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MLRC Media Law Resource Center
MEDIA LAW LETTER

Reporting Developments Through August 25, 2021

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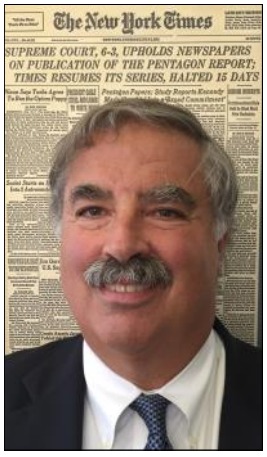
Times v. Sullivan, Rosenbloom, and Justice Gorsuch: Where is SCOTUS Heading?

By George Freeman

For most of our careers, we were pretty secure in believing that Times v. Sullivan and its actual malice rule for public officials and public figures was solid precedent, so well ingrained in American jurisprudence that it was immune from any possibility of successful attack. As Lee Levine and Stephen Wermiel document in their book "The Progeny: Justice William Brennan's Fight to Preserve the Legacy of New York Times v. Sullivan," in the years following Sullivan's constitutionalizing of libel law, some of the justices made attempts to cut back on Sullivan, but after about 20 years these jabs had been successfully warded off and its doctrine appeared rock solid.

Then in the last few years came the dissents of Justice Thomas, but they did not cause great concern in the media bar. Notwithstanding that many, such as the great Supreme Court observer Anthony Lewis in his book "Make No Law", conceded that Sullivan was a decision driven by historical necessity and not necessarily technical legal analysis, Thomas was an outlier, his views could easily be dismissed as unrealistic originalist thinking, he had no allies on the Court, and , after all, Sullivan was now over 50 years old and firmly established as part of American constitutional tradition.



Justice Gorsuch's critique was based on the changing media ecosystem, which somehow, he claimed, had led to more falsity and disinformation and a legal playing field that had inexplicably been tilted against those whose reputations had been wounded.

But early this summer, at the very end of the Court's last term, Justice Gorsuch – who at his confirmation hearing seemed to agree that Sullivan was well-neigh untouchable – upset our comfort level with a passionate plea that Sullivan should be reconsidered. Unlike Justice Thomas' legal criticism, Justice Gorsuch's critique was based on the changing media ecosystem, which somehow, he claimed, had led to more falsity and disinformation and a legal playing field that had inexplicably been tilted against those whose reputations had been wounded.

A seismic alarm was sounded. Might other justices, perhaps those appointed by Trump, the proselytizer of more "open libel laws" – whatever that means – or Justice Kagan, whom Gorsuch cited in his opinion, agree with the call for reconsideration? Was Sullivan's vitality all

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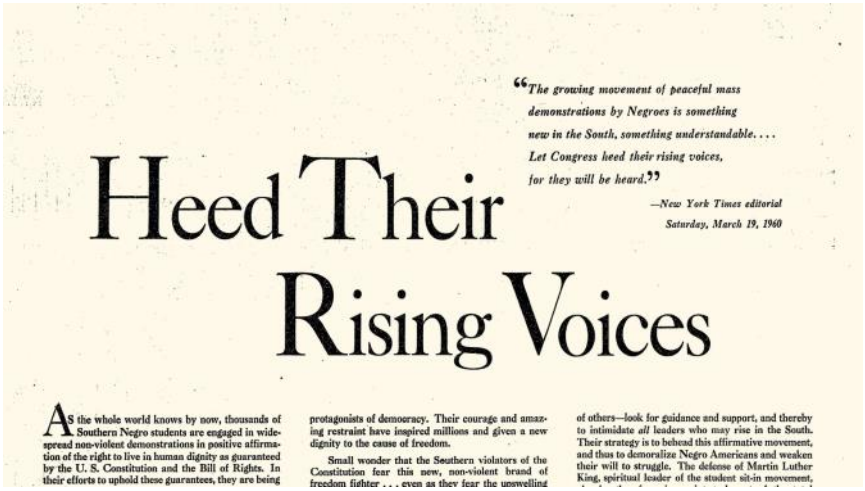


"The growing movement of peaceful mass demonstrations by Negroes is something new in the South, something understandable. . . . Let Congress heed their rising voices, for they will be heard."

—New York Times editorial
Saturday, March 19, 1960

Heed Their Rising Voices

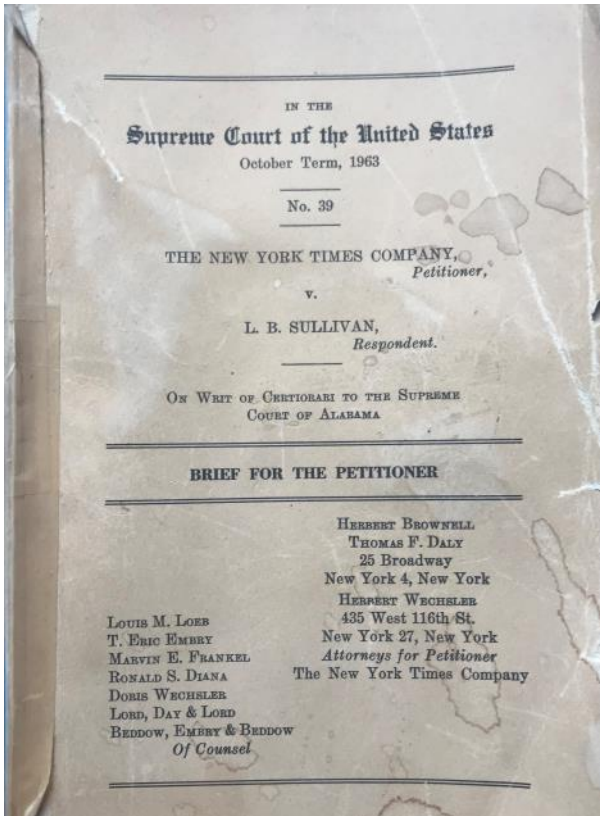
As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U. S. Constitution and the Bill of Rights. In their efforts to uphold these guarantees, they are being protagonists of democracy. Their courage and amazing restraint have inspired millions and given a new dignity to the cause of freedom.

Small wonder that the Southern violators of the Constitution fear this new, non-violent brand of freedom fighter . . . even as they fear the unswelling of others—look for guidance and support, and thereby to intimidate *all* leaders who may rise in the South. Their strategy is to behead this affirmative movement, and thus to demoralize Negro Americans and weaken their will to struggle. The defense of Martin Luther King, spiritual leader of the student sit-in movement,

The advertisement in The New York Times which gave rise to Times v. Sullivan

of a sudden really in doubt? I think it's doubtful, but Sullivan is so much the linchpin of our defamation law and is so keenly a vital pillar of all of our free speech jurisprudence that we no longer can take it for granted. Many columns have been written and programs have been held to discuss the topic and try to predict the future. Indeed, this issue has become the subject of a newly formed plenary program at our upcoming Virginia Conference at the end of the month. (Btw, we are continuing to plan for an in-person conference; registration is pretty strong at about 140 with three weeks to go; we have seen just a handful of a cancellations despite the Delta variant worry; and many have commented favorably on our vaccination requirement and assurances that all Covid advisories will be followed and all hotel staff will be masked.)

Moreover, the MLRC is working on a White Paper, quarterbacked by the aforementioned and masterful Lee Levine, rebutting the arguments against Sullivan. Not only will this tome educate the public, it will also be intended for use by lawyers as a resource to counter arguments by plaintiffs' attorneys seeking change in our libel laws and SCOTUS reconsideration. It will take on the Thomas/Gorsuch attack from all sides: technical legal arguments showing the shortcomings of Thomas' legal argument; a critique of Gorsuch's reasoning stemming from his more practical changed media ecosystem premise; a comparative international analysis highlighting the advantages of American exceptionalism in this area; empirical studies showing that Gorsuch's numbers and reasoning are flawed; and more.



IN THE
Supreme Court of the United States
October Term, 1963

No. 39

THE NEW YORK TIMES COMPANY,
Petitioner,
v.
L. B. SULLIVAN,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE PETITIONER

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The author's well-worn copy of the petitioner's brief in Times v. Sullivan

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While I certainly don't intend to jump the gun on what I hope and assume will become a very thorough and scholarly study, I would just offer a few personal thoughts on the issue – first, on the need for the continued reliance on the actual malice rule; and, second, on the possibility of dealing with the criticism of the public figure (as opposed to public official) categorization by a return to the Rosenbloom rule.

First, Justice Gorsuch makes the argument that Sullivan incentivizes bad journalism. If you can only be liable if you have serious doubts as to the truth of your publication, once you establish the basic facts to support your premise, why do any further research or newsgathering – more facts might give rise to contrary information which might create doubts as to your original thesis. Theoretically, there would be some validity to this construct. But in reality, the problem really does not exist. In over 30 years of working with journalists, I have never – never – seen an instance where a reporter would close his notebook prematurely, thinking that he would legally be better off by doing no more research. First, reporters simply don't think about legal niceties or consequences when working on a story. Second, their training compels them to dig for more and more information – and, perhaps more important, the likely questioning by their editors, their bosses, impels them to get all the facts. So the they will "bury their head in the sand" argument just has no practical resonance. Gorsuch writes, "Under the actual malice regime as it has evolved, 'ignorance is bliss'". That's not what goes on in newsrooms. Such legal strategizing does not take place.

Gorsuch doesn't explain how Sullivan is the cause for the recent alleged lack of success of libel plaintiffs when Sullivan has existed for nearly 60 years and seems not to have had that effect in the first 50. More to the point, at a time when the ecosystem has already resulted in a cutback on local coverage, this would seem to be the worst possible time to add increased legal risk for media barely hanging on.

Indeed, neither does calibrating a reporter's work depending on whether his subject is a public official/figure or private figure. I never saw a reporter say – or an editor allow the thought- that "I can be negligent because I'm writing about a public official, and so negligence won't be my legal test". At our legal newsroom seminars, we would usually discuss the differing standards pertaining to public and private figures, but we would often add that they shouldn't think about that in their work since obviously they should be responsible and professional no matter whom they are writing about. The reaction I received was that I was ridiculous in even saying that, so I tended, in later years, to drop that from my repertoire.

Second, much of Justice Gorsuch's discussion of the media environment really works against his thesis. His dissent notes that a large number of newspapers and periodicals have failed, and quoting Prof. David Logan (who will be joining our plenary panel on this subject at our upcoming Virginia Conference), writes that "the economic model that supported reporters, fact-checking and editorial oversight" has "deeply eroded." While, to a limited degree the latter notion might contain a modicum of truth, the main point is that local journalism is under severe

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financial pressure, and that local newspapers have in large numbers gone out of business or deeply cut staff and coverage.

At his confirmation hearing, Gorsuch indicated that the Times v. Sullivan precedent was secure. "That's been the law of the land for, gosh, 50, 60 years," he testified. His view seems to have changed.

The diminution of investigative reporting and coverage of local governmental institutions cuts directly against what Justice Brennan found to be so important and was a basis for the Sullivan Court's actual malice ruling. Thus, the Court wanted to incentivize the press to cover local city councils and the like, not be chilled from reporting about their possible foibles and abuses because of the fear of losing libel suits and the costs of defending them – costs which, of course, have skyrocketed since 1964. As Gorsuch recognized, the Sullivan Court "took the view that tolerating the publication of some false information was a necessary and acceptable cost to pay to ensure truthful statements vital to democratic self-government were not inadvertently suppressed."

Gorsuch tries to argue that this balance no longer pertains because Sullivan has by now created "an effective immunity from liability". But he doesn't explain how Sullivan is the cause for the recent alleged lack of success of libel plaintiffs when Sullivan has existed for nearly 60 years and seems not to have had that effect in the first 50. More to the point, at a time when the ecosystem has already resulted in a cutback on local coverage, this would seem to be the worst possible time to add increased legal risk for media barely hanging on; in their current precarious position, why would they expend the resources and risk legal jeopardy in assigning investigative stories about governmental and corporate institutions? Such lack of oversight clearly runs counter to Justice Brennan's very premise, that our democracy needs vigorous coverage and monitoring of – and robust, uninhibited, and wide-open debate about – the powerful.

On the other hand, Justice Gorsuch's main critique is much more tenable. He emphasizes not a lower standard for reports about public officials, but a greater chance for libel recoveries by public figures. If this were a negotiation, I would swap the continuation of the actual malice test for public officials for a change to eliminate the public figure categorization and replace it with the Rosenbloom test which lasted just a few years in the early 1970's: that actual malice would be the test depending not on whether the subject of the defamation was a public figure, but on whether the topic was of legitimate public interest.

Recall that Brennan's underpinning for the serious doubts test dealt with the importance on reporting on government and public affairs, not on the need to know more about the sex or drug lives of celebrities. (I hate using the terms actual malice and reckless disregard since those terms actually are inconsistent with the term's legal meaning,) Hence, doesn't it make sense to

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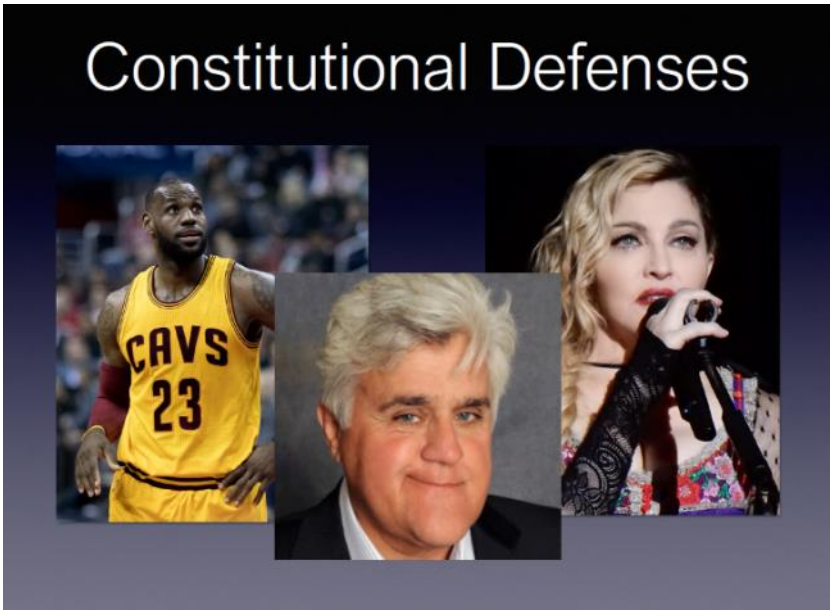
apply the serious doubts test to not only public officials, but to any matters of legitimate public interest, but perhaps not to gossip and private information about famous people in whose private lives we have merely a prurient interest.



