely on hearsay testimony from a Miss USA pageant employee who testified that BP withdrew its $5 million sponsorship fee.[54]

Although this was not raised by Monnin, the arbitrator appeared to apply the negligence standard instead of the required actual malice standard when he cited the following evidence of Monnin's actual malice: she made "malicious" statements as a "disgruntled contestant," her "rigged" allegation was "highly improbable," she "made no attempt to seek verification" of her claim with other sources, she failed to respond to discovery demands, failed to appear to argue the truth of her statements, and lost by default.[55]

On July 2, 2013, U.S. District Judge J. Paul Oetken rejected all of Monnin's challenges and affirmed the arbitrator's $5 million default judgment. While Judge Oetken expressed "[s]ympathy" that Monnin "is suffering from her poor choice of counsel" and agreed that her lawyer acted "unconscionably," he declined to vacate the judgment because the arbitrator relied on evidence to support his decision and the "apparent inequity" of the default judgment was not enough for the federal court vacate the judgment under the very protective rules for arbitration awards.[56]

Monnin later sued her former New Jersey lawyer for malpractice in Camden County (New Jersey) Superior Court in 2013,[57] and her father, Phillip Monnin, contends his daughter did not pay "a penny" of the $5 million judgment when Trump's attorney filed a notice of satisfaction of the full $5 million Miss Universe L.P. v. Monnin arbitration award.[58]

For Trump to boast about winning this arbitration claim is misleading. The arbitrator never heard any rebuttal to the factual allegations and legal theories made by Trump's pageant company, the judgment was not subject to the full appellate review available to litigants in public courts, and Monnin's attorney acted "unconscionably."

E. Trump Sues Maher About Orangutan Joke

Trump has zero sense of humor. But, boy, can he file a hilarious lawsuit! He proved that much when he sued HBO Real Time cable television show host Maher for not making good on Maher's joke that Maher would donate $5 million to charity if the orange-haired and orange-tinged Trump could provide a birth certificate showing that Trump was not the "spawn of his mother having sex with an orangutan."[59]

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At the time, Trump was exploring a run for the GOP presidential nomination and Maher made his donation joke as part of his political comedy shtick ridiculing Trump's "racist" and false "birther" claim that President Obama, our first African American president, was born in Kenya, not the United States, and Trump's offer to pay $5 million to charity if Obama produced his birth certificate.[60]

Trump's lawyer responded by sending Maher a copy of Trump's birth certificate, "demonstrating he is the son of Fred Trump, not an orangutan," and a "formal acceptance" letter directing Maher to divvy up his $5 million donation among five charities.[61]

When Maher did not cut a donation check, Trump filed a $5-million "breach of contract" lawsuit in Los Angeles Superior Court against Maher. [62] Exhibit A of his lack of a sense of humor (literally it was Exhibit A): Trump attached a transcript of Maher's appearance on the Tonight Show with Jay Leno to prove Trump thought Maher's offer was serious, including Maher's offer to "donate to a charity of his choice …. Hair Club for Men, The Institute for Incorrigible Douche-bag-ery. Whatever charity!"[63]

Trump thought it was important to state in his lawsuit that a 2011 Newsweek poll showed he would "enjoy the support of 41% of voters in a hypothetical race against President Obama."[64]

Trump was roundly ridiculed by the Hollywood Reporter for filing such a frivolous lawsuit.[65]

It was obvious to media lawyers that Maher could seek a quick dismissal under the U.S. Supreme Court decision Hustler, which held that statements about a public figure reasonably understood to be a caricature, parody, or satire – a joke – are not actionable under any theory of liability claiming a falsehood.[66]

Shortly after filing his frivolous lawsuit against Maher, Trump quickly withdrew it, and his lawyer said he would refile an amended complaint. He never did.

Maher also had a very good chance of winning an anti-SLAPP motion under California's anti-SLAPP statute. Although Trump's lawsuit against Maher was labeled a "breach of contract" lawsuit, Trump's lawsuit targeted Maher's speech about a matter of public concern – Maher's critique of Trump's "racist," anti-Obama birther campaign while Trump explored a presidential bid [67] As it turns out, Trump's birther campaign likely helped catapult Trump to the GOP presidential nomination three years later.

Shortly after filing his frivolous lawsuit against Maher, Trump quickly withdrew it, and his lawyer said he would refile an amended complaint.[68] He never did.

F. Trump Hotel Sues Bartender and Culinary Unions

By 2015, Trump was an actual GOP candidate for the presidential nomination and more aggressive in using lawsuits to chill negative speech about him. He was probably fed up with

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losing libel claims and being blocked by the First Amendment and became more creative trying to avoid the defamation label and his old foe, the First Amendment.

On October 5, 2015, Trump gave a campaign speech at the Treasure Island Hotel & Casino, a rival hotel. Outside the hotel, culinary workers and bartenders trying to organize a union at the Trump Hotel Las Vegas handed out flyers saying that Treasure Island Hotel & Casino employed unionized workers while Trump "refused to agree to a fair process for workers at his hotel to form a union." The workers' flyers asked "If Trump choses to stay at a union hotel, why can't Trump Hotel workers choose to form a union."

Trump sued the culinary and bartender labor unions that organized the protest in U.S. District Court in the District of Nevada, claiming the flyers hurt his hotel's reputation by falsely implying that he had not stayed at his own hotel due to lesser quality. Instead of suing for libel, the companies sued the unions for violating Section 43(a) of the federal Lanham Act for alleged false advertising and for violating Nevada's deceptive trade practices law. Trump sued in the name of his hotel companies, Trump Ruffin Commercial LLC and Trump Ruffin Tower I LLC.[69]

There was just one problem with the Trump hotel lawsuit, according to Chief U.S. District Court Judge Gloria M. Navarro. To make out a case for false advertising, Trump's hotel needed to allege that the workers' allegedly false statements were "commercial speech," that is, to propose a commercial transaction.

The court found that even if the workers' statements were "intended to, and would have the tendency to cause harm to the reputation of Trump Hotel Las Vegas," the workers' statements did not qualify as commercial speech under the Lanham Act because they were not proposing a commercial transaction.

Judge Navarro dismissed the Lanham Act claim without prejudice on August 8, 2016, holding that Trump's hotel companies failed to allege that the labor unions were engaged in commercial speech.

Judge Navarro dismissed the Lanham Act claim without prejudice on August 8, 2016, holding that Trump's hotel companies failed to allege that the labor unions were engaged in commercial speech, and dismissed the state law claim due to lack of jurisdiction.[70] The Trump hotel companies chose not to file an amended complaint and voluntarily dismissed the lawsuit,[71] and the court closed the case.

Once again, Trump's attempt to escape the burdens of libel law and the First Amendment by pleading a non-libel claim failed.

G. Trump Sues to Make Clear He Is Not a Racist Mass Murderer

Not only does Trump lack a sense of humor, he doesn't know from rhetorical hyperbole. We got the message loud and clear from Trump's $2.5 billion lawsuit against television network Univision Networks & Studios, Inc. and its programming chief Albert Ciurana.

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In his 2015 lawsuit, Trump filed claims for breach of contract, intentional interference with contractual relationships, and defamation arising from the Spanish-language network's decision to stop airing Trump's beauty pageants after Trump stated during his presidential campaign announcement that Mexican immigrants were "rapists" and criminals.

Trump alleged that he was defamed to the tune of $1 billion by Ciurana's Instagram post of Trump's photo side-by-side with a photo of accused Southern white supremacist mass murderer Dylann Roof with the caption "Sin commentaries," or "No comments."[72] Ciurana posted the Instagram photos shortly after Trump's "rapists" and criminals statement, and later apologized.

Trump claimed that given the "target audience" of Ciurana's post, "a reasonable person could understand Mr. Ciurana to be stating that Mr. Trump had committed heinous acts similar to Roof, and/or that Mr. Trump had incited others to commit similar heinous acts."[73]

Without an ounce of irony, Trump wanted to make it clear in his lawsuit that he is not a racist mass murderer: "This statement [the alleged implication of the Instagram post] is patently false," Trump alleged, "because as Defendants well knew (or should have known) at the time (and still) Mr. Trump has never committed heinous acts similar to Roof's and never incited Roof or anyone else to commit such heinous acts."[74]

Univision and Ciurana filed a motion to dismiss, arguing that the Instagram post was not a statement of fact, but a "visual satire" and an expression of a personal opinion by Ciurana, a Mexican immigrant himself, about Trump's qualifications as a candidate for president, which is quintessential political speech protected by the First Amendment. The defendants chided Trump for not remembering that he lost his first defamation case against the Chicago Tribune for failing to understand the protection of opinion.

Univision and Ciurana also argued that the satirical post simply compared the two men's similar frowns and hair, and that it would be a "stretch" and "far from plausible" that the post conveyed that both Roof and Trump "hold comparably racist views," but even if that was the message, this message still would be protected opinion.[75] The breach of contract claim was frivolous, Univision argued, because Trump had already breached the contract by pushing away all the advertisers and viewers of the planned first-ever Spanish-language version of Trump's beauty pageants with his offensive comments about Mexican immigrants who formed a large part of the Univision audience.

Shortly before oral argument on the motion to dismiss, Trump and co-plaintiff Miss Universe L.P., LLLP filed a notice of voluntary dismissal of their lawsuit with prejudice on Feb. 11, 2016, depriving us of what promised to be a very interesting oral argument. The parties announced a confidential settlement of the lawsuit but only mentioned the settlement of the contract claim,[76] so I count the dismissal of the defamation claim as another loss to Trump.

