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Media Law Resource Center
MEDIA LAW LETTER

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Things that Keep a Conference Organizer Awake at Night

In place of my usual Executive Director's column, I've asked our staff attorney Mike Norwick to give us an inside account of the recent Legal Frontiers in Digital Media conference. I think you'll find it unusually funny and informative. I'll be back next month with a regular column. Allbest, George Freeman

By Michael Norwick

What do you call it when the Supreme Court still hasn't decided the case that your entire afternoon session is based upon, and the microphone of one of your moderators goes dead at the very beginning of your first panel, and a scheduled panelist goes into labor three and a half hours before her session? I call it Wednesday.

After many years of organizing the *Legal Frontiers in Digital Media* conference, an often stress-inducing orchestration in which I'm a conductor of sorts, I've aspired to embrace that divine inspiration that calls on us to have the serenity to accept the things we cannot change. And then there are days like Wednesday, May 19th in which events on the ground turn serene calm into panic and hyperventilation in this conference planner. Thankfully, I am surrounded by a team of colleagues and co-planners that prove to be cool cucumbers in the face of some challenging conditions.

By the late fall, it became clear that the *Legal Frontiers* conference – usually held in the Bay Area – would have to be conducted virtually in 2021 due to the pandemic. We've all gotten used to Zoom over the past year and all have a good sense of the pros and cons of doing online events. In particular, the pros include being able to more easily schedule speakers who don't need to make travel arrangements, but the cons being the technical difficulties that can result from, e.g., an unstable internet connection. That and so-called "Zoom fatigue."

For our May 18-20, 2021 virtual digital conference, we had the advantage of being able to invite a number of speakers from around the world. Our Thursday panel on the EU's Digital Services Act brought together three experts from Europe: moderator, Remy Chavannes (Amsterdam), Google's Chiara Garofoli (Milan) and TikTok's Caroline Greer (Brussels) who joined in conversation with Stanford's Daphne Keller. Our Tuesday kickoff panel on content moderation was led by Andrew Bridges from a hotel room in Greece, and later that day, University of Ottawa professor, Michael Geist, spoke about the worldwide trend in news payment laws being imposed on digital platforms that host news snippets. Last but not least, our featured speaker on

What do you call it when the Supreme Court still hasn't decided the case that your entire afternoon session is based upon, and the microphone of one of your moderators goes dead at the very beginning of your first panel, and a scheduled panelist goes into labor three and a half hours before her session? I call it Wednesday.

Wednesday was the director of nascent Facebook Oversight Board, Thomas Hughes, who is based in London. So, the virtual format very much gave us the opportunity to bring together people who might not have otherwise been able to travel to the San Francisco area in a normal year. And while it was these distant (and potentially buggy) internet connections that frightened this conference planner the most, it seems as though technical glitches always come from the place you least expect.

In our case, internet connections with London and cities around the world worked fine, but it was apparently a faulty microphone utilized by the Facebook Oversight Board panel moderator and organizer, Bob Latham, that silenced and delayed the start of this highly anticipated session. Mind you, Bob’s mic worked fine in our virtual “green room” before the session, and he tells me he’d successfully done Zoom calls for the past 14 months without a hitch; but, of course, the technical gremlins chose the very start of this session – with 130 people watching – to make their appearance. Fortunately, our colleagues and partners at the Berkeley Center for Law & Technology (BCLT), who were the virtual hosts for this conference and took the lead on technical support, were in the background feeding Bob a checklist of potential fixes and work-arounds to overcome this snafu. Bob – a

seasoned trial lawyer – stayed calm in the face of this unexpected difficulty. The ultimate solution turned out to be Bob calling in on his mobile phone for the audio, while his video connection continued to work problem-free. Once we solved the technical problem, Bob and Tom Hughes, joined by Katy Glenn Bass from the Knight Institute, ended up having a very informative and thoughtful discussion addressing the effectiveness and legitimacy of this new so-called “Supreme Court” of Facebook, which included an analysis of their most noteworthy ruling to date regarding Facebook’s indefinite suspension of former president Trump. Due to the long break between sessions, we were able to let them run over to make up for lost time.

From the very outset of our digital conference planning over the winter, the Oversight Board’s decision on the Trump suspension was actually one of two major decisions we were hoping would be decided in time for an in-depth discussion during our conference, the other being the Supreme Court’s anticipated ruling in *United States v. Van Buren*, a case addressing what it means to access a computer system “without authorization” under the Computer Fraud and Abuse Act. The Court’s decision is expected to impact how information is collected and disseminated on the internet, as data scrapers face CFAA threats from public-facing websites that do not want their services mined for troves of user information. Back in January, when our planning committee (led by co-chairs, Ashley Kissinger, Kandi Parsons and Lauriebeth Bugawan) agreed to move forward with panels on the *Van Buren* case, as well as on the Facebook Oversight Board, for the May conference, we had every reason to believe that those two key decisions would be decided in time.

In the case of the *Trump* ruling by the Facebook Oversight Board, we were comforted by the

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knowledge that Facebook referred its decision – to indefinitely suspend Trump from its platform following the January 6 insurrection – to the Oversight Board on January 21, and it was the established practice of the Board to decide cases within 90 days. So surely, the decision would arrive by April, well in advance of the May conference? Not so fast. Come April 16, the Board announced – in a lump-in-throat moment for this conference organizer – that it would not decide the Trump case within the 90-day window, but rather “in the coming weeks.” What did that mean? Fortunately, it only meant a delay of a couple more weeks, with the decision handed down on May 5th (upholding, at least for the moment, the decision to suspend Trump from Facebook), still two weeks ahead of the conference.

While we lucked out with the “Supreme Court” of Facebook, we weren’t so fortunate when it came to the decision we were waiting for from the *real* Supreme Court. We had every reason to be hopeful: *Van Buren* had been argued at the end of November and wasn’t one of those blockbuster cases you’d expect the Court to hold on to until the end of the term. Early on, we had handed panel organization into the capable hands of Jonathan Blavin of Munger, Tolles & Olson, who put together a panel of public-interest lawyers who had submitted amicus briefs in the case. All we needed was a decision. Weeks and months went by with no decision. Decision days would find this MLRC staff attorney repeatedly hitting the “refresh” button on the supremecourt.gov opinions page in a manner similar to how one might approach a Las Vegas one-armed bandit, hoping against all odds for an elusive jackpot. Meanwhile, my colleague and co-planner, Jeff Hermes, was further panicked by the possibility that the delay was potentially due to Justice Thomas deciding to write separately once again to pontificate on the First Amendment’s application to the internet, as he has been known to do in recent months.

While Jonathan had planned for the possibility that we would not yet have our decision, it was only on that last decision day before the conference -- Monday May 17th -- that reality set in that we would go forward without an opinion in *Van Buren*. A disappointment to be sure -- but no problem -- Jonathan and the panel can take us through the arguments raised in their briefs and in the oral arguments and explain why this ruling will be significant in the areas of data privacy, data journalism and freedom of information on the internet. Wait, there’s a problem.

On the day of the Noon Pacific Time CFAA panel, Jonathan received an email at 8:27 a.m. PT from one of his panelists indicating that it looks like she’s going to be – earlier than expected -- having a baby that day! In quick consultation with Jonathan, I texted MLRC’s other resident CFAA guru, Marc Zwillinger. (Months earlier, conference co-chair Kandi Parsons had reminded me that her law partner, Marc, is a good emergency “phone a friend” for all things CFAA). Marc couldn’t do it, but Marc and Kandi’s partner, Stacy Brandenburg, could indeed fill-in on the panel! A few quick emails and texts and we had a substitute in under a half-hour from the time we learned our original panelist had gone into labor. Meanwhile, as MLRC and

While we lucked out with the “Supreme Court” of Facebook, we weren’t so fortunate when it came to the decision we were waiting for from the *real* Supreme Court.

BCLT staff were grappling with the aforementioned audio problems on the first panel, Jonathan was getting Stacy up to speed on how things would proceed on the second panel.

In the end, it all worked out fine, and with the convenience of Zoom, we've already made plans to hold a second session on the CFAA after *Van Buren* has been decided. While a traditional in-person conference takes place in a specific place over contiguous dates, a "virtual conference" can in some sense take place without the constraints of time and space and can be reconvened at will. (I know I'm no Stephen Hawking, but I'm trying to think multi-dimensionally). We're very much looking forward to once again holding this conference in-person in the Bay Area next year and seeing all of our friends without the aid of a computer screen. Still, if we've learned anything from this past year, it's that the conversation doesn't have to end when the face-to-face event ends, and we're all just a few clicks away from continuing important discussions all year long.

Michael Norwick is a staff attorney at MLRC.



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#TimesUp On #MeToo Defamation Suits— Defendants Need Our Help!

By Natalie A Harris

“The Silence Breakers” were honored as *Time* magazine’s [Person of The Year in 2017](#). These women (and men) sparked a revolution that was part of the #MeToo movement. Their courageous decision to speak up and speak out against their abusers forced a collective reckoning that has held many powerful men to account for the sexual assault and harassment committed with impunity for decades. Unfortunately, for many victims inspired to come forward as part of the #MeToo movement, the relief and liberation of telling their stories is followed by a retaliatory defamation suit filed by an angry abuser. A moment of triumph quickly shifts to despair as the victims are saddled with the emotional and financial burden of defending a re-traumatizing lawsuit.

Some celebrity victims have the resources necessary to hire competent defamation defense counsel to shut down their abusers’ effort to silence them through litigation. However, the vast majority of survivors cannot pay for legal representation and are unfamiliar with the legal process. One victim recently approached me and asked, “If truth is a defense, how do all these guys get away with suing the women they abused for speaking out?” The time, effort and expense required to prevail, and the uncertainty of victory often come as a harsh, unexpected blow.

TIME’S UP Legal Defense Fund and the Legal Network for Gender Equity provide a ray of hope for victims who find themselves in the legal dark. The Fund and the Network are housed at and administered by the National Women’s Law Center Fund. They help people facing sex discrimination, sex harassment, and related retaliation at work, at school connect with attorneys. Victims of sexual abuse and harassment also contact the Network seeking attorneys who can (1) provide counseling on the legal risks of speaking publicly about their sex harassment or assault and (2) provide litigation defense against threatened or filed defamation suits arising from the public disclosure of their abuse story. The first step involves the potential client’s completion of the [on-line request for help form](#).

If a matter qualifies sex discrimination or harassment in the workplace, education, or health care, the potential client is sent the names of three attorneys who are members of the Network. Attorneys in the Network agree to do an initial free consultation for all referred matters. The TIME’S UP Legal Defense Fund helps fund attorneys’ fees and media assistance in selected cases of workplace/industry sex harassment. Attorneys must be LNGE members to apply for funding. [Joining the Network](#) is simple, fast and free. [Applying for TIME’S UP Legal Defense Fund funding](#) is also quick and painless.

For many victims inspired to come forward as part of the #MeToo movement, the relief and liberation of telling their stories is followed by a retaliatory defamation suit.

TIME'S UP Legal Defense Fund will also consider funding cases that did not originally come in through TIME'S UP Legal Defense Fund or the Network. If you have a potential matter that you believe may be eligible for funding, you can join the Network and complete a funding application for consideration by TIME'S UP Legal Defense Fund.

Since TIME'S UP Legal Defense Fund began in 2018, there has been a consistent demand from potential clients for attorneys who specialize in defamation defense. The Network needs more competent defamation defense attorneys in all jurisdictions to join its ranks to provide a robust pool of attorneys. One example of the program's success was a case TIME'S UP Legal Defense Fund funded in Florida filed against a woman who was raped by her supervisor in the late 1990s. Because of the assault, she suffered from extreme anxiety and emotional distress. She finally decided to come forward many years later and talked about her experiences on the internet. As a result, she was approached by other women who said they had been assaulted by the same man. She named the offender publicly, and he sued her for defamation. TIME'S UP Legal Defense Fund funded her legal defense, and the defamation case against her was dismissed.

Joining the Legal Network for Gender Equity and the TIME'S UP Legal Defense Fund is an extraordinary opportunity for media attorneys to serve a community of clients often overlooked and victimized by the legal system. For young attorneys in particular, direct client contact can be rare, making it difficult to develop the crucial skills necessary to build and foster good attorney-client relationships. Network attorneys engage directly with individual clients on familiar issues, providing desperately needed quality service to those clients as well as valuable client relationship experience for the attorneys.

For more insight into the importance of this kind of work, and the benefits of serving as a Network attorney, please watch this [MLRC Next Gen Committee presentation](#) featuring TIME'S UP Legal Defense Fund Director Sharyn Tejani, Program Manager Sky Sealey and Network member attorney and MLRC member Natalie Harris of Baron Harris Healey in Chicago.

This past year has brought personal, economic and social upheaval along with an opportunity to reflect on the things that are most important in our lives. Perhaps you have asked yourself, "What can I do to help?" You can use your skills, experience and power to make the legal system work for those it was intended to protect. Please consider joining Legal Network for Gender Equity, and encourage others in the media bar to do the same.

For more information, you may contact:

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Chart-Topping, Grammy-Nominated Music Producer Not a “Public Figure”

Ruling Threatens to Stymie Speech, Chill Exposes of Sexual Abuse

By Kelly L. McNamee and Michael J. Grygiel

On April 22, 2021, the New York Appellate Division, First Department, [in a 3-2 ruling](#), affirmed a lower court’s decision that the tremendously successful and influential pop music producer, Lukasz Gottwald, who is widely known as “Dr. Luke,” is not a public figure for purposes of a series of legal disputes, known collectively as “Dr. Luke v. Kesha.”

Unless it is determined that New York’s recently amended anti-SLAPP statute applies, the ruling clears a pathway for Dr. Luke to prevail at trial on his claim that Kesha Rose Sebert, the pop music star known professionally by the mononym Kesha, defamed him by falsely accusing the producer of abuse and rape. From a jurisprudential perspective, the Appellate Division’s ruling is surprising given Dr. Luke’s prominence in the music industry, his popularity on social media, and his acknowledged influence over pop-music superstars such as Britney Spears, Doja Cat, Pink, Miley Cyrus, and Kelly Clarkson. The ruling is arguably more shocking from a public policy perspective, especially when one considers the chilling impact it may have on efforts by the press and the public to expose sexual abuse perpetrated by wealthy, influential, and well-connected men in the music industry.

Unless New York’s recently amended anti-SLAPP statute applies, the ruling clears a pathway for Dr. Luke to prevail at trial on his claim that Kesha defamed him by falsely accusing the producer of abuse and rape.

The *Dr. Luke v. Kesha* Lawsuits

Kesha initiated the lawsuits in 2014 when she sued Dr. Luke, her former producer, for sexual assault and battery, sexual harassment, gender violence, emotional abuse, and violation of California business practices, all of which had allegedly occurred over the ten years the two had worked together. Among other things, Kesha claimed that after a party in October 2005 when she was 18 years old, Dr. Luke drugged her, took her back to his hotel room, and sexually abused her. Noting the alleged abuse and unfair business practices, Kesha sought to untangle her career from Dr. Luke’s influence and control by voiding her contractual agreements with the producer, which obligated Kesha to provide exclusive recording services to Dr. Luke’s recording label. On the same day Kesha filed her action against Dr. Luke, the producer filed his own lawsuit against Kesha, claiming the singer defamed him by fabricating her allegations of abuse.

In April 2016, a New York trial court dismissed Kesha’s claims against Dr. Luke, holding, among other things, that the statute of limitations applicable to claims of rape and sexual abuse had expired. Dr. Luke’s defamation suit, however, continued. Recently, the Appellate Division affirmed a New York trial court’s determination on summary judgment that Dr. Luke is not a public figure under the First Amendment. With the defamation suit now on the verge of trial, the Appellate Division’s public figure determination could represent a major blow to Kesha’s defense.

Defamation Law’s Public v. Private Figure Distinction

As readers of this newsletter well know, the status of a defamation plaintiff is often critical to the outcome of a defamation claim—and for good reason. Acknowledging that politicians, celebrities, social media personalities, and others who enjoy a general level of fame in society are effectively able to communicate their views and respond to criticism, the United States Supreme Court has held that the First Amendment mandates a certain amount of latitude be given to defendants who make allegedly false statements concerning such “public figures” so as not to stifle public discourse and debate on significant matters of public concern. In this regard, to succeed on a defamation claim, a plaintiff deemed to be a public figure must prove, by clear and convincing evidence, that the defendant communicated false statements with “actual malice”—that is with knowledge, or reckless disregard, of their falsity. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280-81 (1990); *Mahoney v. Adirondack Pub. Co.*, 71 N.Y. 2d 31, 38-99 (1987).