Should public figures, like LeBron James, Jay Leno and Madonna, have the same high burden in a libel case as government officials?

By the numbers, I think such a change would be close to a wash. The media would lose Sullivan protection in libel suits brought by celebrities about their private lives, but would gain Sullivan protection in reporting on matters of public concern even if the person libeled was a private figure. And by agreeing to, or accepting, such new criteria, we might well be solidifying the principle that reporting on government and other powerful institutions really deserves Sullivan protection.

One example I was involved with illustrates the point. Back in the early 80's the Miami Herald hosted a brainthink at the venerable, pink Don CeSar hotel on St. Petersburg Beach. It was to discuss an appeal strategy in a case they had lost in the lower court called Ane v. Miami Herald. As I recall, plaintiff in the case was a truckdriver who got into a violent altercation with the police and alleged police overreaction; in the course of the article the driver's prior criminal history was wrongly described. In his subsequent libel suit, he was classified as a private figure, just a driver stopped on the road by the authorities. But shouldn't such reporting about possibly unwarranted governmental action deserve the broadest of libel protection. Under the Rosenbloom test, the Herald would have the benefit of the serious doubts test because the topic of the article surely is on a matter of legitimate public concern. Conversely, an article about a rock singer's sexual affairs or a tv host's drug use – not topics Justice Brennan was probably too concerned with – would receive only the protection of the Gertz negligence test or, perhaps, a tougher state law standard.

I am sure that the MLRC White Paper will be far more wide-ranging and thorough than these preliminary thoughts. Plus, our plenary session in Virginia, featuring experienced litigators and constitutional scholars, will delve into this issue with far more eloquence than the above. But I fear we have to start seriously thinking about this issue. I welcome your thoughts about this modest start.

The opinions expressed in this column are those of the author and not the MLRC. We welcome responses at gfreeman@medialaw.org; they may be printed in next month's MediaLawLetter.

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Ninth Circuit Unanimously Affirms First Amendment Protection for Rachel Maddow's "Paid Russian Propaganda" Commentary

By Nathaniel L. Bach & Marissa M. Mulligan

On August 17, 2021, a unanimous Ninth Circuit panel issued its opinion affirming the dismissal of Herring Networks, Inc.'s ("Herring") defamation suit against Rachel Maddow, MSNBC, NBCUniversal, and Comcast ("Defendants"). *Herring Networks, Inc. v. Maddow*, No. 20-55579, 2021 WL 3627126 (9th Cir. Aug. 17, 2021) ("*Herring II*"). The Court held that District Judge Cynthia Bashant of the Southern District of California correctly granted Defendants' anti-SLAPP motion to strike (Cal. Code Civ. Proc. § 425.16) because Ms. Maddow's statement that OAN "really literally is paid Russian propaganda"—in the context of her broadcast, in which she employed entertaining and hyperbolic language while commenting on a matter of public concern and fully disclosing the facts—"is well within the bounds of what qualifies as protected speech under the First Amendment." *Herring II*, 2021 WL 3627126 at *9.

Background

In September 2019, Herring—owner of the upstart conservative cable channel One America News Network ("OAN")—sued Defendants over comments Ms. Maddow made during the July 22, 2019 broadcast of *The Rachel Maddow Show*. During her three-and-a-half-minute intro segment, Ms. Maddow commented on an article *The Daily Beast* published that same day entitled "Trump's New Favorite Channel Employs Kremlin-Paid Journalist," which reported that OAN employs an on-air reporter who also works for Sputnik, a news organization funded by the Russian government.

While commenting on the article, Ms. Maddow exclaimed, "the most obsequiously pro-Trump right wing news outlet in America really literally is paid Russian propaganda. Th[eir] on air U.S. politics reporter is paid by the Russian government to produce propaganda for that government." *Id.* at *2. Herring alleged that Ms. Maddow's statement that the network "really literally is paid Russian propaganda" was false and defamatory, and sought damages of $10 million. *Id.* In May 2020, Judge Bashant granted the Defendants' anti-SLAPP motion to strike Herring's complaint with prejudice, and invited Defendants to seek their attorneys' fees and costs, to which they were entitled after prevailing on their motion. *Herring Networks, Inc. v. Maddow*, 445 F. Supp. 3d 1042, 1054 (S.D. Cal. 2020) ("*Herring I*"). Herring appealed.

Ninth Circuit's Opinion: Writing for the panel—which also included Circuit Judge John B. Owens and Judge Eduardo C. Robreno of the Eastern District of Pennsylvania—Circuit Judge Milan D. Smith, Jr. rejected Herring's arguments and agreed with the Defendants' counter-

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arguments across the board, concluding that "the challenged statement was an obvious exaggeration, cushioned within an undisputed news story. The statement could not reasonably be understood to imply an assertion of objective fact, and therefore, does not amount to defamation." *Herring II*, 2021 WL 3627126 at *1.

In rejecting Herring's three principal arguments, Judge Smith authored a strong new First Amendment precedent that will be of use to media defendants nationwide.

First, Herring argued that the district court's refusal to allow it to submit evidence in response to the Defendants' anti-SLAPP motion was in error. Specifically, Herring attempted to oppose the motion to strike using (i) other, unrelated instances of Ms. Maddow using the word "literally" during her shows; (ii) an interview with Ms. Maddow in *The New York Times Magazine*; (iii) a single website comment submitted anonymously to OAN, allegedly in reaction to Ms. Maddow's segment; and (iv) a linguist's 20-page report purporting to analyze Ms. Maddow use of "modal verbs," the word "literally," and "intonational contours" of her speech (including via waveform diagrams). Herring then sought to supplement the record with statements made in December 2019 by Chris Matthews on his show *Hardball*, in which he stated OAN was "Russian owned" before correcting himself after a commercial break. Herring asserted that all this evidence went to the broad context in which a reasonable viewer would have understood the challenged statement.

In response, Defendants argued that they chose to bring their motion to strike as a facial attack on the pleadings and thus, under the Ninth Circuit's controlling decision in *Planned Parenthood Federation of America, Inc. v. Centre for Medical Progress*, 890 F.3d 828 (9th Cir. 2018), their motion is to be examined as under Rule 12(b)(6), which does not permit a plaintiff to submit evidence. The Court agreed that "the applicable reasoning in *Planned Parenthood* squarely forecloses Herring's argument." *Herring II*, 2021 WL 3627126 at *5. And it reaffirmed the Ninth Circuit's view "that 'there is no direct collision' between the special motion to strike subsection of [California's anti-SLAPP law] and the Federal Rules," and to avoid any conflict, courts should "review anti-SLAPP motions to strike under different standards depending on the motion's basis." *Id.* at *4 (quoting *United States ex rel. Newsham v. Lockheed Missiles &*

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Space Co., 190 F.3d 963, 972 (9th Cir. 1999) and *Planned Parenthood*, 890 F.3d at 833). Here, as Herring had conceded, Defendants brought their motion as a facial attack without submitting any evidence of their own, and Herring "cannot convert Maddow's motion to strike into a motion for summary judgment" on its own accord. *Id.* at *5.

Second, Herring asserted that it was for a jury, not the court, to determine whether Ms. Maddow's statement asserted or implied a provably false statement of fact. In response, Defendants argued, as they did before the district court, that Ms. Maddow's statement was fully protected opinion under the First Amendment, and that examining its broad and specific contexts under the Ninth Circuit's totality of the circumstances test showed that the statement could not be interpreted in the manner Herring advanced as a matter of law. Defendants specifically highlighted Ms. Maddow's use of colorful language and rhetorical hyperbole—she described *The Daily Beast* article as a "sparkly story"—and that she had disclosed the entire basis for her comments (*i.e.*, *The Daily Beast* article).

The Court agreed with Defendants and the district court "that the broad context of Maddow's show makes it more likely that her audiences will 'expect her to use subjective language that comports with her political opinions.'" *Id.* at *6 (quoting *Herring I*, 445 F. Supp. 3d at 1050). The panel noted Ms. Maddow's tone further supported this finding, as she "opens the segment by calling *The Daily Beast* article 'perhaps the single most perfectly formed story of the day, the single most like sparkly story of the entire day,'" and "one of 'the giblets the news gods dropped off their plates for us to eat off the floor today.'" *Id.* The Court concluded that "Maddow's gleeful astonishment with *The Daily Beast*'s breaking news is apparent throughout the entire segment," and therefore "at no point would a reasonable viewer understand Maddow to be breaking new news. The story of a Kremlin staffer on OAN's payroll is the only objective fact Maddow shares." *Id.*

Turning to the specific context of Ms. Maddow's statement, the Court rejected Herring's effort to read the challenged six-word phrase in isolation, noting that "our precedent requires us to expand our focus to the surrounding sentences." *Id.* at *7. "Because Maddow discloses all

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relevant facts and employs colorful, hyperbolic language, we conclude that the specific context of the statement does not render it an assertion of fact." *Id.* Quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the Court found that "Maddow's use of hyperbolic rhetoric bolsters this conclusion." *Id.* at *8. Adopting Defendants' characterization of her comment, the challenged statement was thus no more than an "obvious exaggeration" "sandwiched between precise factual recitations" of *The Daily Beast* article—*i.e.*, that OAN employs an on-air reporter paid by the Russian government. *Id.*

Third, Herring argued that it should have been granted leave to amend to allege additional facts, including those submitted as evidence in opposition to the anti-SLAPP motion. While finding it a "much closer question," the Court agreed with Defendants that Herring had waived the issue "because Herring never asked to amend" at the district court, "and if it had, amendment would have been futile" because nothing Herring could plead could change Ms. Maddow's statement or the way a reasonable viewer would have understood it. *Id.* at *8–9.

* * *

Finally, because California's anti-SLAPP law provides for the mandatory award of attorneys' fees and costs to a prevailing defendant, Defendants are entitled to recover their appellate fees and costs in addition to the nearly $250,000 already awarded by the district court for the proceedings below. The Ninth Circuit's well-reasoned and comprehensive opinion thus stands as a clear victory both for these Defendants and the media in general, providing another helpful precedent against SLAPPs like this one.

Nathaniel Bach is Of Counsel and Marissa Mulligan is an Associate Attorney in Gibson, Dunn & Crutcher LLP's Los Angeles Office. They—along with Gibson Dunn partners Theodore Boutrous Jr., Scott A. Edelman, and Theane Evangelis—represented Rachel Maddow, MSNBC, NBCUniversal, and Comcast before the district court and on appeal.

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New York Federal District Court Dismisses Financier's Libel Case

Judge Looks to Chapadeau *to Determine Public Interest Under SLAPP Law*

By Robert P. LoBue

On August 11, 2021 Judge Lewis Kaplan in the Southern District of New York issued a 34-page decision granting Dow Jones & Company's motion to dismiss a libel complaint filed by insurance magnate Greg Lindberg. Lindberg v. Dow Jones & Co., Inc., 20-cv-8231 (Aug. 11, 2021). The decision covers a number of issues of current interest to the media bar, including the circumstances in which hyperlinking to an earlier, allegedly libelous article is a republication starting a new limitations period, the scope of the "issue of public interest" standard in the recently-enacted amendments of New York Anti-SLAPP statute, and the actionability in the context of newsgathering of torts such as interference with confidentiality agreements and inducement to breach of fiduciary duty.

Background

The action arose from two articles published by Dow Jones in *The Wall Street Journal.* The first appeared on February 28, 2019, headlined "Financier Who Amassed Insurance Firms Diverted $2 Billion into His Private Empire." The second was published on October 3, 2019, entitled "'Active Interest': Insurance Tycoon Spied on Women Who Caught His Eye."

There was no republication, because the second article did not in words repeat the alleged libels in the first article. In doing so, the Court conducted a detailed survey of the case law on hyperlinking.

As Judge Kaplan recounted, the first article reported that Lindberg, a reclusive and wealthy owner of an array of businesses including insurance companies and many others, had "diverted $2 billion of insurance company funds for his personal benefit by causing the insurers to lend money to entities he owned." The article noted that many of those insurance companies were domiciled in North Carolina, whose then-Insurance Commissioner received generous political contributions from Lindberg in support of his campaign for re-election to that post. The article described some of Lindberg's opulent acquisitions—mansions, a jet, a yacht—in the same time period when his alleged financial machinations took place. It concluded by revealing that Lindberg was then under federal investigation regarding his campaign contributions.

The second article reported that Lindberg had been arrested and charged with attempting to bribe a successor state insurance regulator to obtain favorable treatment for his insurance companies. It also revealed that Lindberg "had paid dozens of surveillance operatives to trail

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women he was, or was interested in, dating" and included "colorful details and photos from surveillance dossiers…" The second article included a hyperlink back to the first, and contextualized that link by mentioning Lindberg's lavish lifestyle and stating: "the spending took off after Mr. Lindberg began lending at least $2 billion of the insurer's funds to his private conglomerate, the focus of a Journal investigation in February."

Lindberg alleged 11 libels, eight arising from the first article and three from the second. Most concerned the report of his "diversion" of funds for personal benefit and related business matters, but he also complained about aspects of the disclosure of his alleged surveillance of romantic partners. Lindberg also claimed that the reporting of details from surveillance files and quotes from private security agents who allegedly conducted that surveillance at his request constituted interference with confidentiality agreements and inducement to breach fiduciary duties.

The second article just snuck in under New York's one-year statute of limitations, but the first article was only actionable if the hyperlink to it in the second article constituted a republication of the first.

The court did not address the plaintiff's status as a public or private figure because it decided that the Anti-SLAPP statute governed, with its requirement that all plaintiffs seeking to recover damages arising from a publication on an issue of "public interest" prove actual malice.

District Court Decision

The court held that there was no republication, because the second article did not in words repeat the alleged libels in the first article. In doing so, the Court conducted a detailed survey of the case law on hyperlinking and followed a number of federal precedents*: e.g., Lokhova v. Halper*, 995 F.3d 134, 143 (4th Cir. 2021); *In re Philadelphia Newspapers,*690 F.3d 161, 175 (3d Cir. 2012); *Salyer v. Southern Poverty Law Center*, 701 F. Supp.2d 912, 916-17 (W.D. Ky. 2009).

