

RECENT DEVELOPMENTS IN MEDIA, PRIVACY,  
AND DEFAMATION LAW

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*Rare is there an opportunity to interrupt today's twenty-four-hour news cycle, fueled by cable television's incessant need for content and the explosion of Internet websites that promptly apprise us of events across the world.<sup>1</sup>*

Such a rare opportunity—for judicial sarcasm—prefaced the First Circuit's serious discussion of actual malice principles “in the context of a consistently irreverent (and to many, insensitive) morning television show.”<sup>2</sup> And while sarcasm from the bench may have been rare, many courts this year addressed serious legal issues in the context of circumstances that might delight a carnival barker: TV hosts harangue school official who did *not* really say, “These children have got to learn that ham is not a toy!” Forged masturbatory fantasies on MySpace do not suggest promiscuity! Persistent photographer encounters insistent police officer! Public officials send (possibly?) criminal e-mails! Distraught mother kills self after cable TV interview! Woman acquitted for cyber-bullying thirteen-year-old girl who commits suicide! Journalist takes the Fifth to avoid naming sources! Prison inmate can't sue cable network for showing decade-old attack captured on security camera! Records of alleged sexual

1. *Levesque v. Doocy*, 560 F.3d 82, 84 (1st Cir. 2009).

2. *Id.* at 92.

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abuse by priests unsealed after settlement! Appeals court blocks gavel-to-gavel webcast of peer-to-peer sharing trial! A new Twist on insurance for comic books!

Step right up, folks! Your journey through the fun-house begins now.

## I. DEFAMATION

### A. *Truth as a Defense*

The First Circuit rattled the libel defense bar in early 2009 when it held that truth may not be a complete defense in a private-plaintiff, private-concern defamation case.<sup>3</sup> In the nonmedia case *Noonan v. Staples*, a former Staples salesman sued the office supply store for libel after a company executive e-mailed 1,500 employees, informing them that the plaintiff had been fired for violating the company's travel and expense policy.<sup>4</sup> The executive sent the e-mail after a team of certified accountants and a former police investigator examined the plaintiff's past expense reports and unanimously concluded that he had deliberately falsified them.<sup>5</sup> The district court granted summary judgment in favor of Staples, finding that the statements in the e-mail were true and that the plaintiff had presented no evidence of actual malice on the part of Staples.<sup>6</sup> The First Circuit initially affirmed,<sup>7</sup> but changed its mind on rehearing, holding that although there was "no triable issue of fact on the question of truth," a "narrow exception" to the truth defense in Massachusetts required remand.<sup>8</sup> That exception is found in Massachusetts General Laws ch. 231, § 92, which reads: "The defendant in an action for writing or for publishing a libel may introduce in evidence the truth of the matter contained in the publication charged as libelous; and the truth shall be a justification unless actual malice is proved."<sup>9</sup> Although the First Circuit initially interpreted the statute as referring to *New York Times* actual malice,<sup>10</sup> it reversed itself on rehearing and held that the statute instead required "actual malevolent intent or ill will."<sup>11</sup> The court found evidence of ill will in the record (such as evidence that the executive

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3. *Noonan v. Staples, Inc.*, 556 F.3d 20 (1st Cir. 2009).

4. *Id.* at 22.

5. *Id.* at 23.

6. *Id.* at 25.

7. *Noonan v. Staples, Inc.*, 539 F.3d 1 (1st Cir. 2008), *rev'd in part on rehearing*, 556 F.3d 20.

8. *Noonan*, 556 F.3d at 26. The First Circuit noted that this exception to the truth defense is not constitutional when applied to matters of public concern. *Id.* at 28 n.7. It declined to consider Staples' late-raised argument that the exception is *never* constitutional. *Id.* at 28.

9. *Id.* at 28 n.8.

10. *Id.* at 28 (applying *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964) (defining "actual malice" as "with knowledge that it was false or with reckless disregard of whether it was false or not")).

11. *Id.*

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had “singled out” the plaintiff to humiliate him and that he had sent the e-mail to an unnecessarily large number of employees) and held that summary judgment was not appropriate.<sup>12</sup>

*B. Plaintiff’s Status and Determination of Actual Malice*

Hyperbole over a hunk of ham led the First Circuit to consider in *Levesque v. Doocy* whether Fox News and co-hosts of its morning show acted with actual malice when they inaccurately reported on a middle school’s decision to suspend a student for placing leftover ham on a cafeteria table where Muslim students were sitting.<sup>13</sup> The school classified the suspended student’s conduct as a “hate crime,” which caught the attention of amateur satirist Nicholas Plagman, who posted an article on the Internet that referred to the school’s “anti-ham ‘response plan’” and used made-up quotes, including, “These children have got to learn that ham is not a toy,” which Plagman attributed to the school’s superintendent.<sup>14</sup> Not realizing the nature of Plagman’s article, the defendants used it in their morning show, during which they ridiculed the superintendent and falsely attributed various statements to him. Throughout the broadcast, they both vouched for and questioned the veracity of the story, with such statements as “I am not making this up,” “I’ve looked it up on a couple of different websites,” “I hope we’re not being duped,” and “I thought this was a joke.”<sup>15</sup> The superintendent lost his subsequent lawsuit on summary judgment. The First Circuit affirmed, holding that although a jury might find the fabricated quotes attributed to the superintendent defamatory, dismissal was proper because he had failed to show actual malice.<sup>16</sup> The court noted attempts that Fox had made to confirm and corroborate Plagman’s story.<sup>17</sup> With regard to defendants’ expressions of incredulity during the broadcast, the court noted their consistent deposition testimony that they believed the story was true, and it held that “in the context of a consistently irreverent (and to many, insensitive) morning television show, such statements frequently are used as devices to magnify the presentation and grab viewers’ attention.”<sup>18</sup>

Turning from pork to a sometimes porky Playmate and TrimSpa spokeswoman, a federal court in New York denied in part a motion for summary judgment by the author of *Blonde Ambition: The Untold Story Behind Anna*

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12. *Id.* at 30–31.

13. 560 F.3d 82, 84 (1st Cir. 2009).

14. *Id.* at 84–85.

15. *Id.* at 85–86.

16. *Id.* at 91.

17. *Id.*

18. *Id.* at 92.

*Nicole Smith*, in a case brought by Smith's former attorney and companion, Howard Stern.<sup>19</sup> At issue in the case were statements and implications in the book that Stern "had engaged in sex with the father of Smith's child, 'pimped' Smith to as many as fifty men a year, and played a role in Smith's death."<sup>20</sup> The author and her publisher, also a defendant, moved for summary judgment on various grounds, including that Stern could not show actual malice. The court held that the publisher had no independent duty to investigate the author's story, absent actual doubts as to its accuracy.<sup>21</sup> However, it rejected the author's arguments regarding actual malice, due to evidence that two sources "accuse her of trying to get them to say untrue things, and two deny what she attributed to them entirely"; that the author tried to bribe sources; and that she relied on sources who were obviously biased against Stern.<sup>22</sup>

In *Kipper v. NYP Holdings Co.*, the high court of New York made clear that a libel defendant's burden on summary judgment is not to prove lack of actual malice, "but to point to deficiencies in the record that will prevent plaintiff from proving [actual malice] by clear and convincing evidence."<sup>23</sup> The case arose out of the *New York Post's* rewrite of a story from the *Los Angeles Times's* wire service about Ozzy Osbourne's physician. Although the *Times's* story said that the California Medical Board had "moved to revoke" the doctor's license, the story printed in the *Post*, under the inaccurate headline "Ozzy's Rx doc's license pulled," said that "the state medical board revoked Kipper's license."<sup>24</sup> Although the *Post* could not explain how the error was inserted during the rewrite process, the court affirmed dismissal of the case on grounds that plaintiff could not meet his burden of showing actual malice.<sup>25</sup> The court rejected the plaintiff's argument that the *Post's* attempt to "spice up" the story created a jury issue.<sup>26</sup>

### C. *Fact v. Opinion*

Just as the First Circuit held in *Levesque* that the context in which statements are made affects their value as evidence of actual malice, the Ninth Circuit held in *Mt. Hood Polaroid, Inc. v. Martino (In re Gardner)* that a "review of the context" in which the defendant made particular statements demonstrated that they were not assertions of fact.<sup>27</sup> The defendant in *Gardner* hosted a

19. *Stern v. Crosby*, No. 07-cv-8536, 2009 U.S. Dist. LEXIS 70912 (S.D.N.Y. Aug. 12, 2009).

20. *Id.* at \*2, 5.

21. *Id.* at \*60.

22. *Id.* at \*43.

23. 12 N.Y.3d 348, 354 (N.Y. 2009).

24. *Id.* at 351.

25. *Id.* at 355.

26. *Id.* at 356.