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More Anti-SLAPP Statutes Are Needed

Trump has pledged to get revenge on the First Amendment. Trump has promised "to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money."[77]

Trump's campaign pledge misrepresents and misunderstands libel law. The First Amendment already punishes "purposely … false articles" about powerful public figures like Trump and his companies. It's called publishing with actual malice.[78] Trump has never been able to prove actual malice in a public trial court.

Trump's speech-targeting lawsuits filed in public courts were doomed to failure because the First Amendment protects good-faith reporting about public figures (that is, published without actual malice) and immunizes subjective opinions and jokes, even if they are "negative" and "horrible," as Trump complains.

Journalists and whistleblowers may have won dismissal of Trump's libel lawsuits, but at significant cost of time, energy, and money.

State legislatures should enact more anti-SLAPP statutes allowing defendants to quickly dismiss meritless lawsuits targeting speech about matters of public concern.[79] Over two dozen states have enacted these statutes.[80] A federal anti-SLAPP law has been proposed. Many state statutes require plaintiffs like Trump to pay the prevailing defendant's legal fees, as Trump University discovered in California when the court granted a former student's anti-SLAPP motion dismissing the school's flawed libel claim and ordered Trump University to pay nearly $800,000 in attorney's fees.[81] A federal anti-SLAPP law has been proposed.

Journalists and whistleblowers may have won dismissal of Trump's libel lawsuits, but at significant cost of time, energy, and money.

These anti-SLAPP laws, while not perfect, would help discourage frivolous libel lawsuits favored by Trump & Co. Instead of labeling frivolous, speech-targeting lawsuits "SLAPP suits," perhaps we should call them "Trump Suits."

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Notes

[1] A 2016 study by USA TODAY located over 4,000 lawsuits filed by or against Trump and his companies over three decades, an unprecedented number for a presidential nominee. USA TODAY located seven speech-related lawsuits or arbitrations filed by Trump and his companies. USA TODAY Network: Dive into Donald Trump's thousands of lawsuits, USA TODAY, http://usatoday.com/pages/interactives/trump-lawsuits/, Nick Penzenstadler, New USA TODAY interactive database shows Trump lawsuits surpass 4,000, USA TODAY (July 7,

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2016), http://www.usatoday.com/story/news/politics/onpolitics/2016/07/07new-usa-today-interactive -database-shows-trump-lawsuits-surpass-4000/86809010/. This article examines the seven speech-related lawsuits or arbitration proceedings brought by Trump and his companies discussed by USA TODAY and located in an independent search by the author.

[2] 485 U.S. 46, 56-57 (1988) (statements not reasonably understood as stating facts – in this instance a parody liquor-and-sex advertisement in Hustler magazine poking fun at the Rev. Jerry Falwell – are not actionable under any theory of liability based on an alleged "false" publication, even if the statements are "offensive" and "vulgar").

[3] Trump v. Chicago Tribune Co., 616 F. Supp. 1434 (S.D.N.Y. 1985) (Trump I).

[4] Nat Hentoff, Citizen Trump, Wash. Post (Oct. 19, 1985), http://www.washingtonpost.com/archive/politics/1985/10/19/citizen-trump/88efc4ba-6c1e-4226-8924-4101-=a60f5478/

[5] Trump I, 616 F. Supp. at 1434.

[6] Id. at 1435.

[7] Id.

[8] Id. at 1436.

[9] Id.

[10] Id. at 1435 (citations and quotations omitted).

[11] Id., citing Letter Carriers v. Austin, 418 U.S. 264, 284 (1974) and Greenbelt Pub. Assn v. Bresler, 398 U.S. 6, 14 (1970). Although Judge Weinfeld's decision in Trump v. Chicago Tribune Co. was issued in 1985, before the U.S. Supreme Court narrowed its protection for opinions in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), Judge Weinfeld's decision was based on the protection for non-factual, hyperbolic opinions and remains good law.

[12] Trump I, 616 F. Supp. at 1436.

[13] Id.

[14] Id. at 1438.

[15] Id.

[16] Hentoff, supra note 4.

[17] SLAPP suits are meritless lawsuits that target speech about a matter of public concern. SLAPP is an acronym for Strategic Litigation Against Public Participation. See generally Cal. Civ. Proc. Code § 425.16.

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[18] Paul Farhi, What really gets under Trump's skin? A reporter questioning his net worth, Wash. Post (March 8, 2016), https://www.washingtonpost.com/lifestyle/style/that-time-trump-sued-over-the-size-of-hiswallet/2016/03/08/785dee3ee-e4c2-11e5-bofd-073d5930a7b7_story.html

[19] Trump v. O'Brien, 29 A.3d 1090, 1092 (N.J. Super. Ct. App. Div. 2011) (Trump II).

[20] Id. at 1092-1093.

[21] Id. at 1094-1095.

[22] Id. at 1101.

[23] Id.

[24] Id. at 1101.

[25] Id. at 1092,1097.

[26] Id. at 1094, citing Trump v. O'Brien, 958 A.2d 85 (N.J. Super. Ct. App. Div. 2008) (Trump III) (defendants did not have to disclose confidential source identities).

[27] Id. at 1099-1100.

[28] Id. at 1099.

[29] Id.

[30] Id. (emphasis added).

[31] Farhi, supra note 18.

[32] Id.

[33] Makaeff v. Trump University, LLC, 715 F.3d 254, 260 (9th Cir. 2013) (Makaeff I).

[34] Id.

[35] Id.

[36] Cal. Civ. Proc. Code § 425.16.

[37] Id. at 260-261, citing Cal. Civ. Proc. Code § 425.16.

[38] Id.

[39] Id. at 268, 271-272.

[40] Makaeff v. Trump University, LLC, No. 10-cv-00940, ECF No. 328 (S.D. Cal. June 17, 2014) (Makaeff II).

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[41] Makaeff v. Trump University, LLC, No. 10-cv-00940, ECF No. 331 (S.D. Cal. April 9, 2015) (Makaeff III) (awarding $790,083.40 in fees and $8,695.81 in costs).

[42] Makaeff v. Trump University, LLC, No. 10-cv-00940 , ECF No. 472 (S.D. Cal. March 21, 2016) (Makaeff IV).

[43] Maureen Groppe, What Trump has said about Judge Curiel, IndyStar (June 11, 2016), http://www.indystar.com/story/news/2016/06/11/what-trump-has-said-judge-curiel/85641242/

[44] Trump Lawyer Bragged: I 'Destroyed' a Beauty Queen's Life, Daily Beast (July 31, 2015), http://thedailybeast.com/articles/2015/07/31d/trump-lawyer-bragged-i-destroyed-a-beauty-queen-s-life.html.

[45] Miss Universe L.P., LLLP v. Monnin, 952 F.Supp.2d 591, 594 (S.D.N.Y. 2013) (Monnin I).

[46] Id. at 594-95.

[47] Id. at 595.

[48] Id. at 596.

[49] Id. at 597.

[50] Id. at 603-606.

[51] Id. at 598.

[52] Id. at 598.

[53] Id. at 600-610. See also Miss Universe L.P., LLLP v. Monnin, No. 12-cv-09174, ECF No. 17 (S.D.N.Y Feb. 5, 2013).

[54] Miss Universe L.P., LLLP v. Monnin, No. 12-cv-09174, ECF No. 17 (S.D.N.Y Feb. 5, 2013).

[55] Miss Universe L.P., LLLP v. Monnin, No. 12-cv-09174, ECF No. 1 (S.D.N.Y Dec. 17, 2012).

[56] Monnin I, 952 F.Supp.2d at 610.

[57] Monnin v. Klineburger & Nussy, No. L-4505-13 (Nov. 4, 2013 N.J. Super. Ct., Camden Cty); see also Joshua Alston, Pageant Queen Blames NJ Firm For $5M Miss Universe Win, Law360 (Nov. 8, 2013), http://www.law360.com/articles/487678/pageant-queen-blames-nj-firm-for-5m-miss-universe-win

[58] Nick Penzenstadler, Trump, Bill Maher and Miss Pennsylvania: The 'I'll sue you' effect, USA Today (July 11, 2016), http://www.usatoday.com/story/news/politics/elections/2016/2016/07/11/trump-bill-maher-and-miss-pennsylvania-Il-sue-you-

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effect/85877342/; see also Miss Universe L.P., LLLP v. Monnin, No. 1:12-cv-09174, ECF No. 27 (S.D.N.Y Aug. 15, 2014).

[59] Trump v. Maher, No. BC 499537 (Los Angeles Super. Ct. Feb. 4, 2013), http://www.hollywoodreporter.com/sites/default/files/custom/Documents/ESQ/Trump_Maher.pdf.

[60] Id.

[61] Id.

[62] Id.

[63] Id. at Exhibit A.

[64] Id.

[65] Eriq Gardner, Why Donald Trump is Likely to Lose a Lawsuit Against Bill Maher (Analysis), Hollywood Reporter (Feb. 3, 2013), http://hollywoodreporter.com/thr-esq-why-donald-trump-is-lose-417806.

[66] Hustler, 485 U.S. at 56-57.

[67] See Cal. Civ. Code § 425.16(e)(4) (allowing defendant to bring anti-SLAPP motion to dismiss "a claim" arising from speech "in connection with a public issue or an issue of public interest").

[68] Eriq Gardner, Donald Trump Withdraws Bill Maher Lawsuit, Hollywood Reporter (April 3, 2013), http://hollywoodreporter.com/thr-esq-donald-trump-withdraws-bill-maher-432675.

