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# **Upcoming MLRC Events**

**November 11, 2015** 

MLRC Forum & MLRC Annual Dinner New York, NY

**November 12, 2015** 

DCS Annual Meeting New York, NY

**January 14, 2016** 

MLRC/Southwestern Entertainment and Media Law Conference Los Angeles, CA

# MEDIA LAW RESOURCE CENTER

# ANNUAL DINNER WEDNESDAY, NOVEMBER 11, 2015

# A Night at the Movies:

# Media Law & Ethical Issues in Recent Documentaries and Films

# **Marty Baron**

Executive Editor, The Washington Post; Former Editor, The Boston Globe;
Played by Liev Schreiber in "SPOTLIGHT",
a new movie about The Globe's coverage of the Boston Catholic priest sex abuse scandal

# **Erin Lee Carr**

Director, "THOUGHT CRIMES: THE CASE OF THE CANNIBAL COP"

# **Victor Kovner**

Davis Wright Tremaine LLP,
Attorney for "The Jinx: The Life and Deaths of Robert Durst"

# Laura Poitras (Invited)

Producer and Director,
"CITIZENFOUR"

2015 Academy Award Winner for Best Documentary Feature, about Edward Snowden

*Moderated by:* 

# Cynthia McFadden

Senior Legal and Investigative Correspondent, NBC News

(Excerpts of all Films Noted Above will be Shown)

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

Dinner at 7:30 P.M.

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

RSVP by Friday, October 23, 2015 Business Attire

# MEDIA LAW RESOURCE CENTER

# ANNUAL DINNER – WEDNESDAY, NOVEMBER 11, 2015

RSVP for Dinner by Friday, October 30, 2015

Reservations are not refundable for cancellations received after Monday, November 2, 2015

Firm/Organization:
Contact Person:
Address:
Phone: Fax:
E-mail:
Please reserve: Single seat(s) at \$450 each
Table(s) for 10 at \$4,500 each
Table(s) for 11 at \$4,950 each
Table(s) for 12 at \$5,400 each
Amount Enclosed for Dinner Reservations: \$
Please make checks payable to:
Media Law Resource Center, Inc. 266 W 37th Street, 20th Floor, New York, NY 10018
If you prefer to pay by credit card please go to our website, www.medialaw.org, and click on MRLC Annual Dinner. Please note that online payments will be 2.9% higher to cover credit card fees.
Dietary restrictions/requests:
In honor of the Media Law Resource Center's 35th Anniversary, the 2015 Dinner Program will include a special section of commemorative ads. Please see next page for Dinner Program ad details.

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

# MLRC DEFENSE COUNSEL SECTION 2015 ANNUAL MEETING

Thursday, November 12, 2015

Lunch will be served 12:00 NOON to 2:00 P.M.

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

# Proskauer Rose Eleven Times Square - Conference Room 2700

Visitor entrance is on the NE corner of 41st Street and Eighth Avenue.

Price per person: \$40.00

# **RSVP** by November 2, 2015

Reservations are not refundable for cancellations received after Friday, November 6, 2015.

We are required to submit a list of attendees prior to the event for security purposes so please send in your reservation as soon as possible!

### MEDIA LAW RESOURCE CENTER, INC.

266 W 37TH STREET — 20TH FLOOR NEW YORK, NY 10018

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For further information contact Debra Danis Seiden at dseiden@medialaw.org.

# MLRC DEFENSE COUNSEL SECTION

# **2015 ANNUAL MEETING**

\$40.00 per person includes lunch.

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

— OR—

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

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Address:		
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	Please list names of individuals attending below (print clearly)	
Name:	E-mail:	

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# From the Executive Director's Desk

# **London Conference a Rousing Success**

# And Back in America, 50-State Surveys to Come Out as E-Books

As I wing my way back across the ocean, it seems pretty clear, based on the enthusiastic audience participation and the reaction and reviews of our registrants, that this week's London Conference was – to use a favourite British adjective – a massive success. Perhaps best symbolizing its unique international flavor, of our 230 attendees – a record number – exactly half were from the U.S.; the other half were from the U.K., Continental Europe, Canada, Australia and elsewhere. This truly global mix enabled all attendees to interact and learn from others with different legal regimes

and cultures.

The Conference started with an exceptional reception thrown by Bloomberg at their snazzy London headquarters. The energy level was high as delegates renewed acquaintances from prior meetings and after summer vacations. That party was outdone only by the site of our Monday night reception – at the House of Lords. We drank champagne on a terrace of Parliament overlooking the Thames on a brilliant evening with a full moon staring at us and reflecting on the river.



Your author takes in moonlight on the Thames at the House of Lords reception.

Our party host, Hiscox, also had arranged for guided tours through Parliament, including stops in the chambers of the House of Lords and Commons, which provided us with some history to supplement our drinks. (One highlight was a desk in the middle of one of the chambers where a spot was somewhat rubbed out – according to our guide, because of Winston Churchill's fist-pounding during his speeches in the war years.)

I would be remiss if I didn't mention the hardy 24 of us who trekked out to Tottenham to see the hometown Hotspur upset highly-favored and world-class Manchester City 4-1. The stadium



Spurs v Man City playing at White Hart Lane

(Continued from page 7)

was an antiquated, bare-bones relic making Fenway Park look modern, but we sopped up the atmosphere, cheers and song while being inculcated with British culture.

Oh, and there was a Conference. It started with a home-run: joint keynote addresses by British barrister Geoffrey Robertson QC and NYU Professor Burt Neuborne. Robertson, in a smooth as silk elegant oratorical style, spoke on the 800<sup>th</sup> anniversary of Magna Carta: essentially, he said, it was largely irrelevant to current law, with its current importance magnified by the American Bar Association and its meaning artificially reinvented by some English advocates centuries ago. Neuborne, in a much different but equally intense and engaging style, argued that our founding documents, in particular the First Amendment, must be read not by looking at the text alone, but by considering it in the context of the entire Bill of Rights.

It was a tough act to follow, but our first panel, on hate speech in the aftermath of Charlie Hebdo, provided its share of fireworks. While the American position, well articulated by Robert Corn-Revere, is that any speech short of inciting imminent lawless action is defensible and can be evaluated in the marketplace of ideas, the European view was that bullying, insulting speech, particularly against powerless groups, is not worthy of much protection.

Next was a session where Australian and British judges openly opined on a variety of issues from cameras in the courtroom (they were generally for it) to defamation and the application of *New York Times v. Sullivan* in their countries (they said that recent rulings had moved the needle toward some sort of fault / did the media act responsibly standard, though still well short of *Sullivan* itself.)

After lunch came a panel at once depressing and fascinating: three women press advocates from India, Egypt and Turkey discussing criminal defamation, government censorship and other

(Continued from page 8)

forms of repression against journalists in their countries. It was an eye-opening account of the degree to which media law as we know it and the values of free speech are under attack in other corners of the world. Finally came a session of audience participation on a variety of digital and copyright issues led by our provocative facilitators.

The second day began with a session on where English defamation and privacy law are after the Levinson Inquiry, the phone hacking scandal and the recent Defamation Act. The principal speaker was Sir Alan Moses, a former Court of Appeal judge and now the Chair of IPSO, the independent regulatory body which most English newspapers have agreed could rule on retraction demands and the like. He was not so subtly sniped at by the leader of another

regulatory body that had no members and an editor from the Guardian which has not bought into the regulatory scheme.

The following two sessions consisted of a vetting exercise, along with newsgathering questions, of an article about a fictional FIFA official accused of taking bribes. (It turned out that fact had overcome fiction in that reality, as reflected in recent criminal allegations, was worse than the hypo.) But the 200-person workshop was unique in that it required the article to be reviewed from an American, U.K., and Continental European point of view, quickly bringing to the fore many of the differences between the countries: in Britain, most of the article couldn't run because of the rules against publication from the time of an arrest to the time of trial; in France, a photo of a public figure kissing in an open convertible on a public street would be an invasion of privacy; and in Germany there is absolute protection for journalist source material, including the identity of



**Group Discussion at the Law Society** 

confidential sources. The session helped lawyers understand media laws of other counties, something becoming more and more essential as so many media now publish and broadcast globally.

The coda was a fun session about the legitimacy and need of the British tabloids. The consensus was that they would be around for the foreseeable future, and that starkly showing the hypocrisy of celebrities, their stock in trade, was an ingrained and almost necessary part of British culture.

So, a huge mix of legal topics, skilled speakers and facilitators, a variety of program formats, zealous audience participation and, above all, perspectives from scores of countries around the world – from Hungary to Scotland and India to Bulgaria – made for an engaging, interesting

(Continued from page 9)

and informative Conference. The energy and charm of London didn't hurt. We hope to make the next London Conference even better when we do a reprise two years from now.

\* \* \*

We are very happy to announce that, starting in December, our very popular 50-state surveys will be coming out in eBook, as well as print, form. Even more useful, these digital versions of the book will have the capacity to directly link to the Lexis version of the many thousand cases cited in the books. We think this will greatly aid the many lawyers – particularly the few who are younger than I – who do most, if not all, of their research online. The first book to come out in these dual versions will be Libel 2015-16 which will be published in December.