27. 563 F.3d 981, 988 (9th Cir. 2009).

nationally syndicated radio talk show in which he attempted to help callers with their consumer problems. In the on-air conversation that gave rise to the suit, the defendant told a woman, unhappy with a jet ski she had purchased from plaintiffs, that “they’re just lying to you,” and asked, “Will they admit to us that they . . . they went back on their word?”<sup>28</sup> The court held these statements nonactionable for two reasons. First, in making the statements, the defendant relied on the caller’s descriptions of the plaintiffs and their representations; therefore, reasonable listeners would not consider his comments to “imply an assertion of objective facts rather than an interpretation of the facts equally available to [defendant] and to the listener.”<sup>29</sup> Moreover, the plaintiffs had not presented sufficient evidence, given the context of the radio show, to demonstrate that defendant’s reliance on the caller’s story was unreasonable.<sup>30</sup> Second, the “lying” statements were not sufficiently factual; rather they were “the type of obvious exaggeration generally employed on [defendant’s] program.”<sup>31</sup> The court held that, unlike the statements at issue in *Milkovich v. Lorain Journal Co.*,<sup>32</sup> the statements made on the radio show “did not accuse Appellants of committing a serious civil and/or criminal violation” (such as perjury).<sup>33</sup>

#### D. *Defamatory Meaning*

In a case with facts too salacious to ignore, a New York appellate court held that a statement accusing the plaintiff of detailing a masturbatory fantasy on MySpace did not reasonably imply that she was sexually promiscuous and therefore was not defamatory.<sup>34</sup> *Ava v. NYP Holdings, Inc.*, arose out of a story in the *New York Post* that followed up on the plaintiff’s filing of a lawsuit against billionaire Jeffrey Epstein in which she sought money damages based on allegations that he had sexually exploited her when she was sixteen. Headlined “GENDER-BEND SHOCKER, Kinky-sex suit gal is a man,” the story disclosed that the plaintiff was born a biological male<sup>35</sup> and stated that on one of three MySpace pages featuring the plaintiff’s pictures, “she lists her gender as male” and that on one of the pages “she gives a graphic depiction of a ‘masturbatory fantasy’ she has of being with multiple men and then multiple women.”<sup>36</sup> The plaintiff claimed that she did not maintain or contribute to the three MySpace pages referenced in

28. *Id.* at 984–85.

29. *Id.* at 988.

30. *Id.* at 989.

31. *Id.*

32. 497 U.S. 1 (1990).

33. *In re Gardner*, 563 F.3d 981, 990 (9th Cir. 2009).

34. *Ava v. NYP Holdings, Inc.*, 64 A.D.3d 407 (N.Y. App. Div. 2009).

35. *Id.* at 409.

36. *Id.*

the *Post's* story, that the *Post* knew the pages were forgeries, and that the "masturbatory fantasy" statement was defamatory.<sup>37</sup> The court disagreed, holding that the statement did not support "the inference that plaintiff in fact was promiscuous."<sup>38</sup> The opinion distinguishes *Rejent v. Liberation Publications*,<sup>39</sup> in which the court held that a suggestive photograph of the plaintiff, used in connection with an advertisement in a gay publication for a book featuring erotic photographs, was susceptible to defamatory meaning. In doing so, the *Ava* court noted the *Post's* status as a daily newspaper and that the story was not accompanied by any suggestive photographs of the plaintiff.<sup>40</sup>

In sharp contrast, a federal court in Pennsylvania held that the comparatively antiseptic statement "inappropriate communications with a 15-year old" girl was capable of defamatory meaning because it implied plaintiff's communications were of a pedophilic nature.<sup>41</sup> The court rejected the defendants' argument that the statement implied that the communications were inappropriate merely because the plaintiff used his work computer to engage in them.<sup>42</sup>

#### E. *Of and Concerning*

In *Diaz v. NBC Universal, Inc.*, the Second Circuit held that a reference to three-quarters of the entire New York office of the U.S. Drug Enforcement Administration could not support a jury finding that the allegedly libelous statements referred to plaintiffs as individuals.<sup>43</sup> The plaintiffs in *Diaz* were former members of the DEA who sued over a statement in the movie *American Gangster* that collaboration between a New Jersey police officer and a major New York City drug dealer "led to the convictions of three quarters of New York City's Drug Enforcement Agency."<sup>44</sup> The court held that the group libel doctrine barred plaintiffs' claim, which they brought on their own behalf and as representatives of a class of 400 DEA agents: "In view of the large size of this group . . . , and that the Legend makes reference only to three-quarters of the group, i.e., 'some' of its members, appellants' claim is incapable of supporting a jury's finding that the allegedly libelous statements refer to them as individuals."<sup>45</sup> The court

37. *Id.* at 411.

38. *Id.* at 414.

39. 197 A.D.2d 240 (N.Y. App. Div. 1994).

40. *Ava*, 64 A.D.3d at 416.

41. *Morgenstern v. Fox Television Stations of Phila.*, No. 08-0562, 2008 U.S. Dist. LEXIS 92990, at \*19, 37 Media L. Rep. (BNA) 1238 (E.D. Pa. Oct. 31, 2008).

42. *Id.*

43. No. 08-1190-CV, 2009 U.S. App. LEXIS 15653, 37 Media L. Rep. (BNA) 1993 (2d Cir. 2009).

44. *Id.* at \*2.

45. *Id.* at \*3-4.

also rejected the plaintiffs' argument that they should be able to sustain their claim on behalf of a smaller team of nine DEA agents who searched the dealer's home. The court stated that this would impermissibly "define the group by standards outside the comment."<sup>46</sup>

## II. PRIVACY

### A. Misappropriation

In *Toffoloni v. LFP Publishing Group*, the Eleventh Circuit held that a magazine's publication of decades-old nude photos of former professional wrestler Nancy Benoit were only incidental to a story about her, and therefore not entitled to the newsworthiness exception for Georgia's "right of publicity" claim.<sup>47</sup> Benoit's mother brought the misappropriation claim for violation of her deceased daughter's right of publicity.<sup>48</sup> Benoit, a model and professional wrestler, was murdered by her husband, also a professional wrestler, in a case that attracted considerable publicity. Twenty years earlier, Benoit had posed nude for a photographer, who refused her request to destroy the photos and later gave them to *Hustler* magazine.<sup>49</sup> *Hustler* published the photos along with an article titled "NANCY BENOIT Au Naturel: The long-lost images of wrestler Chris Benoit's doomed wife."<sup>50</sup> The Eleventh Circuit agreed that the biographical piece, in and of itself, fell within the newsworthiness exception but concluded that the brief biography of Benoit's life was merely incidental to the nude photographs. The court noted that neither the cover nor the table of contents referenced the article and that the article itself comprised one-third of a page, while the photos were almost a page and a half.<sup>51</sup>

The press had more success in *Bustos v. United States*,<sup>52</sup> where a Colorado federal court held that the First Amendment did protect a cable television network from an invasion of privacy/misappropriation claim involving the use of prison security camera footage of an attack on an inmate. The videotape was made available to the History Channel—a cable television network owned and operated by A&E Television Networks ("AETN")—which used the video in a television program titled *Gangland: Aryan Brotherhood*. Plaintiff Bustos—who is Mexican-American—alleged that the program's narrator incorrectly described Bustos as the instigator of the decade-old at-

46. *Id.* at \*5.

47. 572 F.3d 1201, 1213 (11th Cir. 2009).

48. *Id.* at 1204.

49. *Id.*

50. *Id.* at 1209.

51. *Id.*

52. No. 08-cv-00153-LTB-MEH, 2009 WL 2602640 (D. Colo. Aug. 21, 2009).

tack and as a member of the white supremacist Aryan Brotherhood prison gang. He alleged that, as the *Gangland* program was broadcast to the prison population for several weeks, some prisoners incorrectly believed Bustos to be an undercover member of the Aryan Brotherhood and threatened him with serious physical injury and death. The district court dismissed the misappropriation claim because the First Amendment “permits the use of a plaintiff’s name or likeness when that use is made in the context of, and reasonably relates to, a publication concerning a matter that is newsworthy or of legitimate public concern.”<sup>53</sup> The court held that “so long as the video clip was newsworthy—as it is undoubtedly alleged to be—AETN’s decision to publish the clip in the context of the *Gangland* program is protected despite the fact that AETN may have published the clip or the *Gangland* program in order to increase viewership, sell videos, or otherwise make a profit.”<sup>54</sup>

#### B. *False Light Invasion of Privacy*

Courts in Missouri and Florida considered whether to recognize false light invasion of privacy, reaching conflicting conclusions. An intermediate appellate court in Missouri recognized the tort,<sup>55</sup> expressly noting that a majority of jurisdictions that have addressed the question have recognized false light and only a minority of states have declined to do so.<sup>56</sup> The court found false light sufficiently distinguishable from defamation because “the interest affected is the subjective one of injury to the person’s right to be let alone,” whereas defamation torts protect an objective reputational interest.<sup>57</sup> It concluded that First Amendment concerns could be “easily mitigated through the adoption of a heightened standard like actual malice or recklessness.”<sup>58</sup> The Florida Supreme Court, on the other hand, declined to recognize the tort.<sup>59</sup> It noted that both false light and defamation have essentially the same elements. The court stated that the nature of the in-

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53. *Id.* at \*4 (citing *Joe Dickerson & Assoc., LLC v. Dittmar*, 34 P.3d 995, 997 (Colo. 2001)).

54. *Id.*

55. *Meyerkord v. Zipatoni Co.*, 276 S.W.3d 319, 321 (Mo. Ct. App. 2008). Greg Meyerkord had been Zipatoni’s designated “registrant” for its account with Register.com, a website the company used to register websites for other companies. Zipatoni failed to remove Meyerkord as its registrant after his employment ended. Three years later, the false listing of Meyerkord as “registrant” embroiled him in controversy when unhappy consumers and bloggers criticized the PlayStation Portable marketing campaign and a website Zipatoni had registered for Sony.

56. *Id.* at 323–24.

57. *Id.*

58. *Id.* at 325.

59. *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098 (Fla. 2008), *on remand* to 1 So. 3d 1284 (Fla. Dist. Ct. App. 2009).