Defamation law recognizes both general purpose and limited purpose public figures. “General purpose” public figures are those individuals who have achieved such pervasive fame that they are deemed to be public figures for all aspects of their lives. “Limited purpose” public figures are those who voluntarily inject their views or are otherwise drawn into a particular public controversy and are therefore treated as public figures when they sue about statements bearing on that controversy. Plaintiffs deemed to fall within either category carry the burden of proving actual malice by clear and convincing evidence.

The Appellate Division’s Ruling that Dr. Luke is Not a Public Figure

Notwithstanding a mountain of record evidence demonstrating Dr. Luke’s fame, influence, industry status, and power, the Appellate Division affirmed the trial court’s determination that Dr. Luke is neither a general purpose public figure nor a limited purpose public figure and, accordingly, that he need not prove actual malice. While the Appellate Division’s majority opinion recognized that Dr. Luke is “an acclaimed and influential music producer” who has experienced “success in a high-profile career” and is “well known in the music industry,” it nevertheless concluded that Dr. Luke is not a general purpose public figure because he is not a “household name.” Further, and perhaps more interestingly, the Appellate Division also rejected arguments that Dr. Luke is a limited purpose public figure, all but faulting Kesha herself for narrowly defining the public controversy at issue to be “sexual assault and the abuse of artists in the entertainment industry.”

Working within this limited scope, the court disregarded Dr. Luke’s aggressive efforts to promote himself as a producer, including his widely publicized statements regarding the importance of strong relationships between producers and their young female artists, and held that Dr. Luke is not a limited purpose public figure because he has “never injected himself into the public debate about sexual assault or abuse of artists in the entertainment industry.”

In a stinging and well-reasoned dissent, Justice Saliann Scarpulla (joined by Justice Jeffrey K. Oing) took issue with the determination that Dr. Luke is not a general purpose public figure, devoting page after page of her dissent to evidence of his acclaim and publicity — including that he had been selected to receive a star on the Hollywood Walk of Fame — and concluding that Dr. Luke “is a household name to those that matter.” Justice Scarpulla also expressed a cutting disbelief that Dr. Luke would not, at the very least, constitute a limited purpose public figure under the circumstances presented.

Seizing on the majority’s “cramped” view of what it takes to constitute a limited purpose public figure, the dissent reframed the public controversy at issue as “a self-promoting, powerful music industry person’s use of his financial leverage over a person whose career he controls to allegedly commit an unpunished sexual assault.” When the issue is defined appropriately, Justice Scarpulla submitted that Dr. Luke is undoubtedly a limited purpose public figure because he “purposefully and continuously publicized and promoted his business relationships with young, female music artists, like Kesha, to continue to attract publicity for himself and new talent for his label.”

It appears the majority botched the public figure analysis and bent over backwards to save Dr. Luke from the constitutional burden of having to prove actual malice.

As the dissent suggests, it appears the majority botched the public figure analysis and bent over backwards to save Dr. Luke from the constitutional burden of having to prove actual malice—a critical move that could make it significantly easier for Dr. Luke to prevail on his defamation claim. Following the exposure of film producer Harvey Weinstein’s decades of sexual abuse, the global impact of the #MeToo social media movement, and the number of recent legal and organizational reforms meant to encourage victims of sexual assault to come forward, the majority’s ruling is particularly disconcerting to the extent it encourages the wealthy and powerful to wield defamation claims as a form of intimidation.

Potential Impact of New York’s Recently Amended Anti-SLAPP Law

New York’s recently expanded anti-SLAPP law may help right some of the apparent wrong caused by the Appellate Division’s ruling. In November 2020, the New York Legislature amended its anti-SLAPP statute, which offers certain protection to defendants in legal actions “involving public petition and participation.” The 2020 amendments expand the scope of the statute to cover cases involving “any communication in a place open to the public or a public forum in connection with an issue of public interest” or “any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest[.]” The amended anti-SLAPP statute requires courts to “broadly” construe the

term “public interest” to “mean any subject other than a purely private matter.” By way of comparison, the old version of the statute narrowly defined “public petition and participation” to include only cases brought by plaintiffs seeking public permits, zoning changes, or other entitlements from a government body. When the anti-SLAPP law is triggered, defamation plaintiffs carry the burden of demonstrating by clear and convincing evidence that the defendant made the challenged statement knowing it was false or with reckless disregard as to its falsity — the same fault standard applicable in defamation cases involving public figures.

On April 6, 2021, Kesha submitted a motion to the trial court seeking a ruling that New York’s amended anti-SLAPP law applies to Dr. Luke’s defamation claims. Although the statute was amended years after Dr. Luke initiated his defamation suit, courts that have considered the issue to date have concluded that the remedial purpose of the amendments to the anti-SLAPP law should be effectuated through retroactive application. *Sackler v. American Broadcasting Companies, et al.*, Index No.: 155513/2019 (Sup Ct, NY County, March 9, 2021), *Palin v. New York Times, et. al.*, 17-cv-485s (JSR) (SDNY December 29, 2020), and *Coleman v. Grand*, 18-cv-5663 (ENV) (RLM) (EDNY February 26, 2021).

Accordingly, it appears the central question posed by Kesha’s motion is whether the allegedly defamatory allegations of sexual abuse and rape implicate issues of public interest. Although the trial court has previously stated that the case involves “important public matters implicated by the defamatory statements,” the court’s ruling on the public figure issue, together with the Appellate Divisions affirmance, invite uncertainty as to how the court will rule. The trial court is scheduled to hear argument on Kesha’s motion seeking application of the amended anti-SLAPP law on June 30, 2021.

Michael J. Grygiel is the Co-chair and Kelly L. McNamee is a member of Greenberg Traurig, LLP’s Media & Entertainment Litigation Practice Group in the firm’s Albany, New York office. Defendant Kesha Rose Sebert, p/k/a Kesha, is represented by Anton Metlitsky, Leah Godesky, Yaira Dubin, Daniel M. Petrocelli, James M. Pearl and Moshe Mandel of O’Melveny & Meyers LLP. Plaintiff Lukasz Gottwald, p/k/a Dr. Luke, is represented by Jeffrey M. Movit, Christine Lepera, and David A. Steinberg of Mitchell Silberberg & Knupp LLP.

Roy Moore Allowed to Proceed to Discovery on Defamation Claim Against PAC

He'll Also Replead Claims Against Washington Examiner

By Christopher Proczko

On March 31, 2021, United States District Judge Corey L. Maze set the table for what remains of GOP Senate candidate Roy Moore's two defamation suits—one against political action committees that ran ads against Moore's candidacy in Alabama's 2017 special election, and one against the Washington Examiner and several of its editors and columnists—for calling Moore a “pedophile” and a “child molester.” See [Moore v. Cecil](#) and [Moore v. Lowe](#).

Background

Roy Moore, the twice-elected former Alabama Supreme Court Justice, decided to run for the U.S. Senate seat vacated by Jeff Sessions in February 2017 when Sessions was nominated to become Attorney General. On November 9, 2017—a few weeks before the special election—the Washington Post published an article in which four women accused Moore of courting them when he was in his early 30's and the women were between 14 and 18 years old. Moore denied the allegations, calling them “completely false” and “a desperate attack by the National Democrat Party and the Washington Post on [his Senate] campaign.”

The allegations continued, however, with subsequent reports by the New American Journal (November 12), The New Yorker (November 13), Al.com (November 13), a press conference held by a fifth accuser (November 13), another Washington Post report (November 15), an ABC News Interview of one of Moore's accusers (November 15), and another New American Journal report (November 27).

On November 6, 2017, three days before the Washington Post's first report on the allegations against Moore, the Highway 31 Super PAC filed its statement of organization. Highway 31 was created and funded to help Doug Jones defeat Moore in the special election. Highway 31 ran two ads that recounted the media reports “in the light least-favorable to Moore—labeling him a ‘child predator’ in the digital ad and quoting [New American Journal journalist] Glynn Wilson's initial report that ‘Moore was actually banned from the Gadsden Mall . . . for soliciting sex from young girls’ in the television ad.” Guy Cecil, the chair of Priorities USA (which, alongside the Senate Majority PAC (“SMP”), was a major funder of Highway 31), tweeted several statements treating the allegations against Moore with a

The articles presented an unflattering picture of Moore, referring to him as an “accused sexual assailant and pedophile,” “credibly accused sexually pedophilic predator,” “comic book villain,” “skunk,” and a “terrible human being.”

similar level of veracity—calling Moore a “child predator,” a “Republican pedophile,” and a “sexually assaulting pedophile.”

Moore lost the 2017 special election. He filed suit against Cecil, Highway 31, Priorities USA, SMP, Waterfront Strategies (a media buying firm SMP used to place pro-Jones, anti-Moore ads) in United States District Court for the Northern District of Alabama, asserting claims for defamation, defamation by implication, and IIED.

After losing the 2017 special election, Moore decided to seek the same seat in when it reopened in 2020. Before Moore announced his candidacy, the *Washington Examiner* published four opinion pieces and two news stories that recounted the 2017 allegations and results. The articles presented an unflattering picture of Moore, referring to him as an “accused sexual assailant and pedophile,” “credibly accused sexually pedophilic predator,” “comic book villain,” “skunk,” and a “terrible human being.” The *Washington Examiner* articles also described one accuser’s account as saying that Moore was “attempting to rape her.” Moore then sued the *Washington Examiner*’s parent company WNPC, as well as several reporters, columnists, and editors, again asserting claims of defamation per se, defamation by implication, and IIED/outrage.

Both cases landed before U.S. District Judge Corey L. Maze, who issued two opinions on March 31—one in *Moore v. Cecil* granting in part and denying in part defendants’ motion to dismiss Moore’s amended complaint, and one in *Moore v. Lowe* granting the *Washington Examiner*’s motion and dismissing Moore’s complaint without prejudice, allowing Moore to attempt to correct his pleading deficiencies.

Moore v. Cecil

In his order in *Cecil*, Judge Maze first addressed Moore’s new actual malice arguments. The court quickly dismissed Moore’s challenge to the constitutionality of the New York Times actual malice requirement. Whatever Justice Thomas might say in a dissent, the actual malice standard from New York Times remains binding precedent.

The court then addressed Moore’s argument that pleading ill will or animosity was enough to plead actual malice. The court noted that Moore was attempting to impute a “common-law malice” standard from a state court case that involved a private figure seeking to overcome a conditional privilege. “Common-law malice,” which focuses generally on the defendant’s attitude toward the plaintiff, differs substantially from “constitutional malice,” which focuses on the defendant’s attitude towards the truth or falsity of his published material. In cases involving public figures and public officials, Alabama courts, as they must, apply the “constitutional malice” standard from New York Times.

The court quickly dismissed Moore’s challenge to the constitutionality of the New York Times actual malice requirement. Whatever Justice Thomas might say in a dissent, the actual malice standard from New York Times remains binding precedent.

Defamation

Shopping Mall Ad

After reaffirming that Moore had to satisfy the New York Times standard of actual malice, Judge Maze turned to the political ads at issue. In a September 18, 2020 order, Judge Maze had already determined that the shopping mall ad created a false impression that Moore solicited sex from young girls at the Gadsden Mall. The defendants argued that the following statements in the ad were not also defamatory:

“Moore was actually banned from the Gadsden Mall...”;

“These stories have been going around for 30 years”;

“These women are being skewered for the truth”; and

“I actually voted for Moore...but I am basically disgusted now.”

The court agreed with the defendants with respect to the last three statements, but not the first. It determined that the phrase “Moore was actually banned from the Gadsden Mall . . .” as part of the larger, juxtaposed statement that the court had already ruled will go forward. There were no reports that Moore had actually been banned from the mall for soliciting sex from young girls at the mall. Because the defendants’ juxtaposition “tied the alleged mall ban to Moore asking a 14-year-old Santa’s Helper (and others) to have sex,” the court determined that Moore had sufficiently pleaded actual malice about a mall ban, entitling Moore to discovery about that statement.

Digital Ad

Moore also argued that the defendants’ digital ad used an image of a “young black girl seemingly under the age of 10” “to imply that Roy Moore has, or would prey on prepubescent black girls.” Moore argued that if the digital ad stated or implied that he “has or would prey on prepubescent black girls,” he might be able to show that Defendants were reckless in publishing the ad.

Judge Maze was not convinced. He determined as a matter of law that viewers of reasonable and common understanding would not come away from watching the digital ad thinking that Moore has or would prey on prepubescent black girls. (In the process, the court noted that Moore had not cast his claim with racial undertones in his initial complaint, and that he added the words “prepubescent” and “black” only after the court mentioned the diagnostic definition of “pedophilia” when rejecting his original actual malice arguments.) The court dismissed all claims related to the digital ad because it ultimately determined that the ad was not reasonably capable of conveying the defamatory meaning that Moore gave it.

Priorities USA Press Release

Judge Maze then turned to claims against Guy Cecil arising from his tweets and a Priorities USA Press Release. First, the court affirmed its earlier ruling that it has no personal jurisdiction over four tweets sent by Guy Cecil because no pleaded facts alleged that Cecil aimed his tweets at Alabama.

Judge Maze next addressed whether Moore sufficiently pleaded that Cecil acted with actual malice when he called Moore a “pedophile” in a Priorities USA Press Release. To do so, the court examined whether a reasonable reader would interpret the use of the word “pedophile” to suggest that Moore suffered from a mental disorder, and if so, whether Cecil acted with actual malice in calling Moore a “pedophile.”

Judge Maze first determined that readers of the press release likely understood the use of the word “pedophile” to refer to the allegations that Moore sexually assaulted a 14-year-old and 16-year-old girl. Defendants argued that Cecil used the word “pedophile” as laypeople understand it: “someone who is sexually attracted to children of any age.” After all, Cecil was not the first person to use the word in this manner. Nonetheless, the court determined that the press release was at least “reasonably capable” of being read to suggest that Moore suffers from a disorder that makes him want to have sex with prepubescent girls. Judge Maze pointed to both Webster’s dictionary definition of the term “pedophilia” and the fact that the Washington Post had “chastised persons for using the clinical terms ‘pedophile’ and ‘pedophilia’ to describe Moore.”

Because the press release could be reasonably read to suggest Moore was sexually attracted to, or had sexually assaulted, prepubescent girls, the court next examined whether Moore had pleaded that Cecil acted with actual malice when he called Moore a “pedophile” in the Priorities USA Press Release. To do so, Moore must show that “Cecil intended that the reader believe Moore had been accused of sexually assaulting a prepubescent girl, or Cecil knew that a reader might read the word ‘pedophile’ that way and was reckless with the implication.”

Judge Maze held that, when parties disagree about a word’s meaning, a public figure Plaintiff must prove the Defendant intended the reader to ascribe the defamatory meaning. Quoting extensively from *Kendall v. Daily News Publishing Co.*, 716 F.3d 82 (3d Cir. 2013), Judge Maze agreed that malice in general depends upon a showing that the defendant acted with improper motive. Where a word’s definition can be reasonably disputed, a “public figure must show that the defendant either intended to communicate the defamatory meaning or knew of the defamatory meaning and was reckless in regard to it.”

Looking at the Amended Complaint, however, the court determined that Moore did not plead that Cecil intended the Press Release to convey that Moore suffered from clinical pedophilia. Instead, the Amended Complaint alleged:

Judge Maze held that, when parties disagree about a word’s meaning, a public figure Plaintiff must prove the Defendant intended the reader to ascribe the defamatory meaning.

The purpose of Cecil’s tweets and press release is apparent; the Defendants were supporting Doug Jones against Roy Moore and they wished to damage Roy Moore’s reputation to such an extent to deter support of Roy Moore and deter voters from choosing a ‘pedophile’ as a Senator. This was the end goal of all defamatory statements made by Cecil.

