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EXPLORING THE ISSUE OF "STRICT LIABILITY" FOR DEFAMATION

BY MICHAEL K. CANTWELL*

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In a case that has gained the attention of the public and First Amendment scholars, an Oregon court this year held that a “blogger” sued for libel was entitled to no constitutional defenses where the plaintiffs were private figures, the blogger was not “media,” and the posts did not involve matters of public concern. Obsidian Finance Group, LLC v. Cox, No. CV-11-57-HZ, 2011 WL 5999334 (D. Ore., November 30, 2011), motion for new trial denied, 2012 WL 1065484 (D. Ore. March 27, 2012). Following trial, a jury awarded plaintiffs $2.5 million in damages. Defendant’s motion for a new trial was denied and the case is now on appeal to the Ninth Circuit. With the support of a noted First Amendment scholar, and an impressive group of amici, defendant is arguing that the jury instructions fundamentally misstated the law and the verdict was excessive.

The purpose of this article is to assess the legal bases, if any, for the recrudescence in the Cox case of the concept of “strict liability” in defamation law, whose demise had long been assumed as a result of the constitutional revolution in defamation law spawned by the Sullivan and Gertz cases, in the context of the important range of new and contentious issues raised by suits arising out of blogging on the internet.

**Background**

Plaintiff Kevin Padrick was a senior principal with Obsidian Finance Group, LLC (hereinafter “Obsidian”), an advisory and investment firm that specializes in unique and difficult business situations, including distressed enterprises and distressed assets. Padrick was appointed as a bankruptcy trustee in a bankruptcy case involving a company named Summit 1031.

Defendant Crystal Cox is a self-described “investigative blogger” who posted criticisms of Padrick and Obsidian on her own issue-specific website (www.obsidianfinancesucks.com) as well as websites operated by third parties. On January 14, 2011, Obsidian and Padrick filed a claim for defamation against Cox, alleging that Cox had published “the following false and defamatory statements of purported fact concerning Padrick and Obsidian:

“a. Padrick has committed ‘fraud against the government.’


“c. Padrick has engaged in ‘illegal’ and ‘fraudulent’ activity.

“d. Padrick is ‘VERY Corrupt’ and has engaged in ‘Corruption, Fraud, Tax Crimes, Solar Tax Credit Crimes.’

“e. Padrick is a ‘liar.’

“f. Padrick pays off the media and politicians.

“g. ‘Did Oregon Attorney Kevin Padrick hire a hitman to kill me?’

“h. Padrick has committed ‘tax fraud.’
“i. Padrick is “guilty of Fraud, Deceit on the Government, Illegal Activity, Money Laundering, Defamation, Harassment’

“j. ‘Kevin Padrick of Obsidian Finance LLC is a Criminal, he has broken many laws in the last 2 years to do with the Summit 1031 case and regardless of the guilt of the Summit 1031 principals, Kevin Padrick is a THUG and a Thief hiding behind the Skirt tails of a corrupt unmonitored bankruptcy court system and protected by Corrupt Bend DA and Corrupt Bend Oregon Judges. And I will Expose every detail of every law he broke, every secret hand shake and back alley deal., every solar credit fraud., every sale to a friend or cronic (sic) of real estate consumer money and every indiscretion[.]”

Complaint ¶ 8.

On April 27, 2011, Plaintiffs moved for summary judgment, arguing that defendant was liable as a matter of law because her statements were defamatory, published to third parties and were actionable per se. In an opinion issued on July 7, 2011, Judge Hernandez not only denied the motion, but found that “defendant’s statements are expressions of opinion protected by the First Amendment.” Obsidian Finance Group, LLC v. Cox, 2011 WL 2745849 (July 7, 2011) *2 (Slip. op. at 4).

After setting forth in full all ten blog postings submitted by plaintiffs, Judge Hernandez proceeded to examine their broader and specific context as well as the susceptibility to being proven true or false. He began his analysis by noting that each post contained the identical introductory information and a headline which “expressly discloses [the blog’s] bias against bankruptcy courts, bankruptcy trustees, and what Cox considers the broken and corrupt bankruptcy court system.” Id. at *6 (Slip op. at 12).1

The court concluded that while several of the accusations made by defendant “appear to assert facts or to imply the existence of undisclosed defamatory facts” if considered in isolation, when viewed in context readers would be less likely to view them as assertions of fact rather than expressions of opinion. The court pointed both to the broad context of an obviously critical blog and the specific context, namely, the “scattershot, hyperbolic accusations which are untethered to factual data regarding the ‘Summit’ bankruptcy and whatever role Padrick and Obsidian Finance actually played in the bankruptcy.” Id. at *6 (Slip op. at 12).

Although Cox had not cross-moved for summary judgment, Judge Hernandez held that he intended sua sponte to enter an order granting summary judgment to defendant on the defamation claim unless the plaintiffs filed a memorandum in opposition with 15 days. Id. at 14-15. Plaintiffs timely submitted their opposition, along with additional blog posts not included in the original motion. Cox was offered an opportunity to file a reply but did not.

1 The following information appeared at the top of each post: “The Bankruptcy Court System is Broken and the Real Estate Consumer is Paying the Price. No One Can Hold them Accountable but you. And so Far the Consumer Does not Even know how is really getting their money. Knowledge is Power Folks. Wake Up.. Email Your Bankruptcy Court Story to Crystal@CrystalCox.com—and Expose the Supposed Highest Fiduciary Responsibility of the U.S. Bankruptcy Court System.” Below that was a headline that read “Bankruptcy Corruption—Trustee Corruption—Blog by Investigative Blogger Crystal L. Cox.” Id. at *3 (Slip op. at 6).
In an opinion issued on August 23, 2011, the court adhered to its position that the blog postings submitted in connection with the original motion were constitutionally-protected expressions of opinion, as were all but one of the postings submitted with the plaintiffs’ opposition. As to that, a lengthy posting on the website “bankruptcycorruption.com” that appeared under the headline “Why Investigative Blogger Crystal L. Cox Says Kevin Padrick, Obsidian Finance LLC is a Liar,” Judge Hernandez maintained that there were several fairly specific allegations that a reasonable reader could understand to imply a provable assertion of fact. 812 F. Supp.2d 1220, 1238 (D. Ore. 2011). Accordingly, while he granted summary judgment to Cox on all but one of her posts, he denied summary judgment and scheduled a trial on the remaining post.2

Pre-Trial Rulings, and a One-Day Trial

At a hearing on November 28, 2011, the court orally denied all Cox’s First Amendment defenses as to the one remaining claim, holding that the plaintiffs were not public figures, Cox was “not media,” and the subject matter of the blog posting at issue did not involve a matter of public concern, setting forth its rationale for trying the case as a strict liability tort3 in a written opinion issued two days later. Obsidian Finance Group, LLC v. Cox, Dkt. # 95 (November 30, 2011).

The court rejected Cox’s claim that she should be treated as a “media” defendant on the ground that she had failed to cite any cases in which an “investigative blogger” was held to be a media defendant or to provide any evidence of any education in journalism, connection with recognized news entities, adherence to journalistic standards, or other indicia of what the court considered illustrative of the media. See November 30 slip op. at 9.

Without any discussion, the court also held that neither plaintiff was an “all-purpose” public figure. Id. at 6. And it concluded that neither plaintiff was a limited-purpose public figure because any controversy that existed surrounding the Summit bankruptcy had predated their involvement. Id. at 8-9.

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2 While the post also contained “several non-provable, figurative or subjective-type words which tend to negate the impression that defendant asserts provable statements of fact,” the Cox court found that “this is a fairly long post [it occupies a full 3 pages of the Federal Supplement in the printed opinion] and overall, these words do not dominate the statements made there.” 812 F. Supp.2d 1238. Although the post is somewhat abstruse, it asserted that “Kevin Padrick, Obsidian Finance Group, LLC” was hired, in connection with the Summit bankruptcy, to recommend the best method of realizing the value of the company’s real estate investments, that he promised the Summit shareholders that he had friends who would fund what he termed a “short-term liquidity crisis” but that he failed to complete his contract with the shareholders and instead “illegally, unethically, corruptly” used his privileged information to get appointed to the position of bankruptcy trustee for Summit bankruptcy and make himself TONS of money.” Id. at 1236. Cox also claimed plaintiffs committed tax fraud by failing to pay taxes on gains realized from sales of various properties under his trusteeship and avoided paying taxes on others by giving away the property. Id. at 1237 (“For an example, Kevin Padrick just gave away the Summit Shareholders’ interest in Century Drive Mobile Home Park to another owner named Jim Hull.”)

3 The court also denied virtually all of the defendant’s remaining defenses, holding that Oregon’s retraction statute, its Anti-SLAPP law, and its shield law were all inapplicable and, further, that the posting was not protected by the absolute privilege for judicial proceedings. See November 30 slip op. 2-5.
Finally, the court reasoned that the subject matter of the posting was not an issue of public concern because it had not generated public concern, did not involve the evaluation of a public agency or official, and did not relate to products available to the public at large. *Id.* at 10-12.

In a one-day trial held on November 29, 2011, a jury awarded $1 million to Obsidian Finance and $1.5 million to Kevin Padrick. Although the jury instructions included falsity as an element to be proven by the plaintiffs, they specifically provided that “[d]efendant’s knowledge of whether the statements at issue were true or false, and defendant’s intent or purpose in publishing those statements, are not elements of the claim and are not relevant to a determination of liability.” *Obsidian Finance Group, LLC v. Cox*, Dkt. # 92 (Jury Instructions), 11.

On January 4, 2012, Cox filed a motion for a new trial, arguing that the jury instructions misstated the law and the verdict was excessive.

**The Motion for a New Trial**

Until her trial Cox had proceeded *pro se*. On her motion for a new trial, she was represented by the noted constitutional scholar Eugene Volokh, of the UCLA School of Law, who argued that the jury should have been instructed that a defendant cannot constitutionally be held liable without a finding of negligence and that presumed damages cannot constitutionally be awarded without a showing of “actual malice.” A new trial was necessary because the court’s failure to properly instruct the jury made it impossible to determine whether the jury had found Cox had acted with the requisite levels of fault and whether the $2.5 million verdict included presumed damages. Memorandum of Law, Dkt # 106, filed January 4, 2012, at 8 (hereinafter “Defendant’s January 4 MOL”).

In his brief for Defendant, Prof. Volokh argued that (1) Cox was entitled to the same constitutional protections afforded media defendants under *Gertz*, (2) the speech at issue was on a matter of public concern and (3) even if the speech was “private,” the court could not constitutionally uphold a finding a liability without some level of fault.

On the first point, he cited decades of precedent supporting the argument that the protections afforded by the First Amendment apply equally regardless of whether the speaker is part of the institutional press. *Id.* at 9.5

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4 *See Obsidian Finance Group, LLC v. Cox*, 2012 WL 1065484 (D. Ore. March 27, 2012) * 1 (Slip op. at 1). The court did not provide a breakdown of damage elements.

5 *Id.* at 9 (*citing* Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (freedom of the press “comprehends every sort of publication which affords a vehicle of information and opinion”); *New York Times v. Sullivan* (applying the same First Amendment protection to the newspaper defendant and to the individual defendants who placed an advertisement in the newspaper); *Garrison v. Louisiana*, 379 U.S. 64 (1964) (applying the rule of *New York Times v. Sullivan* to a speaker who was an elected district attorney and not a member of the institutional press); *Henry v. Collins*, 380 U.S. 356, 357 (1965) (applying the rule of *New York Times v. Sullivan* to an arrestee who issued a statement alleging that his arrest stemmed from “a diabolical plot”); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 782 n.18 (1978) (rejecting the “suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same communication by [non-institutional-press businesses]”); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 665–67, 669 (1991) (concluding that the press gets no special immunity from laws that apply to others, including laws—such as copyright law—that target
On the second, he cited Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986) and various lower court decisions for the proposition that allegations that a person or organization is connected to criminal activity constitute speech on a matter of public concern, and he argued that – for purposes of whether the publication at issue involved a matter of public concern – it is irrelevant whether there is already public concern or the public becomes interested as a result of a defendant’s publication.6

And on the third, he cited dictum from a Ninth Circuit decision observing that, under Gertz, “[a] private person who is allegedly defamed concerning a matter that is not of public concern need only prove, in addition to the requirements set out by the local jurisdiction, that the defamation was due to the negligence of the defendant.”7

Judge Hernandez denied the motion in an opinion issued March 27, 2012. Obsidian Finance Group, LLC v. Cox, Dkt. # 123 (March 27, 2012). The opinion was largely based on the reasoning in his pre-trial opinion in which he imposed strict liability on the ground that the plaintiffs were private figures, the defendant was nonmedia, and the matter was not one of public concern.

Issues on Appeal

Both parties appealed, with briefing ongoing as of the date of this writing.8

As framed by Prof. Volokh for Cox, the following issues were presented for review:

(1) Whether, even if plaintiffs are treated as private figures, defendant is entitled to a new trial in which the jury is instructed—consistently with Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)—(a) that it could hold defendant liable for proven compensatory damages only if it found that defendant acted negligently, and (b) that it could hold defendant liable for presumed damages only if it found that defendant acted with “actual malice.”

(2) Whether plaintiffs, a court-appointed bankruptcy trustee and the partnership through which he operates, are properly treated as special-purpose public

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6 Defendant’s January 4 MOL 14-16.

7 Id. at 17 (citing Newcombe v. Adolf Coors Co., F.3d 686, 694 n.4 (9th Cir. 1998)).

8 In addition to the Defendant-Appellant’s brief, Scotusblog.com filed an amicus brief arguing that a blog that provides a useful public service and that should be entitled to receive the protections of First Amendment would not satisfy the criteria set out by Judge Hernandez for determining what constitutes the constitutionally-protected “media.” And The Reporters Committee for Freedom of the Press also filed an amicus brief arguing that “media defendants” must be broadly interpreted and must include content providers who intend, when gathering information, to disseminate that information to the public and that what constitutes an issue of public concern must also be broadly interpreted.
officials, so that the defendant is entitled to a new trial in which the jury is instructed—consistently with New York Times Co. v. Sullivan, 376 U.S. 254 (1964)—that it could hold defendant liable for presumed damages only if it found that defendant acted with “actual malice.”

(3) Whether a new trial—or at least remittitur—is also required because the evidence presented to the jury did not support a conclusion that plaintiffs suffered $2.5 million in damages (whether proven or presumed) from the one post that this Court ruled could form the basis for plaintiffs’ lawsuit.

Opening Brief of Defendant-Appellant and Cross-Appellee Crystal Cox, Dkt # 11, filed October 10, 2012 (hereinafter “Defendant’s Opening Brief”).

Plaintiffs cross-appealed Justice Hernandez’s prior holding that all but one of defendant’s posts were constitutionally protected opinion.

**Nature of the Defendant: Is Cox “Media” and Does That Matter?**

In the Opening Brief, Professor Volokh reiterated the argument that the constitutional protections set forth in decades of Supreme Court decisions apply to all persons who speak to the public, whether or not defined as “media.”

According to Volokh, *Citizens United* put the issue to rest, with the following definitive statement: “We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.” *Citizens United v. FEC*, 130 S. Ct. 876, 905 (2010) (internal quotation marks omitted). Moreover, as Prof. Volokh goes on to argue, the *Citizens United* majority specifically acknowledged the role of the Internet in blurring the distinctions between speakers. Defendant’s Opening Brief, at 7 (citing *Citizens United*, 130 S. Ct. at 905–06 (“With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred.”)).

The two amici devote considerable space to this question. In its brief, Scotusblog.com focuses on the importance of a broad definition of “media” in order to protect bloggers, and in turn the public interest, in the free dissemination of important information. As its brief illustrates, it is not only traditional media or journalists who produce important information “that provides a useful public service” – a service that “ought to receive the protections of the First Amendment” from “potential [defamation] liability.”

On the flip side, Scotusblog points out that its own very important information dissemination would not qualify for protection as “media” activity, under several of the criteria identified by the Cox court that utilized factors more appropriate to established media and

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9 See note 5, supra and accompanying text.

10 Indeed, even Judge Hernandez appeared to concede the point in his denial of a new trial. See 2012 WL 1065484 at *4 (acknowledging “six justices may have agreed in *Dun & Bradstreet* that there should be no distinction among [media and non-media] defendants in defamation cases”).
professional journalists. Thus, according to the amicus brief, Scotusblog is written largely by
staffers who are attorneys but who do not have formal training in journalism; the blog is not
credentialed or affiliated with any recognized news entity; moreover, the blog has no formal
policy regarding fact-checking nor does it have a policy of “maintaining notes of conversations,
interviews or research.”

In its amicus brief, in addition to addressing the issue of media definition, the Reporters
Committee also argues the need for a broad definition of whether speech is in the public interest
for purposes of the applicable fault standard in defamation actions, citing U.S. Supreme Court,
Ninth Circuit and Oregon cases. The criteria, as distilled by the Reporters Committee brief, must
be determined by the “content, form and context” of a given statement and should not be limited
to only those statements addressing obvious issues of public concern but should be construed
broadly to reach interests of subsets of the public, and must also be held to protect even “crude,”
arguably narrow, expression if, properly understood, the expression raises broader issues of
concern to society.

Nature of the Speech: Were Cox’s Posts on Matters of Public Concern?

In addition to the question of whether Cox is a “media defendant” entitled to the
constitutional protections of Gertz (and the related question of whether Gertz protects nonmedia
as well as media defendants), whether her speech involved a matter of public concern will be
critical to the outcome of her appeal.11

That is, it is possible that the Ninth Circuit could determine that she is not entitled to the
constitutional protections announced in Gertz because her speech did not involve matters of
public concern, as did Judge Hernandez in the court below. Moreover, under Dun & Bradstreet,
there would be no federal constitutional impediment to awarding plaintiffs presumed and
punitive damages absent a showing of actual malice unless Cox’s blogs involved a matter of
public concern. (Of course this assumes that the Cox plaintiffs are not public figures or
public officials.)

In this regard (i.e., determining the nature of the speech) it would seem that the
institutional media enjoys a distinct advantage over “nonmedia” speakers, namely, that courts are
more willing to presume that the speech published by the institutional media is speech on a
matter of public concern.12

Cox argues that allegations that a person or organization is involved in criminal activity
generally are considered speech on matters of public concern, providing as examples cases
holding the following matters as being of public concern: allegations that the plaintiff had
violated federal gun laws,13 committed fraud in the art market14 or in connection with a

11 Cox also argues that plaintiff is a public official or a “special-purpose” public figure, but whether a trustee
appointed by a bankruptcy court is a public plaintiff is beyond the focus of this article.

of legitimate public interest and concern is a function for editors” and not for judges.)

13 Adventure Outdoors, Inc. v. Bloomberg, 552 F.3d 1290, 1298 (11th Cir. 2008).
government program, engaged in corruption in the jai alai industry, or had links to organized crime. Even accusations that a store owner refused to refund a customer for an allegedly defective product or a mobile home park operator had charged an excessive rent or that a lawyer was an “ambulance chaser” interested only in “slam dunk cases” were held to be on matters of public concern. Defendant’s Opening Brief 15-16.

In his denial of the motion for a new trial, Judge Hernandez had sought to distinguish these cases as involving allegations of “fraud or corruption within an industry, or in the context of a national or international market,” rather than merely involving the plaintiffs’ alleged individual acts of criminality. *Obsidian Finance Group, LLC v. Cox*, 2012 WL 1065484 (D. Ore. March 27, 2012) *5.

In response, Cox points out that not all the cases she had previously cited involved fraud on such a wide scale and that several of these cases (which the court had failed to address) involved allegations of criminality committed solely by individuals. Not only may addressing single instances of misconduct be important to the public but it may lead to exposing large-scale patterns of misconduct within an industry. Defendant’s Opening Brief 18-20.

Often, there may be no preexisting controversy, and the speaker is merely attempting to promote the public interest. Although the absence of a public controversy may be relevant to plaintiff’s status as a limited purpose public figure, it is not relevant to whether the speech involves a matter of public concern. In this regard, cases involving private figure and speech on matters of public concern often involve situations where there is insufficient controversy to make the plaintiff a limited purpose public figure but the allegations nonetheless involve matters about which the public could reasonably be concerned. *Id.* at 20.

**Is Defamation a Strict Liability Tort in the Private-Private Context?**

Before addressing the ultimate question, namely, the applicable fault standard in private figures cases where the speech is purely on a matter of private concern, it is worth noting the extreme narrowness of this category of speech. *See, e.g., Dun & Bradstreet v. Greenmoss Bldrs.***,

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14 *Boule v. Hutton*, 328 F.3d 84, 91 (2d Cir. 2003)

15 *Weeks v. Bayer*, 246 F.3d 1231, 1233 (9th Cir. 2001).


18 *Gardner v. Martino*, 563 F.3d 981, 989 (9th Cir. 2009)

19 *Flamm v. Am. Ass’n of Univ. Women*, 201 F.3d 144, 147, 150 (2d Cir. 2000).

20 Indeed, the New York Court of Appeals goes even further, including not only matters in which the public might be concerned but matters in which he public ought to be concerned. *See Chapadeau v. Utica Observer–Dispatch, Inc.*, 38 N.Y.2d 196, 199 (1975) (defining a statement as “within the sphere of legitimate public concern” when it is “reasonably related to matters warranting public exposition.”). In New York, at least, it is clear that allegations an attorney had engaged in criminal or unethical activities would surely constitute speech on a matter of public concern.
472 U.S. 749, 759 (1985) (observing that “publications directed only to a limited, private audience are ‘matters of purely private concern.’” Most often this is found in the employment context. See, e.g., Albert v. Loksen, 239 F.3d 256 (2d Cir. 2001); Weldy v. Piedmont Airlines, Inc., 985 F.2d 57 (2d Cir. 1993).

In the appellate briefing Prof. Volokh maintains that even if the speech is deemed a matter of purely private concern, Gertz would not permit a court to constitutionally impose liability without fault, a view, he argues, that is shared by the Ninth Circuit:

The free speech concerns are not as great when a publication involves a private person and matters of private concern and therefore we do not require such a demanding standard to allow a private plaintiff to prevail. A private person who is allegedly defamed concerning a matter that is not of public concern need only prove, in addition to the requirements set out by the local jurisdiction, that the defamation was due to the negligence of the defendant. Gertz v. Robert Welch Inc., 418 U.S. 323, 347, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

Newcombe v. Adolf Coors Co., 157 F.3d 686, 694 n.4 (9th Cir. 1998).

Newcombe involved a beer advertisement allegedly bearing the likeness of the former Brooklyn Dodger star pitcher Don Newcombe, a recovering alcoholic who had devoted substantial time to using his fame to warn of the dangers of alcohol. Newcombe brought claims, inter alia, for commercial misappropriation, negligent publication, intentional infliction of emotional distress, and defamation. The Ninth Circuit affirmed the grant of summary judgment on the negligent publication, intentional infliction of emotional distress, and defamation claims, holding (with respect to the defamation claim) that the defamatory language was not libelous on its face21 and plaintiff had failed to prove special damages, as required under the California defamation statute. 157 F.3d at 695.

