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During the 30 years I was vetting articles for The New York Times, other than evaluating pejorative charges from confidential sources, the most vexing problems I had were when an article repeated a clearly newsworthy but pretty unbelievable allegation by a public figure.

I would start by asking the reporter if he believed the charge, and typically s/he would say he either had no idea or that he had never seen anything which supported the brazen accusation. I would then tell the editor that the statement seems obviously newsworthy and I could see why journalistically the reporter would want to run it, but that legally we could be in trouble since we were printing something we really didn’t believe was true. The clever editor would then respond that we weren’t publishing it for the truth of the charge, but, on the contrary, to inform the public that it was made and to cast doubt on the credibility of the outlandish speaker.

I would nod my understanding, but suggest that technically, legally, our goal doesn’t matter. The editor would then offer that we could really try to make it clear to our readers that we don’t believe the charge, but included it more to say something about the speaker. I would respond that legally that would make it worse: although we would be fully squaring with our readers, at the same time we would be handing the potential plaintiff proof of actual malice on a silver platter.

In the end, I would generally wind up agreeing with the journalist’s original assessment: we really have no choice but to publish since the statement was newsworthy. To conclude on a high note, I would say that I’m sure, in the event we were sued, that we could convince a judge that we did what was journalistically demanded, and, therefore, that we shouldn’t be held liable.

However, as I was saying this, I always thought of Norton v. Glenn, a Pennsylvania case with a very similar scenario, where the newspaper had topnotch attorneys, but where that state’s high court decided that proof of actual malice was evident and so trial was warranted. Sadly, though it did nothing wrong – the article in question repeated, then rebutted an incumbent candidate’s allegation that the opposing candidate was a child molestor, and then
strongly pointed to the wrongheadedness of the charges, and the public got it by voting the bloviating accuser out of office – the newspaper was forced to settle.

* * *

Missing from the above analysis is what ought to be the simple answer to this seeming dilemma – the neutral reportage privilege. It was created in 1977 by the Second Circuit in a case where The New York Times was reporting on a DDT-related controversy in which the Audubon Society published an editorial accusing certain scientists as being “paid liars” for the chemical industry. Those scientists responded in the Times article, but nonetheless sued both the Audubon Society and the Times for its reporting of the dispute. But Judge Irving Kaufman questioned how the Times was supposed to report on this debate but by publishing the charges and counter-charges of both sides. The Court stated, “public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to repeat such charges without assuming responsibility for them.” So the Court crafted a privilege where if the media republished newsworthy charges about public figures made by responsible and prominent people or institutions, and did so neutrally and disinterestedly, without supporting or endorsing either side, it would be protected.

(Chief Judge Kaufman sat on panels in a remarkable number of First Amendment cases, and almost invariably, as in Edwards v. Audubon Society, was strongly on the media’s side. The scuttlebutt had long been that this was somewhat a result of the fact that he was the judge who put the Rosenbergs, alleged Soviet spies, to death during the McCarthy era. Their execution dismayed the Jewish community, and it was believed that his pro-First Amendment stance was his attempt to get the Times to publish a favorable obit about him, downplaying his Rosenberg decision. Read the obit if you’d like to see how the Times handled the matter.)

Recognition of the neutral reportage doctrine appears to answer the dilemma posed by the scenario I’ve depicted above – one of the very few areas in which good journalism and good law diverge. But for some inexplicable reason, the privilege has not been accepted by most courts. A few states have adopted it, and a few federal courts have used its reasoning (often without naming the privilege), but, in general, it has been rejected – even by a mid-level New York appellate court, in the very state the federal appeals court which gave rise to the privilege sat. I’m not sure why. The best I can come up with is a longstanding judicial attachment to the republication theory – that the entity repeating and more widely distributing the libel is as guilty as the original tortfeasor herself. As is said, “Tale bearers are as bad as tale makers.” Aside from being illogical in the scenario posed, such reverence for republication seems to ignore two widely recognized exceptions to the republication rule: the fair report privilege, which allows repeating a libel if it is made in public forum or official document no matter how heinous it might be and no matter how strongly the republisher doubts the truth of the statement; and Section 230, which immunizes an internet service provider from publishing the posts of third
parties. Why a privilege based on newsworthiness – the gravamen of journalism – shouldn’t similarly be recognized remains both problematic and unwarranted.

(It’s not from a lack of trying, at least on the MLRC’s part. As readers of this column know, I’ve written a number of these columns proselytizing for recognition of this privilege. In almost all the hypothetical case studies we’ve run at our Virginia Conference through the years, one scenario in the hypo gives rise to a republication of a newsworthy but baseless accusation fact pattern, and more recently, as an advisor, I’ve lobbied with the leaders of ALI’s “Restatement of the Law Third, Torts: Defamation and Privacy” drafting project to include a section about neutral reportage.)

* * *

Comes now the Dominion and Smarmatic defamation suits against Fox and also the Trumpian enablers who spewed the “Stop the Steal” nonsense. For many reasons, these are the most interesting libel lawsuits to come down the pike in decades. But, most significantly, they offer a great opportunity to have the neutral reportage privilege recognized in a consequential and highly visible setting.

Fox’s defense relies on a basic argument: there is little that deserves more protection by the First Amendment than speech by the President of the United States about the result of a presidential election. To be sure, Fox makes other solid arguments: e.g. most of the discussion about the purported election fraud is about lawsuits which had been filed and therefore are protected by the fair report privilege; much of their commentary is protected opinion; and it makes an actual malice point as well. But, at bottom, without introducing the neutral reportage theory, its theme is whatever one’s view of what happened, the public should have access to such inherently newsworthy statements.

Indeed, it would resolve the problematic situation set forth above. However appetizing this position may be, I sometimes wonder whether perhaps it proves too much, whether it argues for too broad a protection and is an attempt to push the needle too far.

First, it is food for the plaintiffs’ bar’s argument, echoed by Justice Gorsuch suggesting reconsideration of Times v. Sullivan, that the press seeks total immunity for almost everything, and that a test which plaintiff can never pass is not a viable standard at all. That argument runs the risk of actually endangering Sullivan, which in the long run would be counterproductive. Second, in principle, do we really want a system where more than just objectively reporting on wild accusations, it’s fine to support and endorse them, no matter how unfounded and dangerous they may be? That’s, of course, the plaintiffs' allegation in the voting fraud cases against Fox. Fox, in turn, has said that its hosts had expressed incredulity in direct response to some of the wilder claims. There’s
certainly a powerful argument for immunity where the speech is from the highest public official in the land about a presidential election, but the broad protection sought might be viewed as protecting republication of even the most bizarre and unsupported statements. The view ultimately taken on whether the journalists were sufficiently skeptical or, as the plaintiffs argue, were part of the problem, is going to be critical. Finally, as set forth above, judges seem to instinctively dislike and reject even the narrowly crafted neutral reportage privilege; why would they be more receptive to an even broader protection?

In many cases, trial court judges have dismissed libel cases with similar facts than these, but by calling it something other than neutral reportage. They are wary perhaps because a higher court has rejected the privilege, or because they don’t feel they can be the first judge in the jurisdiction to recognize it, or because of an antipathy to another privilege which aids the media and/or an antipathy to creating an exception to the beloved republication principle. Instead, because common sense, justice and good journalism demands it, they have dismissed such cases on the basis of calling it opinion or non-defamatory speech or some other construct. Why not call it what it is: neutral reportage?

A case involving baristas handled by David McCraw during my time at the Times is a prime example. In the somehow aptly named *Gorilla Coffee v. New York Times*, employees alleged the owners ran a perpetually “malicious, hostie and demeaning work environment.” The court, fully understanding the Times was objectively and neutrally describing the dispute but worried about a higher court decision rejecting neutral reportage, dismissed the complaint on the far more questionable grounds of opinion.

Now it’s true that the neutral reportage privilege, with the conditions laid down by Judge Kaufman, may be nettlesome in the voting machine company cases and give rise to complicated and close factual issues. And it is likewise true that lawyers have to do whatever it takes to win litigations for their clients – particularly in cases where billion of dollars are somehow sought. But from a long run perspective and with an overview from high above, these are still cases which cry out for recognition of this critical privilege. (BTW, with respect to the outrageous *ad damnum* clause claiming $2.7 billion, the Times had a policy never to publish the monies sought because they were so meaningless; lawyers do seem to insert high numbers out of the sky – to scare defendants, generate publicity, provide a good starting point in settlement talks and with jurors – but they often are not based in reality. Indeed, here my understanding is that the companies never made that sort of money in profit, so how could they claim such damages?)

The cases offer a great opportunity to have the neutral reportage privilege recognized in a consequential and highly visible setting.

It would seem that however the voting machine cases are litigated, they will come down to factual questions raised by Judge Kaufman’s conditions. First, whether the folks whom Fox had on the air and quoted, such as co-defendants Rudy Giuliani and Sidney Powell, were prominent and responsible. That does seem like a reasonable condition. Certainly, particularly in this era of disinformation, repeating bogus claims that massacres or terrorist attacks didn’t happen should
not be condoned, even less so when they harm someone’s reputation. After all, what good is it to give Alex Jones’ garbage theories any air? Certainly Giuliani was a responsible person in his heroic posture in the days after 9/11. But whether he could be said to be responsible in the last few years when he served as a mouthpiece for Trump’s lies is quite another question.

The more interesting question may be the second condition – that the republication be made accurately and disinterestedly, not by endorsing or supporting the statements. Whether the neutral reportage privilege is in play or not, my hunch is that the these cases will hinge on the answer to this question. And interestingly, that question will probably come down to a decision as to whether one looks at each republished statement separately or whether one examines the totality of the re-publisher’s coverage overall.

Usually, the libel plaintiff seeks to look at one sentence or one statement alone, highlighting it independent of the rest of the story. The media usually argues that one should look at the entire story in context, that you shouldn’t consider the headline or a single quote without reference to the article as a whole. Here the arguments are reversed. While Fox defends the totality of its coverage as balanced, it also argues more specifically that if you look at any of the scores of examples the voting machine companies have complained of, the Fox host, anchor or commentator asked a skeptical question, sought more evidence, left the issue open, or did not agree with the interviewee’s accusation. In short, they did the routine work of television interviewers and journalists.

The plaintiffs, on the other hand, will ask the court to look at Fox’s coverage overall. They’ll argue that the tenor and weight of the entire post-election coverage supported the spurious and unfounded accusations that the election was rigged and that the voting machine companies had acted fraudulently.