But an intent to smear Moore so that he would lose an election does not prove actual malice. Because Moore pleaded that Cecil intended to affect Moore’s election changes—and did not plead that Cecil intended the reader to believe that Moore suffered from a disorder that made him assault prepubescent girls (which is a false and defamatory fact that Moore alleged had no support in published reports)—Judge Maze determined that Moore had failed to plead actual malice and dismissed the defamation claim arising from the Priorities USA Press Release.

IIED

Judge Maze also dismissed Moore’s IIED claim. Because IIED requires actual malice, the only statement that could support an IIED claim is the portion of the shopping mall ad that the court determined above sufficiently pleaded actual malice—the portion that implied Moore had been banned from the mall for soliciting sex from young girls.

The court determined that Moore failed to allege conduct that was extreme and outrageous. Egregious sexual misconduct is one of the three circumstances in which the Alabama Supreme Court has recognized a viable IIED claim. However, Judge Maze reasoned that “being falsely accused of asking a child for sex in a political ad is far less outrageous than the sex-related conduct the Alabama Supreme Court has found viable—i.e., a family doctor giving a 13-year old boy opiate prescriptions in exchange for performing sexual acts, a practice that lasted 7-plus years and led to the boy becoming addicted to opiates.” And the court found no support for Moore’s argument that a false accusation in a political ad is sufficiently over-the-line outrageous and extreme to support a viable IIED claim.

New Claims

Finally, Judge Maze addressed two new claims that Moore added to his Amended Complaint—violation of the Voting Rights Act and invasion of privacy (false light). The court determined that Moore lacked standing to bring an action under the VRA because he did not plead a cognizable injury or redressability. As for Moore’s invasion of privacy (false light) claim, Defendants conceded that the claim should not be dismissed with respect to the portion of the shopping mall ad that the Court had already determined had been sufficiently pleaded.

Ultimately, the only claims that survived are defamation, defamation by implication, and invasion of privacy (false light) claims arising from the shopping mall ad. Judge Maze tied it all together by dismissing the rest of Moore’s claims with prejudice, finding that allowing Moore another chance to re-plead his claims would be futile. Moore later filed a motion for reconsideration and Defendants filed a motion for certification and to stay discovery, both of which the court denied, and the case is proceeding to discovery.

Moore v. Lowe

Judge Maze’s contemporaneous opinion in *Moore v. Lowe* was a much simpler affair. In response to the Defendants’ motion to dismiss, Moore conceded that he would amend his deficient complaint, and Judge Maze agreed that an amendment should be allowed under Eleventh Circuit precedent that a public figure who alleges actual malice “should be given the opportunity to amend his complaint to plead further facts in support of his claims.” *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 706 (11th Cir. 2016). In the order granting the motion and allowing Moore the opportunity to replead, Judge Maze noted a few specific issues present in the complaint.

First, Moore did not allege any facts that explain how the defendants were involved in publishing the defamatory statements, nor did he plead any facts that would show the defendants had constant and pervasive contacts that would allow the U.S. District Court for the Northern District of Alabama to exercise jurisdiction over them. As such, the court dismissed Defendants Clarity Media Group, Anschutz, and Klein for lack of personal jurisdiction.

Second, Judge Maze turned to Moore’s “deficient pleading” and addressed Moore’s claims one-by-one. He dismissed the defamation per se claim for failing to specify any specific defamatory statements, suggesting that any amended complaint should “specify the defamatory statement and then plead facts that would establish both defamation under Alabama law and actual malice under the First Amendment for that statement.”

Judge Maze then noted that Moore’s defamation-by-implication claim specified statements that used terms that the court, in its contemporaneous Cecil opinion (see above), had held lack the requisite actual malice—terms like “pedophile” and “sexually assaulted.” Because the court was going to grant leave to amend, it declined to analyze those statements and instead reminded Moore that he must plead facts that would establish both state-law defamation and actual malice for each individual statement.

As for Moore’s IIED claim, Judge Maze again referenced his contemporaneous order in Cecil, which held that making false accusations in a political ad is not one of the categories of action that are “so extreme and outrageous” that they can sustain an IIED claim. It logically follows that “if false accusations in a political ad cannot sustain an IIED claim, then neither can false accusations in a political news article or opinion piece.”

Nonetheless, the court dismissed Moore’s complaint without prejudice, allowing Moore a chance to file a second amended complaint, which he filed on April 30, 2021. At the time of this writing, Defendants’ expected motion to dismiss has not been filed.

Christopher Proczko practices media law at Sapia Law Group, PLLC in Minneapolis, Minnesota. Roy Moore is represented in both cases by Larry Klayman and the Isaak Law Firm, Montgomery, AL. Defendants in Moore v. Cecil are represented by Marc Elias, Perkins Coie, DC; and Barry Ragsdale, Sirote & Permutt, Birmingham, AL. Defendants in Moore v. Lowe are represented by Kellogg, Hansen, Todd, Figel & Frederick, DC; and Jonathan R Little, Lightfoot Franklin & White, Birmingham, AL.

Connecticut Court Upholds Fair Report Privilege and Anti-SLAPP Law

Two Decisions Concern Local Lawyer's Professional Sanctions

By William S. Fish, Jr. and Alexa Millinger

Two recent Connecticut Appellate Court decisions based on *The Hartford Courant's* reporting on a local lawyer's professional sanctions affirmed the strength of the fair report privilege as a defense to a defamation claim under Connecticut law and also represented the first appellate case decided under the state's relatively new Anti-SLAPP law. [*Elder v. 21st Century Media Newspaper*](#)

The cases both involved claims by plaintiff Joseph Elder, a Connecticut attorney who had been the subject of a professional discipline proceeding in 2015. The discipline arose from an incident in 2004 where Elder was alleged to have misrepresented his identity to a police officer, instead representing himself to be Wesley Spears, another Connecticut attorney. The Connecticut Superior Court, in a July 29, 2015 decision, suspended Elder from practicing law for one year.

The Hartford Courant published an article on July 31, 2015 reporting on the Superior Court's decision to impose sanctions on Elder under the headline "Attorney Suspended for Impersonating Fellow Lawyer." Several other local papers published similar articles shortly thereafter. In May 2017, the Connecticut Supreme Court reversed the suspension decision on statute of limitations grounds. On April 26, 2017, *The Hartford Courant* published a second article summarizing the Superior Court and Supreme Court rulings.

Nearly two years after the initial publication, in August 2017, Elder filed a defamation lawsuit against *The Hartford Courant* and several other media outlets in Connecticut Superior Court alleging that the articles about him were defamatory and a false light invasion of his privacy. Elder had also filed an action in the U.S. District Court for the District of Connecticut on the same facts, in which summary judgment was granted for the defendants. Two years after the initial Superior Court action, Elder filed a second Connecticut Superior Court action – a third lawsuit on the same facts – this time alleging that *The Hartford Courant's* 2017 article on Elder was also false and defamatory based on the same characterization of the disciplinary proceedings and the 2004 underlying incident.

2017 Superior Court Action and Appellate Court's Affirmance

In the 2017 Superior Court action, the media defendants' primary defense was that 2015 articles were protected by the fair report privilege because they were entirely based upon the Superior Court decision imposing sanctions on Elder. Elder argued in response that the media defendants were required to submit evidentiary proof establishing that the defendants *actually relied* on the

Superior Court decision in reporting on their respective articles. He also argued that certain language in the articles, including the characterization that Elder had “impersonated” another attorney, and the omission of certain details of the underlying 2004 incident, took the article outside the scope of the fair report privilege because it was no longer a substantially accurate report of the incident. The Superior Court granted summary judgment for the defendants.

The Connecticut Appellate Court affirmed the Superior Court’s decision on May 4, 2021. In the decision, the Appellate Court affirmed that a defendant asserting the fair report privilege did not have an obligation to establish evidentiary proof of reliance on the official source. It was enough that the defendants had submitted the underlying official report as the only evidence. The Appellate Court also agreed that the defendants’ articles were fair and accurate reports of the trial court decision imposing sanctions on Elder, and that the articles’ use of the term “impersonate” and omission of certain details related to the 2004 underlying incident did not change the fact that they were “substantially true” accounts. Finally, the Appellate Court devoted several pages of its opinion defending the constitutionality of the fair report privilege in response to Elder’s argument that the fair report privilege abridged his constitutional rights.

2019 Connecticut Superior Court Action and Appellate Court’s Affirmance

On May 25, 2021, the Appellate Court also affirmed a ruling for the defendants in Elder’s 2019 Superior Court action, but on slightly different grounds. *The Hartford Courant* and its individual reporter, the only defendants in the 2019 action, had filed a Special Motion to Dismiss under Connecticut’s relatively new Anti-SLAPP law. That law, which went into effect in 2018, was not available at the time of Elder’s first action in 2017.

The Special Motion to Dismiss argued that Elder could not prevail on his claims based on the 2017 *Hartford Courant* article because the issues he raised had already been decided in the prior state and federal court actions, and he could have raised the 2017 article in those actions as it was published before he brought his first lawsuit. He also could not prevail because, similar to the 2017 action, the fair report privilege barred his claims. The Superior Court had granted the defendants’ Special Motion to Dismiss.

The Appellate Court affirmed dismissal, first rejecting Elder’s claim that it was inappropriate to consider *res judicata* or collateral estoppel on an Anti-SLAPP motion to dismiss. The Appellate Court also affirmed that collateral estoppel barred Elder’s claims based on *The Hartford Courant*’s 2017 article because Elder’s defamation claims regarding that article raised the very same issues as had been decided in the prior actions (specifically use of the term “impersonated” and omission of certain details). The prior courts had found the fair report privilege barred those issues, and therefore Elder could not relitigate them here, even in the context of a subsequent publication. Finally, the court rejected Elder’s argument that Connecticut’s Anti-SLAPP law was unconstitutional. This decision was the first appellate authority decided under Connecticut’s three-year-old Anti-SLAPP law.

Alexa Millinger is an associate, and William Fish a partner, at Hinckley Allen in Connecticut.

Judge Dismisses Defamation Lawsuit and SLAPPs Plaintiffs with Newspaper's Legal Fees

By Karim A. Abdulla and Joseph M. Finnerty

On April 11, 2018, the *Plattsburgh Press-Republican* published an article about “Gray Gables,” an historically significant building located in Chazy, New York. The once-grand building had deteriorated to the point where the local Legal Aid Society intervened on behalf of its low-income tenants, writing letters to the Town and – ultimately – filing lawsuits against it, Clinton County, and owners Fred and Cecile Reus.

Headlined “Legal Aid: Gray Gables should be shut down,” and sub-headlined “APARTMENTS: *Tenants suing owner; owner says damage was caused by residents*,” the article reported on the litigation and the antecedent landlord/tenant disputes. The reporter interviewed Legal Aid (provided the newspaper with copies of the filed complaints and photographs of the building), a Gray Gables tenant, the Town, and Mr. Reus. The article provided both sides of the landlord/tenant disputes and litigation, including extensive quotes from a telephone interview of Mr. Reus.

The Reuses sued the newspaper (and others) in November 2018 alleging, among other claims, libel *per se*. On February 12, 2021 after discovery, the newspaper moved for summary judgment arguing: the report was a privileged fair report (§ 74 of New York’s Civil Rights Law); it was substantially true; and plaintiffs failed to establish either actual malice (the paper argued the Reuses are public figures) or gross irresponsibility (New York’s private-figure standard). It also requested dismissal and attorney fees under New York’s recently amended anti-SLAPP law.

On May 6, the court granted the motion holding, not only that the article was substantially true and privileged, but also that the amended anti-SLAPP legislation required dismissal and attorney’s fees. [Reus v. Plattsburgh Press-Republican et al.](#), No. 2018-1669 (N.Y. Sup., Clinton Co.).

The court held the law: (a) applies retroactively; (b) imposes an actual malice fault standard in matters involving the public interest; and (c) mandates an award of attorney fees to a successful media defendant. As to fault, this decision constitutes an early state-court recognition that, in broadly defined “public interest” reporting, the amended SLAPP statute raises the fault bar, even in “private figure” cases, and requires application of the “actual malice” standard, replacing New York’s lower “gross irresponsibility” standard.

The Court’s anti-SLAPP analysis is of principal interest. Civil Rights Law §§ 70-a and 76-a (amended November 2020) defines an “action involving public petition and participation” as “a claim based upon (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or (2) any other lawful conduct in furtherance of the

exercise of the constitutional right of free speech, or in furtherance of the exercise of the constitutional right of petition [...].” The law requires that “public interest shall be construed broadly” and that damages may be recovered only if the plaintiff “shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false [...].” In other words, the newspaper argued, the amended law imposes the “actual malice” standard (established in *Sullivan v. New York Times*, 376 US 254 (1964)) regardless of whether (s)he is a public or private figure.

Citing [Sackler v. American Broadcasting Companies](#), (N.Y. Sup. Mar. 9, 2021), [Coleman v. Grand](#), (E.D.N.Y. Feb. 22, 2021) and [Palin v New York Times](#), (S.D.N.Y. Dec. 29, 2020), Justice Lawliss held that, although the anti-SLAPP amendments occurred almost 2 years after the Reuses filed their lawsuit, it applies retroactively. Noting: (a) Gray Gables had been the subject of reports for decades (the newspaper included the historical reporting in the motion); and (b) under *Gaeta v. New York News*, 62 NY2d 340 (1984), New York’s courts “are deferential to editors in terms of what is of interest to the public and thus what is newsworthy,” the court held the article was of “public interest” and thus within the scope of communications or other lawful conduct protected by the legislation.

On actual malice, the judge held: “[a]s noted above, Defendant in a meticulous manner, recites the newsgathering process, interviews, meetings, editing and rounds of review that went into the article’s production. While Plaintiffs may raise various non-material claims regarding the newsgathering process and alleged instances of negligence – such as the query of why Defendant did not interview Plaintiffs’ counsel with regards to Gray Gables – there is no evidence that Defendant acted with actual malice in its publication Plaintiffs cite no facts which would argue in its favor of the conclusion that Defendant published a news article with knowledge of its falsity or reckless disregard thereof.” Accordingly, summary dismissal under the anti-SLAPP statute was appropriate.

The court then examined the newspaper’s request for legal fees. Observing that, under § 70-a, “costs and attorney’s fees shall be recovered upon a demonstration, including adjudication pursuant to [motions to dismiss or for summary judgment], the action involving public petition and participation was commenced or continued without a substantial basis in fact and law [...],” it held:

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

Joseph M. Finnerty and Karim A. Abdulla of Finnerty Osterreicher & Abdulla in Buffalo, NY represented the Press-Republican.

Florida Court SLAPPs Anti-Muslim Activist Laura Loomer's Lawsuit

Considers Sanctions Against Attorney Larry Klayman

By Lauren Russell, Matthew Cate and Charles Tobin

Applying Florida's anti-SLAPP statute, a Palm Beach County Circuit Court dismissed with prejudice Laura Loomer's lawsuit against several media defendants. The court also extended a rare invitation to the defendants to request sanctions against her attorney, Larry Klayman.

[Loomer v. New York Media, LLC, et al.](#), 50-2019-CA-015123.

Background

Loomer is a notorious anti-Muslim activist whose rhetoric and antics led digital-platform companies like Twitter, Facebook, Uber and Lyft to ban her from their services. She's successfully leveraged the resulting attention into right-wing stardom and a GOP political career. In 2020, Loomer handily won the Republican primary to campaign for Florida's 21st Congressional District but lost to the incumbent, Democrat Lois Frankel, in the general election. She has announced a 2022 campaign for the same seat and quickly obtained endorsements from Republicans Marjorie Taylor Greene and Paul Gosar.

From 2017 through 2019, New York magazine, TechCrunch, BoingBoing.net, Media Matters for America, The Washington Examiner, Rolling Stone, Bernard Media, and GQ published reports about her political campaign, controversial anti-Muslim rhetoric, notorious self-promotional tactics, and her bans from digital platforms. In response, Loomer retained the help of Larry Klayman. Klayman is frequently counsel to plaintiffs like Loomer and has been sanctioned and disciplined in multiple courts—including most recently the U.S. Court of Appeals for the D.C. Circuit, which in March 2021 barred Klayman from practicing in that circuit for 90 days.

Characterizations of Loomer as a “white supremacist” or “alt right” constitute non-actionable statements of pure opinion.