This comes as a result of a 5-year agreement we have just signed with Lexis. The MLRC, through their contributors, will continue to provide the content for the books – 50-state surveys of Media Libel, Media Privacy, and Employment Libel & Privacy Law. Lexis will handle the printing of the traditional volumes as well as the digitization of the new eBooks, and will deal with the promotion, distribution and billing of both versions. This year's price will be the same as last year's, with our usual MLRC member discount – and we expect there will also be an additional discount for purchasers who buy both versions.

For the uninitiated, these books are research gems. They cover all relevant topics and issues in the titled topics via similar organizational outlines for each of the 50 states (as well as the District of Columbia, the federal circuits, the U.S. Territories, England and Canada). They cite thousands of cases, most of which will now be readable by just one click of the mouse. I shouldn't admit this, but back when I was doing briefs, I could write them by essentially using nothing other than one of our 50-state surveys and the cases cited therein. So to have them available online and with this linking capacity should make legal research far more efficient and maybe even pleasant.

I signed the contract with Lexis the day after Labor Day, minutes after we had our food and wine tasting for our Annual Dinner (no, I was not too inebriated to properly execute it). That culminated a lengthy but always amicable negotiation with Lexis. Having finalized the agreement, we now have already given them the content for the Libel volume and they have started to turn it into digital form. This accomplishment – and, I am confident, great benefit to our members – was a total team effort. Michael Norwick is the books' editor and is playing the lead role in the operations and implementation of the new publications; Jake Wunsch is working on the technical and digital details. Debby Seiden aided us in the negotiations with respect to budget reviews and finances. And Jeff Hermes and I worked as a team on the substantive legal negotiations. Look out for a more formal introduction to the eBooks at the Annual Dinner and for distribution in December.





NYU Law School Professor Burt Neuborne (left) and Geoffrey Robertson QC, Doughty Street Chambers, speaking at the MLRC London Conference on Magna Carta and interpreting the First Amendment



Are We Charlie? Free Expression After the Charlie Hebdo Tragedy panel (left to right): Giles Fraser (London), Robert Corn-Revere (Washington D.C.), Ralph Graef (Hamburg) and Clara Steinitz (Paris)

MLRC warmly thanks our London Conference sponsors – and all our moderators, panelists and delegates who made the conference a success.

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# Mug Shots Redux in the Sixth Circuit: 20 Year Battle Continues

# By Herschel P. Fink

The long and hotly contested issue of whether mug shots are public records under federal FOIA in the Sixth Circuit appears headed for *en banc* review in that Court.

On August 12, 2015, the Court affirmed a 2014 Eastern District of Michigan ruling in a third FOIA suit by the *Detroit Free Press* against the Department of Justice on that issue in a little more than 20 years. *Detroit Free Press v. DOJ.* The *Free Press* has won each skirmish.

The appeals court again ruled in favor of the newspaper in the most recent case, rejecting the DOJ's claim that criminal defendants had a privacy interest in preventing disclosure of their booking photos. The Court said in the latest case that it was required to follow a 1996 Sixth Circuit precedent (*Detroit Free Press v. Dep't of Justice*, 73 F.3d 93 (6<sup>th</sup> Cir. 1996), also in a case brought by the Free Press, which held that there is no privacy interest. But the latest decision questioned whether that precedent should be reexamined by the full court *en banc* in light of contrary decisions by the 10<sup>th</sup> and 11<sup>th</sup> circuits in 2011 and 2012.

# **Background**

In 1996 the *Free Press* won a decision in the Sixth Circuit affirming a 1994 district court opinion, which held that persons currently charged with federal crimes, who had already been indicted by a grand jury and had already appeared in open court, had no privacy interest under federal FOIA in release of their mug shots. Following the recent contrary decisions in the 10<sup>th</sup> and 11<sup>th</sup> circuits, however, the DOJ

Whether mug shots are public records under federal FOIA in the Sixth Circuit appears headed for en banc review.

unilaterally decided in December, 2012 that it was free to ignore the *Free Press* precedent, even in the Sixth Circuit.

The *Free Press* sued the DOJ again in early 2013, as it also had in 2005, when the DOJ also briefly refused to obey the Sixth Circuit precedent. The DOJ backed off when sued then, but refused to do so in 2013, resulting in a decision by the district court in favor of the *Free Press* in early 2014 upholding the precedent.

The DOJ appealed again to the Sixth Circuit, and sought an initial *en banc* review, notwithstanding that the Sixth Circuit had rejected *en banc* reconsideration in 1996. The court rejected initial *en banc* review on August 18, 2014, setting the stage for panel consideration, and the resulting August 12, 2015 opinion.

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### **Sixth Circuit Panel Decision**

In its latest decision, the Sixth Circuit stated that it was "constrained" to follow its 1996 holding, but "urge[d] the full Court to reconsider the merits of *Free Press I*" (the 1996 holding). Specifically, it said:

"Although we must follow Free Press I, see 6<sup>th</sup> Cir. R 32.1(b), we urge the full court to reconsider whether Exemption 7(C) applies to booking photographs. In particular, we question the panel's conclusion that defendants have no interest in preventing the public release of their booking photographs during ongoing criminal proceedings. See Free Press I, 73 F.3d at 97."

Because the 1996 panel had found that "no" privacy interest existed, it did not base its holding on whether, even if some privacy interest existed, a public interest would outweigh any such privacy interest. The 1996 opinion did, however, express the view in dicta that there would indeed be strong public interest, enough to outweigh a privacy interest. Similarly, the 2015 decision was not based on public interest, but it did question whether there would be sufficient public interest.

On September 25, 2015, the DOJ filed its anticipated Petition for Rehearing en Banc, and it is expected, given the panel's urging, that the Sixth Circuit will request a response from the *Free Press*, and likely take up the matter.

The Sixth Circuit proceedings are being closely watched by news organizations, as the DOJ had earlier pledged to not only seek the *en banc* reconsideration of the 1996 opinion, but to carry the battle, if necessary, to the Supreme Court. The DOJ in 1996, however, chose not to challenge in the Supreme Court the Sixth Circuit's refusal of *en banc* rehearing. It also actively opposed certiorari review by the Supreme Court to resolve the Circuit split in the 11<sup>th</sup> Circuit case of *Karantsalis v. Dep't of Justice*, 635 F.3d 497 (11<sup>th</sup> Cir. 2011), where it won a ruling that criminal defendants did have a non-trivial privacy interest in preventing disclosure of their mug shots. The great majority of state jurisdictions which have considered the issue have found, as did the Sixth Circuit in 1996, that there is no privacy interest in mug shots.

The *Free Press's* in house legal counsel is being joined in the *en banc* proceeding, and any resulting Supreme Court action, by the D.C. based appellate and Supreme Court practice group of Orrick, Herrington & Sutcliffe LLP, led in this case by Robert M. Loeb.

Detroit Free Press is being represented by Herschel P. Fink, its Legal Counsel, of Detroit, who also represented the paper in the 1994, 1996 and 2005 cases, and Paul McAdoo of Aaron Sanders PLLC of Nashville.

# DC Circuit Clarifies FOIA Public-Interest and News-Media Fee Waivers

# Decision Makes It More Difficult for Agencies To Deny Fee Waivers

# By Adrianna C. Rodriguez and Charles D. Tobin

A three-judge panel for the U.S. Court of Appeals for the District of Columbia Circuit rejected a lower court ruling under the Freedom of Information Act (FOIA) that had imposed burdensome requirements on a fledgling nonprofit's eligibility for public-interest or newsmedia fee waivers.

The Court of Appeals' decision in <u>Cause of Action v. Federal Trade Commission</u> – the first ruling in more than two decades to address the issue – will make it more difficult for agencies to deny fee waivers to the news media and other organizations serving the public's interest.

### **FOIA Fee Waiver Provisions**

FOIA generally permits an agency to charge reasonable fees for "document search, duplication, and review, when records are requested for commercial use." In several cases, however, including when disclosure of the information is in the public's interest or when the request is made by a representative of the news media, the requester may ask the agency to waive some or all of those fees.

# **Cause of Action's FOIA Requests**

Cause of Action, a nonprofit organization, made three FOIA requests to the Federal Trade Commission (FTC) beginning in August

2011. It sought fee waivers for each request on the grounds that it was: 1) a nonprofit education organization with no commercial purpose; or, in the alternative, 2) a representative of the news media.

In correspondence with the FTC, Cause of Action described reports that it planned to produce based on the analysis it planned to conduct with the requested records. The group also described how it would make the information available through its online newsletter, website, various social media accounts and press releases. It also pointed the FTC to its history of "extensive publication activities," including various articles published by other media outlets.

The first ruling in more than two decades to address the issue – will make it more difficult for agencies to deny fee waivers to the news media and other organizations serving the public's interest.

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The FTC denied Cause of Action's fee waiver applications, finding that the organization was not entitled to a public-interest fee waiver because it had failed to demonstrate that disclosure was "likely to contribute significantly to public understanding of the operations or activities of the government." The FTC also said Cause of Action was not entitled to a fee waiver as a member of the news media because the organization had not demonstrated an ability to disseminate information it obtained through its requests.

# **Cause of Action's Lawsuit Against FTC**

In May 2012, Cause of Action filed suit in the U.S. District Court for the District of Columbia challenging the FTC's denial of the fee waiver applications. The District Court upheld the FTC's denial and the organization appealed.