Regardless of how these questions are answered and how these lawsuits are resolved, I would repeat my overall proposition that these cases provide an excellent opportunity for recognition of the neutral reportage principle. And this is a protection which is sorely needed, would put the law in line with good journalism and common sense, and which so far has not been widely recognized for any discernible reason. The fact that we and the media are still talking about an election being stolen after scores of courts (many of which had Trump-appointed judges) found no credible evidence of any, let alone, significant fraud, is ludicrous and tragic. The fairness of an election is only the most important value in our democracy. Let’s hope at least this one positive development might result from it.

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.
Maine Newspaper Cleared in Defamation Case Involving Alleged Sexual Abuse of Minors by Police

By Cynthia Counts

A York County Superior Court jury has found in favor of a Maine newspaper and two reporters accused of defamation for reporting on sexual abuse allegations dating back to the 1970s – and spanning decades – against a now retired police captain. *Gaudette v. Mainely Media*, (jury verdict March 30, 2022).

After seven years of litigation and a two-and-a-half-week trial, jurors took just an hour before unanimously clearing the Biddeford-Saco-Old Orchard Beach Courier of defamation and invasion of privacy claims filed by former Biddeford Police Captain Norman Gaudette and his wife. Gaudette accused the Courier, owned by Mainely Media LLC, of defaming him when it reported in April 2015 on allegations that Gaudette and another Biddeford officer had sexually abused youths. His wife, Joanne Gaudette, joined her husband in the lawsuit, suing for loss of consortium.

The plaintiffs not only sued the newspaper but the reporters individually in an attempt to scare them and to chill their speech. The jury’s unanimous verdict not only exonerates the newspaper and its reporters, but also helps vindicate those teenagers (now men) who never had the chance to present their claims of sexual abuse before a judge and jury. Three of the accusers testified at trial, describing in detail how Gaudette allegedly abused them.

The newspaper initially began looking into the allegations involving several Biddeford police officers in 2015 following a public outcry by a Biddeford native who claimed in a social media post that when he was in high school, he had been brutally sexually assaulted by a Biddeford police officer. Through the spring of 2015, others began to come forward, including a retired Biddeford police officer, Terry Davis, who said the sexual abuse claims regarding the department had merit.

Defendants Molly Lovell-Keely, the Courier’s managing editor, and reporter Ben Meiklejohn, among others at the paper, made extensive efforts to investigate the abuse claims, contacting alleged victims, family members, the plaintiff and his attorney, state Attorney General investigators, and current and former Biddeford officers.
On March 5, 2015, the Courier published the first in a six-week series of 29 investigative news reports about the Biddeford Police Department’s and Attorney General’s handling of the sexual assault charges. The civil trial focused on just two of those stories that pertained to allegations against Gaudette.

Now 73 years old, Gaudette was placed on administrative leave in 1990 when allegations were first made. The Maine AG’s office investigated Gaudette, but a grand jury chose not to indict. Gaudette was reinstated as a police officer in 1991 after the investigation concluded and retired as a captain in 2001. Gaudette has never faced any criminal charges in connection with any of the allegations, but four people filed federal civil rights lawsuits related to them. Two cases named Gaudette as a defendant, and both are still open in the U.S. District Court of Maine. See, e.g., Ouellette v. Beaupre, 977 F.3d 127 (1st Cir. 2020).

An investigator with the Attorney General's office who was on the case in 1990, confirmed at trial that the Attorney General’s office failed to present evidence to the grand jury that would have brought to light the severity of allegations against Gaudette – characterizing the failure as a “cover-up.” Trial jurors were charged with determining whether there was falsity and actual malice in the 2015 reporting. The jury determined that Gaudette had not proven the articles to be false, so the case never reached his other claims.

Meiklejohn and Lovell-Keely testified at the trial for a total of 29 hours combined. “These brave men who testified finally obtained some justice this week,” said Lovell-Keely, following the verdict. Although other media outlets, including The Boston Globe, reported on the issue in Biddeford, The Courier was the only publication to be sued. The Gaudettes have given notice they intend to appeal.

_Cynthia Counts of Fisher Broyles in Atlanta, represented the newspaper defendants. She took over the case from another attorney and has worked on it for more than five years. Attorneys Toby Dilworth and Melissa Hewey of Drummond Woodsum in Portland assisted at trial. Plaintiffs were represented by Gene Libby, Libby O'Brien Kingsley & Champion, LLC, Kennebunk, Maine._
Second Circuit Affirms Dismissal of
The Most Bizarre Lawsuit Involving
The Most Gullible Man in Cambridge

By Jeremy Chase

The convoluted lawsuit of Harvard Law School Professor Bruce Hay against New York Magazine and reporter Kera Bolonik over their July 2019 article about his tabloid-ready relationship and legal wrangling with Maria-Pia Shuman and her transgender wife, Mischa, came to a fitting conclusion on March 10, 2022, as the U.S. Court of Appeals for the Second Circuit affirmed Judge J. Paul Oetken’s decision denying Hay leave to file a second amended complaint and dismissing his first amended complaint with prejudice. Hay v. New York Media, No. 21-1727.

This decision dismissing Hay’s breach of contract and discrimination lawsuit leaves unresolved just the Shumans’ state court appeal of the dismissal of their libel lawsuit before this unusual legal maelstrom can dissipate once and for all.

Background

For those who have not been following the strange saga of Bruce Hay closely, 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 and with Hay as one of several sources, the article described the tumultuous relationship between Hay, Maria-Pia Shuman, and her transgender wife Mischa Shuman, 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 the relationship spawned, including a Title IX complaint Mischa filed against Hay, as well as the Shumans’ disputes with other men who they claimed were the father of Maria-Pia’s unborn child.

A second article, published on August 8, 2019, titled The Harvard Professor Scam Gets Even Weirder Six Other Men Describe their Encounters with the Same Mysterious Frenchwoman, 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.
Nearly a year after publication, Hay had something of an epiphany. Suddenly, he expressed regret for acting as a source of the articles and requested that they be retracted.

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 had something of an epiphany. Suddenly, he 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 his and the Shuman’s lawsuits.

**The Hay Complaint and Judge Oetken’s Decision**

On July 21, 2020, the Shumans filed a complaint in New York Supreme Court against Bolonik, *New York Magazine*, its publisher New York Media, and Vox Media, LLC (who acquired New York Media after publication of the articles) (the “Shuman Complaint”). The Shuman Complaint alleged that the Articles defamed them for a variety reasons, and attached 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”). The Shuman Complaint was ultimately dismissed for failure to plead gross irresponsibility, and on both substantial truth and fair report privilege grounds. The appeal of that decision is pending with the New York Appellate Division, First Department.

Shortly after the Shumans filed their complaint, on August 5, 2020, Hay filed his complaint in the Southern District of New York against New York Media, Kera Bolonik, and David Korzenik (the magazine’s outside counsel), 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 a claim for breach of contract based on an alleged oral agreement pursuant to which Hay alleged that, in exchange for his promise to “work exclusively with Bolonik and New York Magazine,” Bolonik provided assurances “(1) that the investigation and the reporting of the story by her and the Magazine would be professional . . . (2) that her investigation and reporting of the story would be thorough . . . (3) that the investigation and reporting of the story by, her and the Magazine would be sensitive to the delicate gender issues raised by the story . . . and (4) that . . . Plaintiff would be treated with the utmost professionalism and respect.” The amended complaint also included claims for sexual harassment under the New York State and New York City Human Rights Laws (NYSHRL and NYCHRL) on the basis of Bolonik’s purported interactions with Hay.

After Hay retained counsel, he agreed to dismiss his defamation claim with prejudice and accordingly dismiss Korzenik from the action, 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 [] deliberate 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.

**Second Circuit’s Decision**

On March 10, 2022, in a Summary Order, the Second Circuit affirmed Judge Oetken’s Decision and Order dismissing Hay’s Amended Complaint and denying him leave to file a Second Amended Complaint.
After recounting the gist of the article, and Hay’s involvement in pitching, sourcing, and promoting it, the Court recounted Hay’s “change of heart.” It observed that Hay did not dispute the truth of any of the underlying facts in the article; Hay simply objected to “the way in which Bolonik characterized the Shumans” as “sexually deviant predators” and Hay “as their clueless, gullible victim.” He claimed that the Shumans were “victims of a campaign of lies directed at them, fueled . . . by prejudice” against Maria-Pia for “reject[ing] traditional notions of feminine passivity in relationships” and against Mischa for being “a transgender woman of color.” In sum, the Court observed that Hay turned his ire from the Shumans to Bolonik, claiming that it was she, not the Shumans, who “deceived and manipulated” him by “turning him against the Shumans to facilitate publication of the article.”

The Court then moved to Hay’s claims themselves, and quickly dispensed with both. With respect to the breach of contract claim, the Court affirmed its dismissal but departed from the reasoning of Judge Oetken. Instead of holding the contract to be unenforceable on vagueness and First Amendment grounds, the Second Circuit held that it was void under the New York Statute of Frauds, as nothing in the Second Amended Complaint suggested that Hay’s alleged promise to “cease communications with the [New York] Times and other media outlets about the story and to work exclusively with Bolonik and New York Magazine” had an end point. With regards to Hay’s NYCHRL claim, the Court affirmed Judge Oetken’s decision on the grounds that there was no impact of any of the alleged violations within New York City since Hay was a Massachusetts resident and the alleged events all took place outside New York City.

Conclusion

The Second Circuit’s ruling comes as no surprise, as Hay’s unconventional lawsuit never had much chance at success. Nevertheless, this ruling closes what is hopefully the penultimate chapter – affirmation of the dismissal of the Shumans’ appeal being last chapter – in this peculiar story.

*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. David Korzenik, of Korzenik Miller Sommers Rayman LLP, advised New York Media, LLC prior to the filing of the lawsuit. Bruce Hay was represented by Jillian T. Weiss of the Law Office of Jillian T. Weiss, P.C.*
New York Appellate Court Affirms Anti-SLAPP Legal Fees to Newspaper

By Karim A. Abdulla

On March 3, 2022, the Third Department in Reus v ETC Housing, issued a Memorandum and Order affirming not only the grant of summary judgment in favor of a newspaper, but also the retroactive application of New York’s amended anti-SLAPP statutes (Civil Rights Law §§ 70-a and 76-a) to existing cases and controversies.