But the focus of the current case was on the plaintiff's argument that by updating the original report, the second article "reinforced" the "message" of the earlier piece to a new audience. Calling that argument "entirely meritless," the Court held that "presenting *new* information to reinforce the impression presented in the First Article – by its very nature – does not repeat the allegedly defamatory material in the First Article." This decision thus stands as a counterpoint to cases such as *Enigma Software Grp. USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263 (S.D.N.Y. 2016), where text surrounding the hyperlink in a later article was considered enough of a reiteration of the original, time-barred statement to constitute republication.

Dow Jones argued that Lindberg was required to allege actual malice both as an involuntary public figure—having made significant campaign contributions to influence public policy in North Carolina—and also under the amendment to New York's Anti-SLAPP statute, which became effective in November 2020.

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The court did not address the plaintiff's status as a public or private figure because it decided that the Anti-SLAPP statute governed, with its requirement that all plaintiffs seeking to recover damages arising from a publication on an issue of "public interest" prove actual malice. While the pathway to determining that the allegations concerning Lindberg's alleged financial chicanery touched on a matter of public interest was relatively straightforward, the Court spent more time considering whether the discussion of Lindberg's surveillance of potential girlfriends qualified.

The court concluded that the reporting on Lindberg's romantic pursuits, in context, was a matter of public interest triggering the Anti-SLAPP law. The key link in the court's reasoning in construing the new New York statute was to look to a long line of case law under New York's *Chapadeau* doctrine, which since the 1970s has imposed a gross irresponsibility standard on libel actions brought by private figures on matters of "legitimate public concern." Equating the two standards, the court found in the *Chapadeau* jurisprudence ample support for a broad reading of that test, and one that gives great deference to editorial decisions on what stories to report and how to illustrate them.

For example, the *Lindberg* Court relied heavily on *Gaeta v. New York News, Inc.* 62 N.Y.2d 340 (1984), in which the Court of Appeals held that under *Chapadeau* a report that a mental health patient's suicide was caused by his mother's marital infidelity was a matter of public concern in the context of an article generally about mental health treatment facilities. So too, here, the revelation of Lindberg's surveillance activities was viewed by the court as not gratuitous but rather an illustration of the larger theme of a wealthy financier "leveraging his business assets for his personal benefit." As with so many issues in the law of libel, here context is everything. As a result, because the complaint did not sufficiently allege actual malice with respect to the timely libel claims, they were dismissed.

Lastly, the Court turned to Lindberg's allegations of tortious newsgathering acts by the Dow Jones authors. Inferring that the sources for the details about Lindberg's surveillance actions were the security personnel engaged to carry out those activities, Lindberg asserted that Dow Jones interfered with those agents' employment contracts and violated their supposed fiduciary duties to Lindberg by eliciting confidential information. The court was utterly unpersuaded by these claims as pleaded, holding that the complaint failed to set forth essentially all of the elements of these torts including the identity of the persons who were supposedly induced to violate their duties, the contractual terms breached, any facts sufficient to support the existence of a fiduciary rather than purely contractual relationship, and any basis for alleging that the journalists knew of their sources' obligations to Lindberg.

Due to these failings, the Court did not need to address the larger issue – exemplified in cases such as *Highland Capital Management L.P. v. Dow Jones,* 178 A.D.3d 572 (1st Dep't 2019) – whether newsgathering is an independent proper purpose that privileges what might otherwise be an actionable tortious interference. Because the court granted Lindberg leave to replead

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these claims, it remains to be seen whether the parties eventually will join issue on this question.

Lindberg, incidentally, was convicted in federal court in North Carolina of felonies based on his attempted bribery of the insurance regulator and is presently serving an 87-month sentence. At this writing, his appeal in the Fourth Circuit is pending.

Robert P. LoBue and Tara Norris of Patterson Belknap Webb & Tyler LLP represent Dow Jones & Company, Inc. Aaron Tobin and Michael Merrick of Condon Tobin Sladek Thornton PLLC and Charles A. Gruen of the Law Offices of Charles A. Gruen represent Mr. Lindberg.

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The Most Bizarre Lawsuit(s) Involving 'The Most Gullible Man in Cambridge' Get Dismissed

By Jeremy Chase and Carl Mazurek

In July 2019, *New York* Magazine introduced its readers to Harvard Law School Professor Bruce Hay. The *New York* piece tells the bizarre story about how Hay, who teaches a class on judgment, had an affair with a woman named Maria-Pia Shuman and was subsequently drawn into a combative relationship with her and her wife, transgender graduate student Mischa Shuman, that led to reciprocal allegations of abuse, alleged paternity traps, house-napping, and a slew of lawsuits both between the antagonists, and between the Shumans and other men who had similar experiences to Hay.

The article and a follow up piece, spawned two lawsuits against the publication: the first a defamation lawsuit by the Shumans in New York Supreme Court; the second, a convoluted breach of contract and employment discrimination lawsuit by Hay (the primary source for the articles) in the Southern District of New York.

On June 16, 2021, Justice Richard Latin of the New York Supreme Court dismissed the Shumans' lawsuit, Schuman v. New York Magazine, and two weeks later, on July 1, U.S. District Court Judge J. Paul Oetken dismissed Hay's claim, Hay v. New York Media. These decisions – both of which are now on appeal to the Appellate Division, First Department and U.S. Court of Appeals for the Second Circuit respectively – serve as vindication for the magazine and its author, Kera Bolonik, and mark a key turning point in this long-running and outlandish saga.

These decisions serve as vindication for the magazine and its author, Kera Bolonik, and mark a key turning point in this long-running and outlandish saga.

Background

On July 23, 2019, *New York* published The Most Gullible Man in Cambridge A Harvard Law Professor Who Teaches a Class on Judgment Wouldn't Seem Like an Obvious Mark, Would He? Written by Kera Bolonik, with Hay as one of several sources, the article described the tumultuous relationship between Hay and the Shumans, which began with a sexual relationship between Hay and Maria-Pia and led to dueling allegations of physical, sexual, and emotional abuse centering around the Shumans' claim that Hay was the father of the child with which Maria-Pia became pregnant. The article described the numerous legal proceedings spawned by the relationship, including a Title IX complaint filed against Hay by Mischa, as well as the Shumans' disputes with other men who they claimed were the father of Maria-Pia's unborn child.

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The second article, published on August 8, 2019, was titled The Harvard Professor Scam Gets Even Weirder Six Other Men Describe their Encounters with the Same Mysterious Frenchwoman. It told the story of six other men who contacted Bolonik after the publication of the first article to discuss their similar encounters with the Shumans.

In the months after publication of the articles, Hay remained involved in their promotion, and even became involved in negotiations to sell the rights to the story to make a motion picture based on the same. Nearly a year after publication, however, Hay expressed regret for acting as a source of the articles and requested that they be retracted, which *New York* Magazine declined to do. Hay's after-the-fact reinterpretation of the Shumans' conduct toward him (the Shumans were misunderstood), his conduct toward the Shumans (he was insufficiently sensitive to their needs), and Bolonik and *New York's* reporting (Bolonik and *New York* should not have believed Hay, their other interview subjects, or the reams of supporting documentation Hay provided them), were at the center of the lawsuits.

The Shumans' Complaint

On July 21, 2021, the Shumans filed a complaint in New York Supreme Court against Bolonik, *New York* Magazine, its publisher New York Media, and Vox Media, Inc. (who acquired New York Media after publication of the articles) (the "Shuman Complaint"). The Shuman Complaint alleged that the articles' portrayal of the Shumans was defamatory. The Shuman Complaint, while lacking in specifics regarding the alleged defamatory statements at issue, nonetheless claimed in salacious detail that the Articles' account of the Shumans' relationship with Hay and other men was false, transphobic, and misogynist.

In particular, it argued that Hay, rather than the Shumans, was the aggressor and abuser in their relationship. Further, without identifying the particular statements, it made a variety of characterizations about what the articles said, ranging from the Shumans having participated in a "paternity trap" in which they concocted a scheme to seduce men into having sex, have a child, and extort those men for money, to filing a spurious Title IX Complaint against Hay, to defrauding Hay and his wife of their home. Importantly, the Shuman Complaint attached

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several exhibits, including a draft copy of the complaint Hay later filed in the United States District Court for the Southern District of New York against New York Media LLC, Bolonik, and others (the "Hay Complaint"), which itself contains a number of attachments.

The Shuman Complaint and its attachments contained a number of important concessions. *First*, the Shumans conceded that Hay himself was the primary source for the articles – and that, indeed, Hay sought out a reporter to write his story. *Second*, the Shumans conceded that Hay provided Bolonik with relevant documents that supported his claims about the Shumans. *Third*, the Shumans conceded that Hay had a "sincere belief" in his account of his relationship with the Shumans at the time he supplied information to Bolonik, even though they claimed he later interpreted their actions differently. *Fourth*, the Shuman Complaint referenced the existence of multiple litigations involving the Shumans and Hay, and the Shumans and other men. *Fifth*, the Shuman Complaint also discussed at great length a Title IX proceeding brought by Mischa against Hay alleging sexual harassment, abuse, and retaliation. *Sixth*, the Shuman Complaint described what the Shumans believed to be Bolonik's newsgathering for the articles, including alleging that Bolonik spent months with Hay learning every detail about the events in question, reviewing documents provided by Hay and probing his recollection of events, reaching out to the Shumans, contacting the Shumans' friends and family and those in their orbit, consulting two attorneys who had represented former sexual partners of Maria-Pia's in legal proceedings against the Shumans, and speaking with several former sexual partners of Maria-Pia's. And *seventh*, the Shumans also alleged that prior to publication of the first article Bolonik sought an interview with the Shumans, spoke off the record with Mischa, and eventually contacted the Shumans via their attorney and invited them to verify the accuracy of a number of factual statements.

Nearly a year after publication, however, Hay expressed regret for acting as a source of the articles and requested that they be retracted, which *New York* Magazine declined to do.

On September 28, 2020, the New York Plaintiffs moved to dismiss the Shuman Complaint under CPLR §§ 3211(a)(1) and (a)(7) on multiple grounds including lack of gross irresponsibility, substantial truth, and that at least one statement was absolutely privileged by the fair report privilege of N.Y. Civil Rights Law § 74. In support of their motion to dismiss, Vox Media submitted attached four exhibits: (1) the SLAPP Complaint; (2) the Final Confidential Investigation Report regarding the Title IX complaint filed by Mischa Shuman against Bruce Hay, dated March 15, 2019 (the "Title IX Report") obtained by Bolonik during her reporting; (3) the subsequent Final Determination of Harvard Law School regarding the Title IX complaint, dated November 5, 2019 (the "Title IX Final Determination"); and (4) a copy of a transcript from a March 31, 2014 restraining order hearing against a man identified as "John Poe," in Cambridge Dist. Ct., No. 1452RO67 (the "Poe Hearing Transcript").

Justice Latin's Decision Dismissing the Shuman Complaint

In his opinion dismissing the Shuman Complaint, Justice Latin pulled no punches. *First*, in reaffirming an earlier ruling of Justice Billings on a sealing application that "the public interest is substantial" in this action, Justice Latin held that **"**the core of the articles reasonably relates to

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deceptive and/or criminal activity in the community," they involved the "important modern social issue" of "evolving gender power dynamics in sexual relationships," and that "accounts of sexual harassment, rape, and/or the potential abuse of the Title IX process at well-known academic institutions," all of which were at the heart of the Articles, are "matters of social concern to the public." Thus, the "gross irresponsibility" standard of fault applied here.

Second, Justice Latin held that "Defendants were not grossly irresponsible in their reporting" in light of their reliance on Professor Bruce Hay, "text messages, court documents from various litigations, and Title IX documents," consultation with "at least seven other individuals, many with first-hand knowledge," and significant efforts – including an off-the-record conversation with Mischa Shuman – to obtain and include in the Articles the Shumans' side of the story.

Third, while Justice Latin's first two holdings would be sufficient in and of themselves to warrant dismissal, Justice Latin went further. With respect to the Title IX Report, he observed the following:

> [I]t is also worth noting that the Title IX report, that was based on over 2,000 attorney hours and over six months of investigation in preparing and conduction interviews of the plaintiffs, professor Hay, and others, and reviewing documents provided by the aforementioned (including emails and text messages), as well as documents from court filings and other public records, serves to demonstrate that what plaintiffs claim as libel was, by a preponderance of the evidence, more substantially accurate than false.

The core of the articles reasonably relates to deceptive and/or criminal activity in the community," they involved the "important modern social issue" of "evolving gender power dynamics in sexual relationships."

Then, with respect to the Poe Hearing Transcript, he concluded:

> Also, the court transcript concerning "Poe," another alleged victim, demonstrates that plaintiff Maria-Pia Shuman did state that she told "Poe" through an intermediary that he was the father of her child, and that "Poe" did state that she called him and said that he did not need to take a paternity test, but he had to give his time and/or money, for which he paid over $11,000.

Put simply, the Court ruled that the Title IX report established the substantial truth of the articles, and the Poe Transcript established the statement regarding Poe was absolutely privileged by the fair report privilege.

Hay Complaint and Judge Oetken's Decision

Shortly after the Shumans filed their complaint (attaching a draft of the Hay Complaint), on August 5, 2020, Hay filed his complaint in the Southern District of New York, and amended it on October 22, 2020. Hay alleged that he, too, had been defamed by the articles, marking the rare instance in which a source claims a publication has defamed him by publishing his own unadulterated quotes. In addition, Hay's amended complaint included claims for breach of

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contract based on assurances Bolonik allegedly provided to Hay regarding the care she would exercise in researching and writing the articles, and for sexual harassment under the New York State and New York City Human Rights Laws (NYSHRL and NYCHRL) on the basis of Bolonik's interactions with Hay.

After Hay retained counsel, he agreed to dismiss his defamation claim with prejudice and sought leave to file a second amended complaint, containing only claims for breach of contract and sexual harassment under the NYCHRL. The defendants opposed Hay's second amendment as futile on the basis that the proposed second amended complaint failed to state a claim for either cause of action.

On July 1, 2021, Judge Oetken denied Hay's request for leave to file a second amended complaint and dismissed the case in its entirety. The opinion held that the alleged assurances given by Bolonik to Hay – that Bolonik's reporting would be "professional," "thorough," and "sensitive to [] delicate gender issues," and that Hay would be "treated with the utmost professionalism and respect" – were too vague to give rise to a legally enforceable contract. Judge Oetken also observed that "asking this Court to weigh in on what are essentially subjective matters of journalistic discretion would raise serious First Amendment issues."