In a recent opinion, the U.S. Court of Appeals for the District of Columbia Circuit reversed the District Court's decision.

### Public-Interest Fee Waiver

The Court of Appeals rejected the District Court's holding that to qualify for a public-interest fee waiver, a requester must demonstrate "that the requested information would increase understanding of the public at large" and "identify several methods of disseminating the information, and provide some concrete basis upon which the agency can conclude that those methods are adequate to convey the requested information to a wide audience."

The Court of Appeals held that FOIA did not require either a showing that disclosure would increase the understanding of the "public at large" or the requester's ability to widely disseminate the information. Instead, that statute required only that release of the

The Court of Appeals rejected the District Court's holding that to qualify for a public -interest fee waiver, a requester must demonstrate "that the requested information would increase understanding of the public at large."

information would likely contribute significantly to public's understanding. "There is nothing in the statute that specifies the number of outlets a requester must have, and surely a newspaper is not disqualified if it forsakes newsprint for (or never had anything but) a website."

The Court also held that a finding that the information will primarily benefit the requester – as in this case where Cause of Action's second and third requests were made in preparation for litigation challenging the FTC's fee waiver denials – will not foreclose a requester from being eligible for a public-interest fee waiver, as long as the release of the information will contribute significantly to the public's understanding.

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### News-Media Fee Waiver

The Court of Appeals similarly rejected the District Court's determination that Cause of Action did not qualify for a fee waiver as a member of the news media.

A "representative of the news media" is entitled to a waiver of all but copying costs. 552(a) (4)(A)(ii)(II). To qualify, a requester must "(1) gather information of potential interest (2) to a segment of the public; (3) use its editorial skills to turn the raw materials into a distinct work; and (4) distribute that work (5) to an audience." The District Court held Cause of Action failed the last three prongs.

The Court of Appeals clarified with respect to the first two prongs that the exemption focuses on the requester, not the nature of the request, and thus, how much interest there is in a story will not prevent a requester from qualifying for a fee waiver as a representative of the news media.

With respect to the third prong, the Court of Appeals rejected the District Court's formulation, which required Cause of Action to "demonstrate that it would use information from a range of sources to independently produce a unique product." The Court held that even a press release or editorial comment based on the records obtained would suffice as a "unique product" and that FOIA did not require a requester to gather and use information beyond that obtained through the request to create its product.

With respect to the fourth and fifth criteria, the Court of Appeals held that the District Court's requirement that a requester demonstrate both "that it has the intent and ability to disseminate the requested information to the public rather than merely make it available" and "that its operational activities are especially organized around doing so" imposed greater burdens on requesters than FOIA required.

Specifically, the Court held that FOIA does not specify what size audience a requester must have, nor an established track record of publication – the firm plans of a new organization, such as Cause of Action, to publish a newsletter in the near future could suffice. "An entity with an extensive record will ordinarily qualify with only a thin recital of its plans (or perhaps none at all," the Court stated. "Conversely, an entity with little or no historical record of distributing its work ... may make up for that absence by concretely setting out its plans to do so."

Additionally, the Court of Appeals found no basis in FOIA to require organizations to show that their "activities are organized especially around dissemination" of its work. Merely distributing its work to media outlets who then reach the public could suffice.

The Court remanded the case for reconsideration of Cause of Action's entitlement to a public-interest or news-media fee waiver in light of its decision.

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### **Impact On Pending And Future FOIA Requests**

While the FOIA establishes fee waivers when disclosure of the information is in the public's interest or when the request is made by a representative of the news media, agencies have discretion, in the first instance, to determine whether a requester qualifies for those exemptions. To this end, many agencies have adopted regulations interpreting the statute and setting forth the parameters they weigh in determining whether a requester qualifies.

For example, in this case, FTC regulations required that to qualify for a public interest waiver an organization show that "disclosure is likely to contribute to the understanding of the public *at large*, as opposed to the understanding of the individual requester or a narrow segment of interested persons."

The FTC's regulation also narrowly defined "a representative of the news media" who could qualify for a fee waiver as only those persons who gathered news "for an entity that is *organized and operated to publish or broadcast news* to the public." That definition, which was amended after Cause of Action filed suit to reflect later amendments to the FOIA, often resulted in the exclusion of new media, such as online-only publications, and so-called "middlemen" that collect information for news media organizations to disseminate.

The FOIA, itself, does not contemplate either of the limitations set forth in the FTC's regulations.

The Court of Appeal's decision made clear that, as written in the FOIA, the public interest and news media fee waiver provisions are meant to facilitate the dissemination of information that is in the public's interest to access. Agencies' interpretation of the statute cannot function as a barrier by limiting access to fee waivers for qualifying entities. The Court's decision also made clear that the fee waiver provisions in the FOIA were not limited to traditional news outlets or organization with a brick-and-mortar presence. As a result, it will be more difficult for agencies to deny waivers to fledgling or smaller organizations that are just beginning to establish a following.

The decision will also have an important and far reaching impact on access for new media organizations and citizen journalists who have flourished in recent years. These newsgatherers often operate on shoe-string budgets and maintain a web presence as their primary – or in some cases, exclusive – outlet. Many also gather information, not to disseminate themselves, but to pass on to traditional media organizations. These newsgatherers had found it increasingly difficult in recent years to meet the restrictive qualifications set forth in agency regulations for fee waivers. As a result of the Court's decision, these newsgatherers should find less barriers to qualifying for fee waivers in the future.

Charles D. Tobin is a partner, and Adrianna C. Rodriguez is an associate, with the Washington, D.C., office of Holland & Knight LLP.

# **Appellate Court Affirms Limited Nature of New York's Right of Publicity Statute**

Use of Video Clip in Comedy Segment Not for "Advertising or Trade"

# **By Rachel Strom**

A New York appellate court recently affirmed the dismissal an action against Jimmy Kimmel and ABC, Inc. arising out of the use of a video of plaintiff during a segment of the Jimmy Kimmel Live! show. *Sondik v. Kimmel*, 2013-07373 (2d Dep't. Sept. 9, 2015).

The court rejected plaintiff's attempts to apply California law to his claims, although the segment was prepared in California. Under New York law, the court found, plaintiff could not state a claim for the unauthorized use of his

likeness as the use of his image in a comedy segment was not used for "advertising or trade purposes" and, in any event, the use fell within the "public interest" exception to Sections 50 and 51 of the New York Civil Rights Law.

# **Background**

Plaintiff Daniel Sondik, a Brooklyn resident, who refers to himself as the "Flying Rabbi," become a minor Internet



sensation through numerous YouTube videos depicting him antically singing, chanting and proselytizing to people on the streets of Brooklyn. Among the videos of plaintiff on YouTube is one showing him looking into the camera through the window of a car while he animatedly sings, chants and gesticulates alongside the car.

In August 2010, it was widely reported that basketball star LeBron James had hired a rabbi who spoke only in Hebrew, Yishayahu Yosef Pinto, to provide business advice in connection with a merchandising deal. On August 11, *Jimmy Kimmel Live!* spoofed this news item in a short segment. Kimmel told some jokes about LeBron James and his meeting with the rabbi finding it humorous that the Rabbi spoke "only Hebrew" and James spoke "only not Hebrew," and then set up a video spoof by saying facetiously that "[a]t one time, I actually consulted with the rabbi myself."

(Continued from page 19)

What followed was a just over 30-second video portraying a supposed meeting at which Kimmel, sitting in a car, drolly received "business" advice from a rabbi he too could not understand – the YouTube clip of Sondik, who is shown alongside the car as seen through the car window. As a result of the editing the two clips together, Kimmel appears to be listening to Sondik's singing and chanting, and interacting with him by making comments such as "yeah that's true" and "yeah, I think you're right. Thanks, man."

The plaintiff brought suit, contending that defendants' video made use of his image without permission and made him "look foolish." His complaint alleged causes of action for unauthorized use of his likeness in violation of Section 51 of the New York Civil Rights Law, California Civil Code Section 3344, and under California common law, and claims for unjust enrichment and breach of the YouTube terms of use.

Defendants moved to dismiss all claims, contending that plaintiff had failed to state a valid claim because his likeness had not been used for advertising or purposes of trade within the meaning of Section 51, California law was inapplicable (and defendants did not in any event violate California law), the unjust enrichment claim was preempted by Section 51, and plaintiff lacked standing to assert a violation of YouTube's terms of use. The trial court granted the motion and dismissed the action, finding that under easily determ that plaintiff or the court plaintiff or the court granted the motion and dismissed the action, finding that under easily determ that plaintiff or the court plaintiff or the court granted the motion and dismissed the action, finding that under easily determ that plaintiff or the court granted the motion and dismissed the action, finding that under easily determ that plaintiff or the court granted the motion and dismissed the action, finding that under easily determ that plaintiff or the court granted the motion and dismissed the action, finding that under that plaintiff or the court granted the motion and dismissed the action, finding that under that plaintiff or the court granted the motion and dismissed the action, finding that under the court granted the motion and dismissed the action, finding that under the court granted the motion and dismissed the action, finding that under the court granted the motion and dismissed the action, finding that under the court granted the motion and dismissed the action, finding that under the court granted the motion and dismissed the action granted the motion granted granted granted g

Once the court reasoned that New York law applied, it easily determined that plaintiff did not have any viable claim.