[69] Trump Ruffin Commercial, LLC v. Local Joint Executive Board Las Vegas, Culinary Workers Union Local 226, No. 15-cv-01984, ECF No. 1 (D. Nev.).

[70] Trump Ruffin Commercial, LLC v. Local Joint Executive Board Las Vegas, Culinary Workers Union Local 226, No. 15-cv-01984, 2016 WL 4208437 (D. Nev. Aug. 8, 2016).

[71] Trump Ruffin Commercial, LLC v. Local Joint Executive Board Las Vegas, Culinary Workers Union Local 226, No. 15-cv-01984, ECF No. 21. (D. Nev. Aug. 17, 2016).

[72] Miss Universe L.P., LLLP v. Univision Networks & Studios, Inc., No. 15-cv-05377, ECF No. 22 (S.D.N.Y. Nov. 6, 2015).

[73] Id.

[74] Id. (emphasis added).

[75] Miss Universe L.P., LLLP v. Univision Networks & Studios, Inc., No. 15-cv-05377, ECF No. 25 (S.D.N.Y. Dec. 4, 2015).

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[76] Nick Niedzwiadek, Donald Trump, Univision Settle Lawsuit over Miss Universe Pageant, Wall Street Journal (Feb. 11, 2016), http://www.wsj.com/articles/donald-trump-univision-settle-lawsuit-over-miss-universe-pagaent-1455220440; see also joint statement, http://corporate.univision.com/2016/02/donald-j-trump-and-univision-reach-settlement/

[77] Trump declared the following at his Feb. 26, 2016 campaign rally in Fort Worth, Texas: "I'm going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money. We're going to open up those libel laws. So when the New York Times writes a hit piece which is a total disgrace or when the Washington Post, which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they're totally protected." Hadas Gold, Donald Trump: We're going to 'open up' libel laws, Politico (Feb. 26, 2016), http://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866

[78] New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (public official must prove actual malice to win libel case); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342, 346 (1974) (same for public figure).

[79] E.g., Cal. Civ. Code § 425.16.

[80] State-by-state guide, Reporters Committee for Freedom of the Press, https://www.rcfp.org/slapp-stick-fighting-frivolous-lawsuits-against-journalists/state-state-guide

[81] Makaeff III, relying on Cal. Civ. Proc. Code § 425.16(c)(1) ("a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs") (emphasis added).

"Ballot Selfies:" Photo Ops in the Granite State

By William L. Chapman

Concerned about "dark forces" engaged in buying votes or coercing voters to prove how they votes, against a backdrop of no documented instances of such election misconduct in recent memory, the New Hampshire legislature in 2014 made it illegal for any voter to "tak[e] a digital image or photograph of his or her marked ballot and distributing or sharing the image via social media or by any other means." RSA 659:35,I. Violation of the law could result in a fine of up to $1,000.

Three "Live Free or Die" Granite Staters challenged the law by taking ballot and posting selfies after voting in the September 2014 Republican primary election. Upon learning they were being investigated by the New Hampshire Attorney General's Office, they challenged the law of First Amendment grounds and were represented by the American Civil Liberties Union of New Hampshire.

Singer Justin Timberlake's Instagrammed ballot selfie highlighted state laws banning ballot photos.

The district court, relying on the Supreme Court's recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 218 (2015), ruled that the law was content-based and subject to strict scrutiny:

> In the present case, as in *Reed,* the law under review is content based on its face because it restricts speech on the basis of its subject matter. The only digital or photographic images that are barred by RSA 659:35,I are images of marked ballots that are intended to disclose how a voter has voted. Images of unmarked ballots and facsimile ballots may be shared with others without restriction … In short, the law is plainly a content-based restriction on speech because it requires regulators to examine the content of the speech to determine whether it includes impermissible subject matter ... [T]he law under review here is subject to strict scrutiny even though it does not discriminate based on viewpoint and regardless of whether the legislature acted with good intentions when it adopted the law. *Rideout v. Gardner*, 123 F. Supp. 3d 218, 229 (D.N.H. 2016).

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The court concluded the law did not serve any compelling state interest because neither the legislative history nor record in the case showed it addressed an actual problem. "'Anecdote and supposition' cannot substitute for evidence of a real problem." The court ruled the state has an obvious less restrictive way to address any concerns it had: "it can simply make it unlawful to use an image of a completed ballot in connection with vote buying and voter coercion schemes."

Believing that the district court had erred in ruling the law was content-based, the Attorney General appealed to the First Circuit Court of Appeals, arguing that the law was content-neutral and meets the intermediate level of scrutiny.

First Circuit Decision

"Slam dunk" is an expression not often used in free speech cases, but that might accurately describe how the First Circuit saw the issue. The case was argued on September 12, 2016; the decision was issued 16 days later. *Rideout v. Gardner,* 2016 WL 5403593 (1st Cir. September 28, 2016).

After reviewing the legislative history, the First Circuit agreed with the district court that "'[t]he summary judgment record does not include any evidence that either vote buying or voter coercion has occurred in New Hampshire since the late 1800s.'" Holding "that the statute at issue here is facially unconstitutional even applying only intermediate scrutiny," the court explained in footnote 4:

The state "has not attempted to tailor its solution to the potential problem it perceives."

> The district court chose to rely on reasoning that section 659:35, I is a content-based restriction. Rideout, 123 F.Supp.3d at 229. To reach this conclusion, it relied heavily on the Supreme Court's recent decision in Reed. Id. at 228–29. Secretary Gardner vigorously contests this conclusion. As the statute fails even intermediate scrutiny, we need not resolve the question of whether section 659:35, I is a content-based regulation.

In doing so, the First Circuit rejected arguments that the law (i) "serves prophylactically to 'preserve the secrecy of the ballot" from potential future vote buying and voter coercion; (ii)"does not secure the immediate physical site of elections," since it "instead controls the use of imagery of marked ballots, regardless of where, when, and how that imagery is publicized;" and (iii) that "scattered examples of cases involving buying from other jurisdictions" serve to justify the law.

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And, like the district court, it ruled that the state "has not attempted to tailor its solution to the potential problem it perceives." Instead of "curtail[ing] the speech rights of all voters," it could have singled out "just those motivated to cast a particular vote for illegal reasons." Nor had the state shown why "other state and federal laws prohibiting vote corruption are not already adequate to the justifications it has identified."

Finally, the First Circuit stated that the law regulates "voters engaged in core political speech," noting the "increased use of social media and ballot selfies" and underscoring the important communicative value of an image: "'it attracts the attention of the audience to the [speaker's] message, and it may also serve to impart information directly." (Quoting from *Zauder v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985)).

William L. Chapman is a partner at Orr & Reno, P.A., Concord, N.H. The three New Hampshire voters were represented by Gilles R. Bissonette, with whom American Civil Liberties Union of New Hampshire, William E. Christie, and Shaheen & Gordon, P.A., Concord, NH, were on brief for appellees. Stephen G. LaBonte, Assistant Attorney General, with whom Joseph A. Foster, New Hampshire Attorney General, and Laura E. B. Lombardi, Senior Assistant Attorney General, were on brief, for appellant. Amicus curiae: Christopher T. Bavitz, New York, NY, Cyberlaw Clinic, Harvard Law School, Justin Silverman, Sherman Oaks, CA, and Andrew F. Sellars on the brief for The New England First Amendment Coalition and The Keene Sentinel. Eugene Volokh, Lost Angeles, CA, and Scott & Cyan Banister First Amendment Clinic, UCLA School of Law on the brief for the Reporters Committee for Freedom of the Press. Neal Kumar Katyal, Sean Marotta, Hogan Lovells US LLP, Washington, DC, Christopher T. Handman, and Dominic F. Perella on brief for Snapchat, Inc.

Third Circuit's 'Bridgegate' Decision Undermines First Amendment Right to Bill of Particulars

Court Refuses to Release List of Unindicted Co-Conspirators

By Bruce S. Rosen and Zachary D. Wellbrock

The following analysis is solely the work of the authors, and does not reflect the views of the 13 media entities they represented in access proceedings described below.

The Third Circuit's recent decision to reverse a trial court's order granting access to a list of unindicted coconspirators in the indictments involving the scandal over a politically-motivated traffic jam at the George Washington Bridge was stunning in its own politics – in an apparent determined effort to expand privacy rights of unindicted coconspirators while eviscerating its own 1985 decision granting First Amendment and common law right of access to bills of particulars.

In *North Jersey Media Group Inc. v. United States*, 2016 WL 4651386 (16-2431, September 7, 2016), the Court determined that a request by defense counsel for the list as part of a bill of particulars – then provided to counsel and the court by the government – was ordinary discovery ineligible for First Amendment access. In doing so, the Court essentially laid out informal instructions to federal prosecutors explaining how to avoid such access requests in the future by specifically providing requested bills of particulars as discovery. At the same time, the Court ruled that the list of unindicted coconspirators sent to the trial court was not a judicial record and therefore ineligible for common law access.

The Court essentially laid out informal instructions to federal prosecutors explaining how to avoid such access requests in the future.

Bills of particulars are a list of details to claims or charges in indictments or complaints presented in response to a defendant's request. While not explicitly overruling *United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985), which created a hybrid First Amendment/Common Law access right to Bills of Particulars because these documents were extensions of publicly accessible indictments, the recent decision made it unlikely any such access would be available in the future.