Loomer initially sued the defendants in the U.S. District Court for the Southern District of Florida on November 15, 2019, asserting among other things that the publications defamed her by calling her “alt right” and a “white nationalist,” terms she alleged could not apply to her because of her Jewish ethnicity. The district court, on its own initiative, dismissed the case for lack of diversity jurisdiction in light of Loomer's failure to allege and establish the citizenship of each of the defendants.

On November 25, 2019, Loomer filed substantially the same complaint in state court. All defendants—except for Bernard Media and GQ, who were never served the complaint—filed dispositive motions pursuant to Florida's anti-SLAPP statute, Fla. Stat. § 768.295. That statute provides for swift dismissal of lawsuits filed “without merit and primarily because such person

or entity has exercised the constitutional right of free speech in connection with a public issue,” and it allows for successful defendants to recover attorney’s fees.

The defendants filed anti-SLAPP motions, generally arguing that much of Loomer’s claims attacked non-actionable statements of pure opinion and that she failed to plead the defendants published with actual malice. Rolling Stone, TechCrunch, Media Matters for America and New York magazine also argued Loomer did not provide pre-suit notice required by Fla. Stat. § 770.001. Additionally, New York magazine and TechCrunch argued Plaintiff did not bring her lawsuit within the state’s two-year statute of limitations for defamation actions. A week before the hearing, Loomer filed an Amended Complaint, a re-hash of her original pleading. Defendants promptly filed new anti-SLAPP motions.

The Order

On April 29, 2021, the court granted each of the dispositive motions, dismissing Loomer’s Amended Complaint with prejudice as to all defendants. Among the court’s rulings:

Characterizations of Loomer as a “white supremacist” or “alt right” constitute non-actionable statements of pure opinion. The court explained that “ample case law holding that rhetorical classifications concerning social and political beliefs are protected opinions, particularly when those comments are made in the course of discussing public figures, political candidates, and activists.”

Loomer, a public figure, inadequately relied on “conclusory and vague” assertions of actual malice. The court also rejected Loomer’s argument that the defendants knew their characterizations of her were false because the terms “white supremacist” and “alt-right” can never apply to a Jewish woman like herself. Instead, the court reasoned, “[a]ssumptions and stereotypes standing alone do not allege the ultimate facts required to establish clear and convincing evidence of actual malice.”

Loomer failed to provide the requisite prior notice of suit to Rolling Stone and New York magazine.

Loomer failed to sue TechCrunch and New York Magazine within Florida’s two-year statute of limitations for defamation claims. In both cases, the claims had been timely filed in federal court, with no time to spare. The dismissal of that action 10 days later was thus fatal to her claims against these two defendants.

The court concluded that Loomer’s Complaint was “precisely the type of harassing lawsuit condemned by” the anti-SLAPP statute—not least given her “completely unsubstantiated claim for \$90 million in damages.” It thus reserved jurisdiction to determine attorney’s fees to be awarded. Finally, the court invited defendants to seek sanctions under Florida’s frivolous-filing statute against Klayman, in the form of shared liability with Loomer for the attorney’s fees

The court concluded that Loomer’s Complaint was “precisely the type of harassing lawsuit condemned by” the anti-SLAPP statute.

award, on the grounds that he knew or should have known Loomer's claims were not supported by the facts or by controlling law.

Loomer has filed a notice of appeal to the Fourth District Court of Appeal, and defendants are preparing their motions for fees and sanctions.

Charles Tobin, Matthew Cate and Lauren Russell of Ballard Spahr LLP represented The Washington Newspaper Publishing Company LLC d/b/a The Washington Examiner and New York Media LLC d/b/a/ New York Magazine; Rachel Fugate and Giselle Girones of Shullman Fugate PLLC represented The Rolling Stone PLLC; Frederick S. Wermuth of King, Blackwell, Zehnder & Wermuch, P.A., Marc E. Elias and William B. Stafford of Perkins Coie LLP represented Media Matters for America; Jean-Paul Jassy, William T. Um and Elizabeth Baldrige of Jassy Vick Carolan LLP and L. Martin Reeder of Atherton Galardi Mullen & Reeder PA represented Verizon Media d/b/a TechCrunch; and Capri Trigo of Gordon Rees Scully Mansukhani represented Happy Mutants LLC d/b/a BoingBoing.net. Larry Klayman of Klayman Law Firm represented Plaintiff Laura Loomer.

New York Court Grants Anti-SLAPP Motion and Dismisses Defamation Claims Against Local Blogger

By Michael J. Grygiel

In what can only be considered a David-versus-Goliath scenario, on May 10, 2021, New York State Supreme Court, Ontario County (Hon. Brian D. Dennis) granted an anti-SLAPP motion for summary judgment dismissing a defamation action brought by a construction company against a community blogger and awarding the defendant costs and attorneys' fees. [Massa Construction v. Meaney](#).

Background

Plaintiff Massa Construction is a contractor that was the successful bidder on certain construction contracts with the City of Geneva, New York, receiving in excess of \$4,000,000 in payments for the work over a period of several years. Defendant James Meaney is the owner and publisher of *The Geneva Believer*, a public watchdog blog dedicated to reporting on governmental affairs in the City of Geneva, including its expenditure of taxpayer funds on municipal construction projects and the process by which such bids are awarded.

The blog's reporting featured a series of articles critical of Massa's cozy relationship with the City of Geneva, which noted the company's campaign support for a former City Council member and that a current Massa employee is also a City Council member. *The Geneva Believer's* exploration of the nature of the Plaintiff's political entanglements with the City of Geneva was based primarily on statements made at City Council meetings and information contained in official government records obtained through FOIL requests.

Massa was not happy with Mr. Meaney's investigative reportage, and filed a complaint on February 5, 2020, alleging that the articles, individually and collectively, suggested that Massa obtained its contracts with the City of Geneva via unlawful methods — as repeated mantra-like throughout the complaint, “by means of collusion and bribery.” In response to the complaint, the author and Cornell Law School's First Amendment Clinic wrote Massa's counsel on February 20, 2020, requesting voluntary withdrawal of the complaint to avoid anti-SLAPP motion practice under N.Y. *Civil Rights Law* §§ 70-a and 76-a, and pointing out that the complaint was defective as pleaded for failure to identify with specificity the statements alleged to be actionable. The letter further stated that “your Complaint amounts to a transparent attempt to harass and intimidate Mr. Meaney into silence,” and noted that “[i]f you filed suit with the

The author and Cornell Law School's First Amendment Clinic wrote Massa's counsel on February 20, 2020, requesting voluntary withdrawal of the complaint to avoid anti-SLAPP motion practice.

expectation that Mr. Meaney would lack the resources to defend himself, we hope that this letter disabuses you of that notion.”

Massa’s *Ex Parte* Motion for Emergency Injunctive Relief

Alas, Massa was undeterred. Rather than discontinue the litigation, it chose instead to double down by filing an amended complaint on February 26, 2020, listing no fewer than thirty-four statements (along with various comic images published by *The Geneva Believer*) alleged to be defamatory, although without indicating how they were false. Massa also took the extraordinary step of seeking immediate injunctive relief, asking the Court in a companion *ex parte* motion to force *The Geneva Believer* to remove the articles at issue from its website. Mr. Meaney opposed the emergency motion as a prior restraint on speech that was presumptively invalid under the First Amendment. As stated in *The Geneva Believer*’s brief:

The Supreme Court has warned against silencing the press through governmental means because “[t]he newspapers, magazines, and other journals of the country . . . have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity” such “[t]o allow [the free press] to be fettered is to fetter ourselves.” *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249–51 (1936). Indeed, as the *Pentagon Papers* case emphasized, “[b]oth the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints” because “[i]n the First Amendment the Founding Fathers gave the free press the protection it must have . . . The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government.” *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (the “Pentagon Papers” case) (Black, J., concurring).

Rather than discontinue the litigation, it chose instead to double down by filing an amended complaint, listing no fewer than thirty-four statements (along with various comic images) alleged to be defamatory.

The Court issued a ruling on May 13, 2020, denying Massa’s TRO application.

Court Grants *Geneva Believer*’s Anti-SLAPP Motion

As it said it would, *The Geneva Believer* proceeded to file a comprehensive anti-SLAPP motion for summary judgment seeking dismissal of the amended complaint’s defamation claims as legally insufficient and requesting payment of its costs and attorneys’ fees as authorized by N.Y. *Civil Rights Law* 70-a. The blog’s central arguments in the motion were (1) Massa had failed to establish the falsity of any alleged express or implied defamatory facts; (2) certain statements complained of were reported from City of Geneva FOIL documents and statements made by elected officials during City Council meetings, and were therefore immunized from defamation liability by the fair report privilege codified in Section 74 of the N.Y. *Civil Rights*

Law; (3) the majority of statements complained of were protected opinions based on facts disclosed to the reader from acknowledged sources; and (4) Massa was unable to overcome the rigorous standards governing disfavored defamation by implication claims under New York law.

The blog's arguments found a receptive judicial audience. As a threshold point, the Court determined that New York's anti-SLAPP statute, in both its previous and amended iterations, applied to Massa's defamation claims:

Given the nature of Massa's business and the significant number of projects it has bid upon, been awarded and completed for the City of Geneva, it is clear that Massa met the more restrictive definition of "public applicant or permittee" under the former law and there is no doubt that this is an "action involving public petition and participation" under the amended law. It is equally clear that the amendment was intended to be retroactive as both state and federal courts have made that determination. See *Sackler v. American Broadcasting Companies, et al.*, Index No.: 155513/2019 (Sup Ct, NY County, March 9, 2021), *Palin v. NYT. et. al.*, 17-cv-485s (JSR), SDNY December 29, 2020 and *Coleman v. Grand*, 18-cv-5663 (ENV)(RLM) EDNY February 26, 2021.

Following from this determination, the Court examined whether Massa's defamation claims had "a substantial basis in law and . . . fact" as required by *Civil Rights Law* § 70-a(1)(a), holding that Massa had failed to meet its burden of demonstrating falsity:

With respect to the articles referred to in the Amended Complaint, Meaney clearly sets out the facts via reference to public documents, City Council Meeting minutes, video of Council meetings, statements documented and attributable to the speakers, reputable traditional news sources, responses to FOIL requests, verifiable observations and information generally available in the community. Massa's allegations are conclusory at best and are insufficient to establish those statements are false. *Roche v. Hearst Corp.*, 53 NY2d 767, 769 (1981). In New York, truth is still a complete defense in defamation actions. *Ryan v. New York Tel. Co.*, 62 NY2d 494 (1984) and a determination that the facts are substantially true is sufficient to overcome a defamation claim.

The Court then turned to Mr. Meaney's opinion privilege defense and applied New York's established three-part test in ruling that the overall publication context supported constitutional protection of his journalistic advocacy:

As already discussed, the factual allegations set forth in the posts are substantially true. Those facts in and of themselves are neither indefinite nor ambiguous. The real issue is whether the questions Meaney raises

concerning the relationship between City Council and Massa are matters of opinion. It is clear from the articles that Meaney is submitting facts and then asking the readers to think and draw their own conclusions. As a practical matter, like Op Ed pieces in traditional media, the articles published in *The Geneva Believer* involving matters of public concern serve to signal to the reader that they are expressions of opinion. *Brian v. Richardson*, 87 NY2d 46 (1995); *Immuno AG v. Moor-Jankowski*, 77 NY2d 235 at 245 (1991). This Court finds that Meaney's questions and suggestions reflect his opinion while encouraging readers to draw their own conclusions.

Moreover, and “for arguments [*sic*] sake,” the Court rejected Massa's libel-by-implication cause of action as unable to meet the stringent requirements imposed by New York Law on such a claim, which “is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements. *Stepanov v. Dow Jones & Co., Inc.*, 120 AD3d 28 (1st Dept. 2014); *Martin v. Daily News L.P.*, 121 AD3d 90 (1st Dept. 2014).”

Massa must make a “rigorous showing” that although the factual assertions are substantially true, the defamation was by implication, and that a reasonable person could read the statement as a whole and glean both a defamatory inference as well as Meaney's clear intent to intend and endorse that inference. *Stepanov v. Dow Jones & Co., Inc.*, supra. Massa's position is that the articles taken as a whole create the intended inference that it was awarded contracts by the City of Geneva by means of collusion, bribery, undue influence and favoritism. Although one could certainly argue that Meaney believes the inferences, the articles themselves do not naturally lead a reader to the same conclusion. For this reason, Massa fails to make the required “rigorous showing”.

As a result of repudiating the amended complaint's theories of recovery, the Court awarded Mr. Meaney his costs and attorneys' fees as authorized by *Civil Rights Law* § 70-a (1)(a).

Massa filed a Notice of Appeal on May 24, 2021.

Defendant James Meaney a/k/a The Geneva Believer was represented by co-counsel Michael J. Grygiel of Greenberg Traurig, LLP and Mark H. Jackson, Tyler Valeska, and Cortelyou C. Kenney of the Cornell Law School First Amendment Clinic. The successful anti-SLAPP motion was argued by Rob Ward, a third-year student at Cornell Law School. Massa Construction was represented by Anthony C. Galli of Sheats & Bailey, PLLC in Liverpool, N.Y.

Washington Enacts Uniform Public Expression Protection Act

New Anti-SLAPP Law Replaces Former Statute Struck Down in 2015

By Bruce E.H. Johnson

On May 12, Washington Governor Jay Inslee signed [SSB 5009](#), Washington’s version of the Uniform Public Expression Protection Act (“UPEPA”). With his signature, Washington has become the first state to enact the Uniform Act adopted by the Uniform Law Commission (“ULC”) in July 2020.

The Washington bill was introduced (as a pre-filed bill) by State Sen. Jamie Pedersen, a Seattle Democrat who is one of the state’s Uniform Law Commissioners and also serves as chair of the Senate Law and Justice Committee. It received substantial support from Republicans as well, with State Sen. Mike Padden, a Spokane Republican and the Committee’s ranking member, serving as primary sponsor of the Senate bill.

Washington had a prior anti-SLAPP law, enacted in 2010 and rejected by the State Supreme Court in *Davis v. Cox* in 2015 because the justices opposed the vagueness of its adoption of California’s “probability of prevailing” language coupled with the statement that the law mandated a “clear and convincing evidence” standard of proof, both of which suggested that courts might weigh and evaluate the parties’ factual submissions in pretrial motions, which would be in violation of the state’s constitutional right to trial by jury. (*Davis v. Cox*, 83 Wash.2d 269, 351 P.3d 862 (2015). Bruce represented the defendants in that case, which was remanded for further discovery and eventually dismissed on a motion for summary judgment applying the same undisputed facts and legal principles affirmed by the Washington Court of Appeals in February 2020.)

UPEPA completely eliminates those risks. By its terms, Section 7 of the Uniform Act strictly adheres to Rule 12 and Rule 56 standards (which have been adopted as Washington Civil Rules) in evaluating potential SLAPPs.

The 2010 law also had no exemptions, which meant that plaintiff’s cases that lawyers and clients had no reasonable expectation that the First Amendment was implicated by their claims were suddenly and unexpectedly dragged into motions for early dismissals and large fee awards. The result was active opposition to the 2010 anti-SLAPP law by the Washington State Association of Justice (“WSAJ”), the trial lawyers’ lobby, which was heavily involved in enlisting the State Supreme Court to grant review and eventually overturn the SLAPP dismissal order, in *Davis v. Cox*.

WSAJ also vigorously opposed UPEPA when it was introduced by Senators Pedersen and Padden. As a result, a lawyer representing the media (me) was tasked by the bill’s sponsors to

negotiate potential amendments with WSAJ. And, as a result of this invitation, I began a series of Zoom dialogues with WSAJ board members, hoping to arrive at legislative compromises that would address the WSAJ's legitimate concerns while also preserving UPEPA's significant protections from liability for core First Amendment activities.

One of the key backstops in negotiating any requested changes in UPEPA was the ULC committee with responsibility for this Uniform Act, chaired by Oregon lawyer Lane Shetterly, who testified in support of the bill in both the Senate and House committee hearings, and staffed by the ULC's legislative counsel, Kaitlyn Wolff, who kept close tabs on all of the proposed changes and coordinated between committee members and me. That coordination was crucial to the final product, in large part because the ULC has nonpartisan credibility everywhere in the United States.