### **Choice of Law**

law. Plaintiff appealed the dismissal of all claims, except for the

breach of the YouTube terms of service.

At the appellate level, plaintiff argued that California law should apply to his claims because the segment was edited and produced in California. He also argued that his place of domicile should not control because he was so simple minded he could not fully comprehend how his image was used and his reputation tarnished. He argued that like little children, the law should offer him extra protection because he was not able to comprehend what the defendants had done to him.

Defendants argued that the choice of law analysis was rather straight forward: right of publicity or right of privacy claims are governed by the law of the domicile of the person claiming the right—in this case, New York.

The court agreed, explaining that "New York uses an interest analysis, [u]nder which 'the law of the jurisdiction having the greatest interest in resolving the particular issue' is given controlling effect." When laws regulate conduct," the law of the place of the tort 'almost invariably obtains' because 'that jurisdiction has the greatest interest in regulating behavior

(Continued from page 20)

within its borders." (citation omitted). Where as here, the plaintiff and defendant are domiciled in different states, "the applicable law in an action where civil remedies are sought for tortious conduct is that of the situs of the injury." Following these principles, the court reasoned "the law of New York, where the alleged injury or damage occurred, applies. Although the alleged tortious conduct, the editing of the video clip, occurred in California, the plaintiff's alleged injury occurred in New York, where he is domiciled and resides. Moreover, New York is the state with the greater interest in protecting the plaintiff, its citizen and resident."

# **Right of Publicity Claim**

Once the court reasoned that New York law applied, it easily determined that plaintiff did not have any viable claim.

In support of his claim for violation of Section 51 of the Civil Rights Law, plaintiff alleged that defendants used his image and "took words that [he] had spoken in one context, and turned them into the butt of a joke in another context," and did this without consent. Plaintiff also bemoaned that Mr. Kimmel's lead-in to the video wrongly identified him as Rabbi Pinto. He argued that the law should not allow Mr. Kimmel to callously make fun of someone who was clearly feeble minded.

The court rejected all of these contentions, finding that the Sections 50 and 51 claims failed because plaintiff's image "was not used for advertising or trade purposes." In any event, the Court found that the use would fall into the "public interest" or newsworthy exception to Section 50 and 51.

### **Other Claims**

The court similarly gave short shrift to plaintiff's remaining claims, finding that because Sections 50 and 51 displace any common-law privacy right or other non-statutory claims relating to the unauthorized use of a person's likeness, plaintiff had no cause of action for unjust enrichment.

Jimmy Kimmel, American Broadcasting Companies, Inc. and ABC, Inc. were represented by Robert Penchina and Rachel Strom of the New York office of Levine Sullivan Koch & Schulz, LLP and by Michael Beylkin of the Colorado office of Levine Sullivan Koch & Schulz, LLP. Plaintiff was represented by Robert Tolchin of The Berkman Law Office, Brooklyn, NY.

# **Sleepy Yankee Fan Loses Libel and Privacy Claims**



A Bronx judge recently dismissed libel and privacy claims brought by a Yankee fan who sued after he was mocked on-air for falling asleep in the midst of a tense Yankee vs. Red Sox game. *Rector v. Major League Baseball Advanced Media, ESPN New York et al.*, No. 303630/2014 (N.Y. Sup. Aug. 17, 2015) (Rodriguez, J.).

During a 2014 broadcast, ESPN commentators John Kruk and Dan Shulman poked fun at plaintiff, saying among other things "What's the deal with this guy?" and "We gotta see how long this guy's out for." A video clip of the incident was later posted to MLB.com and YouTube attracting thousands of views.

Plaintiff <u>sued for libel, false light, and emotional distress</u> and requested \$10 million in damages, alleging that defendants implied:

- Plaintiff is unintelligent and stupid individual.
- Plaintiff is not worthy to be fan of the New York Yankee
- Plaintiff is a fatty cow that need two seats at all time and represent symbol of failure.
- Plaintiff is a confused disgusted and socially bankrupt individual.
- Plaintiff is confused individual that neither understands nor knows anything about history and the meaning of rivalry between Red Sox and New York Yankee.
- Plaintiff is so stupid that he cannot differentiate between his house and public place by snoozing throughout the fourth inning of the Yankee game.

(Continued from page 22)

Defendants moved to dismiss attaching a copy of the broadcast to the motion.

# **Opinion of the Court**

Granting the motion to dismiss, the court agreed that nothing defendants said was false or defamatory. Crowd shots at baseball games are traditional and at worst defendants comments were hyperbolic. Moreover, nothing in the broadcast amounted to "extreme and outrageous conduct."

Objectionable statements about plaintiff were made online by third parties. Plaintiff argued that defendants "set the stage" for these remarks. But the court found no legal authority to hold defendants liable for such third party statements.



# **MEDIA LIBEL LAW 2014-15**

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# Federal Court Dismisses Lawsuit Alleging Journalists Hacked Plaintiff's Computers

# Computer Fraud and Abuse Act and Stored Communications Act Claims

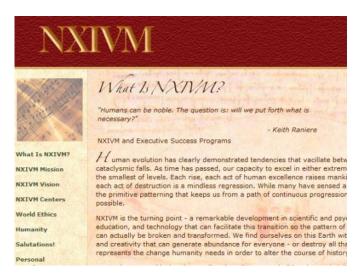
# By Thomas B. Sullivan

Last month, Judge Lawrence E. Kahn of the Northern District of New York dismissed claims involving allegations that reporters and others had accessed the password-protected website of a controversial corporation without authorization, finding that the plaintiff had failed to file its complaint within the required statute of

limitations period. *NXIVM Corp. v. Foley et al.*, No. 14-cv-1375 (LEK/RFT) (N.D.N.Y. Sept. 17, 2015).

### **Background**

NXIVM Corporation is a for-profit corporation based in Albany, New York, which was founded in 1988 by Nancy Salzman and Keith Raniere. NXIVM purports to be an executive training program, charging thousands of dollars to clients to attend seminars designed to



Screenshot of plaintiff's website.

improve communications skills, memory, and decision making. However, others have alleged that NXIVM is a cult-like entity tightly controlled by Raniere. NXIVM has filed a number of lawsuits against former members and others critical of the group.

Over the years, a number of journalists covered NXIVM, its leadership, and its members. *Times Union* investigative and political reporter James Odato began reporting about NXIVM in 2007. In 2012, the *Times Union* published Odato's four-part series on the group, titled "Secrets of NXIVM," which detailed, among other things, a plan by Raniere to create his own country, claims that Raniere did not drive "because his intellectual energy sets off radar detectors," and allegations that Raniere had perpetuated psychological and sexual abuse. In 2010, *Vanity Fair* published contributor Suzanna Andrews's article "The Heiresses and the Cult." The article described how two Seagram's heiresses had paid for over \$150 million in NXIVM expenses. Blogger and NXIVM critic John Tighe was the creator of the site "Saratoga in Decline." In August 2011, he posted online NXIVM's client list.

(Continued from page 24)

On October 22, 2013, NXIVM filed a lawsuit under seal in the Western District of New York, alleging that Odato, Andrews, Tighe, former NXIVM member Toni Foley, and former NXIVM legal adviser Joseph O'Hara had violated the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (the "CFAA"), and the Stored Communications Act, 18 U.S.C. § 2701 (the "SCA"). The statutes create a private cause of action against a person who intentionally accesses a computer or a facility through which an electronic communication service is provided without authorization.

The complaint was unsealed and served on the defendants in August 2014. On September 30, 2014, Odato and Andrews moved to dismiss all claims against them on the grounds that they were untimely. NXIVM subsequently consented to the transfer of the action to the Northern District of New York. O'Hara later filed a letter motion seeking dismissal on the same grounds.

# The Court's Opinion

A claim under the CFAA must be made "within two years of the date of the act complained of or the date of the discovery of the damage," whichever is later. 18 U.S.C. § 1030(g). Similarly, a plaintiff must bring a SCA claim within "two years after the date upon which the claimant first discovered or had reasonable opportunity to discover the violation." *Id.* § 2707(f). In an August 2015 opinion, the Second Circuit clarified that the limitations period for a CFAA claim runs from when a plaintiff learns that the integrity of its account has been impaired, and the period for a SCA claim runs from when a

Others have alleged that NXIVM is a cult-like entity. NXIVM has filed a number of lawsuits against former members and others critical of the group.

plaintiff discovers, "or has information that would motivate a reasonable person to investigate," unauthorized access. *Sewell v. Bernardin*, 795 F.3d 337, 340 (2d Cir. 2015).

Because NXIVM's complaint was filed on October 23, 2013, any unauthorized access which was discovered, with respect to the CFAA, or which NXIVM had a reasonable opportunity to discover, with respect to the SCA, before October 23, 2011 would be untimely. Slip op. at 14. The court noted that though the complaint was "generally specific and detailed," its allegations as to when NXIVM discovered the alleged unauthorized access to its website were extremely vague, stating only that this occurred in "late 2011."