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terests protected by defamation and false light is a “distinction without a difference in practice” because “conduct that defames will often be highly offensive to a reasonable person, just as conduct that is highly offensive will often result in injury to one’s reputation.”<sup>60</sup> Concluding that “the benefit of recognizing the tort . . . is outweighed by the danger of unreasonably impeding constitutionally protected speech,” the court declined to recognize false light claims.<sup>61</sup>

### C. *Intrusion*

In *Boring v. Google, Inc.*, the plaintiffs unsuccessfully sued Google for invasion of privacy after pictures of their home were included on “Street View,” an option on Google’s online map access program, Google Maps.<sup>62</sup> The plaintiffs claimed that their home was on a private road and that in making the pictures available to the public, Google “significantly disregarded [their] privacy interests.”<sup>63</sup> A federal district court in Pennsylvania found it “hard to believe” that an ordinary reasonable person would suffer shame or humiliation from the disclosure of a photo of one’s home on Google’s virtual map and noted that the plaintiffs failed to implement Google’s option to have one’s images removed.<sup>64</sup>

### D. *Publication of Private Facts*

In a two-to-one decision, the Texas Court of Appeals held that in evaluating a publication-of-private-facts claim, the public does not have “a legitimate interest in the mere fact that an individual has been accused of a crime.”<sup>65</sup> *Freedom Communications, Inc. v. Coronado* arose out of a political advertisement published in the *Brownsville Herald* and *Valley Morning Star* newspapers shortly before an election in which the local district attorney was seeking reelection.<sup>66</sup> The advertisement, placed by the incumbent’s opponent, contained a chart with 103 rows of data detailing the disposition of child-related cases by the district attorney’s office in the preceding year, including a description of the charge, the “name of accused,” and the case “disposition.”<sup>67</sup> The advertisement asserted that the incumbent “has invariably *stood against children* who have been sexually abused, sexually assaulted, or physically injured, and stood with those who would commit

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60. *Id.* at 1109.

61. *Id.* at 1114.

62. 598 F. Supp. 2d 695, 698 (W.D. Pa. 2009).

63. *Id.* at 699.

64. *Id.* at 700.

65. *Freedom Commc’ns, Inc. v. Coronado*, 296 S.W.3d 790 (Tex. App. 2009).

66. *Id.* at 793–94.

67. *Id.*

such heinous crimes.”<sup>68</sup> Four of the “accused” men listed in the chart sued the newspaper on both defamation and publication-of-private-facts theories.<sup>69</sup> The Corpus Christi Court of Appeals affirmed the trial court’s denial of summary judgment. It held that although “underlying facts reflecting criminal activity can certainly be of legitimate public interest, we find [no authority] holding that the public has a legitimate interest in the mere fact that an individual has been accused of a crime.”<sup>70</sup> The dissenting justice would have held that “the fact that [plaintiffs] were accused of committing crimes against children is of legitimate public concern,” and therefore not actionable.<sup>71</sup>

Two cases during the survey period held that information posted on social networking websites is not “private,” regardless of how few viewers actually see it. In *Yath v. Fairview Clinics, N.P.*,<sup>72</sup> the plaintiff sued for invasion of privacy after a health care professional posted information about her medical conditions (including the married woman getting tested for a sexually transmitted disease because she had a new sex partner) on a MySpace webpage. Yath had gone to a clinic to be tested for a sexually transmitted disease. The Minnesota Court of Appeals held that a plaintiff may satisfy the publicity element of a publication-of-private-facts claim either by proving a single communication to the public through a public forum or by proving communication to such a large number of people that it is deemed to have been communicated to the public. The court held that Yath satisfied the publicity element under the first alternative because the website was a public forum (not a privately directed communication) and therefore the number of people who actually saw it was irrelevant,<sup>73</sup> and that the publicity element is satisfied “when the discloser makes the private information publicly available, not when some substantial number of individuals actually get the information.”<sup>74</sup>

In *Moreno v. Hanford Sentinel, Inc.*, the California Court of Appeal held that a person who posts an article on MySpace cannot maintain an invasion-of-privacy claim against a person who submits that posting to a newspaper for republication.<sup>75</sup> The plaintiff in *Moreno*, a college student, wrote an unflattering “ode” to her hometown and posted it on her MySpace page. Titled “An ode to Coalinga,” it began with “the older I get, the

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68. *Id.*

69. *Id.* at 795.

70. *Id.* at 802.

71. *Id.* at 807 (Vela, J., dissenting).

72. 767 N.W.2d 34, 37 (Minn. Ct. App. 2009).

73. *Id.* at 42.

74. *Id.* at 43.

75. 91 Cal. Rptr. 3d 858, 861 (Ct. App. 2009).

more I realize how much I despise Coalinga” and continued with numerous disparaging remarks about the town and its residents.<sup>76</sup> The local high school principal sent the posting to the local newspaper, which published it and identified Moreno as the author.<sup>77</sup> Moreno’s family, which lived in Coalinga, received death threats and was forced to move. Moreno and her family members then sued the newspaper and the high school principal for publication of private facts, among other claims.<sup>78</sup> Because Moreno had posted her ode on “a hugely popular Internet site . . . available to any person with a computer,” the court concluded that “no reasonable person would have an expectation of privacy regarding the published material.”<sup>79</sup>

### III. INTERNET-RELATED DEVELOPMENTS

#### A. Unmasking Anonymous Posters

For the most part, courts continued to afford significant protection to anonymous speech on the Internet. Two state high courts adopted the general framework set forth in *Cabill* and *Dendrite*, the seminal decisions applicable to efforts to compel production of anonymous speakers’ identity information in defamation and related cases.<sup>80</sup> The courts of appeals of Maryland and the District of Columbia held that, before requiring a website or ISP to divulge such information, courts should require efforts to notify the anonymous speakers and afford them an opportunity to respond. The District of Columbia requires the plaintiff to “proffer evidence creating a genuine issue of material fact on each element of the claim that is within its control,” and the Maryland Court of Appeals requires the plaintiff to “set forth a *prima facie* cause of action against the fictitiously-named anonymous defendants.”<sup>81</sup>

Three trial courts applied their states’ shield laws to quash, at least in part, subpoenas for anonymous poster information, bringing the total

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76. *Id.*

77. *Id.*

78. *Id.* at 861–62. The trial court dismissed the claim against the newspaper, and the plaintiffs abandoned their appeal of that ruling.

79. *Id.* at 862.

80. *Doe No. 1 v. Cahill*, 884 A.2d 451, 460 (Del. 2005) (requiring a defamation plaintiff seeking to unmask an anonymous defendant to “support his defamation claim with facts sufficient to defeat a summary judgment motion”); *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001) (requiring subpoenaing defamation plaintiff to “set forth a *prima facie* cause of action” before an anonymous poster may be unmasked).

81. *Solers, Inc. v. Doe*, 977 A.2d 941, 954 (D.C. Cir. 2009); *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 454 (Md. App. 2009); *see also Ecommerce Innovations L.L.C. v. Does 1–10*, No. MC-08-93-PHX-DGC, 2009 WL 322893, at \*2 (D. Ariz. Feb. 10, 2009) (applying summary judgment standard and refusing to quash subpoena); *Maxon v. Ottawa Publ’g Co.*, No. 08-MR-125 (Ill. Cir. Ct., LaSalle County, Oct. 2, 2008) (quashing subpoena under *Dendrite* standard).

number of states in which courts have done so to five.<sup>82</sup> In *Alton Telegraph v. Illinois*,<sup>83</sup> although the court ruled that the Illinois shield law's definition of "source" does not include individuals who voluntarily post information in response to an article, it applied the shield law in a criminal case involving the murder of a child and invited the legislature to clarify the issue. The court denied a newspaper's motion to quash the prosecution's subpoena with respect to two anonymous posters whose comments related to "the Defendant's prior conduct, his propensities for violence, and relationship with the child," and quashed the subpoena as to three other posters.<sup>84</sup> A Texas court applied that state's May 2009 shield law to quash a subpoena by a criminal defense lawyer seeking the identities of people who commented on a newspaper's website for purposes of excluding the commenters from the jury pool.<sup>85</sup> A Florida court applied Florida's shield law to grant a newspaper's motion to quash.<sup>86</sup>

In *Enterline v. Pocono Medical Center*,<sup>87</sup> a federal district court in Pennsylvania ruled, as a matter of first impression nationwide, that a newspaper has standing to assert the First Amendment rights of the posters of information on the newspaper's website. *Enterline* is also one of very few decisions to address what standard applies where the anonymous speaker is sought solely as a witness rather than as a libel defendant. The court declined to determine the proper standard, instead holding that the plaintiff failed to satisfy even the standard she advocated, which is similar to the test for determining whether a qualified reporter's privilege has been overcome.<sup>88</sup>

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82. See also *Doty v. Molnar*, No. DV-07-022 (Mont. Dist. Ct., Yellowstone County, Sept. 3, 2008); *Doe v. TS*, No. 08030693 (Or. Cir. Ct., Clackamas County, Sept. 30, 2008). But see *People v. Kuehl*, No. 09HF0538 F A (Cal. Super. Ct., Orange County, Aug. 18, 2009) (where criminal defendant sought identity of anonymous poster who was percipient witness to fatal car accident, court denied newspaper's motion to quash subpoena, holding that "[e]ven if the California Shield Law is applicable to the subject information, the defendant's due process right to a fair trial supersedes any otherwise conflicting rights of the moving party [or the anonymous poster]").

83. No. 08-MR-548, 37 Media L. Rep. (BNA) 2084, 2086-87 (Ill. Cir. Ct., Madison County, May 15, 2009).

84. *Id.* at 2087.

85. See *Texas v. Martinez*, No. 17042-B (Tex. Dist. Ct., Taylor County, June 19, 2009) (discussed in Patrick File & Jacob Parsley, *Subpoenas to Unmask Anonymous Internet Users Continue to Challenge News Media and Courts*, 14:4 SILHA BULL. 1-2 (Summer 2009); see also n. 187, *infra*).