Periodically, during the progress of the bill through the Washington legislature, I would regularly consult with the UPEPA committee members on WSAJ's various proposals (which were offered while the bill was in the Senate committee and again while it was pending in the House committee), so that the resulting product, while containing some amendments, would remain consistent with UPEPA's policy goals and statutory structure. These committee members, who were constantly responsive at all hours, were an incredibly valuable resource during the discussions with WSAJ's lobbyists and representatives.

As a result of those negotiations, the Washington version of UPEPA has several unique features that deviate from the text of the Uniform Act. First, various causes of action (generally addressing litigation matters that WSAJ and I believed were generally unlikely to trigger core First Amendment concerns, such as actions "[a]gainst a person named in a civil suit brought by a victim of a crime against a perpetrator," "[a]gainst a person named in a civil suit brought to establish or declare possessory rights, use of property, recovery of property, quiet title to property or related claims relating to real or personal property," or ["b]rought under the Insurance Code or arising out of an insurance contract," etc.) were the subjects of a statutory exemption from the law's protections and were incorporated in the Washington bill.

Interestingly, the WSAJ negotiators were very familiar with similar exemptions negotiated in 2019 involving amendments to the Texas Citizens Participation Act ("TCPA"), and in fact successfully sought to copy some of the TCPA language into the Washington bill. (Laura Prather, our MLRC anti-SLAPP committee co-chair and principal proponent of the TCPA, was an obvious resource and very useful as we negotiated this language with the WSAJ.) *See* Tex. Civ. P. & Rem. Code § 27.010.

Second, we negotiated in Section 3 of the Uniform Act an unusual pre-motion "safe harbor" requirement that had been requested by the WSAJ lawyers. As a result, to gain full access to all of the UPEPA's remedies, the target (or the lawyer for the target) of the SLAPP lawsuit should provide 14 days "written notice" of the intent to file a motion to strike, which gives the plaintiff an opportunity to cure these deficiencies by amendment or dismissal. (The "written notice" also automatically triggers the Act's discovery stay.)

The third substantive change that we negotiated with the WSAJ lawyers was the attorney fee provision in Section 10 of the Washington law. The Uniform Act provides for a prevailing party fee award for the successful moving party seeking dismissal of the claims, and a fee award for the responding party if that motion is frivolous. By contrast, the Washington language provides a prevailing party fee award to the responding party if they prevail on the anti-SLAPP motion “and the court finds that the motion was not substantially justified or filed solely with intent to delay the proceeding.” (The WSAJ negotiators cited the Equal Access to Justice Act as a model for this alteration to the text of the Uniform Act. The EAJA, 5 U.S.C. § 504, provides that an agency that conducts an adversary adjudication against a prevailing party shall pay the reasonable attorneys’ fees and expenses of that party, unless the adjudicative officer of the agency finds that the position of the agency was “substantially justified.” Other applications of this standard are found in many civil discovery rules, including the Federal Rules of Civil Procedure and the Washington Civil Rules.)

Of course, notwithstanding these various changes, core First Amendment protections — the key ingredients of UPEPA — are preserved in SSB 5009. Thus, by its terms, the new law applies to any “[e]xercise of the right of freedom of speech or of the press, the right to assemble or petition, or the right of association, guaranteed by the United States Constitution or Washington state Constitution, on a matter of public concern.” In addition, the state law incorporates the UPEPA’s reminder that this law should be “broadly construed” to protect these important constitutional rights, and also (absent of course from our 2010 law) that “consideration must be given to the need to promote uniformity of the law . . . among states that enact it.”

With the changes that were negotiated with WSAJ and with substantial support from both political parties, the final version of the bill sailed through both the Washington House (97-1) and the Washington Senate (48-0).

Finally, with its UPEPA enactment, Washington becomes the 34th state (plus the District of Columbia and Guam) with an effective anti-SLAPP law. The new law takes effect on July 25.

Bruce is a partner in the Seattle office of Davis Wright Tremaine LLP. He serves as co-chair (with Laura Prather, a partner in the Austin office of Haynes and Boone, LLP) of the MLRC’s Anti-SLAPP Committee.

With its UPEPA enactment, Washington becomes the 34th state (plus the District of Columbia and Guam) with an effective anti-SLAPP law. The new law takes effect on July 25.

Petty Tyrants, Dethroned: Michigan Court Dismisses Frivolous Lawsuit by City Officials Against Their Constituents Over Social Media Criticisms

By Brian D. Wassom

It is a litigator's truism that the pettier a dispute is, the nastier it will be fought. A corollary to this wisdom holds that the less actual power people have, the more they will flaunt it.

Leo Savoie and Brian Kepes, then then the elected Supervisor and Treasurer of Bloomfield Township, Michigan, evinced these maxims on May 28, 2020 when they filed a class action complaint naming their constituents Valerie Murray and Kathleen Norton-Shock, as well as the social media platform NextDoor. The alleged transgressions? That Murray had shared various posts on NextDoor critiquing the Township's handling of the COVID-19 pandemic, encouraging other residents to shelter in place, and criticizing a 2019 special assessment referendum. *That is all.*

Yet, on that basis, Savoie and Kepes (all while referring to themselves as mere "residents," rather than acknowledge they were public officials running for re-election) sued Murray (who they also failed to note was running as a candidate of the opposite party for the Township Board of Trustees) for "tortious interference with residents' public service expectations." The theory? That Murray's criticisms were somehow responsible for the assessment proposal's 2-1 landslide electoral defeat, thus depriving residents of *nine million dollars* worth of public safety services. (Savoie and Kepes' complaint actually had the gall to allege that, because the 26-square-mile community is one of Michigan's most affluent, its residents have a higher expectation of quality from their public services.)

Plaintiffs' primary objection was that Murray used social media "as a political tool." Specifically, that she: criticized the performance of both plaintiffs in their official capacities and advocated for the voters to turn them out of office; promoted her own candidacy for trustee; argued against a tax proposal favored by plaintiffs; and had the audacity to question the veracity of statements made by the Township in favor of the tax proposal.

Apparently unaware of their hypocrisy, plaintiffs criticize Murray for "specifically targeting and attacking other [residents] who expressed an opposing viewpoint," and of seeking to "attack," belittle," "bully," "drown out," and "intimidate" political opponents. The only "examples of the bullying and attacking comments" recited in the 26-page complaint, however, are mere expressions of opinion on political issues—including calling out plaintiffs for receiving taxpayer-funded luxury cars, fuel, and insurance while insisting on raising residents' taxes for questionable spending projects. Murray's comments apparently struck a nerve.

If ever there were a case that called out for an Anti-SLAPP statute, it would be this one.

A similar interference claim postulated that residents may have missed out on public services due to Murray's (entirely accurate) statement that the Township's office were closed due to the pandemic. For their part, NextDoor and Norton-Shock (a volunteer group administrator with no role in Murray's posts) were named in two counts for "negligent enforcement" of the site's community standards by not removing Murray's posts.

If ever there were a case that called out for an Anti-SLAPP statute, it would be this one. But Michigan does not have one. Fortunately, however, and thanks largely to the efforts of many MLRC member litigators in prior generations, the state does have a helpful body of case law upholding the value of First Amendment liberties and of the press function. When, as here, plaintiffs ask a Michigan court "to restrict ... core political speech, courts apply exacting scrutiny, upholding the restriction only if it is narrowly tailored to serve a compelling state interest." *In re Chmura*, 461 Mich 517, 533; 608 NW2d 31 (2000).

Further, when addressing "claims implicating First Amendment freedoms, ... courts must make an independent examination of the record to ensure against forbidden intrusions into the field of free expression and to examine the statements and circumstances under which they were made to determine whether the statements are subject to First Amendment protection." *Northland Wheels Roller Skating Ctr, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 322; 539 NW2d 774 (1995).

Early summary disposition is particularly important where claims "are made against publications dealing with matters of public interest and concern, [to avoid a] chilling effect." *Lins v Evening News Assoc*, 129 Mich App 419, 425; 342 NW2d 573 (1983).

Murray and Norton-Shock responded to the complaint with motion to dismiss under Mich. Ct. Rule 2.116(C)(8) (the equivalent of a motion to dismiss) that dug deep into both Michigan and United States

Supreme Court case law emphasizing the cherished role of speech on matters of politics and public concern. Regarding the COVID-related allegations, besides the fact that the alleged statements were innocuous on their face, the Michigan Constitution provided additional assistance by expressly declaring that the "public health and general welfare of the people of the state are ... matters of primary public concern." Const 1963, art 4 § 51. The motion also drew on *Washington League for Increased Transparency and Ethics v Fox Corp*, No. 20-2-07428-4 SEA (King Co, WA Sup Ct, May 27, 2020)—a decision then less than a month old—to argue that even false or misleading statements about COVID-19 still enjoyed First Amendment protection.

The tortious interference claims also failed to meet their own elements. For her part, Norton-Shock relied on Section 230 of the Communications Decency Act to shield her from liability for her alleged (mischaracterized, really) actions as a moderator. Plaintiffs' anemic 10-page response reiterated the alleged falsity of the social media posts, and little else.

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In an August 6, 2020 order entered after a Zoom hearing, Judge Daniel P. O'Brien of the Oakland County Circuit Court granted Murray and Norton-Shock's motion in full adopting their motion papers as its ruling on the motion, and denying plaintiffs leave to amend their complaint. That unabashed victory nearly a year ago still stands.

The procedural record of the case has been muddied somewhat since then, though, after Plaintiffs filed an August 6, 2020 post-judgment motion to find the Complaint frivolous and to award Murray and Norton-Shock their attorneys' fees. Defendants have done much more to defend against that motion than they ever did with respect to the merits of the case. On November 5, 2020, after much procedural wrangling, the court refused reconsideration of its ruling, found three of the four counts to be frivolous, and permitted plaintiffs to take both written discovery and an evidentiary hearing regarding the amount of the fee award. In light of continued court closures due to the pandemic and other procedural gamesmanship, the fee motion remains pending as of this writing in June 2021.

Meanwhile, NextDoor negotiated a stipulated dismissal of the claims against it. Savoie lost his bid for re-election as Supervisor, although Kepes remains Township Supervisor—working together with Murray, who won election to the Board of Trustees.

Brian D. Wassom is a litigation partner at the Michigan-based firm Warner Norcross + Judd LLP. He and partner Matthew Nelson represented Valerie Murray and Kathleen Norton-Shock. Plaintiffs are represented by Norman Yatooma of the Yatooma Law Firm. Theodore Seitz of Dykema Gossett PLLC represented NextDoor.

Massachusetts Supreme Judicial Court Digs Into Section 230 for the First Time

By Jeff Hermes

On April 21, 2021, the Supreme Judicial Court of Massachusetts issued its opinion in [Massachusetts Port Authority v. Turo Inc.](#), No. SJC-13012. The decision, which involves the question of whether peer-to-peer vehicle marketplace Turo is immunized by § 230 from liability for users' unauthorized activity at Boston's Logan Airport, is the first significant ruling from Massachusetts' high court on the scope of § 230's protection. Unfortunately, the Court's handling of the question of whether Turo's own statements can render it liable for its users' transactions is vague, leaving questions about both the Court's interpretation of § 230 and the constitutionality of a preliminary injunction entered by the trial court.

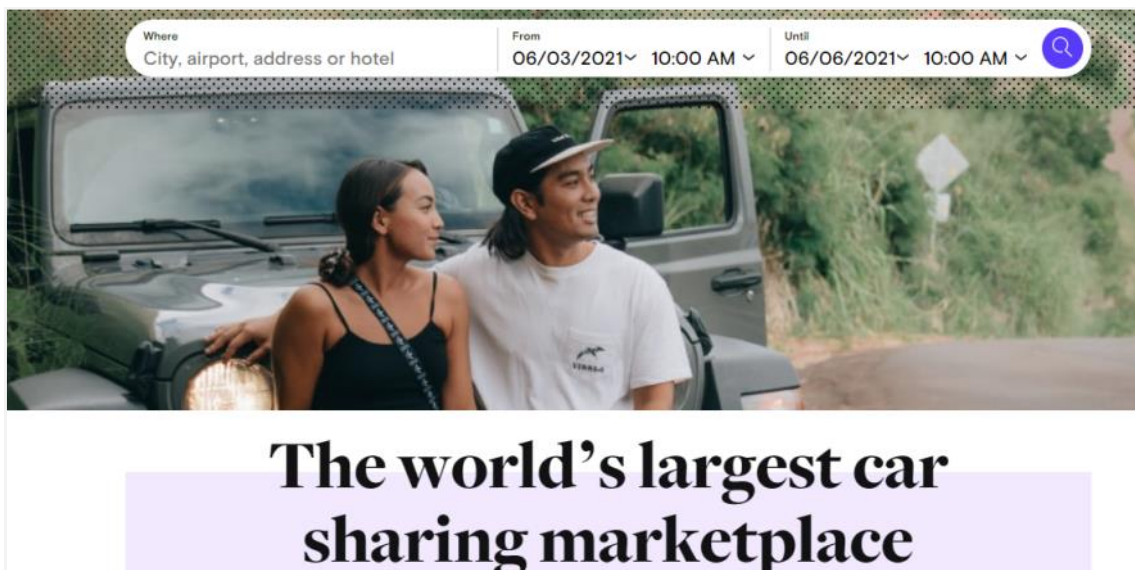
Background

The Massachusetts Port Authority, better known as Massport, is the public authority that runs Logan Airport. Among other regulations, Massport enforces rules against the unauthorized conduct of commercial activity at Logan, including the operation of a car rental service without a governing agreement between Massport and the operator. In addition to charging substantial fees, such agreements preclude rental services from picking up or dropping off passengers directly at the airport's terminals in order to reduce traffic.

Turo is an online service that facilitates peer-to-peer arrangements between users for short-term rentals of vehicles, comparable to how Airbnb and other services facilitate peer-to-peer arrangements for housing. Turo users offering their vehicles create their own listings and determine pricing, and agree to pick-up/drop-off locations with other users who are looking for vehicles. None of these factors are determined by Turo, although Turo's website does identify nearby airports as potential pick-up locations and offers a specific button to quickly search user-generated listings on its site for cars available at Logan. Turo also offers payment processing, access to vehicle insurance, guest screenings, and emergency support.

In the years leading up to this lawsuit, approximately half of the rentals arranged through Turo involved vehicles "handed off" at Logan. In response, Massport repeatedly asked Turo to sign an agreement to operate a car rental service under the governing regulations. Turo refused, arguing that it is not itself a car rental service and therefore not subject to the rules.

Massport sued Turo, one of its corporate users, and a number of individual Doe users in June 2019, alleging violations of the commercial activity and car rental regulations, as well as claims for trespass, aiding and abetting trespass, unjust enrichment, and violations of Massachusetts' consumer protection law. A Superior Court judge granted a preliminary injunction in January 2020 against Turo's operation at Logan Airport and against either Turo or its users listing vehicles available for pickup at Logan, rejecting Turo's argument that § 230 immunized it from



Turo is an online service that facilitates peer-to-peer arrangements between users for short-term rentals of vehicles, comparable to how Airbnb and other services facilitate peer-to-peer arrangements for housing.

liability for any arrangements made by its users. The Supreme Judicial Court transferred Turo's appeal of the preliminary injunction to itself sua sponte.

The SJC Ruling

While acknowledging that Congress intended to create broad immunity from liability for third-party content through § 230, the Supreme Judicial Court signaled at the outset that it would not consider that immunity to be limitless, citing the U.S. Court of Appeals for the Ninth Circuit for the principle that “courts consistently have eschewed an expansive reading of the CDA that would render unlawful conduct magically lawful when conducted online, and therefore give online businesses an unfair advantage over their real-world counterparts.” Slip op. at 9, *quoting HomeAway.com, Inc. v. Santa Monica*, 918 F.3d 676, 683 (9th Cir. 2019). That said, the Court stated that it would apply the now-traditional three-part test for § 230, i.e., asking if “the defendant (1) is a provider or user of an interactive computer service; (2) the claim is based on information provided by another information content provider; and (3) the claim would treat the defendant as the publisher or speaker of that information.” Slip op. at 10.

The Court noted that there was no dispute that Turo is a provider of an interactive computer service under the first prong. *Id.* at 11. It went on, however, to find that Massport's claims did not satisfy the second prong because they related to the content that Turo itself created “advertising Logan Airport as a desirable pick-up or drop-off location.” *Id.* at 11. But as discussed further below, it is not clear that Massport's claims, or the Court's conclusion in this case, did turn in fact on Turo's statements referencing Logan. Moreover, the Court's somewhat cursory treatment of this point disguises the fact that it took a step beyond other courts in holding that Turo's own statements are sufficient to render it liable for its users' activity.