The decision serves to tee up a divide between Appellate Divisions on the issue of retroactivity because one week later, on March 11, 2022, the First Department in Gottwald v Sebert (the “Dr. Luke v Ke$ha” case) went the other way, holding that the anti-SLAPP amendments should not have retroactive application.

In Reus, the Plattsburgh Press-Republican in early 2018 published an article concerning an historically significant building in Chazy, New York. Headlined “Legal Aid: Gray Gables should be shut down,” and sub-headlined “APARTMENTS: Tenants suing owner; owner says damage was caused by residents,” the article reported that the local Legal Aid Society had intervened on behalf of several of the building’s low-income tenants, filing lawsuits against the Town, Clinton County, and the building’s owners. Having interviewed Legal Aid (which also provided the newspaper with copies of the filed complaints and photographs of the building), one of the tenants, a representative of the Town, and Mr. Reus, the article reported both sides of the dispute and, indeed, extensively quoted Mr. Reus.

The Reuses sued in November 2018. In February 2021 and after the close of discovery, the newspaper moved for summary judgment on several grounds including the fair report privilege (New York Civil Rights § 74), substantial truth, and lack of fault under either the actual malice or gross irresponsibility standard (the paper argued the Reuses were public figures).

The newspaper also requested dismissal and attorney fees under New York’s then-recently amended (i.e., November 2020) anti-SLAPP statutes. The amendments to New York’s anti-SLAPP law were viewed as significant for several reasons. First, they served to broaden the definition of an “action involving public petition and participation” to include “a claim based upon (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech, or in furtherance of the exercise of the constitutional right of petition […]” Expressly stating that
“public interest shall be construed broadly,” the law as amended also limits the recovery of damages to cases where the plaintiff “shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false […].” In other words, in all cases involving speech on matters of public interest, New York’s anti-SLAPP law now requires all plaintiffs to meet the “actual malice” standard (established in Sullivan v. New York Times, 376 US 254 (1964)) regardless of whether they are public or private figures.

On May 6, 2021, the trial court (Sup. Ct., Clinton Co., Lawliss, J.) granted the newspaper’s motion, holding not only that the article was substantially true and privileged, but also that the amended anti-SLAPP legislation applied and that dismissal and attorney’s fees were appropriate under the statute.

The court’s anti-SLAPP analysis was significant. Citing Sackler v. American Broadcasting Companies (N.Y. Sup. Mar 9, 2021), Coleman v. Grand (E.D.N.Y. Feb 22, 2021) and Palin v New York Times (S.D.N.Y. Dec. 29, 2020), Justice Lawliss held that although the anti-SLAPP amendments were enacted almost 2 years after the filing of the lawsuit, they applied retroactively thereby requiring the plaintiffs to establish the reports were made with actual malice, a burden which the plaintiffs could not meet. (“As noted above, Defendant in a meticulous manner, recites the newsgathering process, interviews, meetings, editing and rounds of review that went into the article’s production. […] Plaintiffs cite no facts which would argue in its favor of the conclusion that Defendant published a news article with knowledge of its falsity or reckless disregard thereof.”) The decision thus constituted an early state-court recognition that the amendments applied not only to newly filed matters, but also existing or pending cases.

The lower court also examined the newspaper’s request for legal fees. Observing that, under § 70-a as amended, “costs and attorneys fees shall be recovered upon a demonstration, including adjudication pursuant to [CPLR 3211(g)] or [CPLR 3212(h)] [motions to dismiss or for summary judgment], the action involving public petition and participation was commenced or continued without a substantial basis in fact and law […],” Justice Lawliss held:

“Plaintiffs knew or should have known long ago of the non-meritorious and futile nature of the instant litigation. The conduct is especially egregious where, as here, the Defendant is a news media organization exercising the fundamental rights of a free press, which New Courts have long and zealously guarded. Owing simply to the exercise of their constitutional rights, Defendants have been forced to suffer this litigation. Under the circumstances, the award of costs and attorneys fees is mandatory. […] If the award of costs and attorneys fees were discretionary, the Court would still grant the request.”

Plaintiffs, of course, appealed the decision arguing, among other things, that the court erred in its retroactive application of the anti-SLAPP amendments. The appeal was heard January 10, 2022.
Expressly finding that the 2018 article at issue was substantially true, the Third Department concluded the grant of summary judgment was proper. As to plaintiffs’ “remaining contentions” (which included their arguments concerning SLAPP, retroactivity, and the award of attorney’s fees), the Court “examined” plaintiffs’ arguments and found them “to lack merit.” The Court thus rejected plaintiffs’ arguments in their entirety, unanimously affirming the lower court’s May 6 Decision and Order.

Karim Abdulla is a member of Finnerty Osterreicher & Abdulla in Buffalo, NY, which represented the Press-Republican.

New York First Department Rules Anti-SLAPP Law Not Retroactive

In the high-profile defamation case between music producer Lukasz Gottwald, aka Dr. Luke, and pop star Kesha, the Appellate Division, First Department, in March issued a short four paragraph ruling, addressing the retroactivity of New York’s recently amended anti-SLAPP statute. Gottwald v. Sebert.

Contrary to Reus, supra, and several federal court rulings, the First Department held that “there is insufficient evidence supporting the conclusion that the legislature intended its 2020 amendments to the anti-strategic lawsuit against public participation (anti-SLAPP) law to apply retroactively to pending claims such as the defamation claims asserted by plaintiffs in this action.”

The court noted that under New York and U.S. Supreme Court precedent, courts should approach the issue of retroactivity cautiously – questioning “the continued utility of the tenet that new `remedial' statutes apply presumptively to pending cases.” And adding: “Classifying a statute as remedial does not automatically overcome the strong presumption of prospectivity since the term may broadly encompass any attempt to supply some defect or abridge some superfluity in the former law.”

“[W]e find that the presumption of prospective application of the amendments has not been defeated. The legislature acted to broaden the scope of the law almost 30 years after the law was originally enacted, purportedly to advance an underlying remedial purpose that was not adequately addressed in the original legislative language. The legislature did not specify that the new legislation was to be applied retroactively. The fact that the amended statute is remedial, and that the legislature provided that the amendments shall take effect immediately, does not support the conclusion that the legislature intended retroactive application of the amendments.”
Second Circuit Affirms Dismissal of Defamation Suit Against Researcher

Researcher Criticized Medical Device Company for Misleading Marketing and Junk Science

By Dori Hanswirth and Sam Callahan

In March, the Second Circuit affirmed dismissal of a defamation suit brought by a medical device company against a reproductive health epidemiologist who had criticized the company’s marketing practices and its scientific research. Valley Electronics AG v. Polis, No. 21-2108 (2d Cir. Mar. 28, 2022). The researcher lodged these criticisms on her personal blog, on social media, and in an interview with a reporter for BuzzFeed News. The Second Circuit held that all of the researcher’s challenged statements were nonactionable opinions under New York law, based primarily on the statements’ connection with a debate playing out in scientific literature. The decision reaffirms the overriding importance of context under New York defamation law, particularly for statements made amid ongoing public controversies.

Background

The case is the latest episode in a years-long controversy surrounding Valley’s marketing of its fertility tracking thermometer, the Daysy. The Daysy is registered with the Food & Drug Administration as a “proceptive” device, meaning one that can help women get pregnant. The Daysy is not, however, cleared as a contraceptive. Over the past decade, Valley has drawn scrutiny from FDA over marketing touting the Daysy and similar devices as highly effective at preventing pregnancy. Despite these warnings, Valley has continued to advertise the Daysy as a contraceptive—even equating its efficacy with that of an IUD.

The defendant, Dr. Chelsea Polis, is an epidemiologist with nearly twenty years’ experience studying reproductive health and fertility. Her work on contraceptives has helped form the guidance of major public health organizations, including the Centers for Disease Control and the World Health Organization. Dr. Polis reviewed Valley’s marketing and the scientific articles on which it relied, and became concerned that Valley was misleading the public about the risk of unintended pregnancy. Dr. Polis took particular issue with a 2018 study that Valley had funded and published in the academic journal Reproductive Health, which she found severely underestimated the rate at which Daysy users became pregnant. Dr. Polis published her own peer-reviewed commentary in Reproductive Health describing the flaws with the Valley-funded study and Valley’s marketing.
Dr. Polis’s criticisms prompted the journal to independently review Valley’s study. In 2019, the journal publicly retracted the study, citing “fundamental flaws” that produced “unreliable” conclusions. But leading up to and even immediately following the journal’s retraction, Valley continued to promote the Daysy as an effective contraceptive.

Shortly after the retraction, Dr. Polis published a post on her personal blog describing her experience and commenting on Valley’s behavior leading up to and following the retraction. Her blog post opened with links to the journal’s retraction and her own published commentary. Dr. Polis expressed being “glad to have helped to remove junk science from the literature,” and shared her hope that “fewer people will be made vulnerable to unintended pregnancy via misleading, unsupported claims.” Dr. Polis also took issue with Valley’s response to the retraction. She cited the company’s public comments minimizing the flaws in the 2018 study and asserted that Valley had “recklessly rejected” the journal’s decision.

Dr. Polis likewise criticized Valley in an interview with BuzzFeed News, which published a story on the same day as the retraction quoting several public health experts, including Dr. Polis. And Dr. Polis made similar statements on social media—for example, in Instagram comments responding to a user who was promoting the Daysy, in which Dr. Polis called Valley “particularly unethical” and linked to the BuzzFeed News story.

In May 2020, Valley sued Dr. Polis for defamation in the Eastern District of New York. The company claimed that Dr. Polis’s blog post, Instagram comments, and statements to the BuzzFeed reporter were defamatory—though it did not challenge her underlying journal commentary asserting many similar criticisms. Valley sought over $1 million in compensatory and punitive damages, as well as an injunction requiring Dr. Polis to publicly retract her statements.

Dr. Polis moved to dismiss on several grounds, including that all of the statements were nonactionable opinions under New York law, and that Valley was a limited public figure and failed to plausibly allege actual malice. In November 2020, after the motion to dismiss was briefed, New York amended its Anti-SLAPP statute to cover a broader array of cases—including any case involving a communication in “a public forum in connection with an issue of public interest.” For any defamation suit meeting that broad standard, the plaintiff is required to establish actual malice. Accordingly, Dr. Polis filed a notice of supplemental authority invoking the amended Anti-SLAPP law as yet another basis for dismissal.