As for the sexual harassment claim, the opinion noted that the New York Court of Appeals had held the protections of the NYCHRL extend only to those who feel the impact of the alleged discriminatory conduct within New York City. Because Hay was a citizen of Massachusetts, and all of the complained-of conduct occurred in Massachusetts, Hay's claim fell outside the scope of the NYCHRL and was dismissed.

Both the Shumans and Hay have filed notices of appeal.

Conclusion

Strange and convoluted facts often beget strange and convoluted law. Thankfully, that was not the case here. Justice Latin and Judge Oetken saw these meritless lawsuits for what they were and swiftly disposed of them both.

Defendants Vox Media, LLC, New York Media, LLC, New York Magazine, and Kera Bolonik were represented by Kate Bolger, Jeremy Chase and Carl Mazurek of Davis Wright Tremaine LLP, and Miriam Nissly and Elissa Cohen of the Vox Media, LLC Law Department. Maria-Pia and Mischa Shuman were represented by David Boies and Valecia Battle of Boies Schiller Flexner LLP, and Catharine MacKinnon of the University of Michigan Law School. Bruce Hay was represented by Jillian T. Weiss of the Law Office of Jillian T. Weiss, P.C.

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What the Zuck!

Court Grants *USA Today*'s Motion to Dismiss Social Media Personality's Complaint

By Michael Pusateri and Michael J. Grygiel

On July 20, 2021, Judge Craig A. Karsnitz of the Delaware Superior Court granted *USA Today*'s motion to dismiss a complaint filed by conservative political commentator Candace Owens and her LLC. Owens v. Lead Stories.

Judge Karsznitz — who presided over a two-hour oral argument on the motion to dismiss — was guided by longstanding precedent holding that the First Amendment is implicated whenever a plaintiff takes aim at speech addressing matters of legitimate public concern, no matter how her claims are styled. On August 10, 2021, Owens appealed that decision to the Delaware Supreme Court; briefing is forthcoming.

Owens's Facebook Post

For years, Candace Owens utilized Facebook's platform to earn revenue through a "monetized" personality page that attracted third-party advertisers. She also paid Facebook to run her own advertisements.

As alleged in the Complaint, on April 28, 2020, Owens posted on her Facebook page (the "Post") questioning the relationship between flu deaths and COVID-19 deaths in early 2020. The Post stated as follows:

> According to CDC reports—2020 is working out to be the lowest flu death season of the decade. 20,000 flu deaths took place before Covid-19 in January, and then only 4,000 deaths thereafter. To give you context: 80,000 Americans died of the flu in 2019.

The Post incorporated the text of a tweet published by Owens on her Twitter account:

> Possibly the greatest trade deal ever inked was between the flu virus and #coronavirus. So glad nobody is dying of the flu anymore, and therefore the CDC has abruptly decided to stop calculating flu deaths altogether. Agreements between viruses are the way of the future.

According to the Complaint, the Post set forth Owens's "opinion" and stated that its purpose was "not to republish actual statistics but to raise an issue in an ongoing debate surrounding Covid-19."

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USA Today's Fact-Check Article

On April 30, 2020, *USA Today* published an article (the "Article") entitled "Fact Check: CDC has not stopped reporting flu deaths, and this season's numbers are typical." As its title suggests, the Article addressed two factual assertions in the Post: (1) that "the CDC has abruptly decided to stop calculating flu deaths" and (2) that "2020 is working out to be the lowest flu death season of the decade."

The Article quoted from the Post and indicated what other users had said about the Post: "Some Facebook and Twitter users questioned the validity of Owens' statistics. Others read between the lines of her sarcasm to comment on what she may be implying." The Article also quoted a Facebook user's comment suggesting that other causes of death in addition to the flu were attributed, incorrectly, to COVID-19.

The Article stated that, "[a]ccording to CDC data, none of Owens' statistics is correct." It explained how the CDC tracks flu deaths and defines the flu season, and why Owens's claim that "80,000 Americans died of the flu in 2019" was incorrect. Specifically, in 2020, the CDC continued to report flu deaths; Owens's assertion that "20,000 flu deaths took place before Covid-19 in January, and then only 4,000 deaths thereafter" was thus disproven by the CDC's own data.

The Article concluded that "the claim that the CDC has stopped reporting flu deaths because the death rates are so low is FALSE because it is not supported by [*USA Today*'s] research," and provided a summary of the data. The Article bolstered its conclusions by listing eleven "fact-check sources," including several official CDC reports.

The Lawsuit and Motion to Dismiss

On October 19, 2020, Candace Owens and her LLC filed a three-count Complaint in Delaware Superior Court, alleging the Article (and a separate article published by co-defendant Lead Stories) caused Facebook's "demonetization" of her account, thus constituting intentional interference with contractual relations (Count I), tortious interference with prospective business relations (Count II), and unfair competition (Count III). As a result, she was no longer able to solicit revenue from third-party advertisers, and could also no longer run her own advertisements on Facebook's platform. The Complaint alleged that Owens lost Facebook revenues of $1,065,000 per month. An amended complaint made additional factual allegations, but maintained these same theories of recovery.

Owens's Use of the Lawsuit as a Fundraising Vehicle

In what seems to be the fashion of the day in certain circles, Owens sought to monetize her lawsuit against *USA Today* by maintaining a website (www.factcheckzuck.com) that promoted the action as "*Candace v. Zuck*" and portrayed her as battling the "the overlords of big tech" rather than a newspaper that exercised its First Amendment rights by challenging the validity of her assertions about the virality and lethality of the public health pandemic gripping the nation.

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(Owens posted an eight-minute video promoting her "massive lawsuit" and warning "yes, Mr. Zuckerberg, you have been trying to hide behind your fact checkers and now it's time to put your sleazy little fact checkers through discovery" and blaming a co-defendant for the "mass un-doing of society." The website included a disclaimer: "A portion of the total funds raised will be used to cover legal costs incurred by Candace Owens LLC in relation to the aforementioned case. All excess funds will be used for other purposes by the LLC.")

The splash-page graphic speaks for itself:

But what the lawsuit featured in exploitation it lacked in legal substance, and *USA Today* moved to dismiss. Among other points, USA Today argued that each of the plaintiffs' causes of action was barred by the First Amendment because they failed to plead specific factual allegations demonstrating that the Article was false or published with constitutional malice, and therefore the suit failed as a matter of law.

Specifically, *USA Today* argued that where a plaintiff seeks to impose civil liability based on the *content* of a defendant's speech, the First Amendment "can serve as a defense in state tort suits." *Snyder v. Phelps*, 562 U.S. 443, 451 (2011); *see, e.g., City of Keene v. Cleaveland*, 118 A.3d 253 (N.H. 2015) (holding tortious interference claims asserted against political activists barred by First Amendment). This is especially so where the speech comments on matters of public concern. That is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (quotation marks and citations omitted). "Accordingly, 'speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'" *Snyder*, 562 U.S. at 452 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

These protections, *USA Today* argued, apply irrespective of whether the plaintiff challenging the speech brings a claim for defamation or one restyled as a different tort. Thus, as in the defamation context, a plaintiff must sufficiently allege falsity and actual malice in order to state a claim. "[I]n instances in which a plaintiff's tortious interference claims are based on lawful conduct or speech, the courts have concluded that such lawful activity is insufficient to establish the required element of improper conduct." *Jefferson Cty. Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 858 (10th Cir. 1999).

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Superior Court Ruling

On July 20, 2021, Judge Karsnitz dismissed Owens's complaint, noting that "[a] bedrock principle of our law is that the United States Constitution protects freedom of speech," and applying the principle to "tort lawsuits whose complaints are based on defendants' [allegedly] injurious false statements." Slip op. at 25.

Turning to Count I, Judge Karsnitz explained that Owens failed to "plead that Defendants 'improperly' or 'wrongfully' interfered with the performance of the contract" because "the exercise of constitutionally protected speech cannot be an 'improper' or 'wrongful action'" unless the speech is false. *Id*. at 46. And, in the case of a public figure like Owens, the speech must not only be false, it must be published with knowledge of a high likelihood of probable falsity. Slip op. at 46-47. Because he found that no such allegations were made or inferable, Judge Karsnitz dismissed Count I. In so doing, he also rejected Owens's argument that her Facebook Post concerning flu deaths was "obvious hyperbole," noting the Post's use of sarcasm was supplemented with "factual statistics." *Id*. at 50-52.

Similar logic led Judge Karsnitz to dismiss Count II for tortious interference with prospective business relations and Count III for unfair competition. As before, he affirmed that "there is no 'improper' or 'wrongful' interference … where Defendants' conduct was protected by the First Amendment." *Id*. at 54.

Implications

While it certainly did not break new constitutional ground, Judge Karsnitz's comprehensive opinion reinforces well-settled case law prohibiting tort plaintiffs from circumventing First Amendment defenses and limitations by relying on ancillary tort theories of recovery to challenge truthful published accounts. It made clear, too, that reporting on the COVID-19 pandemic implicates an issue of deep public concern. That, in turn, raises the pleading bar for suits taking aim at those engaging in this public debate of paramount importance.

Given the abundant reporting (and in some cases, misreporting) surrounding the pandemic, Judge Karsnitz's thoughtful analysis provides a roadmap for media defendants who are sued for their news coverage of this ongoing matter of public health and safety.

Defendant Gannett Satellite Information Network, LLC d/b/a USA Today was represented by Michael J. Grygiel and Cynthia E. Neidl of Greenberg Traurig, LLP in Albany, New York, Steven T. Margolin of the firm's Wilmington, Delaware office, and Michael Pusateri of its Washington, D.C. office. Co-defendant Lead Stories, LLC was represented by Garvan McDaniel of Hogan McDaniel in Wilmington, Delaware and Craig Weiner and Reena Jain of Akerman LLP in New York City. Plaintiffs Candace Owens and Candace Owens, LLC were represented by Todd McMurtry and Jeffrey Standen of Hemmer DeFrank Wessels, PLLC in Ft. Mitchell, Kentucky, Sean Bellew of Bellew LLC, Wilmington, Delaware, and John P. Coale of Washington, D.C.

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Eleventh Circuit Affirms Early Dismissal of 'Hate Group' Defamation and Religious Discrimination Claim

By Peter Canfield

Alleging "nothing but love for people who engage in homosexual conduct," no matter how "vile" and "shameful" their conduct, is not enough to legally ground a defamation and religious discrimination lawsuit filed by a media ministry challenging its public branding as an anti-LGBTQ "hate group."

As alleged in its complaint, Coral Ridge Ministries Media is a Christian ministry based in Florida whose main activities include broadcasting via television, and otherwise spreading, the "Gospel of Jesus Christ" as well as fundraising. It alleged that it espouses "biblical morals and principles" on homosexuality and marriage and opposes same-sex marriage and the "homosexual agenda" based on its religious beliefs.

The Southern Poverty Law Center, based in Montgomery, Alabama, is a nonprofit that, among a range of activities, disseminates a "Hate Map" that lists groups that it designates as "hate groups." The Center and its map define "hate groups" as groups that "have beliefs or practices that malign or attack an entire class of people, typically for their immutable characteristics." According to Coral Ridge, the Center designated Coral Ridge as an anti-LGBTQ hate group because of its espousal of biblical views concerning human sexuality and marriage—that is, because of its religious beliefs on those topics.

An entire class of people, typically for their immutable characteristics." According to Coral Ridge, the Center designated Coral Ridge as an anti-LGBTQ hate group because of its espousal of biblical views concerning human sexuality and marriage.

Amazon, the largest internet-based retailer in the world, operates the AmazonSmile program, whereby it donates 0.5 percent of the price of purchases made on smile.amazon.com to any eligible charitable organization selected by the customer. Under the rules, entities designated by the Southern Poverty Law Center as "hate groups" are not eligible.

Coral Ridge brought suit in the Middle District of Alabama against the Southern Poverty Law Center for defamation and Amazon for religious discrimination, alleging that the Center had falsely designated it as a "hate group" and that, because of this designation, Amazon had improperly excluded it from receiving donations through its AmazonSmile charitable-giving program.

On motions to dismiss, the trial court in a 141-page order dismissed the complaint with prejudice, 406 S. Supp. 3d 1258 (M.D. Ala. 2019) (Thompson, J.), and, late this July, a three-

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judge panel of the Eleventh Circuit unanimously affirmed. *Coral Ridge Ministries Media v. Amazon.com*, No. 19-14125 (11th Cir. July 28, 2021) (Wilson, J., with Grant and Tjoflat, JJ.).

Dismissal of Defamation Claim Discussed and Affirmed

Sidestepping the trial court's initial dispositive determination that the term "hate group" has a "highly debatable and ambiguous meaning" not susceptible of being proved true or false, the Eleventh Circuit affirmed dismissal of the defamation claim based on the trial court's alternative ground, that Coral Ridge, which conceded its status as a public figure, had failed to adequately plead actual malice.

The Court explained that Coral Ridge made two basic contentions regarding actual malice: first, that the Center's definition of hate group was so far removed from the commonly understood meaning of the term that its designation of Coral Ridge as a hate group was "intentionally false and deceptive"; and, second, that the Center acted with "reckless disregard for the truth" in designating Coral Ridge a hate group even under the Center's definition.

The Eleventh Circuit affirmed dismissal of the defamation claim based on the trial court's alternative ground, that Coral Ridge, which conceded its status as a public figure, had failed to adequately plead actual malice.

In rejecting the first contention, the Court noted that Coral Ridge had not plead any facts that would allow a court to infer that the Center "doubted the veracity of its own definition" of hate group. Also, that given that the Center publicly disclosed the definition on its website, it is hard to see how the Center's "use of the term would be misleading." Finally, the Court cited Coral Ridge's failure to present any factual allegations that would allow the Court to infer that the Center's "subjective state of mind was sufficiently culpable."

In rejecting the second contention, the Court reiterated again that Coral Ridge pleaded no facts that would allow an inference that the Center "seriously doubted the accuracy of designating Coral Ridge a hate group." The Court held that, even accepted as true, Coral Ridge's "bare-bone allegations" that it "has never attacked or maligned anyone on the basis of engaging in homosexual conduct" and that the Center's conduct "in and of itself" would have "created a high degree of awareness of the probable falsity" of its designation are insufficient to show that the Center doubted its truth.

For the first time on appeal, Coral Ridge asked the Court to "get rid of the actual malice requirement," citing *McKee v. Cosby*, 139 S. Ct. 675 (2019) (Thomas, J., concurring). The Court rejected the request in a footnote, stating that, even if this argument were not waived, a circuit court is not at liberty to decline to follow the decisions of the Supreme Court.