In a footnote, the court addressed the constitutional barriers that Newcombe would have faced even if he had been able to meet the statutory requirements, namely, he would have been required to prove actual malice in the (likely) event he were found to be a public figure and to prove negligence even if he were to be found a private figure and the speech on a matter that is not of public concern. Id. at 694 n.4.

Prof. Volokh acknowledges that Newcombe is dictum as to whether Gertz, which involved speech on a matter of public concern, also requires proof of negligence when the speech is not of public concern but argues that a constitutional limitation on strict liability is nonetheless consistent with Dun & Bradstreet and broader First Amendment precedents. It is consistent with Dun & Bradstreet22 because that case only addressed “the other half” of Gertz in holding that private figures need not prove actual malice to recover presumed or punitive damages in cases involving speech that is not of public concern. And it is consistent with First Amendment

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21 The defamation lay in the suggestion that he, a recovering alcoholic, endorsed alcohol. Id. at 694.

22 It is more accurate to say that it is not inconsistent with Dun & Bradstreet.
holdings in a variety of contexts that prohibit the imposition of strict liability. Defendant’s Opening Brief 23-24.23

Conclusion

What should be made of the Court’s silence in Dun & Bradstreet on the liability prong in Gertz? Prof. Volokh argues that it indicates an unwillingness to treat defamation as a strict liability tort.24

On the one hand, it may be seen as evidence that the Dun & Bradstreet Court believed it unnecessary to do so because plaintiff there had satisfied the liability prong. That is, and notwithstanding the fact that the plurality opinion does not use the word “negligence,” it is difficult to consider the Supreme Court’s recitation of the facts established at trial without reaching a firm conclusion that defendant’s negligence had been established in Dun & Bradstreet and that the Court decided the case on the basis of that understanding as to liability. Thus, as recited by the Supreme Court, the defendant’s erroneous claim that plaintiff had filed for bankruptcy “had been caused when one of its employees, a 17-year-old high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed to respondent a bankruptcy petition filed by one of respondent’s former employees.” 472 U.S. at 752. Moreover, although the defendant’s representative “testified that it was routine practice to check the accuracy of such reports with the businesses themselves, it did not try to verify the information about respondent before reporting it.” Id.

Moreover, Justice Brennan, dissenting on the second prong of Gertz, clearly and expressly stated his view that on the facts of the case the defendant had been negligent:

Greenmoss Builders should be permitted to recover for any actual damage it can show resulted from Dun & Bradstreet’s negligently false credit report, but should be required to show actual malice to receive presumed or punitive damages.

Id. at 796 (Brennan, J., dissenting).

On the other hand, the Court might simply have wished to avoid deciding an issue before it was necessary to do so.25 Yet Justice White made evident his belief that fault should not be


24 Of course, even removing the constitutional defenses and reverting to the common law would not eliminate the various common law privileges available to the defamation defendant.

25 See, e.g., Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 n. 6 (1990) (noting that in Philadelphia Newspapers, the Court “reserved judgment on cases involving nonmedia defendants and accordingly we do the same.”).
required in the private-private context, and both the plurality opinion and (more so) the concurrence of Chief Justice Burger suggest a potential willingness – at least among the Justices on the Court at that time – to eliminate all constitutional barriers for purely private speech. And if not a thumb the Supreme Court may be said to have placed a finger on the scales with regard to the issue in Hepps, observing:

When the speech is of exclusively private concern and the plaintiff is a private figure, as in Dun & Bradstreet, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986). But, still, this statement leaves open the possibility that as to at least “some features of the common-law landscape” even Dun & Bradstreet – other than the rule of presumed and punitive damages – the constitutional requirements may still have application.

26 Id. at 773-74 (White, J., concurring) (“Although Justice Powell speaks only of the inapplicability of the Gertz rule with respect to presumed and punitive damages, it must be that the Gertz requirement of some kind of fault on the part of the defendant is also inapplicable in cases such as this.”).

27 Id. at 763-64 (“I dissented in Gertz because I believed that, insofar as the ‘ordinary private citizen’ was concerned, the Court’s opinion ‘abandon[ed] the traditional thread’ that had been the theme of the law in this country up to that time”) (Burger, C.J.) (internal citations omitted).

28 The majority of lower courts that have considered the issue have concluded that the states can impose liability without fault in the private-private context. See Snead v. Redland Aggregates Ltd., 998 F.2d 1325, 1334 (5th Cir. 1993) (“Although Justice Powell’s opinion for a three-Justice plurality appears to adhere to the Gertz holding where issues of public concern are involved, his opinion contains strong hints that the plurality intended for the holding in Dun & Bradstreet to allow states to return to common law rules in private/private cases (citing Smolla, § 3.02[5]); Cox v. Hatch, 761 P.2d 556, 559-60 (Utah 1988) (“Dun & Bradstreet made clear that the constitutional requirement of fault in a private plaintiff defamation case applies only if the subject matter of the defamatory falsehood pertains to a matter of ‘public concern.’ If the defamatory falsehood does not relate to a matter of ‘public concern,’ state law could constitutionally continue to apply the common law doctrine of strict liability in a defamation action.”); Dombey v. Phoenix Newspapers, Inc., 150 Ariz. 476, 481 (1986) (“when a plaintiff is a private figure and the speech is of private concern, the states are free to retain common law principles”) (dictum); Ramirez v. Rogers, 540 A.2d 475, 477 (Me. 1988) (“Because this case involves a non-media defendant, defaming a private plaintiff concerning a matter that is not of public concern, we hold that the trial justice properly applied the common law defamation rules when instructing the jury.”); Mutafis v. Erie Ins. Exchange, 775 F.2d 593, 595 (4th Cir. 1985) (“[In Dun & Bradstreet] a majority of the Court ruled that the principles of New York Times and Gertz had no application where the speech concerned no public issue but was speech solely in the individual interest of the speaker and was on a matter of purely private concern.”); but see Huggins v. Moore, 253 A.D.2d 297, 312-13 (1st Dept.) (“Since plaintiff is not a public person and the matters publicized were not of public concern, defendants are held to New York’s negligence standard.”), rev’d on grounds that the matters were of public concern, 94 N.Y.2d 296 (1999); Krauss v. Globe Intern., Inc., 251 A.D.2d 191 (1998) (same); Newcombe, supra. And, of course, even if constitutional defenses are eliminated, there are numerous common law defenses still potentially applicable even in a purely private-private setting. So eliminating constitutional minimum standards in certain cases may still not in practice result in a strict liability regime. See note 25. Moreover, cases like Huggins, Krause, and Newcombe, would apply a negligence standard to non-public concern cases. None of these cases elaborate why the negligence standard applies, beyond a citation to Gertz. Moreover, the New York Court of Appeals in particular – if it found a suitable case – could (as in Immuno) be expected to find that the State Constitution requires negligence in the private-private context even if Gertz does not. New York has already applied a stricter standard than mere negligence, under Gertz, in its landmark case of Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196 (1975) (applying standard of “gross irresponsibility” in private figure/public concern cases) and it has consistently held that the New York State
That said, if public concern is required to trigger the minimum liability protections of Gertz, courts will at the very least be required “to take on the added responsibility for deciding, in every private-figure case, whether the subject of the communication at issue is newsworthy . . . a role for which courts are not particularly well equipped, and which the Supreme Court has, from time to time, explicitly eschewed.” Sack on Defamation, § 6.6, at 6-28 (citing Gertz, Miami Herald Publ’g v. Tornillo, 418 U.S. 241 (1974); Columbia Broadcasting System, Inc. v Democratic Nat’l Committee, 412 U.S. 94 (1973)).

And it is the final irony of this analysis, that it was the reluctance to place courts in the business of determining what is and what is not a matter of public concern that was a central factor of the original rationale, in Gertz, for overruling Rosenbloom in the first place.

The extension of the New York Times test proposed by the Rosenbloom plurality would abridge this legitimate state interest to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of ‘general or public interest’ and which do not-to determine, in the words of Mr. Justice Marshall, ‘what information is relevant to self-government.’ We doubt the wisdom of committing this task to the conscience of judges. 418 U.S. at 346 (internal citation omitted, emphasis added).

Constitution provides greater protection from claims of defamation than the First Amendment for statements of opinion – see Immuno AG v. Moor-Jankowski, 77 N.Y.2d 235 (1991).
BROADCASTERS BATTLE UNLICENSED INTERNET STREAMING AND COMMERCIAL-SKIPPING DVRS
AEREO AND DISH NETWORK TEST THE LIMITS OF SONY PICTURES V. UNIVERSAL STUDIOS

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The introduction earlier this year of two controversial new digital video technologies – Aereo, a digital streaming service that offers internet access to local broadcast television stations; and the “Hopper,” a new commercial-skipping DVR from Dish Network – has caused an enormous stir among broadcasters who have brought several lawsuits to stop these technologies.

Aereo allows its paying customers to watch and record live over-the-air broadcasts via an internet connection from a series of miniature antennas and hard disks located at Aereo’s facilities. Aereo, which does not have a license to copy or transmit the broadcasters’ programming, argues, in part, that its service – which assigns a different antenna to each individual user seeking to access broadcasts – is legal because Aereo merely facilitates user-directed private performances that are no different from those enabled by Cablevision’s Remote Storage DVR (“RS-DVR”) that was approved by the Second Circuit in Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008) (“Cablevision”). A federal district court judge agreed with Aereo, refusing to enter a preliminary injunction that was sought by numerous broadcasters, see American Broadcasting Cos. v. Aereo, Inc., Case No. 12 Civ. 1540 (S.D.N.Y. July 11, 2012) (Nathan, J.), and the matter is currently on appeal to the Second Circuit.

The Dish Network’s “Hopper” is a set-top DVR that gives Dish Network subscribers the ability to automatically record the primetime schedules of the four major broadcast networks – and with the DVR’s “AutoHop” feature – skip all commercials entirely. All four major broadcast networks have sued Dish Network, claiming that the service violates the Networks’ contractual agreements with Dish and infringes their copyrights under direct, contributory, vicarious and inducement theories of liability. Dish argues, in large part, that its technology is protected under the Supreme Court’s nearly 30-year-old 5-4 decision in Sony Pictures, Inc. v. Universal Studios, Inc., 464 U.S. 417 (1984) (Stevens, J.), which held that Sony was not contributorily liable for consumer copying of television programming with Sony’s Betamax VCR – where most of that consumer copying was found to be in the nature of home “time-shifting,” which the Court held to be a fair use. Fox moved for a preliminary injunction, which was denied by the Central District of California, Fox Broadcasting Co. Inc. v. Dish Network, L.C.C., 12-cv-4529 (C.D. Cal. Nov. 12, 2012), and is currently on appeal to the Ninth Circuit.

Broadcasters argue that both of these technologies blatantly free ride on their copyrighted content in new and unprecedented ways – going far beyond the parameters of Sony and Cablevision. Aereo argues that its technology does no more than facilitate its customers’ existing right to access free over-the-air broadcasts via antenna; and Dish argues that its AutoHop feature simply automates the current fast-forward and 30-second skip technology on existing DVRs. Like the VCR and DVRs that came before them, Aereo and Hopper are ground-shifting – but less for their technological innovations than for pushing Cablevision and Sony Pictures, to their farthest limits to date. The questions now pending in the Aereo and Dish cases is whether those two precedents can be extended to technologies that will likely harm broadcasters’ ability to monetize their content.

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1 That is, watching recorded programs later than the original airing time and subsequently erasing them – rather than copying programs to create a permanent library of past programs.
Aereo and the Mini-Antenna Loophole

Aereo offers a number of different plans (for about $7 to $12/month) for consumers in a particular broadcast area (currently, only New York) to receive their local broadcast channels via the internet. From the user’s perspective, the Aereo system works in a manner very similar to that of a DVR, particularly a remote DVR. Aereo users receive their programming through the internet, rather than via cable, and consumers can watch Aereo channels on their computers, laptops and mobile devices, as well as on traditional television screens. See Aereo, Slip Op. at 4. Users can scroll through a programming guide, and if a program is currently airing, select to either “Watch,” to view the program live, or “Record” to copy the program for later viewing. Likewise, a program airing in the future can be scheduled for recording in advance.

Unlike remote DVRs offered by cable television companies, the programming transmitted to users consists only of local broadcast channels (no basic cable or premium networks are offered), and those broadcasts are not licensed under retransmission agreements. Rather, Aereo has designed a system of hundreds of miniature antennas, and as found by the District Court, each antenna is capable of independently receiving over-the-air broadcast signals (although the broadcasters dispute that each antenna operates independently). See id. at 11.

When most Aereo users select a program to “Watch” or “Record,” the Aereo system randomly assigns an antenna to that user alone, and the over-the-air programming is streamed and/or recorded for only that individual user. Even if dozens of Aereo users all record the same program at the same time, the local station is tuned into separately via different antennas for each user and a separate copy of the program is made for each user.

It has been lost on no one that Aereo does not receive, copy and stream over-the-air programming in the most efficient way possible; from a technological perspective, a company that wishes to stream broadcast programming only needs one antenna, and one copy of each program, which could be streamed to multiple users live or on demand. Such a system, however, would clearly be an infringing public performance under existing law, and thus, the Aereo system was specifically designed to comply with the Second Circuit precedent established in Cablevision. Indeed, the Aereo service has been deliberately rolled out only in New York City, thus far, to confine initial legal challenges to the Second Circuit.

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In Cablevision, a wide array of broadcasters, cable networks and television content creators sued Cablevision to block its operation of a remote storage DVR (“RS-DVR”) service to its customers. The RS-DVR works much like a home set-top DVR, but allows Cablevision customers to record cable programming on central disk drives housed and maintained by Cablevision, and playback recordings on their cable-connected televisions, using only their remote controls and a cable box equipped with the RS-DVR software. The plaintiffs alleged theories of direct infringement of their reproduction and public performance rights against Cablevision. Plaintiffs did not raise issues of contributory infringement, and defendants waived

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any defense based on fair use. 536 F.3d at 124. The district court granted the plaintiffs’ motion for summary judgment and entered an injunction blocking the RS-DVR service, but the Second Circuit reversed.

On the issue of direct liability for the creation of playback copies, the Second Circuit held that it was the customer and not Cablevision that was making the copies. The court held: “We do not believe that an RS-DVR customer is sufficiently distinguishable from a VCR user to impose liability as a direct infringer on a different party for copies that are made automatically upon that customer’s command.” Id. at 131. Further, the Court held that the transmission of programming to the customer was not a “public performance” because the RS-DVR system “only makes transmissions to one subscriber using a copy made by that subscriber[.]” The Court took the view that the transmission was not a public performance because “the universe of people capable of receiving an RS-DVR transmission is the single subscriber whose self-made copy is used to create that transmission.” Id. The Second Circuit left open whether Cablevision could be subject to secondary liability for customer copying of programming – a question that was not raised by the Plaintiffs and therefore not properly before the Court. See id. at 124, 132-133.

* * *

While the plaintiffs in the Aereo litigation brought a wide range of claims in their complaint, including for direct and contributory liability, as well as for infringement of their reproduction and public performance rights, their motion for a preliminary injunction was much more limited in scope. For the purposes of the preliminary injunction application, Plaintiffs sought injunctive relief only on the grounds that Aereo was directly infringing their public performance rights; and only as to those aspects of the Aereo service that allow subscribers to watch live broadcasts – not prerecorded content.

Plaintiffs argued that the Aereo service was unambiguously a public performance under the “transmit clause” of 17 U.S.C. § 101, which gives the copyright holder the exclusive right “to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or different times.” They argued that Congress incorporated this language into the Copyright Act of 1976 for the express purpose of overturning two Supreme Court decisions, Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968) and Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394 (1974), which had held that cable operators could retransmit over-the-air broadcast signals without authority from, or compensation to, the broadcasters. See Pl.’s Dist. Ct. Br., at 12; ABC Plaintiffs’ App. Br. at 21-24. As the Plaintiffs argued: “Put simply, using the ‘Watch Now’ service, multiple subscribers, complete ‘strangers’ to one another, can contemporaneously view the same television program, in separate places, and at the same time as the original OTA broadcast.” Pl.’s Dist. Ct. Br., at 9-10.

Notwithstanding the plaintiffs’ arguments, District Court Judge, Alison J. Nathan, found the Aereo service to be legally indistinguishable from the Cablevision RS-DVR, since, like the RS-DVR, Aereo: (1) creates a unique copy of each television program for each subscriber who requests to watch that program; (2) each transmission to subscribers is from that unique copy; and (3) the transmission of the copy is made solely to the subscriber who requested it. Aereo,
Slip Op. at 19-20. Judge Nathan reasoned that the RS-DVR merely gave customers the same functionality that can be obtained with an ordinary home DVR or VCR.

As in Cablevision, the functionality of Aereo’s system from the user’s perspective substantially mirrors that available using devices such as a DVR or Slingbox, which allow users to access free, over-the-air broadcast television on mobile internet devices of their choosing. To the extent that the Second Circuit’s holding in Cablevision was premised on an inability to distinguish Cablevision’s system from otherwise lawful activities, Aereo’s system deserves the same consideration.

Id. at 20-21:

The Aereo Plaintiffs attempted to distinguish Cablevision on the grounds that RS-DVR transmissions merely permitted time-shifted viewing, while Aereo transmits “live” programming. See id. at 22-25. But the court rejected this argument, finding that the Second Circuit did not at all rely upon time-shifting as a rationale for its Cablevision holding. Id. The Plaintiffs further argued, citing the Second Circuit’s earlier precedent in NFL v. PrimeTime 24 Joint Venture, 211 F.3d 10 (2d Cir. 2000), that Aereo’s transmission to consumers was an unlawful public performance in that it was a “link in the chain” of transmission beginning with the original upstream signal from the broadcasters that “wends its way to a public audience” in real time. But Judge Nathan noted that the Cablevision court had expressly distinguished PrimeTime on the grounds that the transmissions had emanated from unique copies that were not transmitted “to the public.” Aereo, Slip Op. at 28.

Although the District Court, in denying Plaintiffs’ motion for a preliminary injunction, found that the broadcasters were not likely to succeed on the merits, it did nevertheless conclude that Plaintiffs will suffer irreparable harm in the absence of an injunction. Among the harm recognized by the court was (1) damage to the broadcasters’ ability to negotiate with advertisers by Aereo’s siphoning of viewers that could be measured by Nielsen ratings; and (2) damage to the broadcasters’ ability to negotiate retransmission agreements with, e.g., cable companies, who

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3 A Slingbox is a set-top box that allows consumers to transmit their home television programming, including DVR programs, over the internet to a mobile device, such as a laptop, tablet or smartphone. The Aereo court noted that the broadcasters in the litigation did “not appear to contend . . . that services such as Slingbox are unlawful [and] instead claim[ed] that they are ‘irrelevant’ and that Aereo’s service is distinguishable because Slingbox consumers themselves set up the Slingbox in their homes.” Slip Op. at 5.

4 See Pl.’s Dist. Ct. Br. at 23. As Judge Nathan explained, at pp. 27-28, in the PrimeTime case:

the Second Circuit addressed whether PrimeTime’s satellite transmissions were an infringing “public performance” under the transmit clause, even though the transmissions from the satellite were received in Canada, where the Copyright Act does not apply. The Second Circuit found that PrimeTime’s uplink transmission of the signals, which occurred in the United States, was a step in the process of transmission and, therefore, PrimeTime was making a public performance in the United States subject to the Copyright Act.

Citations omitted.
will likely lose customers to Aereo. *Id.* at 39-42. The broadcasters have filed an interlocutory appeal, which is currently pending before the Second Circuit.

**FilmOn.com / Barry Driller**

Meanwhile, similar litigation is proceeding in a California federal district court. Two years before Aereo was launched, British billionaire, Alki David, launched a service called FilmOn.com, which streamed unlicensed broadcast content over the internet. That service did not employ individually assigned antennas or user-directed copies, but rather, claimed that it was entitled to retransmit broadcasts under the statutory license fee scheme available for “cable systems” Under Section 111 of the Copyright Act.

The Southern District of New York entered a temporary restraining order enjoining FilmOn\(^5\) -- but after the court’s decision in *Aereo*, Alki David launched a new service (doing business under the not-so-subtle “Aereokiller LLC” corporate name), the technology for which is claimed to be similar to Aereo in every material respect. The service, originally called BarryDriller.com (an over-the-top poke at well-known Aereo backer, Barry Diller), claims to utilize “mini antennas,” and individually stored user-directed copies of programming just like Aereo, but unlike Aereo, is also available in select cities in California and elsewhere. The major broadcast networks have sued Aereokiller – now marketed as “FilmOnX” -- after Barry Diller filed suit separately and won a preliminary injunction application claiming “BarryDriller.com” infringed his trademark and publicity rights. *See Diller v. Barry Driller, Inc.*, No. CV 12-7200, 2012 U.S. Dist. LEXIS 133515 (C.D. Cal. Sept. 10, 2012). The networks have moved for a preliminary injunction against Aereokiller in their federal lawsuits pending in the Central District of California, and a hearing has been scheduled for December 20, 2012. *Fox Television Stations, Inc. v. Barry Driller Content Systems PLC*, 12-cv-6921 (C.D. Cal.).

Aereokiller may indeed spell bad news for Aereo – not necessarily on the competitive playing field, but in its inadvertent reshaping of the legal landscape. The Central District of California, and ultimately the Ninth Circuit – not bound by the Second Circuit’s decision in *Cablevision* – has the opportunity to revisit that decision’s rationales, and the networks have been given – thanks to Aereokiller – a second chance to make the case for limiting remote storage and streaming of their content. Thus far, however, the Central District has been reluctant to challenge the fundamental holding in *Cablevision*, at least in the context of the commercial-skipping DVR at issue in the *Dish Network* case.

**Dish Network and its Commercial-Skipping DVR**

Right around the time Aereo began its service in early 2012, Dish Network launched its “Hopper” DVR. The Hopper is a traditional set-top DVR with a two-terabyte hard drive; it enables users to record, save and play back all Dish Network programming in much the same way as other DVRs, including the ability to fast-forward though commercials, either straight through or using a 30-second skip button. But the Hopper has one particularly controversial

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\(^{5}\) *See CBS Broad., Inc. v. FilmOn.com, Inc.*, No. 10-cv-07532 (S.D.N.Y. Nov. 22, 2010). The parties settled the case, consenting to the entry of a permanent injunction on August 9, 2012.
feature: the ability to completely skip the commercials of the four major network’s primetime line-ups.

The DVR allows users to enable Dish’s “PrimeTime Anytime” service (“PTAT”), which automatically records the primetime schedule of the four major networks each night, without the need for customers to program their DVR to record specific network primetime shows. The customer can, however, select a particular network, day of the week or show to be excluded from his or her PTAT recordings. PTAT shows are kept on the customer’s DVR hard drive for only eight days unless the user chooses to delete a program earlier, or conversely, selects a program to be saved beyond the eight-day period. At the heart of the controversy, Dish Network allows consumers to enable the DVR’s “AutoHop” service, which automatically skips the commercials on any PTAT programming that is played back after 3:00 a.m. the morning after the programs airs. The consumer may see the first few seconds or last few seconds of a commercial break, but the bulk of the commercials are skipped and replaced with a kangaroo icon that lets customers know that commercials are being skipped.