The Court relied upon the Tenth Circuit's oft-cited decision in *FTC v. Accusearch, Inc.*, 570 F.3d 1187 (10th Cir. 2009), for the principle that an information service provider can be held liable for "development of offensive content only if it in some way specifically encourages development of what is offensive about the content." *Id.*, citing *Accusearch* at 1199. But in *Accusearch*, the Tenth Circuit was discussing a "people search" website that solicited telephone information from third-party researchers, acquisition of which "would almost inevitably require someone to violate the Telecommunications Act or to circumvent it by fraud or theft." *Accusearch* at 1192. It was the website's affirmative request for information that it knew would be acquired illegally that constituted the "encouragement" vitiating § 230 protection. *Id.* at 1199.

Similarly, in another frequently cited case, *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008), the Ninth Circuit held that housing website Roommates.com was an information content provider not protected by § 230 when it compelled users to disclose their sex, family status and sexual orientation as part of the process of creating or seeking listings for rooms for rent. This information populated the listings, leading to unlawful expressions of preference in violation of the federal Fair Housing Act. *Roommates.com* at 1164-66. In contrast, the Court of Appeals held that Roommates.com did enjoy § 230 protection against liability for comments made in an "Additional Comments" section whose content was not edited by the website operator, even in light of the discriminatory questions posed by the website during the listing process. *Id.* at 1173-75.

In contrast, Turo did not require, request, or even directly recommend that its users offer airport pick-ups; at most, reading its website would suggest that airport pick-ups are particularly desirable to renters. While there is an argument that this might suffice to "specifically encourage development of what is offensive about the content," this "encouragement" is not of the same caliber as that discussed in *Accusearch* and it is not clear where it falls between the mandatory questions and the free-comment sections discussed in *Roommates.com*. Additional discussion would have been helpful to understand whether and how the Supreme Judicial Court considered the differences.

On the third prong of the § 230 test, i.e., whether the claim at issue treated Turo as a "publisher or speaker" of third-party information, the Court held that Massport was not seeking to hold Turo liable for what its users posted to the site but for its role in facilitating the transactions that resulted in violation of the airport rules. Slip op. at 12. The Court explains:

The ultimate question in determining whether an interactive computer service provider like Turo is entitled to § 230 immunity is whether the cause of action necessarily requires that the defendant be treated as the publisher or speaker of content provided by another. Features that reflect choices about what content can appear on the website and in what form are editorial choices that fall within the purview of traditional publisher functions, ... but more concentrated involvement in the transaction may fall outside that purview.

Id. at 12-13 (internal quotation marks and citations omitted). It then pointed to the decision in *Airbnb, Inc. v. Boston*, 386 F. Supp. 3d 113 (D. Mass. 2019), in which the district court held that, notwithstanding § 230, Airbnb could be fined for facilitating transactions for unlawful housing rentals and taking payment for that service because “[t]he fine is neither expressly tied to the content of the underlying listing, nor explicitly aimed at penalizing the manner in which Airbnb has structured its booking and payment services.” *Id.* at 13-14, *citing Airbnb* at 120-22.

Comparing *Airbnb* to the case at bar, the Court found that “[r]ather than focusing on what Turo allows its hosts to publish in their listings, Massport’s claims pointedly focus on Turo’s role as the facilitator of the ensuing rental transactions at Logan Airport, which is far more than just offering a website to serve as a go-between[.]” Slip op. at 14. The Court pointed to Turo’s additional services such as payment processing, offering insurance, and roadside services. *Id.* at 14-15. It rejected Turo’s argument that aiding-and-abetting claims based on hosting a peer-to-peer marketplace violate § 230, because “Massport’s complaint targets Turo’s own conduct and the claims of aiding and abetting are not predicated on the publication of Turo’s hosts’ content.” *Id.* at 15. Finally, it pointed out that the U.S. District Court for the Central District of California had reached a similar result with respect to Turo’s facilitation of unauthorized rentals at LAX. *Id.* at 16, *citing Turo Inc. v. Los Angeles*, No. 2:18-cv-06055 (C.D. Cal. Jun. 19, 2020), *rev’d on limited grounds*, Nos. 20-55729 & 20-55731 (9th Cir. Mar. 10, 2021).

Massport was not seeking to hold Turo liable for what its users posted to the site but for its role in facilitating the transactions that resulted in violation of the airport rules.

It is worth noting that the bulk of the Supreme Judicial Court’s analysis relates to the third prong of the § 230 analysis. Indeed, it is not obvious that the Court’s holding on the second prong that § 230 actually matters to the Court’s conclusion.

The only section of the opinion that specifically discusses the relevance of content created by Turo itself relates specifically to Turo’s mental state with respect to the aiding-and-abetting claim. Slip op. at 19-21. The Court points out that such features evince Turo’s knowledge that its users would transact unlawful activity at Logan, *id.* at 19. But while the Court reiterates that Turo can be held liable for its own content under § 230, *id.* at 19 n.3, using such content as evidence of state of mind does not actually hold Turo liable for the publication of content and thus does not present a § 230 question in the first place.

The Court also states that Turo’s offering of “an online platform that identifies Logan Airport as a pick-up or drop-off location” helps to satisfy another element of the aiding-and-abetting tort as “active participation in or substantial assistance of” its users’ violations at Logan. *Id.* at 21. But while the Court references “Turo’s broadcasting of airport handoffs,” which could be tortious under § 230 only if Turo can be considered to have contributed to its user listings, the Court also points to all of the other services offered by Turo that it held were not protected by § 230 under the third prong. *Id.* One might therefore wonder whether the Court’s analysis of the

second prong of the § 230 is superfluous because it does not change the outcome of the court's liability analysis.

However, the distinction between first-party and third-party speech on Turo's website led the Supreme Judicial Court to modify the language of the injunction issued by the trial court. The trial court did not merely prohibit activity at Logan; rather, it issued a prior restraint against Turo "listing or permitting motor vehicles to be listed on Turo's website, or by means of any other Turo application, as available for pickup or drop-off at Logan Airport." The Supreme Judicial Court held that the phrase "or permitting motor vehicles to be listed" violated § 230 by potentially requiring Turo to vet content posted by its users, but left in place that portion of the injunction prohibiting Turo from creating such listings itself. Slip op. at 23-24.

In thinking about this part of the holding, the § 230 questions are less pressing than the basic constitutionality of the prior restraint, which the Court did not consider. The Court's primary focus on Turo's support services in the rest of the opinion begs the question of whether such a restraint is either necessary or effective. Plainly, the real issue here had to do with the actual transactions taking place at Logan and the support services provided by Turo, which could be enjoined directly. Meanwhile, forcing removal of the "Logan Airport" button (assuming that is what the somewhat vague injunction was intended to address) would at best provide only marginal relief given that users are still permitted to list airport pickups on the site, which other users could find with a neutral search function.

Ultimately, the Supreme Judicial Court's conclusion mostly aligns with how other courts have treated online peer-to-peer marketplaces for rental services. However, its treatment of Turo's own speech and whether that provides a hook for imposing liability on Turo for its users' transactions raises further questions that are not adequately addressed.

Jeff Hermes is a deputy director at MLRC.

Prometheus IV: Supreme Court OKs FCC Updates to Local Media Ownership Rules

By Julia Ambrose & Patrick Cross

The Telecommunications Act of 1996 directs the Federal Communications Commission to review its media ownership rules every four years and to “repeal” or “modify” any rule that is no longer “necessary in the public interest as the result of competition.” § 202(h), 110 Stat. 111–112, as amended § 629, 118 Stat. 99–100; *see also* 47 U.S.C. § 303.

In November 2017, the Commission did just that: It entered an [Order on Reconsideration](#) (the “2017 Order”) that modified or eliminated several decades-old ownership rules in light of substantial competitive changes in the media marketplace since those rules—some of them decades old—were originally enacted. Of relevance here, the 2017 Order repealed or modified the Newspaper/Broadcast Cross-Ownership Rule, the Radio/Television Cross-Ownership Rule, and the Local Television Ownership Rule (including the “eight voices” test and the prohibition on top-four combinations).

Soon thereafter, several public interest and advocacy groups appealed the 2017 Order to a three-judge panel of the U.S. Court of Appeals for the Third Circuit—the same panel that has overseen challenges to the Commission’s efforts to modernize the local media ownership rules for more than 17 years—in the latest iteration of *Federal Communications Commission, et al. v. Prometheus Radio Project, et al.* In September 2019, by 2-1 decision, that divided panel vacated the Commission’s rule changes in their entirety, reinstating the pre-2017 ownership rules. The panel majority found no fault with the FCC’s analysis of competitive marketplace conditions, but it concluded that the Commission had failed to “adequately consider the effect its new rules would have on ownership of broadcast media by women and racial minorities.” One of the three judges on the panel dissented from that decision, reasoning that the Commission is not required “to quantify the future effects of its new rules as a prerequisite to regulatory action.”

In 2020, both the FCC and NAB filed petitions for writ of certiorari, asking the Supreme Court to intervene and correct errors in the Third Circuit’s reasoning—errors that, if allowed to stand, could have far-reaching consequences for the broadcast industry. Local broadcasters weighed in to support the parties’ arguments and emphasize the importance of the issues presented for the broadcast industry as a whole. Woefully outdated ownership rules have long negatively impacted broadcasters’ ability to achieve efficiencies and economies of scale that are critical to the continued production and distribution of locally focused news, weather, emergency, public

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interest, sports, and public affairs programming, with viewers in local markets bearing the ultimate cost.

The broadcasters' submissions to the Court pointed to discrete examples in which local stations were permitted—under certain exceptions to the generally applicable ownership rules—to combine news-gathering and -production and other operations to achieve economies of scale. In such cases, stations in precarious financial positions were able to leverage the benefits of joint operation and thereby continue to provide locally focused programming to viewers in their markets, thus serving the Commission's core localism mandate in markets and circumstances where a lone station would likely have been unable to do so.

The Supreme Court granted the FCC and NAB cert petitions in late 2020. Both NAB and the FCC filed merits briefs emphasizing multiple grounds for reversing the Third Circuit majority's decision and paving the way for the FCC's relaxation of its ownership rules. Generally speaking, the FCC's opening brief relied heavily on the administrative law principle that courts should defer to federal agencies' decision-making whenever it is reasonable to do so; NAB's opening brief largely focused on the fact that the FCC's decision-making process was both mandated and circumscribed by Congress, via the statutory mandate to update ownership rules that no longer serve the public interest "as the result of competition." And—once again—local broadcasters lent their voices in support of the challenges to the Third Circuit majority's decision setting aside the updated ownership rules, offering real-world examples and implications for local broadcasters, and the viewing public they serve, of operating under decades-old, anachronistic ownership rules that no longer reflect today's vibrant, highly competitive media marketplace.

The Court heard oral arguments in January 2021.

On April 1st of this year, the Court issued a unanimous Opinion reversing the Third Circuit's decision and upholding the legality of the FCC's 2017 Order. [FCC v. Prometheus Radio Project](#). The Opinion, authored by Justice Brett Kavanaugh, upheld the FCC's 2017 Order as "reasonable and reasonably explained" under the statutory standard governing agency decision-making set forth in the Administrative Procedure Act ("APA"). That is, the Supreme Court found that the FCC's decision-making was not "arbitrary and capricious." (Justice Clarence Thomas authored a concurrence articulating what he believes to be "another, independent reason why reversal is warranted: The Third Circuit improperly imposed nonstatutory procedural requirements on the FCC by forcing it to consider ownership diversity in the first place.")

The Supreme Court's Opinion emphasized that the FCC has "broad statutory authority to regulate broadcast media" as public convenience, interest, and necessity require, and that a court reviewing regulatory action taken by the FCC must be "deferential" and "may not substitute its own policy judgment for that of the agency." The Opinion further noted—as a factual matter—that the ownership rules at issue were each adopted during the period from 1964–1975, "in an early-cable and pre-Internet age when media sources were more limited."

The Commission’s decision to update those rules reflected just the sort of marketplace changes that Congress intended when it enacted Section 202(h). And though the FCC “did not have perfect empirical or statistical data” regarding the effects of its proposed ownership relaxation on minority and female ownership” when it adopted its 2017 Order, the FCC requested, but did not receive, such data. As the Court declared, the law imposes no “general obligation on agencies to conduct or commission their own empirical or statistical studies.”

Against that legal and factual backdrop, the Opinion held that the Commission’s 2017 decision to deregulate various of its local ownership rules fell well within the legal scope of the FCC’s authority to calibrate those rules to serve “the public interest as the result of competition.” As the Opinion succinctly states:

The FCC reasoned that the historical justifications for those ownership rules no longer apply in today’s media market, and that permitting efficient combinations among radio stations, television stations, and newspapers would benefit consumers. The Commission further explained that its best estimate, based on the sparse record evidence, was that repealing or modifying the three rules at issue here was not likely to harm minority and female ownership. The APA requires no more.

The outcome of the *Prometheus* litigation is an extremely positive one for broadcasters. It is, however, by no means the end of the road for the FCC’s recalibration of its ownership rules. The FCC now must take a number of procedural steps in order to formally re-adopt the rule changes authorized by the Opinion, including by re-adjusting various of its forms to account for those ownership rule changes. And the FCC is currently considering certain of its ownership rules in a separate, open proceeding—the FCC’s 2018 quadrennial review—which was initiated more than two years before the Supreme Court’s decision, during which period the broadcast industry has seen changes both in presidential administration and the composition of the FCC.

Although in one sense the resolution of the *Prometheus* case brings an end to an extremely long legal battle waged on a number of fronts since 2002, in another sense this is only the beginning of the FCC’s continuing, statutorily mandated examination of how its media ownership rules can best be calibrated to the vibrant, diverse, and constantly evolving media marketplace.

Julia Ambrose is a partner, and Patrick Cross an associate, at Brooks Pierce in Raleigh, NC. Julia and Mark Prak represented Amici ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates. [Petitions and briefs in the case are available here.](#)

The outcome of the Prometheus litigation is an extremely positive one for broadcasters. It is, however, by no means the end of the road for the FCC’s recalibration of its ownership rules.

Oracle v. Google: It's Not Over

Setting the Stage For The Future of Fair Use Litigation

By Moon Hee Lee

The case of [Oracle v. Google](#) involves the technology in many of our pockets: the software platform for Android smartphones. To develop the Android platform, Google programmers wrote “millions of lines of new code” in the popular Java computer programming language. They wrote all the implementing code that actually tells the computer how to execute a particular task. To call up the implementing code for a given task, a programmer uses a command, or “API call,” that is defined in “declaring code.” Google used the same set of commands defined in Oracle’s Java SE Standard Library API, so that programmers could write their new programs using the same commands they were already familiar with. To use the same set of commands, Google used the same declaring code. In 2010, Oracle sued Google for doing so.

In the ten years that followed, the case ping-ponged up and down the district court and the Federal Circuit over two issues: is the declaring code copyrightable? And was Google’s copying fair use? The district court held that the declaring code was not copyrightable; the Federal Circuit disagreed. Then a jury found that Google’s copying of the declaring code was fair use; the Federal Circuit disagreed. Before the second trial on the damages, the Supreme Court granted cert on both questions.

The Court—ostensibly side-stepping the copyrightability question—[sided with Google on the fair use question](#). Google’s copying of the API was fair use because Google’s reimplementing of that user interface allowed a generation of programmers (who learned Java’s API commands to work in the desktop and laptop computing systems) to be creative in a new context (to write programs for mobile devices without having to learn an entirely new system).

The Court’s decision may have ended the decade-long fight between Google and Oracle, but this decision sets the stage for decades of future copyright litigation. What follows are some new stage directions.

The Second Factor’s New Role: Connecting Copyrightability & Fair Use

Though the Court ostensibly did not decide the copyrightability issue (and so assumed “purely for argument’s sake” that the API, including all of the declaring code, was copyrightable), the Court actually had plenty to say about it. This second fair use factor—the nature of the copyrighted work—has not taken the leading role in fair use cases. The Court, however, used

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the lens of this factor to cast some doubt on whether the declaring code that Google copied is entitled to strong copyright protection.