Judge Ross dismissed the case in August 2021, holding that all of Dr. Polis’s statements were nonactionable opinions as a matter of law. The court declined to reach the alternative bases for dismissal. Valley appealed, and the Second Circuit (Judges Cabranes, Carney, and Raggi) held argument in March 2022.
Court of Appeals Decision

Less than a week after oral argument, the Second Circuit issued a unanimous summary order affirming the dismissal. Relying on Immuno AG v. Moor-Jankowski—a leading New York Court of Appeals decision involving a letter to the editor of a medical journal—the court focused primarily on the “broader written and social contexts” of Dr. Polis’s statements, which the court recognized are “often the key considerations” in deciding whether a statement is actionable. The court emphasized that each challenged publication either “recited or referred to” Dr. Polis’s scientific commentary criticizing Valley’s study, along with the journal’s retraction of the initial study. Because readers were presented with Dr. Polis’s “longstanding and ongoing role in criticizing” Valley, the court explained, “the average reader [would] look upon the communication as an expression of opinion rather than a statement of fact.”

The court also focused on the nature and style of the challenged publications. It noted that personal blogs and Instagram comments “are typically regarded by the public as vehicles for the expression of individual opinion.” And while Dr. Polis’s blog touted her serious “scientific credentials” and had “a professional look,” the court explained that “the writing on her blog [was] informal, and readers are put on alert that she is sharing her opinions by the statement at the top of the webpage that she ‘hopes to transmute her rate at social injustice and scientific denialism into something useful.’”

The court found that its contextual analysis was “reinforced by the fact that the vast majority of Polis’s statements carry no precise meaning as used.” In particular, the court held that Dr. Polis’s statements regarding Valley’s “ethics”—for example, that it “has no shame or integrity” and is not “interested in providing accurate information” to customers—were the sort of hyperbolic statements that courts consistently hold nonactionable.

The Second Circuit’s decision reaffirms the breadth and flexibility of New York’s speech protections. While the court found that the language of Dr. Polis’s individual statements bolstered its ultimate conclusion, the court did not finely parse the publications in search of factual assertions. Rather, the court’s overriding focus was on the statements’ broader social setting, and on the very character of personal blogs and social media. The court’s significant reliance on Immuno, a case involving sharp criticism of a medical company by a research scientist, signals that courts are particularly sensitive to context when evaluating statements made by participants in ongoing scientific controversies. In those settings, readers expect that speakers will take strong positions, not observe passively.

Defendant-Appellee Chelsea B. Polis was represented by Dori Hanswirth, Paul Q. Andrews, and Sam Callahan of Arnold & Porter Kaye Scholer LLP. Maurice W. Sayeh and Rachel Carpman assisted with the case; Ms. Carpman is not admitted to the practice of law. Plaintiffs-Appellants Valley Electronics AG, Valley Electronics GmbH, and Valley Electronics, LLC were represented by Peter W. Ross and Charles Avrith of Ross LLP, and by Jeffrey A. Mitchell of Ellis George Cipollone O’Brien Annaguey LLP.
Second Circuit Affirms Dismissal of Chinese Company’s Defamation Suit Against VICE

By Amanda Levine

On March 1, 2022 – a mere one week after oral arguments were held – the Second Circuit, in a panel consisting of Judges Livingston, Kearse, and Lee, issued a summary order affirming the dismissal of a defamation claim brought against VICE, BYD Company, Ltd. against VICE Media LLC, 21-1097.

The claim stemmed from an article that VICE published on April 11, 2020 titled Trump Blacklisted This Chinese Company. Now It’s Making Coronavirus Masks for U.S. Hospitals. The article provided a broad overview of BYD—an electric vehicle manufacturing company that made headlines after it entered into a $1 billion contract to produce personal protective equipment for the state of California at the beginning of the COVID-19 pandemic.

The article explained that, despite recent approval from the FDA to provide respirator masks in the United States, BYD had a turbulent past. Among other things, the article noted that BYD was “prohibited by law from bidding for some federal contracts in the United States” and that it had “possible links to forced labor.” The article then explained each of these issues in turn. It stated that, in 2019, the President signed legislation that banned federal funds from being used to purchase BYD’s electric buses. In addition, it explained that a report recently released from the Australian Strategic Policy Institute (“ASPI”) listed BYD as one of 83 companies that was “using Uighur forced labor in its supply chain.”

On April 27, 2020, BYD filed a complaint against VICE, alleging that two statements in the article were false and defamatory. First, BYD claimed that the article’s headline was false and defamatory because President Trump did not have an actual “blacklist” that included BYD. Instead, the headline was referencing legislation by Congress, not the President, that prohibited any Chinese company, not merely BYD, from receiving federal funds.

Second, BYD claimed that the statement “BYD was one of the companies identified in the report as using Uighur labor in its supply chain” was false and defamatory because BYD did not use any forced labor in its supply chain. BYD alleged that the ASPI report, which was the sole source cited by VICE, was unreliable.

On March 31, 2021, Judge Alison Nathan of the Southern District of New York dismissed BYD’s claims in their entirety. The Court held that the article’s headline was both a “fair index” of the substantially accurate information contained in the article and was protected under New York Civil Rights Law Section 74 (“Section 74”) as a fair report of a legislative proceeding. As
to the statement about BYD’s alleged use of forced labor, the Court held that BYD failed to plausibly allege actual malice. BYD appealed shortly thereafter.

In an eight-page summary order, the Second Circuit affirmed the District Court’s holding. It first held that the District Court had properly concluded that the article’s headline was protected as a fair report. It explained that legislation passed by Congress and signed into law by then-President Trump prohibited the use of federal funds for the purchase of rail cars and buses from companies in certain countries, and BYD qualified as one such company. Accordingly, it was accurate to state that BYD was “blacklisted.” Quoting Holy Spirit Association for Unification of World Christianity v. New York Times, Co., 49 N.Y.2d 63, 67 (1979), the Court explained, “while BYD may wish for us to apply a ‘lexicographer’s precision’ to this term, ‘parsing and dissect[ing] a claim that is substantially true, that is not the law.’”

The Court then held that the article’s statement about BYD’s alleged use of forced labor was not made with actual malice. The Court compared the text of VICE’s article to the text of the ASPI report and found that “[t]o the extent there is an appreciable difference in meaning . . . standing alone, it is far too insignificant to support a claim of actual malice.” The Court also highlighted other sections of the ASPI report, which buttressed the claim that BYD used forced labor in its supply chain.

Perhaps most notably, the Court also included a footnote stating that BYD further failed to plead actual malice because it did not “identify the individual responsible for publication of the challenged statements” in the article. This footnote seemingly re-affirms the U.S. Supreme Court’s mandate from New York Times Co. v. Sullivan, 376 U.S. 254 (1964) that “the state of mind required for actual malice would have to be brought home to the persons . . . having responsibility for the publication of the [challenged statement].” The Second Circuit’s decision to include this footnote should be re-assuring for media companies, particularly in the wake of the Delaware Superior Court’s decision in U.S. Dominion, Inc. v. Fox News Network, LLC, 2021 WL 5984265 (Del. Sup. Ct. Dec. 16, 2021), where the court held that Dominion had adequately pled actual malice, including by pointing to other Fox News anchors who were not responsible for the challenged statements but seemed to disbelieve them.

Rachel Strom and Amanda Levine of Davis Wright Tremaine LLP represented VICE. BYD was represented by Charles Harder and Dilan Esper of Harder LLP.
Texas Federal Courts Analyze Personal Jurisdiction in Online Defamation Cases

By Michael J. Lambert

Texas federal courts have sent a clear message to those considering filing a defamation suit over online statements – personal jurisdiction only exists if the statements concern the forum or the defendant is located in the state. In December, the Fifth Circuit held in Johnson v. HuffPost that a non-resident website accessible in Texas that collects data from, and sells online ads and merchandise to, residents in Texas is not subject to personal jurisdiction there. Specific jurisdiction over online statements, instead, requires the forum to be the “focal point” of the alleged libel and the harm suffered.

In January, the Eastern District of Texas rejected similar arguments that operating an “active website” and YouTube channel, publishing statements on Twitter, and soliciting subscriptions in Texas conveyed specific jurisdiction in Nunes v. NBCU. There, too, the statements at issue did not concern Texas. The court also held that general jurisdiction all but demands a defendant be located in the forum, even if it has affiliates in the state, and declined jurisdictional discovery because it would be fruitless.

Johnson v. HuffPost

On December 23, 2021, the Fifth Circuit, 2-1, affirmed the dismissal of conservative activist Charles Johnson’s defamation claim against TheHuffingtonPost.com (HuffPost) because Johnson failed to adequately plead the “key question” in libel cases—that the forum state was “the focal point” of the alleged libel and the harm suffered. Johnson v. TheHuffingtonPost.com, Inc., 21 F.4th 314, 318 (5th Cir. 2021) (quoting Calder v. Jones, 465 U.S. 783, 789 (1984)). The HuffPost article, which identified him as “noted Holocaust denier and white nationalist,” neither concerned Texas nor relied on any Texas sources. It, instead, involved a meeting between Johnson and two members of Congress in Washington, D.C.

Our decision in Revell requires dismissal. HuffPost is interactive, but its story about Johnson has no ties to Texas. The story does not mention Texas. It recounts a meeting that took place outside Texas, and it used no Texan sources. Accordingly, we lack jurisdiction over HuffPost with respect to Johnson's libel claim. 

Id. at 319 (citing Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002)).

Johnson’s allegations—that HuffPost was “visible” in Texas, sells ads and merchandise to Texans, contracted with advertisers from Texas, and collects data from viewers in Texas—failed to meet the specific jurisdiction threshold. Id. at 317.
[M]ere accessibility cannot demonstrate purposeful availment, as we and our sister circuits have held many times. Though HuffPost’s site shows ads and sells merchandise, neither act targets Texas specifically. And even if those acts did target Texas, neither relates to Johnson’s claim, so neither supports specific jurisdiction.

_Id._ at 326.