Dish Network also makes, for itself, a Quality Assurance (“QA”) copy of its PTAT line-up to check to see that the Hopper DVRs’ commercial-skipping technology has properly marked the points in programming where commercials aired. A technician reviews the QA recordings each night to make sure the commercial marking is accurate and that no programming has been cut off. If errors are detected, the technician can attempt to correct the error so that commercial skipping is successful in upcoming broadcasts of the same program. But if an error in the commercial-skip marking program cannot be corrected in time, AutoHop will not be available for that particular show.

All of the major broadcast networks have sued Dish Network, claiming that the commercial-skipping product and service breaches their contracts with Dish, and constitutes direct and derivative copyright infringement. Fox Broadcasting Co. was the first of the broadcasters to move for a preliminary injunction, and have its application decided. The Central District of California denied the motion, notwithstanding its finding that a couple of Fox’s copyright and contract claims – but not others – were likely to succeed on the merits. See Fox Broadcasting Co. Inc. v. Dish Network, L.C.C., 12-cv-4529 (C.D. Cal. Nov. 12, 2012). In contrast to the New York federal court’s decision Aereo, which acknowledged the potential for irreparable harm to the broadcasters, California District Court Judge Dolly M. Gee held that Fox had not established that it would suffer irreparable harm absent an injunction.

On the likelihood of success on the merits of Fox’s most straightforward copyright infringement claims, Judge Gee’s ruling deferred to the central holdings of the Supreme Court’s decision in Sony and the Second Circuit’s opinion in Cablevision.

On the point of secondary and vicarious liability, Fox argued that at the time of the Sony decision, many copyright owners did not object to audience copying; and most users found it too tedious to fast-forward through commercials (basic fast-forwarding technology was clearly far less user-friendly in those days). See Fox’s Br. at 18 (citing Sony at 424, 453 n.36). Fox further argued that Dish’s AutoHop service, rather than primarily facilitating the fair use of time-shifting approved of in Sony, instead made copies for the purpose of watching programs without
commercials. These commercial-free copies, Fox argued, compete with the existing and potential markets for video-on-demand—markets that did not exist at the time of *Sony*.

Nevertheless, the Central District of California held that there was insufficient evidence to suggest that Dish Network’s services do anything other than facilitate time-shifting, noting that Fox had failed to “identify a specific theory under which individual PTAT users could themselves be liable for copyright infringement without circumventing *Sony*.” *Fox Broadcasting*, Slip Op. at 12.

On the issue of direct liability, the court was persuaded that the Second Circuit’s analysis in *Cablevision* was in harmony with other precedents that call for the examination of whether it is the user or the defendants’ computer system or software that is ultimately responsible for the copying. See Slip Op. at 13-19 (citing, inter alia, *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs.*, 907 F. Supp. 1361 (N.D. Cal. 1995) and *CoStar Group v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004)). Judge Gee acknowledged that the Hopper was a closer call than *Cablevision*’s RS-DVR; after all, it is Dish Network, and not the user, that decides when and how long PTAT programming will be available and it is Dish Network that controls when “primetime” recordings begin and end (indeed, users cannot stop a PTAT recording while it is still in progress). And as Fox argued, it is Dish Network that selected the default PTAT line-up to include the four major broadcast networks (to the exclusion of all other programming available on Dish). Even so, the Court was persuaded that it is still, ultimately, the user that causes the PTAT copy to be made:

As the *Cablevision* court noted, “*Sony* warns us that ‘the lines between direct infringement, contributory infringement, and vicarious liability are not clearly drawn.’” It is clear that Dish exercises a degree of discretion over the copying process beyond that which was present in *Cablevision*. Nevertheless, at this stage of the proceedings, the Court is not satisfied that PTAT has crossed over the line that leads to direct liability.

*Id.* at 19 (citations omitted); see also *id.* at 18.

Where the Court did find direct infringement, perhaps unexpectedly, was in the so-called Quality Assurance ("QA") copies that Dish Network makes every night to check that AutoHop is functioning correctly in eliminating the commercials from the PTAT line-up. Those copies are not distributed to users, but are used by Dish Network technicians to send software updates that correct the commercial marking process on subscribers’ Hopper DVRs. Fox successfully argued that the copy made—in this case by Dish, not the user—primarily facilitated commercial skipping, not time-shifting. Dish Network argued that these QA copies, too, met the criteria for fair use. But with a scarcity of precedent for such copying, the Court apparently no longer felt restrained by the legacy of *Sony* and *Cablevision* in its fair-use analysis of the QA copies.

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6 Several parts of the Court’s opinion and the parties’ submissions have been redacted of confidential discussions of the technology used to perfect and update the AutoHop commercial-skipping process, and thus, there is no publicly available information on how, precisely, this procedure is performed.
With respect to the “purpose and character of the use,” the court noted that “[w]hile the copies themselves are not sold or otherwise monetized, they are undoubtedly made for the commercial purpose of providing a high-quality commercial skipping product that more users will want to activate. Moreover, the copies are not transformative because they do not alter their originals ‘with new expression, meaning, or message.’” *Id.* at 21-22 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)). More importantly, in examining the “effect of the use on the market,” the Court recognized the negative impact AutoHop might have on the market for Fox programming on digital platforms, such as iTunes, Hulu, Netflix and Amazon. The Court concluded, therefore, that the QA copies do not constitute a fair use:

Although they are “intermediate” copies not ultimately used in any end product, they threaten to reduce the value of the right to copy the Fox Programs and undermine Fox’s relationships with licensees who pay for that right. The fact that consumers ultimately use AutoHop in conjunction with PTAT for private home use, a fair use under *Sony*, does not render the intermediate copies themselves a fair use as well.


Fox’s breach of contract claims were decided along the same dividing lines as its copyright claims. The Court held that those copies it had found were made by PTAT users – and not Dish Network itself – were not violations under the parties’ retransmission agreement, which prohibited Dish from recording, copying or duplicating any portion of Fox’s broadcast “for pay or otherwise,” other than by consumers for private home use.7 *Id.* at 27. But, according to the Court, the QA copies, which were made by Dish Network and not users, did violate those express terms.

Of course, regardless of this Court’s interpretation of the parties’ current agreements here, and for that matter, the courts’ interpretation of Dish’s agreements with all of the major broadcasters, retransmission consent will, ultimately, have to be renewed and renegotiated for Dish to continue to carry the broadcasters’ programming. In part, this fight over the legality of the Hopper can be viewed as posturing for position in the next round of retransmission consent negotiations, in which the fate of the AutoHop and PTAT services can be bargained for, notwithstanding the final outcome of this litigation. This round, however, must be awarded to Dish Network.

Notwithstanding the Court’s finding that Dish Network’s QA copies of Fox programming violated copyright law and breached the parties’ retransmission agreement, Judge Gee concluded that Fox had failed to establish that it would be irreparably harmed as a result of those copies. The Court expressed the view that (1) “the extent of harm caused by the QA copies is calculable

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7 The Court also found that user home recording of programming on the Hopper DVR, even with the assistance of the PTAT service, did not constitute a “distribution” that ran afoul of copyright law or Dish’s contractual obligations. *See* Slip Op. at 25, 27.

The parties also litigated the interpretation of a second agreement that prohibited the availability of fast forwarding on video on demand (“VOD”) programming. The Court, however, found that the PTAT service was much more akin to a DVR than VOD, and that the agreement did not apply to PTAT. *See* Slip Op. at 28-30.
in money damages”; and (2) “the record does not show that the harms flow from the QA copies themselves.” Id. at 32. While the Court recognized that Fox may be subject to irreparable harm in the form of loss of control over its copyrighted works and loss of advertising revenue, the Court reasoned that:

[I]f those harms were to materialize, they would be a result of the ad-skipping itself, which does not constitute any copyright or contract breach. Because the alleged harms that Fox will suffer as a result of the QA copies is essentially contractual in nature, the Court finds that the injury is compensable with money damages and does not support a finding of irreparable harm.

Id.

The Court’s analysis is somewhat puzzling. In essence, the judge seems to conclude that the lion’s share of the harm Fox will suffer is a result of commercial-skipping technology that is perfectly legal, so long as technology is designed such that the customers make all of the copies; however, Dish Network’s use of copies that aid and abet the consumer in the same legal commercial-skipping process is unlawful, even though such activity does not, according to the Court, proximately cause the bulk of Fox’s injuries.

It is not clear from the public record, which has been redacted to protect confidential information, to what extent the PTAT and AutoHop service could operate independently, or even exist as a commercially viable product, in the absence of the QA copies made to correct process errors. From all outward appearances, the Court’s seemingly incongruous analysis appears to have been driven by its strict adherence to the real or perceived legal constraints of Sony and Cablevision, which if followed to the letter, leave little room to prohibit any form of user-initiated television recording made for time-shifting.

Fox has appealed the District Court’s ruling.

Can the Law Keep Up With the Technology?

In both the Aereo and Dish Network cases, the plaintiffs have, in essence, argued that the defendants’ new technologies have far exceeded the limits of the existing legal precedents that Dish Network and Aereo rely upon, and that the law must catch up to these new technologies that are threatening the broadcasters’ ability to be compensated for their copyrighted programming. To an extent, the broadcasters have a point.

At the time the Sony case was tried in 1979, the plaintiffs admitted that no actual harm to their copyrights had occurred to date, and the district court judge rejected the plaintiffs’ concerns of future economic harm, noting, in part, that the defendant’s survey had found that only 25% of VCR owners fast-forwarded through commercials. This, apparently, was a limitation of the technology of the day, in which “[t]o avoid commercials during playback, the viewer must fast-forward and, for the most part, guess as to when the commercial has passed.” Sony, at 452 n.36 (emphasis added). The fast-forward and 30-second skip functions on modern DVRs are far easier to operate, and more recent data has suggested that commercial skipping is far more prevalent today. One observer, using data from TiVo DVRs in operation this past May found that, of people watching a time-delayed recording of a particular episode of CSI NY, 80% of the
ads were skipped. Tom Wolzien, “What is TV Today?” *TVB Ad Week Address at NASDAQ Auditorium*, in New York, NY (Oct. 1, 2012).

It was also significant to the *Sony* court that the “only contact between Sony and the users of the Betamax . . . occurred at the moment of sale” and that Sony had no direct involvement with the allegedly infringing activities of its customers. *Sony* at 438. The Betamax and its early VCR progeny were stand-alone devices that the customer could use – independent of the manufacturer – to record content that had entered the public domain and content for which the copyright owner did not object to copying. (At the time, Fred Rogers, PBS’s celebrated television host of “Mr. Rogers,” came forward in the litigation to state his belief that parents’ ability to record children’s programming and play it back at an appropriate time was a “real service to families.”). The Supreme Court simply affirmatively answered the question of whether the Betamax was “capable of substantial noninfringing uses.” *Id.* at 456.

Today’s DVRs, whether set-top or remote, are all networked to programming services operated by the manufacturers, sellers or lessors of the DVR, and customers generally pay a monthly fee to have their DVRs updated with the latest programming information. Unlike in the days of the Sony Betamax, the technology certainly exists today which would allow the DVR service providers to honor television network requests to opt out of being available for recording, commercial-skipping, or both. Unlike the case of the Betamax, all of the networks object to Aereo and Dish Network’s AutoHop service. Neither Aereo or Dish Network argued that they are technically unable to limit their services to those broadcasters, if any, who wish to participate, or that they cannot block networks that do not want to be available on Aereo or on PTAT/AutoHop.

Realistically, however, the tide of more convenient technologies for viewing television may be difficult to hold back, and it is unlikely that the networks can put the toothpaste back in the tube on the Supreme Court’s core finding that home time-shifting is fair use. At the time of *Sony*, Justice Blackmun made clear, in his dissenting opinion, what a departure this was from then-existing precedent. Stark was his comparison between what had been traditionally understood to be fair uses of copyrighted works: for criticism, comment, news reporting, teaching, scholarship or research, which *benefit the public* – and the fair use allowed by the majority decision – allowing time-shifting; an extension of fair use to copying which *benefits only the individual user*. See *Sony*, at 477-479, 479 (“I am aware of no case in which the reproduction of a copyrighted work for the sole benefit of the user has been held to be fair use.”)

Fast-forward 30 years and home television viewers expect to be able to watch any program at any time. And as improvements in the technology evolved, the consumer learned to expect new features: the ability to seamlessly fast-forward through commercials; the ability, with the introduction of the DVR, to effortlessly program recordings, even from a remote location; and at least for some consumers, the ability, with the introduction of Slingbox, to watch recordings or live television from a remote location. Consumers also don’t particularly want to pay much more for these modern conveniences. For many years, the television industry sat on the sidelines as these cumulative improvements slowly began to capitalize on new markets for the industry’s copyrighted works, in some instances, eroding their value.
The industry’s appetite for litigation remained dormant – perhaps in recognition of the uphill battle of overcoming the Supreme Court’s precedent in *Sony*, or perhaps due to the reluctance of television broadcasters to directly or indirectly challenge the behaviors and expectations of their loyal viewers. Not until the introduction of Cablevision’s RS-DVR did the television industry go back on offense, but even then, it, deliberately avoided a showdown with *Sony* over secondary liability, and the recordings made by television viewers. And even in that context, the Second Circuit gave great weight to the similarity between the RS-DVR and the now-seemingly innocuous VCR, finding that the RS-DVR customer is not “sufficiently distinguishable from a VCR user to impose liability as a direct infringer on a different party for copies that are made automatically upon that customer’s command.” The Second Circuit, in rejecting the plaintiffs’ direct infringement claims, did expressly leave open the question of whether Cablevision could be held secondarily liable for facilitating the copies made by their customers. *See Cablevision*, at 132-33.

However, after this year’s introduction of Aereo and the Hopper, the broadcast networks appear resolute to cede no further ground. Both sets of lawsuits claim secondary copyright liability against the defendants, although only in the *Dish Network* litigation has *Sony* been put directly at issue in the preliminary injunction stage.

As the early decisions indicate, it’s not going to be an easy fight for the networks. Aereo clearly saw the legal doorway open to them: if the RS-DVR service is legal because it’s similar to the VCR, than why not a remote antenna service that operates in a manner strikingly similar to the way the RS-DVR does? If, in the case of Dish Network, it’s legal to sell a device that can quickly breeze through commercials with the push of a button, why not sell a device that eliminates the commercials altogether?

The guiding and controlling precedent, *Sony*, is now 29 years old; a case decided well before the internet age, and based upon a clunky Betamax technology that is difficult to even imagine navigating now. The technology of today, which has improved exponentially in recent years, makes the television viewing experience extremely convenient; and while arguably still complying with the letter of current copyright law, these technologies have whittled away at the value of the copyrights the law intended to protect. Both the *Aereo* and *Dish Network* courts, while denying injunctive relief, recognized to some degree the harm these technologies cause to the networks’ ability to profit from their content.

As Justice Blackmun stated: “It may be tempting, as, in my view, the Court today is tempted, to stretch the doctrine of fair use so as to permit unfettered use of this new technology in order to increase access to television programming. But such an extension risks eroding the very basis of copyright law, by depriving authors of control over their works and consequently of their incentive to create.” *Sony*, at 480-81 (Blackmun, J., dissenting).

Over the next few years, courts will decide the fate of the Aereo and Hopper services. Eventually, though, it may fall to Congress to address the fundamental issue of the impact of technology on the incentive to create.
PHONE HACKING AND THE PRESS: THE LEVESON REPORT

NEW PRESS REGULATIONS MAY CHANGE FOR EVER THE UK PRESS

BY DAVID HOOPER AND BRID JORDAN

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Following a 16 month public inquiry in response to the UK phone hacking scandal, Lord Justice Sir Brian Leveson in November 2012 released a 2,000 page report with a proposal for press regulation that is likely to change for ever the UK press.

This article explains how and why the inquiry took place, the background of the arrests of former senior editors at the News of the World, the terms of reference for the inquiry and Leveson's qualifications to conduct the inquiry.

The proposals of Leveson are reviewed. A new form of regulation is clearly essential. But is Leveson really in tune with the workings of the press? How much power is he willing to give to legislators over the press? Do his proposals threaten to undermine investigative journalism? Is he imposing excessive burdens on the press? Can there be a level playing field between a regulated press and unregulated social media and will there be only one winner?

Leveson’s proposals have now moved to the political stage, so the reaction of the Prime Minister is key and that is examined. Despite his reservations, the Prime Minister has ordered that a Bill be prepared to implement the Leveson proposals. A lot of political skirmishing lies ahead. This articles analyses the reaction of the UK press and how they propose to meet the demands of Leveson.

Where Do Things Stand at Present?

The press has been invited by the Prime Minister to come up with an enhanced system of self-regulation that meets the requirements stipulated by Lord Justice Leveson. In mid-December it was reported that the representatives of the national press had accepted the vast majority of Lord Justice Leveson's recommendations and were nearing agreement on the form and structure of a new regulatory body. Whatever its form, a new form of press regulation is inevitable.

Pressure is also on the editors of national newspapers to deliver a system of self-regulation that will satisfy the many voices that are calling on the Prime Minister to implement Lord Justice Leveson's proposals without delay or dilution. After a meeting in central London in mid-December, a leaked report suggests that the representatives of the press are prepared to accept most of Lord Justice Leveson's proposals. This was confirmed by a press statement the following day. The agreement reached by the editors of national newspapers has been referred to as "the Delaunay Deal". The name Delaunay comes from the name of the restaurant in central London where the editors hammered out a deal over their croissants. The leaked report found its way into the Guardian newspaper and a summary of the proposals and what was agreed and not agreed was prepared in a spreadsheet by the Media Standards Trust. The Media Standards Trust has shown itself to be fairly hostile to the activities of the press and with some honourable exceptions appears to be pretty close to the Hacked Off campaign. Readers might be interested to glance at the final column which represents the commentary of the Media Standards Trust which quite neatly encapsulates their hostility towards the press as a whole – a campaign which has been supported with some enthusiasm by the Plaintiff Bar.

Cross-party talks on press regulation broke up in mid-December with members no closer to an agreement. The reported issues of disagreement are the proposal for the watchdog to be backed up in law and differences over data protection reforms.

In the weeks since the publication of the Report, the editors of various national newspapers and their advisers have engaged in a series of intense meetings intended to meet the Prime
Minister's challenge to deliver a workable system of self-regulation that all interested can be confident in.

Newspaper and magazine publishers have written to Culture Secretary Maria Miller detailing their support for the "clear majority" of Lord Justice Leveson's recommendations for the reform of press regulation; the so-called Delaunay Deal. Work is continuing on a draft contract.

Lord Hunt, chairman of the Press Complaints Commission (PCC), whose proposal for reform of press regulation was rejected by Lord Justice Leveson, is acting as a point of contact between publishers and the Government. Lord Hunt announced in mid-December that he had appointed three independent advisers to help him "adjudicate" on the industry's proposals for a new regulator. They are Lord Phillips of Worth Matravers, the recently retired president of the Supreme Court; Guardian columnist and former editor of The Times Sir Simon Jenkins; and Lord Smith, the former Labour Culture Secretary and now chairman of the Advertising Standards Authority. They have agreed to work with him in an unpaid capacity and will have a temporary role. Lord Hunt has confirmed in a press briefing that he would be complying with the best practice in public appointments processes when evaluating appointees to the new regulator (as prescribed by the Leveson recommendations).

Lord Hunt has confirmed that the principles to underpin the new regulator include independence of appointments and funding, a standards code, an arbitration service, a speedy complaint-handling mechanism and the power to demand up-front, prominent apologies and impose million-pound fines.

There are a small number of outstanding recommendations on which there is reportedly some disagreement. Unsurprisingly these are said to be the proposals for third party actions, the extent to which the powers vested in the new body could amount to a form of pre-publication censorship and the proposal to increase the transparency of source material.

The industry is not waiting on cross-party politics to settle a draft bill. Lord Hunt has stated that they are hopeful that a new form of press self-regulation will be set up and at work by early next year.

In addition, The Editors' Code of Practice Committee, which oversees the implementation of The Editors' Code of Practice (the Code), announced that the Code is to be amended to take into account Lord Justice Leveson's recommendations. The reform of the Code had been the subject of a special meeting of editors in the wake of the Leveson report. The Committee has explained that the Code's definition of the public interest would be revised in the light of the Leveson report but also to take into account the definition of the public interest published by the Director of Public Prosecutions in his recent guidelines for prosecutors.

The Committee has also agreed to take up Lord Justice Leveson's recommendation to appoint lay members. In future it is proposed the number of editors will be reduced by three, to 10, with five lay individuals - including the chairman and director of the new regulator - joining the committee as full members.

Reflecting Lord Justice Leveson's recommendations on compliance, it is proposed to add a new compliance clause to the Code. Under this clause all editors must offer readers a clear and effective means of making complaints, and publish corrections and apologies promptly, preferably without recourse to the new regulator. Where it is not possible to reach agreement by negotiation,
the clause will make clear that editors will have to publish adjudications, and approved corrections and apologies, in positions required by the regulator.

For the first time in its history, the Committee will invite suggestions from the public as part of its review of the Code.

**Background to the Leveson Inquiry**

The first phone-hacking scandal related to the hacking into the voicemails of the Royal Princes which led to the conviction of the Royal correspondent of the News of the World and an outside investigator. This was dismissed by the newspaper as the conduct of a rogue journalist. There was an extremely myopic investigation of the extent of phone hacking by the Police which after and extremely brief investigation concluded that all was for the best in the best of all possible worlds. Investigations by the *Guardian* of 9 July 2009 followed by a similar article in the *New York Times* of 1 September 2010 revealed that phone hacking at the News of the World was on an almost industrial scale. Following the revelation that the telephone of a missing murder victim, Milly Dowler, had been hacked in to by the newspaper the Prime Minister, David Cameron, in July 2011 announced that there would be a Judicial Inquiry into the Culture, Practice and Ethics of the Press. It is the seventh time in seventy years that there has been an inquiry into the practices of the Press in the United Kingdom. Pressure has now built up to produce an effective result which was not the consequence of the six previous efforts.

**Terms of Reference**

The Inquiry was divided into two parts. The first part was sub-divided into four modules. The first was to examine relationships between the Press and the public including phone hacking and other potentially illegal behaviour. The second module related to relationships between the Press and the Police and whether such relationships operated in the public interest. The third module was to examine the relationships between the Press and politicians and the fourth was to consider whether recommendations should be made regarding the future conduct of the Press and a system of regulation which would support the integrity and freedom of the Press whilst encouraging the highest ethical standards. Part Two of the Inquiry was designed to look in to unlawful or improper conduct at News International and possibly police misbehaviour in relation to corrupt payments and to consider generally the issue of corporate governance at News International. However Part Two of the Inquiry has to be put on hold until the conclusion of criminal proceedings. It is open to question whether part two will ever take place.