Religious Discrimination Claim Discussed and Affirmed

Below and on appeal, Coral Ridge argued that by deferring to the Southern Poverty Law Center's "hate group" designation Amazon violated Title II of the Civil Rights Act, 42 U.S.C. §

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2000a et seq., because (1) Amazon is a "place of public accommodation," (2) the AmazonSmile program is a "privilege," "service," or "advantage" of Amazon, and (3) Amazon effectively excluded Coral Ridge from benefiting from the AmazonSmile program because of Coral Ridge's religious views.

The Eleventh Circuit affirmed dismissal of this claim as well, holding that the district court was correct in finding that Coral Ridge's interpretation of Title II, even assuming it applied, would violate the First Amendment by essentially forcing Amazon to donate to organizations it does not support.

Peter Canfield is of counsel with Jones Day in Atlanta. The views and opinions set forth herein are his personal views or opinions; they do not necessarily reflect views or opinions of Jones Day. David Gibbs III of The National Center for Life & Liberty, Inc., Bartonville, Texas, represented Coral Ridge Ministries Media, Inc. Shannon L. Holiday, Robert D. Segall and Benjamin W. Maxymuk of Copeland, Franco, Screws & Gill, PA, Montgomery, Alabama, represented the Southern Poverty Law Center. Ambika K. Doran, Bruce E.H. Johnson and Tim Cunningham of Davis Wright Tremaine, LLC, Seattle, Washington, together with Harlan I. Prater, IV, and R. Ashby Pate of Lightfoot, Franklin & White, LLC, Birmingham, Alabama, represented Amazon.Com, Inc. and AmazonSmile Foundation.

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Dr. Seuss / Star Trek Mashup Case Heads to Trial After Fair Use Roller Coaster Ride

By Jeremy S. Goldman

A made-for-law-school copyright case involving a *Dr. Seuss* / *Star Trek* mashup is heading for trial. On August 9, 2021, U.S. District Judge Janis Sammartino denied a motion for summary judgment brought by the plaintiff, Dr. Seuss Enterprises, leaving it to a jury to decide whether ComicMix's unpublished book – *Oh, the Places You'll Boldly Go!* – infringes the copyrights in Dr. Seuss' famous children's books. The case not only raises terrific questions of fair use and substantial similarity under copyright law, but also features a roller coaster ride at the district court and a battle royale with the Ninth Circuit over fair use.

Oh, the Places You'll Boldly Go! (or Not)

Dr. Seuss Enterprises owns the copyrights in the works of Theodor S. Geisel a/k/a Dr. Seuss, the author and illustrator of *Oh, the Places You'll Go!*, *How the Grinch Stole Christmas!*, and *The Sneetches and Other Stories*, among many other works. In 2016, ComicMix launched a Kickstarter campaign to fund the publication of *Oh, the Places You'll Boldy Go!*, an illustrated book that combines aspects of Dr. Seuss' books with characters, imagery and other elements of *Star Trek*. ComicMix described the book as a "parody" that "fully falls within the boundary of fair use," but acknowledged that they "may have to spend time and money proving it to people in black robes." Indeed!

The case not only raises terrific questions of fair use and substantial similarity under copyright law, but also features a roller coaster ride at the district court and a battle royale with the Ninth Circuit over fair use.

Fair Use Roller Coaster Ride at the District Court

On November 11, 2016, Dr. Seuss sued ComicMix and its principals for copyright infringement, trademark infringement and unfair competition in the U.S. District Court for the Southern District of California. This article focuses only on the copyright claim. On June 9, 2017, the court ***denied*** ComicMix's motion to dismiss, holding that "the Court cannot say as a matter of law that Defendants' use of Plaintiff's copyrighted material was fair." Dr. Seuss filed an amended complaint, ComicMix again moved to dismiss, and the court again ***denied*** it, doubling down on its prior fair use ruling. After discovery, the parties cross moved for summary judgment. This time, on March 12, 2019, the court ***granted*** ComicMix's motion, holding that *Boldly* was fair use as a matter of law. The court concluded that, because "*Boldly* is highly transformative," ComicMix "took no more than was necessary for their purposes," and the harm to Dr. Seuss' market was "speculative," the four fair use factors of Section 107 of the Copyright Act favored ComicMix.

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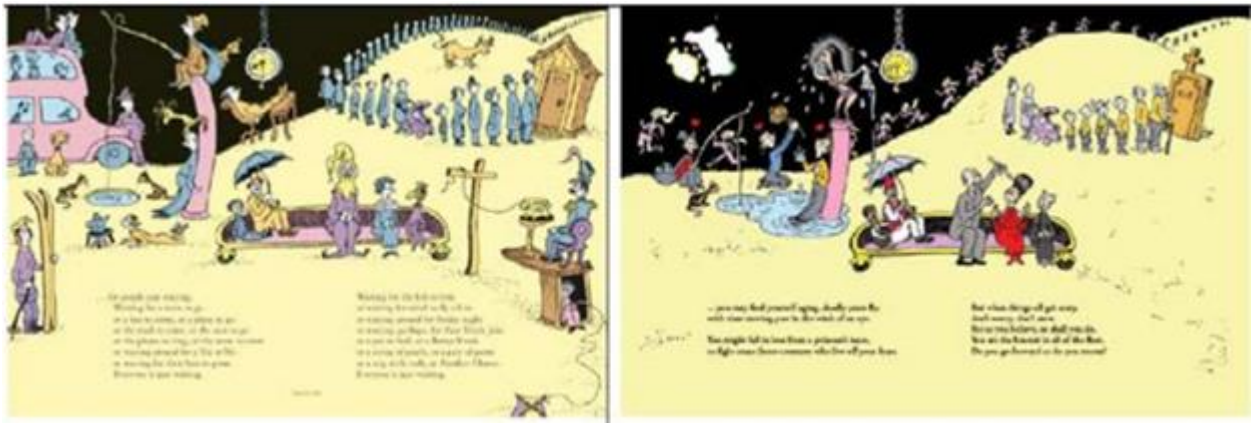
The Ninth Circuit Drops the Hammer on Fair Use

On December 18, 2020, the U.S. Court of Appeals for the Ninth Circuit *reversed* the district court's fair use decision. Judge McKeown, writing for the 3-judge panel, held that it wasn't even a close call, completely disregarding Judge Sammartino's opinion reaching the opposite conclusion. Seriously, the appellate court did not make a single reference to the decision it was reversing.

The opinion provides a bread-and-butter application of the four fair use factors, concluding that all of them weighed "decisively" against a finding of fair use. Not surprisingly, the most interesting part of the decision is the discussion of whether the mash-up is "transformative" under the standard set by the U.S. Supreme Court in *Campbell v. Acuff-Rose*. The court was not persuaded that the "extensive new content" created by the work is enough, holding that "the addition of new expression to an existing work is not a get-out-of-jail-free card that renders the use of the original transformative." Rather than parodying, commenting on, or shedding new light on Dr. Seuss's original, *Boldly!* merely "repackaged" *Go!* "into a new format, carrying the story of the [*Star Trek*] Enterprise crew's journey through a strange star in a story shell already intricately illustrated by Dr. Seuss."

The court juxtaposed several examples in its opinion, including:

And:



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And:

District Court Sends the Case to the Jury Anyway

Critically, the Ninth Circuit's decision was on defendant ComicMix's motion for summary judgment. Thus, the appellate court was only telling the district court that it should not have knocked out Dr. Seuss's claim on fair use grounds at the summary judgment stage. The Ninth Circuit did ***not*** hold that *Boldly!* infringed Dr. Seuss's copyright as a matter of law.

Emboldened, however, by the Ninth Circuit's ruling, Dr. Seuss moved for summary judgment on its claim for copyright infringement, arguing that "the Ninth Circuit's ruling, which found substantial and significant copying, ***requires*** the Court to find that substantial similarity has been established as a matter of law."

On August 9, 2021, the court denied Dr. Seuss's motion. The court first noted that "it is somewhat rare for the plaintiff copyright holder affirmatively to move for summary judgment of infringement and for such a motion to be granted." Historically, courts have only done so in in cases involving "overwhelming similarity."

The court then applied the Ninth Circuit's 2-part test for substantial similarity. As to the "objective extrinsic test," which compares the "overlap of concrete elements," the court acknowledged that "portions of the Ninth Circuit's opinion make clear that, extrinsically, *Boldly!* overlaps concrete elements in the Copyrighted Works, particularly in its exacting replication of iconic illustrations from each of the Copyrighted Works."

The court then proceeded to the "subjective intrinsic test," which examines the "total concept & feel" of the two works.

And then, TWIST!

In a two-sentence analysis, the court determined that, while the works have a significant amount of overlap of concrete, protectable elements, *Boldly* "is not so similar to the protected works that no triable issue exists with respect to whether the total concept and feel of the works are substantially similar. Therefore, the issue of intrinsic similarity must be left for the jury."

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Given Judge Sammartino's ruling that *Boldy!* was fair use as a matter of law, perhaps it's not all that surprising that she wasn't willing to hand Dr. Seuss a victory "on the papers." Though the district court is bound by the Ninth Circuit's ruling on fair use, Judge Sammartino is going to make a jury take the final step of deciding whether the work is infringing.

Jeremy S. Goldman is a partner at Frankfurt Kurnit Klein + Selz PC.

Dr. Seuss Enterprises is represented by Stanley J. Panikowski, Andrew L. Deutsch,Tamar Y. Duvdevani and Marc E. Miller, of DLA Piper LLP (US). ComicMix is represented by Dan Booth, Dan Booth Law LLC, and Sprinkle Lloyd & Licari.

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The 'Embed' Saga Continues: Another Court Rejects 'Server Test' With More Decisions Looming

By Kenneth P. Norwick

"Embedding" is a computer coding process that allows a website ("Website A") to take – borrow/help-itself-to/steal(?) – content (for present purposes, a photo that is the copyright property of someone else) from a different site ("Website B") and present – show/publish/display(?) – that content as if it originated from – belonged on – Website A. For about ten years, beginning on December 3, 2007, it was widely assumed by most online publishers and platforms, and many copyright lawyers, that Website A's embedding of that content did not infringe the content's underlying copyright.

That assumption derived from the Ninth Circuit's *Perfect 10 v. Amazon* decision issued on that date that addressed copyright infringement claims by a publisher of photos of nude women against Google based on Google's rendering of the plaintiff's photos in response to searches for them on Google's "Image Search" service. The Circuit, without purporting to rely on any case authority, held that Google's rendering of those photos in response to those searches did not constitute a "display" – the relevant "exclusive right" in Section 106 of the Copyright Act – because the photos were never "stored" on Google's servers but were only embedded (although that word was not used) from other sites. The Court used the term "server test" to refer to the legal analysis it employed, which term has recently morphed to "server rule."

Based on that holding, despite grumbling (mostly) by photographers and their lawyers, many online publishers proceeded to adopt embedding as a major means of providing to its visitors – without cost to it – copyrighted content that it would otherwise have to license and pay for. But, at least to some extent, that all changed on February15, 2018, when SDNY Judge Katherine B. Forrest, in *Goldman v. Breitbart*, declined to follow *Perfect 10* and held that a website's embedding of a photo from a tweet could infringe Section 106's "display right." As a result, at the very least, the prevailing *Perfect 10*-based "embedding can't infringe" assumption was challenged, if not dispelled. The *Breitbart* holding was widely discussed in legal circles, with photographers (and others) happily supportive and the website community (and others) not so much. Later that year the Second Circuit refused to hear an interlocutory appeal of that ruling, and thereafter the case was concluded by settlement.

And then, for the following three years, there was virtually no judicial activity on the "embed" issue. During that period some websites treated *Breitbart* as a direct legal disincentive to continued embedding, while others seemed to consider it just one judge's (mistaken) view and not "the law," with many continuing to embed in lieu of licensing. (One exception to that judicial silence: a judge in the Northern District of California – in the Ninth Circuit no less! – offered this observation about the wholesale reliance on *Perfect 10*: "First, FSS cites no case

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applying the *Perfect 10* server test outside of the context of search engines. Indeed, subsequent cases have refused to apply the *Perfect 10* server test outside of that context. See, e.g., *Goldman v. Breitbart News Network*, (SDNY 2018); *The Leader's Inst., LLC v. Jackson*, (N.D. Tex. 2017). While these cases are from outside the Ninth Circuit, FSS has not provided any case within the Ninth Circuit applying the server test outside of the search engine context or in the context here, the wholesale posting of copyrighted material on a news site." *Free Speech Sys., LLC v. Menzel*, 390 F. Supp. 3d 1162 (N.D. Cal. 2019).

But that three-year judicial silence was loudly broken on July 30, 2021, when SDNY Judge Jed R. Rakoff, in *Nicklen v. Sinclair*, effectively followed *Breitbart* and fulsomely rejected *Perfect 10*'s "server rule." And there is more judicial "embed" activity to be expected in the immediate future.

The plaintiff in *Nicklen*, a nature photographer and conservationist, videotaped an emaciated polar bear in the Canadian Arctic and posted the video to his Instagram and Facebook pages, making clear that licensing was available. The video went "viral," here meaning that many hundreds of separate websites helped themselves to it – by embedding. The plaintiff sued as many of those sites as he could in a single copyright infringement action in the SDNY, and Sinclair, which itself owned hundreds of those sites, was the last "unsettled" defendant. Sinclair's lead argument for summary judgment was that *Breitbart* was wrongly decided and that *Perfect 10's* "server rule" required the rejection of *Nicklen's* infringement claims. But Judge Rakoff would have none of it.