"Bridgegate" involved the indictments of William Baroni and Bridget Kelly, aides to New Jersey Gov. Chris Christie (Baroni worked for Christie at the Port Authority of New York and New Jersey, which operates the bridge) who were accused of involvement in a conspiracy to create a huge traffic jam as political punishment for the mayor of Fort Lee, at the bridge's western terminus, who had resisted endorsing Christie for reelection in 2013. The indictment

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mentioned one other conspirator who had pleaded guilty, David Wildstein, and would testify at trial, but also referred to "others."

After defendants requested the list of "others" in their omnibus motions, and before Judge Susan Wigenton could rule on the motions, the government provided it to defense counsel in January and the court, informally asking Judge Wigenton to seal it, despite a protective order in place that required a formal sealing process. In their submission and in subsequent trial court submissions the government never took the position that the document was not a bill of particulars and in fact cited a section of the U.S. Attorney's Manual (USAM) dealing with bills of particulars as reason to keep it sealed to protect the privacy of the list.

A media coalition immediately filed a motion to intervene to access the list. The government opposed access, while the defendants remained silent. On May 10, Judge Wigenton ordered the list released pursuant to the *Smith* decision. Unbeknown to the media intervenors, one of the persons on the list, self-identified as John Doe, obtained a hearing without notice to the media intervenors where the government and defendants' counsel were present and where the judge told counsel for John Doe she must file a formal motion for a stay and reconsideration.

The motion alleged there was no right of access and that Doe's due process rights had been violated. The judge then granted Doe's motion to intervene and denied the request for a stay, determining the list was a judicial record, reiterating that the list was submitted in response to motions for a bill of particulars, the document sent to the court was not labeled a courtesy copy and the government had never before filed ordinary discovery with the court. The media also sought access to other discovery it claimed should be available under First Amendment access and because the parties failed to follow the protective order. Some relief was granted.

"Bridgegate" involved the indictments of William Baroni and Bridget Kelly, aides to New Jersey Gov. Chris Christie,

Doe then filed an emergency motion to the circuit, and the circuit not only granted a stay and ordered briefs filed on an expedited basis, but *sua sponte* sealed all filings and closed all public proceedings, requiring additional media motions to open the proceedings. Through this point, the government still had not taken the position that the list was ordinary discovery, but in its appellate briefs it changed course and became the primary protagonist against disclosure claiming the list was not a bill of particulars. Doe, meanwhile continued to make due process deprivations as his primary argument (which was dropped before oral argument).

In *Smith*, privacy considerations for those on the list are already incorporated in the calculations. Third Circuit law affords even less protection to public officials or public figures and it is likely most, if not all, on the list are in that category.

The reasons the Court gave to identify the list as simple discovery were all developed post-hoc, and were all quite nebulous: that the document was not a "formal" bill (even though there

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is no template for such a document, the government cited the USAM section on bills of particular and the court acknowledged that bills do not have to be ordered to be considered bills), that the District Court did not treat it as a formal bill because it never ordered it as such (despite the fact that the trial court itself formally considered it a bill of particulars in its decision to release it), that the government would have formally filed the bill if it were such (they sent it under seal to the court in violation of the protective order to avoid signaling to the media that it had been filed), defendants should have insisted on its filing (although defendants in reality did not care as long as they received the information) and because bills of particular are meant to provide detail where there is none and the 36-page indictment was sufficient detailed (although it lacks any details concerning the unindicted co-conspirators).

Nevertheless, at oral argument Judge Jordan, who wrote the unanimous decision, was singularly focused on his belief that the indictment was sufficiently detailed that it should not have required a bill of particulars, and Judge Ambro was focused on Doe's privacy rights, at one point asking whether it was right that if the court ruled for the media, John Doe's obituary would likely begin with "John Doe, an unindicted coconspirator in the Bridgegate scandal, died yesterday…"

The decision, issued on the eve of trial four months later, said that these factors satisfy the "experience" prong of a First Amendment analysis and then added into the "logic" analysis "adjudicatory significance," claiming there was none, and emphasizing an aspect that was noticeably missing from previous circuit decisions. The Court noticeably cited no case law to bolster that determination.

A media coalition immediately filed a motion to intervene to access the list.

The court then potentially made the common law right of access in the circuit more difficult by adopting the Second Circuit's statement in *U.S. v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995), that "the item must be relevant to the performance of the judicial function," ruling that the trial court was simply a passive recipient, and the list was not a judicial document.

The media coalition, American Broadcasting Companies, Inc., Associated Press, Bloomberg LP, Advance Publications, Inc., North Jersey Media Group Inc., The New York Times Company, NJTV, NBC Universal Media, LLC, Dow Jones & Company, Inc., New York Public Radio, Philadelphia Media Network, PBC, POLITICO LLC, (and for later trial court proceedings Gannett), was represented by Bruce S. Rosen and Zachary D. Wellbrock of McCusker, Anselmi, Rosen & Carvelli, P.C. Florham Park N.J. and New York, N.Y., DCS members. John Doe was represented by Jenny Kramer, Chadbourne and Park, NY. The Government was represented by Paul Fishman, U.S. Attorney for New Jersey, and AUSA Mark Coyne.

New York Court Quashes Subpoenas for Newsgathering Materials

Request for Unaired Footage is not "Critical or Necessary"

By Amy Wolf

After a pair of unfavorable decisions compelling testimony and disclosure of various newsgathering materials at the request of prosecutors in New York state courts, last month a New York trial court quashed subpoenas issued to both News 12 and ABC seeking outtakes and notes from interviews with a criminal defendant, finding that the District Attorney had failed to overcome the heavy burden of the Shield Law. Decision on Motion to Quash News 12 Subpoena, *People v. Graswald*, Indictment No. 2015-295, Index No. 3775/2015 (N.Y. Sup. Ct. Orange Cnty. Aug. 31, 2016); Decision on Motion to ABC News Subpoena, *People v. Graswald*, Indictment No. 2015-295, Index No. 3775/2015 (N.Y. Sup. Ct. Orange Cnty. Aug. 31, 2016).

Background

A New York trial court quashed subpoenas issued to both News 12 and ABC seeking outtakes and notes from interviews with a criminal defendant.

On April 30, 2015 Angelika Graswald was arrested (and has since been indicted) on charges of second-degree murder for the death of her fiancé, Vincent Viafore, who disappeared and was later found dead after falling into the water during a kayaking trip on the Hudson River.

Prior to her arrest, Graswald spoke to News 12 reporter Blaise Gomez and recounted her kayaking trip and the last moments that she saw her fiancé alive. Graswald again spoke to Ms. Gomez from the jailhouse on the day of her arrest, where Ms. Gomez was not permitted to record the interview in any fashion.

Graswald's case got extensive media coverage, and both she and her attorneys gave several interviews to various media outlets concerning the events surrounding her fiancé's death, throughout all of which Graswald continued to maintain her innocence. In particular, Graswald also granted a jailhouse interview to ABC reporter Elizabeth Vargas, which was later featured in a November 6, 2015 *20/20* broadcast.

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The Subpoenas and Motions to Quash

In January 2016, the Orange County District Attorney subpoenaed both News 12 and ABC for the aired and unaired footage of their April and November broadcasts, respectively. The DA also sought the "notes" from Ms. Gomez's unrecorded jailhouse interview that the DA assumed must exist simply because Ms. Gomez had been holding a notebook on-air. Both News 12 and ABC voluntarily provided the aired footage of their interviews with Graswald and independently filed motions to quash their respective subpoenas on the grounds that the outtakes were protected from disclosure by the New York Shield Law, N.Y. Civ. Rights Law § 79-h.

The Shield Law protects against compelled disclosure of unpublished material unless the party seeking the materials can make a "clear and specific showing" that the material demanded (1) is highly material and relevant; (2) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (3) is not obtainable from any alternative source. N.Y. Civ. Rights Law 79-h(c).

The DA subpoenaed both News 12 and ABC for the aired and unaired footage of their April and November broadcasts.

In most cases, the key issue is the "critical or necessary" prong of the test, which requires the District Attorney to convince the court that the claim "virtually rises or falls" on the admission or exclusion of the proffered evidence. *See Flynn v. NYP Holdings, Inc.*, 235 A.D.2d 907, 908 (3d Dep't 1997); *see also Perito v. Finkelstein*, 51 A.D.3d 674, 675 (2d Dep't 2008).

Importantly, courts are clear that to overcome the Shield Law's high burden, the DA must offer more than mere speculation as to the criticality or necessity of the materials sought. *United States ex. Rel. Vuitton Et Fils S.A. v. Karen Bags, Inc.*, 600 F. Supp. 667, 669 (S.D.N.Y. 1985); *Ayala v. Soto*, 162 Misc. 2d 108, 114 (Sup. Ct. Queens Cnty 1994).

New York courts have also repeatedly held that speculation about the potential for uncovering information that might impact a defendant's credibility falls far short of demonstrating that the prosecution's case "could not be presented without" journalists' unpublished materials. *In re Subpoena Duces Tecum to ABC*, 189 Misc. 2d 805, 808 (Sup. Ct. Queens Cnty. 2001).

In light of these well-established principles, both News 12 and ABC took issue with the

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District Attorney's speculation that it could be "inferred" that the outtakes contain insight into Graswald's demeanor and grasp of the English language such that they *might* demonstrate potential inconsistencies in her statements and accounts of the day in question.