**How the Inquiry worked**

The Chairman Sir Brian Leveson, a Lord Justice sitting in the Court of Appeal was assisted by but presided over six independent assessors, many of whom had some connection with the world of journalism, plus a team of six barristers who acted for the Inquiry. The Inquiry itself was established under the Inquiries Act 2005 with the procedure being governed by the Inquiry Rules 2006. Those who felt that, for example, they played a direct and significant role in the events in question or the issues to be examined by the Inquiry or might be felt to be subject to explicit or significant criticism could apply to become core participants, a matter determined by the Chairman. Of the Inquiry, Core participants, included various sections of the media and 51 of the alleged victims of phone hacking. Core participants were able to be legally represented and could request that certain questions were put to witnesses and would be entitled to receive earlier notification of the findings of the Inquiry. Those with relevant evidence to give could be required under Section 21 Inquiries Act 2005 to produce a witness statement dealing with a number of listed points and to
produce the relevant documents. Failure to provide such a witness statement was punishable by a fine and evidence had to be given on oath. As the hearings developed a pattern emerged where Leading Counsel for the Inquiry, Robert Jay QC, would end his examination of the witnesses by pinpointing some potentially embarrassing detail about which the witness had had to volunteer details under his Section 21 Notice. It made for good theatre, but it did also provide a fairly unremitting picture of misconduct by the Press. The evidence started in Court 73 at the Royal Court of Justice in London on 24 November 2011 and formally ended on 24 July 2012 by which time evidence had been taken from some 337 witnesses in person or by written submissions from 300 individuals or organisations. The Inquiry is reckoned to have cost somewhere in the region of £5.6m, a relatively modest cost compared to the Police Inquiries into hacking-related criminality and to the Bloody Sunday Inquiry which cost £155,628,791 of which the legal profession received no less than £67,603,621. At the end of the hearings Leveson produced a searing 100 pages of potential criticisms of the press which, under Rule 13 of the Inquiry Rules 2006, he sent to the core participants who might be subject to criticism to give them an opportunity to respond to those criticisms.

Arrests and charges

During the course of the Inquiry, a constant flow of journalists, investigators and government officials have been arrested. A leading firm of lawyers in the City of London have been applying a toothcomb to the emails and other documents at News International and – on the instructions of News International – handing over to the Police any incriminating material. Those arrested had even included a former lawyer at one of the papers and another had the indignity of being interrogated as a suspect albeit not formally under arrest. Relatively few of the 40 or so individuals arrested have yet been exonerated by the Police and informed that they will not be prosecuted. Eight of them have been charged with conspiracy to intercept communications, generally known as phone-hacking. These include two former News of the World editors, plus a former news editor, a chief reporter and a managing editor at the paper. The flaxen-haired former editor of the Sun, has additionally found herself accused of conspiring to pervert the course of justice with her husband, conduct which it is said arises out of trying to jettison a computer which the Police wanted to examine. Rebekah Brooks and Andy Coulson and two others are accused of a separate conspiracy which is said to involve corrupt payments to the Police and public officials. Those charges are said to include a payment to a police officer in return for a confidential phone directory listing the private numbers of members of the Royal Family and there are also allegations of payment of a sum allegedly in the region of £100,000 over a period of years to an official in the Ministry of Defence in return for official information.

While no one would condone such conduct – if it is established – and while many found it astonishing that the Police originally found there was nothing to investigate in terms of phone-hacking, a piece of blindness which cost a number of very senior officers their jobs, there are many who feel that there has been a degree of overkill in the Police investigation which is estimated to have cost somewhere in the region of £40m and to have engaged the attention of hundreds of police officers. To root out this criminality the Police felt it necessary to set up:

- **Operation Weeting** to investigate phone hacking at the News of the World;
- **Operation Elveden** to investigate payments to the Police and public officials;
- **Operation Tuleta** to investigate the alleged hacking by journalists into computers; and
Operation Sacha into the issue of the perversion of the course of justice (in relation to Rebekah Brooks).

Just for good measure, the Police had to set up a fifth operation called Operation Kilo which rather incestuously was designed to investigate alleged leaks by the Police themselves about the progress of Operation Weeting.

What seems to have happened might be thought to be a little more simple than all these inquiries would suggest. The alleged criminal conduct was relatively simple, namely that a number of journalists found it all too simple to listen to messages on people's cellphones. Clearly, that would have been illegal and a gross intrusion of privacy. It clearly moved into the criminal realm when it became a wholesale activity and moved beyond the occasional nugget of celebrity gossip into outrageous areas such as the hacking into the family telephones of murder victims. It was often the product of a seemingly insatiable desire for celebrity gossip and of a mistaken belief on the part of certain journalists that the law did not apply to them and that these breaches of the criminal law were permissible and justifiable short cuts in the pursuit of their stories. The same considerations seemed to underpin the view of certain journalists that they could corruptly pay officials for confidential information. The story and the perceive public interest was thought to be everything. Although the corrupt payments have received less publicity, arguably that conduct is even more serious than phone hacking, as it involves the corruption of public officials and not simply misconduct by the journalists themselves. The abhorrence felt by the public at the hacking of the Milly Dowler telephone and the fact that one of those charged, Andy Coulson, a former editor of the News of the World, worked as a director of communications for the governing Conservative Party and the fact that the likes of Rebekah Brooks were close socially to the British Prime Minister plus the fact that the Police had been remarkably myopic in not finding widespread evidence of phone hacking when they first considered the matter have led to this twin colossus of the Leveson Inquiry and the Police investigation when the actual allegations of wrongdoing seem relatively clear in nature. The allegations are firmly denied by those involved and the trials are presently scheduled to commence in September 2013. In the meantime, we have all become expert in hacking, blagging (obtaining data-protected information by deception) and pinging (monitoring which signal mast a given cellphone used at a particular time and thereby locating its owner). The Leveson Inquiry which has been remarkably open with very full details being given on its website www.levesoninquiry.org.uk of the evidence and documents tendered to the Inquiry together with explanations of the various processes of the Inquiry, did, for very understandable reasons, feel it prudent to make a restriction order under Section 19 Inquiries Act 2005 restricting the reporting of the evidence when details were given as to how to hack telephones.

Leveson

The man chosen to head the Inquiry on the recommendation of the Lord Chief Justice, Lord Judge, was Sir Brian Leveson, a Lord Justice of Appeal in the Court of Appeal. It was a slightly odd choice as Leveson's practice had predominantly been as a criminal lawyer. Insofar as one can generalise there are two problems about criminal lawyers and the Press. One is that in their professional life criminal lawyers tend not to instinctively embrace the concept of open justice but rather to feel that the activities of the Press make the administration of the criminal law that much more difficult.

Criminal lawyers also tend to feel that with the nature of the work and their interaction with those caught up in the criminal justice system whether as defendants, witnesses or juries, they are that much more attuned to a man in the street. Whether that is always the case or whether that was
the case in relation to Leveson is a matter for debate. Leveson's strengths are an ability to get to the heart of the facts and to expose any wrongdoing.

His perceived weaknesses might be thought to be a dislike of the Tabloid Press, a reputation as a somewhat colourless individual and some doubts as to whether his intellectual qualities provided the right mix for this Inquiry. As to his determination to get to the heart of the issues as he saw them and his organisational skills in running the Inquiry and his ability to produce a report within the stipulated year there could be no doubt. However the tetchiness that was evident in him telling one distinguished witness that he scarcely needed to be lectured on the importance of the freedom of the Press and in his complaint to the Cabinet Secretary which the Judge apparently felt appropriate on the somewhat unconvincing grounds that this might represent Government policy and might be undermining the Inquiry – notwithstanding the fact that it was after all the Government who had set up the Inquiry – about a speech made by the Education Secretary, Michael Gove, who claimed that the Leveson Inquiry was creating a "chilling atmosphere" about freedom of expression and warning of the dangers of tighter regulation for newspapers, suggested a degree of over-sensitivity and reluctance to accept criticism. It raised doubts in the minds of some as to whether this was a man who really understood the press and was best suited to report on the law and practice of the press.

Few, however, were neutral in the debate and he must at the same time have reassured those who feared that his recommendations might be brushed under the carpet. Leveson's report demonstrated his distaste for the tabloid press. They had 'wreaked havoc with the lives of innocent people; there was outrageous behaviour by newspapers, newspapers behaved as if the code of conduct did not exist', 'significant and reckless disregard for accuracy'.

Prime Minister David Cameron’s Reaction to Leveson's Report

Any change in the legal framework under which the press operates is a distinctly political matter. Initial reactions have shown that there are deep political divisions as to the extent to which and the manner in which the press should be regulated. The Prime Minister (PM) proposes to hold cross-Party talks to seek agreement as to how the Leveson proposals are to be agreed.

The PM agrees with the concept of a new independent regulatory body, to be appointed so as to be independent of Parliament and the press, as proposed by Leveson. A difference arises as to whether legislation is required to establish it.

Broadly speaking, the PM accepts Leveson's proposal that the new regulatory body should lay down a code of standards for the press, that it should run an arbitration service with a swift complaints handling procedure and that it should have power to demand suitably worded apologies and how they should be published and that the powers should in the last analysis be backed with the ability to levy fines of up to £1m. Leveson also envisages an arbitration service which would be administered by the regulatory body which would be part of the legal system and would be a factor to be taken into account in litigation but that the cost of such arbitration would be borne by the press.

Where the PM has his main disagreement with Leveson is the idea that press regulation should be made part of the law of the land. That, he feels, is crossing the Rubicon.

The PM's concern is that talk of legislation to "provide the mechanism to recognise and certify a new regulatory body" would be in effect to give a vehicle for politicians to impose regulations and obligations on the press.
The PM also differs over Leveson's contention that legislation is necessary to implement his proposals over such matters as the award of costs or exemplary damages against the press, although he does not disagree in principle with the idea of such orders for costs or exemplary damages. A Bill will nevertheless be prepared. Initial government briefing suggests this will highlight the difficulties of what Leveson proposes. The contrary view is that parliamentary mathematics suggest that there is a majority which will compel legislation to implement the Leveson proposals.

The PM also is concerned about Leveson's proposed changes to the protection of journalistic material which exists under Section 32 Data Protection Act and its effect on investigative journalism, particularly when one bears in mind how wide the definition of such data is. The PM says that he is "instinctively concerned" about that proposal.

Leveson's primary recommendations therefore were:

- a new and independent regulatory body which should have no serving editor or member of the House of Commons or Government on the board but should contain people with experience of the industry;

- as Lord Justice Leveson put it in his statement releasing the report, the press can no longer mark its own homework. There is one exception; Lord Justice Leveson foresaw one current editor sitting on the board that appoints the members of the regulator. Funding should be settled in agreement between the industry and the board, should be negotiated in advance and cover a 4 or a 5 year period;

- this would be a self-regulating regime which would set a Standards Code which would recognise freedom of speech and the importance of issues of public interest which he perceived to include such matters as the exposing of crime or serious impropriety or the public being seriously misled. However, the other side of the coin was that the Standards Code must relate to the way that the press treated people particularly in relation to an appropriate respect for their privacy where there was no public interest justification for breaching that privacy and equally for accuracy and avoiding of any misrepresentation of the facts.

- Leveson envisages legislation to underpin the system of independent self-regulation. His thinking is that such legislation is necessary to establish the parameters of the self-regulating body and to facilitate the recognition of that body in the legal process so that exemplary damages and costs could be awarded against the press if they fail to comply with the requirements of the regulatory board. He envisaged that the self-regulatory body would be benchmarked by the Office of Communications (the body that regulates various forms of media such as television (Ofcom) in a sense of its composition and criteria being verified so that its procedures could be recognised by the courts.

- Leveson does also envisage a failsafe option that whereby if this regulatory system failed, legislation would be brought in to bring the regulatory body under the general umbrella of Ofcom and that Ofcom should regulate those who do not cooperate with the self-regulatory body.

- The regulatory body should have power to direct appropriate remedial action for breach of the press standards it had established and powers to direct the nature and placement of apologies and corrections.
• The regulatory body should also have powers to impose appropriate sanctions which could include powers to impose financial penalties of up to 1% of turnover with a maximum penalty of £1m for serious of systemic breaches.

• The board would provide arbitration services for disputes where the costs would be borne by the parties subscribing to the regulatory board. It should be fair, quick and inexpensive. It should be inquisitorial and free for complainants to use. Clearly, it would be important to ensure that there was an appropriate filtering process for complaints.

• Lord Justice Leveson also envisages that the arbitration service which would be administered by the regulatory body would be part of the legal system and would be a factor to be taken into account in litigation and any evaluation of the conduct of a member.

• Lord Justice Leveson further recommends that the board should have authority to examine issues of its own initiative and have sufficient powers to carry out investigations into systematic or serious breaches of the code. Those who subscribe should be required to cooperate with any such investigation. Lord Justice Leveson has also recommended that the board should have the power to "intervene in cases of allegedly discriminatory reporting" but no definition or explanation is offered.

• Leveson proposed that the protections that the media enjoy under Section 32 Data Protection Act in regard to data which is held for journalistic purposes should only apply where the processing of data is actually necessary for publication and not simply where it was undertaken with a view to publication. In these proposals Leveson appears to want external supervision of editorial decisions taken by editors. In doing so he is in the opposite direction of travel from UK and European courts. He would also want Section 32 to be amended to that there must be a reasonable belief on the part of the journalist who was processing the information that the material would be in the public interest with their being no weighting in favour of freedom of speech. He appears to favour that it should be objectively established that the likely interference with privacy would be outweighed by the public interest in publication. As the PM noted, this could have implications for investigative journalism. It could also produce a significant raft of litigation where the media would face a considerable burden of proof.

• Lord Justice Leveson further recommends that the necessary steps be taken as soon as possible to increase the maximum sentence for unlawfully obtaining personal data (s55 DPA), typically by ‘blagging’, from the current fine-only to 2 years’ imprisonment. Blagging in this context means obtaining protected information by deception, typically by a private investigator pretending to be the customer or some other authorised person to obtain details of their bank account.

• Leveson also recommended that the enhanced defence in criminal law of public interest journalism (s78 CJIA) be brought into force immediately. This may, however, prove to be unnecessary as the Director of Public Prosecutions has issued guidelines which set out the public interest considerations which need to be reviewed before a journalist is prosecuted.
• Lord Justice Leveson recommends that all who subscribe to the regulatory system have appropriate and transparent internal governance processes, and that the board should require members to give notice of any failure in compliance, and the steps taken to rectify any issues identified.

• Controversially, Lord Justice Leveson proposes that the board should have the power to hear complaints regarding breach of standards from third parties or representative organisations as well as from affected individuals.

• Lord Justice Leveson recommends a whistleblowing hotline for those who feel that they are being asked to do things that are contrary to the code.

• Another recommendation which some may have felt betrays Lord Justice Leveson's inexperience in the industry is the suggestion that the press, with the aim of increasing transparency, should be encouraged to provide readers with information that would help them to assess the reliability of information from a source.

• Lord Justice Leveson has controversially recommended amending three key journalistic protections in the Police and Criminal Evidence Act 1984 ("PACE"), despite receiving only submissions from the police on this topic and none from the media. First, that journalistic material should only be held in confidence (and attract the full PACE protections) if it is continuously held subject to an enforceable/lawful confidentiality undertaking (s11 PACE). Worryingly Lord Justice Leveson recommended consideration be given to defining journalism in s13 PACE, a suggestion that is somewhat removed from the realities of modern day reporting and the blurring of boundaries between blogger and staffer. Finally Lord Justice Leveson recommended that consideration be given to diluting the access conditions to be satisfied by the police in any request for materials.

• Leveson envisages newspapers having compliance officers and readers being able to find information in newspapers as to the compliance procedures. That is a development which could notably add to the burdens of the press and lead to ever tighter regulation of the press.

• Leveson wants that the Civil Justice Council to consider the level of damages in libel and privacy claims. Leveson envisages widening the criteria for the aware of exemplary damages which would take account of the extent of internal good governance and compliance with the code of standards by the press. One's concern here would be the underlying cost attached to such requirements and obligations and the scope for litigation. Damages have, from time to time, been reviewed by the courts under a system that appears to work reasonably well. There are parts of the Leveson Report which do appear to seek to fix everything and may suffer from the fact that Leveson's background is not in media law.

• Leveson makes criticism of the over-close relationship between the police and the press. He makes a number of practical recommendations to what is termed "revolving doors" suggesting that police officers should not take up positions in the press within 12 months of their leaving the police force and that there should be regulations and transparency as to dealings between the press and the police, including matters such as entertainment.
• There are a number of detailed recommendations and criticisms relating to the relationship between the press and politicians. Here, Leveson's recommendations are less specific, he would wish political figures to reflect constructively on such relationships and for there to be greater transparency.

• Leveson proposes that the Information Commissioner should issue practical guidance in relation to data protection which would support the press in improving its standards and practice in handling personal information.

• Leveson is highly critical of the News of the World, for example, criticising the favourable treatment their staff received when they were imprisoned or dismissed as a result of their misbehaviour. He also criticised the failure of management to deal appropriately with compliance issues at the News of the World.

• Leveson was highly critical of the Press Complaints Commission (PCC). He noted that Cameron had described it as "ineffective and lacking in rigour" and that the leader of the opposition had called it "toothless poodle". Leveson noted that it was not a regulator at all but a complaints handling body, which was under-utilised and had insufficient resources. He also criticised the fact that it had not monitored compliance with the PCC Code, instead he advocated the need for a genuinely independent and effective system of self-regulation. He rejected an entirely voluntary scheme which had been advocated by former executives of the PCC based on a five-year binding contract. He simply did not believe that would work.

**Conclusion**

The report is impressively thorough. The debate will now move into the political arena. So far as one can judge, there appears to be a strong majority for a new and effective system of regulation. There may be a majority for some sort of legislative framework for the regulatory body, but that will be a matter for negotiation and discussion with no political party wishing to be seen to be defending the press too strongly in the current climate in the United Kingdom. The concept of the importance of freedom of speech and the dangers of starting to regulate the press seem, at the very least, to be counterbalanced by the general distaste for the misbehaviour on the part of a section of the tabloid press.

The elephant-in-the-room, which Leveson does not seem to have properly grasped, is how one equates a greater regulation of the press with an inability to provide any such comparable regulation for the social media. An unequal playing field looks as if it is about to be created and the traditional press will be thereby weakened at the expense of the unregulated media. Leveson's comments on the social media and internet account for only one of the 2000 pages. He views the growth of the internet as irrelevant to most of the inquiry.

There will doubtless be a widespread welcome for swift and cheap resolution of complaints but it is important to ensure that there is an appropriate filtering process for complaints and that complainants focus on their actual complaint rather than being able to raise issues of corporate governance that the Leveson report seems to bring into play, which would make the process more costly and slow and open many side issues which will serve only distract from the issues in dispute.

Leveson envisages newspapers having compliance officers and readers being able to find information in newspapers as to the compliance procedures. Although unobjectionable as a principle, it is a development which could notably add to the burdens of press organisations and
lead to ever tighter regulation. Coupled with the startling proposal that interested third parties (as opposed to victims) have standing to bring complaints to the new regulatory body in circumstances of a perceived breach of standards by a publisher it could shackle the press in time consuming and costly regulatory investigations.

Despite repeated recognition of the importance of freedom of expression a number of Lord Justice Leveson's proposals stray very close to, or are at risk of becoming, a form of pre-publication intervention. Lord Justice Leveson's recommendation on an advisory service in particular may result in a significant change in press regulation as it is likely that running stories past such an advisory service would quickly become a requirement via the backdoor (on the basis that publishers that failed to do so or who did so and decided against the advice given would likely face criticism in subsequent litigation), limiting editors' ability to assess the public interest in a story for themselves. The same can be said about the proposal to enable the board to intervene in cases of perceived discriminatory reporting.

The recommendation on the reform of section 55 of the Data Protection Act on blagging is relatively uncontroversial given that the power to increase the sentence is already on the statute book (s77 Criminal Justice & Immigration Act 2008) but has not yet been exercised. In contrast the other proposed reforms to data protection legislation need careful consideration. Putting to one side the point that it is difficult to know whether data is "necessary for publication" until one has seen it (hence the justification for the previous wording of "view to publication"), this proposal again appears to show that Leveson wants external supervision of editorial decisions. In doing so he is in the opposite direction of travel from UK and European courts.

He would also want Section 32 Data Protection Act to be amended to that there must be a reasonable belief on the part of the journalist who was processing the information that the material would be in the public interest with their being no weighting in favour of freedom of speech. He appears to favour that it should be objectively established that the likely interference with privacy would be outweighed by the public interest in publication. This proposal does seem to call into question the judge's understanding of how papers work. Investigative journalists need background material to be able to carry out their investigations effectively and they may need it on a moment's notice to deal with unexpected world events. The Leveson proposals suggest they may be spending increasing amounts of time with compliance officers. As the Prime Minister noted, this could have implications for investigative journalism. It could also produce a significant raft of litigation where the media would face a considerable burden of proof.

The proposed reforms of PACE, without hearing from the media on the sensitive issue of sources and protection of materials, ought to be a concern and should be the subject of intense lobbying in the event the Home Office is persuaded to pursue them. In particular the proposed amendment to section 11 has serious consequences for the protection of journalistic materials, significantly lowers the threshold to access and, as one commentator put it, it puts policemen in the pressroom, something Lord Justice Leveson indicated he was at pains to avoid.

In his statement on the release of the report, Lord Justice Leveson stressed that the press' freedom of expression was different from that exercised by blogs and social media, because its impact was uniquely powerful. Social media in described as operating in an "ethical vacuum", in contrast to the press from whom the trust of readers is essential. His comments on the social media and internet account for only one of the 2000 pages, which may properly reflect the fact that the online media was outside the Inquiry's terms of reference but is nevertheless disappointing, and betrays a misunderstanding of the workings of today's 24 hour, mobile, technology-driven news culture.
NEW DEVELOPMENTS 2012
INTRODUCTION

Decisions applying traditional media law doctrines to online publications made for some of the most interesting developments over the past year, adding some valuable insights and precedents to media case law.

Among the interesting decisions were those that considered the opinion defense in various online contexts. Websites that post ratings of products or services have been the subject of a number of lawsuits, but two decisions are worth noting. A libel suit brought by a hotel with the dubious distinction of being number one on Tripadvisor’s 2011 list of “Dirtiest Hotels,” was dismissed on opinion grounds. *Seaton v. Tripadvisor*, 2012 U.S. Dist. LEXIS 118584 (E.D. Tenn. Aug. 22, 2012). The online ranking was clearly rhetorical hyperbole, notwithstanding the use of a numerical ranking based on user reviews. Similarly, the opinion defense protected the Better Business Bureau in a libel suit over its issuance of a “C” grade to plaintiff. *Castle Rock Remodeling, L.L.C. v. Better Business Bureau*, 354 S.W.3d 234 (Mo. App. 2011). Even where the online rating relied on objective components, the grade was a subjective evaluation not capable of being proved true or false.

A California appellate court affirmed dismissal of a libel and false light complaint over an article on the Gizmodo technology blog. *Redmond v. Gawker Media LLC*, No. A132785 (Cal. App. Aug. 10, 2012) (unpublished). In addition to citing the loose and casual language of the online article, the opinion defense was bolstered by the liberal inclusion of hyperlinks to source material. The article was therefore “completely transparent” and readers were invited to draw their own conclusions about plaintiff.