On the crucial issue of the proper interpretation of the "display" right, the court declared:

> In 1976, Congress crafted a broad display right, conscious that section 106(5) "represent[ed] the first explicit statutory recognition in American copyright law of an exclusive right to show a copyrighted work, or an image of it, to the public." . . . The display right as initially drafted was "analogous to the traditional common-law right of first publication in a literary work, or to the moral right of divulgation in continental law, but that right would cease as soon as a copy of the work was transferred." . . . But this approach was ultimately set aside. The display right in its final form encompasses "not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public." . . . As such, an infringer displays a work by showing "a copy" of the work - not the first copy, or the only copy, but any copy of the work.....
>
> Further, the exclusive display right set forth in the Copyright Act is technology-neutral, covering displays made directly or by means of any device or process "now known or later developed." The concept of "display" thus includes "the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage

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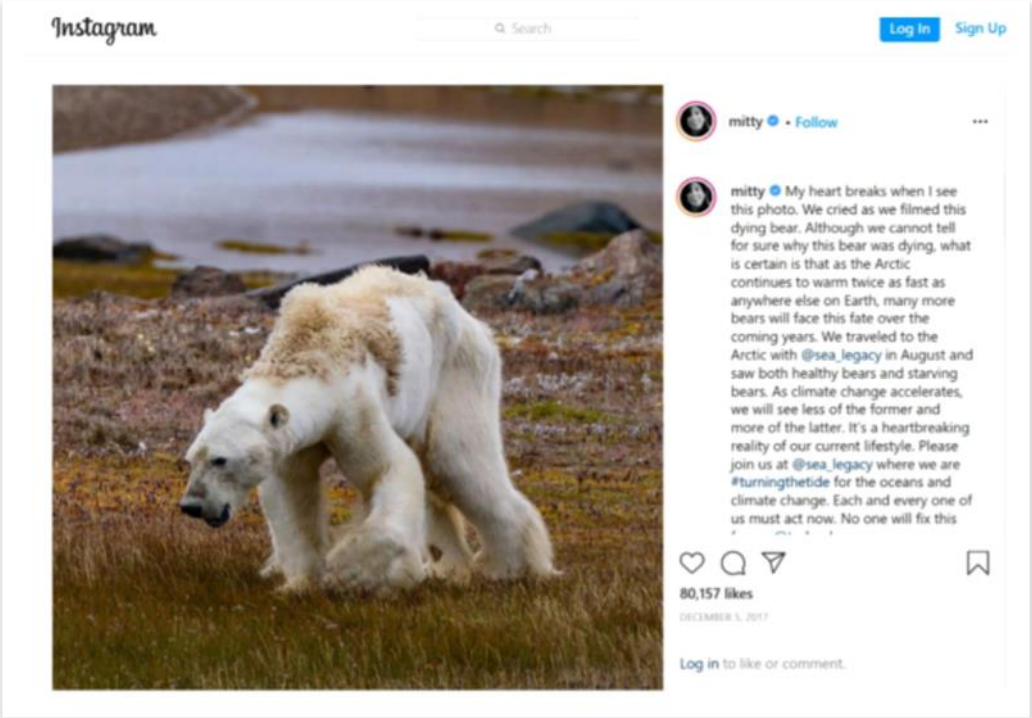

The plaintiff, a nature photographer and conservationist, videotaped an emaciated polar bear in the Canadian Arctic and posted the video to his Instagram and Facebook pages, making clear that licensing was available.

> and retrieval system." . . . The right is concerned not with how a work is shown, but that a work is shown.
>
> The Copyright Act's text and history establish that embedding a video on a website "displays" that video, because to embed a video is to show the video or individual images of the video sequentially by means of a device or process.

Judge Rakoff also agreed with *Breitbart* as follows:

> Further, the Ninth Circuit's reasoning in *Perfect 10* should be cabined by two facts specific to that case: (1) the defendant operated a search engine and (2) the copyrighted images were displayed only if a user clicked on a link. See *Goldman v. Breitbart News Network, LLC*, (distinguishing *Perfect 10* on these grounds). When a user "open[s] up a favorite blog or website to find a full color image awaiting the user, whether he or she asked for it, looked for it, clicked on it, or not," the Ninth Circuit's approach is inapt. This case does not involve a search engine, and Nicklen alleges that no user intervention was required to display the Video's individual images nonsequentially.

However, lest the opponents of the "server test" celebrate too soon, there are at least two further cases that could breathe new life into *Perfect 10*. The first is *McGucken v. Newsweek*, also in the SDNY, now fully briefed, where Newsweek has mounted a frontal assault on *Breitbart* (and now presumably *Nicklen* as well). The gist of Newsweek's argument in defense of the "server

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test" is that "showing" a copyrighted work via embedding is outside the scope of the Copyright Act because the embedder never created a fixed material copy but merely created code – aka a "jumble of numbers and letters that are incomprehensible to human readers."

The second is *Hunley v. Instagram*, a putative class action in N.D. Cal. alleging that Instagram has unlawfully contributed to infringements by countless websites by enabling and encouraging their (infringing) embedded uses. Instagram has moved to dismiss based entirely on *Perfect 10* – i.e., embedding can't infringe – but a decision almost certainly won't be forthcoming until well into 2022. And that decision – sooner or later – will no doubt be the subject of a major appeal to the Ninth Circuit, giving it an opportunity to embrace or not the various interpretations provided by others as to the true meaning of its holding in *Perfect 10*.

The recent judicial "embed" activity, and especially *Nicklen*, has inspired renewed commentary and speculation about both the legal and non-legal future of the process. On the legal front, it is assumed that – perhaps relatively soon – the issue will get to the Second Circuit, probably in *Nicklen* or *McGucken* or both. And that assumption has encouraged speculation that if the Second Circuit agrees with *Breitbart*/*Nicklen*, that would create a "circuit split" supporting Supreme Court review. However, it seems likely that even if the Second Circuit affirms the *Breitbart/Nicklen* holdings, it will at the same time emphasize that it does not dispute *Perfect 10's* application to search engines, which may muddy the possible split. And, of course, an appeal to the Ninth Circuit in *Hunley* could lead to a revised approach by that Circuit to the whole subject of embedding, also affecting the projected split.

It seems clear that the embed saga is far from completed, with major further developments yet to come.

On the non-legal front, a recent Bloomberg report identified several business/technological proposals that might alleviate the current stresses. One such, citing a current YouTube feature, "allows users to disable embeds for their [content]." A second proposal is "an instant license that pops up upon an embed attempt, which could seamlessly let news organizations [presumably all websites] get permission and creators get paid."

For now, it seems clear that the embed saga is far from completed, with major developments yet to come.

Kenneth P. Norwick is a partner at Norwick & Schad in New York. He represented the plaintiff in Goldman v. Breitbart News Network. His report on Breitbart *appeared in the February 2018 MLRC Law Letter. (In that piece he wrote: "'Embed' as a defense to copyright infringement? Did I miss that class?") He also reported on the Second Circuit's recent* Warhol v. Goldsmith *"fair use" decision in the March 2021 Law Letter.*

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Sacramento Bee Scores Win Against Police Secrecy

By Karl Olson and Aaron Field

California's Legislature passed a landmark bill, Senate Bill 1421, to curb police secrecy effective in 2019, but the state's police agencies and powerful police unions have fought and delayed its implementation virtually every step of the way.

Now the *Sacramento Bee*, in an August 13 ruling, has scored another victory -- mirroring earlier victories by the state's newspapers -- against the delays in producing records and overzealous redactions by police departments.

The ruling by Sacramento County Superior Court Judge Steven Gevercer found that the Sacramento Police Department had delayed too long in releasing records of an officer-involved shooting, and redacted too much of the records it had released.

Judge Gevercer's ruling wasn't the first rebuke of police agencies since SB 1421 became effective. Indeed, Judge Gevercer himself had scolded the Sacramento Sheriff's Department in a ruling against that department in a 2019 case brought by the *Bee* and the *Los Angeles Times*.

SB 1421 has spawned a plethora of litigation since day one of its January 1, 2019 effective date. Initially, police unions sued in an unsuccessful attempt to block its implementation, arguing among other things that the bill didn't apply to officer-involved shootings and use of force which took place before the bill's effective date. Proponents of the bill, led by the state's news media and the American Civil Liberties Union, successfully argued that the bill did apply to pre -2019 incidents.

But that victory wasn't the end of the story. It wasn't even the beginning of the end. Police agencies up and down the state delayed in releasing records. Before the Bee's August victory, the *Los Angeles Times* sued the LA Sheriff's Department and got a ruling this year that found the sheriff had delayed too long in releasing records.

Police agencies have attempted to justify their delays in various creative, and often frivolous, ways. Initially the refrain was "we have hundreds of files to review, and not that many people to review them." They noted that newspapers and other requesters had requested years' worth of records, often spanning a five-year period.

But that argument got old fast, and in the *Bee*'s latest victory, the Sacramento Police Department's arguments bordered on lunacy. A police records custodian argued that it took 21 hours of time for the police to review and redact one hour of video footage of an officer-involved shooting. She said it would take 136 weeks -- yes, 136 weeks, that's not a typo -- for the police to fully comply with the Bee's request for records of an officer-involved shooting that took place in 2018.

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The Bee and Judge Gevercer were singularly unimpressed with that police argument. The *Bee* and the judge noted that the Sacramento City Council had authorized four full-time positions last year to review SB 1421 records, but the Police Department – for reasons it never explained, perhaps out of a lack of enthusiasm for transparency -- hadn't filled the positions.

Moreover, there was a certain disingenuity and a self-inflicted wound in the Sacramento PD's argument: most of the delay in the release of records came about because the Police Department, like other agencies throughout the Golden State, was taking an overbroad view of its right to redact records.

The Sacramento Police redacted records in four categories: (1) redacting the victim's face; (2) redacting speculation by his family about his possible medical conditions before he was killed by two officers; (3) redacting his "rap sheet" of prior run-ins with the law; and (4) redacting the faces of the officers involved in the shooting.

Judge Gevercer rejected all four categories of redactions. He made short shrift of the first three arguments, correctly noting that under California law dead people have no privacy rights (and in this case, the decedent's family hadn't even arged for privacy).

As to the officers' faces, the court found that they hadn't made the demanding showing required by SB 1421 and California case law to justify redaction. The subjective concerns of one officer involved in the shooting were understandable, the judge noted, but they hadn't shown a specific, articulable, substantial showing that would justify secrecy.

The Sacramento ruling was the latest word in a battle which has been waged for more than a decade over the right to know vs. officer safety concerns. Police advocates argued 17 years ago that disclosure of police officer salaries and even police names would endanger officer safety. The California Supreme Court in 2007 ruled in favor of disclosure in a landmark pair of cases, *International Federation of Professional and Technical Engineers Local 21* v. *Superior Court* (2007) 42 Cal. 4th 319 and *Commission on Peace Officers Standards and Training* v. *Superior Court* (2007) 42 Cal. 4th 278. Later, the state Supreme Court again rejected officer safety concerns in *City of Long Beach* v. *Superior Court* (2014) 59 Cal. 4th 59. The Court has never said that officer safety concerns would never justify non-disclosure, but it has set a very high bar for non-disclosure, and that high bar was maintained by the California Legislature when it enacted SB 1421. It's against that background that Judge Gevercer rued in the Sacramento Bee's favor when the Sacramento Police Department argued for redaction of an officer's face.

This case won't be the last word in the battle over the public's right to know about officer-involved shooting, but in a hopeful sign, Sacramento announced on August 31 that it wouldn't appeal the judge's ruling. Could that be a sign that the message is beginning to sink in to public agencies that they should focus on fighting crime and not fighting transparency? Let's hope so.

Karl Olson is a partner and Aaron Field is an associate at the San Francisco law firm of Cannata, O'Toole, Fickes and Olson.

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Pushing Back Against NYPD for Violations of Journalists' Constitutional Rights

By Mickey H. Osterreicher and Robert D. Balin

In a recently filed suit led by the National Press Photographers Association (NPPA), in partnership with Davis Wright Tremaine LLP, five visual journalists are suing the NYPD for civil rights violations after each journalist was targeted, beaten, or arrested by NYPD officers while attempting to cover the 2020 George Floyd protests in New York City. Gray, et al. v. City of New York, et al., 21-cv-06610 (SDNY).

At the core of the case is a concerted effort to remedy—through appropriate training, supervision, and discipline—the NYPD's longstanding and widespread disregard for, and interference with, the First Amendment right of journalists to record police activity in public places.

The lawsuit, filed on August 5, 2021, was brought in the Southern District of New York by plaintiffs Adam Gray, Amr Alfiky, Diana Zeyneb Alhindawi, Jemell ("Mel") D. Cole, and Jason "Jae" Donnelly. Each plaintiff has a disturbing story to tell:

— Adam. Gray is based in New York City as Chief Photographer for British press agency South West News Service. On May 30, 2020, he was on assignment covering protests near Union Square in Manhattan when he was tackled to the ground by an NYPD officer and then handcuffed, imprisoned for hours and ultimately issued a desk appearance ticket for Unlawful Assembly in violation of New York Penal Law Section 240.10. Throughout his seizure and detention, Mr. Gray repeatedly stated he was a journalist and asked officers to look at his press credentials that were hanging around his neck. Those requests were ignored. The Manhattan District Attorney's office subsequently declined to prosecute Mr. Gray.

— Amr Alfiky, a photography resident at National Geographic and former photography fellow at the New York Times, was arrested while capturing police activity taking place on a public sidewalk in the Lower East Side in early 2020. Mr. Alfiky was held for approximately three and a half hours and charged with Disorderly Conduct – Failure to Disperse pursuant to New York Penal Law Section 240.20(6). Throughout the entire incident Mr. Alfiky continually identified himself as a member of the press. His NYPD issued press credential was seized and held by police until his lawyers were able to have it returned a few days later. He was ultimately informed by letter from the court that "the NYPD has failed to file a legally acceptable accusatory instrument" and that, therefore, "there is no reason for you to return to court[.]" In a second incident in late May 2020, Mr. Alfiky was violently attacked by an officer as he covered protests in Brooklyn. While being shoved backwards by an officer with a baton, Alfiky shouted, "I'm a journalist, I have a press pass" as he held up his camera and press pass at eye level. The officer's response – "I don't give a fuck about your press pass!" The officer continued to shove him, forcing Mr. Alfiky to fall backwards, rupturing a pre-existing cyst on his back.