The vagueness of the pleading, the court found, limited its ability to draw inferences in NXIVM's favor as to the timeliness of its claims. *Id.* However, the court stated, the complaint did allege that NXIVM placed great importance on maintaining the confidentiality of its site and that it was aware that various defendants possessed material that was contained only on the site. *Id.* at 14-15. Specifically, Odato's 2007 article included the fact that he had obtained a

(Continued from page 25)

copy of NXIVM's client list. Tighe made a blog post in August 2011 containing a copy of NXIVM's list of coaches, and had attended the group's private events in 2010 and 2011 which he could only have obtained information about through the website's calendar section. *Id.* at 15.

The court noted that NXIVM did not allege that it suspected this information came from a source other than the website and offered no explanation about why its IT staff did not investigate after the journalists' pieces were published. *Id.* at 15. Therefore, the court found that because NXIVM had a reasonable opportunity to discover the access outside of the limitations period, its SCA claims were untimely. *Id.* at 15-16.

The court analyzed the CFAA claims separately. In addition to the facts supporting dismissal of the SCA claim, the court accepted Odato's argument that it could take judicial notice of September 2011 testimony in an unrelated bankruptcy proceeding, as it was taking the statements made therein not for the truth of the matter asserted but only to show NXIVM's awareness of a potential breach. *Id.* at 18-19. In the bankruptcy case, NXIVM's counsel had accused the debtor of providing O'Hara with access to its website, including the client list and calendar contained therein. A NXIVM board member also testified in the case that she was aware that Tighe had obtained a copy of the client list from the group's website. *Id.* at 17-18.

Therefore, the court concluded, NXIVM had knowledge of unauthorized access to the website by two defendants in this action at least one month outside of the statute of limitations period, making the CFAA claims also time-barred. *Id.* at 18. The court rejected NXIVM's argument that the court was inappropriately using the statements to contradict the allegations of the complaint, finding that it was instead using the testimony to clarify NXIVM's vague allegation that it discovered the access in "late 2011." *Id.* at 19.

Having dismissed the CFAA and SCA claims against Odato, Andrews, and O'Hara, the court then *sua sponte* dismissed the same claims against Foley and Tighe as well, finding that those claims were equally untimely. *Id.* at 20. It declined to exercise supplemental jurisdiction against the remaining state law claims against O'Hara, Foley, and Tighe and dismissed the complaint.

Times Union reporter James Odato was represented by David Schulz and Thomas Sullivan of Levine Sullivan Koch & Schulz, LLP's New York office, along with Nabiha Syed and Julie Ehrlich, both at the time associated with that firm. Vanity Fair contributor Suzanna Andrews was represented by Michael Grygiel and Cynthia Niedl of Greenberg Traurig LLP's Albany office. "Saratoga in Decline" blogger John Tighe was represented by Donald P. Ford, Jr. of Thuillez, Ford, Gold, Butler & Monroe, LLP in Albany. Former NXIVM client Toni Foley was represented by William Dreyer and Lauren Owens of Dreyer Boyajian LLP in Albany. Former NXIVM legal adviser Joseph O'Hara represented himself. Plaintiff was represented by Michael Wolford and Laura Myers of The Wolford Law Firm LLP of Rochester and Pamela Nichols of O'Connell & Aronowitz of Albany.

# Washington Court Denies Backpage.com's Section 230 Motion to Dismiss

# Plaintiffs Sued Website for Sex Trafficking

# By Ambika Kumar Doran and Tom Wyrwich

Although overwhelming authority affords websites broad immunity for content supplied by third parties under Section 230 of the Communications Decency Act, 47 U.S.C. § 230, the Washington Supreme Court has held a plaintiff may evade the statute's protections by alleging a website's posting rules are "designed... to induce" illegal conduct, even where the plaintiff admits the content at issue was authored by third parties. *J.S. v. Village Voice Media Holdings*, *LLC*, 2015 WL 5164599 (Sept. 3, 2015).

Interpreting Section 230 for the first time, the court affirmed the denial of a motion to dismiss brought by Backpage.com against claims it was responsible for the sex trafficking of minor victims who alleged they were advertised on the website by adult pimps.

### **Background**

Section 230 prohibits the government from treating websites and other online service providers "as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). It also prohibits holding any such provider liable for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider... considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." *Id.* § 230(c)(2)(A). Finally, the statute contains an express preemption clause that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3).

In *J.S.*, three minors alleged they were abused by adult pimps who prostituted them. They claimed Backpage.com was responsible for the harm they suffered because the pimps posted ads about them on the Backpage.com website. The plaintiffs admitted Backpage.com did not author the ads. They nonetheless claimed Backpage.com was the "information content provider" of the ads based on its posting rules, which prohibit "solicitation... for any illegal service exchanging sexual favors for money or other valuable consideration," "any material on the Site that exploits minors in any way," and "any material ... that in any way constitutes or assists in human trafficking." *J.S.*, 2015 WL 5164599, at \*11. These rules, the plaintiffs alleged, "were designed to help pimps develop advertisements that can evade the unwanted attention of law enforcement, while still conveying the illegal message." *J.S.*, 2015 WL 5164599, at \*12.



(Continued from page 27)

Backpage.com brought a motion to dismiss under Washington's equivalent of Fed. R. Civ. P. 12(b)(6), and the trial court denied the motion.

## **Washington Supreme Court Decision**

After accepting direct review of the decision, the Washington Supreme Court concluded that "[t]aking the complaint as true, as we must at this point, we find that the plaintiffs have alleged sufficient facts that, if proved, would show that the defendants helped to produce the illegal content and therefore are subject to liability under state law." *Id.* at \*1. The Court appeared to find Section 230 immunity applies only to websites with "neutral policies prohibiting or limiting certain content," and held the plaintiffs had adequately alleged Backpage.com "did more than simply maintain" such policies.

The Court's unusually short opinion discussed few cases interpreting Section 230, even though the vast majority of them have afforded broad protection to websites that host content admittedly authored by third parties. For example, in 2009, a federal court in Illinois dismissed claims by the Cook County sheriff that Craigslist created a public nuisance and aided and abetted prostitution by inducing users to post prostitution ads. *See Dart v. Craigslist*, 665 F. Supp. 2d 961, 968-69 (N.D. Ill. 2009). In *Dart* the court held even if users "routinely flout Craigslist's guidelines," Craigslist had not caused them to do so, except "in the sense that on one could post [unlawful content] if craigslist did not offer a forum," and that Section 230 "would serve little purpose if companies like Craigslist were found liable under state laws for 'causing' or 'inducing' users to post unlawful content." *Id.* at 967, 969.

In *M.A. v. Village Voice Media Holdings*, LLC, 809 F. Supp. 2d 1041 (E.D. Mo. 2011), a minor sex trafficking victim alleged Backpage.com "creat[ed] a highly viewed website" with "adult sex focused categories"; used "posting rules and limitations which ... create the veil of legality"; "had knowledge" that "postings ... were advertisements for prostitution," including for "numerous minors"; and "had a desire that these posters accomplish[] their nefarious illegal prostitution activities so that the posters would return to the website and pay for more posting."

(Continued from page 28)

Id. at 1044-45. The court rejected these arguments, held Backpage.com immune under Section 230, and dismissed the case. See also Jones v. Dirty World Entertainment Recordings LLC, 755 F.3d 398, 414 (6th Cir. 2014) (rejecting claims premised on assertion that website "encouraged" unlawful content; websites cannot be sued on an "encouragement" theory because that would "eclips[e] the immunity from publisher-liability that Congress established.").

# **Dissenting Opinion**

Three of the Washington high court's nine justices dissented. They reasoned that because the complaint "clearly alleges that another content provider, not Backpage, provided the content for the advertisements, J.S. thus seeks to hold Backpage liable as a publisher or speaker of that information." *Id.* at \*10. They also wrote that even if Backpage had designed its posting rules to induce sex trafficking, "adopting such posting rules still does not make Backpage a 'content provider' within the meaning of the CDA." *Id.* at \*18. Although Washington has refused to adopt the more rigorous federal pleading standard established by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the dissent held that even under the state's relaxed standards, the Court need not to accept the plaintiff's *legal conclusions* —e.g., that Backpage "developed" the content at issue—as true. *Id.* 

The dissent concluded:

This case does not ask us to decide whether pimps should be able to traffic our children without consequence. The answer to that question is certainly no. And this case does not ask us to decide whether third party accomplices or coconspirators should be able to escape criminal prosecution for human trafficking and child rape. The answer to that is also a resounding no. Instead, the question before us is whether the CDA, a federal statute, shields this defendant from this state law claim. Using settled principles of statutory interpretation, the CDA compels me to conclude that the answer to that question is also no. J.S. fails to allege facts sufficient to prove that Backpage was a content provider as opposed to a service provider. Thus, subsection 230 (c) immunizes Backpage from liability for J.S.'s claims. And subsection 230

(c) trumps conflicting state law.

*Id.* at \*27.

Ambika Kumar Doran is a partner and Tom Wyrwich an associate at Davis Wright Tremaine LLP in Seattle, WA. Davis Wright Tremaine represented Backpage.com in J.S.

# Update: S.D.N.Y. Limits Reach of TVEyes Fair Use Ruling

# Not All Media Monitoring Functions Covered By Fair Use

# By Judith A. Endejan

TVEyes monitors and records all content broadcast by more than 1400 television and radio stations 24 hours a day, 7 days a week. It then transforms this content into a searchable database for subscribers who pay \$500 a month for the service. Fox News Network LLC sued TVEyes for copyright infringement for this core service. Approximately a year ago, a federal court in New York found that the core business of TVEyes was protected by the fair use doctrine. *Fox News Network LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379 (S.D.N.Y. 2014) (Hellerstein, J.).