News 12 and ABC further argued that such speculation falls far short of the heavy burden the District Attorney bears to overcome the Shield Law and it would defy reason to suggest that merely because both News 12 and ABC had interviewed Graswald, and outtakes of that interview *may* reflect potential inconsistencies in her statement or demeanor, the District Attorney would suddenly have the critical evidence to prosecute the case against Graswald that it would otherwise lack.

Indeed, even if there were inconsistent statements discovered in the unaired footage, courts have been clear that such impeachment material is not "critical or necessary" within the meaning of the Shield Law.

The *Bonie* Decision and the Order

On July 5, 2016, while News 12's and ABC's motions to quash were pending, a New York appellate court handed down a troubling decision that the Orange County District Attorney argued should favor denial of these motions. In *People v. Bonie*, now on appeal before the New York Court of Appeals, the First Department held that the People had pointed to specific statements by a News 12 reporter that had paraphrased unaired portions of the interview with defendant which, if accurate, contradicted defendant's earlier statements to police. 141 A.D.3d 401 (1st Dep't 2016).

The District Attorney's subpoenas lacked any specific facts and instead sought to review the entire unaired recordings in an attempt to search for potential inconsistencies.

On that basis, the *Bonie* court concluded that the People had made a clear and specific showing of criticality, thus overcoming the Shield Law, because the outtakes would presumably contain the purportedly inconsistent statements defendant had made. The court, therefore, denied News 12's motion to quash and ordered disclosure of those portions of the outtakes related to the specific showing that it found the People had made.

In reliance on *Bonie*, a New York trial court then ruled that New York Times reporter Frances Robles could be compelled to testify at a trial about her jailhouse interview with a defendant concerning the voluntariness of his confession. Despite previously ruling (before the *Bonie* decision) that Ms. Robles could not be forced to testify at a pre-trial hearing as to whether the same confession was admissible, the court held that her notes and testimony were suddenly critical or necessary because they could be corroborative of defendant's statements, including the confession, to the police. Decision, *People v. Juarez*, Indictment No. 04667/2013,

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SCID No. 30222/15 (Sup. Ct. N.Y. Cnty. Aug. 4, 2016) (reversed by the First Department on Oct. 20th).

Regardless of the merits of the *Bonie* and *Juarez* decisions, the New York Supreme Court agreed with News 12's and ABC's arguments and held that here, unlike in *Bonie*, the District Attorney's subpoenas lacked *any* specific facts and instead sought to review the entire unaired recordings in an attempt to search for *potential* inconsistencies in the content of defendant's statements and demeanor.

But, the court held, such speculative and non-specific information "does not constitute evidence critical or necessary to the maintenance of a party's claim." Thus, "unconvinced that there are relevant inconsistent statements in the televised statement of defendant," the court quashed the subpoenas issued to both ABC and News 12. (The court also credited News 12's assertion that no notes from the jailhouse interview existed, dismissed the District Attorney's insistence that because Ms. Gomez was holding a notepad, notes must have been taken, and quashed that portion of the subpoena as well.)

In its decision, the court pointedly emphasized that "there would effectively be no Shield Law if it could be set aside to look for inconsistencies in the demeanor of a witness." Fortunately, that is not the case.

Katherine M. Bolger and Amy Wolf of the New York office of Levine Sullivan Koch & Schulz, LLP and Nathan Siegel of the firm's Washington, D.C. office worked on behalf of News 12 and ABC.

N.C. Jury Hits News & Observer With $9M Verdict in Public Official Libel Case

Newspaper Stands By Accuracy of Investigative Articles

After a three-week libel trial, a North Carolina jury awarded $9 million in compensatory and punitive damages to a state firearm's investigator who was criticized in investigative articles published in the Raleigh *News & Observer*. *Desmond v. News & Observer Pub. Co.* (N.C. Super. Oct. 18, 19, 2016).

The jury awarded $1.5 million in compensatory damages and $7.5 million in punitive damages. The punitive damage award exceeds the state's statutory cap limiting punitive damages to no more than three times compensatory damages. Thus the total allowable damage award is $6 million. The newspaper plans to file post-trial motions and appeal the judgment.

Background

In August 2010, the *News & Observer* published a four-part series of articles about the North Carolina State Bureau of Investigation. SBI conducts criminal investigations and assists local and federal law enforcement. The opening article reported that "SBI agents have cut corners, bullied the vulnerable and twisted reports and court testimony when the truth threatened to undermine their cases."

At issue in the libel trial were statements in the articles highly critical of Agent Beth Desmond's bullet analysis and testimony in two criminal trials.

At issue in the libel trial were statements in the articles highly critical of Agent Beth Desmond's bullet analysis and testimony in two criminal trials. One article was entitled "SBI relies on bullet analysis critics deride as unreliable" and reported that "Independent firearms experts who have studied the photographs question whether Desmond knows anything about the discipline. Worse, some suspect she falsified the evidence to offer prosecutors the answers they wanted."

Desmond sued the News & Observer, parent company McClatchy, and reporter Mandy Locke, alleging that 16 statements in the articles were defamatory. The trial court denied defendants' motion for summary judgment. On interlocutory appeal, the North Carolina Court of Appeals reversed in part, but held that a jury could find that six statements were published with actual malice. *Desmond v. News and Observer Pub. Co.*, 772 SE 2d 128, 143 (N.C. App. 2015).

In a significant pretrial ruling, the trial court barred the admission of a report about practices at SBI which had been prepared in response to the News & Observer articles. The report was prepared by the American Society of Crime Laboratory Directors, an accrediting agency for

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AGENTS' SECRETS

Part 1: SBI ignores years of warnings on confession called 'fiction'

SBI agents have cut corners, bullied the vulnerable and twisted reports and court testimony when the truth threatened to undermine their cases, our investigation of the SBI's work, policies and practices reveals.

AGENTS' SECRETS

Part 2: Fantastic tales told in blood; a jury stunned by SBI's acts

Attorney General Roy Cooper suspended the unit that handles bloodstain pattern analysis, which hid results and ran bizarre experiments.

AGENTS' SECRETS

Part 3: Witness for the prosecution: Lab loyal to law enforcement

The work of the SBI crime lab has been under fire since February, when Greg Taylor, an innocent man, was freed after judges learned an SBI serologist withheld crucial evidence that proved a stain on Taylor's SUV wasn't blood.

AGENTS' SECRETS

Part 4: SBI relies on bullet analysis that critics deride as unreliable

Attorney General Roy Cooper has asked his new director, Greg McLeod, to review the work of the firearms identification unit, citing concerns raised by The N&O this summer.

The four-part investigative series reported that: "SBI agents have cut corners, bullied the vulnerable and twisted reports and court testimony when the truth threatened to undermine their cases."

crime labs. Among other things, the report found that plaintiff's lab work in the murder cases was not sufficiently documented and thus ASCLD inspectors could not determine if plaintiff's data supported her court testimony. The court found that the report was not relevant since it was prepared after the publication of the articles at issue in the case, seemingly barring on the report as irrelevant to actual malice while ignoring its relevance to proving substantial truth.

Trial

A jury trial commenced at the end of September 2016 before Superior Court Judge A. Graham Shirley II. The jury included a security guard from a nuclear plant, the owner of a pool and home spa business, a Duke University administrator, a computer engineer, a computer sales representative, a county food inspector, a retired IBM administrator, and a daycare worker.

While the case did not receive any national attention, the News & Observer published detailed reports throughout the trial.

The gist of plaintiff's case was that the newspaper misquoted or took out of context statements by the independent ballistics experts cited in their articles; and that none of their

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statements supported the newspaper's conclusion that plaintiff was unqualified or falsified evidence. Instead the newspaper followed a preconceived story line that SBI was fabricating evidence to convict innocent people.

The gist of the newspaper's case was that the investigative articles and statements about plaintiff were substantially true; the sources were accurately quoted; that plaintiff, indeed, gave misleading and false testimony in murder trials; and the newspaper had no doubts about the accuracy of its articles or ill feeling toward plaintiff.

During the trial, the four ballistics experts testified that they had not told the reporter Mandy Locke that they suspected the plaintiff of fabricating evidence. They testified that they were speaking hypothetically, or generally, and that their comments had been taken out of context. In contrast, Locke testified that the experts used terms like "lying," "gross incompetence," "malfeasance," and "misconduct" to describe the plaintiff's forensics testimony, and it was those comments upon which the allegations in her article were based. Locke also testified that "If I didn't believe this is what they're telling me, I wouldn't have written it.... I believed that it was true then, and after a lot of re-evaluation and reflection, I believe I was right."

Judge Shirley denied a motion for a directed verdict for the newspaper and reporter, but dismissed McClatchy from the case.

After the verdict the jurors requested that no one speak to them about their decision. Judge Shirley described the case as "probably one of the most interesting cases that I've ever been involved in."

John Bussian, Raleigh, NC, and Mark Prak, Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, Raleigh, NC, represented the defendants. Plaintiff was represented by James Johnson, Raleigh, NC.

N.Y. Court of Appeals Affirms Dismissal of Complaint By Strip Club "Managers" on "Of and Concerning" Grounds

Providing a solid restatement of "of and concerning" principles, New York's highest court recently affirmed the dismissal of claims by three plaintiffs in a defamation case against CBS Broadcasting Inc., involving the Cheetah Club, an adult entertainment establishment in Manhattan. *Three Amigos SJL Rest., Inc., et al. v. CBS News Inc., et al.*, No. 131 (N.Y. Oct. 25, 2016).