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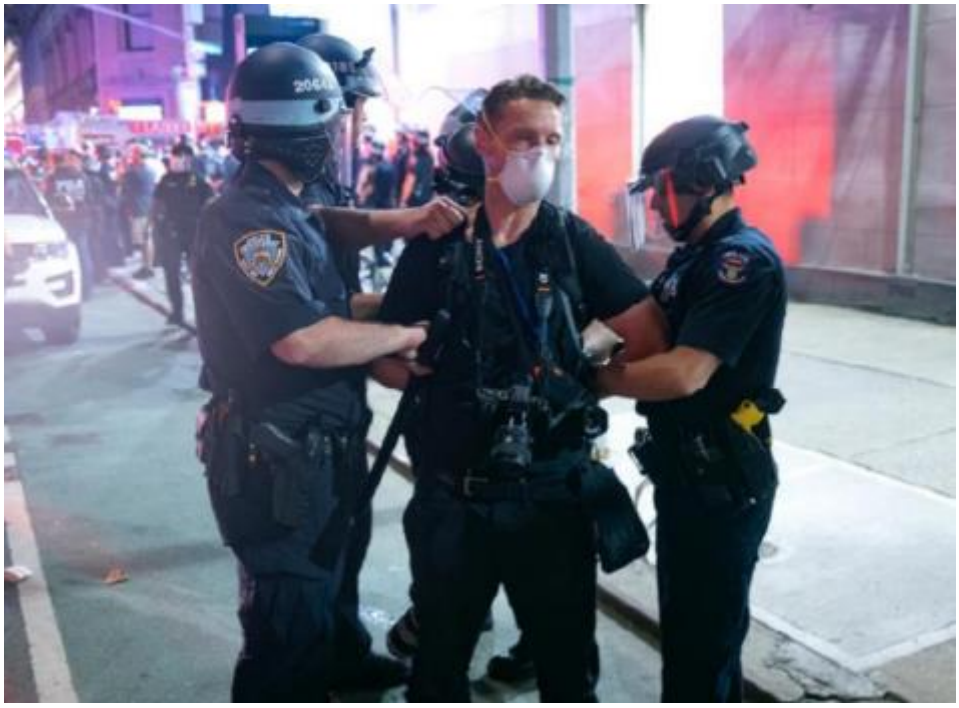

This photograph, included in the complaint, shows Adam Gray immediately following his arrest. Two cameras and the lanyard with his press credentials are clearly visible hanging around his neck.

— Diana Zeyneb Alhindawi is an internationally renowned documentary and conflict news photographer based in New York City. In late May 2020, she was in lower Manhattan covering widespread looting. While standing in front of a Footlocker store which had been broken into, she along with several other news photographers photographed police officers beating a young man inside the store. Without warning at least two NYPD officers charged across the sidewalk to the group of photographers. One of them struck Ms. Alhindawi in the face, splitting her lip open. At the time Ms. Alhindawi was wearing her press credential and had not interfered with police activity in any way.

— Mel D. Cole is a widely published visual journalist and music photographer, whose work has been featured in *Rolling Stone*, *Esquire*, *National Geographic* and *The Atlantic* and on CNN and the BBC. On July 15, 2020, he was on the Brooklyn Bridge footpath photographing a march by Blue Lives Matter protesters which turned into violent clashes between protestors, counter-protestors, and police. Mr. Cole photographed these events without interfering with policy activity and had not been asked to leave the scene by police. After the clashes were over, Mr. Cole was inexplicable arrested despite identifying himself as a journalist. Although the police seized his camera equipment and detained him for seven hours in various police locations, he was never charged with any crime.

— Jae Donnelly is also based in New York City and works largely on assignment for *The Daily Mail.* On June 2, 2020, he was on assignment photographing the George Floyd Protests taking place in Manhattan when a police officer rushed at him and struck him with a baton. After being hit, Mr. Donnelly retreated backward, repeatedly declaring he was a member of the media, and holding up his press pass. Ignoring that information, the officer pursued Mr. Donnelly into the street and shoved him again sending him to the ground several feet away causing abrasions and large bruises

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on Mr. Donnelly's arms and legs, head trauma, and a hematoma on his cheek as well as damaging his camera equipment.

In their civil rights suit, brought under 42 U.S.C. §1983, the plaintiffs-journalists allege that the individual officer defendants violated their First, Fourth, and Fourteenth Amendment rights under the United States Constitution. But the centerpiece of the complaint is a *Monell* claim against the City of New York which pleads that these individual violations of the plaintiffs' rights are part of, and were caused by, a much larger and longstanding failure by the NYPD (a City agency) to adequately train its officers regarding the First Amendment right of journalists to record police activity in public and its failure to supervise and discipline officers who interfere with this right.

(Every federal circuit court to consider this issue has held that the press and public have a "clearly established" First Amendment right to record police activity in public places. *See Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), *Fields v. City of Philadelphia*, 862 F.3d 353 (3rd Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017); *ACLU of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000).;, While the Second circuit has yet to squarely address the question, Judge P. Kevin Castel of the Southern District of New York has found that "the right to record police activity in public, at least in the case of a journalist who is otherwise unconnected to the events recorded, [is] 'clearly established' in the Second Circuit. *Higginbotham v. Sylvester*, 105 F. Supp. 3d 369, 380 (S.D.N.Y. 2015).)

Every federal circuit court to consider this issue has held that the press and public have a "clearly established" First Amendment right to record police activity in public places.

In addition to these federal constitutional claims, the Complaint also avers violations of Article 1, § 8 (the free press provision) of the New York State Constitution, violations of the recently-enacted "New Yorker's Right to Monitor Act" (N.Y. Civil Rights Law § 79-P), and violations of the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa (arising from the unlawful seizures of camera equipment), along with several state law tort claims for false arrest, assault and battery.

The plaintiffs' suit (besides requesting damages) seeks injunctive relief directing the NYPD (a) to end its practice of targeting, arresting and using physical force against photographers; (b) to effectively train its officers on the press and public's right to record police activity in public locations; and (c) to appropriately discipline those officers who violate this constitutional right.

The journalists in the Gray case are represented by Davis Wright Tremaine attorneys Robert D. Balin, Abigail Everdell, Kathleen Farley, Alison Schary, and Nimra H. Azmi, as well as NPPA's attorneys Mickey H. Osterreicher and Alicia Calzada.

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Court Analyzes FOSTA Exception to Section 230

Heightened Knowledge Standard Not Required for Civil Sex Trafficking Claim

By Jeff Hermes

On August 19, 2021, Judge Joseph C. Spero of the U.S. District Court for the Northern District of California ruled on a motion to dismiss in Doe v. Twitter, Inc., No. 3:21-cv-485 (N.D. Cal. Aug. 19, 2021). The case involved claims against Twitter arising out of its alleged failure to remove links to third-party sex trafficker pornographic videos upon the request of minors depicted therein. Twitter moved to dismiss the case on the basis of, inter alia, Section 230, requiring the court to determine the scope of § 230(e)(5), the exception to § 230's protection for sex trafficking violations created by the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, P.L. 115-164 (2018), better known as FOSTA.

The plaintiffs' primary claims arose under the Trafficking Victims Protection Reauthorization Act, 18 U.S.C. §§ 1591(a) and 1595(a). Section 1591(a) sets forth two separate criminal violations:

> (a) Whoever knowingly—
>
> > (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or
> >
> > (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),
> >
> > > knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

18 U.S.C. § 1591(a). Note that the mens rea standard for "advertising" violations under either (a)(1) or (a)(2) is knowledge; reckless disregard is insufficient.

Section 1595(a), in turn, authorizes a federal civil action for damages and attorneys' fees for victims of violations set forth in the chapter, including but not limited to § 1591(a). 18 U.S.C. § 1595(a) However, § 1595(a)'s knowledge standard is different, stating that a claim may be

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brought against "the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter)." Id. (emphasis added).

The plaintiffs brought claims under § 1595(a) alleging that Twitter's conduct violated both § 1591(a)(1), a/k/a "direct" trafficking, and § 1591(a)(2), a/k/a "benefiting from a venture," as well as a host of other federal and state law claims. Twitter moved to dismiss the entire case, both on the merits of the claims and on the basis of § 230.

Judge Spero quickly disposed of the § 1591(a)(1) "direct" trafficking claim, agreeing with Twitter that such a claim required that the listed offense be directed specifically toward a "person" and that Twitter's alleged acts of omission with respect to the videos were insufficient. Doe, slip op. at 33. Accordingly, it did not reach the § 230 defense to that claim.

The § 1591(a)(2) "benefiting from a venture" claim posed more significant questions. The court started off by analyzing the difference between the mens rea standards in § 1591(a) and § 1595(a), and agreed with other courts that while criminal liability under § 1591(a)(2) requires actual knowledge, the "should have known" language in § 1595(a) allows a civil claim based on constructive knowledge of the alleged sex trafficking. Slip op. at 34-37. That, however, did not solve the question of whether a § 1595(a) claim based on constructive knowledge was sufficient to evade Twitter's protection under § 230 via the FOSTA exception.

The court's ruling on the scope of the FOSTA exception could have significant consequences in other contexts.

As relevant to this case, FOSTA added the following exception to § 230: "Nothing in this section … shall be construed to impair or limit … any claim in a civil action brought under section 1595 of title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title." 47 U.S.C. § 230(e)(5)(A). Twitter argued that the exception only applies to § 1595(a) claims that are also actual violations of § 1591(a), meeting the heightened mens rea standard necessary to establish criminal liability. Twitter cited Doe v. Kik Interactive, Inc., No. 0:20-cv-60702 (S.D. Fla. Aug. 31, 2020), in which another district court agreed with this interpretation, holding that the FOSTA exception requires knowing participation in a sex trafficking venture and that mere awareness of other trafficking incidents on the defendant's website do not suffice.

Judge Spero "respectfully disagreed" with Kik Interactive, noting that a remedial statute such as FOSTA "should be liberally construed." Doe v. Twitter, slip op. at 39-40. Moreover, he found that the "more natural reading" of the exception was that it covered civil claims based on § 1591 but not other sections of Chapter 77 of Title 18, such as § 1581 (holding or returning any person to condition of peonage), § 1583 (enticement into slavery), or § 1589 (benefiting from participation in a venture engaged in the providing or obtaining of forced labor). Accordingly, he rejected Twitter's § 230 defense.

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Before moving on, it is worth noting that the court's ruling on the scope of the FOSTA exception could have significant consequences in other contexts. Twitter noted at oral argument that another section of the FOSTA exception, § 230(e)(5)(B), used the same language to exclude certain criminal prosecutions under state law from § 230's reach: "Nothing in this section … shall be construed to impair or limit … any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18." (Emphasis added.) This section had been widely presumed to preclude state sex trafficking prosecutions against platforms where the elements of the state law in question do not match all of the elements of § 1591. If states are allowed to set different *mens rea* requirements, then it is possible that such charges could be brought on a recklessness, negligence, or even strict liability basis. That would, in turn, radically alter the framework of § 230 by allowing state governments to create affirmative obligations for platforms to monitor user-generated content.

Judge Spero rejected that concern, finding that "there is no authority one way or the other" as to whether § 230(e)(5)(B) was actually intended to address state law mens rea requirements. Slip. op. at 41 n.4. In any event, he found that § 230(e)(5)(B) had little bearing on the interpretation of § 230(e)(5)(A), which cross-references a federal statute that explicitly has a lower mens rea requirement. Id.

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Turning to the merits of the plaintiffs' "benefiting from a venture" claim, Judge Spero looked at whether the complaint sufficiently alleged that Twitter "1) … knowingly participated in a venture; 2) … received a benefit from its participation; and 3) … knew or should have known that Plaintiffs were victims of sex trafficking." Id. at 42.

On the first element, the court held that it was sufficient that Twitter was alleged to have been "specifically alerted that the Videos contained sexual images of children obtained without their consent on several occasions but either failed or refused to take action." Id. at 43. On the second element, the court found that detailed allegations explaining Twitter's monetization of content and establishing the number of views and retweets of the specific posts at issue "supported a plausible inference that the Videos of Plaintiffs generated advertising and attracted users, both of which benefited Twitter." Id. at 45. And on the third element, while "Twitter contends it had no way of knowing that the Videos might have been evidence of commercial sex trafficking," the court found "this argument is hard to square with Plaintiffs' allegations that they alerted Twitter that the Videos were created under threat when Plaintiffs were children and provided evidence of John Doe #1's age in response to Twitter's request for further information." Id. at 47.

Accordingly, Judge Spero found that the plaintiffs had adequately pleaded their claim under §§ 1591(a)(2) and 1595(a), and denied Twitter's motion to dismiss as to that claim. Id.

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Twitter's motion fared better with respect to the plaintiffs' other claims, with Judge Spero acknowledging that the FOSTA exception could not be stretched to civil claims beyond those authorized by § 1595 and falling under § 1591. Id. at 48. With that understanding in place, the court quickly dismissed the plaintiffs' remaining claims as follows:

- 18 U.S.C. §§ 2258A, 2258B (duty to report apparent child pornography violations): "Based on their plain language, neither of these provisions reflects a clear intent on the part of Congress to establish a private right of action[.]" Id. at 48-49.

- 18 U.S.C. §§ 2255, 2255A (personal injuries related to sex trafficking and receipt and distribution of child pornography): "While there is not a great deal of authority on this question, at least two courts have concluded that under Section 230, ICSs are immune from civil liability under 2252A and 2255." Id. at 49.

- California product liability: "Plaintiffs attempt to avoid Section 230 on the ground that the claim is not based on Twitter's conduct as a publisher of information but instead, on a defective product, citing Lemmon v. Snap, Inc., 995 F.3d 1085, 1090 (9th Cir. 2021) in support of their position. … The facts here differ, however, from those in Lemmon because the nature of the alleged design flaw in this case – and the harm that is alleged to flow from that flaw – is directly related to the posting of third-party content on Twitter." Id. at 52-53.

This decision creates an incentive for social media platforms to act quickly to remove child sexual abuse material upon notification.

- Negligence: "The essence of these claims is that Twitter breached a duty to Plaintiffs – and violated various criminal statutes –by failing to remove the Videos after being notified of them and instead allowing them to be broadly disseminated on Twitter. These claims seek to treat Twitter as a publisher of information, which is prohibited under Section 230." Id. at 54.

- Cal. Civ. Code § 1708.85 (distribution of private sexually explicit material): "Section 1708.85 exempts from liability … a 'person distributing material under subdivision (a)' where '[t]he distributed material was previously distributed by another person.' Cal. Civ. Code section 1708.85(c)(6). … [T] he allegations in the FAC make clear that at that point these Videos had already been posted by 'another person,' namely, the owners of the user handles @StraightBross and @fitmalesblog. … Further, to the extent that this claim seeks to hold Twitter liable for failing to remove third-party content from its platform, the Court concludes that the claim is barred under CDA § 230 because it treats Twitter as a publisher." Id. at 55.

- Intrusion into private affairs: "The basis for this claim is Twitter's 'role as a "republisher" of material posted by a third party,' and therefore, the claim is barred by CDA § 230." Id.

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- Invasion of privacy under California Constitution: "[L]ike the claim for intrusion into private affairs, this claim is based on Twitter's role as a 'republisher' of third-party content and therefore is barred under CDA § 230." Id. at 56.