But on August 25 of 2015, the court issued a mixed ruling with respect to four features of the service. *Fox News Network LLC v. TVEyes, Inc.*, 2015 WL 5025274 (S.D.N.Y.) (Aug. 25,

2015). In 2014, Judge Hellerstein reserved judgment on whether TVEyes' archiving, emailing, downloading, and date/time search features were protected by the fair use doctrine. He allowed the parties to conduct discovery on those features and both sides filed motions for summary judgment on the fair use issue for the four complementary features.

TVEyes has won the war but lost several battles over whether supplemental functions can qualify as fair use.

# **Fair Use Analysis**

With respect to archiving, the court found that the ability to archive video clips is integral to TVEyes' core business and thus is fair use, complementing TVEyes' searching and indexing functions. This archiving feature allows a user to "archive" a clip that has been stored on TVEyes' servers for later examination. It enables researchers to study Fox News' coverage of an issue and compare it to other coverage by other stations. It serves a fundamental democratic purpose and should be protected from claims of copyright infringement.

With respect to the second function, emailing and sharing, the court found that these cannot be considered fair use without the development of reasonable and adequate protections on the subscriber's ability to share video clips. The court acknowledged that the emailing and sharing capability <u>could</u> be fair use, for instance, when sharing video clips are shared with members of Congress who rely on TVEyes to be made aware of what the media has to say about the issues of the day.

(Continued from page 30)

However, the TVEyes' sharing capability provides a substantial potential for abuse by enabling indiscriminate sharing between parties who have no need to know the information contained in the shared clip. Hence, the court placed the burden on TVEyes to put in place protections to prevent against this abuse and it would not rule at this time as to whether this second function is protected by fair use.

With respect to downloading, the court found that this function goes well beyond TVEyes' transformative services of searching and indexing. The downloading function allows a subscriber to identify a clip and download it to his computer for offline viewing. While convenient, the downloading function is not integral to TVEyes' transformative purpose. Downloading poses undue danger to content owners' copyrights because it allows subscribers to download unlimited clips for free distribution elsewhere. Hence—no fair use for this function

Finally, the court also found that the date/time search function is not integral to TVEyes' core service. The court found that the date/time search function duplicates Fox's existing functionality and therefore would likely cannibalize Fox News' website traffic and sales by its licensing agents. TVEyes could not show that Fox would not be harmed, so it failed in carrying its burden of proving fair use for this function.



In sum, TVEyes still has won the war but lost several battles over whether supplemental functions can qualify as fair use. The case remains alive, however, as the court ordered the parties to propose a schedule for TVEyes to develop the protective measures needed for emailing and sharing to be protected by fair use. The court sustained only those services that it found truly essential to the TVEyes core business and protected the features only to that extent. Fox was able to show harm to its derivative businesses with respect to the date/time search function so TVEyes lost that capability. All in all this ruling is a pragmatic decision that demonstrates only tangential progress in the law impacting wholesale copying of others' copyrighted works.

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

# Ninth Circuit Rules in "Dancing Baby" Copyright Case

# **By Jeff Hermes**

In September, the Ninth Circuit issued its eagerly awaited ruling in the "Dancing Baby" case, *Lenz v. Universal Music Corp.*, Nos. 13-16196 & 13-16107 (9th Cir. Sept. 14, 2015). This long-running case (originally filed in July 2007) delves into liability under 17 U.S.C. § 512(f) for issuance of a Digital Millennium Copyright Act takedown notice for content alleged to constitute fair use. In its opinion, the Ninth Circuit considered whether there is an obligation on the part of copyright holders to evaluate whether the subject of a takedown notice is a fair use, and, if so, the nature of the inquiry that it must conduct.

# **Dancing Babies and Copyright Enforcement**

The factual background of the case is well known. In February 2007, Stephanie Lenz posted a 29-second video of her two children to YouTube under the title "Let's Go Crazy" #1. The

video is set in the family's kitchen, where the children are seen dancing along to a low-quality but recognizable recording of Prince's song *Let's Go Crazy*. At one point, Lenz asks her then thirteen-month-old son what he thinks of the music, with a fairly gleeful response.

Universal was, at the time, responsible for enforcing Prince's copyrights. As relevant to Lenz's video, an assistant in the legal department named Sean Johnson was responsible for searching YouTube for



instances of Prince's music and reviewing the content of videos returned by the search. His review entailed determining whether there was a "significant use of . . . the composition, specifically if the song was recognizable, was in a significant portion of the video or was the focus of the video." Universal did not explicitly require Johnson to consider whether a use of Prince's music in a video would be protected by the fair use doctrine.

Johnson decided that Prince's song "was very much the focus" of Lenz's video, and caused the video to be included in a bulk DMCA takedown notice listing more than 200 YouTube

(Continued from page 32)

videos that Universal alleged misused Prince's songs. The notice included the following statement required by 17 U.S.C. § 512(c)(3)(A)(v): "We have a good faith belief that the above-described activity is not authorized by the copyright owner, its agent, or the law."

Lenz's video was removed from YouTube, and she subsequently submitted a pair of counternotices to YouTube in an attempt to restore the video. Universal objected to the attempt to restore the video on the basis that Lenz had never been licensed to use Prince's music, but did not mention fair use. The video was restored to YouTube by mid-July 2007. (Likely due to the Streisand Effect, the video has now been viewed more than 1.7 million times.)

### Lenz's Lawsuit

Lenz then sued Universal in the Northern District of California. After the winnowing of subsidiary claims, the final operative version of Lenz's complaint asserted that Universal made a material misrepresentation in violation of 17 U.S.C. § 512(f) when it stated that it had "a good faith belief" that Lenz's use of *Let's Go Crazy* was "not authorized by ... the law."

Section 512(f) provides that:

Any person who knowingly materially misrepresents ... that material or activity is infringing ... shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer ... as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing.

Overall, the Ninth
Circuit's rule was
strong on principle,
but light on detail.
Fair use must be
considered before
sending takedown
notices, but the
required scope and
detail of that
consideration has
largely been left for
the trial court to
determine.

17 U.S.C. § 512(f). A fair use is an authorized use, Lenz argued, and because Universal never considered and should have known that her use was fair, it could not have formed a "good faith belief" that her use was unauthorized.

Both parties moved for summary judgment on the substance of the § 512(f) claim. The district court denied both motions on January 24, 2013, and the Ninth Circuit granted permission for an interlocutory appeal.

### Must Copyright Holders Consider Fair Use Before Sending a Takedown Notice?

The starting point for the Ninth Circuit's analysis was whether fair use would bear on Universal's representation that Lenz's video was "not authorized by ... the law." Noting that the

(Continued from page 33)

question was one of first impression in the federal circuits, the Ninth Circuit held that the DMCA "unambiguously contemplates fair use as a use authorized by the law," and that "[f]air use is not just excused by the law, it is wholly authorized by the law." Slip op. at 11.

The court highlighted the language of 17 U.S.C. § 107, which states explicitly that "the fair use of a copyrighted work ... is not an infringement of copyright." *Id.* Turning to dictionary definitions for the meaning of "authorized" as used in 17 U.S.C. § 512(c), the court held, "Because 17 U.S.C. § 107 both 'empowers' and 'formally approves' the use of copyrighted material if the use constitutes fair use, fair use is 'authorized by the law' within the meaning of § 512(c)." *Id.* at 12-13.

The court rejected Universal's argument that, due to its procedural status as a defense, fair use is an excuse rather than an affirmative authorization: "Universal's interpretation is incorrect as it conflates two different concepts: an affirmative defense that is labeled as such due to the procedural posture of the case, and an affirmative defense that excuses impermissible conduct." *Id.* at 13. Quoting the Eleventh Circuit, the court stated:

"Although the traditional approach is to view 'fair use' as an affirmative defense, ... it is better viewed as a right granted by the Copyright Act of 1976. Originally, as a judicial doctrine without any statutory basis, fair use was an infringement that was excused—this is presumably why it was treated as a defense. As a statutory doctrine, however, fair use is not an infringement."... Fair use is therefore distinct from affirmative defenses where a use infringes a copyright, but there is no liability due to a valid excuse, e.g., misuse of a copyright ... and laches.

Id. at 13-14, quoting Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1542 n.22 (11th Cir. 1996).

Accordingly, the Ninth Circuit held that, just as Universal conceded that it was required to consider "other uses authorized by law such as compulsory licenses," a copyright holder "must consider the existence of fair use before sending a takedown notification under § 512(c)." *Id.* at 14-15.

### Fair Use and Good Faith

However, while fair use must be considered, the Ninth Circuit held that a copyright holder is not liable merely because a particular use turns out to be fair or reasonably should have been known to be fair. Rather, it stated, "our court has already decided a copyright holder need only form a subjective good faith belief that a use is not authorized." *Id.* at 15-16, *citing Rossi v*.