The suit arose from breaking news reports by CBS's New York television station that federal authorities had raided the Cheetah Club as part of an investigation into an underground immigration ring that brought eastern European women into the United States, forcing them to work in strip clubs as exotic dancers. In affirming the Appellate Division's decision, the Court held that the challenged reports were not "of and concerning" the three plaintiffs in question, who alleged that they provided managerial, talent booking, and promotional services to the club. The Cheetah Club itself was not a party to this interlocutory appeal.

"The statement that Cheetah's was 'run by the mafia' could not reasonably have been understood to mean that certain unnamed individuals who do not work for Cheetah's."

Background

On November 30, 2011, CBS2 New York reported on the federal government's crackdown on a criminal enterprise that allegedly involved recruiting women from Russia and other Eastern European countries to illegally enter the United States to work as exotic dancers at adult entertainment clubs. Federal authorities charged seven alleged representatives of the Gambino and Bonnano organized crime families and thirteen others, on counts ranging from extortion to visa fraud and transporting, harboring, and inducing the entry of illegal aliens to work at New York area strip clubs. The morning of the arrests, federal agents executed search warrants on various strip clubs, including the Cheetah Club in Times Square. CBS2 broadcast reports that same day about the raids and arrests. The reporter, who was on scene outside the Cheetah Club as federal agents carried out boxes of evidence, said that the Club was at the "center of the operation," and was alleged by federal authorities to be "run by the Mafia."

In April 2012, plaintiffs filed their four-count complaint against CBS, its reporter, and three anchors who introduced the reports. In addition to the Cheetah Club, five other plaintiffs joined in the defamation action: Times Square Restaurant No. 1, Inc. and Times Square Restaurant Group, two separate companies that alleged they provide management, promotional, and

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booking services to the Cheetah Club, and three individual employees or managers of the Times Square Restaurant companies: Dominica O'Neill, Shawn Callahan and Philip Stein. All five of these plaintiffs alleged that the news reports were defamatory of them because they managed various aspects of the Cheetah Club's services and the statement that the Club was "run" by the Mafia had caused people who knew them to think they were involved in organized crime and sex-trafficking.

Defendants filed a partial motion to dismiss the Complaint, arguing insofar as relevant to the present appeal that all claims by the five plaintiffs other than the Cheetah Club itself should be dismissed because the challenged statements are not "of and concerning" them as a matter of law.

On April 18, 2013, the Supreme Court, New York County (Ellen M. Coin, J.), granted the defendants' partial motion to dismiss, concluding that none of the non-Cheetah plaintiffs could state a claim as a matter of law because the reports were not "of and concerning" them. After the two Times Square companies and the three individual plaintiffs appealed, on August 4, 2015, the First Department, on a 3-2 vote, affirmed the trial court's ruling. All five justices agreed that the two companies had no claim. While the two dissenting justices would have held that it was sufficient for the three individual plaintiffs to *allege* that viewers would understand the defamatory statements to be about them because of their role as "managers" and the statement in the report that the Club was "run" by the Mafia, the majority held that this was not a reasonable reading of the phrase "run by the Mafia," which would be understood by reasonable people to refer to outside coercion, such as extortion, by organized crime figures.

The three individual plaintiffs, but not the two Times Square entities, appealed this decision to New York's highest court. Proceedings involving the Cheetah Club itself have been stayed pending outcome of the appeal.

Court of Appeals Decision

On October 25, 2016, the New York Court of Appeals affirmed the Appellate Division's decision, 5-1 (one judge having recused). Writing for the majority, Judge Eugene Pigottt, Jr. explained that "[t]he news broadcast stated that *Cheetah's* was purportedly used by the mafia to carry out a larger trafficking scheme. It did not mention any employees of the club or of the management and talent agencies that facilitate its daily operations, let alone the individual plaintiffs in these appeals, who were not identified or pictured in the report." Thus, in context "the statement that Cheetah's was 'run by the mafia' could not reasonably have been understood to mean that certain unnamed individuals who do not work for Cheetah's but oversee its food, beverage and talent services are members of organized crime." Contrary to

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the dissent's assertion, the majority held that "the broadcast referred only to the club and failed to include sufficient particulars of identification in order to be actionable by an individual."

In this regard, the Court rejected the appellants' argument under the small group libel doctrine. Because the statements in the report did not describe "a particular, specifically-defined group of individuals who 'run' the Cheetah Club," the doctrine was inapplicable.

Defendants are represented by Anthony M. Bongiorno and Joseph F. Richburg of CBS and by Jay Ward Brown, Chad R. Bowman and Shaina Jones Ward of Levine Sullivan Koch & Schulz, LLP. Plaintiffs have been represented by a series of counsel, most recently by Rex Whitehorn, Esq. of Rex Whitehorn & Associates, P.C.

Single Publication Rule Applies to Edited Internet Articles

Immaterial and Unsubstantial Edits Do Not Retrigger Statute of Limitations

By Sarah Fehm Stewart

A New Jersey appellate court recently ruled that minor edits to an internet article, in particular edits that lessen the defamatory "sting" of the article, do not retrigger the statute of limitations. In *Petro-Lubricant Testing Labs. v. Adelman*, No. A-5214-14T4 (Super. Ct. App. Div. Oct. 19, 2016), a three-judge panel affirmed the lower court's grant of summary judgment to defendant Asher Adelman, creator of the website eBossWatch.com, finding that plaintiffs' defamation complaint was time barred, and that the statute of limitations was not retriggered by a later, edited version of the article.

Background

eBossWatch.com was created by Mr. Adelman as a website for job seekers to search workplaces and access information about "what it's really like to work there." On August 3, 2010, Mr. Adelman published an article on the website repeating allegations in a recently filed complaint by an employee of Petro-Lubricant Testing Laboratories, Inc. against the company and its owner, John Wintermute. The article described Wintermute as a "violent bully, a racist, and a womanizer who regularly brought guns to the workplace."

"If minor edits to an internet article could retrigger the statute of limitations, then the legislative purpose behind a short statute of limitations would be defeated."

In December 2011, after receiving a takedown demand, Mr. Adelman made minor edits to the article to "make it even more clear that our article is a factual reporting of the [employee's] complaint." In other words, Mr. Adelman's minor edits were intended to emphasize that the article was a fair report of an employee's complaint, and to diminish the defamatory sting of the article. To do so, Mr. Adelman slightly reworded certain paragraphs, changed the title from "'Bizarre' and Hostile Work Environment Leads to Lawsuit" to "Hostile Work Environment Lawsuit Filed Against Petro-Lubricant Testing Laboratories," and removed language to instead quote from the employee's complaint itself. The content and substance otherwise remained the same.

Petro-Lubricant and Wintermute filed a defamation complaint against Mr. Adelman in June 2012. On motion for summary judgment, the lower court found that the single publication rule did not apply to the December 2011 version of the article "as that rule applies to a mass

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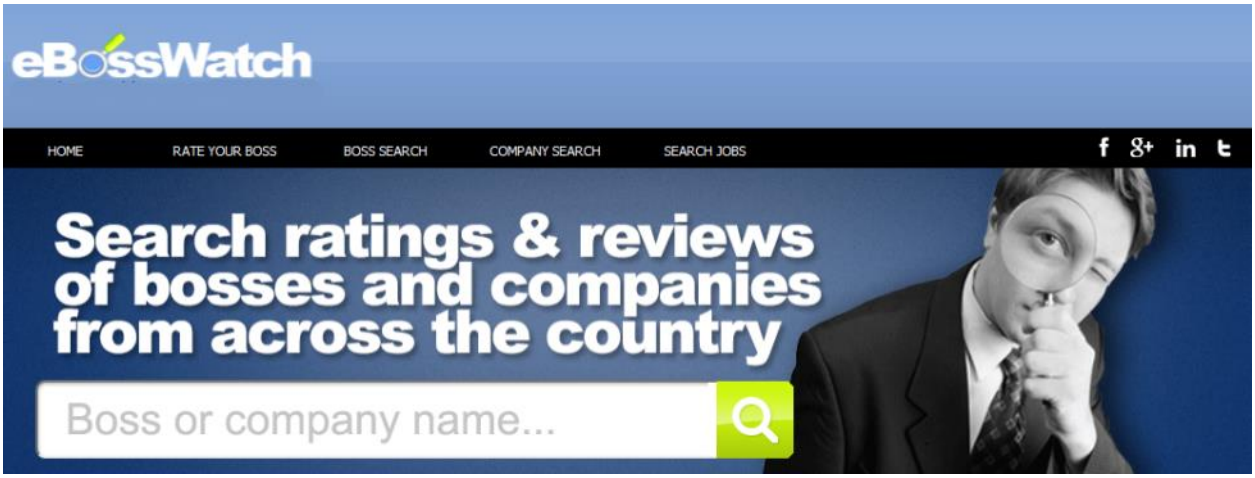

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distribution of the same material," but granted summary judgment on the basis that the article was a privileged fair report. (On an earlier motion for summary judgment, the lower court found that the statute of limitations had run as to the August 3, 2010 version of the article.)

Appeals Court Decision

On appeal, however, the appellate court found that the single publication rule did apply. Noting that "[c]ommunications posted on websites are viewed on a far wider scale than traditional mass media" and "are available for an indefinite period of time," the appellate court concluded as a matter of policy that if minor edits to an internet article could retrigger the statute of limitations, then the legislative purpose behind a short statute of limitations would be defeated. Relying on *Churchill v. State*, 378 N.J. Super. 471 (App. Div. 2005), the appellate court therefore held that the statute of limitations will only be retriggered if the edit "materially and substantially alters the content and substance of the article." Using this rubric, the appellate court found that the statute of limitations was not retriggered by Mr. Adelman's December 2011 edits.