- Unfair competition law: "The gravamen of the UCL claim … is that Twitter engaged in an unlawful and unfair practice by failing to ensure that the Videos were blocked from Twitter or at least, removed promptly. As such, this claim seeks to impose liability on Twitter as a publisher of third-party content and is therefore barred by Section 230." Id.

Ultimately, this decision creates an incentive for social media platforms to act quickly to remove child sexual abuse material upon notification, given that a well-drafted notice was held to support allegations satisfying two out of the three elements of the plaintiffs' claim (knowing participation in a venture and constructive knowledge that the plaintiffs are victims of sex trafficking), while it appears trivially easy to plead monetization of content to support the third element (receipt of a benefit from the illegal activity). Moreover, while the Southern District of Florida did reach a different result in Kik Interactive, creating a split in the relevant authority on whether § 230 limits a § 1595(a) claim, this decision from the Northern District of California hits many platforms where they live.

This decision creates an incentive for social media platforms to act quickly to remove child sexual abuse material upon notification.

It is also frustrating that Judge Spero did not devote greater attention to Twitter's concern over how this ruling would affect the state criminal law exception for sex trafficking under § 230(e)(5)(B), which uses the exact same language in cross-referencing § 1591. It might well be that Congress used that language to mean two different things in different contexts; Judge Spero left open that possibility. However, this decision could easily be taken as an invitation to state legislators and state attorneys general, who have been champing at the bit to go after social media sites, to test the boundaries of § 230 with broad state criminal laws.

Jeff Hermes is a Deputy Director of MLRC.

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Some DNA Issues for Art Law

By Jesse H. Ausubel

My point of departure is a human leaves biological traces all over the place: on the clothes you wear, your eyeglasses, a glass from which you drink, a paint brush or palette that you hold, a canvas that you stretch, a sheet of paper on which you draw.

Most often the traces are skin and other cells from surfaces of your body, epithelial cells, which we shed all the time. The traces can also be blood or sweat or saliva or a hair. COVID has alerted humans to how much biological material may be transmitted in a breath.

Every single cell of your body contains your DNA. And there is extracellular DNA, too, that may, for instance be floating around in your saliva. Of course, if you ate a carrot for lunch, you may also have carrot DNA in your saliva. But my purpose is not to investigate what was in your lunch box.

My interest is the human DNA, your DNA. Just as an active cellphone creates a digital trail of your movement, an animal leaves a biological trail. For millennia hunters and detectives took keen interest in scat and footprints.

Around 1800 anatomists realized that fingerprints are unique to each individual, and fingerprinting created the basis upon which the first forensic professional organization formed, the International Association for Identification, in 1915. Fingerprinting relies on pattern matching. Your cellphone may use it. In fact, fingerprints often contain skin cells and thus DNA.

About 7 years ago, a colleague in Tuscany, a physical anthropologist interested in bones but also in DNA, realized that a group of us might have the skills and connections to obtain and sequence the DNA of Leonardo da Vinci.

A uniquely powerful identifier, DNA, invaded American courtrooms during the 1990s through rape and murder trials. If forensic scientists can obtain the DNA, then there is a good chance to identify the individual from whom it came. Of course, it takes two to make a match. One needs a reliable source against which to compare the new evidence.

About 7 years ago, a colleague in Tuscany, a physical anthropologist interested in bones but also in DNA, realized that a group of us might have the skills and connections to obtain and sequence the DNA of Leonardo da Vinci. The challenge was to make a match from several independent sources. With the help of a talented network of associates in Italy, France, Spain, the USA and other nations, we are trying.

One source of DNA could be from swabbing the cheeks of living descendants of his half-brothers whom network members have identified in Tuscany in a 600-year long family tree based on baptismal and other records. Bones or teeth or other relics in tombs of members of the

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Presumed self-portrait of Leonardo da Vinci

family, including his father (buried in a beautiful church in Florence), could be another. Leonardo's own tomb in a splendid chateau in Amboise in the Loire Valley might be another source, but alas strong evidence reports that the tomb was opened a few times and disturbed.

Most interesting is the possibility to obtain DNA from the notebooks of Leonardo, of which about 7000 pages survive, including more than 600 in the Spanish National Library in Madrid. He completely covered these sheets with writing and drawing, on both sides, and would have rubbed the side of his hand and his wrist across the sheets and held them firmly with his fingers, especially their borders.

Our project teams have been developing techniques to extract human DNA from ancient paper. If the same DNA appears on many sheets, and parts of the sequence match with DNA from living descendants or relics of dead relatives, we have powerful evidence that of a handle on the DNA of Leonardo.

Let's suppose we can obtain quite a good portion of Leonardo's DNA. What might we learn? A primary interest is visual acuity. Leonardo's drawings of birds, dragonflies, and water in motion suggest he had extraordinary eyesight, like the best baseball player or soccer goalie. Part of vision is genetic, and maybe Leonardo's genes can point to favorable outliers.

Secondly, we might learn about Leonardo's ancestry. Little is known about his mother's family. We might learn the geographic origins of her family.

Importantly for Art Law, DNA can also contribute powerfully to attribution and authentication of artworks, and thus to historic and market value.

Let me briefly raise some potential Art Law issues. A basic issue is contamination. Not only Leonardo touched his notebooks. During the past 500 years many others did too. A major challenge is to isolate the DNA of the person of interest from many others, including assistants.

Another issue is the meaning of absence. Presence of DNA might strongly argue for association with a particular individual. But what does absence mean, particularly for older works or work extensively cleaned?

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Cleaning itself is a third issue. Does the value of biological traces suggest that strategies for cleaning and preservation of works of cultural heritage should change to include preservation of the biological materials? Is more disclosure about cleaning materials and methods desirable?

With regard to attribution, can DNA be used going forward as a hidden signature? Should artists deliberately drool or sweat on their works as a unique identifier?

With regard to forgeries, would it be worthwhile to create a library of the DNA of forgers and use that library to reveal their work? Can a living forger create a work that is free of the forger's biological traces?

In turn, what are the possibilities for active fraud or deception with DNA? Suppose I arrange for an artist to lick an envelope or stamp. I might then rub this on a work of art or letter and use the presence of that person's DNA to claim that the person authored it.

Importantly for Art Law, DNA can also contribute powerfully to attribution and authentication of artworks, and thus to historic and market value.

Consider not only natural but synthetic fraud. In the foreseeable future, with digital information about the sequence of the four nucleotides that make a DNA strand, a mischief maker might affordably synthesize an actual long strand that would appear to be the unique identifier. Should it be legal to synthesize the DNA of other humans? Could it be stopped? Could a sequence be doped somehow to show it is a fake?

My penultimate issue is what should be standards of evidence about DNA for an auction house or art market to consider satisfactory or definitive? A related question is whether to license and certify practitioners.

A final issue, should institutions be created that would act as safe deposit boxes for the DNA sequences of artists, to be used confidentially for authentication?

In closing, let me mention that a small private philanthropic foundation, the Richard Lounsbery Foundation, is sponsoring a program to explore "Biology-in-Art" in a range of settings, including African Art and Medieval manuscripts. In this domain the artist has traditionally has not been identifiable and might now become known only by a DNA sequence. From cases of anonymous Medieval monks to Leonardo to pricey recent artists such as Magritte, Rothko, and Basquiat, to young living artists, Art Lawyers will have much DNA to consider.

Jesse H. Ausubel chairs the Leonardo Da Vinci DNA Project and directs the Program for the Human Environment at The Rockefeller University. This essay was presented to the Art Law Committee of the New York City Bar 13 April 2021. Thanks to Eric Rayman, Miller Korzenik Sommers & Rayman, for the invitation to present and to biochemist Dr. Marguerite Mangin for comments.

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10 Questions to a Media Lawyer: Harry Melkonian

How'd you get interested in media law? What was your first job in the business?

Media law – that came along very late. Opportunities are typically opportunistic. I have been practicing for nearly 50 years (yipes!) and have re-invented myself any number of times. Initially, I wanted to be a plaintiff's tort lawyer and the late Melvin Belli was my role model. I still have my rejection letter from him when I looked for a job right out of NYU. It was very polite.

Frustrated in my attempt to gain entry to the big-time plaintiff's bar, I decided to tread water for a while and joined the NYC firm of Breed Abbott & Morgan, working with the antitrust group. While at Breed Abbott, I was admitted to practice before the United States Temporary Emergency Court of Appeals. I wonder how many MLRC members belong to that ever-dwindling fraternity of practitioners?

New York was not for me, and I moved to Beverly Hills and joined a boutique securities law firm, Rifkind Sterling & Lockwood – still far removed from media law. Settled in LA, I moved to the Buchalter Nemer Fields firm and there, I met a substantial entertainment law group, and that was the beginning of a whole new career.

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Receiving my PhD in law at Macquarie University 2007. Thesis on US/ UK defamation Law and SPEECH ACT.

Representing a major television studio, the firm offered a wide range of entertainment related litigation. But my first entre was in pursuing my earliest ambition – a big plaintiffs' libel claim. Our plaintiffs' team was led the legendary Louis Nizer from New York. We were unsuccessful and, in retrospect, I realise that under *Gertz v Robert Welch,* our claims should never have been allowed to get to the jury.

After many years at Buchalter, I became one of the founding partners at White & Case Los Angeles where my media law interest was put to the side as I helped to build a corporate litigation department. I established the firm's local pro bono department where we performed both corporate and litigation services. My major letdown was when the associates would not back me in mounting a serious challenge to the California death penalty laws.

Disappointed, I packed my bags and moved to Australia where I started out as an insurance company executive – very boring and blessfully short-lived. After this brief stupid interlude, during which I went back to school and did a master's degree in astrophysics, I was admitted to practice law in New South Wales where intellectual property work suddenly occupied most of my working time.

Then, finally, came media law proper. I was doing some part-time teaching and became interested in philosophy of law and quickly realized that this was the domain of PhD studies as opposed to the semi-vocational JD training. So, while practicing, I went back to school studying Kant, Durkheim, Weber and that brooding theoretical omnipresence, Jurgen Habermas. From this, emerged my first insights to freedom of speech, resulting in a thesis and two books about speech, sociology and legal philosophy.

Once media law opened up to me, it has been non-stop representing traditional and online publishers. I also teach media law and conflict of laws at Macquarie Law School and continue

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Fly fishing with my twin sons in 2016

to write about the subject. My current project is to develop my long-held belief that the underlying approach in *New York Times v Sullivan* was simply incorrect and has led to the United States being an outlier rather than a leader in world media law.

What do you like most about your job? What do you like least?

I cannot imagine doing anything else. I have worked in mega firms, large forms, small firms and now as a solo – reinventing myself each time. I cannot imagine any other profession that allows so much variety. My friends became doctors and after 40 years, many of them are bored and retired. I have no desire to retire and when I start to become bored, I just initiate interest in some other area of law. Right now, I am exploring the addition of Native American Tribal Courts into the Conflict of Laws curriculum.

As for what I like least, that's easy – I cannot tolerate dealing with dishonest or mean people. Life's too short to waste on them.

How has quarantine affected your work and routines?

The continued lockdown in Sydney has had some beneficial effects on me. To avoid boredom and ennui, I am back to studying German – an exercise I undertake every few years as I am convinced that the study of German grammar is one of the most extreme exercises for the brain.

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I also have been participating in some weekly Zoom poetry events. I enjoy the efforts of others but am still reluctant to share my own rather miserable compositions in which I try to channel Alan Ginsberg.

While I miss the monthly casting practice of my fly-fishing club, other pastimes are unaffected. I have a model train layout, consisting of my beloved New Haven Railroad that brings back memories of growing up in Naugatuck. Reading, of course, to many of us, is a wonderful escape. Right now, I am awaiting word to see if a paper I have proposed dealing with the Republican Party and Racial Politics will be accepted by the Australian and New Zealand American Studies Association for the 2021 Zoom Symposium.

Chloe and I at the polls in 2019

I really miss the MLRC London Conference. To me that was a highlight that I saved for and looked forward to. The anticipation of future travel only makes me value these experiences all the more.

Highest profile or most memorable case?

It has to be *Meinhold vs United States,* a pro bono matter, where I led a team of really fine lawyers at White & Case taking on the loathsome practice of the US Defense Department of banning gays and lesbians from military service. I felt very strongly about this case – two of my younger brothers were gay and ultimately were casualties of AIDS and I wanted to do something for them. The case was filed in the dying days of the Bush Administration, and we faced bitter and near fanatical opposition from US Government lawyers.

The lawyers for the US seemed to go to any lengths to undermine us – even accusing me of not being loyal to the United States. All this while they were advocating for bigotry and prejudice. To be sure, there was nothing collegial. We won in the US District Court and then had to fight back appeals in the Ninth Circuit and the Federal Circuit. To the firm's great credit, White &

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Case backed us with personnel and finances. As we prevailed in the courts, political winds started to change when President Clinton took the oath of office.

It's almost a cliché for lawyers to tell others not to go to law school. What do you think?

The Australian law school experience is different from the US. Australian law students routinely are studying law + something else, usually commerce or accounting. Many of these students have absolutely no interest in pursuing a conventional career in the law. To answer the question, I encourage law students to become lawyers.

What's your home office set-up?

Oil painting of Mel Belli (originally from his office) on the wall watching over me; three laser printers, two monitors, desktop computer with battery backup, large partner's desk from my White & Case days, and my gift to my back – a newly acquired genuine Herman Miller Time-Life chair.

What's a book, show, song, movie, podcast or activity that's been keeping you entertained?

Rowan & Martin's Laugh In. I have a complete DVD set and watch an episode each night. While working out on my rowing machine daily, I watch an episode of the original Perry Mason to keep up on evidence.

What's a typical weekday lunch?

As my office is in Sydney and most of my clients and corresponding counsel are in the US and Germany, I keep hours like the local stockbrokers. I am usually at my desk at 4AM. Lunch just doesn't fit in the equation.

Your most important client takes you out for karaoke. What do you sing?

The Kingston Trio's 1958 hit – *The Sloop John B* with an emphasis on the line, 'I want to go home'!

Where's the first place you'd like to go when the quarantine is lifted?

No question about that – Egypt for a Nile Cruise and a visit to the new Grand Egyptian Museum. Our entire family had booked travel for January 2021. Now, all is on hold. Australia still prohibits international travel, and we cannot travel more than 5 KM from home – Cairo is over 14,000 KMs. In the meantime, I have ambitions of learning to read hieroglyphics and by playing armchair archaeologist come up with my own theory about the location of Cleopatra's tomb.