The court distinguished _Keeton v. Hustler Mag._, 465 U.S. 770 (1984), emphasizing the differences between magazines and websites. The _Keeton_ court “stressed the substantial physical circulation of print media because that reflects purposeful availment of the forum state.” _Id._ at 325 (citing _Walden v. Fiore_, 571 U.S. 277, 285 (2014)). Websites, unlike magazines, are “circulated to the public by virtue of their universal accessibility, which exists from their inception. That’s why clicks, visits, and views from forum residents cannot alone show purposeful availment. They are not evidence that ‘the defendant has formed a contact with the forum state.’” _Id._

The court explained that personal jurisdiction requirements ensure fairness and protect federalism. Subjecting a website to jurisdiction in a forum when the claim does not relate to or arise from contacts with the forum is unfair and inconsistent with a defendant’s reasonable expectations. “Grannies with cooking blogs do not, and should not, expect lawsuits from Maui to Maine.” _Id._ at 320.

In dissent, Judge Catharina Haynes wrote that _HuffPost_ was subject to specific jurisdiction in Texas under _Keeton_ because its presence in the state was not “random, isolated, or fortuitous.” By “continuously and deliberately” exploiting the Texas market by actively seeking Texas readers and selling them ads, _HuffPost_ should expect to be haled into court there. _Id._ at 329. These actions directed toward Texas, according to Judge Haynes, are “the modern equivalent of Keeton sending magazines to New Hampshire.” The majority countered that the dissent’s vast view of personal jurisdiction would cause “unlimited jurisdiction over virtual defendants—and not just our cooking-blog granny.”

_Nunes v. NBCU_

One month later, the Eastern District of Texas held that NBCUniversal (NBCU) was not subject to personal jurisdiction in Texas regarding California Congressman Devin Nunes’s defamation claim based on statements from _The Rachel Maddow Show_ about Nunes’s handling of a package from alleged Russian agent Andriy Derkach during the 2020 presidential election. _Nunes v. NBCU_, No. 21-cv-00608, ECF No. 21 (E.D. Tex. Jan. 28, 2022).
Judge Amos L. Mazzant III found that Nunes failed to plead that NBCU, who is incorporated in Delaware and headquartered in New York, was subject to general jurisdiction in Texas. Order at pp. 5-9. Even taking Nunes’s allegations about NBCU and any Texas affiliates as true, NBCU’s contacts with Texas “fall far short” of establishing general jurisdiction, Mazzant wrote. General jurisdiction requires that the corporation itself—not its agents, subsidiaries, or affiliates—be “at home” in the forum state. Order at p. 7 (quoting Zoch v. Daimler, AG, No. 6:16-CV-00057, 2017 WL 2903264, at *3 (E.D. Tex. May 16, 2017)). The “activities and physical presence of NBCU-affiliates in Texas cannot create general jurisdiction over NBCU.” Id.

Applying Calder, the court found that Nunes also failed to plead that NBCU was subject to specific jurisdiction based on national reporting about a California citizen and U.S. Representative with no references to activities in Texas or Texas sources. “Aside from conclusory allegations, Nunes presents no evidence that the statements made in the Report or any actions by NBCU related to the Report’s publication directly targeted Texas residents. Nor can he.” Order at pp. 11-12. The court rejected Nunes’s “flawed” specific jurisdiction allegations that NBCU (1) “specifically targeted and purposely exploited the Texas market by selling its cable television programs, including The Rachel Maddow Show, to subscribers and consumers in Texas;” (2) operates an “active website” and YouTube channel; and (3) broadcasted the Report to “millions of subscribers and followers” on Twitter. The court wrote that anyone in the world with an internet connection, not exclusively Texas viewers, could access NBCU’s website and Twitter accounts.

Posting an allegedly defamatory statement on Twitter does not satisfy Calder’s “effects test” merely because some members of the Tweet’s audience fortuitously reside in the forum state. This remains true even where the publisher of the statement is aware that some viewers could be forum residents.

Order at p. 12.

The court denied Nunes’s request for jurisdictional discovery because the lack of personal jurisdiction was “clear” and further discovery “would serve no purpose.” Order at pp. 15-17. General jurisdiction would not exist even if NBCU had additional offices or employees in Texas. Id. And discovery would not change the undisputed facts that Maddow’s reporting did not focus on Texas or rely on Texas sources. Id.

After finding a lack of personal jurisdiction in Texas, and pursuant to 28 U.S.C. § 1406(a), the court ordered the case be transferred to the Southern District of New York, where NBCU is headquartered and prepared, produced, and published the Report. Order at pp. 17-20.

Laura Prather and Michael J. Lambert of Haynes and Boone, LLP represented NBCU. Steven S. Biss represented Devin Nunes. Jean-Paul Jassy, Jassy Vick Carolan LLP, and Marc Fuller, Vinson & Elkins, represented Huffpost. Charles Johnson was represented by Joseph Sibley, Houston, TX.
Kansas Supreme Court Censures Judge for Online Sex Pics

Concurrence Ponders Boundaries of Privacy

By Eric Weslander

Writing that “Judges should be role models for society,” the Kanas Supreme Court censured recently retired magistrate judge Marty Clark for posting, while still on the bench, nude pictures of himself on an adult sex site. The court held that Clark violated Canon 1, Rule 1.2 (Promoting Confidence in the Judiciary) and Canon 3, 3.1(C) (Extrajudicial Activities in General) and affirmed a disciplinary panel's recommendation of public censure. Because Judge Clark retired he did not contest the court’s decision. In the Matter of Marty K. Clark, No. 123,911, 2022 Kan. LEXIS 13 (Jan. 28, 2022).

The most notable part of the decision is a concurrence which adds thought-provoking commentary on evolving concepts of personal and sexual privacy in the digital age. Although styled as a concurrence, it took substantive issue with the application of the judicial Canons to the judges behavior, noting “Judge Clark's actions did not have any real, factual connection to his role as a judge. So what is really going on? In short, Judge Clark has embarrassed us—the Examiner, the Commission, this court, the judiciary, and the wider legal community.”

Referencing everything from The Scarlett Letter to Austin Powers, the Federalist Papers and the King James Bible, the concurrence discusses and comments on the erosion of traditional privacy doctrines and warns about the dangers of hypocrisy and overreaching in response to discovery of information that, while embarrassing to the legal system, involved “lawful, private, consensual sexual practices.” The concurrence, authored by Justice Caleb Stegall and joined by Justice K.J. Wall, noted that the behavior came to light only “because it was disclosed by a disgruntled participant in that behavior.”

“The concurrence discusses and comments on the erosion of traditional privacy doctrines and warns about the dangers of hypocrisy and overreaching.

“Rapid advancements and use of technology… have outpaced legal protections for privacy,” the opinion stated. “Surveillance of all kinds (including the kind of self-surveillance practiced by Judge Clark) abetted by ubiquitous high-powered video and audio recording devices – along with the ease of publication and distribution offered by digital social media – has allowed for substantial increase in governmental and employer intrusion into the private lives of individuals. We have become a society not so much subject to one all-powerful watcher but to the whims of a thousand-and-one watchers… Indeed, ‘it isn’t some stern and monolithic Big Brother that we have to reckon with as we go about our daily lives, it’s a vast cohort of prankish Little Brothers equipped with devices that Orwell, writing 60 years ago, never dreamed of and who are loyal to no organized authority.’” (citation
omitted). By turning ‘our lenses on ourselves in the quest for attention by any means’ the ‘invasion of privacy… has been democratized.’” (citation omitted).

The opinion went on to discuss the ways in which automated 24/7 surveillance has become ingrained into daily life, and commented on the “end game of surveillance which may be described as a kind of collusion between big and little brothers. Governments have been unable to resist utilizing the vast store of data being collected by little brother to monitor the citizenry… I am reminded of the truth that ‘the greatest dangers to liberty’ are often found ‘in insidious encroachment by men of zeal, well-meaning but without understanding.’” (citing Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). It continued, “And so reminded, wisdom counsels that big brother himself is not obliged to act on every scrap of tittle-tattle that comes his way from ill-meaning little brothers.”

*Eric Weslander is a partner at Stevens & Brand LLP in Lawrence, KS.*
Minnesota Federal Court Enters Six-Year Permanent Injunction to Stop Abuse of Journalists and Protestors

By Isabella Salomão Nascimento and Kevin Riach

A Minnesota federal court recently approved a six-year monitored injunction which prohibits the Minnesota State Patrol from arresting, using projectiles or chemical munitions against, or otherwise targeting journalists, as part of a settlement agreement reached between the plaintiffs and two State of Minnesota law enforcement agencies, Department of Public Safety and Minnesota State Patrol (the “State Defendants”) in the lawsuit Goyette et al. v. City of Minneapolis et al., 20-cv-1302 (WMW/DTS).

Background

This case stems from the protests that erupted in and around Minneapolis, Minnesota, as a result of the murder of George Floyd by the Minneapolis Police Department on May 25, 2020. In the days following George Floyd’s murder, journalists from around the world flocked to the Twin Cities to cover the clash between law enforcement and protesters seeking to hold police accountable for the unjust killings of unarmed black men and women. But the press soon became caught in police cross hairs. Local and national media suffered arrests and abuse at the hands of law enforcement, which lead to the filing of the Goyette complaint.

In April 2021, with all eyes trained back on Minneapolis because of the ongoing murder trial of Derek Chauvin, Brooklyn Center police killed Daunte Wright. Protests once again erupted in the Twin Cities. Within a few days State Patrol again started targeting – harassing, threatening, shooting at, photographic, arresting – members of the press. The Goyette plaintiffs rushed back to the court, seeking a temporary restraining order (“TRO”) barring the State Defendants from arresting and assaulting journalists, or ordering their dispersal. The court granted this TRO and several months later converted the TRO into a preliminary injunction.

Settlement Agreement

The centerpiece of the Settlement Agreement is the conversion of the preliminary injunction into a permanent injunction, to remain in place for the next six years. The preliminary injunction broke new ground under the First Amendment when it ordered that journalists need not disperse when State Defendants issued otherwise lawful crowd-dispersal orders. This provision remains in effect in the now-permanent injunction.
The injunction binds not just the State Defendants, but any other agency working “in active concert or participation” with them in responding to civil unrest or protests. It further requires that, when responding to civil unrest or protests, the State Defendants’ employees must display their agency name and badge numbers so that it is readable from a distance of at least twenty feet away, and the agencies must maintain a record of all employees deployed to respond to the protests.