An Oregon federal district court denied a motion for a new trial in a libel case against a blogger, letting stand a $2.5 million damage award. *Obsidian Finance Group v. Cox*, No. CV-11-57-HZ, 2012 WL 1065484 (D. Ore. March 27, 2012). The court found that the blogger was not a media defendant and her statements about a private figure plaintiff did not involve a matter of public concern. Under this scenario, the court found it could constitutionally impose a strict liability standard – and the blogger could be liable for false statements published without fault.¹

Indiana and Idaho joined the list of states that give heightened protection to anonymous speech on the Internet. *In re Indiana Newspapers Inc.*, 963 N.E.2d 534 (Ind. App. 2012); *Jacobson v. Doe*, Civ. 12-3098 (Idaho Dist. July 10, 2012). Both courts adopted versions of the

¹ For detailed discussion of this case see “Exploring the Issue of ‘Strict Liability’ for Defamation,” by Michael K. Cantwell in this issue of the MLRC Bulletin.
famous *Dendrite* \(^2\) test requiring courts to consider, inter alia, the merits of the underlying action before unmasking the anonymous speaker. However, both courts rejected the argument that the anonymous commenter was protected as a confidential news source. The Indiana court held the commenter did not fit within the meaning of the state shield law. The Idaho court held the commenter was not protected as a confidential source under the Idaho Constitution or First Amendment.

Several courts considered the application of the single publication rule to the Internet. The Third Circuit Court of Appeals rejected the argument that a hyperlink to an alleged defamatory article constituted a republication to restart the statute of limitations. *In re: Philadelphia Newspapers, LLC*, 2012 U.S. App. LEXIS 15419 (3rd Cir. July 26, 2012). “If each link or technical change were an act of republication, the statute of limitations would be retriggered endlessly and its effectiveness essentially eliminated,” the court concluded.

A New York court held that the addition of “share buttons” to an archived online article was not a republication even though the buttons facilitate the sharing of content. *Martin v. Daily News, LP*, 2012 N.Y. Misc. LEXIS 1735 (N.Y. Sup. 2012). Readers could have always shared the article by e-mail or by printing and distributing it, thus the new online functionality was simply “akin to a delayed circulation of the original rather than a republication.”

Section 230 of the Communications Decency Act continues to provide robust protection for websites. One outlier case, however, made headlines. A Kentucky federal court refused to apply Section 230 to a gossip website called thedirty.com. *Jones v. Dirty World Entertainment Recordings LLC*, (E.D. Ky. Jan. 10, 2012). The court noted the name of the website “in and of itself encourages the posting only of ‘dirt,’ that is material which is potentially defamatory or an invasion of the subject’s privacy.” In addition, and on less controversial grounds, the court found that defendant was not entitled to Section 230 where he endorsed the defamatory statements with his own online comments.

In the long-running battle over the right of publicity in the name and image of legendary actress Marilyn Monroe, the Ninth Circuit ruled that no such right exists because the actress was domiciled in New York at the time of her death and New York does not recognize postmortem publicity rights. *Milton H. Greene Archives v. Marilyn Monroe LLC*, 692 F.3d 983 (9th Cir. 2012). Also on the issue of postmortem rights, a California federal court dismissed a right of publicity lawsuit over the use of Albert Einstein’s image in a car advertisement. *Hebrew University of Jerusalem v. General Motors LLC*, 2012 U.S. Dist. LEXIS 148150, 40 Media L. Rep. 2449 (C.D. Cal. 2012). Applying New Jersey law (where Einstein was domiciled at the time of his death in 1955), the court found that New Jersey would recognize a common law postmortem right of publicity, but for no more than 50 years. Thus, Einstein’s identity had entered the public domain by the time the advertisement was published.

On the anti-SLAPP law front, the Illinois Supreme Court significantly narrowed the application of the state’s anti-SLAPP law in *Sandholm v. Kuecker*, 962 N.E.2d 418 (2012). The Illinois anti-SLAPP statute immunizes from liability “[a]cts in furtherance of the constitutional rights to petition, speech, association, and participation in government ..., regardless of intent or

purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome.” As reported last year, the intermediate appellate court in Sandholm found that the statute “alters existing defamation law by providing a new, qualified privilege for any defamatory statements communicated in furtherance of one's right to petition, speak, assemble, or otherwise participate in government even with actual malice.” See 942 N.E.2d 544. The Illinois Supreme Court, however, ruled that the legislature could not have intended to create absolute immunity for defamation and other intentional torts. Instead the anti-SLAPP statute only applies to claims “solely based on” protected speech and with no other basis than to chill speech; that is, the lawsuit does not seek genuine relief for defamation or other tortious acts. These new requirements put substantial burdens on defendants seeking dismissal of cases under the SLAPP statute.

Those additional burdens were apparent in a decision applying the new Sandholm standard. In Ryan v. Fox Television Stations, Inc., et al., No.1-12-0005, 1-12-0007 (Ill. App. Oct. 23, 2012), the court held that the Illinois anti-SLAPP statute did not protect a television news report about alleged judicial misconduct. Although the news report was clearly the type of speech the Illinois anti-SLAPP Act was designed to protect, the broadcaster could not present “undisputed facts that demonstrate plaintiff’s claim is meritless.”


In 3M, Judge Robert Wilkins held the statute cannot be used in federal court because it conflicts with Rules 12 and 56 of the Federal Rules of Civil Procedure. In Sherrod, Judge Richard Leon held that the statute was “substantive – or at least has substantive consequences” and, thus would be applicable in federal court. Finally, in Farah, Judge Rosemary Collyer expressed her disagreement with the 3M decision and found the statute was substantive law that applied in diversity actions. All three cases are now on appeal to the D.C. Circuit.

On the international front, following an 18 month public investigation into the News of the World phone hacking scandal, in November 2012 Lord Justice Leveson released a 2,000 page report recommending a new and aggressive regulatory scheme for national newspapers in England. The recommendations include the creation of a new code of conduct for the press and a new independent regulatory body with powers to levy fines of up to £1 million.³

On a more positive note from the UK, a Defamation Bill to overhaul the law of libel in England and Wales is making its way through Parliament. A revised Bill was released in May 2012. Among other things, the revised Bill provides that a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant. The bill also adopts the single publication rule; contemplates increased protections for the operators of websites; and provides for some limits on jurisdiction to deter libel tourism in England.

³ For a detailed discussion and analysis see “Phone Hacking and the Press: The Leveson Report – New Press Regulations May Change For Ever the UK Press,” by David Hooper and Brid Jordan in this issue of the Bulletin.
Further amendments to the Bill may be made during the legislative process, but it is expected to become law in 2013.

These and other cases are discussed below.

A. MEDIA LIBEL LAW

1. Defamatory Meaning

Citing public policy and evolving social standards, a New York appellate court held that a false allegation of homosexuality is no longer defamatory per se. *Yonaty v. Mincolla*, N.Y.S.2d 774 (N.Y. App. 2012). The old common law presumption was based on “the flawed premise that it is shameful and disgraceful to be described as lesbian, gay or bisexual.” Thus prior rulings to the contrary are “inconsistent with current public policy and should no longer be followed.” The court cited the New York’s 2011 Marriage Equality Act as evidence of the “tremendous social evolution in social attitudes regarding homosexuality.”

Stating that plaintiff made a political event “off the record” was not defamatory even if deliberately false. *Burke v. Gregg et al.*, 40 Media L. Rep. 2365 (R.I. 2012). Plaintiff argued that the newspaper falsely portrayed him as “someone to be disliked because he is a political insider who attacks the First Amendment.” The Rhode Island Supreme Court rejected this reading as “overly broad” and not reflective of the language and context of the article. In fact, even if the newspaper falsely blamed the plaintiff for making the event “off the record” the court could not “conceive of how these comments could reasonably be interpreted to have injuriously affected [plaintiff’s] reputation, degraded him in society, or brought him into public hatred and contempt.”

Calling plaintiff a “kid” and omitting his role in the creation of Facebook was not defamatory since neither would hold the plaintiff up to contempt or ridicule. *Greenspan v. Random House, Inc.*, 859 F. Supp. 2d 206, 222 (D. Mass. 2012), aff’d, U.S. App. LEXIS 22285 (1st Cir. 2012). Dismissing defamation claims against the author, publisher and producers of a book and related movie about the creation of Facebook, the court reasoned that the references to plaintiff as a “kid” were not reasonably susceptible of a defamatory meaning. The decision to omit plaintiff’s role in the creation of Facebook would not hold plaintiff up to scorn, hatred, ridicule or contempt even if it suggested that plaintiff was irrelevant to the founding of the company.

The use of plaintiff’s photo to illustrate an article on gang violence was capable of a defamatory meaning. *Knutt, et al. v. Metro International*, 91 A.D.3d 915 (N.Y. App. Div. 2012). The New York appellate court reinstated a defamation claim against a newspaper that used an archived crime scene photograph showing plaintiff, a 10 year old African-American boy, peering over a yellow police tape line at a crime scene. The photo was placed directly below the headline “Call to Get Tougher on Gang Activities,” about rising gang violence. The trial court dismissed the defamation claim on the ground that publication was not grossly irresponsible as a matter of law. In a short decision, the appellate court reinstated the defamation claim, holding 1) that the juxtaposition of photo and text could create a defamatory impression; and 2) that dismissal for
lack of fault was premature. As to defamatory meaning, the court recited hornbook law that imputing a serious crime to a person constitutes defamation per se.


Similarly, stating that the plaintiff failed to cooperate or comment for a news report was not defamatory as a matter of law. *C & D MacConnell's, Inc. d/b/a “Ollie Wallie's Fun Center” v. Gray Television Group, Inc.*., No. 11-CA-2848 (Fla. Cir. Sept. 4, 2012). At issue were television news reports about an alleged sex assault at the plaintiff’s amusement park. The court additionally found that reporting that a crime occurred at a business is not defamatory as a matter of law.

Can you be libeled by a question? That was an issue considered by a Tennessee appellate court in *Eisenstein v. WTVF-TV, News Channel 5 Network, LLC*, No. 2012 Tenn. App. LEXIS 515, *14-15 (Tenn. App. July 30, 2012). At issue was a news broadcast about a judge that began “Is the presiding judge of Davidson County’s General Sessions Court facing an ethics investigation?” The plaintiff argued that the introduction “asserted” that he was under investigation. The court accepted that a question can be defamatory if it is reasonably understood as an assertion of fact. Here, however, the question was just that — a question and not a direct accusation. “Rather, it invites an answer of yes, no or I don't know,” the court found.

The statement that plaintiff lost her job because she was “lazy” could reasonably be construed as a defamatory statement of fact. *Sang Lan v. AOL Time Warner, Inc.*, 40 Media L. Rep. 2109 (S.D.N.Y. May 9, 2012) (the statement “portrays Plaintiff as lacking an essential character – call it diligence or dedication or industriousness – necessary to the performance of any and all professions or callings, and such statements would certainly injure her in her professional capacity”). However, the statement that plaintiff is “too lazy” to get a job was more generalized and “best treated as opinion.”

**Of and Concerning**

Statements that a company and its employees (numbering in the thousands) engaged in illegal activity, were not “of and concerning” plaintiff, a former executive at the company. *Gilman v. Spitzer et al.*, 40 Media L. Rep. 2345 (S.D.N.Y. 2012). At issue was an article written by former New York Governor Eliot Spitzer for online magazine Slate defending his white collar criminal prosecutions of Marsh & McClennan. The plaintiff, who had been convicted of illegal restraint of trade, but acquitted on appeal, was not specifically named in the article. The court noted that the absence of plaintiff’s name in the article was “not necessarily fatal to his claim,” but as a matter of “grammar and logic” no reasonable reader would understand the alleged defamatory references to be about plaintiff.

Similarly, under Virginia law a television news broadcast about a corporation was not “of and concerning” the president of the corporation who was not named in the report. *Hanks v.*
Moreover, statements about “unscrupulous tax preparers” did not refer to plaintiff individually but to tax preparers as a class.

2. Opinion

Decisions involving the defense of opinion in the wake of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), continue to provide interesting analyses as courts attempt to distinguish between fact and opinion.

A libel suit brought by a hotel with the dubious distinction of being number one on TripAdvisor’s 2011 list of “Dirtiest Hotels,” was dismissed on opinion grounds. *Seaton d/b/a Grand Resort Hotel & Convention Ctr. v. TripAdvisor*, No. 3:11-cv-549, 2012 U.S. Dist. LEXIS 118584 (E.D. Tenn. Aug. 22, 2012). The court held that the online ranking was clearly unverifiable rhetorical hyperbole, notwithstanding the use of a numerical ranking based on user reviews. “From law schools to restaurants, from judges to hospitals, everything is ranked, graded, ordered and critiqued. Undoubtedly, some will accept the array of ‘Best’ and ‘Worst’ rankings as impenetrable maxims. .... [T]he standard, fortunately, is what a ‘reasonable person’ would believe. A reasonable person would not confuse a ranking system, which uses consumer reviews as its litmus, for an objective assertion of fact; the reasonable person, in other words, knows the difference between a statement that is ‘inherently subjective’ and one that is ‘objectively verifiable.’”

Similarly, a “C” grade from the Better Business Bureau was a subjective evaluation not capable of being proved true or false. *Castle Rock Remodeling, L.L.C. v. Better Business Bureau*, 354 S.W.3d 234 (Mo. Ct. App. E.D. Nov. 11, 2011). Even though the BBB’s rating system relied on objective components, the resultant grade and the context in which it was presented was BBB’s opinion about the business. “Although one may disagree with BBB’s evaluation of the underlying objective facts, the rating itself cannot be proved true or false. Therefore, the rating is protected as opinion under the First Amendment.”

A New York trial court dismissed a libel case brought by a medical doctor over harsh criticism left on an online review site. *Tener v. Cremer*, 2012 N.Y. Misc. LEXIS 3721, 2012 NY Slip Op 32022U (N.Y. Sup. Aug. 1, 2012). At issue was a terse three sentence review stating: “Dr. Tener is a terrible doctor. She is mentally unstable and has poor skills. Stay far away!” The court held the review was pure opinion and did not apply any defamatory facts. Looking at the context of the Internet, the court went on to note that the anonymous comments can be understood as a platform for “unsupported and often baseless assertions of opinions” rather than fact.

Similarly, statements by two women accusing an ex-boyfriend of being a “liar” and “cheater” was opinion, particularly in the context of publication on a website where people can air grievances about dishonest romantic partners. *Couloute v. Ryncarz, et al.*, No. 11 CV 5986, 2012 U.S. Dist. LEXIS 20534 (S.D.N.Y. Feb. 15, 2012).

article entitled “Smoke & Mirrors: The Greatest Scam in Tech,” which criticized plaintiff for overhyping his tech products and startups. Plaintiff placed great reliance on the use of the word “scam” to argue the article title was a defamatory statement of fact. While the word is undoubtedly pejorative, it “means different things to different people” and the use of the word by itself was insufficient to make the article title a statement of fact. Instead, the court looked at the article as a whole and found it had “the tone and style of a sarcastic product or movie review.” Moreover, the court described the article as “completely transparent” because it liberally hyperlinked to source material and readers could draw their own conclusions about plaintiff’s products.

A Pennsylvania appellate court affirmed dismissal of a libel claim against a lawyer and sheriff who were quoted in a newspaper article calling plaintiffs “anarchists,” “paper terrorists,” “opportunists,” and “fellow travelers” of anti-government groups. Balletta v. Spadoni, 47 A.3d 183 (Pa. App. 2012). The colorful epithets were in response to plaintiffs’ attempt to buy a $4 million dollar property out of foreclosure with gold and silver bullion. The descriptions were all opinion based on the facts disclosed in the article and the context of the article. Moreover, terms such as “anarchists” and “fellow traveler” were essentially incapable of defamatory meaning since with described political, economic or sociological philosophies.

A New York appellate court affirmed dismissal of a failed political candidate’s libel suit against multiple media defendants who had described plaintiff as anti-Semitic and racist. Russell v. Davies, et al., 948 N.Y.S.2d 394 (N.Y. App. Div. 2012). The press reports were pure opinion and/or opinion based on disclosed facts, primarily plaintiff’s own writings on the subject.

A Pennsylvania federal court denied a motion to dismiss libel and false light claims over statements made by two business school professors on their “Grumpy Old Accountants” blog. Zagg, Inc. v. Catanach, No.12-4399, 2012 U.S. Dist. LEXIS 139095 (E.D. Pa. Sept. 27, 2012) (applying Utah law). The court rejected the argument that the statements were opinion as a matter of law. Instead, the statements were likely to be taken seriously given their nature and the defendants’ profession. Finally, under the fourth factor, the court looked at the nature of the website. The court recognized that readers might not treat the postings with the same weight as the front page of The Wall Street Journal. But the “defendants are professors at business schools, with apparently no political axe to grind. Readers are likely to take their statements about corporate finance seriously.” The court found this particularly so when blogging about business rather than politics. “Readers expect that public officials will be criticized in newspaper editorials and that these criticisms are opinions. That is just the nature of politics. Here, in contrast, two business school professors are making statements about the dishonesty of a corporation. Public companies are not routinely accused of fraud by business professors, and any such accusations would not be presumed to be opinions.”

Similarly, edits to a Wikipedia page were treated as fact and not opinion because the online encyclopedia is generally considered a site for “factual information rather than as a forum for expressing opinion.” Pitale v. Holestine, No. 11 C 00921, 2012 U.S. Dist. LEXIS 24631 (N.D. Ill. Feb. 27, 2012).

A statement by a blogger that “in his belief” a Judge was violating the Code of Judicial Conduct by endorsing a political candidate was not protected opinion. Lewis v. Rapp, 725 SE
Although defendant framed his statement as an opinion, the court noted that “an individual cannot preface an otherwise defamatory statement with ‘in my opinion’ and claim immunity from liability.” Here the defendant blogger wrote that he read the Code of Judicial Conduct from “top to bottom” and “probable cause” existed for the authorities to discipline the plaintiff. The Code of Judicial Conduct, however, actually contained a Canon allowing plaintiff to make such an endorsement.

A newspaper column stating that plaintiff is a “birther” who “believes” President Obama is Muslim was held to be opinion. *Delle v. Worcester Telegram & Gazette Corp.*, 29 Mass. L. Rep. 239, at *2-3 (Mass. Super. Sept. 14, 2011). The statement did not imply undisclosed facts, was prefaced by word “believe,” and centered on an interpretation of plaintiff’s motives.

Statements by a radio talk show host about a hunting accident and criminal trial were deemed opinion given the format of the show and the audiences’ familiarity with the controversy. *Gisel v. Clear Channel Communications, Inc.*, 94 A.D.3d 1525 (N.Y. App. 2012). Among other things, the host called plaintiff a “a cold-blooded murderer,” and asked whether he “put a notch in the stock of his gun as he kills people?”

3. **Truth/Falsity**

**Substantial Truth**

Last year, the Texas Court of Appeals gave wide berth to reporting allegations under the umbrella of the substantial truth defense. *See Neely v. Wilson*, 331 S.W. 900, 922 (Tex. App. 2011), *appeal pending*, (Tex. 2012). This year the Texas Supreme Court agreed to review the decision. At issue is an investigative news report focusing on malpractice and disciplinary proceedings brought against plaintiff, a neurosurgeon. Among other things, the report asked: “If you were told you needed surgery would you want to know if your surgeon had been disciplined for prescribing himself and taking dangerous drugs, had a history of hand tremors and had been sued several times for malpractice in the last few years?” The Court of Appeals held that Texas follows a “third-party allegation rule,” which provides that “a media defendant’s reporting that a third party has made allegations is substantially true if, in fact, those allegations have been made and their content is accurately reported.”

An Ohio court rejected plaintiff’s claim that automatic liability exists for a misattributed statement. *Baxter v. Sandusky Newspapers, Inc.*, 2012 Ohio 1233 (Ohio App. 2012). At issue was the newspaper’s coverage of a civil service disciplinary hearing. The newspaper wrote that “An undercover narcotics agent from the Ohio Bureau of Criminal Investigation & Identification testified about Erie County prosecutor Kevin Baxter’s alleged cocaine use, but it was stricken from the record.” This statement about plaintiff actually came from a law enforcement report that was read into the record. Since the report contained the same information, the court treated the newspaper article as substantially true.

Several cases highlighted the doctrinal point that a minor inaccuracy does not necessarily render a statement false.

For example, a television news “Hall of Shame” report accusing plaintiff of “promptly” writing a bad check, was substantially true “whether it was written immediately or several weeks

In Rosenfeld v. City of New York, 2012 WL 976044, at *7-8 (E.D.N.Y. Mar. 22, 2012), a journalist reported that a teacher received two unsatisfactory evaluations after receiving confirmation from two representatives of the Department of Education. The teacher sued for defamation, asserting that one report was an “official evaluation” and the other was merely an “observation.” The court found the “attempt at semantics” unpersuasive, concluding that “[a]n ‘assessment’ does not differ in any way from an ‘evaluation.’”

4. Fault

Plaintiff’s Status

The Eighth Circuit held that a cashier pulled into a racial controversy was a private figure even after engaging with the media to defend her reputation. Cockram v. Genesco, Inc., 680 F.3d 1046, 1053 (8th Cir. 2012). In an incident that gained national attention, the plaintiff was fired after giving a receipt containing a racial slur to an African American customer. The store later discovered that a former employee had coded the register to generate such receipts. Plaintiff was deemed a private figure because she did not “voluntarily inject” herself into a preexisting controversy. When speaking to the media, “plaintiff insisted that her name not be used, thus indicating an intent to defend her reputation among those who knew that she was the subject of the reports while avoiding any additional exposure among those unaware of her involvement in the incident.”

Actual Malice Standard Applied

A $3 million jury verdict for against the Virginian-Pilot newspaper was set aside on a post-trial motion to strike. Webb v. Virginian-Pilot, No. CL10-2933 (Va. Cir. Aug. 6, 2012). The plaintiff, a high school assistant principal, sued over an article reporting on the arrest of his son. Plaintiff conceded the article was literally true, but argued it falsely implied that he used his position to obtain preferential treatment for his son. The court found insufficient evidence of actual malice to support the verdict. The court first held that Virginia recognizes a claim for libel by implication. In addition, in such cases the plaintiff need not prove that defendant intended the defamatory implication. Thus while the article was literally true, the jury could have found it defamatory. However, the court held that plaintiff failed to show knowledge of falsity or recklessness. Under the circumstances, the reporter simply disbelieved the official explanations of the incident and questioned the truthfulness of the school officials. This did not amount to actual knowledge of falsity. Moreover, the court found the record “fatally void” of evidence showing that the reporter entertained serious doubts as to the truth of the implication. Plaintiff argued that the reporter had threatened to write a one-sided story and wrote to a colleague about the story stating “I love the smell of napalm in the morning.” While this may be evidence of ill will, such evidence alone was not proof of recklessness.
An Ohio federal district court denied a newspaper’s post-trial motion for judgment as a matter of law, holding there was sufficient evidence of reckless disregard and harm to reputation to support the jury’s $100,000 libel damage award. **Young v. Gannett Satellite Information Network, Inc.**, 837 F. Supp.2d 758 (S.D. Ohio 2012). Affirming that there was sufficient of actual malice, the court noted that the reporter had read the arbitrator’s decision, and went beyond its assessment of disputed evidence, to accuse plaintiff of having “had sex with a woman while on the job.” The court “was satisfied that there was sufficient evidence presented at trial “upon which reasonable minds may reach different conclusions” on the issue of actual malice.