86. *Beal v. Calobrisi*, No. 08-CA-1075 (Fla. Cir. Ct., Okaloosa County, Oct. 9, 2008).

87. No. 3:08-cv-1934, 2008 WL 5192386, at \*4 (M.D. Pa. Dec. 11, 2008).

88. *Id.* at \*5 (subpoenaing party must show "(1) the subpoena seeking the information was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4) information sufficient to establish or to disprove that claim or defense is unavailable from any other source"); see also *People v. Kuehl*, No. 09HF0538 F A (Cal. Super. Ct., Orange County, Aug. 18, 2009) (denying motion to quash criminal defendant's subpoena for identity of anonymous poster who was percipient witness).

A federal district judge in the District of Columbia reached the novel conclusion that three subpoenas for anonymous poster defendants had to be quashed on the ground of lack of subject matter jurisdiction because the citizenship of the anonymous defendants was unknown and diversity of citizenship therefore could not be established. The court similarly found no basis to believe that the plaintiff could establish personal jurisdiction over the defendants.<sup>89</sup>

### B. Single Publication Rule

The trend of courts applying the single publication rule to tort claims based on online content<sup>90</sup> has continued in the past year. In *Salyer v. Southern Poverty Law Center*,<sup>91</sup> an attorney had sued for defamation based on statements first published on the defendant's website more than two years earlier. Applying the law of Kentucky, the district court found that the purposes of the single publication rule—avoiding a multiplicity of actions, protecting defendants from excessive liability, allowing plaintiffs to recover all damages at once, and reducing the chilling effect on mass communication that would result from application of a contrary rule—fully “align with the Internet as a means of communication,” and therefore concluded that Kentucky courts would extend the single publication rule to Internet publications.<sup>92</sup> The court, however, permitted the plaintiff to take limited discovery on the issue of whether any “changes to the website's content [had occurred since the initial publication date] that would constitute substantial modification” and thereby potentially trigger an actionable “republishing” of the alleged defamation.<sup>93</sup> In a case arising from alleged defamatory web postings, the Court of Appeals of New Mexico “adopt[ed] the majority position applying the [single publication] rule to Internet publications,” observing that there may be a “greater need for the policy advanced by the single publication rule in the Internet realm” than in other forms of mass media.<sup>94</sup> However, the court found a triable issue of fact with respect to whether alterations the defendant made to her website sufficed to trigger the republication exception to the single publication rule.<sup>95</sup>

89. *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128, 132–33 (D.D.C. 2009). The court also held the plaintiff's substantive allegations were insufficient under the standard established by *Dendrite* and *Cabill*. *Id.* at 133–34.

90. See *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 146 (5th Cir. 2007) (applying Texas law); ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER & RELATED PROBLEMS* § 7.2, n.19.1 (2008) (collecting cases).

91. No. 3:09-CV-44-H, 2009 WL 1036907 (W.D. Ky. Apr. 17, 2009).

92. *Id.* at \*3.

93. *Id.* at \*4.

94. *Woodhull v. Meinel*, 202 P.3d 126, 130 (N.M. Ct. App. 2008).

95. *Id.* at 131.

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### C. Section 230 of the Communications Decency Act

The Ninth Circuit has remained in the jurisprudential vanguard in defining the scope of the immunity available to interactive service providers under § 230 of the Communications Decency Act (“CDA”). After handing down closely watched CDA immunity decisions in each of the previous two years—in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*<sup>96</sup> and *Perfect 10, Inc. v. CCBill LLC*<sup>97</sup>—the court ruled in 2009 that § 230 did not preclude a claim for damages against a website operator based on an alleged failure to keep a promise to remove offensive content.<sup>98</sup> Where the suit is for promissory estoppel, the Ninth Circuit said in *Barnes v. Yahoo!, Inc.*, the operator’s liability would be predicated upon its status “as the counter-party to a contract” and not upon its status “as a publisher or speaker of third-party content,” for which § 230 provides immunity.<sup>99</sup> The plaintiff in *Barnes* had alleged that her ex-boyfriend vindictively appropriated her identity to create a fake, sexually provocative profile on the defendant’s social-networking website, and she sought to recover from the website operator for the resulting harassment and reputational injury. The alleged wrongdoing by the website operator was not in allowing the profile to be posted in the first place, nor in failing to purge the profile from the site upon learning it was fake; rather, it arose from an allegedly broken pledge to the plaintiff, made by the defendant’s director of communications, to “personally walk the statements over to the division responsible for stopping unauthorized profiles,” which “would take care of it.”<sup>100</sup> Although the appeals court held that the CDA immunized Yahoo against a claim for “negligent undertaking,”<sup>101</sup> it concluded that, insofar as the complaint sought damages arising from the plaintiff’s detrimental reliance upon the website operator’s alleged binding promise to delete the profile, § 230 would not bar the claim from proceeding because any “[c]ontract liability here would come not from Yahoo’s publishing conduct, but from Yahoo’s manifest intention to be legally obligated to do something.”<sup>102</sup> Because a website operator “need only disclaim any intention to be bound” in order to avoid promissory estoppel liability, the Ninth Circuit predicted

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96. 521 F.3d 1157 (9th Cir. 2008).

97. 488 F.3d 1102 (9th Cir. 2007).

98. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1107 (9th Cir. 2009).

99. *Id.*

100. *Id.* at 1099.

101. *Id.* at 1105.

102. *Id.* at 1107. The *Barnes* opinion originally suggested that the § 230 immunity question was procedurally ill-suited for resolution based solely upon the allegations of the complaint because the immunity is in the nature of an “affirmative defense,” but in response to Yahoo’s motion for reconsideration, the court directed that that portion of its opinion be deleted.

that the consequences of its decision would not be far-reaching,<sup>103</sup> and, in fact, *Barnes*—like *Roommates.com* before it—has had relatively limited influence in light of its peculiar facts.<sup>104</sup>

Three notable exceptions to this trend are *Certain Approval Programs, L.L.C. v. XCentric Ventures, L.L.C.*,<sup>105</sup> *Woodhull v. Meinel*,<sup>106</sup> and *NPS LLC v. StubHub, Inc.*<sup>107</sup> In *Certain Approval Programs*, the U.S. District Court for the District of Arizona concluded that plaintiffs' proposed addition of a misappropriation claim against the operators of the "Ripoff Report" website was "not necessarily futile" because there were sufficient factual allegations that the defendants had participated in the creation or development of information on the website—"including meta tags . . . inserted into the HTML script" and by "actually solicit[ing] defamatory comment from third parties and directly encourag[ing] the use of hyperbole and exaggeration in the title and body of the [consumer] complaint to maximize the impact and marketability of false reports."<sup>108</sup> Similarly, in *Woodhull*, the New Mexico Court of Appeals found that summary judgment was precluded by a genuine issue of material fact as to "whether defendant may be considered at least partly responsible for [the] creation or development" of defamatory information posted on a website because she "apparently requested potentially defamatory material for her own stated purpose of 'making fun

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103. *Id.* at 1108.

104. *See, e.g.,* *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1200 (N.D. Cal. 2009) (although "[t]heoretically, intended third-party [contract] beneficiaries . . . could invoke the distinction drawn in *Barnes*" and thereby circumvent CDA immunity, plaintiff did not state such a claim against search-engine provider based on provider's alleged violation of its "Advertising Terms and incorporated Content Policy"); *Cornelius v. Deluca*, No. 1:09CV72 SNLJ, 2009 WL 2568044, at \*3 (E.D. Mo. Aug. 18, 2009) (bald allegations that defendant website operator "conspired" with the other defendants to "post [ ] or allow [ ] to be posted" the allegedly libel[ous] statements" insufficient to overcome § 230); *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 701 (S.D.N.Y. 2009), *later proceeding at* 2009 U.S. Dist. LEXIS 63692 (S.D.N.Y. July 24, 2009) ("At best, [the defendant website operator] is guilty of 'passive acquiescence in the misconduct of its users,' and, even under *Roommates.com*, [it] is entitled to immunity under Section 230(c)(1)."); *Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663, 665 (E.D. Tex. 2009) (*MySpace.com* does not lose CDA immunity by enabling user entry of personal profile data and criteria-based searching of profiles; expressly distinguishing *Roommates.com* decision, which "required its users to provide certain information"); *Doe II v. MySpace, Inc.*, 96 Cal. Rptr. 3d 148, 156 (Cal. Ct. App. 2009) ("That appellants characterize their complaint as one for failure to adopt reasonable safety measures does not avoid the immunity granted by Section 230. . . . At its core, appellants want MySpace to regulate what appears on its Web site."); *Higher Balance, LLC v. Quantum Future Group, Inc.*, No. 08-233-HA, 2008 WL 5281487, at \*7 (D. Or. Dec. 18, 2008) (applying Oregon's anti-SLAPP statute and CDA § 230 to strike claims for libel, false light, and intentional interference against website operator because comments about plaintiff posted by forum moderators were not shown to be made by "employees or agents" of website, but were made by third-party volunteers).

105. No. CV08-1608-PHX-NVW, 2009 WL 596582 (D. Ariz. Mar. 9, 2009).

106. 202 P.3d 126 (N.M. Ct. App. 2008).