Other notable parts of the settlement include:

- That the State Defendants must amend their First Amendment policies to classify any allegation of a First Amendment violation regarding the press a “serious misconduct,” automatically triggering an Internal Affairs investigation;

- Issuing body-worn cameras to all State Patrol troopers by June 2022;

- That State Defendants will contract with a nationally recognized Media Expert to develop training of employees on interacting with the press and the importance of the First Amendment—the initial training will be open to any member of the media who wishes to attend;

- Training on data retention practices; and

- The appointment of an Independent Expert Reviewer who will investigate all complaints regarding treatment of the media lodged against an employee of the State Defendants for their conduct during the protests of May-June 2020 and April 2021, provided the complaints are filed no later than July 12, 2022.

Additionally, the State Defendants have paid $825,000 in damages to the individual journalist plaintiffs for the harm they suffered at the hands of Minnesota State Patrol troopers while covering the protests over the police killings of George Floyd and Daunte Wright.

What Comes Next?

Any member of the press who was covering the protests following the murder of George Floyd in Minneapolis or Daunte Wright in Brooklyn Center, Minnesota, and who had a negative interaction with a member of the Department of Public Safety or Minnesota State Patrol should file a complaint with:

**Internal Affairs/Affirmative Action**
445 Minnesota Street, Suite 530
St. Paul, MN  55101-5530
Telephone: (651) 201-7136
TTY: (651) 282-6555
Fax: (651) 282-6873
Email: dps.ia@state.mn.us
If you were covering the protests but are unsure of which law enforcement agency personnel you interacted with, and you are willing to share your story, contact counsel for the plaintiffs:

Kevin Riach: kevin@riachdefense.com
Pari McGarraugh: pmcgarraugh@fredlaw.com

This lawsuit continues as against the other defendants, including the City of Minneapolis and Hennepin County. This is a monumental victory for the First Amendment—may it continue to protect us all.

*Isabella Salomão Nascimento is an associate with Ballard Spahr in Minneapolis. Kevin Riach is founder of The Law Office of Kevin C. Riach.*
Ninth Circuit’s Dark Horse Opinion Clarifies What Music Is Not Protected by Copyright

By Vincent H. Chieffo, Julianna M. Simon, and David H. Marenberg

After almost seven years of hard-fought litigation, the Ninth Circuit vindicated Defendants Katheryn Hudson (pka Katy Perry), Lukasz Gottwald (pka Dr. Luke), Karl Martin Sandberg (pka Max Martin), and other co-defendants by affirming that no reasonable jury could have concluded that Perry’s hit song “Dark Horse” infringed Plaintiff Marcus Gray (pka Flame)’s song “Joyful Noise,” based on the similarities of two 8-note “repeating musical figures” (called “ostinatos”) that occur throughout both songs. Gray v. Hudson, No. 20-55401, 2022 WL 711246 (9th Cir. 2022).

The Court held that each of the ostinatos’ claimed similarities were too commonplace to be individually protectible, and that the combination of those claimed similarities was unoriginal. With Gray and a prior case, Skidmore v. Led Zeppelin, 952 F.3d 1051 (9th Cir. 2020), the Ninth Circuit sharpened previously blurred lines to prevent the monopolization of basic musical building blocks and delivered a win to advocates for a robust public domain.

Background and Context

In 2008, Gray authored the song Joyful Noise, which featured an 8-note ostinato (with two alternating endings) that he purchased from co-Plaintiff Chike Ojukwu. The pitch sequences for those two alternative versions are 3-3-3-3-2-2-2-1 and 3-3-3-3-2-2-2-6:

Joyful Noise Ostinato (Ending 1):

Joyful Noise Ostinato (Ending 2):

In 2014, Gray and co-writer Lambert, together with Ojukwu sued the Perry Defendants for copyright infringement in the Eastern District of Missouri, which action was transferred in 2015 to the Central District of California. Plaintiffs initially claimed that two separate ostinatos heard within Dark Horse were substantially similar to the Joyful Noise Ostinato. Ostinato 1 was a 4-
note repeated phrase with the pitch sequence 3-2-1-5, while Ostinato 2 was an 8-note repeated phrase with the pitch sequence 3-3-3-3-2-2-1-5.

**Dark Horse Ostinato 1 (conceded at trial to be non-infringing):**

![Dark Horse Ostinato 1](image)

**Dark Horse Ostinato 2 (allegedly infringing, with alleged similarity in orange):**

![Dark Horse Ostinato 2](image)

Plaintiffs claimed the two ostinatos at issue shared the following similarities:

**Pitch collection** — The use of the minor scale

**Phrase length** — A phrase length of eight notes

**Pitch** — A pitch sequence of scale degrees 3-3-3-3-2-2

**Resolution of melodic tension** — The resolution downward by stepwise motion from scale degree 3 to 2 to 1

**Rhythm** — An evenly syncopated or “square” rhythm

**Timbre** — a “pingy” tone quality to the synth sound playing the ostinatos

**Texture** — The shared empty and sparse texture surrounding the ostinatos

**Structure** — The musical decision to use an ostinato.

The Perry Defendants moved for summary judgment, arguing a lack of substantial similarity between the ostinatos as a matter of law, among other grounds. Judge Christina A. Snyder held that fact issues remained. After a bifurcated trial, a jury concluded that Dark Horse and Joyful Noise were substantially similar and awarded Plaintiffs $2.8 million in damages.

**The Ninth Circuit’s Ruling In the “Blurred Lines” Case — Deferential Appellate Review**

At the time of the jury verdict in 2019, the copyright law landscape appeared to favor Plaintiffs. Just a year earlier, the Ninth Circuit had deferred to a similar jury determination in *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018), which heavily relied on expert testimony. In *Williams*, the jury had found that counterclaim defendants Pharrell Williams’ and Robin Thicke’s song “Blurred Lines” was substantially similar to Marvin Gaye’s classic “Got To Give It Up,” crediting a nebulous “constellation” of shared elements appearing throughout the works as a
whole (rather than in an individual ostinato), including a “Theme X,” a descending bass line, rhythms in a keyboard part, and “structural similarities . . . at a sectional level and at a phrasing level.” *Id.* at 1126. The Thicke defendants did not move for judgment as a matter of law before the case was submitted to the jury under Rule 50(a), and instead filed post-trial motions challenging the verdict, which were denied. *Id.* at 1118. On appeal, the Thicke defendants faced a highly unfavorable standard of review. The Ninth Circuit panel majority felt constrained by the outcomes of these post-trial motions challenging the verdict to be “necessarily deferential” to the jury’s findings, which were “not against the clear weight of the evidence.” *Id.* at 1127.

Drawing lessons from *Williams*, the Perry Defendants filed Rule 50(a) motions at the close of both the liability and damage phases and thus preserved their ability to file a Rule 50(b) motion for JMOL. The motion ultimately persuaded Judge Snyder to reconsider her earlier denial of summary judgment. In departing from her Rule 56 motion ruling, Judge Snyder held that the claimed musical similarities were either too commonplace or too abstract to be protectible, and their combination was not “particularly unique or rare.” *See Gray v. Perry*, Case No. 2:15-CV-05642-CAS-JCx, 2020 WL 1275221, at *10 (C.D. Cal. Mar. 16, 2020). Judge Snyder was able to quote from *Skidmore*, issued just a week before her ruling.

**Ninth Circuit Opinion in Gray v. Perry**

In early March, the Ninth Circuit largely adopted Judge Snyder’s reasoning on appeal. Unlike in *Williams*, the Ninth Circuit was not constrained by the outcome of prior post-trial motions but focused on the trial record, which “require[d] [the Court] to conclude that no single point of similarity between Joyful Noise and Dark Horse ar[ose] out of a protectible form of expression.” *See 2022 WL 711246, at *6. In a discussion that delved much deeper into musical composition concepts than many prior appellate decisions, the Court similarly concluded that the two ostinatos at issue shared only a “manifestly conventional arrangement of musical building blocks.” *Id.* at *10. The Court found no originality in a pitch sequence 3-3-3-3-2-2 played in even rhythm (the only material the two ostinatos shared), deeming it “nothing more than a two-note snippet of a descending minor scale, with some notes repeated.” *Id.* The Court issued a clear warning against “allowing an improper monopoly over two-note pitch sequences or even the minor scale itself, especially in light of the limited number of expressive choices available when it comes to an eight-note repeated musical figure.” *Id.* (By restricting this reasoning to “eight-note repeated musical figure[s],” the Ninth Circuit correctly avoided precedent stating that musical compositions as a whole are “not confined to a narrow range of expression.” *See Williams*, 895 F.3d at 1120.)

**Lessons Learned: Takeaways for Practitioners**

There are several key takeaways from the Ninth Circuit’s opinion. First, beginning with *Skidmore* and now *Gray*, the Ninth Circuit reaffirmed that it is the court’s, not the expert’s, responsibility to identify and distill the protectible from the unprotectible material under the extrinsic test, emphasizing that “judges retain an important gatekeeping role in applying the law” and reminding us that expert musicologists are not experts “on copyright law.” The Court...
scrutinized the expert testimony in the record, specifically internal contradictions and admissions in the Plaintiffs’ expert’s testimony, which reinforced the commonplace nature of the elements Plaintiffs asserted, as well as uncontradicted and unimpeached prior art invoked by the Perry Defendants’ expert, Dr. Lawrence Ferrara.

Second, the Court showed a willingness to get into the reeds (forgive us). Music has been viewed as opaque and esoteric in past decisions—see, e.g., Swirsky v. Carey, 376 F.3d 841, 848 (9th Cir. 2004) (“Music is an art form that ‘produces sounds and expresses moods’ . . . but it does not necessarily communicate separately identifiable ideas.”)—but Gray engaged with and converted complicated musical concepts into transparent and digestible legal conclusions, elevating the potential discourse for practitioners. Some clear examples:

The Court presented a legal distinction between melody, which remains a sacrosanct and protectible element, and ostinato or pitch sequence, which are not automatically protectible, leaving room for advocacy in the future.

The Court confirmed that although the full chromatic scale—the (Western) musician’s “palette”—has twelve unique notes, modern songs tend to use only seven of those notes, and not all combinations of those notes are pleasing to the ear. Advocates for copyright defendants should keep this in mind when a plaintiff exaggerates the exponential possibilities of twelve unique notes.

The Court recognized that the tendencies of certain scale degrees to resolve in pleasing and predictable directions made such resolutions commonplace.

The Court’s informed discussion of “rules of consonance” and commonly used musical tools to create and resolve dramatic musical tension in popular music should assist practitioners and their retained expert musicologists to better articulate to judges and jurors why appealing and similar musical phrases may still not be sufficiently original to merit copyright protection.