The First Circuit applied the *Iqbal/Twombly* federal pleading standard to a claim of actual malice. **Schatz v. Republican State Leadership Cmte.**, No. 11-1437, 2012 U.S.App. LEXIS 2653 (1st Cir. Feb. 10, 2012). Under *Ashcroft v. Iqbal*, 556 U.S. 622, 678 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), the factual allegations in a complaint, even though assumed to be true, must still be enough to raise a right to relief above the speculative level. The pleading standard was addressed in the context of affirming dismissal of a political candidate’s complaint alleging he was defamed by misleading political attack ads. The court noted that the use of “actual malice buzzwords” is not sufficient to state a claim. Instead the plaintiff must “lay out enough facts from which malice might reasonably be inferred.”

Similarly, the Fourth Circuit held that conclusory allegations of actual malice are insufficient to state a claim for defamation under the *Iqbal/Twombly* standard. **Mayfield v. NASCAR**, 674 F.3d 369 (4th Cir. 2012). The plaintiff race car driver sued a racing organizer over its statement that plaintiff was suspended because he took a performance enhancing or recreational drug. Plaintiff did not dispute that he is a public figure and with regard to actual malice alleged that the statements about his drug suspension “were known by [them] to be false at the time they were made, were malicious or were made with reckless disregard as to their veracity.” Affirming dismissal, the court stated “This kind of conclusory allegation—a mere recitation of the legal standard—is precisely the sort of allegations that *Twombly* and *Iqbal* rejected.”


The Sixth Circuit affirmed summary judgment in favor of a Tennessee television station, in a mistaken identity libel suit. **Milligan v. U.S.**, 670 F.3d 686, 698 (6th Cir. 2012) (applying Tennessee law). The U.S. Marshalls Service erroneously arrested plaintiff instead of a fugitive with the same name. Compounding the error, they invited the media to witness and videotape the arrest. One day after all charges were dropped, the station aired its report and video of plaintiff’s arrest. The Sixth Circuit held there was no evidence of actual malice because the station did not know the plaintiff was wrongly arrested and had no duty to investigate the validity or status of the arrest.

A Texas appellate court held that a doctor who, among other things, had a radio program and wrote editorials, was a member of the media entitled to an interlocutory appeal from a denial of a motion for summary judgment. **Hotze v. Miller**, 361 S.W.3d 707 (Tex. App. 2012); **petition**
for review filed (May 17, 2012). As to actual malice, “the mere fact that a defamation defendant
knows that a public official has denied harmful allegations or offered an alternative explanation
of events is not evidence that the defendant doubted the allegations.”

A divided New Jersey Supreme Court affirmed summary judgment to a local newspaper
over an erroneous front page “teaser” headline stating that plaintiffs had been arrested in a pump-
news article itself made clear that plaintiffs were only facing a civil complaint. “Although this
case unquestionably involves sloppy journalism, the careless acts of a harried editor, the
summary judgment record before us cannot support a finding by clear and convincing evidence
that the editor knowingly or in reckless disregard of the truth published the false teaser.” The
editor responsible for the mistake testified that he believed the teaser was correct at the time of
publication. Looking at the entire record the court found no reason to find the editor’s
explanation “unworthy of belief.” The dissent criticized this approach, arguing there was an
issue of credibility for the jury to decide.

A Texas appellate court affirmed summary judgment to a reporter and magazine
App. Aug. 8, 2012). At issue was a magazine article on alleged police misconduct. The plaintiff
police officers argued that summary judgment was not warranted because the defendants relied
in part on confidential sources and plaintiffs questioned whether the sources existed. This,
however, was no bar to summary judgment. The court acknowledged that most of the cases
granting summary judgment for lack of actual malice do not involve a media defendant’s
reliance on confidential sources. Here, however, the confidential sources were not the primary
source of the allegations, but were used to corroborate information from named sources and
police records.

The behavior of a Little League coach was a matter of public concern, triggering the
application of the actual malice standard under New Jersey law. Rossi v. CBS Corporation, 40
Media L. Rep. 2131 (N.J. Super. 2012). At issue was a television news report about an
altercation at a game which stated that plaintiff was “verbally abusing, or assaulting, rather, an
opposing player.” This “indisputably involved a matter of public interest or concern.” And there
was no evidence that the reporter doubted the accuracy of the report.

Strict Liability

Denying a motion for a new trial, the Oregon federal district court refused to set aside a
$2.5 million judgment against a blogger. Obsidian Finance Group v. Cox, No. CV-11-57-HZ,
2012 WL 1065484 (D. Ore. March 27, 2012), appeal pending (9th Cir.) As reported last year, the
court held that a strict liability standard applied because the plaintiffs were private figures, the
statements at issue did not involve a matter of public concern, and the defendant was non-media.
In concluding that the blogger was not a media defendant, the court originally noted she had no
journalism training, media affiliations or adherence to journalistic standards. On the motion for a
new trial, the judge clarified that “I did not state that a person who ‘blogs’ could never be
considered ‘media.’ I also did not state that to be considered ‘media,’ one had to possess all or
most of the characteristics I recited. Rather, I confined my conclusion to the record defendant
created in the case and noted that defendant had presented no evidence as to any single one of the
characteristics which would tend to establish oneself as a member of the ‘media.’” As to fault, the court reasoned that the U.S. Supreme Court “has not squarely held that a private figure plaintiff who sues a non-media defendant regarding allegedly defamatory statements made on a private issue, is required to demonstrate negligence to establish liability.” Thus a strict liability jury instruction was not erroneous.

**Gross Irresponsibility**

In private figure cases involving matters of public concern New York applies a standard of gross irresponsibility – which is higher than negligence. Under this standard, the plaintiff must prove that the defendant published without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.

A New York appellate court reinstated a defamation claim against Metro newspaper over the use of plaintiff’s photo to illustrate an article on gang violence. *Knutt, et al. v. Metro International*, 91 A.D.3d 915 (N.Y. App. Div. 2012). As to fault, the court held that plaintiffs adequately pled the elements of gross irresponsibility at least to survive a motion to dismiss. The complaint stated “Metro acted in a grossly irresponsible and reckless manner without due consideration for the standards of information gathering and dissemination, and showed a reckless disregard for the truth, by prominently displaying the unrelated photograph of an African American child next to an article on gang violence in the city.” The court noted that prior to discovery plaintiffs could not plead any factual allegations concerning Metro’s methods for gathering information, researching, writing and editing the subject article. Thus giving the complaint a liberal construction, the claim should not have been dismissed.

A New York trial court dismissed a libel complaint brought by a Rabbi against a tabloid news article (and video) showing the plaintiff “cavorting” with two women in a hotel room. *Rabinowich v. NYP Holdings, Inc.*, 110427/2011 (N.Y. Sup., Nov. 29, 2012). In addition to being substantially true, the court found that defendants were not grossly irresponsible. First, the article related to a divorce and custody dispute and was therefore of legitimate public interest. Second, the newspaper’s reliance on the ex-wife as the source was not grossly irresponsible as a matter of law.

In the summary judgment context, a New York trial court ruled that a cable news broadcaster was not grossly irresponsible in reporting on allegations of discrimination by a landlord. *Levy v. Johnson*, 40 Media L. Rep. 1780 (N.Y. Sup. 2012). The subject matter was clearly of public concern and the broadcast was well sourced to insure accuracy.

A court granted summary judgment to a newspaper which reported on consumer complaints against a bridal shop. *Gebbia v. The Times Herald-Record*, No. 2009/6858 (N.Y. Sup. Aug. 13, 2012). The consumer complaints were a clear matter of public concern, and there was no evidence of gross irresponsibility in reporting those complaints.
5. Liability for Republication

Communications Decency Act Section 230

An Illinois appellate court affirmed dismissal of a defamation suit against a newspaper based on user comments posted to the paper’s website. Gains et al. v. Romkey et al., No. 3-11-0594, 2012 IL App (3d) 110594-U (2012). This was only the second Illinois appellate court decision to apply Section 230, and the court relied on more than a decade of case law from around the country to hold that the newspaper was immune from liability even where its terms of use allowed it to remove inappropriate comments.

Section 230 was similarly applied to dismiss a libel claim against a newspaper over a user comment posted to the newspaper’s website. Delle v. Worcester Telegram & Gazette Corp., 29 Mass. L. Rep. 239 (Mass. Super. 2011). The court dismissed notwithstanding plaintiff’s allegations that an employee or agent of the newspaper posted the comment. These allegations were merely “labels and conclusions” insufficient to establish a plausible entitlement to relief under federal pleading standards. See, e.g., Ashcroft v. Iqbal, 556 U.S. 662 (2009).

Rejecting what it called a “creative” attempt to plead around Section 230, a Louisiana federal court dismissed a defamation complaint against consumer review website Angie’s List. Courtney v. Vereb and Angies List, Inc., No. 12-655, 2012 U.S. Dist. LEXIS 87286 (E.D. La. June 21, 2012). Plaintiff argued that the website was not entitled to Section 230 protection because registered users are able to receive reviews by telephone and fax, in addition to online. The court, however, found no law or policy reason to hold the website responsible for third party statements.

In Ascentive, LLC v. Opinion Corp., 842 F.Supp.2d 450 (E.D.N.Y. 2011), the court dismissed a defamation complaint against PissedConsumer, a consumer complaint website. Plaintiff alleged that the website was responsible for third party reviews because it encouraged negative reviews and refused to remove the alleged defamatory posts. However, under section 230, simply “encouraging the publication of defamatory content” does not make the website operator “responsible, in whole or in part, for the creation or development of every post on the site.” The court added that “it is legally (although perhaps not ethically) beside the point whether defendants remove the material, or how they might use it to their advantage.” But see Vo Group, LLC v. Opinion Corp. d/b/a Pissedconsumer.com, 40 Media L. Rep. 2022 (N.Y. Sup. 2012) (Section 230 defense denied at motion to dismiss stage where plaintiff alleged the website wrote the defamatory comments).

A Kentucky federal district court refused to dismiss a libel and privacy suit against a gossip website called thedirty.com, holding that under Section 230 a website is responsible for offensive third-party content when “it in some way specifically encourages the development of what is offensive about the content.” Jones v. Dirty World Entertainment Recordings LLC, 840 F. Supp. 2d 1008 (E.D. Ky. 2012). The court found that the name of the website “in and of itself encourages the posting only of ‘dirt,’ that is material which is potentially defamatory or an invasion of the subject’s privacy.” Moreover, the court found separate grounds to deny Section 230 holding that the defendant endorsed the defamatory statements with his own online comments. The Sixth Circuit refused to hear an interlocutory appeal, finding that the website

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failed to show that a substantial public interest would be imperiled if it had to wait for a final order in the case to take an appeal on the Section 230 issue. *Jones v. Dirty World Entertainment, dba Thedirty.com et al.*, No. 12-5133 (6th Cir. May 9, 2012).

6. Privileges

**Fair Report Privilege**

The Sixth Circuit affirmed summary judgment in favor of a Tennessee television station, holding that the fair report privilege applied to a news report about plaintiff’s arrest. *Milligan v. U.S.*, 670 F.3d 686, 698 (6th Cir. 2012) (applying Tennessee law). In a case of mistaken identity, the U.S. Marshalls Service erroneously arrested plaintiff instead of a fugitive with the same name. Compounding the error, the Marshalls Service invited the defendant television station on a ride-along to cover the arrest. One day after all charges were dropped, the station aired its report and video of plaintiff’s arrest. Among other things the report stated that officers arrived “with warrants in hand.” The Sixth Circuit held that the news report was a fair and accurate account of official government action even if the phrase “warrants in hand” was inaccurate. In addition, there was no evidence of actual malice to defeat the privilege since the station did not know the plaintiff was wrongly arrested and had no duty to investigate the validity or status of the arrest.

In an interesting fair report case, the Court of Appeals of Alabama affirmed dismissal of a libel complaint premised on a television station’s accurate report about plaintiff’s arrest, but failure to broadcast an update following the dismissal of charges. *Jackson v. WAFF, LLC, and Huntsville Broadcasting Corp.*, No. 2110643, 2012 Ala. Civ. App. LEXIS 295 (Ala. App. Oct. 23, 2012). Under Alabama law, fair and impartial reports of arrests are privileged “unless it be proved ... that the publisher has refused upon the written request of the plaintiff to publish the subsequent determination of such suit, action or investigation.” No reported Alabama case ever considered this portion of the statute. However, the Court found it unnecessary to “delve into the parameters of the fair report statute” because plaintiff failed to allege that any of the broadcasts were false. The Court also rejected plaintiff’s argument that the fair report statute created a cause of action to obtain a retraction or clarification.

A divided New York appellate court affirmed summary judgment for The Buffalo News, holding that statements about the guilty plea of an air cargo company were protected by the state’s fair report privilege or were not “of and concerning” the individual plaintiff. *Alf v. The Buffalo News, Inc.*, No. 12-00560, 2012 N.Y. App. Div. LEXIS 7783 (N.Y. App. 4th Dept. Nov. 16, 2012). Noting that newspaper articles should not be “dissected and analyzed with a lexicographer’s precision,” the majority found the articles fairly and accurately summarized the company’s guilty plea to falsifying a document and paying fines and restitution to the government of $28 million. In addition, statements that only mentioned the company and not the sole shareholder plaintiff were not “of and concerning” plaintiff.

The fair report privilege applied to a local newspaper’s coverage of a murder prosecution, including reports based on a discovery memorandum that was part of criminal case file, but not offered into evidence at trial. *Piscatelli v. Smith*, 424 Md. 294, 309-10, 35 A.3d 1140, 1149 (2012). See also *Brewster v. Laurens County Advertiser*, 40 Media L. Rep. 1978 (S.C. Cir. April
However, in Abakporo v. Sahara Reporters, 40 Media L. Rep. 1543 (E.D.N.Y. 2011), the court refused to apply the fair report privilege to a petition from a Nigerian citizens group to the President of Nigeria. The defendants argued that such petitions are “akin to complaints in civil actions” in Nigeria. Refusing to extend the privilege to the document, the court noted that the Petition’s true authors are unknown and extending protection to such a document could fuel “mischief.”

The privilege was also denied to a legal publisher in an unusual defamation claim over a head note in a law report. Von Kahl v. Bureau of Nat’l Affairs, Inc., 810 F. Supp. 2d 138, 145-46 (D.D.C. 2011). At issue was a summary of a mandamus petition to the U.S. Supreme Court arising out of a murder conviction. The summary stated in part that plaintiff “showed no hint of contrition and made statements to press that he believed that murders of U.S. marshals in course of their duties were justified by religious and philosophical beliefs.” The head note summarized the prosecutor’s comments at sentencing, not the plaintiff’s court petition. Because the summary was not a fair abridgement of the mandamus petition itself the privilege did not apply.

An inaccurate summary was the basis for the denial of the privilege in Mitan v. Osborn, 39 Media L. Rep. 2498 (W.D. Mo. Sept. 16, 2011). The statement that plaintiff “stole mountains of money from unsuspecting small business owners from coast to coast and then sued almost anybody who complained about it” went beyond the litigation documents involving plaintiff. “A shady business deal, a questionable business practice or involvement as a defendant in a bankruptcy proceeding or other litigation does not equate to stealing mountains of money from unsuspecting small business owners,” the court concluded.

With respect to recognition of the privilege, the District of Maine federal court refused to apply the fair report privilege at the motion to dismiss stage finding that the privilege “has not yet been recognized in Maine.” Pan Am Systems, Inc. v. Hardenbergh, 2012 U.S. Dist. LEXIS 67020 at *17 (D. Me. May 14, 2012).

7. Discovery of Sources in Libel and Related Cases

Courts around the country continue to grapple with the scope of protection for anonymous speech on the Internet.

The Indiana Court of Appeals adopted a modified Dendrite test\(^4\) to protect the identity of anonymous online speakers sued for defamation. In re Indiana Newspapers Inc., 963 N.E.2d 534 (Ind. Ct. App. 2012). Under this test, a libel plaintiff must produce prima facie evidence of every element of his or her claim that does not depend on the commenter’s identity before the news organization is compelled to disclose the person’s identity. The Court, however, rejected the newspaper’s argument that the anonymous commenter was protected under the state’s shield

The Court reasoned that a person who comments on an already-published online news story and whose comment was not used by the news organization in its newsgathering and reporting function cannot be considered a “source” within the meaning of the Shield Law, Indiana Code section 34-46-4-2.

Similarly, in a defamation case against an anonymous online commenter, an Idaho District court held that an anonymous speaker can only be identified if the plaintiff: 1) makes reasonable efforts to notify the defendant of a subpoena or application for an order of disclosure; 2) demonstrates that it would survive a summary judgment motion and 3) show’s that his or her case and the necessity of disclosure outweights the poster’s First Amendment right of anonymous free speech. Jacobson v. Doe, Civ. 12-3098 (Idaho Dist. July 10, 2012) (relying on an unpublished Idaho federal district court decision, SI03, Inc. v. Bodybuilding.com, LLC, No. CV 07-mc-6311-EJL-LMB (D. Idaho March 23, 2010), vacated by SI03, Inc. v. Bodybuilding.com, LLC, 441 F. App’x 431 (9th Cir. 2011)(unpublished). Applying this standard, the court found sufficient evidence of actual malice for the claim to proceed. In addition, the court rejected the newspaper’s argument that the commenter was a confidential news source protected by the First Amendment and Idaho State Constitution. The court did not rule out that possibility, but found that the newspaper merely facilitated and administered the comments at issue rather than rely on them for news content.

Reviewing and applying the Dendrite standards for protecting anonymous online speech, a New Jersey appellate court affirmed that a subpoena seeking the identity of anonymous community forum online posters was properly quashed. Somerset Development v. Cleaner Lakewood, No. A-2819-10T3, 2012 N.J. Super. Unpub. LEXIS 2194 (N.J. App. Sept. 26, 2012) (unpublished). Among other things, the posters called the real estate developer plaintiff a “rip off artist” and “under the table crook” who was “stealing million in tax dollars.” The plaintiff satisfied two of the Dendrite requirements by giving notice of the subpoena and setting out the complained of statements in detail. But plaintiff failed to satisfy the third Dendrite prong and show a prima facie cause of action for defamation. Here no reasonable person would understand the comments to accuse plaintiff of committing actual criminal behavior.

An Illinois trial court, on reconsideration, held that a technology website was “news medium” under the state’s reporter’s privilege law and was entitled to shield the identity of a confidential source. Johns-Byrne Co. v. TechnoBuffalo LLC, et al., Cook County No. 2011 L 9161 (Ill. Cir. July 13, 2012). Plaintiff sued the website to obtain the identity of the person who leaked then-secret information about a smartphone to bring trade secret and breach of contract claims.

8. Remedies

Proof of Injury

The New Mexico Supreme Court ruled that proof of injury to reputation is required to recover for defamation. Smith v. Durden, 276 P.3d 943 (N.M. 2012). “Injury to reputation is the very essence of the tort of defamation,” – evidence of humiliation or distress is insufficient. The court acknowledged that proof of injury to reputation may be impossible in some cases, but added that “recovery for a mere tendency to injure reputation, or only upon a showing of mental
anguish, is not only too speculative ... it inappropriately blends defamation, a tort properly limited by constitutional protections, with other causes of action.”

The New Jersey Supreme Court addressed the doctrine of presumed damage to reputation in *W.J.A. v. D.A.*, 210 N.J. 229, 43 A.3d 1148 (2012). The court held that presumed damages are available to private figure plaintiffs to obtain nominal damages. The court noted that private figures face “real risk of harm” particularly through “misuse of the Internet.”

**Punitive Damages**

According to the 2012-2013 *MEDIA LIBEL SURVEY*, eight jurisdictions do not permit punitive damages in defamation cases. 5 Eleven states impose statutory limitations on punitive damage awards 6 and 21 states limit punitive damages through retraction laws. 7

Punitive damages in defamation cases are determined by state law, with only rough guidance from the Supreme Court on the constitutionality of such awards in the First Amendment context. 8 Several recent U.S. Supreme Court cases, though, have reviewed the constitutionality of punitive damages on due process grounds, 9 requiring de novo review of awards and cautioning that disproportionate awards will constitute a deprivation of property – standards now being applied in the defamation context.

South Carolina enacted a tort reform statute, effective January 1, 2012, which limits punitive damages to the greater of three times the amount of actual damages or $500,000. S.C. Code Ann. §§ 15-32-510 to -540.

In the first Alabama case to analyze the guideposts set out in *BMW of North America, Inc. v. Gore*, an appellate court held that an award of punitive damages may be higher in proportion to the compensatory or nominal damages awarded if the defamation was so egregious that enforcement of a ratio analysis would do an injustice to Alabama’s interest in punishing the tortfeasor. *Tanner v. Ebbole*, 88 So.3d 856, 875-876 (Ala. Civ. App. 2011).

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5 Louisiana, Michigan, Nebraska, Puerto Rico and Washington do not allow punitive damages; Massachusetts and Oregon prohibit punitive damages in cases involving the First Amendment; and New Hampshire, although prohibiting punitive damages, permits plaintiffs an “enhanced recovery” in tort cases where defendant acted with malice or wanton disregard of plaintiff’s rights.

6 Colorado, Georgia, Kansas, Missouri, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Texas and Virginia.

7 Alabama, California, Connecticut, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Minnesota, Mississippi, Montana, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma (rarely invoked), South Dakota, Tennessee, Utah and Wisconsin.


9. Criminal Libel

The Colorado legislature this year repealed the state’s 100 year old criminal libel statute, C.R.S. § 18-13-105, which among other things criminalized statements “tending to blacken the memory of one who is dead” and tending to “expose the natural defects of one who is alive.” The statute was rarely used, but was recently the subject of extended civil litigation after a college student was threatened with prosecution for publishing a web article satirizing one of his professors. See, e.g., Mink v. Knox, 613 F.3d 995 (10th Cir. 2010) (prosecutor not entitled to qualified immunity for issuing search warrant on student since “[n]o reasonable prosecutor could believe it was probable that publishing such statements constituted a crime warranting search and seizure of Mr. Mink’s property”).

Similarly, a Louisiana federal court ruled that a man arrested for criminal libel, and jailed overnight in leg irons, could pursue federal civil rights claims against the police officials who obtained and executed the arrest warrant. Simmons v. City of Mamou, et al., No. 09-663, 2012 U.S. Dist. LEXIS 36081 (W.D. La. March 15, 2012). Even though the arrest was made pursuant to a valid warrant, the defendants were not immune from suit because they 1) should have known that the Louisiana criminal libel law was unconstitutional as applied to the facts of the case; and 2) defendants withheld exculpatory facts in their affidavit to obtain the arrest warrant.

A California appellate court granted an anti-SLAPP motion striking a defamation complaint brought by a bank against a former employee who posted “rants and raves” about the bank on Craigslist.com. Summit Bank v. Rogers, 206 Cal. App. 4th 669 (Cal. App. 1st Dist. 2012). In granting the motion, the also court struck down as unconstitutional California’s bank rumor statute, Financial Code Sec. 1327, which imposes criminal liability for false statements and rumors about a bank’s financial condition. The statute, enacted in 1917, failed on multiple grounds: it lacked a fault standard, was vague and over broad, and discriminated based on content.