The appellate court alternatively held that the statute of limitations should not be retriggered where a minor edit is intended to "diminish the defamatory sting" of the article. Stated differently, remedial measures intended to soften an article do not give libel plaintiffs a second bite at the apple.

In sum, while determination of whether an edit is "minor," "material" or "substantial" is necessarily fact-specific, *Petro-Lubricant* sets forth an instructive framework for an issue that will undoubtedly be litigated more frequently in years to come.

Sarah Fehm Stewart is an associate with Duane Morris LLP, in the firm's Newark, New Jersey office. Defendant was represented by Garen Meguerian, Paoli, PA. Plaintiff was represented by Mark G. Clark, Traverse Legal, Travis City, MI. Professor Eugene Volokh argued the case for amicus curiae The Reporters Committee for Freedom of the Press.

Judge: Newspaper can be Liable for Printing Records Provided by Government

Driver's Privacy Protection Act Applied to News Article

A district court judge in the Northern District of Illinois recently applied the federal Driver's Privacy Protection Act (DPPA) to an investigative news report to rule that a newspaper could be liable for printing an infographic that referenced physical characteristics of Chicago police officers used as lineup "fillers." *Dahlstrom v. Sun-Times Media, LLC*, No. 12 C 658, 2016 WL 5477889 (N.D. Ill. Sept. 29, 2016).

The DPPA makes it "unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record" unless a statutory exemption applies. 18 USC 2722 (a). After their union was denied injunctions against the *Chicago Sun-Times* in state court, the officers filed a federal complaint alleging that the newspaper violated the DPPA by obtaining their hair and eye colors, heights, weights, and approximate ages from the Illinois Secretary of State to include in the infographic.

A newspaper could be liable for printing an infographic that referenced physical characteristics of Chicago police officers.

The award winning report included the graphic to show how closely the police selected for the lineup resembled the politically-connected homicide suspect, Richard Vanecko, a nephew of then-Mayor Richard M. Daley. Although Vanecko was identified as throwing a fatal punch outside a Chicago bar, police quietly shelved their investigation after witnesses failed to pick him out of the curated lineup. Prompted by the Sun-Times's reporting, a special prosecutor was appointed (who also questioned why a lineup was necessary when police knew who threw the punch) and Vanecko eventually pled guilty and several officers pleaded the Fifth Amendment before the grand jury.

Judge Harry D. Leinenweber granted partial judgment on the pleadings after the Seventh Circuit held that the Complaint stated a claim under Rule 12(b)(6), *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 946 (7th Cir.), *cert. denied,* 136 S. Ct. 689, 193 L. Ed. 2d 519 (2015). The Seventh Circuit, at the behest of the Department of Justice, extended the DPPA definition of "personal information" to cover shared characteristics and held that courts could impose liability on the press if the extent of the public interest in the news report did not outweigh the privacy interests underlying the DPPA. The officers thereafter argued that the newspaper's citation to the Secretary of State as the source was dispositive.

In applying the balancing test to the officers' motion, Judge Leinenweber distinguished between initially obtaining information from the Illinois Secretary of State and subsequent publication of the infographic. The judge noted that the balance favored the Sun-Times as long as the Chicago Police Department opposed its Freedom of Information Act request but that it

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flipped once the Illinois Attorney General overruled the police to hold that Sun-Times could obtain the lineup photographs through FOIA.

The judge reasoned that the FOIA win on the photographs rendered the Secretary of State's release cumulative and diminished the value to the public in publishing the data. The judge did not, however, consider whether publishing cumulative information could incrementally intrude on the officers' privacy – the other side of the Seventh Circuit's balancing test.

Thus, the judge ruled that, even if the Sun-Times lawfully obtained the information, it could not legally publish it. This ruling (as well as the Seventh Circuit opinion) is significant because it marks a rare instance in modern jurisprudence where a court allowed the press to be punished for printing lawfully obtained and truthful information regarding matters of public concern.

The ruling is also significant because the judge did not apply *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (immunizing the press for publishing police disclosure of rape victims' identities) and other cases holding that the media can publish any information provided by government actors. The judge apparently did not consider it material that the Secretary of State was charged with interpreting the DPPA and had made the decision to provide the challenged information.

Finally, although the DPPA does not contain an express newsgathering exemption, it defers to exemptions created by State law. Judge Leinenweber decided that, despite the Seventh Circuit's broad reading of the DPPA definition for "personal information," he should narrowly construe the Illinois Vehicle Code's exemption for newsgathering regarding "operation of a motor vehicle *or* public safety" as limited to concerns relating to motor vehicles.

Sun-Times Media, LLC was represented by Damon E. Dunn and Seth A. Stern of Funkhouser Vegosen Liebman & Dunn Ltd. The Plaintiffs were represented by Sean C. Starr and Ronald Dahms of the Law Officers of Dahms & Starr.

CJEU: Magazine That Linked to Infringing Photo Can Be Liable

Hyperlinking at One's Own Risk

By Jens van den Brink and Joran Spauwen

The *GS Media* decision of 8 September 2016 is the latest chapter in the case law from the Court of Justice of the European Union ("CJEU") on hyperlinking and copyright. Some consider it a questionable outcome with drastic restrictions on the freedom to link, and consequently of the freedom of information. Others feel the *GS Media* decision is merely a logical consequence of CJEU's previous case law on the copyright holder's exclusive right to 'communicate his work to the public'. In any event, the decision has caused quite a stir, which may in part be due to the racy facts underlying this case.

Leaked Playboy Shots

In a nutshell, *GS Media* is the owner of the well-known 'shock blog' *GeenStijl.nl*, which in 2011 jumped on leaked nude shots for a Playboy spread featuring Dutch reality TV star Britt Decker. *GS Media* only included links to the pictures, which were initially published by a third party through a cyber locker service. Playboy's publisher in the Netherlands (*Sanoma*) sent multiple cease and desists, to which *GS Media* did not comply. Instead, new links were posted to other sources. *Sanoma* then took the case to court and requested damages and an injunction on the grounds that *GS Media* had not only acted unlawfully, but also infringed upon *Sanoma's* copyright by linking to its photos.

GS Media only included links to the pictures, which were initially published by a third party through a cyber locker service.

Hyperlinking under European Copyright

The *GS Media* case elaborates on the *Svensson* decision from 2014. CJEU, 13 February 2014, C□466/12 (*Svensson et al. /Retriever*). In that case, the Court of Justice of the European Union reached the controversial conclusion that posting a link qualifies as an *communication* within the meaning of 'communication to the public', thus satisfying the first element of the right exclusively reserved to the copyright holder under Article 3(1) of the EU Copyright Directive 2001/29. For example, the CJEU ignored the advice of the European Copyright Society of 15 February 2013, *Opinion on the Reference to the CJEU in Case C-466/12 Svensson.*

Nevertheless, the CJEU found that the second element, i.e. the required *public* was not there

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when links are posted. The Court based this on prior case law requiring that such a public would have to be *new* compared to the public that the copyright holder considered when posting the initial publication, i.e. the content to which the link resolves. The CJEU held that in both cases the public is one and the same, since both the link and the initial publication are available to the entire online public. CJEU, 13 February 2014, C□466/12 (*Svensson et al. / Retriever);* ground 27.

The *Svensson* judgment raised several questions. The consensus was that hyperlinking falls outside the scope of copyright. (In these proceedings, the Court of Appeal of Amsterdam still concluded that a link is not much different from a footnote in a book or an article in a magazine. See: Court of Appeal of Amsterdam, 19 November 2013, ECLI:NL:GHAMS:2013:4019 (*GS Media/ Sanoma et al.)*; ground 2.4.4.) Moreover, it was not clear whether the CJEU´s conclusion would have been different if the copyright holder had not considered any audience for the initial publication, most notably, when such a publication occurs without his permission. In the *Bestwater* judgment, rendered a few months after *Svensson*, such circumstances seemed to be at hand. (The BGH, which had already stated in its reference decision that there was no permission, came back to this later on; *Bundesgerichtshof*, I ZR 46/12 (Die Realität II)).

Again, the CJEU held that this was not a communication to the public. However, the CJEU appeared not fully conscious of the absence of permission for the initial publication. In any case it was not clear whether this had played a role.

Preliminary Questions *GS Media*

Not long after the *Svensson* and *Bestwater* decisions were rendered, the Dutch Supreme Court was asked to rule on the *GS Media* case. Both parties appealed to the Supreme Court

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after the Court of Appeal Amsterdam had found that *GS* Media acted unlawfully but did not infringe upon Sanoma's copyright. The Supreme Court considered the *Bestwater* judgment lacking in clarity and decided to ask preliminary questions in order to get a clear answer as to whether there is a new public if no permission has been given for the initial publication.

The New Reality of *GS Media*

The CJEU answered the questions in *GS Media* affirmatively and introduced several new, partly subjective, criteria to do justice to the various interests.

First, the Court rectified the impression created by the *Bestwater* judgment. If content is published online without permission of the rights holder, it cannot be said that the link to this content concerns the same (internet) public as intended by the copyright holder. However, this does not automatically imply that the placing of the link qualifies as a communication to the public.

The CJEU considers that it may be difficult to determine whether consent for the initial publication has been given, especially when it comes to individuals. When links are posted not for profit, it should be assumed that this is done without knowledge of the infringing character of the initial publication. Such links are therefore not infringing. According to the CJEU, this if different if the poster of the link is put on notice of the infringing nature of the initial publication. In that case knowledge generally does exist.