107. No. 06-4874-BLS1, 2009 WL 995483 (Mass. Super. Ct. Jan. 26, 2009).

108. 2009 WL 596582, at \*2.

of [the] plaintiff.”<sup>109</sup> The court noted that, “[i]n general, the exercise of traditional editorial functions such as selecting material for publication or editing portions of material before posting do not rise to the level of creation or development” but found that “a genuine issue of fact exists as to whether defendant’s actions went beyond those intended to be immunized under the CDA.”<sup>110</sup> In *NPS LLC*, the trial court denied summary judgment to the ticket reselling site StubHub.com in a case filed by the New England Patriots NFL franchise, alleging that StubHub improperly induced the team’s season ticket-holders to breach their contracts with the Patriots by reselling their tickets at inflated prices on StubHub. Citing favorably to the Ninth Circuit’s *Roommates.com* decision, the court held that a material factual dispute existed over whether StubHub was an “information content provider” by having “materially contributed to the illegal ‘ticket scalping’ of its sellers.”<sup>111</sup> StubHub allegedly crossed that line by “essentially encouraging [high-volume sellers] to resell these tickets at higher prices” and increase the resulting fifteen percent commission StubHub derives from each sale; accordingly, the court found, StubHub could be found to have “intentionally induced or encouraged others to violate [the anti-scalping statute].”<sup>112</sup>

Finally, there continues to be conflict among courts over whether § 230 immunity applies to claims involving intellectual property rights conferred by state law. Although the Ninth Circuit’s *Perfect 10* decision in 2007 found that a state law “right of publicity” claim against an interactive computer service provider was precluded by § 230, notwithstanding the statute’s carve-out for “law[s] pertaining to intellectual property,”<sup>113</sup> other courts

109. 202 P.3d at 133.

110. *Id.* at 132–34. Applying the Ninth Circuit’s rationale in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (*en banc*), the Tenth Circuit, in *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1191 (10th Cir. 2009), found that a website that provided subscribers access to “details of incoming or outgoing calls from any phone number, prepaid calling card, or Internet Phone” was not entitled to immunity under § 230 of CDA. The court found that “Accusearch solicited requests for such confidential information and then paid researchers to obtain it. It knowingly sought to transform virtually unknown information into a publicly available commodity.” *Id.* at 1199. Because the information solicited by Accusearch was “inherently unlawful,” Accusearch was, like the *Roommates.com* website, an “information content provider” and therefore was not entitled to immunity under § 230.

111. *NPS LLC*, 2009 WL 995483, at \*12–13.

112. *Id.* at \*10 (citing and applying the theory of contributory or vicarious copyright infringement of *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005)). One other court had previously denied a motion to dismiss by StubHub on § 230 grounds. See *Hill v. StubHub, Inc.*, 07 CVS 11310 (N.C. Super. Ct. July 14, 2008), available at <http://www.ncbusinesslitigationreport.com/StubHub%20Order%20MTD.rtf>. But see *Fehr v. StubHub, Inc.*, Case No. 0801-00515 (Or. Cir. Ct. Sept. 9, 2008) (granting StubHub’s motion to dismiss under § 230), available at <http://claranet.scu.edu/eres/documentview.aspx?associd=28397>.

113. *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102, 1118–19 (9th Cir. 2007) (concluding that the term “intellectual property” in 47 U.S.C. § 230(e)(2) means “federal intellectual property”).

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have disagreed. In *Atlantic Recording Corp. v. Project Playlist, Inc.*,<sup>114</sup> the U.S. District Court for the Southern District of New York adopted the reasoning of the U.S. District Court in New Hampshire and concluded that a website operator cannot invoke CDA immunity against a state law claim for misappropriation of another's likeness or image for commercial use.

#### D. *Liability and Criminal Exposure for Injuries to Third Parties*

Although social networking via the Internet has facilitated many crimes and tortious acts,<sup>115</sup> courts have remained skeptical of efforts by prosecutors and plaintiffs to impose criminal and civil liability on website operators and users based on injuries sustained by third parties. In 2009, for instance, a federal judge in California entered a post-trial judgment of acquittal for Lori Drew, the Missouri mother who had been criminally convicted under the Computer Fraud and Abuse Act ("CFAA")<sup>116</sup> in connection with her involvement in the "cyberbullying" of her daughter's thirteen-year-old classmate, who subsequently committed suicide.<sup>117</sup> A jury had found Drew guilty of a misdemeanor offense under the CFAA (accessing a computer involved in interstate or foreign communication, without authorization or in excess of authorization, to obtain information) based upon her intentional violation of the terms of service for the MySpace social-networking website.<sup>118</sup> Although the court concluded that a deliberate breach of a website's terms of service could give rise to criminal liability under the statute, it held that the provision under which Drew was convicted was unconstitutionally vague because, if applied to render criminal any violation of a website's use policies, it "would convert a multitude of otherwise innocent Internet users into misdemeanor criminals."<sup>119</sup>

In another MySpace-related case in 2009, a state appeals court in California rejected an attempt to hold the website operator liable for a series of sexual assaults of young girls by men they met through the social-networking site.<sup>120</sup> The court held that the girls' claims for negligence, gross negligence, and strict product liability—which were founded on the allegation that

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114. 603 F. Supp. 2d 690 (S.D.N.Y. 2009), *later proceeding at* 2009 U.S. Dist. LEXIS 63692 (S.D.N.Y. July 24, 2009) (citing *Doe v. FriendFinder Network, Inc.*, 540 F. Supp. 2d 288, 289 (D.N.H. 2008)).

115. One notable recent example is that of the alleged "Craigslist killer," who is accused of targeting women advertising exotic services on the website Craigslist.org. See *Commonwealth v. Markoff*, No. 0901CR002751 (Boston Mun. Ct., criminal compl. filed Apr. 21, 2009).

116. 18 U.S.C. § 1030.

117. *United States v. Drew*, No. CR 08-0582-GW, slip op. at 32 (C.D. Cal. Aug. 28, 2009).

118. *Id.* at 5, 20.

119. *Id.* at 29.

120. *Doe II v. MySpace, Inc.*, 96 Cal. Rptr. 3d 148, 156-57 (Cal. Ct. App. 2009).

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MySpace had “made a decision to not implement reasonable, basic safety precautions with regard to protecting young children from sexual predators” despite its “aware[ness] of the dangers . . . pose[d] to under-aged minors using [the site]”—were not cognizable in light of the federal policy, reflected in § 230 of the CDA, to immunize website operators against civil actions arising from editorial decisions about user-generated content.<sup>121</sup>

#### IV. NEWSGATHERING

An *Oakland Tribune* staff photographer’s displeasure with police who arrested him while he took pictures of a traffic accident did not develop into a successful § 1983 claim. A federal court in California held that the photographer had no First Amendment right to get out of his car to record a traffic accident (and continue taking pictures after a police officer told him to leave a crime scene and return to his vehicle) if the general public was excluded, even though the photographer’s own car had become stopped along with other traffic.<sup>122</sup> The court held that Chavez “did not have a First Amendment right to take the photograph in the first place in the absence of evidence that the general public is allowed such access to accident sites, and this accident in particular.”<sup>123</sup> The court also rejected Chavez’s claim that the officers had retaliated against him for exercising his First Amendment rights by arresting him because he took photographs, reasoning that if Chavez did not have a First Amendment right “to take photographs while standing in the middle of the freeway in the first place, then arresting him for taking such photographs could not have been in retaliation for the exercise of his First Amendment rights.”<sup>124</sup>

Sad facts led to a sharp challenge to a cable television host’s interviewing tactics in *In re Estate of Duckett v. Cable News Network LLLP*.<sup>125</sup> In late August 2006, Melinda Duckett’s two-year-old child went missing and/or was abducted. That September, CNN’s Nancy Grace interviewed Duckett by telephone about the situation. The following day, before the show was set to air, Duckett committed suicide. CNN aired the recorded interview with Duckett later that evening as scheduled and replayed the interview several times thereafter.<sup>126</sup> The plaintiffs alleged that CNN misrepresented the true aims of the interview, which plaintiffs claimed was to “ambush”

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121. *Id.* at 150, 156–57.

122. Chavez v. City of Oakland, No. C 08-04015 CRB, 2009 WL 1537875 (N.D. Cal. June 2, 2009).

123. *Id.* at \*3.

124. *Id.*

125. No. 5:06-CV-444-Oc-10GRJ, 2008 WL 2959753 (M.D. Fla. July 31, 2008).

126. *Id.* at \*1.

the decedent and “badger” her with accusations.<sup>127</sup> The plaintiffs sued on behalf of Duckett’s estate, asserting that CNN’s conduct caused severe emotional distress that resulted in the decedent’s suicide.<sup>128</sup> The plaintiffs also alleged that CNN was liable to the estate and to the decedent’s family for intentional infliction of emotional distress because it repeatedly aired the interview following the decedent’s suicide.<sup>129</sup> The court held that the defendant’s alleged conduct toward the decedent was sufficiently outrageous to withstand the “extremely lenient pleading standard” for a motion to dismiss.<sup>130</sup>

Court-imposed restrictions on sources can indirectly interfere with news-gathering. In *Perricone v. Perricone*,<sup>131</sup> an ex-husband learned that his ex-wife was planning to appear on a television news show to discuss their divorce and a pending child custody matter. The ex-husband sued for a restraining order to enforce the confidentiality agreement the couple had entered into during the divorce proceedings. The trial court granted the restraining order, and the Connecticut Supreme Court affirmed. The court held that the judicial enforcement of an agreement in which parties (who were represented by counsel) agreed not to “disseminate or cause to be disseminated . . . disparaging or defamatory information” was not unconstitutional state action.<sup>132</sup> The court held that the ex-wife “intelligently and voluntarily” waived her First Amendment rights.<sup>133</sup> It further held that the confidentiality agreement did not violate public policy favoring free speech and did not implicate public policy favoring open courts and was therefore enforceable.<sup>134</sup>

An active news gatherer took a stand against a passive news service in *Associated Press v. All Headline News Corp.*,<sup>135</sup> when the Associated Press (“AP”) sued All Headline News (“AHN”) for misappropriation of AP news articles. AHN did not engage in any original reporting. Rather, AHN revised AP and other articles, removed the identification of the original author and copyright holder, and distributed the articles to AHN clients. The district court held that a cause of action for misappropriation of “hot news” under New York law survives federal copyright preemption when it meets a five-factor test establishing that the plaintiff generates time-sensitive news at a cost, which the defendant used to produce a competing service in a manner that threatened to remove the incentive to gather the news in the first

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127. *Id.* at \*1, 4.