The Minnesota Supreme Court upheld the constitutionality of a state statute, Minn. Stat. § 609.505, that criminalizes the knowing communication of false information regarding police misconduct. State v. Crawley, 819 N.W.2d 94 (Minn. 2012). The court held that the statute only criminalized defamatory speech not protected by the First Amendment, and thus fell within the exception to the constitutional prohibition against content based discrimination.

10. Statute of Limitations / Single Publication Rule

Courts across the country continue to apply the single publication rule to Internet publications and to emerging online publishing platforms.

A hyperlink to an alleged defamatory article is not a republication within the meaning of the single publication rule. In re: Philadelphia Newspapers, LLC, 690 F.3d 161 (3rd Cir. 2012). The case arose in the context of a post-bankruptcy petition defamation claim against the publisher of the Philadelphia Inquirer. The plaintiff, a charter school management company, argued that a newspaper editorial defamed it by hyperlinking to a prior article criticizing the plaintiff. Affirming dismissal, the Third Circuit surveyed case law from around the country and concluded that “[i]f each link or technical change were an act of republication, the statute of limitations would be retriggered endlessly and its effectiveness essentially eliminated.”
The Sixth Circuit ruled that where a news report originally aired on a television station’s news broadcast related to the arrest of plaintiff, any additional publications, including on the television station’s website, are not separately actionable under Tennessee’s single publication rule. *Milligan v. U.S.*, 670 F.3d 686, 698 (6th Cir. 2012).

The Ninth Circuit affirmed summary judgment dismissing right of publicity claims brought by famed pilot Chuck Yeager against an aviation memorabilia website. *Yeager v. Bowlin*, 40 Media L. Rep. (9th Cir. 2012). Although the Court noted that “applying the single integrated publication test to non-traditional publications can be tricky,” it concluded that the district court correctly calculated the statute of limitations as accruing in October 2003. The Court flatly rejected Yeager’s claim that modifications to unrelated portions of defendants’ website constituted a republication of the complained of material. “This holding is consistent with cases in which we have applied the single-publication rule to federal statutes and with decisions of other courts, and prevents freezing websites in anticipation of litigation.” See also *Alberghetti v. Corbis Corp*, 713 F. Supp. 2d 971 (C.D. Cal. 2010), aff’d in part, 2012 U.S. App. LEXIS 14694 (9th Cir. 2012) (unpublished) (affirming summary judgment based on the single publication rule but reversing exclusion and calculation of attorney’s fees).

Minnesota joined the list of states that have applied the single publication rule to the Internet. *Shepard v. TheHuffingtonPost.Com, Inc.*, 40 Media L. Rep. 2605 (D. Minn. 2012). Although no Minnesota state court had considered the issue, the federal court was convinced that the state would follow the principles outlined in *Firth v. State of New York*, 775 N.E.2d 463 (N.Y. 2002) and subsequent cases. Thus the statute of limitations here began to accrue when the alleged defamatory article was published on the defendant’s website and the libel complaint against The Huffington Post was dismissed as time barred.

A New York trial court held that the addition of “share buttons” to an archived online article was not a republication even though the buttons facilitate the sharing of content. *Martin v. Daily News, LP*, 35 Misc. 3d 1210A (N.Y. Sup. 2012). The court found that the targeted audience for the updated article was the same as for the original publication – the newspaper’s readership. Readers could have always shared the article by e-mail or by printing and distributing them, so the “share buttons” did not affect the conclusion, and the changes were deemed to be minor. Thus, the restoration was “akin to a delayed circulation of the original rather than a republication.”

The Oklahoma Supreme Court declined to expressly adopt the single publication rule and instead applied the discovery rule in a mass media publication case. *Woods v. Prestwick House, Inc.*, 247 P.3d 1183 (Okla. 2011). The plaintiff in *Woods* sued a book publisher for using his image on a book cover without authorization. The trial court dismissed the case as time-barred, but the Oklahoma Supreme Court reversed. Although the case was brought one year after the expiration of the state’s statute of limitations for publicity claims, the Court held that the state followed the discovery rule and plaintiff’s delay in bringing suit may have been reasonable. Although 11,000 copies of the book were sold nationally, only 72 were sold in Oklahoma and plaintiff was not credited in the book. Whether plaintiff was diligent or lax in discovering the use of his image was a question for the jury. Moreover, the Court declined to expressly adopt the single publication rule – and cited dicta from a prior decision to the effect that Oklahoma still
follows the multiple publication rule. The *Woods* decision is the only modern case found by MLRC applying the discovery rule to a mass media publication.

In a libel case over a letter to the editor, an Ohio appellate court held that the statute of limitations against the letter writer begins to run when the letter writer gives the newspaper the letter, and not from the date of publication in the newspaper. *Humphrey v. Garbo*, 2011 Ohio 5193 (Ohio App. Oct. 3, 2011).

11. **Procedural Matters**

**Survivability**


**Personal Jurisdiction**

Analyzing in detail whether the *Calder* effects test could be applied to exert personal jurisdiction over an out-of-state news source, a divided Indiana Court of Appeals panel held that merely responding to questions from a reporter is not conduct “expressly aimed” at the forum state. *Davis v. Simon*, 963 N.E.2d 46 (Ind. App. 2012). The majority found that a television news reporter initiated contact with the out-of-state defendant who did nothing more than respond. Thus the defendant did not expressly aim his remarks to Indiana. While the court acknowledged that the resulting injury in Indiana may have been foreseeable to defendant, that foreseeability alone did not mean that defendant “purposefully availed himself of an opportunity to act in” Indiana. The dissenting judge argued that the circumstances of the case were, in fact, more compelling than in *Calder* for purposes of exercising jurisdiction. “The reporter worked only in Indiana, and WTHR broadcasts only in Indiana. Where else, but in Indiana, could the defamatory remarks have been aimed?” The Indiana Supreme Court accepted the case for review.

A divided New York Court of Appeals held the state did not have jurisdiction to hear a defamation case over statements made on a Vermont-based website. *SPCA of Upstate New York, Inc. v. American Working Collie Ass’n*, 18 NY3d 400 (2012). In blog postings, the defendant accused plaintiff of mistreating animals at its shelter facility. Prior to writing these statements, defendant had visited and called the shelter, and donated some supplies. The majority found that these contacts were insufficient to exert long-arm jurisdiction because there was no “substantial relationship” between the visits to New York and the allegedly defamatory website postings.

A North Carolina court dismissed a libel action against an Indian television network. *Danius v. Sun TV Network, Ltd.*, 2012 N.C.B.C. 17 (N.C. Super. 2012). There was no jurisdiction over the network where it had no contacts with North Carolina other than the distribution of its programs by a third-party.

Online publications made by defendants in Colombia were insufficient to confer personal jurisdiction under Georgia’s long-arm statute. *Henriquez v. El Pais Q'Hubocali.com*, No. 2:11-CV-191-RWS, 2012 WL 568246 (N.D. Ga. Feb. 21, 2012), aff’d 2012 U.S. App. LEXIS 25107 (11th Cir., Dec. 6, 2012). “[T]he only factual allegations raised in the Complaint regarding personal jurisdiction are that Defendants, in the country of Colombia, published the allegedly defamatory statements on a website that is accessible from Georgia and that Plaintiff is a resident of Georgia.”

12. International Developments

*United Kingdom*

Following an 18 month public inquiry into the News of the World phone hacking scandal, in November 2012 Lord Justice Leveson released a 2,000 page report recommending a new and aggressive regulatory scheme for national newspapers in England. The recommendations include the creation of a new code of conduct for the press and a new independent regulatory body with powers to levy fines of up to £1 million. The recommendations are now being debated in Parliament. For a detailed discussion and analysis see “Phone Hacking and the Press: The Leveson Report – New Press Regulations May Change For Ever the UK Press,” by David Hooper and Brid Jordan in this issue of the Bulletin.

A Defamation Bill to overhaul the law of libel in England and Wales is making its way through Parliament. A revised Bill was released in May 2012. Among other things, the revised Bill provides that a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant. The bill also adopts the single publication rule; contemplates increased protections for the operators of websites; and provides for some limits on jurisdiction to deter libel tourism in England. Further amendments to the Bill may be made during the legislative process, but it is expected that the Bill will become law in 2013.

The UK Supreme Court bolstered the responsible journalism defense by reversing a controversial Court of Appeal decision that had put the defense in question. *Flood v Times Newspapers Limited* [2012 UKSC11]. At issue was a news article reporting on an alleged corrupt police officer. The Court of Appeal (2011 EWCA Civ 804) ruled that the privilege did not apply because the newspaper gave too many unverified details about the allegations since “it would be tipping the scales too far in favor of the media to hold that not only the name of the claimant, but the details of the allegations against him, can normally be published as ... just because the general subject matter of the story is in the public interest.” This year the UK Supreme Court unanimously reversed. Publication of claimant’s name and details of the corruption allegations were a matter of public interest and in accordance with principles of responsible journalism.

A defamation claim against Google for alleged defamatory statements on a third-party blog was dismissed in *Tamiz v Google Inc. & Anor* [2012] EWHC 449. The High Court held that
Google was not the publisher of the blog, but simply had indexed it as a search engine. Moreover, Google was not required to take any steps to block or remove the content from its search results. This decision is now on appeal to the Court of Appeals.

**B. MEDIA PRIVACY AND RELATED LAW**

1. **False Light**

   According to the 2012-2013 MEDIA PRIVACY AND RELATED LAW SURVEY, 37 jurisdictions currently recognize the false light tort. Ten jurisdictions reject the tort.

   **Significant Media Cases**

   The status of false light law in Pennsylvania was muddled with conflicting appellate court rulings this year on whether the tort applies to publications on matters of public concern.

   In *Henderson v. Lancaster Newspapers, Inc.*, No. 1816 EDA 2011 (Pa. App. Sept. 28, 2012) (unpublished), a public official sued over a series of articles and editorials about a grand jury investigation. Affirming summary judgment for the newspaper, the court held that—all of the publications were substantially true or protected expressions of opinion and there was no evidence of actual malice. In addition, the panel noted that false light claims cannot be brought over matters of “legitimate concern to the public.”

   However, in *Krajewski v. Gusoff*, 53 A.3d 793 (Pa. App. 2012), a different panel reinstated a public official’s false light claim against a newspaper. The court “disavowed” prior decisions limiting false light claims to publications of no concern to the public. The newspaper has petitioned the Pennsylvania Supreme Court for review.

   A New Mexico district court dismissed a false light case filed by a former mayor against the local newspaper and its publisher, holding that New Mexico does not allow a public official to recover for false light invasion of privacy. *Mendoza v. Zollinger and Gallup Independent Company*, N. D-1113-CV-2010-334-II (N.M. County of McKinley, 11th Judicial District Ct.).

2. **Private Facts**

   **Recognition**

   According to the 2012-2013 MEDIA PRIVACY AND RELATED LAW SURVEY, 43 jurisdictions currently recognize a claim for publication of private facts. The tort has been specifically rejected in four jurisdictions.

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10 Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire (no state cases, but a federal court recognized the action), New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, West Virginia, District of Columbia and Virgin Islands.

11 Colorado, Florida, Massachusetts, Minnesota, New York, North Carolina, South Carolina, Texas, Virginia and Wisconsin.
**Significant Media Cases**

A Florida appellate court reinstated a private facts claim against Beasley Broadcasting over on-air statements made by a now-deceased Florida shock jock about plaintiff, his former girlfriend. *Doe v. Beasley Broadcasting Group Inc., et al.* No. 2d11-3869, 2012 Fla. App. LEXIS 15867 (Sept. 21, 2012). The appellate court held that the trial judge erred in directing a defense verdict, finding that the trial judge confused contract and tort requirements for injury. In broadcasts, the host called plaintiff a “stark raving bitch,” and an “infection” that needs to be “killed.” Plaintiff also testified that she had not voluntarily appeared on the radio program but thought she was having private conversations. The plaintiff, according to the appellate court, did not have to prove any special damages or pecuniary loss; and she had shown evidence of stress, humiliation and physical ailment to send the case to the jury. As to the substance of the privacy claim, the court stated, “It is clear from the record in this case that Jane Doe presented evidence that the disc jockey publicly disclosed private facts about her during the subject broadcasts.”

In an interesting case involving the boundaries between editorial speech and commercial use, a Massachusetts federal court denied a motion to dismiss privacy and emotional distress claims over the secondary use of an undoubtedly newsworthy photo. *Peckham v. New England Newspapers*, 865 F. Supp.2d 127 (D. Mass. 2012). The plaintiff alleged that an accident scene photo published in the paper was available for purchase on merchandise such as coffee mugs and mouse pads. Denying a motion to dismiss, the court ruled it was too early to decide whether a First Amendment defense applied, especially on an “anemic” record. The court noted that under Massachusetts law a determination of newsworthiness most often requires some discovery since the boundaries of the newsworthy defense are not clear. “In short, for present purposes, the court finds that reasonable minds may disagree as to whether the sale of an accident photograph, unaccompanied by any information regarding the accident, sold exclusively for commercial purposes disconnected to the dissemination of news, following the prior publication of the photograph alongside an undisputedly legitimate news article, crosses the line from the mere “giving of information” to a “sensational prying into private lives for its own sake.”

In a strong endorsement of the prohibition on prior restraints, a Florida federal court denied a motion for a preliminary injunction to prevent Gawker Media from publishing portions of a sex tape featuring wrestler Terry Bollea aka “Hulk Hogan.” *Bollea v. Gawker Media, LLC*, No. 8:12-cv-02348, 2012 U.S. Dist. LEXIS 162711 (M.D. Fla. Nov. 13, 2012). Gawker published an article about the video together with a short video excerpt. Bollea sued for intrusion, publication of private facts, violation of Florida’s right of publicity law, and intentional and negligent infliction of emotional distress. In addition, he sought a preliminary injunction requiring Gawker to take down the video clip and bar Gawker from publishing any other portions of the tape. The court denied the request finding it would amount to an unconstitutional

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13 Nebraska, New York, North Carolina, and Virginia.
prior restraint under the First Amendment. In a footnote the court explained that “In the context of privacy law, the privilege to publish facts of legitimate public concern extends beyond the dissemination of news to information concerning interesting phases of human activity even when the individuals thus exposed did not seek or have attempted to avoid publicity.”

The D.C. Circuit affirmed summary judgment dismissing a Drug Enforcement Administration agent’s statutory Privacy Act claim and state law private facts claim over the leak of an embarrassing video. *Paige v. Drug Enforcement Administration*, 665 F.3d 1355 (D.C. Cir. 2012). In 2004, speaking in Orlando about gun safety before an audience of 50 school children and parents, plaintiff accidentally shot himself in the thigh with his own gun. The incident was captured on video by one of the parents. That was the only video of the incident and it was taken into evidence by the DEA. The video later leaked and is available to this day on YouTube. Plaintiff’s private facts claim failed because the incident occurred in a public place and plaintiff knew he was being videotaped. The video contained no private facts, but merely gave further publicity to what plaintiff “himself left open to the public eye.” Moreover, the video involved a matter of public concern.

3. **Intrusion and Related Causes of Action**

**Recognition**

According to the 2012-2013 *MEDIA PRIVACY AND RELATED LAW SURVEY*, 44 jurisdictions recognize a claim for intrusion.14 Two jurisdictions have explicitly declined to recognize intrusion,15 in one jurisdiction a federal court has opined that the jurisdiction does not recognize the tort.16

**Significant Cases**

In a non-media case, the Illinois Supreme Court confirmed that the tort of intrusion is actionable. *Lawlor v. North Am. Corp. of Ill.*, 2012 Ill. 112530 (2012). This was the first time that the Illinois Supreme Court expressly considered the tort, though all five Illinois intermediate court districts had previously recognized the tort.

**Eavesdropping / Wiretap Law**

The Seventh Circuit held that the Illinois eavesdropping statute is unconstitutional as applied to people who openly record police officers performing their official duties in public. *ACLU of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir.), *cert. denied*, No. 12-318 (U.S. Nov. 26, 2012). The Illinois wiretap act makes it a felony to audio record “all or any part of any


15 New York and Virginia.

16 Eighth Circuit opinion interpreting North Dakota law.
conversation” unless all parties to the conversation give their consent even in circumstances where there is no expectation of privacy. In addition, the recording of a police officer is a felony with punishment of up to fifteen years in prison. In a 2-1 decision, the Court held that the statute likely violated the First Amendment and granted a motion for preliminary injunction against its enforcement. “Criminalizing all nonconsensual audio recording necessarily limits the information that might later be published or broadcast—whether to the general public or to a single family member or friend—and thus burdens First Amendment rights,” the majority wrote. Judge Posner wrote a lengthy dissent arguing that the majority decision would interfere with police investigations. “An officer may freeze if he sees a journalist recording a conversation between the officer and a crime suspect, crime victim, or dissatisfied member of the public” he reasoned.

4. **Misappropriation/Right of Publicity**

**Recognition**

According to the 2012-2013 MEDIA PRIVACY AND RELATED LAW SURVEY, 47 jurisdictions currently recognize the torts of misappropriation / right of publicity.¹⁷ In seven jurisdictions the courts have not yet had the opportunity to rule on the issue.¹⁸

**Legislative Updates**

In California, a bill was introduced to amend the statute of limitations for right of publicity claims against websites. California has a two year statute of limitations for right of publicity claims. S.B. 999 would have eliminated the statute of limitations for claims against websites. The bill was referred to committee, no hearings were ever held and the bill died at the end of the session.

Indiana passed an amendment to the state’s existing right of publicity statute that would apply rights retroactively (HEA 1258). It provides that for deceased persons, the right of publicity statute is applicable whether the person died before or after enactment of the statute (July 1, 1994), and, if before, then the rights granted in the statute are considered to have existed at the time of the person's death. Under the state’s existing statute, the right terminates 100 years after the person's death. So, the amendment would sweep in anyone who died after 1912. The amendment also exempts deceased personalities who became famous as the result of being “formally” charged with or convicted of a crime.


¹⁸ Alaska (no modern cases have ruled on the issue), Guam, Iowa, Montana (no state cases, but the Ninth Circuit suggested the tort is viable under Montana law), North Dakota (no direct cases but addressed in dicta), South Dakota, and Wyoming.
In Maryland, H.B. 557 was introduced to create a descendible right of publicity extending 70 years after death and retroactively to persons who died after 1942. It was given an unfavorable report in Committee and died at the end of the session.

In Massachusetts, S.2382 would have created a post-mortem right of publicity (terminating 70 years after death). It passed the Senate but failed to move out of the House Ways and Means Committee.

New Hampshire Governor John Lynch vetoed Senate Bill 175, the so-called “J.D. Salinger bill,” which would have created a descendible right of publicity extending 70 years after death. The bill would have prohibited the use of a person’s identity for “commercial purposes,” but as passed by the legislature it contained no definition of what constituted a commercial use. Because of this, the Governor vetoed the bill stating it “would potentially have a chilling effect on legitimate journalistic and expressive works.”

**Significant Cases**

In long-running litigation over Marilyn Monroe’s publicity rights, the Ninth Circuit ruled that the dead actress’s publicity rights have extinguished because she was domiciled in New York at the time of her death and New York does not recognize postmortem publicity rights. *Milton H. Greene Archives v. Marilyn Monroe Llc.*, 692 F.3d 983 (9th Cir. 2012). The court noted that the lengthy dispute ended “exactly the way that Monroe herself predicted more than fifty years ago: ‘I knew I belonged to the Public and to the world, not because I was talented or even beautiful but because I had never belonged to anything or anyone else.’”

A California federal court dismissed a right of publicity lawsuit over the use of Albert Einstein’s image in a car advertisement. *Hebrew University of Jerusalem v. General Motors LLC*, 2012 U.S. Dist. LEXIS 148150, 40 Media L. Rep. 2449 (C.D. Cal. 2012). Applying New Jersey law because Einstein was domiciled there at the time of his death in 1955, the court found that New Jersey would recognize a common law postmortem right of publicity, but such a right lasts no more than 50 years. Thus Einstein’s identity had entered the public domain by the time the advertisement was published. The court rejected plaintiff’s argument that a common law postmortem right of publicity should be coterminus with the Copyright Act, which protects copyrights for 70 years after death. Public policy and First Amendment considerations weighed against “a mechanical application” of Copyright Act to a publicity claim. Moreover, the New Jersey Supreme Court would likely reject lengthy postmortem rights on First Amendment grounds – absent a legislative directive to the contrary.

A long-running right of publicity case against *Hustler* magazine finally came to an end in 2012, as the Eleventh Circuit threw out a punitive damage award against the publisher and the Supreme Court declined to hear plaintiff’s appeal. *Toffoloni v. LFP Publishing Group, LLC, et al.*, 40 Media L. Rep. 1681 (11th Cir. 2012), cert. denied, 2012 U.S. LEXIS 9546 (Dec. 10, 2012). The magazine published 20-year old nude photos of former model and wrestler Nancy Benoit after she was murdered by her husband. In an earlier opinion, the Eleventh Circuit held the photos were not “related in time nor concept” to the murder case and therefore publication was not protected by the newsworthiness exception to Georgia’s right of publicity law. The case eventually went to trial and the jury awarded Benoit’s estate $125,000 in compensatory damages.
and $19.6 million in punitive damages. On post-trial motion, the punitive damage awarded was reduced to $250,000. In an unpublished decision, the Eleventh Circuit threw out all punitive damages since the magazine honestly believed that publication was newsworthy. “Because there was overwhelming evidence that LFP reasonably and honestly (albeit mistakenly) believed that the photographs were subject to the newsworthiness exception to the right of publicity, we conclude that no reasonable jury could find by clear and convincing evidence that punitive damages were warranted in this case.”

The North Carolina Court of Appeals affirmed a $5 million damage award to five North Carolina policemen in a libel and privacy lawsuit over a documentary-style DVD profiling a best-selling rapper. *Nguyen v. Taylor*, S.E.2d 551 (N.C. App. 2012). The music star and a record label failed to respond to plaintiff’s discovery requests for admissions. This prompted the trial court to grant summary judgment to plaintiffs and hold a bench trial solely on damages for claims of libel, misappropriation and unfair and deceptive trade practices. The Court of Appeals affirmed liability and compensatory damages on each of the claims based on defendants’ failure to contest the admissions. These admissions included that the footage used in the DVD appropriated plaintiffs’ likenesses for his own advantage and “made plaintiffs unwitting performers in his commercial DVD.”

The Northern District of Georgia certified a series of questions to the Georgia Supreme Court to help determine whether a minor who was featured in a *Girls Gone Wild* video and related advertising has a claim for misappropriation of image. *Bullard v. MRA Holding, LLC and Mantra Films, Inc.*, No. 1:04-cv-02407-JEC, 2012 U.S. Dist. LEXIS 121308 (N.D. Ga., Aug. 27, 2012). Finding it “not at all clear that the law has caught up with the kind of vulgar exploitation of a young girl” typical of the video series, the court specifically sought clarification on whether Georgia law applied to an incident that occurred in Florida, whether a claim for misappropriation exists under the circumstances, and whether consent to being videotaped on the street protects the use of plaintiff’s image on a videotape cover and related advertising.