(Continued from page 34)

Motion Picture Ass'n of Am. Inc., 391 F.3d 1000 (9th Cir. 2004). Thus, the court restated the liability issue as follows: "Universal faces liability if it knowingly misrepresented in the takedown notification that it had formed a good faith belief the video was not authorized by the law, i.e., did not constitute fair use." *Id.* at 16.

On that issue, the court found that there was conflicting evidence that should go to a jury:

Here, Lenz presented evidence that Universal did not form any subjective belief about the video's fair use—one way or another— because it failed to consider fair use at all, and knew that it failed to do so. Universal nevertheless contends that its procedures, while not formally labeled consideration of fair use, were tantamount to such consideration. Because the DMCA requires consideration of fair use prior to sending a takedown notification, a jury must determine whether Universal's actions were sufficient to form a subjective good faith belief about the video's fair use or lack thereof.

*Id.* at 17. Thus, the court affirmed the district court's denial of summary judgment.

# Sufficiency of a Fair Use Analysis

The Ninth Circuit was less clear as to how a jury should determine whether Universal's fair use analysis was adequate. Copyright holders may not "ignore or neglect" consideration of fair use, said the court, and a "copyright holder who pays lip service to the consideration of fair use by claiming it formed a good faith belief when there is evidence to the contrary is still subject to § 512(f) liability." *Id.* at 17-18. On the other hand, the Ninth Circuit said that "a copyright holder's consideration of fair use need not be searching or intensive. We follow *Rossi*'s guidance that formation of a subjective good faith belief does not require investigation of the allegedly infringing content." *Id.* at 18, *citing Rossi*, 391 F.3d at 1003, 1005.

Note, however, that *Rossi* involved a website that was shut down entirely by its ISP; the MPAA sent a takedown notice to the ISP because the site openly advertised infringing content, and there was no fair use question. The section of *Rossi* cited above relates to whether the MPAA could form a subjective good faith belief that the website was infringing based upon its ads, without needing to check if the advertised download links were actually functional. *See Rossi* at 1003-1005.

It is not clear how *Rossi* applies to the fair use question in *Lenz*. Presumably the concept is that copyright holders are not obligated to investigate extrinsic circumstances or look behind an alleged infringer's own representations, rather than some paradoxical suggestion that they can somehow evaluate fair use without reviewing the content itself. Indeed, the Ninth Circuit in

(Continued from page 35)

Lenz goes on to state that "[t]he DMCA already requires copyright owners to make an initial review of the potentially infringing material prior to sending a takedown notice; indeed, it would be impossible to meet any of the requirements of Section 512(c) without doing so. A consideration of the applicability of the fair use doctrine simply is part of that initial review." Lenz, slip op. at 19, quoting Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1155 (N.D. Cal. 2008).

The court also "note[d], without passing judgment, that the implementation of computer algorithms appears to be a valid and good faith middle ground for processing a plethora of content while still meeting the DMCA's requirements to somehow consider fair use":

For example, consideration of fair use may be sufficient if copyright holders utilize computer programs that automatically identify for takedown notifications content where: (1) the video track matches the video track of a copyrighted work submitted by a content owner; (2) the audio track matches the audio track of that same copyrighted work; and (3) nearly the entirety is comprised of a single copyrighted work. ... Copyright holders could then employ individuals like [Sean] Johnson to review the minimal remaining content a computer program does not cull.

*Id.* at 19 (internal citations and quotation marks omitted). But, the court said, it would not definitively rule on the sufficiency of such measures because there was no evidence that Universal used such a system at the time it took down Lenz's video. *Id.* at 20.

In sum, the court's discussion of how to evaluate fair use is couched in generalities and arguably self-contradictory. Moreover, it leaves open key questions, such as whether a copyright holder must consider all four factors set forth in 17 U.S.C. § 107, or if some more limited substantive inquiry is permissible. Resolving this question will be critical when the case goes to trial and Universal attempts to establish that its efforts were "tantamount" to considering fair use.

# No Second Guessing of Subjective Beliefs

Whatever the standard of sufficiency might be, the Ninth Circuit was clear that if Universal's consideration of fair use were found to be sufficient, the validity of its belief would not be subject to challenge: "If ... a copyright holder forms a subjective *good faith* belief the allegedly infringing material does not constitute fair use, [courts] are in no position to dispute the copyright holder's belief even if we would have reached the opposite conclusion." *Id.* at 17.

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That said, the court noted that a § 512(f) plaintiff might be able to assert willful blindness on the part of the copyright holder with respect to fair use. *Id.* at 20. However, it found that there was no evidence of willful blindness on the part of Universal on this case, foreclosing Lenz from proceeding on that theory:

[To establish willful blindness,] Lenz must demonstrate a genuine issue as to whether—before sending the takedown notification—Universal (1) subjectively believed there was a high probability that the video constituted fair use, and (2) took deliberate actions to avoid learning of this fair use. On summary judgment Lenz failed to meet a threshold showing of the first factor.

*Id.* at 21.

# **Nominal Damages Available**

Finally, the Ninth Circuit considered whether Lenz could proceed without proof of monetary loss from the takedown of her video. Noting that references to "monetary relief" in several sections of the DMCA but not in § 512(f) itself, which refers only to "damages," the court held that monetary loss was not required to bring a § 512(f) claim. *Id.* at 22-23. Comparing § 512(f) to a statutorily created intentional tort claim, the court held that such torts represented *per se* damage for which plaintiffs could seek vindication through nominal damages. *Id.* at 23-25.

### **Judge Smith's Dissent**

Judge Milan Smith concurred with the ruling that fair use must be considered, but dissented on three points relating to the specific nature of the misrepresentation that must be proven under § 512(f) and Universal's conduct in that regard:

First, I question whether § 512(f) directly prohibits a party from misrepresenting that it has formed a good faith belief that a work is subject to the fair use doctrine. I construe the plain text of the statute to prohibit misrepresentations that a work is infringing, not misrepresentations about the party's diligence in forming its belief that the work is infringing. Second, I disagree that there is any material dispute about whether Universal considered fair use. Because Universal did not consider fair use, it may be held liable for "knowingly" misrepresenting that the video was infringing, if it should be determined that the video is a non-infringing fair use. Universal's misrepresentation, if any, was knowing because

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Universal knew it had not considered fair use, and therefore knew it lacked a basis to conclude that the video was infringing. Third, I do not believe that the willful blindness doctrine applies where, as here, a party has failed to consider fair use and affirmatively misrepresents that a work is infringing.

*Id.* at 26-27. Accordingly, Judge Smith would have sent the case back for trial on the question of whether Lenz's video constituted fair use. If a jury were to find that it did, she would have found that liability would automatically follow.

On a separate point, she expressed concern about the majority's comments regarding the use of computer algorithms, stating, "The record does not disclose whether these programs are currently capable of analyzing fair use. ... For a copyright holder to rely solely on a computer algorithm to form a good faith belief that a work is infringing, that algorithm must be capable of applying the factors enumerated in § 107." *Id.* at 32 n.3.

### Conclusion

Overall, the Ninth Circuit's rule was strong on principle, but light on detail. Fair use must be considered before sending takedown notices, but the required scope and detail of that consideration has largely been left for the trial court to determine as it prepares to submit the case to a jury.

Jeff Hermes is a Deputy Director at MLRC. The Electronic Frontier Foundation and Keker & Van Nest LLP represented plaintiff. Universal was represented by Kelly M. Klaus and Melinda LeMoine, Munger, Tolles & Olson LLP, Los Angeles.

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# **Copyright Lawsuit Against Sir Mix-A-Lot Dismissed**

# Collaboration Not Enough to Be Joint Author of "Baby Got Back"

# By Judith A. Endejan

On September 11, 2015, a Washington federal court dismissed a claim of joint copyright ownership brought by an alleged "collaborator to" "Baby Got Back," a hit hip-hop song from the '90s. *Ford v. Ray*, No. 15-cv-0432 (W.D. Wash.). Judge Robert Lasnik dismissed Ford's claim that he was a joint author of 16 hip-hop works of Anthony Ray, known as Sir Mix-A-Lot.

# **Background**

The plaintiff's claims focused on "Baby Got Back" that won a Grammy in 1993. The court dismissed the complaint, brought more than 20 years after the success of "Baby Got Back" and its album, *Mack Daddy*. Under the Copyright Act, such a claim must be brought within three years of accrual.

This case is

In the Ninth Circuit, accrual occurs when "plain and express repudiation of co-ownership is communicated to the plaintiff." *Zuill v. Shanahan*, 80 F.3rd 1316, 1369 (9th Cir. 1996). Such repudiation can occur when the claimant has access to multiple pieces of information that should tell him that the co-author does not consider the claimant to have a copyright interest in a work. While copyright registration alone is insufficient, it is one piece of information available to the plaintiff. More important, the court found that because Sir Mix-A-Lot publicly and repeatedly declared himself to the sole creative force behind *Mack Daddy*,

This case is representative of a string of recent cases in which plaintiffs have lost claims of coauthorship based upon "collaboration or contribution."

and Ford was conspicuously excluded, the plaintiff should have known he was being excluded from joint authorship. Sir Mix-A-Lot did not acknowledge Ford on any of the labels of the *Mack Daddy* album and took credit for all songs on the album with specified exceptions. These exceptions did not include plaintiff.