Third, Gray demonstrates the importance of preserving the ability to seek post-trial relief under Rule 50. The usefulness of Rule 50 cannot be overstated where juries are easily moved by expert testimony not before the court at summary judgment. Expert musicologists are not legal experts, and their testimony can be effectively impeached. A defendant’s attorney should also be mindful that even a carefully crafted plaintiff’s expert report can matter little if the attorney can elicit the right admissions or contradictions from the expert on cross examination. As Judge Snyder astutely noted below, the failure to preserve the post-trial 50(b) motion in Williams proved disastrous on appeal, foreclosing the kind of rigorous musical analysis evident in Gray. See 2020 WL 1275221, at *9.

Vincent H. Chieffo is a shareholder in Greenberg Traurig, LLP’s Los Angeles office and Co-Chair of the firm’s National Media and Entertainment Litigation Group, and Julianna M. Simon and David H. Marenberg are associates at the firm resident in Los Angeles. The firm represented Katy Perry in Gray v. Perry and the remaining defendants were represented by Christine Lepera and Jeffrey M. Movit of Mitchell Silberberg & Knupp.
By Jeff Hermes

On March 2, 2022, the U.S. Court of Appeals for the Ninth Circuit ruled that a lawsuit filed by social media company Twitter, Inc., alleging that it was the target of retaliation by Texas Attorney General Ken Paxton in violation of its First Amendment rights, was not “prudentially ripe.” Twitter, Inc. v. Paxton, No. 21-15869 (9th Cir. Mar. 2, 2022). In affirming the district court’s dismissal of Twitter’s claim, the Ninth Circuit paid little heed to the asserted chilling effects of Paxton’s actions and reached problematic conclusions regarding social media platforms’ representations regarding their moderation of content.

Background

Twitter’s complaint arose out of a civil investigative demand (“CID”) issued by Paxton’s office following Twitter’s decision to ban Donald Trump from its service permanently in the wake of the January 6, 2021, riot at the U.S. Capitol. Prior to issuing the CID, Paxton had tweeted that Twitter and Facebook were “closing conservative accounts,” and that social media companies were “ready/willing to be the left’s Chinese-style thought police.” He also stated that “[a]s AG, I will fight them with all I’ve got.”

The CID, which was issued within a few days of these comments and sought documents from Twitter regarding its content moderation decisions, certainly seemed like Paxton was following through on his promise. Although Paxton asserted that the CID was probing whether Twitter had misrepresented its content moderation policies to Texas consumers and had nothing to do Trump’s de-platforming or any other particular decision, Twitter considered this to be a pretext for retaliation against its exercise of its First Amendment right to control content on its platform and filed suit against Paxton in his official capacity in the Northern District of California.

At the time suit was filed, Paxton had not attempted to enforce the CID in court, and Twitter’s lawsuit sought a declaration that the investigation was unconstitutional as well as an injunction against both enforcement of the CID and future investigation. Paxton moved to dismiss on various grounds, most notably arguing that the Supreme Court had held in Reisman v. Caplan, 375 U.S. 440 (1964), that where a document request is not “self-executing,” a challenge to that request is not ripe until the sender
attempts to enforce it. Twitter argued that the First Amendment implications of the CID distinguished its complaint, because the very existence of the CID created a chilling effect for the company’s exercise of its editorial discretion with respect to blocking user content.

The district court agreed with Paxton on his ripeness argument and dismissed the case on that basis without addressing his other arguments. Twitter’s attempt to secure an injunction pending appeal was denied both at the district court and appellate levels (albeit by a split decision from the Ninth Circuit). This appeal of the dismissal followed.

Ninth Circuit’s Decision

The Ninth Circuit, reviewing the district court’s decision de novo, distinguished between “constitutional ripeness,” deriving from Article III’s requirement of an injury-in-fact, and “prudential ripeness,” which involves a more general determination of “both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” Twitter v. Paxton, slip op. at 7. Although noting that the Supreme Court had questioned whether dismissal of cases as “prudentially” unripe conflicted with the federal courts’ obligation to hear cases within their jurisdiction, the Ninth Circuit stated that it was bound by its own precedents on the matter. Id. at n.1, citing Susan B. Anthony List v. Driehaus, 573 U.S. 149, 167 (2014).

Notably, the Court of Appeals held that while standards of constitutional ripeness were more relaxed in cases involving First Amendment issues, prudential concerns about hearing a case were instead amplified where a constitutional question is involved. Twitter at 8. Moreover, given that constitutional ripeness would be difficult to determine, the court found it appropriate to address prudential ripeness as a “non-merits threshold issue” that offered a “less burdensome course” to resolve the case. Id. at 9.

The court articulated the prudential ripeness analysis as follows:

The prudential part of ripeness … requires us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. … A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. … On the hardship prong, we consider whether the action requires an immediate and significant change in the plaintiffs’ conduct of their affairs with serious penalties attached to noncompliance. … As part of this prong, we have also considered the hardship to the government from moving forward with the case. ... Even if there is some hardship to the plaintiff from withholding consideration, that hardship may still be insufficient to overcome the uncertainty of the legal issue presented in the case in its current posture and thus fail to outweigh our and the government’s interest in delaying review.

Id. at 7-8 (internal citations and quotation marks omitted).
Applying this two-prong analysis, the Ninth Circuit agreed with the district court that the case was prudentially unripe. On the first prong, fitness for judicial decision, the Court of Appeals found that the case was premature because Paxton’s office had not completed its investigation or accused Twitter of wrongdoing, and because Twitter could have refused to comply with the subpoena and challenged its validity in Texas state court. *Id.* at 9.

The court rejected Twitter’s argument that it was the very existence of the CID that created the chilling effect, regardless of whether it had yet been enforced, and that the only factual and legal questions were therefore whether Paxton had issued the CID with a retaliatory motive. According to the Ninth Circuit, Twitter’s lawsuit presumed the conclusion of Paxton’s investigation when it alleged violation of its First Amendment rights, because it might be possible that the statements at issue are not protected by the First Amendment:

> Even if content moderation is protected speech, making misrepresentations about content moderation policies is not. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976) (misleading commercial speech is not protected). If Twitter’s statements are protected commercial speech, then OAG’s investigation would be unlawful if it would chill a person of ordinary firmness from speaking, and if it was caused in substantial or motivating part by Twitter’s content moderation decisions. ... But if Twitter’s statements are misleading commercial speech, and thus unprotected, then Twitter’s content moderation decisions would be a proper cause for the investigation, because they would be the very acts that make its speech misleading.

*Id.* at 10 (internal citation omitted). The court went on to express concern that lawsuits like Twitter’s could be used to stymie any government investigation into whether particular speech was unlawful. *Id.* at 11.

Turning to the hardship prong, the court found that Twitter’s hardship from denying judicial review was attenuated because the company was not required to comply with the CID and could assert its First Amendment interests when Paxton attempts to enforce it. The court also noted that Twitter missed its window to bring an action created by Texas statute to challenge the CID. *Id.* at 12. The court found that cases such as *Bantam Books* cited by Twitter involving chilling effects from informal threats of legal action were distinguishable based on the nature of speech at issue, the lack of systems to challenge those threats, and/or a lack of a discussion of ripeness. *Id.* at 14-18.

In contrast, Paxton’s office would (on the court’s understanding of the alleged retaliation) be required to defend its potential charges in a remote court before having a chance to investigate them, thus impairing Texas’ state sovereignty. *Id.* at 12-13. Accordingly, this prong weighed against Twitter as well.
The Ninth Circuit did find that Reisman, the key case cited by Paxton, was inapposite because it did not involve a claimed chilling effect on First Amendment rights and was dismissed for a “want of equity” rather than a lack of ripeness. *Id.* at 19. However, while Reisman’s reliance on equitable principles made the case inapplicable to a declaratory judgment claim, the Ninth Circuit found that its own ripeness analysis supported dismissal of Twitter’s demands for both injunctive and declaratory relief. *Id.* at 20. The court therefore affirmed the dismissal of Twitter’s complaint. *Id.*

**Commentary**

There are, shall we say, some issues with the Ninth Circuit’s opinion.

First, the court speaks as if Paxton’s alleged retaliation is for Twitter’s statements *about* its content moderation practices, instead of the exercise of editorial choice in blocking particular speakers and content (e.g., the de-platforming of Donald Trump). The court did not deal with Twitter’s claim that Paxton is selectively invoking consumer protection law as punishment for specific editorial decisions that are protected by the First Amendment and – by his own admission (see *Twitter* at 5) – beyond his authority to investigate. The fact that this case alleges retaliation for separate First Amendment activity distinguishes it from the troubling scenarios hypothecated by the court that merely involved investigations into allegedly unlawful speech.

(One might argue that some inquiry into the underlying merits of Paxton’s investigation is still required to resolve Twitter’s claim of retaliation. See *Hartman v. Moore*, 547 U.S. 250 (2006) (plaintiff in First Amendment retaliatory prosecution claim must prove lack of probable cause to link investigator’s alleged animus to prosecutor’s decision to file charges); *but see Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1947 (2018) (noting open question whether *Hartman’s* probable cause requirement applies in case of retaliatory arrest where officer himself has animus); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (in First Amendment claim for retaliatory termination of employment, plaintiff is only required to show that “his conduct was constitutionally protected, and that this conduct was a ‘substantial factor’… in the [defendant]’s decision not to rehire him.”). But even if such an inquiry were appropriate, the burden would be on Twitter, not Paxton, and it would be a preliminary evaluation along the lines of a probable cause analysis rather than a full trial on the merits of the investigation.)

Second, the court assumes that Twitter’s statements about its content moderation practices should be treated as commercial speech. In *Cincinnati v. Discovery Network*, 507 U.S. 410, 422-23 (1993), the Supreme Court discussed the narrowing of its definition of commercial speech from *Central Hudson Gas & Electric Corp. v. Public Service Comm’n of New York*, 447 U.S. 557, 561 (1980) (“expression related solely to the economic interests of the speaker and its
audience”) to *Board of Trustees of State University of N. Y. v. Fox*, 492 U.S. 469, 473-74 (1989) (whether statements “propose a commercial transaction … is the test for identifying commercial speech”). Statements regarding moderation policies do not necessarily propose a commercial transaction, and indeed might not satisfy even the broader *Central Hudson* definition.