The declaring code, unlike the implementing code that Google did not copy, “differs to some degree from the mine run of computer programs,” because “unlike many other programs, its use is inherently bound together with uncopyrightable ideas (general task division and organization).” So even if the declaring code is “copyrightable at all,” the fact that it is “further than are most copyright programs ... from the core of copyright” should weigh in favor of fair use.

The Court’s discussion of the nature of the declaring code will certainly be invoked in future litigation over the copyrightability of source code. There may also be an opportunity to argue that where the work at issue is entitled to a “thin” copyright, the second factor weighs in favor of fair use.

Beyond the Defendant: Fair Use for the Creative Community

The Court asked whether Google’s use of Oracle’s commands was transformative in a much different context than the first time the Court placed transformiveness at the center of the fair use determination in 1994. That case, [Campbell v. Acuff-Rose](#), involved the song “Oh, Pretty Woman,” and the Court considered whether the defendant’s parody song was transformative.

The Court took on a much wider lens this time on the question of whether Google’s use of the API was a transformative use. In answering yes, the Court looked beyond Google and to the possibility for a community of programmers who have already made substantial investment in learning the API’s declaring code. According to the Court, the declaring code was “the key ... needed to unlock the programmers’ creative energies” in Google’s new Android platform. The use of that key to promote subsequent creation of smartphone programs was transformative.

The Court’s community-centric approach to fair use is also reflected in its fourth factor analysis. The Court stated that, in some cases, “the public benefit the copying will likely produce” affects the fourth factor analysis. But the Court left open the question of when the public benefit consideration would be relevant. It will be up to the future litigants and the lower courts to define that scope.

Possibility for Artistic Expressions: Transformative Replicas

The Court’s blockbuster fair use decision is, in some sense, a catch-up to the lower courts who have held, for example in the Second Circuit’s Google Books decision, that technology-dependent copying can be fair use. Nonetheless, the Court’s affirmation that a work that

The Court’s blockbuster fair use decision is, in some sense, a catch-up to the lower courts who have held, for example in the Second Circuit’s Google Books decision, that technology-dependent copying can be fair use.

replicates the original can be transformative is significant because it goes beyond technology-driven copying. The Court's example to illustrate this principle went back to easel art with an obvious reference to the iconic Warhol paintings of commercial objects, and so gave art that *necessarily* resembles or replicates the original—e.g., mash-ups and appropriation art—a stronger claim to fair use. This may be particularly important to those artists who have not had a strong prima facie defense to copyright infringement, such as sampling artists. Though a fair use defense has been rare in sound recordings cases, there may now be a good opportunity to make one.

To be clear, the Court did not answer the question of *when* the replicating art “adds something new and important,” a perennial difficulty in determining whether the use was transformative. But the effect of the Court's pronouncement can already be seen. Within a month of the Court's decision, the Second Circuit asked for briefing on whether, in light of the Court's ruling, it should redo its fair use analysis of Andy Warhol's silkscreen paintings based on photograph portraits of the singer Prince.

Fair Use Takes Center Stage: A Tool for Early Resolution of Copyright Disputes

Stating that the fair use analysis “primarily involves legal work,” the Court substantially limited the role of the jury to the “determination of subsidiary factual questions.” Further, there is no Seventh Amendment right to a jury trial on the equitable doctrine of fair use. As some courts have been hesitant to resolve issues such as substantial similarity at a pre-trial stage, fair use may be the defendant's preferred argument for motions to dismiss and for summary judgment.

Therefore, fair use is now poised to be the denouement of copyright disputes beyond the software issues that plagued Google and Oracle for the past decade.

Moon Hee Lee is an associate at Durie Tangri LLP who specializes in copyright and technology-related litigation.

Second Circuit Affirms Fair Use Dismissal of “Fish Sticks” Copyright Suit

By Joe Slaughter

On May 18, 2021, the Second Circuit issued its latest fair use opinion, [Brown v. Netflix, Inc., et al.](#), affirming the trial court’s dismissal of a copyright infringement lawsuit on fair use grounds.

The case concerned a 7-second snippet from a children’s song called “Fish Sticks n’ Tater Tots” that appeared in a feature-length documentary film entitled “Burlesque: Heart of the Glitter Tribe.” You can hear the song at [this](#) link, but be warned – once it gets in your head it may never come out!

The Glitter Tribe documentary follows the on- and off-stage lives of a group of burlesque performers based in Portland, Oregon. Like many similar films, Glitter Tribe is constructed as a pastiche of footage of actual events interspersed with studio-style interviews and narrative voiceovers. It chronicles various aspects of the performers’ lives, personalities, and ideas, as well as exploring their creative processes, their personal histories and relationships, and their views on burlesque as an art form and as a vehicle for cultural commentary.

The complaint in the case focused on one scene of the film in particular. That scene shows one of the performers, who goes by the stage name Babs Jamboree, sewing a costume while discussing the creative origin of one of her acts. She describes her long-time fascination with the notion of a “reverse mermaid”—that is, a creature with the head of a fish and the legs of a woman. She goes on to explain how she came up with the idea of incorporating the “reverse mermaid” concept into a food-themed show she had developed with some other burlesque performers. As she describes it, her solution was to create a reverse mermaid costume, then have that character’s “mermaid rock” transform into a vat of hot oil. The reverse mermaid then steps behind the “hot oil” prop, undergoes a costume change—taking off her fish head and putting on brown leggings—and emerging as “fish sticks” to continue the act.

As Ms. Jamboree is describing the creative inspiration behind this portion of her act, the film intercuts between footage of an interview with her, footage of her creating the “reverse mermaid” costume, and footage of Ms. Jamboree performing the act itself live in a theater. The key moment occurs as Ms. Jamboree, on stage, emerges from the vat of “hot oil” transformed (by changing clothes) into “fish sticks.” Right as she emerges from the oil, the music she chose to accompany her act changes, and she dances to 7 seconds of chorus from “Fish Sticks n’ Tater Tots.”



Based on the appearance in the documentary film of that snippet of the recording of their song, in 2019 the song's creators sued Apple, Amazon, and Netflix (each of which at one time or another distributed the film via their streaming services) for direct, contributory, and vicarious copyright infringement in the Southern District of New York. On May 27, 2020, the [District Court granted defendants' motion to dismiss](#) on fair use grounds. Plaintiffs appealed.

On appeal, Plaintiffs argued primarily that the District Court had erred in assuming that the film was a documentary without allowing Plaintiffs to take any discovery to test that assertion, going so far as to argue that "there are numerous creative works in existence that take the form or style of a documentary, but do not portray real events." Plaintiffs also sought to analogize the case to those in which nightclub owners have been held liable for playing unlicensed music at a dance party, notwithstanding that these Plaintiffs had sued the streaming platforms, rather than the performer who chose the song or the venue in which she performed. Moving to the fair use factors, the Plaintiffs argued that (1) the use was not transformative because it did not "alter" the song in any way; (2) the "creative" nature of the song weighed against fair use; (3) that while only a small portion of the song was used, it was the "heart" of the song (its hook); and (4) that defendants had effectively usurped the market for licensing of the song for use in films.

Second Circuit Decision

In a summary order, the Second Circuit rejected all of these arguments and affirmed the District Court's opinion dismissing the case. It noted that the "film has all the hallmarks of a documentary film" and that Plaintiffs' suggestion to the contrary (they had not alleged it in their Complaint) was "pure conjecture" which the Court had "no obligation to entertain."

With respect to the first fair use factor, the Court held that the "documentary character of the Film fits within those uses identified by" Section 107 of the Copyright Act, and that in that context, it "incidentally captures this dancer's use of the Song as a brief background accompaniment to her burlesque act" and was therefore entitled to a presumption of fair use.

While the Court did not address the second fair use factor, it further held that the third factor favored the defendants both because the film only used a small portion of the song and because, notwithstanding that the portion was the song's chorus, it was "reasonable in relation to the copying" because the film was attempting to "provid[e] commentary on and criticism of aspects of burlesque as evident in certain dancers' performances."

Finally, with respect to the fourth factor, the Court held that, given the brevity of the portion of the song included in the film, it would be unlikely for anyone seeking the song to "purchase the Film in preference to the original" and that "the film's use of a small portion of the Song as a component of an event recorded for documentary purposes does not plausibly fall within the traditional or well-developed market for the song."

Defendants-Appellees Apple Inc., Amazon.com, Inc., and Netflix, Inc. were represented by Jay Ward Brown and Joe Slaughter of Ballard Spahr LLP. Plaintiffs were represented by Daniel Knox of Knox Law Group, P.C.

Talk to the Hand: Michigan Copyright and Trademark Lawsuit Over Similar Hand Gesture Images Clapped Back

By Brian D. Wassom

This lawsuit vindicates the maxim that “no good deed goes unpunished,” but the outcome provides some encouragement for those using advertising images that are minor variations on common themes. Defendant Michigan Farm Bureau (“MFB”), an insurance provider, launched a charitable program at the height of the COVID-19 pandemic to support Michigan businesses.

Echoing the refrain repeated around the state and the country at the time, MFB’s campaign declared “We’re in This Together, Michigan,” and reinforced that notion with perhaps the most widely recognized shibboleth of Michigander identity: two hands arranged in the shape of the state map. (If you’ve ever asked a local where they’re from, you’ve likely seen them at least point to their palm to indicate their home town.)



MFB mailer, left, and MFB car decal

As a result, MFB found itself defending against this copyright and trademark infringement lawsuit. [High Five Threads, Inc. v. Mich. Farm Bureau](#), No. 1:20-cv-604, 2021 U.S. Dist. LEXIS 86770 (W.D. Mich. May 6, 2021).

Plaintiff High Five, a novelty clothing retailer, has sold products bearing its own version of the Michigan hand map for the past decade:



High Five t-shirt, left, and high-five sticker

Although High Five allegedly owns a copyright registration for this design, its US Trademark Registration is *not* for the High Five Hand Map, but rather for a composite mark containing both that image and a significant amount of text:



This has not, however, prevented High Five from using the ® symbol—which is statutorily reserved for federally registered marks only—with the *unregistered* High Five Hand Map design.

MFB responded with a Rule 12(b)(6) motion to dismiss. It attacked both the validity of High Five's copyright itself, as well as the lack of cognizable substantial similarity between the

parties' images. Leaning heavily on *Enchant Christmas Light Maze & Market Ltd. v. Glowco, LLC*, 958 F.3d 532 (6th Cir. 2020), which found generic outlines of animal bodies unoriginal, as well as a range of images from modern clip art to 10,000-year-old cave paintings all bearing an uncanny resemblance to High Five's design, MFB argued that the mere shape of a human hand was an unoriginal idea dictated by nature and not capable of copyright protection.

Likewise, the particular shape into which High Five arranged the hands could be recognized as generic, not only based on the "generally known within the trial court's territorial jurisdiction" portion of FRE 201(b), but also based on widespread use by third parties and on the various admissions in High Five's trademark applications that acknowledge the commonplace nature of the gesture. Any minor distinctions between this corpus of imagery and High Five's depiction, MFB argued, are too minor to overcome this lack of originality, the scenes a faire doctrine, and the merger doctrine.

Judge Hala Jarbou, newly appointed to the United States District Court for the Western District of Michigan, did not go as far in her ruling as MFB had urged. While acknowledging that neither the shape of hands or their arrangement into a Michigan map are original, the Court took pains to conclude that "High Five's Hand Map is not devoid of protected expression," citing such details as the folded pinky finger and overlapping index finger in the upper hand. This conclusion, at least, preserves High Five's option of enforcing its rights against third parties in the future under other circumstances.

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The Court did, however, agree with MFB that any copyright High Five may own is "thin," requiring a showing of "virtually identical copying"—and that such identity was not present here as a matter of law. The same subtle details on which the Court leaned to show original expression were the same aspects that were *not* present in MFB's design. That, along with MFB's use of "different colors [and] shorter fingers," were enough to find a lack of substantial similarity.

Judge Jarbou also dismissed High Five's trademark infringement and related state and federal claims as a matter of law. To begin with, the Court deemed the "few" factual allegations in High Five's complaint supporting these claims to be largely "conclusory." The pleading relied largely on the side-by-side comparison of the images themselves. Applying the Sixth Circuit's *Frisch* factors for likelihood of confusion, and affording High Five the benefit of the doubt, the Court deemed High Five's mark to be "a relatively strong one due to its distinctiveness"—disregarding MFB's evidence to the contrary in light of the case's procedural posture.

This would, however, be "the only factor that weighs in favor of a likelihood of confusion." For example, the Court found the marks not to be similar to each other, noting not only the distinctions in the images themselves, but also in the text with which they are used in commerce. In its full context, the impression conveyed by MFB's hand image — which constitutes a relatively small portion of MFB's printed material — "is a far cry from the

impression conveyed by High Five’s Hand Map,” and even more distinct from the registered version of that image. MFB’s decals, moreover, were also branded with MFB’s colors and house mark.

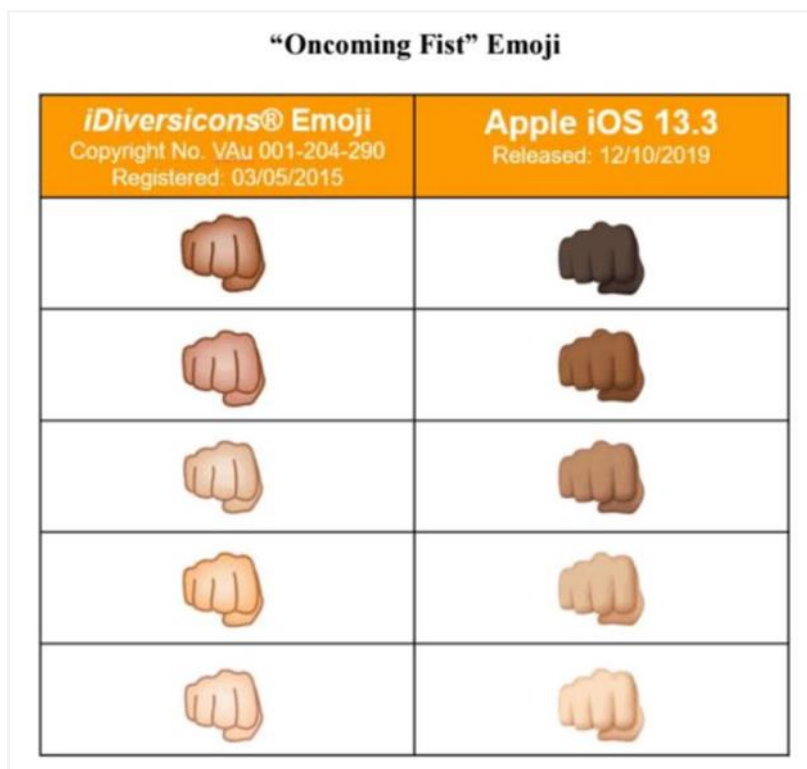
High Five fared no better with any of the other factors. The parties offer “totally unrelated” goods and services, and “common sense indicates that consumers do not exercise the same degree of care when purchasing clothing and novelty items as they do when purchasing insurance.” The parties use largely distinct marketing channels, and no facts were alleged to support a suggestion of actual confusion. In sum, the court agreed with MFB that “the facts alleged indicate that such confusion is very unlikely.”

MFB made additional trademark arguments that the court did not address, including that the *Dastar* doctrine prevented the application of trademark law to the parties’ stickers, which are expressive works, and that High Five’s blatant misuse of the (R) symbol in its marketing and even its demand letter amounted to fraud and unclean hands. Again, the final result was that High Five was left with its asserted rights intact, but too thin to assert against MFB’s imagery. In light of a post-decision agreement between the parties, this dispute is now over, and will not be pursued further in either the state courts or on appeal.

The court’s decision caught the attention of Professor Eric Goldman, who discussed it in a May 11, 2021 post on his widely read [Technology and Marketing Law Blog](#). In his view, “this ruling has some implications for emoji copyrights,” citing in particular the images at issue in *Cub Club Investment, LLC v. Apple, Inc.*, No. 20-cv-856 (W.D. Tex.). (See illustration at right.)