A New York federal court dismissed a misappropriation claim brought by local celebrity “the Naked Cowboy” against the producers of a television soap opera. *Naked Cowboy v. CBS*, 844 F. Supp.2d 510, 514-515(S.D.N.Y. 2012). Plaintiff alleged his persona was used in defendants’ television show, but the court held that under New York’s misappropriation statute “the right to privacy does not extend to fictitious characters adopted or created by celebrities.

In other New York cases, a trial court dismissed misappropriation claims against ABC over the use of a YouTube video clip on the Jimmy Kimmel comedy show. *Sondik v. Kimmel*, 941 N.Y.S.2d 541 (N.Y. Sup. 2011). Plaintiff could not state a claim under New York law for the unauthorized use of his likeness as the use of his image in a comedy segment qualified for the “newsworthy exception” to liability under Sections 50 and 51 of New York’s Civil Rights Law. See also *Rabinowich v. NYP Holdings, Inc.*, 110427/2011 (N.Y. Sup., Nov. 29, 2012) (dismissing misappropriation claim against newspaper for publishing article about plaintiff); *Devenanzio v. HBO*, (N.Y. Sup. May 8, 2012) (dismissing claims against HBO over the use of the name “Johnny Bananas” in the series *Entourage* on statute of limitations grounds).

An Illinois court dismissed a right of publicity suit against the Travel Channel over an episode of the show “Extreme Fast Food.” *Zglobicki v. The Travel Channel, LLC, et al.*, No. 11-
CV-6346 (N.D. Ill. Feb. 2, 2012). The plaintiff alleged she was filmed without permission while eating at a popular hot dog stand profiled in the show. Plaintiff sought to bring a class action lawsuit on behalf of herself and other customers filmed without permission. Dismissing the complaint, the court held that plaintiff’s appearance in the show was a non-commercial use outside the scope of the statute. Moreover, the court observed: “Exposure of the self to others in varying degrees is a concomitant of life in a civilized community.” See also Jordan v. Jewel Food Stores, Inc., 851 F. Supp.2d 1101 (N.D. Ill. 2012) (holding that a supermarket’s tribute page to Michael Jordan in a special issue of Sports Illustrated was non-commercial).

Statute of Limitations

In an Oklahoma right of publicity case, the state Supreme Court declined to adopt the single publication rule and instead applied the discovery rule. Woods v. Prestwick House, Inc., 247 P.3d 1183 (Okla. 2011). The plaintiff sued a book publisher for using his image on a cover without authorization. The trial court dismissed the case as time-barred, but the Oklahoma Supreme Court reversed. Although the case was brought one year after the expiration of the state’s statute of limitations for publicity claims, the Court held plaintiff’s delay in bringing suit may have been reasonable based on when he discovered the use. Although 11,000 copies of the book were sold nationally, only 72 were sold in Oklahoma and plaintiff was not credited in the book. Declining to expressly adopt the single publication rule, the Court cited dicta from a prior decision to the effect that Oklahoma still follows the multiple publication rule.

5. Intentional Infliction of Emotional Distress (IIED)

Recognition

According to the 2012-2013 MEDIA PRIVACY AND RELATED LAW SURVEY, all 54 jurisdictions recognize the tort of intentional infliction of emotional distress, and 40 have case law specifically dealing with the tort in the media context.19

6. Negligent Infliction of Emotional Distress (NIED)

Recognition

According to the 2012-2013 MEDIA PRIVACY AND RELATED LAW SURVEY, 46 jurisdictions currently recognize a cause of action for negligent infliction of emotional distress.20 Six jurisdictions have expressly rejected the tort in all cases.21

19 Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas (federal), Kentucky (intermediate), Louisiana, Maine (federal), Maryland, Massachusetts, Michigan (intermediate), Minnesota, Mississippi (federal), Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma (intermediate), Pennsylvania, Puerto Rico, Rhode Island (federal), South Carolina, Texas, Utah, Virginia, Washington, West Virginia and Wyoming.

A New Jersey federal district court dismissed in part, and granted in part, a motion by Meredith Corporation to dismiss a highly publicized lawsuit by a New Jersey mother suing after her educational breastfeeding video was spliced by a third party into an online porn video. Sahoury v. Meredith Corp., 40 Media L. Rep. 2182 (D. N.J. 2012). Plaintiff alleged sufficient facts to state a claim for NIED based on allegations that she “suffered severe injury by being associated with pornography” and suffered from “humiliation, severe stress, anxiety, panic attacks, crying and shaking spells, vomiting, depression, sleeplessness, anger, [and] sadness.”

7. Breach of Contract

An unusual lawsuit against the popular website Internet Movie Database (IMDb.com), and parent company Amazon.com, for disclosing the true age of an actress survived, in part, a motion to dismiss. Hoang v. Amazon.com, No. C11-1709 (W.D. Wash. March 28, 2012). The plaintiff alleged the website damaged her acting career by revealing her true age. The district court concluded she adequately pled a straightforward action for breach of contract of the subscriber agreement and deceptive business practices. “The plain language of the contract does not permit Defendants unfettered use of the personal information that Plaintiff provided of the purposes of processing payment.” While this does not prove a breach of contract, it was enough to state a claim.

8. Interference with Contract/Business Relations

The Minnesota Court of Appeals reversed a $60,000 jury award against a blogger for tortious interference. Moore v. Hoff, 821 N.W.2d 591 (Minn. App. 2012). The blogger was sued for libel and tortious interference over postings that allegedly caused plaintiff to lose his job. Following a trial, the jury returned a verdict against plaintiff on the defamation count, finding the statements at issue were true; but in favor of the plaintiff on the tortious interference count, and awarding damages. Reversing the Court of Appeals held that a claim for tortious interference with a contract or prospective business advantage cannot be based on conveying true information to a third party. Analyzing the issue the court stated: “When a person conveys unflattering and possibly damaging information to another person's employer, it is unlikely that the motivation for conveying that information is born out of affection. It is much more likely that the intent is for the employer to take responsive action—up to and including termination—based on the content of that information. Regardless of the motivation of the messenger, if the information conveyed is true, it is not appropriate for liability to attach.”

A New York federal district court dismissed with prejudice a lawsuit brought by an attorney against two ex-girlfriends over web postings accusing him of being a “liar” and “cheater.” Couloute v. Ryncarz, et al., No. 11 CV 5986 (S.D.N.Y. Feb. 15, 2012). Among other things, plaintiff failed to state a claim for tortious interference with prospective business relations premised on allegations that he lost clients because of the postings. The web postings were clearly opinion and even if those opinions harmed plaintiff’s professional reputation they were not targeted at any specific professional relationships to support a claim for tortious interference. Even though Plaintiff’s reputation has suffered, I am unwilling to take the leap from generalized

21 Alabama, Arkansas, Georgia, Kentucky, Maryland, and Texas.
comments calling Plaintiff a “liar” and a “cheater”—on a website called “liarscheatersrus” no less—to actions directed at specific business relationships.

9. Injurious Falsehood / Disparagement

A New York federal court dismissed claims of injurious falsehood, false advertising and deceptive trade practices, against the publisher of a scientific journal. ONY, Inc. v. Cornerstone Therapeutics, Inc. et al., No. 11-CV-1027S, 2012 U.S. Dist. LEXIS 69956 (W.D.N.Y. May 17, 2012). A research article comparing the mortality rates associated with two drugs was “debatable hypotheses rather than assertions of unassailable fact.” The court noted that “[t]he chilling effect of protracted litigation can be especially severe for scholarly journals,” and suggested that peer review rather than judicial review was appropriate.


10. Other Theories of Media Liability

Americans with Disabilities Act (ADA)

California and Massachusetts courts split on whether Netflix is required to provide captions under the Americans with Disabilities Act. Nat’l Ass’n of the Deaf v. Netflix, Inc., No.11-CV-30168-MAP, 2012 WL 2343666 (D. Mass. June 19, 2012); Cullen v. Netflix Inc., No. 5:11-cv-01199-EJD, 2012 WL 2906245 (N.D. Cal. July 13, 2012). At issue in both cases was whether the “Watch Instantly” video streaming service on Netflix’s website constituted a “place of public accommodation” under the ADA’s requirement that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of… any place of public accommodation.” 42 U.S.C. § 12182(a). The Massachusetts federal court in Nat’l Ass’n held that the Netflix website was a “place of public accommodation” and could therefore be liable for a violation of the ADA, but the California federal court in Cullen rejected that exact proposition.

A similar lawsuit was brought under California state civil rights and disabilities laws against CNN, alleging that CNN is in violation of the law by not captioning news videos available on CNN.com. Greater LA Agency on Deafness, et al., v. Cable News Network, Inc., 862 F. Supp.2d 1021 (N.D. Cal. 2012). Without reaching the merits, the court denied an anti-SLAPP motion to strike on the ground that plaintiffs’ action did not target defendant’s speech activities.

Fraud

A New Jersey federal district court allowed a fraud claim to go forward against Meredith Corporation in a highly publicized lawsuit by a New Jersey mother suing after her educational breastfeeding video was spliced by a third party into an online porn video. Sahoury v. Meredith Corp., 40 Media L. Rep. 2182 (D. N.J. 2012). Plaintiff had signed a broad release, but alleged she was promised that only her first name would be used in the educational video and it would
only be shown on defendant’s “Parents” website and cable television channel. Instead, plaintiff’s full name was used and the video was available on YouTube. The court held this was enough to move the claim “across the line from conceivable to plausible” under the Twombly/Iqbal standard.

A Montana federal district court dismissed a purported class action lawsuit against the authors and publisher of the 2006 best seller “Three Cups of Tea,” and 2009 follow up book “Stones into Schools,” holding that plaintiffs failed to state any claims over alleged fabrications in defendants non-fiction books. *Pfau v. Mortenson*, 858 F. Supp.2d 1150 (D. Mont. 2012). The plaintiffs sought to hold the authors and publishers liable for falsely marketing the book as non-fiction. After entertaining four complaints, the court dismissed the lawsuit with prejudice, noting that “the imprecise, in part flimsy, and speculative nature of the claims” made any further amendments futile.

### Section 1981

A Tennessee federal district court dismissed a civil rights lawsuit against ABC and the producers of *The Bachelor* and *Bachelorette* shows for failing to cast people of color as the lead in either of the popular reality television shows. In a case of first impression, the court held that casting decisions are protected by the First Amendment from claims of racial discrimination in contracting. *Claybrooks v. American Broadcasting Companies, Inc.*, 40 Media L. Rep. 2417 (M.D. Tenn. 2012). Plaintiffs sued ABC and related producers for violating 42 U.S.C. § 1981, a post-Civil War statute that, among other things, prohibits discrimination in the formation of contracts. Plaintiffs noted that in the 24 combined seasons of the shows no person of color had ever been cast as the lead. Plaintiffs alleged the producers intentionally discriminated against non-whites in their casting decisions to avoid the risk of alienating viewers and advertisers by featuring interracial couples. Casting decisions, the court found, are core aspects of the creative process. While the plaintiffs had a laudable goal of promoting acceptance of interracial relationships, the First Amendment barred their effort to force the producers to alter their content to promote that message.

### Sex Trafficking

In 2012, Washington enacted a law designed to prohibit the depiction of minors in sex industry advertisements. See Wash. Rev. Code §9.68A.0004 (West 2012). The law makes it a criminal offense if a person “knowingly publishes, disseminates, or displays, or causes directly or indirectly to be published, disseminated, or displayed, any advertisement for a commercial sex act, which is to take place in the state of Washington and that includes the depiction of a minor.” Advertisers have a defense if they “made a reasonable bona fide attempt to ascertain the true age of the minor” by requiring proof from a driver’s license or other types of identification cards. Relying on the minor’s own representation of his or her age, without checking for proof from identification, is not a defense. The law was set to go into effect on June 7, 2012.

third parties – namely ads for commercial sex acts depicting minors” and because its scienter element “creates an incentive for online service providers not to monitor the content that passes through its channels.” In December, the state announced it would not challenge the district court’s ruling.

In May 2012, the Tennessee state legislature passed a similar law, 2012 Tenn. Pub. Acts 1075 which makes it a crime if a person “knowingly sells or offers to sell an advertisement that would appear to a reasonable person to be for the purpose of engaging in what would be a commercial sex act . . . with a minor.” In June, 2012, Backpage.com filed a complaint to declare invalid and enjoin enforcement of the law, for, among other reasons, its alleged violation of Section 230. Tennessee agreed to delay enforcement of the law pending a court hearing on the complaint.

Wrongful Death

A Texas trial court dismissed for lack of personal jurisdiction a wrongful death lawsuit against A&E Television. DeWolf v. Kohler, et al., No. 46416 (Tex. Dist. Feb. 13, 2012). The plaintiff sought to hold the cable broadcaster responsible for her husband’s death during a scuba diving trip, alleging that her husband watched the A&E series “Deep Sea Detectives” and went on the trip with a man who had participated in the television show. The court ruled that a nationally broadcast television show does not suffice to create jurisdiction in Texas where there are no other contacts with the state.

C. STATE ANTI-SLAPP STATUTES

At the end of 2012, 27 states, the District of Columbia and one U.S. territory have anti-SLAPP statutes – Arizona, Arkansas, California, Delaware, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington and Guam.

Anti-SLAPP statutes are designed to combat “strategic lawsuits against public participation” and generally provide for the early dismissal of claims brought against the protected right of petition and/or free speech. Statutes may also provide for a stay of discovery and the recovery of legal fees. The scope and application of the statutes to media cases remains very uneven among the states.

California

California continues to be in the vanguard of anti-SLAPP litigation and its broad statute is routinely applied in media libel and privacy cases.

A California appellate court reaffirmed that the “public interest” element of the anti-SLAPP statute is to be construed broadly. Hecimovich v. Encinal School Parent Teacher Org., 203 Cal. App. 4th 450, 464-68 (2012). The court held that a dispute between a youth basketball coach and parents was an issue of public interest – namely, “safety in youth sports, not to mention problem coaches/problem parents in youth sports.”
A federal court held that a disability rights lawsuit against CNN to make the broadcaster caption its online videos was not within the scope of the statute. Greater L.A. Agency on Deafness v. Cable News Network, Inc., 826 F. Supp.2d 1021, 1027-1033 (S.D. Cal. 2012). According to the court, CNN’s refusal to provide closed captioning was “not conduct in furtherance of protected speech rights.” The court rejected CNN’s argument that captioning – or not captioning – videos was a matter of editorial control. The court warned that extending the anti-SLAPP statute to the case would extend protection “beyond conduct in furtherance of creating speech to cover virtually any conduct of a news media organization.”

**District of Columbia**


In 3M Company v. Boulter, Judge Robert Wilkins held the law did not apply in federal court because it fatally conflicts with Rules 12 and 56 of the Federal Rules of Civil Procedure, which “provide the exclusive means for challenging the merits of a plaintiff’s claim based on a defense either on the face of the pleadings or on matters outside the pleadings.” Judge Wilkins relied on the Supreme Court’s decision in Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (U.S. 2010) which held that a New York statute governing certain class action lawsuits did not apply in federal court. In a 5-4 opinion by Justice Scalia, the Court held that if a Federal Rule governs a dispute the Federal Rule applies, unless it exceeds statutory authorization or Congress’s rulemaking power. Judge Wilkins found that Rules 12 and 56 “expressly prohibit” any pre-trial fact-finding and thus the D.C. anti-SLAPP statute directly collides with the Federal Rules.

In contrast, in Sherrod v. Breitbart, Judge Richard Leon implicitly held the statute applies in federal court. The primary issue before the court was whether the statute could be applied retroactively to a defamation complaint filed before the effective date of the statute. Judge Leon held it could not be applied retroactively because it was substantive rather than procedural law – and “only procedural statutes can be applied retroactively.” But as substantive law, the anti-SLAPP statute can apply in diversity actions in federal court.

Finally, in Farah v. Esquire Magazine, Inc., Judge Rosemary Collyer held the statute applies in federal court since the law “is substantive” or “has substantive consequences,” expressly disagreeing with Judge Wilkins’ decision in 3M Co. v. Boulter. She found persuasive decisions from the First, Fifth and Ninth Circuits holding anti-SLAPP statutes applicable in federal court. See Godin v. Schencks, 629 F.3d 79, 81 (1st Cir. 2010); Henry v. Lake Charles Am. Press, LLC, 566 F.3d 164 (5th Cir. 2009); U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999).

All three cases are currently on appeal to the D.C. Circuit.
**Illinois**

The Illinois Supreme Court significantly narrowed the application of the state’s anti-SLAPP law. *Sandholm v. Kuecker*, 2012 IL 111443, 962 N.E.2d 418 (2012). The statute immunizes from liability “[a]cts in furtherance of the constitutional rights to petition, speech, association, and participation in government ..., regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome.” As reported last year, the intermediate appellate court in *Sandholm* found that the statute “alters existing defamation law by providing a new, qualified privilege for any defamatory statements communicated in furtherance of one's right to petition, speak, assemble, or otherwise participate in government even with actual malice.” See 942 N.E.2d 544. The Illinois Supreme Court, however, ruled that the legislature could not have intended to create absolute immunity for defamation and other intentional torts. Instead the anti-SLAPP statute only applies to claims “solely based on” protected speech and with no other basis than to chill speech; that is, the lawsuit does not seek genuine relief for defamation or other tortious acts. These new requirements put substantial burdens on defendants seeking dismissal of cases under the SLAPP statute.

Applying the *Sandholm* standard, an Illinois appellate court held that the statute did not apply to a state court judge’s libel and privacy lawsuit against a television station. *Ryan v. Fox Television Stations, Inc., et al.*, No.1-12-0005, 1-12-0007, 2012 Ill. App. LEXIS 869 (Ill. App. Oct. 23, 2012). The news report was precisely the type of speech the Act was designed to protect, the court found. And the timing of the complaint (filed after an apology was made) and the demand for $5 million in damages suggested that plaintiff had a clear “retaliatory intent.” Nevertheless it was not dismissible. The defendant has the burden of showing the suit is meritless and could only do so here by providing evidence that the statement about plaintiff was true. The gist of the broadcast, according to the court, was that the Judge neglected his official duties by leaving work during business hours. But defendants failed to provide conclusive evidence to prove that.

**Louisiana**

Louisiana amended its anti-SLAPP law to provide for the filling of a motion to strike even where the plaintiff has voluntarily dismissed. Under the amendment, the “[i]f the plaintiff voluntarily dismisses the action prior to the running of the delays for filing an answer, the defendant shall retain the right to file a special motion to strike within [ninety days of service of the petition].”

A Louisiana federal district court, on reconsideration, clarified the application of the state anti-SLAPP statute, holding that the statute can be used to dismiss individual causes of action. *Louisiana Crisis Assistance Center v. Marzano-Lesnevich*, 40 Media L. Rep. 2330 (E.D. La. 2012). Last year the court ruled that the statute could only be used to dismiss a case in its entirety. See *Louisiana Crisis Assistance v. Marzano-Lesnevich*, 827 F. Supp.2d 668 (E.D. La. 2011). On the motion for reconsideration, the court acknowledged that under “a plain reading of the statutory text” the law can be used to strike individual causes of action. The plaintiff, a non-profit legal clinic, had sued a former legal intern turned author for breach of contract and fiduciary duty alleging essays and a planned book would reveal attorney-client
communications. The court reaffirmed that plaintiff demonstrated a likelihood of success on its claims. The court also reaffirmed that the statute could not be applied to strike plaintiff’s request for injunctive relief since this was merely a remedy and not a cause of action within the meaning of the statute.

**Maine**

The Maine Supreme Court announced a change in the burden of proof on anti-SLAPP motions, making it more difficult for cases to be dismissed under the state anti-SLAPP statute. *Nader v. Maine Democratic Party*, 41 A.3d 551, 563 (Me. 2012). To defeat a motion to strike, the non-moving party (typically the plaintiff) must make a prima facie showing that 1) defendant’s petitioning activity was “devoid of any reasonable factual support or arguable basis in law”; and, 2) that plaintiff suffered actual injury. The Court noted that prima facie proof is a “low standard” that does not depend or reliability of credibility of evidence – which is to be considered at a later stage in litigation. Lower courts had been applying a so-called “converse summary-judgment-like standard” by viewing evidence in the light most favorable to the movant. The Supreme Court faulted this approach, finding it burdened the constitutional rights of the nonmovant.

**Nevada**

The Ninth Circuit held that an order denying a motion to dismiss under Nevada’s anti-SLAPP statute, *Nev. Rev. Stat. §§ 41.635-670*, is not immediately appealable in federal court. *Metabolic Research, Inc. v. Ferrell*, 668 F.3d 1100 (9th Cir. 2012), withdrawn by 693 F.3d 795 (9th Cir. 2012). The Court reasoned that the enhanced protection for speech provided by the Nevada anti-SLAPP statutes does not in and of itself satisfy the strict collateral order doctrine governing when non-final judgments are appealable. “In other words,” the Court wrote, “we have recognized that an anti-SLAPP statute’s aim of protecting its citizens’ First Amendment rights can, in some circumstances, be adequately protected without recourse to immediate appeal.”

**New York**

The narrow application of New York’s anti-SLAPP statute to media defamation cases was highlighted once again in *Gilman v. Spitzer et al.*, 40 Media L. Rep. 2345 (S.D.N.Y. 2012). Slate.com invoked the statute as alternate grounds to dismiss a libel claim by an insurance executive suing over an article discussing white collar crime prosecutions. Defendant argued that plaintiff was a “public applicant or permittee” within the meaning of the statute because he was licensed by the NY Insurance Department. “Despite Herculean efforts,” the court wrote, “defendants cannot plausibly allege that Gilman's lawsuit is "materially related to any efforts" on the part of Spitzer or Slate to "comment on . . . or oppose" Gilman's insurance license,” the court noted.

On the legislative front, the Chair of the New York State Assembly Committee on the Judiciary, introduced legislation to expand the scope of the state anti-SLAPP law. The bill would amend the definition of SLAPP suits to:

Any communication in a place open to the public or a public forum in connection with an issue of public concern; or
Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

The bill would also provide for the mandatory award of attorneys’ fees in line with other anti-SLAPP statutes across the country.

**Texas**

The scope of the interlocutory appeal right under Texas’s recently enacted anti-SLAPP statute was interpreted narrowly by one appellate court. *Jennings v. WallBuilder Presentations, Inc.*, 378 S.W.3d 519 (Tex. App. 2012). The court held that the statute provides for an interlocutory appeal only when a trial court does not rule on a motion to strike within 30 days. If a court denies a motion within 30 days, there is no right to an interlocutory appeal.

**Washington**

A disgruntled lawyer’s complaint against a rating website was struck under the state anti-SLAPP statute. *Davis v. Avvo, Inc.*, 40 Media L. Rep. 2372 (W.D. Wash. 2012). The plaintiff sued the website for misuse of his likeness, false advertising and deceptive trade practices. The website profile ranked plaintiff numerically, based on years in practice, disciplinary record, professional achievements, and industry recognition. Because the website’s ratings were not for purposes of trade or commerce, plaintiff failed to state a claim.