128. *Id.* at \*4.

129. *Id.*

130. *Id.*

131. 972 A.2d 666 (Conn. 2009).

132. *Id.* at 671, 676–79.

133. *Id.* at 683.

134. *Id.* at 689.

135. 608 F. Supp. 2d 454 (S.D.N.Y. 2009).

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place (i.e., the defendant's use of the information constituted "free riding" on the plaintiff's efforts).<sup>136</sup> Because AP's allegations met this test, the court denied AHN's motion to dismiss the claim.<sup>137</sup> Additionally, the court refused to dismiss AP's claim under the Digital Millennium Copyright Act—based on AHN's alleged removal or alteration of copyright management information from AP's reports—and rejected AHN's argument that the Act applied only to the technological measures of automated systems.<sup>138</sup> The case subsequently settled.

## V. ACCESS TO INFORMATION

### A. Access to Court Records and Transcripts and Proceedings

Decisions during the survey period generally trended toward greater access. The Connecticut Supreme Court's decision in *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*<sup>139</sup> arose from lawsuits in the wake of allegations of sexual abuse by Roman Catholic clergy. The defendants had produced a number of documents pursuant to protective orders, and some had been filed under seal with the court in connection with pretrial motions. A little more than a year after the cases settled, The New York Times Co. and other media entities intervened for the purpose of obtaining release of these records. The court rejected the defendants' argument that judicial documents should be limited to "pleadings and evidence that are the subject of a judicial ruling on the merits," instead finding that "judicial documents are those filed with a court upon which the court reasonably could rely in the performance of its adjudicatory function, including discovery related motions and their associated exhibits."<sup>140</sup> The court reasoned that the actions of the court during the pretrial period ultimately shape issues between the parties at trial or settlement, and the public has a vested interest in "ensuring that those actions are carried out equitably, free from corruption or error."<sup>141</sup> This finding is broader than that used in some jurisdictions, notably the First and Seventh Circuits, but the court found its approach was in line with most jurisdictions and followed the "clear trend" of the common law.<sup>142</sup> The court held that the appropriate legal standard for modifying a sealing order placed the burden on the party seeking modification to demonstrate that (1) the original basis for the sealing

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136. *Id.* at 461.

137. *Id.*

138. *Id.* at 462.

139. 970 A.2d 656 (Conn. 2009).

140. *Id.* at 683.

141. *Id.*

142. *Id.* at 682.

order no longer exists, (2) the sealing orders were granted improvidently, or (3) the interests protected by sealing the information no longer outweigh the public's right of access. If that burden is met, the court must weigh the countervailing interests against the public's interest in access to judicial documents, such as reasonable reliance on the sealing orders and countervailing privacy concerns.<sup>143</sup> Because the original stated basis for the sealing orders (to guarantee defendants' right to a fair trial) was no longer a concern after trial, and because the sealing orders by their own terms could be revisited, the court held the sealing orders had been properly modified by the trial court with only minimal exceptions.<sup>144</sup>

The issue of modification of a sealing order after the basis for its entry has expired also arose in a decision from the Northern District of New York.<sup>145</sup> The defendant in the case had pleaded guilty to fraud, and he and the government filed sentencing memoranda and letters. The *Albany Times Union* intervened and moved to unseal.<sup>146</sup> The court found sentencing memoranda to be judicial documents and, therefore, both the First Amendment qualified right and the common-law right of access applied.<sup>147</sup> The court specifically stated, "Access to such documents is warranted because they have a direct bearing on sentencing which is a quintessential judicial function. The defendant, the government and the public all have a right to know what information influences a judicial assessment of reasonable punishment."<sup>148</sup> The court found that certain law enforcement interests, such as protection of witnesses and confidentiality of law enforcement methods, could overcome this right of access but stressed that such interests must be set out specifically. The court rejected defendant's claim of right to privacy as a countervailing interest, finding that "a defendant's privacy rights are generally subservient to the higher public value of access."<sup>149</sup> The court found the parties' proposed redactions to the sentencing memorandum overbroad and ordered that its own redacted version be publicly filed and that the government's sentencing letter be disclosed in its entirety, but it allowed the government's later-filed sentencing memorandum to remain sealed.<sup>150</sup> The court included a "sunshine provision" that would automatically terminate the sealing order one year after entry.<sup>151</sup>

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143. *Id.* at 693.

144. *Id.*

145. *United States v. Strevell*, No. 05-CR-477 (GLS), 2009 WL 577910, 37 Media L. Rep. (BNA) 1545 (N.D.N.Y. Mar. 4, 2009).

146. *Id.* at \*2-3.

147. *Id.* at \*3-4.

148. *Id.* at \*4.

149. *Id.* at \*5.

150. *Id.*

151. *Id.*

In *In re New York Times Co.*,<sup>152</sup> the U.S. District Court for the District of Columbia applied the First Amendment test for access to search warrant materials connected with the investigation of Dr. Steven J. Hatfill. That standard places the burden on the government to show that it has a compelling interest in keeping the materials secret, and that the restriction on access is narrowly tailored to serve that interest. The court rejected out of hand the government's claim that the right of Dr. Hatfill "to get on with his life" presented a compelling basis for sealing, and held that the compelling interest in protecting the names of informants could be met by the narrowly tailored means of redacting their names.<sup>153</sup>

The D.C. District Court also favored the news media's objections to the government's request to seal completely the "factual return" setting out the factual basis for continued confinement in every habeas case filed by a Guantanamo Bay detainee.<sup>154</sup> The court applied the "experience" and "logic" test of *Press-Enterprise*<sup>155</sup> and found that the First Amendment afforded the public a qualified right of access to the unclassified factual returns because "they detail what the detainees are accused of doing and who they are accused of being," and were necessary to the public's understanding of the proceedings.<sup>156</sup> The court determined that prohibiting public access to every document in every factual return was neither essential to achieve the government's interest in protecting national security nor narrowly tailored to achieve that interest—protecting "national security is a 'higher value,'" but prohibiting public access to every document in every factual return was not "essential" to achieve this interest.<sup>157</sup> Emphasizing that the government conceded that it could screen the returns to identify classified material that could harm national security if publicly released, the court determined that it was not essential for the government to seal completely every return to protect national security and required the government to specifically designate the lines for which it sought "protected status."<sup>158</sup>

The press had less success in the Second Circuit, which denied the *New York Times* access to records relating to the wiretaps of ex-New York Governor Eliot Spitzer in the prostitution investigation that led to his resignation.<sup>159</sup> The court held that 18 U.S.C.S. § 2518(8)(b), which allows such

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152. 585 F. Supp. 2d 83 (D.D.C. 2008).

153. *Id.* at 90–91.

154. *In re Guantanamo Bay Detainee Litig.*, 624 F. Supp. 2d 27 (D.D.C. 2009).

155. *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986).

156. *In re Guantanamo Bay*, 624 F. Supp. 2d at 37.

157. *Id.* at 38.

158. *Id.* at 38–39.

159. *In re New York Times Co.*, 577 F.3d 401 (2d Cir. 2009).

materials to be released only upon a showing of “good cause,” preempted the common law right of access that normally applies to judicial documents.<sup>160</sup> The *Times* had to show that it was an “aggrieved party” in order to gain access. Pursuing a matter of public interest did not meet this burden because the term “aggrieved party” typically refers to those caught on the wiretaps or whose phones were tapped.<sup>161</sup> The court held that the *Times* did not have a First Amendment right of access under *Press-Enterprise* because the materials had historically been closed and because access would not advance a public interest, rejecting the *Times*’ argument that wiretap applications are akin to executed search warrants.<sup>162</sup>

Under any standard, complaints or petitions initiating lawsuits are public records unless specifically ordered to be sealed. The question of *how quickly* the court must provide access to such records was at issue in a temporary injunction matter regarding access to copies of petitions filed with the Harris County, Texas, district clerk, Loren Jackson.<sup>163</sup> Same-day access had been the norm for many years, but after Jackson’s election, Courthouse News Service began to experience a three- to five-day delay in obtaining copies of lawsuit petitions as a result of the clerk’s efforts to go completely online with filing and access.<sup>164</sup> The federal district court granted Courthouse News Service’s request for a temporary injunction, requiring contemporaneous access based on the standard two-part test, finding that the tradition of accessibility includes affording the media timely access.<sup>165</sup> Jackson did not dispute that these records fell squarely into the test, but he argued that the “slight” delay incurred was a “reasonable time, place or manner restriction.”<sup>166</sup> The judge rejected that argument, relying in part on the Seventh Circuit opinion in *Grove Fresh Distributors*<sup>167</sup> that a necessary corollary to the presumption of access is that once found to be appropriate, access should be immediate and contemporaneous.<sup>168</sup> The court held that, even assuming that the district clerk had an overriding interest, he had failed to demonstrate that the 24- to 72-hour delay in access was narrowly tailored to serve that interest and that no less restrictive means of achieving that interest existed.<sup>169</sup>

160. *Id.* at 406 (“[W]here there is a statute on point, we begin our consideration there.”).

161. *Id.* at 407–08.

162. *Id.* at 410.