Under Judge Jarbou’s reasoning, Prof. Goldman argued, “even minor variations in individual platforms’ emoji depictions—such as finger overlaps or deeper gaps between thumbs—should negate infringement.” While Goldman conveys some mixed feelings about what the outcome should be in that situation, he is certainly correct that decisions like Michigan Farm Bureau will help determine how far copyright law will, and will not, go in protecting the barely-there originality in images derived from nature.

Brian D. Wassom is a litigation partner in the Michigan-based law firm Warner Norcross + Judd LLP. He represented Michigan Farm Bureau in this case.



Law Banning Audio Recording of Bail Proceedings in Philadelphia Is Unconstitutional

By Paul Safier and Shawn F. Summers

Last year, a Pennsylvania District Court upheld a First Amendment challenge to the enforcement of court rules that prohibited the public from making audio recordings of Philadelphia bail hearings, which, at the time, took place entirely off the record. The District Court held that, so long as transcripts of bail hearings are not made publicly available, members of the public cannot be prohibited from audio recording the proceedings and making their own verbatim record of them. [Phila. Bail Fund v. Arraignment Court Magistrate Judges](#), 440 F. Supp. 3d 415 (E.D. Pa. 2020). This ruling appears to be the first federal court decision to recognize a First Amendment right to record judicial proceedings in any circumstance.

The decision, however, was appealed to the Third Circuit Court of Appeals, which initially reversed the ruling in a divided panel decision. The full Third Circuit then granted rehearing en banc. But, shortly before the en banc court held argument, the appeal was voluntarily dismissed. The result is to reinstate the original District Court decision, and to cement an important victory regarding the scope and implications of the First Amendment right of access to the courts.

The Lawsuit

The lawsuit seeking the right to record Philadelphia bail hearings was brought by the Philadelphia Bail Fund (the “Bail Fund”). The Bail Fund is a non-profit organization that (among other things) advocates for reform of Philadelphia’s bail system, including by observing and reporting about bail hearings in Philadelphia. At the time the lawsuit was filed, Philadelphia bail hearings, which take place any time of day or night, 365 days a year, were off the record, with no transcript of the proceedings made available to the public.

In addition, three overlapping court rules (Rule 112(c) of the Pennsylvania Rules of Criminal Procedure, Rule 1910 of the Pennsylvania Rules of Judicial Administration, and Philadelphia Municipal Court Arraignment Magistrate Rule 7.09) operated to prohibit members of the public that attend the hearings from making recordings of them. Prior to filing suit, the Bail Fund sought and was denied permission to record the bail hearings using small hand-held recording devices.

In July 2019, the Bail Fund brought an as-applied challenge in the United States District Court for the Eastern District of Pennsylvania to the court rules barring it from making audio recordings of Philadelphia bail hearings. The Bail Fund contended that, operating in conjunction with the practice of holding bail hearings off the record, the prohibition on

This ruling appears to be the first federal court decision to recognize a First Amendment right to record judicial proceedings in any circumstance.

recording violated its First Amendment right of access to the hearings because it prevented it from adequately documenting what occurred during them. The Bail Fund further contended that the ability to adequately document the proceedings was critical to the public's ability to understand, assess, and debate how bail hearings were being conducted in Philadelphia and to evaluate potential reforms to the bail system.

In its lawsuit, the Bail Fund named as defendants the Philadelphia Arraignment Court Magistrates (the "Magistrates"), who preside over bail hearings in Philadelphia, as well the Sheriff of Philadelphia County, whose deputies enforce the court rules at issue. The case was assigned to Judge Harvey Bartle III.

District Court Proceedings

The Magistrates responded to the lawsuit by moving to dismiss. In their motion papers, they argued that the Bail Fund's challenge to the ban on audio recordings failed under long-settled law providing that there is no affirmative right to record court proceedings. Judge Bartle denied the Magistrates' motion to dismiss, explaining that he needed a more developed factual record to assess the prohibition on recording. The parties then filed cross-motions for summary judgment based on a set of stipulated facts. On February 25, 2020, Judge Bartle entered an order granting summary judgment in favor of the Bail Fund. [Phila. Bail Fund v. Arraignment Court Magistrate Judges](#), 440 F. Supp. 3d 415 (E.D. Pa. 2020).

In his decision, Judge Bartle held that the line of cases rejecting an affirmative First Amendment right to record court proceedings did not apply because "[i]n none of those cases does it appear that the court of first instance had a policy or custom not to make official recordings or transcripts of those proceedings." *Id.* at 423. Explaining that "[p]ublic access to bail hearings is clearly guaranteed under the First Amendment," Judge Bartle held that that right of access is not satisfied simply by "[t]he right to attend and take notes and then to obtain statistical data about the hearings after the fact." *Id.* at 425. As he explained, "Absent an official record other than a ruling set forth on a form, attendance and notes alone are insufficient to comprehend the full import of these numerous and rapid hearings." *Id.*

Accordingly, Judge Bartle held that the court rules barring audio recording of bail hearings could not be constitutionally enforced so long as the court continued not to make transcripts of bail proceedings available to the public. *Id.* at 426. He then directed that, "[i]f after 45 days from the date of the order entered in this case the Philadelphia Municipal Court has not made official judicial recordings or transcripts available to the public ... , the plaintiff may then make its own audio recordings of said hearings by use of silent hand-held recorders." *Id.* The Magistrates subsequently elected to begin making transcripts of bail proceedings available to the public.

The Bail Fund contended that the prohibition on recording violated its First Amendment right of access to the hearings because it prevented it from adequately documenting what occurred during them.

Appellate Proceedings

The Magistrates appealed Judge Bartle’s ruling to the Third Circuit. On September 29, 2020, a divided panel issued a decision reversing the District Court. See [Reed v. Bernard](#), 976 F.3d 302 (3d Cir. 2020).

All the judges on the panel agreed that there is a First Amendment right of access to bail proceedings. Where the majority and dissenting opinions parted company was over what that right of access entails. Writing for the majority, Senior Judge Morton Greenberg stated that “[w]hat is in dispute is whether the right of access includes an affirmative requirement that the judiciary *create* or allow the creation of verbatim records of its proceedings. We hold that precedent does not mandate that it does; rather, the law takes a more modest approach and requires that judicial records – assuming they exist – are generally available to the public.” *Id.* at 306 (emphasis in original). In other words, the majority held that the constitutional right of access to bail hearings is fully satisfied simply by permitting the public to physically attend the proceedings and to obtain any already existing records from them.

In a lengthy dissent, Judge Cheryl Ann Krause departed sharply from that line of reasoning, which she said “reflected a fundamental misunderstanding of the First Amendment,” as it reduced the right of access to “the ability to ‘squeeze through the [courthouse] door.’” *Id.* at 308 (Krause, J., dissenting) (quoting *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994)). She explained her full reasoning as follows:

All parties and members of the panel agree that the First Amendment right of access applies to bail hearings. Yet the Majority proceeds to eviscerate that right: Despite Supreme Court precedent and our own case law holding that the public is entitled to a complete and verifiable record of proceedings to which the right of access attaches, the Majority allows the government – having refused to produce any transcript or audio recording of its own – to also prohibit the public from making even an unobtrusive recording in circumstances where there is no other means of obtaining a complete and verifiable record of what transpired. The Majority thus deprives the public of access to vital information about one of the most urgent and vigorously debated issues in the modern criminal justice arena. And, even more alarming, its *ratio decidendi* is not limited to bail hearings but applies to every proceeding to which the right of access attaches with grave consequences for public discourse and confidence in government institutions.

Id.

Following the decision, the Bail Fund petitioned for rehearing en banc. Its petition was supported by a number of briefs filed by *amici curiae*, representing a wide array of interests and points of view. The *amici* included the ACLU of Pennsylvania, Pennsylvanians for Modern Courts, the CATO Institute, the R Street Institute, Professor Eugene Volokh, and the Reporters Committee for Freedom of the Press, which was joined by nineteen media organizations. Each

amicus argued that, especially in light of significant ongoing debates around bail reform, the constitutional right of access to bail hearings must include a right to some form of verbatim record of them.

On January 13, 2021, the Third Circuit granted the Bail Fund's petition for rehearing en banc. But, on April 30, 2021, just a few weeks before the scheduled date for en banc argument, the Magistrates voluntarily dismissed their appeal. A few days later, the Third Circuit issued an order formally dismissing the appeal and vacating the panel decision.

Looking Ahead

While the Magistrates' decision to dismiss their appeal took away a potential opportunity to get a federal appellate decision affirming a right to record off-the-record court proceedings, it did have the salutary effect of reinstating the original District Court decision. That is significant in at least three respects.

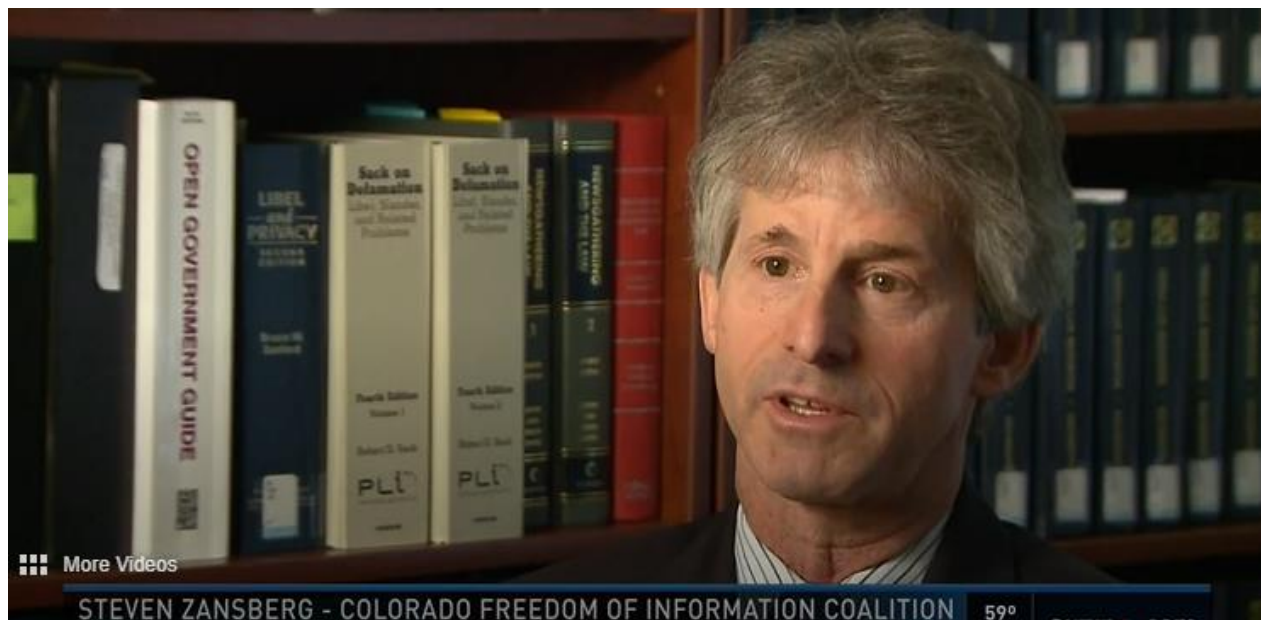
First, and most importantly, the reinstatement of the District Court decision ensures that, going forward, transcripts of Philadelphia bail hearings will be available to the public, or, if they are not, that interested members of the public will be able to make their own audio recordings of the proceedings. This has the potential to significantly advance the public's understanding of what actually happens at Philadelphia bail hearings, and, for that reason, greatly inform the ongoing debates over bail reform.

Second, the District Court decision provides a potential basis for future challenges to court arrangements involving off-the-record proceedings. In Pennsylvania, many preliminary proceedings that are subject to subsequent *de novo* review are held off the record. The same is true in other jurisdictions. The District Court decision in this case provides a basis to challenge such arrangements under the First Amendment.

Third, both the District Court's decision and the Third Circuit's decision to take the case en banc after the initial panel decision reversing the District Court, suggest an increasing willingness on the part of judges to view the right of access as potentially encompassing electronic access to court proceedings, as opposed to simply physical access. This has been a recurrent issue throughout the pandemic, as courts have been forced to address what the right of access entails in a context in which the public cannot be physically present in the courtroom, or can be physically present only on a significantly limited basis. Hopefully, the trajectory of this case is an indication that we will continue to see nuanced and flexible approaches to the right of access going forward.

The Philadelphia Bail Fund was represented in this matter by Nicolas Y. Riley and Robert D. Friedman of the Institute for Constitutional Advocacy and Protection at Georgetown University Law Center, and by Michael Berry, Paul Safier, and Shawn F. Summers of Ballard Spahr LLP. Katie Townsend, Bruce D. Brown, Caitlin Vogus, and Madeline Lamo of the Reporters Committee for Freedom of the Press filed a media coalition amicus brief. The ACLU of Pennsylvania and Cato Institute also filed amicus briefs.

Ten Questions to a Media Lawyer: Steve Zansberg



Steve was a partner at the First Amendment boutique law firm Levine Sullivan Koch & Schulz, which merged with Ballard Spahr in October 2017. He launched his solo practice in January 2021.

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

As a former documentary producer for public television (KQED-TV in San Francisco), my first year of law school was as a Journalism Fellow, courtesy of the Knight-Ridder Foundation. Having been an electronic journalist for several years, I was drawn to media and First Amendment law. Following my graduation and clerkship in the Ninth Circuit, I began practicing with (and under the mentorship of) Tom Kelley at the Denver office of what was then Faegre & Benson.

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

What I enjoy most is working with dedicated reporters in helping devise strategies to “get the story,” tell it in a compelling and well-sourced manner, and (through pre-pub review) make it as “bullet proof” as possible. My least favorite part is dealing with the “business side” of the practice of law.

How has quarantine affected your work and routines?

As a result of the extended period of working from home, I decided, in January, to depart from a national law firm to launch my own solo practice. That is, by far, the biggest change in my work routine. I've also had the opportunity, now, to argue before several courts via Zoom/Webex, including two evidentiary hearings. As others have discussed previously, the “craft” of



Left, cover of “Hit Man,” a how-to guide for murderers for hire, and subject of a First Amendment case in the Fourth Circuit that Zansberg worked on with Lee Levine, Tom Kelley, Seth Berlin and Ashley Kissinger. Right: detail from the journal of one of the Columbine High School shooters. Zansberg argued before Colorado’s Supreme Court for The Denver Post to gain access.

oral argument and witness examination is dramatically different via videoconference than in person, in court.

Highest profile or most memorable case?

Highest profile cases were (1) the “Hit Man” case in the Fourth Circuit, (2) gaining access, under Colorado’s Public Records law, to the killers’ personal journals in the Columbine High School shooting, and (3) challenging the prior restraint order issued by the trial judge presiding over the short-lived sexual assault prosecution of Kobe Bryant. Personally, my most memorable case was *Bustos v. A&E Television Networks*, 646 F.3d 762 (10th Cir. 2011), not because of the excellent opinion penned by now Justice Neil Gorsuch, but because David Sternbach (of A&E Television) & I went into the ADX Maximum Security federal penitentiary in Florence, Colorado to take the plaintiff’s deposition (though we were not given access to the actual cell blocks where the nation’s most dangerous criminals are confined, inhumanely).

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

Law school provides a solid training in analytical thinking and persuasive communication that can help J.D.s in pursuing a multitude of career paths. However, I generally advise people contemplating going to law school to first decide what they would like to do with their law degree, before they apply, and not to treat the three-year graduate program as “advanced undecided.” I also advise people to first pursue their “real passion(s)” professionally, if they have any, prior to going to law school (a/k/a the school of last resort).



Zansberg at his home office in Denver

What’s your home office set-up?

Since August 2020, I have literally been living (and working) in the basement of my in-laws’ house in Greeley, an hour and change North of Denver. I have a more functional home office in Denver (pictured above).

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

I thoroughly enjoyed watching all six seasons of Schitt’s Creek, especially Seasons 4 & 5. I also very much enjoyed the book Apeirogon by Colum McCann; I highly recommend it.

What’s a typical weekday lunch?

I typically grab some fruit and vegetables and eat at my desk. “Lunch” is a misnomer for my eating habits: I’m pretty much shoving something crunchy (nuts, granola, trail mix, or carrots) or sweet (grapes, oranges, apples) into my mouth throughout the day.

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

Toss up: “Born to Run” or “Brown-Eyed Girl.”

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

Spain and Portugal.