If content is published online without permission of the rights holder, it cannot be said that the link to this content concerns the same (internet) public as intended by the copyright holder.

For professional parties, or more specifically, parties that post a link for profit, the CJEU takes a different position. Such parties can be expected to carry out "*the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead.*" Therefore, the CJEU assumes that a party posting a link for profit should have knowledge of the infringing nature of the initial publication. This is presumptive evidence that can be rebutted. According to the CJEU, it was (already) established in these proceedings that *GS Media* placed the links for profit.

Consequences of Judgment Are Not So Bad/Quite Bad

The CJEU's reasoning seems heavily influenced by the facts of the case. The court possibly wanted to provide a course of action against *GS Media* in this matter under EU copyright law. It is not clear to what extent the far-reaching consequences were taken into account. In this respect, it especially relevant what the decision holds in store for online media.

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The CJEU devoted one paragraph to the legitimate conclusion that it may be hard to ascertain whether a link leads to an "illegal publication." The CJEU suggests that there may be sublicenses, or the contents of the site may change after the link has been posted. To this we add a number of obvious problems that were not mentioned in the decision:

- How can the 'necessary checks' be carried out? How can the linker be aware of the lawfulness of the contents on the initial publication? Does the site have to look reliable? Is it sufficient if the posted is a reputable party? Do such parties never infringe? Are websites expected to set up some sort of due diligence room for everyone who wants to link to their website – which sounds ridiculous, but in what other way could one diligently verify the consent for the initial publication?
- What if a license expires?
- What if the lawfulness of the publication of the works on the website depends on the circumstances (for example when copyright exceptions such as the right to quote apply), and what if those circumstances change?
- Normally a link refers to a page on which several works are published. Should the lawfulness of the publication of all those works be ascertained?
    - What if a link is given to a website with one or more subpages, on which a work is disclosed without the permission of the copyright holder. Does the linker still have a problem then? If not, where is the limit?

Are websites expected to set up some sort of due diligence room for everyone who wants to link to their website – which sounds ridiculous, but in what other way could one diligently verify the consent for the initial publication?

In its decision, although the CJEU recognizes the problem, it adds that this is a problem "*in particular for individuals.*" Apparently, for parties who place links for profit, this is not - or hardly - a problem. The CJEU does not explain this difference. Possibly, a party acting for profit can be expected to have more legal knowledge and professionalism. However, it is not about the linker, but about the lawfulness of the original publication. In our experience, a party acting for profit cannot gain access to the underlying licenses more easily than an individual. The for-profit linker is in fact burdened with an impossible task.

Further, it is not clear how the profit criterion should be applied. Obviously, *GS Media* is an online publisher seeking to make a profit, as all media do. However, this does not mean that all links on online media are posted for profit *per se*. Moreover, posting a link falls under the freedom of information, protected under Article 10 of the European Convention of European Right (and Article 11 of the Charter of the European Union). According to established case law

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the mere fact that *GS Media*, like almost all newspapers, broadcasters, comedians and artists, in the end indeed wants to make a profit, does not derogate from the protection offered to such parties by the freedom of expression. See, e.g., Cf. ECrtHR, 22 May 1990, NJ 1991/ 740 (Autronic v. Switzerland), and President Court of The Hague, 4 May 2011, ECLI:NL:RBSGR:2011:BQ3525 (Louis Vuitton/Plesner). Aside from some empty references to the freedom of expression, the CJEU does not explain how the freedom of speech is protected under this decision.

Naturally, it is possible that national courts (implementing the *GS Media* decision) will be lenient when answering the questions raised above. Furthermore, the freedom of information may have an overriding effect when it comes to applying this judgment in practice. After all, the European Court of Human Rights in *Ashby Donald* has confirmed that when enforcing copyright the interests of the copyright holder must be weighed against the interest of freedom of information. Perhaps *GS Media* will eventually evolve to a test that only prohibits hyperlinking to manifestly infringing content.

Nonetheless, regardless of any nuances the future might bring, the present judgment unmistakably has a *chilling effect*. Whoever posts a link can never rule out that he made a communication to the public of a work that was disclosed without consent, and has thus committed infringement. It seems to all boil down to the circumstances of the case. In practice one could say that from now on it is linking at one's own risk.

Jens van den Brink and Joran Spauwen are lawyers at Kennedy Van der Laan, Amsterdam, The Netherlands. Parts of this article were previously published in Dutch. Both GS Media and Sanoma are clients of the authors, who were (as a consequence) not involved in this case.

Federal Trade Commission Poised to Hold Brands and Influencers Responsible for Improper Native Advertising

By Brian J. Goodrich

Social media has brought about a paradigm shift in advertising. User-operated social media platforms have allowed control over brand messaging to shift from brands to consumers and other third-party social media users that influence the brand's messaging ("influencers"). In this new landscape, "native advertising," i.e. advertising content in untraditional forms, has thrived. Yet this new landscape also presents questions and challenges for regulators and brands alike in light of the Federal Trade Commission's ("FTC") position that traditional principles of advertising law apply to new forms of media.

The FTC's straight-forward position raises some not-so-straight-forward challenges. For example, who is to be held responsible when celebrities or YouTube personalities endorse a product without the brand's permission? Moreover, in recent years the marketing industry has seen the growth of third-party advertising networks that connect brands to networks of promoters with the goal of funneling leads to a brand's website. In this environment, one might wonder if traditional legal principles even allow the FTC reach those responsible for improper advertising, or whether the brand or media platform are the actors responsible for all down-stream advertising.

The Second Circuit's ruling serves to put marketing agencies on notice that they share in brands' liability for improper advertising practices.

Recent FTC enforcement actions and a recent FTC appellate victory shed some light on these questions. Discussed below, recent developments suggest that the FTC is poised to aggressively take on and hold liable *all* actors responsible for improper advertising on new media.

#influencerproblems

Social media platforms such as Twitter, Instagram, and Facebook allow brands to promote their products and services to a larger consumer base than ever before; these user-controlled platforms also, however, enable celebrities and other "influencers" to alter a brand's messaging by posting about a particular product or service. Moreover, posts by celebrities showcasing a particular product or service on their personal Twitter or Instagram accounts often come without any disclosures that the celebrity was in fact paid to do so, as is often the case.

This trend has not gone unnoticed by the FTC. At a recent summit co-hosted by Holland & Knight and the Word of Mouth Marketing Association, Mary Engle, Associate Director for

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Advertising Practices at the FTC, reminded attendees in her keynote address of the FTC's expectation that *all* celebrity promotions and native advertising be accompanied by prominent disclosures. This means, according to FTC guidance, prominently using hashtags such as #ad or #sponsored in a tweet or Instagram post. Associate Director Engle also stressed that brands should make a "good-faith effort" at achieving regulatory compliance for all promotional activity. Such an effort, Engle remarked, includes having in place a program to monitor all third-party marketing affiliates endorsing or promoting the brand's products or services.

Engle's remarks are echoed by recent FTC enforcement actions. In a recent settlement with Warner Bros. Home Entertainment Inc., the FTC alleged that Warner Bros. deceived customers when its marketing agency paid YouTube influencers to give Warner Bros. video games positive reviews without disclosing that the posters were paid for the review. The FTC action against Warner Bros. followed the FTC's suit earlier this year against Lord & Taylor, in which the FTC argued that Lord & Taylor violated the FTC Act by paying fashion influencers to post about its dresses on Instagram without disclosing that Lord & Taylor compensated the influencers.

Who Is Liable?

The FTC has successfully held brands liable for paying promoters to promote goods or services without ensuring proper disclosures. But, what about the promoters themselves? Until recently, it remained unclear whether the FTC could hold influencers or even marketing partners that operate networks of influencers liable for deceptive advertising content. A recent appellate victory, however, sheds some light on that question. In *F.T.C. v. LeadClick Media, et al.,* the U.S. Court of Appeals for the Second Circuit issued the first decision by a Court of Appeals holding the operator of an affiliate marketing network liable for deception by third-party marketers. LeadClick Media, LLC, an affiliate marketing network, recruited affiliate marketers that used fake news articles and advertisements on legitimate news websites to drive internet traffic to the website of LeanSpa, a weight-loss supplement.

The Second Circuit's ruling serves to put marketing agencies on notice that they share in brands' liability for improper advertising practices. Additionally, the ruling serves to foreclose a potential defense to such liability under the Communications Decency Act ("CDA"). In its opinion, the Court of Appeals rejected LeadClick's argument that it should not be treated as the "publisher" of the false new stories, which could have entitled it to immunity under § 230 of the CDA. The Court found such liability to be inappropriate because rather than providing neutral assistance to its affiliates, LeadClick directed its affiliates' use of false news articles and advertisements. The Second Circuit's Opinion will likely be a helpful took in the FTC's mission to hold liable all actors responsible for deceptive advertising.

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Takeaway: Ignorance is Not Bliss

While social media has provided new ways for brands to reach consumers, using it comes with a new set of obligations. The FTC's enforcement actions bear out its efforts to grapple with new forms of media, and hold all actors involved in "deception" liable for the alleged deceptive acts. To adapt to this new landscape, brands should monitor their products' promotion on social media to be sure that the brand is being promoted properly. Otherwise, the brand, influencers, and marketing affiliates may all find themselves with a new, unwanted follower on social media: an FTC enforcement team.