163. *Courthouse News Serv. v. Jackson*, No. H-09-1844, 2009 WL 2163609 (S.D. Tex. July 20, 2009).

164. *Id.* at \*2 n.1.

165. *Id.*

166. *Id.* at \*2.

167. *Grove Fresh Distrib., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994).

168. *Courthouse News*, 2009 WL 2163609, at \*4.

169. *Id.*

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Finally, the court held that violation of a constitutional right constitutes irreparable harm as a matter of law.<sup>170</sup>

B. *Access to Courtroom Proceedings*

In a widely watched case regarding video broadcasting of federal court proceedings related to copyright infringement by persons sued for unauthorized peer-to-peer sharing, a district court ruled that it had authority to allow “gavel-to-gavel webcasting” of the proceedings against the alleged infringers, including college student Joel Tenenbaum.<sup>171</sup> However, the First Circuit forbade the webcast through the exercise of its advisory mandamus jurisdiction, based on local rule, a policy of a Judicial Conference of the United States, and a resolution of the First Circuit Judicial Council. The 1988–89 Judicial Conference had concluded “that the intimidating effect of cameras” in the courtroom presented “cause for concern,” and the announced policy “does not authorize the contemporaneous photographing, recording, or broadcasting of proceedings from the courtroom to the public beyond the courthouse walls.”<sup>172</sup>

In contrast, the Arizona Supreme Court strengthened its rule governing cameras in the courts. Effective January 1, 2009, Rule 122 of the Arizona Supreme Court requires judges—before they can limit or prohibit camera access—to issue “specific, on-the-record findings” that the likelihood of harm outweighs the public benefits of camera coverage.<sup>173</sup>

C. *Access to Deliberations of Governmental Bodies*

E-mail can facilitate quick and easy communications, but can government bodies “meet” and transact business by e-mail without violating state open meetings laws written decades before e-mail became commonplace?

Not in Minnesota. In an advisory opinion, the Commissioner of Administration concluded that e-mail exchanges among a quorum of a public body do not comply with the state Open Meeting Law because “a quorum of the [public body], in addition to receiving information, commented on and provided direction to [the Chair] on a matter relating to the official business of the [body].”<sup>174</sup> In contrast, “one-way communication between the chair and members of a public body is permissible, such as when the chair or staff sends meeting materials via email to all board members, as long as no discussion or decision-making ensues.”<sup>175</sup>

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170. *Id.*

171. *Capitol Records, Inc. v. Alaujan*, 593 F. Supp. 2d 319, 324–25 (D. Mass. 2009).

172. *In re Sony BMG Music Entm’t*, 564 F.3d 1, 7 (1st Cir. 2009).

173. ARIZ. SUP. CT. R. 122(c).

174. Minn. Dep’t of Admin., Advisory Op. No. 09-020 (Metro Gang Strike Force Advisory Board), available at <http://www.ipad.state.mn.us/opinions/2009/09020.html>.

175. *Id.*

The eyes of Texas also were on e-mails. After a district attorney indicted city council members who acted as a quorum by exchanging private e-mails (discussing whether to call a council meeting to consider a public contract matter) and then dismissed the charges without prejudice, the council members sued in federal court for a declaration that they had a First Amendment right to talk about public business among themselves. A panel of the Fifth Circuit agreed, holding that, on remand, the district court must apply strict scrutiny to what the appellate court regarded as a content-based speech restriction and determine whether the criminal provisions of the Texas Open Meetings Act<sup>176</sup> (“TOMA”) were narrowly tailored to further a compelling government interest.<sup>177</sup> This ruling prompted numerous *amici* to join the Texas attorney general’s motion for rehearing *en banc*, which argued that TOMA was a content-neutral time, place, and manner restriction subject to intermediate scrutiny and that the First Amendment mandated limited access to the workings of governmental bodies. The Fifth Circuit granted the petition for rehearing, vacated the panel decision, and then dismissed the case as moot after the last plaintiff resigned his position as a council member of the City of Alpine.<sup>178</sup> The author of the panel decision strenuously dissented from the otherwise-unanimous dismissal.<sup>179</sup>

## VI. REPORTERS’ PRIVILEGE

In a suit involving government leaks, former Assistant U.S. Attorney Frank Convertino subpoenaed *Detroit Free Press* reporter David Ashenfelter for the sources for his story about the government’s investigation of Convertino’s conduct during a 2003 terrorism trial.<sup>180</sup> In August 2008, the U.S. District Court for the Eastern District of Michigan held that Ashenfelter was required to reveal his confidential sources in the civil litigation, both because the Sixth Circuit Court of Appeals does not recognize a First Amendment privilege protecting confidential sources<sup>181</sup> and because Ashenfelter was not entitled to a protective order under federal discovery rules.<sup>182</sup> How-

176. TEX. GOV’T CODE § 551.001.

177. *Rangra v. Brown*, 566 F.3d 515, 521 (5th Cir. 2009).

178. *Rangra v. Brown*, 584 F.3d 206, 207 (5th Cir. 2009).

179. *Id.* at 207–11 (Dennis, J., dissenting).

180. *Convertino v. U.S. Dep’t of Justice*, No. 07-CV-13842, 2008 WL 4104347, at \*2 (E.D. Mich. Aug. 28, 2008).

181. *Id.* at \*2. The court noted that although ten of twelve U.S. circuit courts of appeal have recognized some form of constitutional privilege, in *Storer Comm’n Inc. v. Giovan (In re Grand Jury Proceedings)*, 810 F.2d 580 (6th Cir. 1987), the Sixth Circuit had declined to join the majority, in language that foreclosed the recognition of “any reporters’ privilege, qualified or absolute, in civil cases.” at \*4.

182. *Convertino*, 2008 WL 4104347, at \*9.

ever, at his December 2008 deposition, on advice of counsel, Ashenfelter invoked his Fifth Amendment right against self-incrimination as a basis to refuse to answer any questions, on grounds that he could conceivably be charged as a co-conspirator.<sup>183</sup> At a February 2009 contempt hearing, the court ruled that Ashenfelter could not rely on a blanket Fifth Amendment claim as to all questions and suggested that he provide a sealed affidavit explaining why he was entitled to invoke the Fifth Amendment as to specific questions,<sup>184</sup> which he ultimately did.<sup>185</sup> When the deposition reconvened in April 2009, with the district judge present to rule on individual privilege objections, Ashenfelter again invoked his Fifth Amendment right against self-incrimination when asked to reveal his confidential sources, and this time the judge upheld his right to do so.<sup>186</sup>

Texas enacted a new reporter's privilege statute, effective May 13, 2009, thereby becoming the thirty-seventh state to enact a shield law statute.<sup>187</sup> Although patterned in large part on Department of Justice guidelines, the Texas act applies to computer service providers and online journalists, as well as traditional journalists, scholars, and researchers.<sup>188</sup> It also provides some procedural enhancements to the privilege: (i) all subpoenas issued to reporters in connection with criminal matters must be personally signed by the elected district attorney<sup>189</sup>; (ii) anyone issuing a subpoena to a reporter in connection with a criminal matter must pay a reasonable fee for the journalist's time, as well as the costs of responding to the subpoena<sup>190</sup>; and (iii) the law makes broadcast recordings self-authenticating, thereby eliminating the need for a reporter to testify solely to authenticate a recording.<sup>191</sup> The *Abilene Reporter News* used the new law to quash an attempt by a county prosecutor to obtain the identities of readers who posted comments on the newspaper's website about a murder trial, for the claimed purpose of making sure the commenters did not get on the jury in the case.<sup>192</sup>

183. *Convertino v. U.S. Dep't of Justice*, No. 07-CV-13842, 2009 WL 497400, at \*1 (E.D. Mich. Feb. 26, 2009).

184. *Id.* at \*4.

185. *See Convertino v. U.S. Dep't of Justice*, No. 07-CV-13842, 2009 WL 891701, at \*1 (E.D. Mich. Mar. 31, 2009).

186. *Judge Rules in Ashenfelter's Favor on Fifth Amendment; Reporter Protects Sources and Avoids Contempt Order*, 14:3 SILHA BULL. 23 (Spring 2009).

187. *See generally* <http://www.freeflowact.com>.

188. The act was codified at TEX. CIV. PRAC. & REM. CODE ANN. §§ 22.022–.027 and TEX. CODE CRIM. PROC. ANN. arts. 38.11, 38.111.

189. TEX. CODE CRIM. PROC. ANN. art. 38.11 § 4(D).

190. TEX. CODE CRIM. PROC. ANN. art. 38.11 § 9.

191. TEX. CIV. PRAC. & REM. CODE ANN. § 22.027; TEX. CODE CRIM. PROC. ANN. art. 38.111.

192. *Texas v. Martinez*, No. 17042-B (Tex. Dist. Ct., Taylor County, June 19, 2009), discussed in Patrick & Parsley, *supra* note 85, at 1–2.