Moreover, in the context of the publication of information, this presumption risks opening any media outlet to consumer protection litigation when it explains its editorial decisions or practices. Such “speech about speech” is so intimately related to the exercise of First Amendment rights that it is difficult to see how a consumer protection claim could be proven without intruding directly and perversely into protected editorial decisions, chilling not only statements of editorial policy but also the underlying publication of information. Thus, it is doubtful that the First Amendment would apply in the same way as in other contexts, even if the statements at issue could be considered to be “commercial speech.” *See Va. Pharmacy Bd.*, 425 U.S. at 771 n.24 (1976) (commercial speech can be subjected to greater regulation under the First Amendment because it is more easily verifiable and less subject to chilling effects).

Twitter did, of course, point out these problems, comparing its explanation of its content moderation to such well-known news media slogans as “All the News That’s Fit to Print” and “Fair and Balanced,” and arguing that government intrusion into editorial decisions violated the First Amendment. But the Ninth Circuit held that Twitter’s citations to cases such as *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), which held that government efforts to force publishers to be balanced violate the First Amendment, were irrelevant; this case, said the court, was about Twitter’s own representations of balance. *Twitter* at 13. This, again, disregards Twitter’s allegations that Paxton’s investigation was pretextual, and was in fact an effort to intimidate Twitter with the threat of burdensome demands into moderating content not according to its own promises but according to the Texas government’s preferences. (That is to say, as little as possible, per the controversial and enjoined Texas law that Paxton is currently attempting to revive in the Fifth Circuit.)

The Ninth Circuit’s ruling provides a pretty clear road map for plaintiffs seeking to challenge social media companies’ editorial decisions on a consumer protection theory. But this road ultimately leads nowhere.

The Ninth Circuit likewise missed the point with respect to Twitter’s references to media company slogans, calling this a “puffery” argument and stating that while the slogans were puffery, Twitter’s statements might be considered factual. *Id.* at 14. Even thinking about these statements in terms of “puffery” presumes the statements are properly analyzed in a false advertising/commercial speech context, begging the question above. The briefest contemplation would reveal that any discussion of balanced moderation on a massive social media platform could only be understood to be aspirational, given the scale of the communications involved, and indeed is impossible to verify by any kind of objective standard. Again, a key characteristic of commercial speech is that it is “more easily verifiable” than noncommercial speech. *Va. Pharmacy* at 771 n.24.
Some politicians like to hand-wave away the impossibility of objectively balanced moderation by suggesting that tech companies can solve any problem if you threaten them enough. Whenever you hear that line, it’s a sure sign that you’re listening to this guy, https://www.youtube.com/watch?v=Yn5pJtgtRrg; he hasn’t gotten any smarter since 1989, and he still wants to stuff nerds into lockers. Really, the only perfectly “balanced” way to moderate content at scale is not to moderate at all – which of course Paxton knows.

Conclusion

For an opinion that ultimately holds that it is too early for a court to reach the merits of the case, the Ninth Circuit’s ruling provides a pretty clear road map for plaintiffs seeking to challenge social media companies’ editorial decisions on a consumer protection theory. But this road ultimately leads nowhere, and the Ninth Circuit would have better served interests of judicial efficiency by heading Paxton’s investigation – and the lawsuits that will rely on this opinion – off at the pass.

Jeff Hermes is a deputy director at MLRC. MLRC and the Reporters Committee for Freedom of the Press filed an amicus brief supporting Twitter.
Ten Questions to a Media Lawyer:
Adolfo E. Jimenez

Adolfo E. Jimenez is a partner at Holland & Knight in Miami.

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

I have been a news junkie my entire life. I was born in Cuba and arrived in Miami at the age of two on July 4, 1965. Life in Miami was full of change with a never-ending barrage of significant events. There was a constant news stream at my house relating to Cuba, new arrivals, separation and adjusting to a life in exile. Miami at the time was also filled with major stories that remain vivid in my mind: the Vietnam War, the 1972 Democratic and Republican National Conventions in Miami Beach, Watergate (which was also a local story because of Nixon's Summer White House in Key Biscayne and home of some of the Watergate burglars), the Mariel Boatlift, the McDuffie Riots, the Sandinista Revolution and more. But my interest in media law probably came from my father who was a journalist in Cuba, first as a writer for a political newspaper and later as the owner and news director from 1953 to 1959 of Radio Cuba, a radio station in Ciego de Avila, Cuba. He brought his love for journalism with him even though he was unable to continue in his chosen profession. He cherished his membership in the Cuban Journalists Association in Exile. He always had the radio on at home and was always discussing current events. A few years after arriving in the United States, my parents started a printing shop where I worked every day after school from the age of 8 until I went away to college at age eighteen. We printed all types of materials including some local magazines and publications. So you can say that I breathed, heard, read and worked the press from a very young age.

In 1988, after my first year at Boston College Law School, I was a Summer Intern in the General Counsel's Office at National Public Radio. That was my first exposure to media law. It let me see the wide scope of legal issues involving broadcast journalism. I worked on diverse and interesting projects including First Amendment issues, copyright law and administrative law. NPR's legal department was terrific and interested in teaching. We had sessions with Daniel Schorr and Nina Totenberg, attended oral arguments.
in the D.C. Circuit and numerous FCC hearings. The experience provided me with rich content in all aspects of media law.

After law school, I joined Holland & Knight in Miami where I am still practicing. A few years later, a renowned Miami media lawyer, Sandy Bohrer, joined the firm. He represented The Miami Herald and Knight-Ridder for decades and he brought with him a thriving media law practice. He invited me to work with him on Spanish language media cases and I welcomed the opportunity. Sandy taught me a great deal not just about media law but about good lawyering.

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

I have the privilege of being the South Florida Litigation Practice Group Leader. Our group has 80 lawyers in three offices. It provides me the opportunity to interact on a regular basis with very bright talented lawyers with a wide range of views, styles and backgrounds. I've learned a great deal from them both professionally and personally. Whether it's a young attorney or someone with decades of experience, learning from them and being in a position to assist on a personal and professional level is something I don't take for granted.

Time is extremely valuable yet I try not to short-change our attorneys. Too often I am forced to send an email as opposed to picking up the phone. Administrative demands consume a great deal of time and interferes with necessary personal interaction. As long as I continue to be conscientious of the need to engage, I think I will strike a good balance and dedicate the time necessary to be effective.

3. What was your highest profile or most memorable case?

I have worked on significant matters with outstanding legal departments around the country. Over the past 30 years, I worked extensively on cases for CNN, Univision, El Nuevo Herald, People, Telemundo and others. One of my earliest cases is memorable. We represented Telemundo in a libel lawsuit brought by a children's hospital in Mexico concerning two investigative stories airing on a network program. The case included substantial expert issues on foreign libel law, damages, causation and many other issues. The statements at issue were serious and the case carried significant exposure. Opposing counsel, Jonathan Lubell, was excellent and made the case even more interesting. The experts addressed novel issues and the
case brought to the forefront serious constitutional concerns. The case settled after we persuaded the Judge that Mexican law applied to the case and that there were serious public policy concerns with the application of Mexican law.

4. Are you able to maintain a decent work-life balance? What are some rules you follow?

I don't. I recognize there should be more balance in my life and that I should dedicate more time to family, friends and leisure. Client work, administrative responsibilities, necessary travel for international client matters and service on four non-profit boards makes it impossible. To ensure I make time for life, I do try to be intentional applying the following rules: a) my two daughters live far away in San Francisco and Prague so I make it a point of seeing them at least twice a year for an extended stay and connect regularly by phone; b) schedule something just with my wife at least once a week such as a basketball game, dinner or special home stay; c) take 20 minutes once a week to call a friend; and d) try to see one of my siblings at least once a month (I'm the eighth of ten children).

5. Fake news, Sullivan under attack, widespread public distrust of the media – will things get worse before they get better?

Things will get worse. Fake news, attacks on the media and lack of civility in public discourse are not new. However, there are more powerful tools for misinformation than ever before. Media lawyers often defend freedom of expression as staunchly as freedom of the press. That's not wrong but there's a difference between the two. Freedom of the press carries with it an obligation or responsibility to the public. Journalists serve the public and owe a duty to inform. The media certainly facilitates free expression but freedom of expression does not necessarily equate to journalism. Media has ceded too much of the space reserved for journalism to opinion, commentary, public debate and social media. Social media has enabled anyone to claim they are journalists without the corresponding journalistic training or standards. I believe it's time for media as an industry to qualify journalists and impose minimum requirements to recognize and separate professional journalists, promote accuracy and maintain high standards. In the meantime, national governments around the world have weaponized social media circulating false, incomplete and harmful news stories. The stories about chemical labs in Ukraine are the latest example creating a false narrative in an attempt to provide cover for blatant atrocities.
6. Media law can be a difficult industry to break into. What would you suggest to a young lawyer or student trying to do so?

Reach out and spend time with editors, producers and journalists. They are interesting and funny professionals engaged in world events. Journalists around the world are under attack and too many are dying. There are pro bono opportunities to defend journalists, obtain access to public proceedings and secure public documents. You can help foreign journalists who are often working in dangerous conditions, many under death threats and too many being murdered in alarming numbers. We have the opportunity to bring attention to their plight and gain valuable experience. Engage with organizations and Bar associations focused on media law to network and gain substantive knowledge. Identify legal issues that may arise with new technologies and platforms. Become an expert in a new niche area. Be patient, persistent and helpful and you will increasingly find yourself gaining knowledge, experience and relationships.

7. What’s a book, show, song, movie, podcast or activity that’s been keeping you entertained during the pandemic?

My younger daughter who is studying film recently told me that my entertainment genre is violence and cop shows. I wouldn't have selected those categories but I recognize that often an observer is in a better position to evaluate you than you are yourself. So yes, I tend to watch cop shows but I also like history, documentaries and biographies. I have watched a number of streaming shows during the pandemic with Money Heist being a favorite.

8. What’s a typical weekday lunch?

The pandemic altered my routines and I am only now returning to the office on a regular basis. Lunch used to be an opportunity to spend time with clients, friends and colleagues. Since the pandemic occurred it has been a quick bite and back to my computer.

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

With a few drinks I may go out on a limb and go with Purple Rain.

10. Where’s the first place you’d like to visit post-pandemic?

I was actually able to travel in October of last year to attend a wedding in Madrid and visit my daughter in Prague. We had a great time. But what I would most like to do is an adventure trip to Africa or perhaps something less ambitious like Costa Rica.