This failure of acknowledgement, coupled with express statements of authorship in the early '90s met the "express repudiation standard "for accrual under *Zuill*. Therefore, the plaintiff's claims for *Mack Daddy* were barred by the statute of limitations.



Screenshot from Sir Mix-A-Lot's Grammy winning "Baby Got Back."

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# **Claim for Joint Authorship**

The plaintiff claimed that he had contributed or "collaborated" on a total of 16 works as a joint author but the complaint failed to specify anything except a generic contribution of "scratching," a common hip-hop technique. Judge Lasnik found that Ford's complaint had not established sufficient facts to meet the test of co-authorship. Contribution alone is not sufficient to qualify for authorship, Judge Lasnik ruled. Rather, authorship requires "objective manifestations of a shared intent to be co-authors." The complaint alleged no facts sufficient to meet that standard.

This case is representative of a string of recent cases in which plaintiffs have lost claims of co-authorship based upon "collaboration or contribution." *See Aalmuhammed v. Lee*, 202 F.3rd 1227 (9th Cir. 2000), and *Garcia v. Google*, 786 F. 3d 733 (9th Cir. 2015). *Ford v. Ray* means that more than "scratching" on a musical work is required to meet the stiff test for joint ownership under the Copyright Act.

Judy Endejan and John Crosetto of Garvey Schubert Barer in Seattle represented Sir Mix-A-Lot. Plaintiff was represented by John E Whitaker, Whitaker Law Group, Seattle.

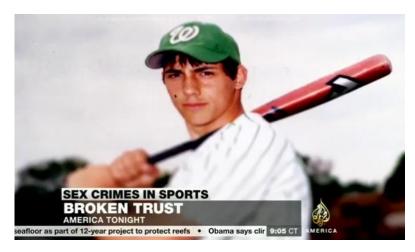
# Illinois Federal Court Quashes Subpoena For News Outtakes

# By Kenneth Schmetterer

On April 7, 2015, Al Jazeera America (AJAM), a news organization based in New York City, aired a story on its "America Tonight" program that examined the risks of sexual abuse faced by child athletes. The piece focused on Spiro Lempesis, a former teacher and baseball coach, sued by two of his former players for alleged sexual abuse. In 2013, Adam Kelley sued Lempesis and a suburban middle school in federal court in Chicago, claiming Lempesis sexually abused him in the mid-1990s. In 2014, Anthony Collaro, a former college baseball player, sued Lempesis and Concordia University in the Circuit Court of Cook County, Illinois, claiming Lempesis sexually abused him over a ten-year period, beginning in youth baseball

camp and continuing through his time at Concordia. Collaro, Lempesis, Kelley's attorney, and an expert on child abuse all appeared on camera during the report. The reporter stated on air that Kelley declined to be interviewed for the segment

Shortly after the program aired, Lempesis issued a subpoena to AJAM in the *Kelley* case, seeking "all news footage" relating to Lempesis, Kelley's attorney, and Collaro. AJAM offered to produce a link to the broadcast, but



Click to view program.

refused to produce its video outtakes. Lempesis's request for outtakes raised profound concerns for AJAM, because its journalists wish to protect against the forced disclosure of their sources – which would make sources reluctant to confide in journalists – or of the reporter's editorial decisions in deciding what to publish. AJAM moved to quash the subpoena, citing the Illinois Reporter's Privilege Act (the IRPA), 735 ILCS 5/8-901 *et seq*.

### The Freedom of the Press and Reporter's Privilege Laws

The First Amendment to the United States Constitution states that "Congress shall make no law . . . abridging the freedom . . . of the press . . . ." In 1972, the U.S. Supreme Court considered whether the First Amendment shields reporters from having to testify to a grand jury about their work and sources. Reporters argued that a constitutional right to publish news

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implied a corresponding right to *gather* news, a right that would be threatened by forced disclosure of sources. They sought to force those seeking such testimony to show a compelling need for it and an inability to secure the information by other means. The Court held, however, that reporters had no constitutional right to refuse to testify.

The ruling alarmed defenders of the press, and many states responded by adopting statutes providing additional protections. But those protections vary. Some states, like New York, provide stringent, absolute protections. Other states, like Illinois, give reports "qualified" privileges requiring courts to balance the competing interests between the reporter and the party seeking disclosure. Congress has yet to pass its own reporter's privilege, and federal courts across the country are divided over the existence and extent of any privilege given to reporters, though generally speaking federal courts provide fewer protections than the state statutes.

Illinois law governed AJAM's motion, because it was in federal court based on diversity jurisdiction, and questions of privilege arising in a federal diversity action are governed by the substantive law of the forum state. Illinois conflict of laws principles give primary consideration to the location of the communications at issue, rather than the location of the parties or of the investigating reporter.

The IRPA provides that "[n]o court may compel any person to disclose the source of any information obtained by a reporter except as provided" elsewhere in the Act. Illinois courts have held that "[t] he reporter's privilege...evolved from a common law recognition that the compelled disclosure of a reporter's sources could compromise the news media's first amendment right to freely gather and disseminate information." *Cukier v. Am. Med. Ass'n*, 259 Ill. App. 3d 159, 163 (1st Dist. 1994). "The purpose of the privilege is to assure reporters access to information, thereby encouraging a free press and a well-informed citizenry." *People v. Pawlaczyk*, 189 Ill.2d 177, 187 (2000). The term "source" is defined broadly, and includes video outtakes, photographs, and unpublished notes, as well as human sources. The privilege applies regardless of whether the source is confidential or not. *In re Arya*, 226 Ill. App. 3d at 852.

The IRPA permits a subpoenaing party to ask the court to divest the reporter of his or her privilege. However, "the legislature intended divestiture of a reporter's privilege to be the *last resort* to get the sought-after information." *In re Arya*, 226 Ill. App. 3d at 862. Thus, parties seeking to divest reporters of their privilege must satisfy a heavy burden.

## **AJAM's Motion to Quash**

AJAM argued that the subpoena should be quashed under the IRPA for failure to satisfy three statutory requirements. First, Lempesis could not show that the material sought was relevant to the claims against him or his defenses. AJAM argued that Kelley's counsel

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possessed no admissible, relevant testimony, and that Lempesis could only speculate whether Collaro would even testify in Kelley's case.

Second, Lempesis could not show that the information in the outtakes could not be obtained from other sources. Lempesis could have deposed Collaro or Kelley's lawyer, if he really wanted to know what else they had told the AJAM reporter. The fact that Lempesis allowed fact discovery to close without seeking those depositions (and did not seek to re-open discovery to take them) was Lempesis's choice, and did not support circumventing the statutory requirements.

Third, Lempesis failed to establish that production of the video outtakes was essential to protect the public interest. AJAM argued that the public is not served by forcing a reporter to produce outtakes irrelevant to the claims or defenses, while compelled disclosure sought *would* contravene a compelling policy reflected in the IRPA: protecting reporters and "thereby encouraging a free press and a well-informed citizenry." *Pawlaczyk*,

189 Ill.2d at 187.

# The Court's Ruling

The court granted AJAM's motion to quash, holding that the video outtakes were relevant to the *Kelley* litigation, but that Lempesis failed to show that the information was unavailable from other sources or that disclosure was essential to protect the public interest. *Kelley v. Lempesis*, No. 13 CV 4922 (N.D. Ill. Aug. 17, 2015). Although Lempesis only speculated that the outtakes may contain information that could be used to impeach Collaro, and that Kelley's lawyer may have said something relevant, the court considered the story's examination of the allegations that Lempesis acted in a predatory manner toward Collaro, Kelley, and another student. The court believed the outtakes were relevant because they made the claims against Lempesis and the knowledge of the schools more or less probable.

The court granted AJAM's motion to quash, holding that the video outtakes were relevant to the Kelley litigation, but that Lempesis failed to show that the information was unavailable from other sources or that disclosure was essential to protect the public interest.

However, the court found that Lempesis failed to satisfy other requirements for disclosure. Lempesis failed to present evidence that he tried to obtain the requested information before issuing the subpoena, holding that the IRPA does not permit a party to "use [a reporter's] investigation in lieu of conducting his own." The court also rejected Lempesis's argument that disclosure was essential to protect Lempesis's ability to "fight[] to protect his character and gather all information and potential evidence to support his defense." As the court explained, Lempesis could have deposed the individuals interviewed in the story and asked them the same

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questions that AJAM's reporter did, but he chose not to do so. Accordingly, the court quashed the subpoena.

# Takeaways from the Kelley Ruling

The court's ruling in this matter highlights the importance of identifying the governing law (which can vary significantly by jurisdiction) as well as the relevance and exhaustion requirements of the IRPA. Despite Lempesis' focused on collateral matters, such as witness impeachment or the potential testimony of a party's attorney, the court applied a concept of relevance broader than many other courts, which considered whether information more directly proved or negated an element of the underlying claim.

As for exhaustion, which the court tied to whether disclosure is essential to the public interest, this decision underscores the Illinois courts' view that forced disclosure under the IRPA is a *last resort*. Those seeking to force a reporter to disclose video outtakes, confidential sources, or other protected information must undertake a thorough investigation before moving to divest the privilege under the IRPA. They cannot simply use a reporters' investigation as a means to conduct their own discovery.

Kenneth Schmetterer is a partner at DLA Piper in New York and represented AJAM in this matter.



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