## VII. INSURANCE

A. *Prior Publication Exclusion*

Refereeing a grudge match between marketers of “Hollywood” diet concoctions and an insurer in *United National Insurance Co. v. Spectrum Worldwide, Inc.*,<sup>193</sup> the Ninth Circuit declared unambiguous the “first publication” exclusion to the “advertising injury” coverage afforded by a general liability policy. The insured had argued that the exclusion, which removed from coverage “advertising injury . . . arising out of oral or written publication of material whose first publication took place before the beginning of the policy period,”<sup>194</sup> did not apply to infringement claims, or, at least, was ambiguous and, thus, to be construed in favor of coverage. This was so, the insured urged, because the grant of advertising injury coverage in the standard form includes four prongs: “oral or written publication of [defamatory matter],” “[o]ral or written publication of material [invasive of privacy],” “[m]isappropriation of advertising ideas or style of doing business,” and “[i]nfringement of copyright, title or slogan.”<sup>195</sup> Spectrum seized upon the presence of the word “publication” in the exclusion and in the first two prongs of the coverage grants, and its absence from the third and relevant fourth prongs, as establishing coverage for infringement, regardless of when the infringing material was first published. Parting company with an earlier district court opinion involving similar language, the court had no trouble concluding that the policy meant what it said, and that what it said was that no form of advertising injury coverage is afforded for material first published before the policy’s inception.<sup>196</sup>

Also addressing the “prior publication” exclusion, in *Capitol Indemnity Corp. v. Elston Self Service Wholesale Groceries, Inc.*,<sup>197</sup> the U.S. Court of Appeals for the Seventh Circuit applied Illinois law and held that the exclusion did not excuse a business owner’s liability carrier’s duty to defend trademark infringement allegations under the policy’s “advertising injury” provisions. The “publication” at issue was the plaintiff’s registered trademark, and the defendant had first published an authorized copy of the trademark before the policy period, and then allegedly published unauthorized copies after coverage incepted.<sup>198</sup> Noting that the purpose of the prior publication exclusion is to stop a policyholder from obtaining insurance coverage for conduct predating the purchase of the policy, the Seventh Circuit held that

193. 555 F.3d 772 (9th Cir. 2009).

194. *Id.* at 775.

195. *Id.* at 775; see also *id.* at 777.

196. *Id.* at 777–78.

197. 559 F.3d 616 (7th Cir. 2009).

198. *Id.* at 619–20.

the “material” in the exclusion referred only to “injurious” material, and it thus refused to apply it to bar coverage for the underlying action.<sup>199</sup>

A bankruptcy court reached the same conclusion in one chapter of the long-running right-of-publicity saga<sup>200</sup> involving the comic book character “Tony Twist.”<sup>201</sup> The court held that the “prior publication” exclusion or its equivalent in the CGL, umbrella, and media E&O policies in issue applied to bar coverage, despite several different alleged violations of the underlying plaintiff’s right of publicity occurring over a span of several years, including uses of the plaintiff’s name in connection with different products and different media, because the relevant “material” referenced in the exclusion was the plaintiff’s name, or its comic book variation, “Tony Twist,” and that name appeared in every publication challenged by plaintiff, both those that preceded the policy inception and those subsequent to it.<sup>202</sup>

In rejecting the insureds’ request that the court adopt the reasoning in *Taco Bell Corp. v. Continental Casualty Co.*,<sup>203</sup> the court held that the *Taco Bell* court’s refusal to apply the “prior publication” exclusion was dependent upon its conclusion that the underlying claims there involved separate torts occurring at separate times.<sup>204</sup> The court found that the Twist litigation, in contrast, involved a single continued tort, making the *Taco Bell* case inapplicable.<sup>205</sup> In addition, the court held that the prior publication exclusion was applicable where the offense was “substantially similar,” and here the continued use of the name Tony Twist as a symbol of his identity satisfied that standard.<sup>206</sup>

### B. Known Loss Doctrine

Although technically construing the “known loss” doctrine only under Massachusetts law in *Employers Reinsurance Corp. v. Globe Newspaper Co.*,<sup>207</sup> the First Circuit provided gloss likely to adhere to the doctrine in most jurisdictions. The underlying libel suit arose out of a series of articles and

199. *Id.* at 620–21.

200. *See Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003); *Recent Developments in Media, Privacy, and Defamation Law*, 39:2 TORT TRIAL & INS. PRAC. L.J. 572–73 (Winter 2004).

201. *In re Todd McFarlane Prod., Inc.*, Bankruptcy No. BR-04-21755-PHX-CGC, 2008 WL 899336 (Bankr. D. Ariz. Mar. 31, 2008).

202. *Id.* at \*13–14; *see also id.* at \*13 (“Viewed in this way, the use of the name is not the important factor; rather, it is the name itself. Therefore, whether the name is used in comic books, trading cards, toys, action figures or an HBO special is not determinative or even relevant; the key point is that Twist’s name **was** exploited for commercial advantage, not **how** it was exploited.”)

203. 388 F.3d 1069 (7th Cir. 2004).

204. *In re Todd McFarlane*, 2008 WL 899336, at \*13 n.10 (citations omitted).

205. *Id.*

206. *Id.*

207. 560 F.3d 93 (1st Cir. 2009).

columns in the *Boston Globe*, beginning in March 2005, about a widely publicized incident at the Dana-Farber Cancer Institute in which two patients were given overdoses of chemotherapy. One misdose proved fatal, the other crippling.<sup>208</sup> Before the newspaper applied for the insurance policy at issue, the claimant had demanded a correction and damages for the first in the series of articles, and the newspaper published a correction but told the claimant it would not pay damages.<sup>209</sup> Shortly after the policy inception, the *Globe* ran another article, which repeated some prior allegations and added new ones. The claimant sued and won \$2 million.<sup>210</sup>

As the First Circuit explained in ruling that the known loss doctrine did not bar coverage here, under the doctrine, “an insurable risk is eliminated in the instance where an insured knows, when it purchases a policy, that there is a substantial probability that it will suffer or has already suffered a loss.”<sup>211</sup> The court focused on the term “loss”: “Loss in this context surely refers to the loss visited by a judgment (or settlement)—not the loss suffered by the plaintiff.”<sup>212</sup> The doctrine does not prohibit insurance coverage for past acts that have not resulted in liability, provided the policy affords coverage for past acts, the court said, which the media E&O policy at issue did.<sup>213</sup> In short, only where the insured (but not the insurer) is aware prior to purchasing a policy that liability has already attached or is substantially certain to attach does the known loss doctrine bar coverage. In this case, although some of the statements complained of had been published before the insurance was purchased and complaints had been made about those statements, suit had not been filed, much less adjudicated, and it appeared then that the *Globe* would have substantive defenses, including the constitutional malice rule.<sup>214</sup> The court concluded that liability to the claimant was not substantially likely when the insurance inception.<sup>215</sup>

### C. *Negligent Publication*

In *Sony Computer Entertainment America v. American Home Assurance Co.*,<sup>216</sup> the U.S. Court of Appeals for the Ninth Circuit examined coverage for two consolidated class actions alleging, among other things, that a design defect that rendered PlayStation 2 unable to play DVDs and certain game

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208. *Id.* at 94.

209. *Id.* at 94–95.

210. *Id.* at 95.

211. *Id.* at 96 (quoting *SCA Serv., Inc. v. Transp. Ins. Co.*, 646 N.E.2d 394, 397 (Mass. 1995)).

212. *Id.*

213. *Id.* at 96–97.

214. *Id.* at 97.

215. *Id.*

216. 532 F.3d 1007 (9th Cir. 2008).

discs gave rise to claims for false advertising and negligent publication based on Sony's marketing of the product.<sup>217</sup> Sony unsuccessfully sought coverage under its media E&O policy on the theory that the false advertising and negligent misrepresentation claims fell within the policy's coverage for "negligent publication," at least if one applied a dictionary definition separately to each of the two words comprising that phrase.<sup>218</sup> The court rejected this theory, finding that such an approach would be inconsistent with the context of the policy as a whole and would not yield the "ordinary and popular" meaning of the phrase in the insurance context.<sup>219</sup> It noted that Sony's interpretation of "negligent publication" as "a communication of information to the public, lacking or exhibiting a lack of due care or concern," would essentially subsume all other wrongful acts listed in the policy.<sup>220</sup> Reading the term in conjunction with the other enumerated wrongful acts, the court held that "negligent publication" in the E&O policy refers to the narrow tort of publication of material that encourages or instructs readers to engage in harmful conduct.<sup>221</sup> The court determined that the lawsuits did not allege this type of conduct, but, rather, that Sony had misrepresented its product's functionality, such that the E&O carrier had no duty to indemnify or reimburse defense costs.<sup>222</sup>

#### D. Trademark Infringement

In parallel decisions, high courts in three states held that allegations of trademark infringement can trigger coverage under the "infringement of title" prong of a CGL policy's advertising injury coverage. In *General Casualty Co. v. Wozniak Travel*,<sup>223</sup> the Minnesota Supreme Court acknowledged that some other courts had concluded that the absence of the word "trademark" from the definition of "advertising injury" foreclosed the argument that trademark infringement claims triggered coverage, but held that, at least where the trademark in question happened to be "Hobbit" (which was also the title of a book), the underlying allegations of trademark infringement fell "within the scope of 'infringement of title' from the 'infringement of copyright, title or slogan' provision."<sup>224</sup>

In *Acuity v. Bagadia*,<sup>225</sup> the Wisconsin Supreme Court had earlier reached the same conclusion in a suit between two vendors of software,

217. *Id.* at 1011.

218. *Id.* at 1013, 1021.

219. *Id.* at 1013.

220. *Id.* at 1014.

221. *Id.* at 1015–16.

222. *Id.* at 1017.

223. 762 N.W.2d 572 (Minn. 2009).

224. *Id.* at 577.

225. 750 N.W.2d 817 (Wis. 2008).

holding that the term “title” in the phrase, “infringement of . . . title” included “trademark,” and that the plaintiff’s trademark infringement claim therefore fell within the policy’s definition of “advertising injury.”<sup>226</sup> South Carolina followed suit in *Super Duper Inc. v. Pennsylvania National Mutual Casualty Insurance Co.*<sup>227</sup>

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226. *Id.* at 818 (citing *Charter Oak Fire Ins. Co. v. Hedeon & Cos.*, 280 F.3d 730, 736 (7th Cir. 2002)).

227. 683 S.E.2d 792 (S.C. 2009).